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## The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment

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# The Rhetoric of the Fourth Amendment: Toward a More Persuasive Fourth Amendment

Timothy C. MacDonnell\*

## *Abstract*

*In the last forty-five years, the United States Supreme Court's Fourth Amendment jurisprudence has been under siege. As early as 1971 one of the Court's own members, Justice Harlan, stated there were "serious distortions and incongruities" in the Court's Fourth Amendment case law. Since Justice Harlan's criticism numerous scholars have echoed his dissatisfaction, calling the Court's Fourth Amendment jurisprudence "unstable and unconvincing," a "tar-baby," and "a mass of contradiction and obscurity." The Court itself seems as unconvinced by its own Fourth Amendment case law as the academic community. In 1967 the Court appeared to have placed the final nail in the trespass doctrine's coffin, only to resurrect the theory in 2012. Between the 1980s and 2000s, the Court significantly altered the contours of the search incident to arrest doctrine with regard to automobiles. In 2006 the Randolph Court created the rule that one resident's decision to permit police to search a home may not overrule another resident's decision to prevent the search. Approximately eight years later, the Fernandez Court limited the applicability of the Randolph Court's rule to such an extent as to make it virtually irrelevant.*

*The focus of this Article is on why many Fourth Amendment opinions are unconvincing. To answer this question, I analyze various Fourth Amendment opinions by the Justices of the United States Supreme Court between 2005 and today. I examine and evaluate the persuasiveness of the Court's Fourth Amendment*

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*jurisprudence through the lens of classical rhetoric. Opinions are assessed based on three areas of persuasion: appeals to logic (logos); appeals to emotion (pathos); and appeals to credibility (ethos). By examining the Justices' opinions in this fashion, patterns of unpersuasive opinion writing emerge. While a common source for all unpersuasive opinions is not available, common patterns of weak persuasion in particular appeals do exist. Weak appeals to ethos commonly stem from Justices failing to fully confront the doctrine of stare decisis. Weak pathos-based appeals often involve Justices engaging in misplaced emotive arguments, where a Justice seeks to persuade by appealing to emotions that are disconnected from the Fourth Amendment or the facts of the case. Logically weak arguments usually include one or more logical fallacies. Misplaced pathos appeals and weak logos appeals often leave readers with the sense that these flaws stem from poorly disguised outcome-directed opinions. Any opinion written in this fashion runs the risk of appearing like an elaborate rationalization and thereby being unconvincing. Additionally, I assert that apparent outcome-directed judicial opinions, particularly Supreme Court decisions, violate one of the core principles of classical and modern rhetoric—that persuasive speech should be modified to account for the expectations of an audience.*

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### I. Introduction

On June 25, 2014, the United States Supreme Court issued its decision in *Riley v. California*,<sup>1</sup> in which it held that cell phones are safe from warrantless governmental searches incident to an arrest.<sup>2</sup> In newspapers throughout the country, the decision was declared a great victory for privacy<sup>3</sup> and, at least in this case, the

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1. 134 S. Ct. 2473 (2014).

2. *See id.* at 2495 (“Our answer to the question of what police must do before searching a cell phone seized incident to in arrest is accordingly simple—get a warrant.”).

3. *See Supreme Court: Warrant Needed to Search Cellphones*, TAMPA BAY TIMES (June 25, 2014), <http://www.tbo.com/news/crime/supreme-court-warrant-needed-to-search-cellphones-20140625/> (last visited on Dec. 15, 2016) (stating that the Court’s decision was “a strong defense of digital age privacy”) (on file with the Washington and Lee Law Review); Adam Liptak, *Justices, 9-0; Rule Cellphone Search Needs a Warrant*, N.Y. TIMES (June 25, 2014), <http://www.nytimes.com/2014/06/26/us/supreme-court-cellphones-search-privacy.html> (last visited on Dec. 15, 2016) (calling the ruling “a sweeping victory for privacy rights”) (on file with the Washington and Lee Law Review); *High Court Defends Personal Privacy*, MERCURY NEWS (June 25, 2014), <http://www.mercurynews.com/2014/06/25/high-court-defends-personal-privacy/> (last visited Dec. 10, 2016) (calling the decision an “emphatic defense”) (on file with the Washington and Lee Law Review).

Justices of the Court were declared wise.<sup>4</sup> While all true, there is more to be found in the *Riley* decision than just cell phone privacy.<sup>5</sup>

Scholars and judges have observed that judicial opinions are “performative utterances . . . an expression that is not only articulated but also operative.”<sup>6</sup> Senior Judge Ruggero J. Aldisert of the United States Court of Appeals for the Third Circuit observed that “a court’s public performance in reaching a conclusion is at least as important as the conclusion.”<sup>7</sup> The Supreme Court has reached a similar conclusion, acknowledging that how the Court explains its decision is often as important as the ruling itself.<sup>8</sup> When it comes to the Supreme Court, a pleasing result in a case is not, in and of itself, enough to declare it “a good opinion.”<sup>9</sup> Nor is it enough that a concurrence or dissent supports the conclusion we may find prudent.

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4. See Editorial, *Court Wisely Protects Cellphones from Searches*, BOS. GLOBE (June 27, 2014), <https://www.bostonglobe.com/opinion/editorials/2014/06/26/court-wisely-protects-cellphones-from-searches/bo2HCPjgTz4PwUjUa1VI5M/story.html> (last visited Dec. 15, 2016) (approving of the Court’s decision) (on file with the Washington and Lee Law Review); Editorial, *The Supreme Court Saves Cellphone Privacy*, N.Y. TIMES (June 25, 2014), <http://www.nytimes.com/2014/06/26/opinion/the-supreme-court-saves-cellphone-privacy.html> (last visited Dec. 15, 2016) (expressing gratitude at the Court’s ruling) (on file with the Washington and Lee Law Review).

5. See, e.g., Adam M. Gershowitz, *Google Glass While Driving*, 47 ARIZ. ST. L.J. 755, 792–93 (2015) (noting that a search of a driver’s Google Glass would be impermissible under *Riley*’s search incident arrest doctrine); Laurie Buchan Serafino, Note, *“I Know My Rights, So You Go’n Need a Warrant for That”: The Fourth Amendment, Riley’s Impact, and Warrantless Searches of Third-Party Clouds*, 19 BERKELEY J. CRIM. L. 154, 205 (2014) (arguing that *Riley*’s standard should apply to data stored in clouds).

6. Dist. Council 47, Am. Fed. of State, County and Mun. Emp.’s v. Bradley, 795 F.2d 310, 320 n.4 (3d Cir. 1986) (Aldisert, J. dissenting); see also Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 499 (2003) (noting that judges’ speech must be performative in order to make law).

7. RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 66 (3d ed. 1997).

8. See *Planned Parenthood v. Casey*, 505 U.S. 833, 866 (1992) (“Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.”).

9. See *infra* Part III.A.2.a (noting that although the Supreme Court denied a warrantless search in *Georgia v. Randolph*, 547 U.S. 103 (2005), the opinion had limited practical effect).

A “good opinion” is expected to be many things. We expect it to be grounded in logic, to be clearly stated, and to credibly account for the impact of prior Court rulings.<sup>10</sup> We also expect the opinion to demonstrate practical wisdom, thereby creating rules that will work in the “real world.”<sup>11</sup> Additionally, the Court must be attuned to the intense emotions stirred by Fourth Amendment questions when balancing between privacy and security.<sup>12</sup> In short, the decision must be persuasive. Persuasive opinions enhance the legitimacy of the Court in the eyes of the public, law enforcement, and lower courts.<sup>13</sup> More importantly, persuasive opinions lay deep roots that grow over time, creating whole new subcategories of constitutional law.<sup>14</sup> Over time, a particularly persuasive concurrence or dissent can outpace a majority opinion and become the new rule of law. Finally, persuasive opinions are more likely to be enforced broadly and consistently by lower courts, rather than being limited to the facts of the opinion or misinterpreted because

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10. See S.I. Strong, *Writing Reasoned Decisions and Opinions: A Guide For Novel, Experienced, and Foreign Judges*, 2015 J. DISP. RESOL. 93, 102 (stating that courts must consider precedent and use precise language in creating binding authority).

11. See Melissa Murray, *Real-Life Effects of Court Rulings Should Matter as Well as the Law*, N.Y. TIMES, <http://www.nytimes.com/roomfordebate/2015/01/26/the-supreme-court-meets-the-real-world/real-life-effects-of-court-rulings-should-matter-as-well-as-the-law> (last updated Mar. 18, 2016) (last visited Dec. 15, 2016) (arguing that courts should consider real-world consequences when reaching decisions) (on file with the Washington and Lee Law Review).

12. See *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting) (noting that many innocent people are subjected to unconstitutional searches).

13. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015) (“Unlike the legislature or the executive, the judiciary ‘has no influence over either the sword or the purse’ . . . so its authority depends in large measure on the public’s willingness to respect and follow its decisions.” (citing THE FEDERALIST NO. 78 (Alexander Hamilton))); see also Earl M. Maltz, *The Function of Supreme Court Opinions*, 37 HOUS. L. REV. 1395, 1420 (2000) (“Without opinions, lower courts and other government officials would be faced with a set of holdings that, separately or together, could be taken to stand for any number of different legal rules.”).

14. See, e.g., Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson’s Youngstown Taxonomy by Hamdan and Medellin*, 58 AM. U. L. REV. 665, 667 (2009) (noting that Justice Jackson’s classification of executive power into three parts “dominated subsequent separation of powers jurisprudence”).

the decision is illogical or just wrong.<sup>15</sup> *Riley v. California* is a persuasive opinion.<sup>16</sup>

It could be argued that the persuasiveness of *Riley* is a matter of no great significance. For one, the Justices of the Supreme Court possess some of the finest legal minds in the country.<sup>17</sup> Further, at the heart of what it is to be a lawyer is the art and science of persuasion.<sup>18</sup> Therefore, all Supreme Court decisions should be persuasive, and it should not come as a great surprise that *Riley* is. Of course, this is not the case with all Supreme Court opinions.<sup>19</sup>

The Supreme Court's post-*Katz* Fourth Amendment jurisprudence has been vigorously criticized. It has been described as "arbitrary, unpredictable and often border[ing] on incoherent,"<sup>20</sup> "a vast jumble of judicial pronouncements that is not merely complex and contradictory, but often perverse,"<sup>21</sup> and "a mass of

15. See Kyle Nelson, Comment, *Florida v. Jardines: A Shortsighted View of the Fourth Amendment*, 49 GONZ. L. REV. 415, 426 (2013) (noting that *Jardines* "solidified an inadaptable standard, leaving the jurisprudence unsettled and ensuring that future cases will not be 'easy'").

16. See generally Adam M. Gershowitz, Symposium, *Surprising Unanimity, Even More Surprising Clarity*, SCOTUSBLOG (June 26, 2014). But see generally Leslie A. Shoebottom, *The Strife of Riley: The Search-Incident Consequences of Making an Easy Case Simple*, 75 LA. L. REV. 29 (2014) (arguing that *Riley* stands for a dramatic shift in the Court's search incident to arrest line of cases).

17. Chief Justice John G. Roberts, Jr., J.D.—Harvard Law School '79; The Late Justice Antonin Scalia, LL.B.—Harvard Law School '60; Justice Anthony Kennedy, LL.B.—Harvard Law School '61; Justice Clarence Thomas, J.D.—Yale Law School '74; Justice Ruth Bader Ginsburg, LL.B.—Columbia Law School '59; Justice Steven Breyer, LL.B.—Harvard Law School '64; Justice Samuel Alito, Jr., J.D.—Yale Law School '75; Justice Sonia Sotomayor, J.D.—Yale Law School '79; Justice Elena Kagan, J.D.—Harvard Law School '86.

18. RONALD WAICUKAUSKI, PAUL M. SANDLER & JOANNE EPPS, *THE 12 SECRETS OF PERSUASIVE ARGUMENT*, at v (2009) ("The essence that the great advocate adds to fact and law is an assessment of their implications for her client's case, and an understanding of the way that the facts and law support her overall rationale.").

19. See *infra* Part III.A.1.b (noting that Justice Scalia's use of precedent in *United States v. Jones* "goes too far" and thus fails to persuade); see also *infra* Part III.A.1.c (asserting that Justice Stevens's opinion in *Illinois v. Caballes*, unnecessarily reworked earlier precedent).

20. David E. Steinberg, *Restoring the Fourth Amendment: The Original Understanding Revisited*, 33 HASTINGS CONST. L.Q. 47, 47 (2006).

21. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994).

contradictions and obscurities.”<sup>22</sup> The Court has struggled to resolve fundamental Fourth Amendment questions including whether the Amendment contains a warrant presumption<sup>23</sup> and the proper breadth of searches incident to arrest.<sup>24</sup> Even recently, with the Court relying more and more consistently on the “reasonableness” doctrine,<sup>25</sup> the Court has drawn criticism for favoring governmental interests over the privacy of individuals.<sup>26</sup>

John G. Roberts became the Chief Justice of the Supreme Court in 2005.<sup>27</sup> Since that time, the Supreme Court has written numerous Fourth Amendment opinions, with varying levels of persuasive power.<sup>28</sup> Of the Fourth Amendment decisions issued between 2012 and 2015,<sup>29</sup> seven have been deeply divided,

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22. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985). *But see* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011) (offering a defense and explanation for the seeming inconsistency of the Supreme Court’s Fourth Amendment jurisprudence).

23. *See* THOMAS K. CLANCY, *THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION* 471–73 (2008) (discussing the Court’s various interpretations of the Fourth Amendment’s warrant clause); THOMAS N. MCINNIS, *THE EVOLUTION OF THE FOURTH AMENDMENT* 110–13 (2009) [hereinafter MCINNIS] (discussing the Court’s creation of exceptions to the Fourth Amendment’s warrant requirement).

24. *See* Shoebottom, *supra* note 16, at 42 (discussing the debate surrounding the scope of the search incident to arrest doctrine).

25. Under this doctrine, the Court relies on the theory that “the ultimate touchstone of the Fourth Amendment is ‘reasonableness.’” *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). To determine whether a search or seizure is reasonable, the Court balances the intrusion the government commits against certain governmental interests, including law enforcement purposes and public safety. *Id.*

26. *See* Cynthia Lee, *Reasonableness with Teeth: The Future of Fourth Amendment Reasonableness Analysis*, 81 MISS. L.J. 1133, 1136 (2012) (noting that the Court’s reasonableness doctrine “tend[s] to be overly deferential to the government”); MCINNIS, *supra* note 23, at 282 (stating that the Court has “enlarged the power of the government”).

27. *See Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S. (Sept. 4, 2016), <https://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 15, 2016) (noting the date Chief Justice John Roberts assumed office) (on file with the Washington and Lee Law Review).

28. *Infra* Part III.

29. *See generally* *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015); *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015); *Rodriguez v. United States*, 135 S. Ct. 1609 (2015); *Grady v. North Carolina*, 135 S. Ct. 1368 (2015); *Heien v. North Carolina*, 135 S. Ct. 530 (2014); *Carroll v. Carman*, 135 S. Ct. 348

demonstrating that the Justices were unable to convince even one another.<sup>30</sup> The Court's majority opinion in cases like *Maryland v. King*<sup>31</sup> and *Navarette v. California*,<sup>32</sup> include questionable logic.<sup>33</sup> Even in a decision like *United States v. Jones*,<sup>34</sup> where all the Justices agreed on the proper outcome of the case, they disagreed sharply about why.<sup>35</sup> While this is not to say that disagreement among the Justices is to be condemned, the lack of optimal persuasiveness the disagreement evidences is to be avoided. When a Supreme Court opinion fails to persuade, the legitimacy of the decision is questioned.<sup>36</sup> As stated above, because the Supreme Court is not elected, the Court's legitimacy comes primarily from its power to persuade.<sup>37</sup> Several of the Fourth Amendment

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(2014); *Riley v. California*, 134 S. Ct. 2473 (2014); *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014); *Navarette v. California*, 134 S. Ct. 1683 (2014); *Fernandez v. California*, 134 S. Ct. 1126 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Florida v. Harris*, 133 S. Ct. 1050 (2013); *Bailey v. United States*, 133 S. Ct. 1031 (2013); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012); *United States v. Jones*, 565 U.S. 400 (2012).

30. *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015) (split 5 to 4 decision); *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (split 6 to 3 decision); *Navarette v. California*, 134 S. Ct. 1683 (2014) (split 5 to 4 decision); *Maryland v. King*, 133 S. Ct. 1958 (2013) (same); *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) (same); *Florida v. Jardines*, 133 S. Ct. 1409 (2013) (same); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (same).

31. *See* 133 S. Ct. 1958, 1979–80 (2013) (authorizing the government to take an individual's DNA when arrested for a serious felony).

32. *See* 134 S. Ct. 1683, 1690–92 (2014) (permitting a weakly substantiated anonymous tip to support a vehicle stop).

33. *See infra* Part III (discussing cases with questionable logic).

34. 565 U.S. 400 (2012).

35. *See id.* at 953, 957 (noting the Court's disagreement on which legal standard should protect data collected from a GPS device).

36. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1659 (2015) ("Unlike the legislature or the executive, the judiciary 'has no influence over either the sword or the purse' . . . so its authority depends in large measure on the public's willingness to respect and follow its decisions.") (citing THE FEDERALIST NO. 78 (Alexander Hamilton)).

37. *See Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."); *see also* Henry M. Hart, Jr., *Forward: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99–101 (1959)

opinions issued by Justices on the Roberts Court are simply unpersuasive.<sup>38</sup>

The purpose of this Article is to examine the persuasiveness of the Roberts Court's Fourth Amendment jurisprudence. As part of that examination, the Article will analyze various Fourth Amendment opinions from the Court, including concurrences and dissents. The opinions will be examined applying primarily classical theories of rhetoric. The lens through which the opinions will be evaluated is Aristotelian (focusing on different Justices' use of appeals to logic, emotion, and credibility). Upon evaluation of the Roberts Court's Fourth Amendment opinions it becomes clear that, more than the modality of constitutional analysis, the use of effective rhetoric determines whether an opinion is a "good opinion." Although restricting this Article to examining only the Fourth Amendment cases from 2005 forward is somewhat arbitrary, it has a purpose. By limiting the discussion in this fashion, the number of Fourth Amendment opinions is more manageable and more current.

The Article is divided into three parts. Part II discusses classical rhetorical theory and how it will be used to evaluate the Roberts Court's Fourth Amendment jurisprudence. In this section I hope to convince readers that persuasion is a universal ideal. Although some of the measures of Aristotelian persuasion, like *logos* (logical reasoning), may seem to favor a formalist approach to constitutional theory, or like *ethos* (which includes the concept of practical wisdom), might appear to favor a pragmatic approach, Aristotle's formula plays no favorites. I suggest that, regardless of the theoretical starting point, a Justice's opinion must incorporate the core elements of effective rhetoric described by Aristotle and others to be fully persuasive. Part III of the Article applies these theories of rhetoric to several Fourth Amendment opinions issued by the Justices of the Roberts Court. This section examines majority, concurring, and dissenting opinions, focusing on opinions

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(arguing that Supreme Court opinions can undermine the Court's legitimacy because they are often poorly written and have an insufficient basis in law); Maltz, *supra* note 13, at 1397–400 (discussing arguments that well-crafted opinions increase the legitimacy of the Supreme Court and maintain its "ability to function effectively as a judicial institution").

38. See *supra* note 33 (discussing *Maryland v. King* and *Navarette v. California*).

that demonstrate a weakness in a given area of evaluation. In Part IV, I suggest several root causes for the weak persuasion described in Part III.

First, weaknesses in ethos are connected to the doctrine of stare decisis. In some decisions the weight of the doctrine seems to paralyze the Justices. Fearing an unwise precedent, the Justice opts for a decision that creates virtually no precedent at all. This approach results in a lack of clear precedent and violates the rhetorical principle of practical wisdom. Second, the constraining effect of stare decisis causes some Justices to overstate or understate precedent, claiming a case stands for a proposition that it simply does not. This undermines the ethos of an opinion by calling into question the author's truthfulness or competence. Weak appeals to pathos and logos manifest very differently in opinions, but I suggest they often create the appearance that the opinion is an inadequately veiled outcome-based judicial opinion.<sup>39</sup> When a Justice has decided the outcome of an issue first and then seeks to fashion a reason to support the position, weaknesses in emotive- and logic-based arguments often occur. Such weaknesses can appear in pathos-based arguments that seek to stir anger or hate toward a criminal defendant instead of appealing to the emotional touchstones of the Fourth Amendment, privacy and security. Also, unveiled outcome-based judicial opinion writing often results in strained or fallacious logic. Opinions that appear outcome-directed are fundamentally less persuasive because they fail to comply with the expectations of the Court's audience.

## *II. Rhetoric: The Art and Science of Persuasion*

The attempt to distill persuasive communication into a system of analysis and application is thousands of years old.<sup>40</sup> The search

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39. It is important to note that this weakness is not intended as a negative judgment of judicial realism. The debate over judicial realism has been raging for decades and will no doubt continue for many more. This Article does not claim that the doctrine of legal formalism is better than legal realism. Rather, this Article asserts that the common expectation of the Court is that it is more formalist than realist. Thus, opinions that appear to be decided first and rationalized second are less persuasive.

40. See George A. Kennedy, *Introduction* to ARISTOTLE, ON RHETORIC: A

for this system (at least in western civilization) reached a high water mark between the fifth and third centuries B.C.E. in Greece.<sup>41</sup> During this time teachers and philosophers debated the nature and purpose of rhetoric (persuasive communication).<sup>42</sup> Out of this era of debate and critical thinking came one of the most important and comprehensive analyses of persuasive speech ever written, Aristotle's *The Rhetoric*.<sup>43</sup> *The Rhetoric* captured and organized the best of Greek teaching regarding persuasion, coupled with Aristotle's own insights.<sup>44</sup>

### A. Classical Rhetorical Theory

Before beginning an in-depth discussion of Aristotle's theories on persuasion, it is valuable to briefly discuss the context in which these theories developed. Aristotle was born into an era of western civilization when rhetoric was the subject of intense debate and analysis.<sup>45</sup> In the fifth century B.C.E., democracy began to take hold in Greece.<sup>46</sup> As democracy grew so too did the need to influence audiences with persuasive arguments.<sup>47</sup> Athenian

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THEORY OF CIVIL DISCOURSE 7 (George A. Kennedy trans., 2007) [hereinafter ON RHETORIC] ("The earliest known rhetorical handbook is *The Instructions of Ptahhotep*, composed by an Egyptian official sometime before 2000 B.C.E."). Kennedy, one of the leading scholars on Aristotle, actually uses different titles when describing Aristotle's treatise on rhetoric, calling it ON RHETORIC and RHETORIC interchangeably. *Id.* These alternative titles merely seem to reflect differences in translation. For the purposes of this Article, I will use *The Rhetoric* to refer to Aristotle's writings on the subject.

41. See BRIAN VICKERS, IN DEFENCE OF RHETORIC 148–64 (1988) (discussing the development of rhetoric against rival classical Greek traditions).

42. See generally JAMES HERRICK, THE HISTORY AND THEORY OF RHETORIC: AN INTRODUCTION 32–69 (2001). The term rhetoric is first used by Plato in *Gorgias*. *Id.*

43. See *id.* at 87–88 ("[Aristotle's] treatment of rhetoric remains one of the most complete and insightful ever penned.").

44. See *id.* at 78 (noting Aristotle's three divisions of rhetoric).

45. See *id.* at 77–78 (discussing Aristotle's dispute with the sophists over rhetoric forms).

46. See *id.* at 32 (noting that Greek culture was shifting from an aristocracy to a democracy).

47. See *id.* ("[T]he key factor in personal success and public influence was no longer class but skill in persuasive speaking.").

democracy included direct representation, entitling all citizens to vote.<sup>48</sup> To be successful in this new style of government, persuasive oral communication was necessary.<sup>49</sup> Additionally, there were no professional lawyers and enormous juries with hundreds of members resolved legal disputes.<sup>50</sup> Thus, if a Greek citizen wanted to win a legal dispute, they often had to do it through their own skills of persuasion.<sup>51</sup>

The importance of effective persuasion to Greek legal and political life gave rise to a group of teachers called sophists.<sup>52</sup> The sophists generally were teachers from outside of the Greek city-state where they taught.<sup>53</sup> Sophists taught persuasive speech for money and some sophists claimed they could “persuade virtually anyone of anything.”<sup>54</sup> Several opened schools in different Greek city-states to teach those who could pay.<sup>55</sup> Several also wrote and published books on the subject of persuasive speech.<sup>56</sup>

Suspicious of the sophists’ claims and hostile to their philosophy, Plato wrote the dialogue, *Gorgias*.<sup>57</sup> In that dialogue, Plato asserted in effect that rhetoric was a tool of deception and those who practiced it were seeking their own ends rather than the

48. See *id.* (noting that “the new system guaranteed a broader distribution of power across different backgrounds, occupations, and economic statuses”).

49. See *id.* (noting that persuasive speaking was a key skill in Athenian society).

50. See JAMES D. WILLIAMS, AN INTRODUCTION TO CLASSICAL RHETORIC: ESSENTIAL READINGS 18 (2009) (“Athenian juries were large, ranging from several hundred to several thousand members . . .”).

51. See E. W. Timberlake, Jr., *Origin and Development of Advocacy as a Profession*, 9 VA. L. REV. 25, 25 (1922) (“Among the ancient Greeks . . . [t]he usual custom was for the client to lay his case before one of the great orators or writers of the day who would then prepare an oration which the client read or delivered at the trial.”).

52. See Edward M. Cope, *Introduction to ARISTOTLE’S RHETORIC WITH ANALYSIS NOTES AND APPENDICES 1–3* (1867) (discussing early developments of rhetoric taught by the sophists).

53. See HERRICK, *supra* note 42, at 37 (explaining that Athenians were skeptical of the sophists because they were foreigners).

54. *Id.* at 39.

55. See *id.* at 37 (noting Athenian skepticism of the sophists’ schools).

56. See *id.* at 42–45 (quoting from one prominent sophist’s writings).

57. See VICKERS, *supra* note 41, at 84 (noting that Plato wrote *Gorgias* attacking the sophists’ teaching of rhetoric).

truth.<sup>58</sup> *Gorgias* was published in approximately 387 B.C.E., when Aristotle was three years old.<sup>59</sup> Aristotle became Plato's student and initially was a critic of the sophists.<sup>60</sup> As time passed, however, his views on rhetoric diverged from Plato's.<sup>61</sup> Unlike Plato, Aristotle saw rhetoric as a valuable tool in the search for truth.<sup>62</sup>

### B. Aristotle's The Rhetoric

In *The Rhetoric*, Aristotle sought to provide a comprehensive analysis of persuasion.<sup>63</sup> In doing so he defined rhetoric, described the different types and species of persuasion, the primary methods of persuasion present in all rhetoric, and the unique methods within specific species of persuasion.<sup>64</sup> In the Introduction to his translation of *The Rhetoric*, George Kennedy, a scholar focusing on classical rhetoric, explains that Aristotle's writings on rhetoric were never meant to be published.<sup>65</sup> Rather, it is believed that much of the book is a compilation of lectures he gave to students in Athens.<sup>66</sup> Further, Kennedy writes that *The Rhetoric* was not

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58. See *id.* ("In the *Gorgias*, rhetoric is treated as subservient to politics.")

59. See *id.* at 85 (explaining that the *Gorgias* was written around the time of Plato's visit to Sicily in 389–87 B.C.E.); HERRICK, *supra* note 42, at 72 (noting that Aristotle was born in 384 B.C.E.).

60. See HERRICK, *supra* note 42, at 73 (noting that Aristotle, "under the influence of Plato . . . was critical of rhetoric")

61. See VICKERS, *supra* note 41, at 161 (defending rhetoric on grounds that it is misused by its speakers, rather than structurally flawed).

62. It could be argued that Plato did see a very limited specialized form of rhetoric that could be used to find truth. In another dialogue called *The Phaedrus*, Plato seems to imply that rhetoric can be a "true art" but to use it so would require the rhetor to be a philosopher. HERRICK, *supra* note 42, at 63.

63. See VICKERS, *supra* note 41, at 19 ("[Aristotle] will describe 'the systematic principles of Rhetoric itself,' and defines it as 'the faculty of observing in any given case the available means of persuasion.'")

64. See *id.* at 18–26 (presenting a comprehensive description of the forms of rhetoric).

65. See ON RHETORIC, *supra* note 40, at 17–18 (explaining that *The Rhetoric* was not published until three-hundred years after Aristotle's death).

66. See *id.* at 18 (noting that Aristotle's students were the intended audience of *The Rhetoric*).

the product of one or two years of study and writing, but was the product of decades of thinking, writing, and revising.<sup>67</sup>

*The Rhetoric* begins with Aristotle's explanation of what rhetoric is and why the study of rhetoric is important.<sup>68</sup> He described rhetoric as "an ability, in each case, to see the available means of persuasion."<sup>69</sup> He explained that "persuasion occurs through the arguments when we show the truth or the apparent truth from whatever is persuasive in each case."<sup>70</sup> Although aware that rhetoric could be used to mislead,<sup>71</sup> Aristotle nonetheless believed it was useful.<sup>72</sup> He explained the primary value of studying rhetoric is to reach the truth and to convince others of the truth.<sup>73</sup> Students of effective rhetoric should be able to argue both sides of an issue "in order that it may not escape [their] notice what the real state of the case is and that [they themselves] may be able to refute if another person uses speech unjustly."<sup>74</sup> Thus, "rhetoric is useful because the true and the just are by nature stronger than their opposites."<sup>75</sup>

After describing rhetoric, Aristotle divided the types of persuasive speech into three genres or species that are separated contextually and temporally.<sup>76</sup> The first is deliberative speech.<sup>77</sup> It is directed toward future events being resolved through the

67. See *id.* (discussing the various decades in which Aristotle developed *The Rhetoric*).

68. See *id.* at 30–37 (discussing Aristotle's dissatisfaction with rhetorical practice and teaching).

69. *Id.* at 37.

70. *Id.* at 39.

71. See ON RHETORIC, *supra* note 40, at 31–32 ("[F]or it is wrong to warp the jury by leading them into anger or envy or pity: that is the same as if someone made a straight-edge ruler crooked before using it.").

72. See *id.* at 35 ("[R]hetoric is useful, because the true and the just are by nature stronger than their opposites . . .").

73. See *id.* at 34 ("[I]t belongs to the same capacity both to see the true and what resembles the true . . .").

74. *Id.* at 35.

75. *Id.*

76. See *id.* at 46–50 (noting that for each species of rhetoric, there is a class to which the audience of the speeches belongs).

77. See *id.* at 48 (stating that deliberative advice is either exhortative or dissuasive).

political process.<sup>78</sup> The second is judicial speech, which is sometimes called forensic speech.<sup>79</sup> It is directed toward past events being resolved in a court of law.<sup>80</sup> The final species is epideictic speech, which is concerned with evoking praise or condemnation in the context of a public address and is focused on producing a response in the present.<sup>81</sup> Although each species of persuasion shares some common methods, *The Rhetoric* discussed the ways in which persuasion differs depending on the species.<sup>82</sup>

Aristotle's division of rhetoric into three species highlights one of the many challenges that Justices face when writing a Fourth Amendment opinion. The purpose of dividing rhetoric into three species is to optimize a rhetor's persuasiveness by narrowing the objective of the rhetoric.<sup>83</sup> Most Fourth Amendment opinions, however, will require a Justice to be persuasive in all three types of rhetoric. To be maximally persuasive, a Justice must convince her audience that she has been fair and just to the litigants in the case, established a wise and correct rule for the future, and properly praised or condemned the virtues and vices present in the case.<sup>84</sup>

Next, Aristotle identified the three primary components of persuasion.<sup>85</sup> This system has sometimes been described as a triangle to emphasize the unitary nature of Aristotle's theory of

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78. *See id.* (identifying future events to dissuade or exhort the audience).

79. *See id.* at 47 (urging against the term "forensic" speech, Kennedy denotes the confusion associated with the term).

80. *See id.* at 48 (prosecuting or defending concerns events of the past).

81. *See id.* at 47 (noting that in Aristotle's time, epideictic speech was usually used at a funeral oration or a commemorative event).

82. *See id.* (stating that there are three species of rhetoric due to the three classes to which hearers of speeches belong).

83. *See id.* (stating that the objective of the speech should relate to the audience).

84. *See* Brett G. Scharffs, *The Character of Legal Reasoning*, 61 WASH. & LEE L. REV. 733, 746–47 (2004) (arguing that judicial opinions must persuade other judges to join the opinion and later apply the opinion to other cases, and the parties to the case, who must feel they have been treated fairly and received due process).

85. *See* ON RHETORIC, *supra* note 40, at 111 (providing these components initially in Book I and further explaining them in Book II).

argumentation.<sup>86</sup> Each of the three components of persuasion impacts the other, thus the theory is described as having three sides rather than three pillars.<sup>87</sup> These components are ethos, logos, and pathos.<sup>88</sup>

Ethos is “the character of the speaker”<sup>89</sup> or said another way, “presenting the character of the speaker in a favorable light.”<sup>90</sup> Important to this component is that the audience’s belief in the character of the speaker “should result from the speech, not from a previous opinion that the speaker is a certain kind of person.”<sup>91</sup> Aristotle rejected the sophist belief that ethos was of little significance.<sup>92</sup> He asserted “character is almost . . . the most authoritative form of persuasion.”<sup>93</sup> *The Rhetoric* breaks ethos down further to include both “practical wisdom . . . [and] virtue.”<sup>94</sup> Thus, strong ethos appeals convince an audience that the presenter has good practical sense and so his or her position is the correct one and the presenter is competent and virtuous, and so can be trusted.<sup>95</sup>

Within this Article, the ethos analysis will follow Aristotle’s suggestion closely. The first measure of analysis is the opinion’s virtue, or the competence and truthfulness of its author. This point of evaluation does not allege that any of the Supreme Court Justices have a bad character, but rather examines how various opinions deal with favorable and unfavorable precedent. The question is whether the author’s suggested account of prior Court

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86. See, e.g., *Aristotle’s Rhetorical Triangle*, BLACK HILLS STATE UNIV., (2015), <https://www.bhsu.edu/Portals/32/Rhetorical%20Appeals.pdf> (depicting a triangle containing the three components of persuasion).

87. See Scharffs, *supra* note 84, at 756 (“Aristotle stressed that all three elements are essential and inexorably linked to successful persuasion.”).

88. See ON RHETORIC, *supra* note 40, at 38–39 (listing and characterizing each component).

89. *Id.* at 38.

90. *Id.* at 111.

91. *Id.* at 39.

92. See *id.* at 39 (disputing the notion that ethos did not contribute to persuasiveness).

93. *Id.*

94. ON RHETORIC, *supra* note 40, at 112.

95. See *id.* at 112–13 (stating that without practical sense the speaker will not form opinions correctly).

rulings hold together with the current ruling, or are we left to question whether the author of the opinion is correct or truly believes what he or she had written. Next, I will examine the practicality of the case opinion and the rule the opinion proposes. This point of evaluation will examine how clear and understandable the proposed rule is, and whether such a rule lends itself to application in real-world law enforcement.

The next component of analysis is pathos. Aristotle explained that an audience can be persuaded “when they are led to feel emotion by the speech; for we do not give the same judgment when grieved and rejoicing or when being friendly and hostile.”<sup>96</sup> Aristotle devoted a fair amount of *The Rhetoric* to how emotion can be used as part of persuasion.<sup>97</sup>

Although some might reject the idea that judges should incorporate appeals to emotion in their opinions, decisions involving the Fourth Amendment are often already emotionally charged.<sup>98</sup> Failing to acknowledge the strong emotions stirred by Fourth Amendment decisions would be a mistake.<sup>99</sup> In order for Justices to provide adequately persuasive opinions, they must either make allowances for these emotions or capitalize on them.

The final method of persuasion Aristotle described is logos.<sup>100</sup> The Greek word logos literally means “what is said,” but in *The*

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96. *Id.*

97. *See id.* at 38–39 (varying the discussion between emotions that the speaker wishes to elicit from the audience about herself, which is more in line with the concept of ethos, and those the speaker directs at a contrary opinion). In this section of the Article, pathos will be used to discuss emotions that the author seeks to elicit about an issue or individual involved in the case that is the subject of the judicial opinion.

98. *See* Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 23 (2003) (“The Fourth Amendment protects core interests essential to human flourishing; interests in privacy, property, and freedom of movement.”).

99. *See* Andrew E. Taslitz, *The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions*, 65 L. & CONTEMP. PROBS. 125, 129 (2002) (“To be sure, sometimes the Court’s cases unavoidably address the relevance of emotions involved in governmental searches, but this is done all too rarely, and when emotions are mentioned, the ones identified are usually rendered minimally important to the Court’s conclusions.”).

100. *See* ON RHETORIC, *supra* note 40, at 111 (identifying logos as the third component).

*Rhetoric* it seems clear that logos is the reason or logic that shows, or appears to show, something to be true.<sup>101</sup> In this regard Aristotle explained that “there is on the one hand induction and on the other the syllogism and apparent syllogism.”<sup>102</sup> Although the term syllogism has come to be associated with formal logic, Aristotle did not mean it to have so narrow a meaning.<sup>103</sup> In *The Rhetoric*, he accepted that few premises that form the basis of syllogisms are necessarily true.<sup>104</sup>

In this section of the Article, the logos analysis will evaluate the logic of various opinions. As part of this examination, the opinions will be distilled into syllogistic form and evaluated to determine whether the syllogism is sound on its face and then whether the foundation of the syllogism is strong or weak.

### *III. Ethos, Pathos, and Logos as Applied*

As mentioned above, because of the interdependence of ethos, pathos, and logos, Aristotle’s formula is often described as a triangle.<sup>105</sup> This metaphor is apt. If one, two, or all three sides of a triangle are out of proportion with one another, the shape’s stability is significantly lessened; so too with persuasion. The following section examines several Fourth Amendment opinions from Justices on the Roberts Court. These opinions have been selected because they illustrate weakness in the use of the individual components of persuasion.

#### *A. Ethos: The Foundation*

Aristotle’s vision of ethos is well summarized in the following passage: “[There is persuasion] through character whenever the

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101. See *id.* at 39 (“Persuasion occurs through the arguments [logoi] when we show the truth or the apparent truth from whatever is persuasive in each case.”).

102. *Id.* at 40.

103. See *id.* (stating that it is always necessary to show something either by syllogizing or by inducing).

104. *Id.* at 40.

105. *Supra* note 86 and accompanying text.

speech is spoken in such a way as to make the speaker worthy of credence; for we believe fair-minded people to a greater extent and more quickly [than we do others], on all subjects.”<sup>106</sup> As mentioned above, this section will discuss how ethos is affected through Justices’ use of precedent and their crafting of rules for real-world application.

### 1. *Credibility and Stare Decisis*

At points in *The Rhetoric*, Aristotle uses the terms ethos and character interchangeably and he treats both as synonymous with credibility.<sup>107</sup> His point, which seems well made, is that an audience must first believe the advocate is correct and being truthful before they can believe the truth and accuracy of the advocate’s position.<sup>108</sup> Thus, credibility has two components: competence and honesty.<sup>109</sup> In the context of this discussion competence is demonstrated when the Justice’s opinion is comprehensive, showing that the Justice understands the relevant precedent impacting the case. Honesty means the judge is being truthful in his or her accounting of the law.

Evaluating the credibility of a Justice’s opinion is a difficult matter. First, competence and honesty are not black and white determinations. Rather, both concepts move along a scale of more or less competent or honest. Further, it can be challenging to parse out what is an incredible opinion as opposed to an opinion with which a reader simply disagrees. Finally, it is important to note that what is being discussed in this Article is apparent competence and honesty. The Article does not assert that a particular Justice

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106. ON RHETORIC, *supra* note 40, at 38.

107. *See id.* at 38–39 (claiming character is one of the most authoritative forms of persuasion).

108. *But see* Michael L. Wells, “Sociological Legitimacy” in *Supreme Court Opinions*, 64 WASH. & LEE L. REV. 1011, 1015–16 (2007) (arguing that Supreme Court opinions need not utilize valid arguments for the outcome to be in step with public expectations).

109. *Cf.* James C. McCroskey, *Scales for the Measurement of Ethos*, JAMES C. MCCROSKEY, <http://www.jamescmccroskey.com/publications/22.htm> (last updated Nov. 5, 2003) (last visited Dec. 15, 2016) (identifying common components in the division of ethos comparable to the components suggested above) (on file with the Washington and Lee Law Review).

is, in fact, incompetent or dishonest. Rather, the Article asserts that certain common deficiencies in opinion writing results in opinions that appear less competent or less truthful.

Below are three examples of opinions where I suggest Justices have offered opinions that suffer from weak credibility. In some opinions, the Justice has failed to fully account for language in earlier precedent that is contrary to their position. This failure can leave a reader wondering if the Justice either missed the contrary point or simply did not have a good answer and so chose not to address it. In two of the opinions below, the Justices appear to present a position that is different from an earlier opinion they wrote. Of course, a Justice may change his or her mind. In these opinions, however, the change in position is unexplained. Such a shift in position without an explanation can leave a reader with the sense of an untrustworthy position.

#### *a.* Rodriguez v. United States

The first opinion is Justice Thomas's dissent in *Rodriguez v. United States*.<sup>110</sup> The *Rodriguez* case was decided in 2015 and focused on the Court's interpretation of *Illinois v. Caballes*.<sup>111</sup> Justice Ginsburg, writing for the majority, claimed that the Court was "adher[ing] to the line drawn in [*Caballes*]." <sup>112</sup> Justice Thomas in dissent claimed that the majority's opinion could not "be reconciled with our decision in *Caballes*."<sup>113</sup>

In *Rodriguez*, a police officer pulled the defendant over for a traffic violation.<sup>114</sup> The officer conducted all the business necessary to the traffic stop, issued Rodriguez a ticket, and then asked for permission to conduct a dog-sniff of Rodriguez's vehicle.<sup>115</sup>

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110. 135 S. Ct. 1609, 1617–24 (2015) (Thomas, J., dissenting).

111. 543 U.S. 405 (2005). *Caballes* was the Court's 2005 decision where it held that a warrantless and suspicionless dog sniff of an automobile stopped for a traffic violation did not violate the Fourth Amendment.

112. *Rodriguez*, 135 S. Ct. at 1612.

113. *Id.* at 1617 (Thomas, J., dissenting).

114. *See id.* at 1612 (stating that the police officer pulled the defendant over for violating a Nebraska law which prohibited driving on a highway shoulder).

115. *See id.* at 1613 ("Although justification for the traffic stop was 'out of the way,' Struble asked for permission to walk his dog around Rodriguez's vehicle.").

Rodriguez refused.<sup>116</sup> The officer next ordered Rodriguez to shut off his car and exit the vehicle.<sup>117</sup> Approximately five minutes later another deputy arrived at the scene, and three minutes later the drug detection dog alerted.<sup>118</sup> A search of the vehicle revealed a quantity of methamphetamine.<sup>119</sup>

Before a Magistrate Judge, Rodriguez challenged the dog sniff as illegal because the officer prolonged the traffic stop without reasonable suspicion.<sup>120</sup> The Magistrate Judge found that there was no reasonable suspicion for the officer to have prolonged the traffic stop once the citation was issued.<sup>121</sup> He found, however, that the seven to eight minute additional detention amounted to a *de minimis* intrusion on Mr. Rodriguez's rights and was thus permissible under the Fourth Amendment.<sup>122</sup> The District Court adopted the Magistrate's findings of fact and law, and the Eighth Circuit Court of Appeals affirmed.<sup>123</sup> A majority of the Supreme Court reversed and remanded the case.<sup>124</sup>

Justice Thomas dissented from the majority and was joined by Justices Alito and Kennedy.<sup>125</sup> In his dissent, Justice Thomas

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116. *Id.*

117. *See id.* ("Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied.")

118. *See id.* at 1612 ("The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs.")

119. *See id.* ("A search of the vehicle revealed a large bag of methamphetamine.")

120. *See id.* ("He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.")

121. *See id.* ("The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert.")

122. *Id.* at 1613.

123. *See id.* at 1613–14 ("The court noted that, in the Eighth Circuit, 'dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only *de minimis* intrusions.'" (quoting *United States v. Alexander*, 448 F.3d 1014, 1016 (8th Cir. 2006))).

124. *See id.* at 1617 (remanding to the Eighth Circuit to determine whether reasonable suspicion warranted expanding the time required for the drug stop).

125. *Id.*

repeatedly asserted that the majority's opinion was contrary to *Caballes*.<sup>126</sup> As part of that claim Justice Thomas stated, “[a]s *Caballes* makes clear, the fact that Officer Struble waited until after he gave Rodriguez the warning to conduct the dog sniff does not alter this analysis.”<sup>127</sup> He also declared, “*Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff.”<sup>128</sup>

Justice Thomas's statements regarding the *Caballes* decision are forceful and definitive, but the opinion does not support them. There are at least three errors in Justice Thomas's characterization of *Caballes*. First, the *Caballes* Court was not required to resolve whether a traffic stop could be extended for the purpose of conducting a dog sniff.<sup>129</sup> Second, the dicta of *Caballes* strongly supports a conclusion contrary to Justice Thomas's position.<sup>130</sup> Third, the *Caballes* Court offered an example of what would constitute an improper detention that strongly resembles the facts in *Rodriguez*.<sup>131</sup> Each of these errors has the effect of weakening Justice Thomas's opinion by suggesting a less than fully competent accounting of the *Caballes* case.

The first problem with Justice Thomas's claims regarding the controlling power of the *Caballes* decision is that *Caballes* did not reach the same issue as the *Rodriguez* decision. The question presented in *Caballes* was “[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-

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126. See *id.* at 1617–19, 1622 (Thomas, J., dissenting) (“The Court’s holding to the contrary cannot be reconciled with our decision in *Caballes* or a number of common police practices.”).

127. *Id.* at 1618.

128. *Id.* at 1619.

129. See *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“The question on which we granted certiorari is narrow: ‘Whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.’” (citing Pet. for Cert. i.)).

130. See *id.* (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”).

131. See *id.* at 407–08 (“In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure.”).

detection dog to sniff a vehicle during a legitimate traffic stop.”<sup>132</sup> The majority in *Caballes* answered no.<sup>133</sup> The essence of the majority opinion was that dog sniffs do not infringe on any legitimate privacy interest, so using a canine sniff during an otherwise lawful traffic stop raises no additional Fourth Amendment issue.<sup>134</sup> An important part of the *Caballes* case was that the officer who stopped the defendant had not completed the traffic related components of the stop before the canine unit conducted its sweep of the vehicle.<sup>135</sup> Given that the *Caballes* Court did not have to resolve the issue in *Rodriguez*,<sup>136</sup> Justice Thomas’s claim that the majority opinion in *Rodriguez* was contrary to *Caballes* is an unsupported stretch.

Second, although the *Caballes* Court never specifically reached the question raised in *Rodriguez*, the majority gave strong indications that if it had, its conclusion would have been contrary to Justice Thomas’s *Rodriguez* dissent. The majority in *Caballes* observed that the initial stop of *Caballes* was lawful but, “a seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.”<sup>137</sup> The Court went on to explain that “[a] seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.”<sup>138</sup> This

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132. *Id.* at 407.

133. *See id.* at 409 (“Moreover, respondent does not suggest that an erroneous alert, in and of itself, reveals any legitimate private information, and, in this case, the trial judge found that the dog sniff was sufficiently reliable to establish probable cause to conduct a full-blown search of the trunk.”).

134. *See id.* at 408 (finding that conduct merely revealing the possession of contraband does not compromise a legitimate privacy interest).

135. *See id.* at 406 (“While Gillette was in the process of writing a warning ticket, Graham walked his dog around respondent’s car.”).

136. *Compare id.* at 407 (stating that the issue was whether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop), *with Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (stating that the issue was whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff).

137. *Illinois v. Caballes*, 543 U.S. 405, 407 (2005).

138. *Id.*

statement, although arguably dicta is, nonetheless, fairly explicit dicta.

Justice Thomas tried to diffuse this language by claiming that:

The dividing line [in *Caballes*] was whether the overall duration of the stop exceeded “the time reasonably required to complete th[e] mission,” not, as the majority suggests, whether the duration of the stop “in fact” exceeded the time necessary to complete the traffic-related inquiries.<sup>139</sup>

There are at least two problems with Justice Thomas’s attempt to explain away this language. First, Justice Thomas placed emphasis on the *Caballes* Court’s decision to use the word “mission,” implying there is a difference between an officer’s “mission” when conducting a traffic stop and the officer’s “traffic related inquiries.”<sup>140</sup> The context with which the *Caballes* Court used the term mission, however, does not support this construction. The *Caballes* Court explicitly links the word mission to the steps necessary to issuing a driver a ticket.<sup>141</sup> Second, Justice Thomas suggested that the majority meant to draw a distinction between the time it actually takes to conduct a traffic stop and the time it reasonably should take to conduct a traffic stop.<sup>142</sup> This distinction suggests that if the time it actually takes to complete a traffic stop is less than what might be viewed as reasonable, the officer can bank the saved time. Under this theory, if a police officer completed a traffic stop and issued a ticket in seven minutes, but the stop could have reasonably taken thirty minutes, the officer can detain the motorist for an additional twenty-three minutes of questioning. The *Rodriguez* majority commented on this idea,

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139. *Rodriguez*, 135 S. Ct. at 1619 (Thomas, J., dissenting).

140. *See id.* at 1616 (“If an officer can complete traffic-based inquiries expeditiously, then that is the amount of ‘time reasonably required to complete [the stop’s] mission.’” (citing *Illinois v. Caballes*, 543 U.S. 405, 407 (2005))).

141. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (“A seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete *that mission*.” (emphasis added)).

142. *See Rodriguez v. United States*, 135 S. Ct. 1609, 1619–20 (2015) (Thomas, J., dissenting) (arguing that the “dividing line” is what is reasonably required “not, as the majority suggests, whether the duration of the stop ‘in fact’ exceeded the time necessary”).

suggesting that Justice Thomas believes police “can earn bonus time to pursue an unrelated criminal investigation.”<sup>143</sup>

Justice Thomas attempted to use this actual-versus-reasonable distinction to claim the majority in *Caballes*, “expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff.”<sup>144</sup> This statement has no support in the *Caballes* decision. Moreover, it is contrary to one of the examples the majority in *Caballes* provided.

Justice Stevens, writing for the majority in *Caballes*, explained:

In an earlier case involving a dog sniff that occurred during an unreasonably prolonged traffic stop, the Illinois Supreme Court held that use of the dog and the subsequent discovery of contraband were the product of an unconstitutional seizure. *People v. Cox*, 202 Ill.2d 462, 782 N.E.2d 275 (2002). We may assume that a similar result would be warranted in this case if the dog sniff had been conducted while respondent was being unlawfully detained.<sup>145</sup>

Thus, had *Caballes* been factually the same as *Cox*, then the dog sniff in *Caballes* would have been illegal. In *Cox*, the officer conducted a lawful traffic stop because the defendant’s rear registration light was out.<sup>146</sup> Immediately after stopping the defendant, the officer called for a canine unit.<sup>147</sup> The dog arrived approximately fifteen minutes after the initial stop and before the officer had issued a ticket.<sup>148</sup> In *Cox*, the Illinois Supreme Court found fifteen minutes was too long of a detention for the traffic

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143. *Id.* at 1616 (majority opinion).

144. *Id.* at 1619 (Thomas, J., dissenting).

145. *Caballes*, 543 U.S. at 407–08.

146. *See People v. Cox*, 782 N.E.2d 275, 277 (Ill. 2002) (“On July 18, 1998, at approximately 2:21 a.m., Officer Matt McCormick of the Fairfield police department stopped defendant’s vehicle because it did not have a rear registration light.”), *overruled by* *People v. Brew*, 866 N.E.2d 1002, 1007 (Ill. 2008) (“After the *Caballes* decisions, it is clear that a suspicionless dog sniff at a routine traffic stop is not a violation of the Fourth Amendment . . . While the specific and articulable facts prong of *Cox* is overruled, the duration prong still survives.”).

147. *See Cox*, 782 N.E.2d at 277 (“At the time of the stop, Officer McCormick called Deputy Dave Zola and asked him to bring his canine, Tango, to the scene.”).

148. *See id.* (arriving at the scene fifteen minutes after the call, Deputy Zola walked the dog around the defendant’s vehicle).

stop, and implied the officer stalled during the traffic stop in order for the canine unit to arrive.<sup>149</sup> It is also noteworthy that in *Caballes*, from the start of the traffic stop to when the dog alerted to the presence of drugs, a total of ten minutes had passed.<sup>150</sup> In *Rodriguez*, it took the officer twenty-one to twenty-two minutes to issue a ticket, five more minutes for the canine unit to arrive, and another two to three minutes before the dog alerted to the presence of drugs.<sup>151</sup>

The *Caballes* case does not support Justice Thomas's strong and definitive statements. In fact, *Caballes* is much more supportive of the majority's position in *Rodriguez* than Justice Thomas's. Additionally, claiming support from *Caballes* was unnecessary, as Justice Thomas's arguments against the majority opinion did not require *Caballes* for resolution of the issue. The essence of Justice Thomas's dissent was that the majority had strayed from the Fourth Amendment's touchstone of reasonableness, and in doing so unnecessarily tied law enforcement's hands during traffic stops.<sup>152</sup> These claims could be valid whether or not he cited to *Caballes*. Further, Justice Thomas's arguably strongest point in the dissent—that the majority has missed the distinction between a traffic stop based on reasonable suspicion and one based on probable cause<sup>153</sup>—did not rely on *Caballes* for its validity. The valuable points in Justice Thomas's dissent are lost in his claims about *Caballes*.

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149. *See id.* at 280 (“We have examined the record and find that it is devoid of circumstances which would justify the length of the detention. Rather, the record leads us to conclude this was a routine traffic stop, which should have resulted in a correspondingly abbreviated detention.”).

150. *See Illinois v. Caballes*, 543 U.S. 405, 406 (2005) (“The entire incident lasted less than 10 minutes.”).

151. *Rodriguez v. United States*, 135 S. Ct. 1609, 1613 (2015) (Thomas, J., dissenting).

152. *See id.* at 1617 (“The only question here is whether an officer executed a stop in a reasonable manner . . . . Because the stop was reasonably executed, no Fourth Amendment violation occurred.”).

153. *See id.* at 1620 (“On a more fundamental level, the majority’s inquiry elides the distinction between traffic stops based on probable cause and those based on reasonable suspicion.”).

## b. United States v. Jones

The next Fourth Amendment case from the Roberts Court discussed under the heading of ethos is Justice Scalia's majority opinion in *United States v. Jones*.<sup>154</sup> *Jones* is one of the most significant Fourth Amendment decisions to come down from the Robert's Court.<sup>155</sup> In *Jones*, a majority of the Justices revised the test for determining whether the Fourth Amendment applies in a given situation.<sup>156</sup> Before *Jones*, the Court applied the reasonable expectation of privacy test from *Katz v. United States*.<sup>157</sup> The *Katz* test asks two questions to determine whether a Fourth Amendment interest is at stake: (1) did the defendant have an actual, subjective expectation of privacy; and (2) was it an expectation society is willing to recognize as legitimate.<sup>158</sup> After *Jones*, the Court asks whether the Government has engaged in a warrantless physical trespass for the purpose of obtaining information and, if the answer is no, then the Court applies the *Katz* test.<sup>159</sup>

In addition to being a transformative Fourth Amendment case, *Jones* is the culmination of Justice Scalia's decades-long effort to close potential privacy gaps created when the Court adopted the *Katz* test.<sup>160</sup> Although Justice Scalia achieved his

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154. 565 U.S. 400 (2012).

155. See, e.g., Daniel J. Solove, *United States v. Jones and the Future of Privacy Law: The Potential Far-Reaching Implications of the GPS Surveillance Case*, BNA (Feb. 8, 2012), <http://docs.law.gwu.edu/facweb/dsolove/files/BNA-Jones-FINAL.pdf> (discussing *Jones* and noting that it is "a profound decision in Fourth Amendment jurisprudence as well as in privacy law more generally").

156. See *id.* ("Writing for the majority, Justice Antonin Scalia bases the Fourth Amendment analysis on a property rationale that had not been used much after the reasonable expectation of privacy test became the approach to determining whether there was a Fourth Amendment search.").

157. 389 U.S. 347 (1967).

158. See *id.* at 361 (Harlan, J., concurring) (stating that, for example, a person's home has an expectation of privacy, but an open area does not because society would be unwilling to recognize it as reasonable).

159. See *Jones*, 565 U.S. at 406 ("But we need not address the Government's contentions, because Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation.").

160. See Timothy C. MacDonnell, *Justice Scalia's Fourth Amendment: Text, Context, Clarity, and Occasional Faint-Hearted Originalism*, 3 VA. J. CRIM. L. 175, 232 (2015) ("*Jones* is the culmination of Justice Scalia's twenty-six-year long fight

objective, it was by a narrow margin. In *Jones*, all the Justices agreed on the outcome of the decision, but only four joined Justice Scalia's opinion.<sup>161</sup> Central to the disagreement was what role, if any, a trespass analysis should play in the Court's opinion. Four Justices believed a trespass/property-based test was unnecessary and inappropriate to a modern analysis of the Fourth Amendment.<sup>162</sup> Justice Scalia explained his approach by asserting that the *Katz* test did not replace the trespass doctrine, but merely supplemented it.<sup>163</sup> It is this assertion that is the subject of the discussion below.

The facts in *Jones* are fairly simple. Police suspected Jones of being involved in drug trafficking.<sup>164</sup> As part of their investigation, they obtained a warrant authorizing them to place an electronic global positioning satellite tracking device on Jones's vehicle.<sup>165</sup> The warrant had a time and location limitation.<sup>166</sup> Police violated the warrant's limitations and subsequently tracked the movement of Jones's vehicle for over twenty days.<sup>167</sup> The information derived from the GPS, along with other evidence, was used to convict Jones of possession and trafficking in illegal narcotics.<sup>168</sup> Jones brought

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to alter the Court's test for determining whether a Fourth Amendment interest is present in a given case.").

161. *United States v. Jones*, 565 U.S. 400, 401 (2012).

162. *See id.* at 401, 418–19 (Alito, J., concurring) (arguing that utilizing outdated tort law concepts is “unwise”).

163. *See id.* at 409 (majority opinion) (“But as we have discussed, the *Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”).

164. *See id.* at 402 (“Jones, owner and operator of a nightclub in the District of Columbia, came under suspicion of trafficking in narcotics and was made the target of an investigation by a joint FBI and Metropolitan Police Department task force.”).

165. *Id.* at 402–03.

166. *See id.* (explaining that the warrant authorized installation of the GPS device in the District of Columbia within ten days).

167. *See id.* at 403 (describing how the agents violated the warrant by installing a GPS tracking device “[o]n the 11th day, and not in the District of Columbia but in Maryland” and then followed the movement of Jones's vehicle “[o]ver the next 28 days”).

168. *See id.* at 403–04 (“The Government introduced at trial . . . GPS-derived locational data . . . which connected Jones to the alleged conspirators' stash house . . . . The jury returned a guilty verdict.”).

a motion to suppress all evidence secured through and because of the government's use of the GPS device.<sup>169</sup> The question before the Supreme Court was whether the placement and subsequent use of the GPS device to track Jones's movements were a violation of the Fourth Amendment.<sup>170</sup> The Court ruled these actions were.<sup>171</sup>

Justice Scalia, writing for the majority, focused on the government's physical intrusion on the defendant's property.<sup>172</sup> He stated, "It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information."<sup>173</sup> He went on to say that "[w]e have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."<sup>174</sup> Based on these facts, and the absence of a warrant, Justice Scalia found the Fourth Amendment had been violated.<sup>175</sup> In responding to the government's argument that the *Katz* test had not been violated, Justice Scalia wrote, "Jones's Fourth Amendment rights do not rise or fall with the *Katz* formulation."<sup>176</sup> He then went on to claim that "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test."<sup>177</sup> Much of Justice Scalia's majority opinion is spent defending this claim.

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169. *See id.* at 403 ("Jones filed a motion to suppress evidence obtained through the GPS device. The District Court granted the motion only in part, suppressing the data obtained while the vehicle was parked in the garage adjoining Jones's residence . . . It held the remaining data admissible.").

170. *See id.* at 402 ("[D]ecid[ing] 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.").

171. *See id.* at 404 ("We hold that the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'").

172. *See id.* at 404–05 (explaining that "a vehicle is an 'effect'" and that the Government physically occupied Jones's vehicle to obtain information).

173. *Id.* at 404.

174. *Id.* at 404–05.

175. *See id.* at 404, 412 (finding that the admission of evidence obtained by warrantless physical intrusion was "an unconstitutional invasion of privacy").

176. *Id.* at 400.

177. *Id.* at 409.

Justice Scalia's assertion is bold. He claims, in effect, that the trespass test has been alive for the last fifty years and the Court simply has not expressly discussed or applied it.<sup>178</sup> To support his position, he relies primarily on the traditional connection between the Fourth Amendment and property, portions of the *Katz* decision, and two post-*Katz* decisions.<sup>179</sup> Although Justice Scalia's argument is not without support, it simply goes too far, leaving readers to question whether Justice Scalia really believes his own argument.

At least three pieces of substantial evidence stand against Justice Scalia's assertion. First, the *Katz* opinion strongly signaled the Court's decision to drop the trespass test from the status of a primary test to, at most, a subordinate sub-test.<sup>180</sup> Second, the weight of time and subsequent decisions argue against Justice Scalia. In the last forty-five years, the United States Supreme Court has never relied on "the trespass test or doctrine" to resolve a Fourth Amendment issue.<sup>181</sup> To be sure, the cases from the last fifty years establish that there is a relationship between property and the Fourth Amendment.<sup>182</sup> They however, do not establish that the Court has been merely biding its time, waiting for the right case to fully reassert the trespass doctrine. Finally, Justice

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178. *See id.* at 407 ("*Katz* did not erode the principle 'that, when the Government *does* engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment.'" (quoting *United States v. Knotts*, 460 U.S. 276, 286 (1983))).

179. *Id.* at 407–08.

180. *See Katz v. United States*, 389 U.S. 347, 353 (1967) ("We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling.").

181. *See United States v. Jones*, 565 U.S. 400, 406 (2012) ("Our later cases have applied the analysis of Justice Harlan's concurrence in [*Katz*], which said that a violation occurs when government officers violate a person's 'reasonable expectation of privacy.'" (quoting *Katz*, 389 U.S. at 360)).

182. *See id.* at 405 (describing the evolution of Fourth Amendment jurisprudence and its close connection to property (citing *Kyllo v. United States*, 533 U.S. 27, 31 (2001))); *see also id.* at 407 ("*Katz*, the Court explained, established that 'property rights are not the sole measure of Fourth Amendment violations,' but did not 'snuff[f] out the previously recognized protection for property.'" (citing *Soldal v. Cook County*, 506 U.S. 56, 64 (1992))).

Scalia's own opinions have asserted conclusions contrary to the claim that the trespass test has merely been lying dormant.<sup>183</sup>

*Katz v. United States* was the *Jones* decision of its day.<sup>184</sup> In *Katz*, the Court brought to a close a chapter in Fourth Amendment jurisprudence that began with Justice Brandeis's dissent in *Olmstead v. United States*.<sup>185</sup> In *Olmstead*, Chief Justice Taft, writing for a majority of the Court, created the trespass doctrine.<sup>186</sup>

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183. See generally *Kyllo v. United States*, 533 U.S. 27 (2001); *Minnesota v. Carter*, 525 U.S. 83 (1998) (Scalia, J., concurring). See also cases cited *infra* note 212 (citing Justice Scalia).

184. See Tom McInnis, *The Changing Definition of Search or Seizure*, 11.2 A.B.A. INSIGHTS ON L. & SOC'Y 10, 12 (2011) ("*Katz*'s change in approach had the potential to enlarge the protections of the Fourth Amendment beyond those things specifically mentioned or directly implied in the amendment to include a wide variety of other human activities.>").

185. 277 U.S. 438 (1928). Justice Brandeis's dissent in *Olmstead* advocated that the Court apply a Fourth Amendment interpretation that was not limited to the trespass theory. *Id.* at 471 (Brandeis, J., dissenting). He noted that wire-tapping, whether through trespass or not, worked "[a]s a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." *Id.* at 476.

186. See *id.* at 466 (majority opinion). Chief Justice Taft writes that no violation of the Fourth Amendment can be found "unless there has been an official search and seizure of [the defendant], or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure." *Id.* It is noteworthy that other Justices and scholars have asserted that the *Olmstead* decision did not rest on the trespass doctrine, but rather on the broad statement that the Fourth Amendment did not apply to the spoken word. See, e.g., *Katz v. United States*, 389 U.S. 347, 362 n.\* (1967) (Harlan, J., concurring) ("[T]oday's decision must be recognized as overruling *Olmstead v. United States*, 277 U.S. 438, which essentially rested on the ground that conversations were not subject to the protection of the Fourth Amendment."); see also *id.* at 369 (Black, J., dissenting) ("[M]y reading of the *Olmstead* and *Goldman* cases convinces me that they were decided on the basis of the inapplicability of the wording of the Fourth Amendment to eavesdropping, and not on any trespass basis."). But see *id.* at 353 (majority opinion) ("It is true that the absence of [physical] penetration was at one time thought to foreclose further Fourth Amendment inquiry."); *California v. Hodari D.*, 499 U.S. 621, 633 (1991) (discussing how *Olmstead* relied on trespass (citing *Katz*, 389 U.S. at 353–54)); *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting) (citing *Olmstead* and *Katz* to note the trespass doctrine was overruled); *United States v. White*, 401 U.S. 745, 748 (1971) (noting that *Olmstead* was decided on trespass); William S. Doenges, *Search and Seizure: The Physical Trespass Doctrine and the Adaption of the Fourth Amendment to Modern Technology*, 2 TULSA L.J. 180, 181 (1965) (discussing how *Olmstead* placed emphasis on the lack of "physical trespass" and found that "[i]n essence, a physical entry into the

In that same decision Justice Brandeis wrote a dissent where he argued, in effect, that physical intrusion into a constitutionally protected area was immaterial to whether a Fourth Amendment violation occurred.<sup>187</sup> Justice Brandeis's position ultimately won out.<sup>188</sup> In *Katz*, the Court changed its test for determining whether a Fourth Amendment interest existed from the *Olmstead* trespass doctrine to the *Katz* reasonable expectation of privacy test.<sup>189</sup> Under the old rule, a physical trespass into a constitutionally protected area was necessary in order for the Fourth Amendment to be violated.<sup>190</sup> Under the *Katz* "reasonable expectation of privacy" test, a physical trespass was no longer necessary to conclude the Fourth Amendment was violated.<sup>191</sup> Of course, this does not resolve the question in *Jones*.

The fact that a trespass is no longer necessary to determine that a Fourth Amendment violation has occurred is not the same as saying that when a trespass has occurred, it is not necessarily a Fourth Amendment violation. The simple fact is that the *Katz* decision never truly resolved this issue.<sup>192</sup> The focus of the majority

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victim's premises was necessary before he could complain that his rights were violated").

187. See *Olmstead*, 277 U.S. at 473–79 (1928) (Brandeis, J., dissenting) ("Applying to the Fourth and Fifth Amendments the established rule of construction . . . It is, of course, immaterial where the physical connection . . . into the defendants' premises was made.").

188. See *Katz*, 389 U.S. at 353 ("[O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of the Fourth Amendment cannot turn upon . . . a physical intrusion into any given enclosure.").

189. See *id.* at 361 (Harlan, J., concurring) ("My understanding of the rule that has emerged . . . is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

190. See *id.* at 349 (majority opinion) (explaining that prior to this case the rule for determining violations of the Fourth Amendment was based on "physical entrance" (citing *Olmstead v. United States*, 277 U.S. 438, 457, 464, 466 (1928))).

191. See *id.* at 353 (explaining that the Fourth Amendment protects both people and areas against unreasonable searches and seizures regardless of a trespass).

192. See *id.* at 350 ("[T]he correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase 'constitutionally protected area' . . . [T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"); see also *United States v. Jones*, 565 U.S. 400, 406–07 (2012) (discussing how *Katz* "did not repudiate [the] understanding" that

opinion and Justice Harlan's concurrence was on expanding the limits of the Fourth Amendment's reach, not on limiting it.<sup>193</sup> That much favors Justice Scalia's position.<sup>194</sup> The opinions of the majority and Justice Harlan, however, strongly suggest that the Court intended the trespass doctrine to be, at most, a component of the new "reasonable expectation of privacy" test.<sup>195</sup>

The majority opinion in *Katz*, written by Justice Stewart, appears to remove property from the Fourth Amendment equation.<sup>196</sup> Justice Stewart noted that "the premise that property interests control the right of the Government to search and seize has been discredited."<sup>197</sup> He also noted that "whether or not a given

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the Fourth Amendment was concerned about government intrusion, it simply established a different test without deciding how trespass fit into the test).

193. See *Katz v. United States*, 389 U.S. 347, 350 (1967) (explaining that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all"); *id.* at 361–62 (Harlan, J., concurrence) (describing how previous precedent was a "limitation on Fourth Amendment protection" that is "bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion").

194. See *Jones*, 500 U.S. at 405–06 (explaining how *Katz* expanded the Fourth Amendment).

195. See, e.g., *Katz*, 389 U.S. at 353 ("Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested."); *id.* at 361 (Harlan, J., concurring)

As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

196. See *id.* at 347–60 (analyzing what is protected by the Fourth Amendment).

197. *Id.* at 353 (quoting *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294,

‘area,’ viewed in the abstract, is ‘constitutionally protected’ deflects attention from the problem presented in this case. For the Fourth Amendment protects people not places.”<sup>198</sup> Justice Stewart goes on to state, “[O]nce it is recognized that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”<sup>199</sup>

Justice Harlan’s concurrence, from which the “reasonable expectation of privacy” test derives, includes property as one of the considerations in determining whether the two-part *Katz* test has been satisfied.<sup>200</sup> He explained:

As the Court’s opinion states, “the Fourth Amendment protects people, not places.” The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a “place.” My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement.<sup>201</sup>

Justice Harlan then went on to describe the two-part “reasonable expectation of privacy” test.<sup>202</sup> Justice Harlan noted that the old test’s “limitation on Fourth Amendment protection is, in the present day, bad physics as well as bad law, for reasonable expectations of privacy may be defeated by electronic as well as physical invasion.”<sup>203</sup>

It appears that the two relevant *Katz* opinions do not support Justice Scalia’s formulation in *Jones*. The *Katz* majority was unclear on how they thought property or trespass should play in their new formulation.<sup>204</sup> Justice Harlan is clearer and perhaps that is why his formulation gained primacy. That clarity, however,

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304 (1967)).

198. *Id.* at 351.

199. *Id.* at 353.

200. *See id.* at 361 (Harlan, J., concurring) (describing the two-part requirement).

201. *Id.*

202. *Id.*

203. *Id.* at 362.

204. *See id.* at 353 (majority opinion) (explaining that the trespass doctrine is no longer the controlling test for Fourth Amendment violations).

squarely places property and trespass under the *Katz* test and not alongside it, or—according to Justice Scalia’s design—before it.<sup>205</sup>

Justice Scalia also cites two post-*Katz* majority opinions and a concurring opinion to assert that the trespass doctrine was meant to endure independent of the *Katz* test.<sup>206</sup> Although the cases support the general argument that the *Katz* test was not meant to roll back Fourth Amendment protection, they only partially support the more controversial claim that the trespass test has endured all these many years.<sup>207</sup> Despite the support Justice Scalia

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205. *Compare id.* at 361 (Harlan, J., concurring) (explaining that the reasonable expectation of privacy test applies to “people, not places. The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a place”), with *United States v. Jones*, 565 U.S. 400, 407 (2012) (“[W]e [do not] believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home [or property].” (quoting *Alderman v. United States*, 394 U.S. 165, 189 (1969))).

206. Justice Scalia cites the majority opinions in *Alderman v. United States*, 394 U.S. 165 (1969), and *Soldal v. Cook Cty.*, 506 U.S. 56 (1992), and Justice Brennan’s concurring opinion in *United States v. Knotts*, 460 U.S. 276, 286 (1983). *Jones*, 565 U.S. at 407.

207. Of these two cases, *Alderman* is more supportive of Justice Scalia’s claim. *Alderman* resolves the unique question of whether a defendant had standing to challenge the government’s use of evidence secured through a warrantless listening device in a defendant’s home when the evidence did not include the defendant’s conversations. *Alderman v. United States*, 394 U.S. 165 (1969). A majority of the Court ruled no. *Id.* at 171–76. Justice White, writing for the majority, stated:

Because the Court has now decided that the Fourth Amendment protects a person’s private conversations as well as his private premises . . . [citing to *Katz*], the dissent would discard the concept that private conversations overheard through an illegal entry into a private place must be excluded as the fruits of a Fourth Amendment violation.

*Id.* at 178. He goes on to state:

Nor do we believe that *Katz*, by holding that the Fourth Amendment protects persons and their private conversations, was intended to withdraw any of the protection which the Amendment extends to the home or to overrule the existing doctrine, recognized at least since *Silverman*, that conversations as well as property are excludable from the criminal trial when they are found to be the fruits of an illegal invasion of the home

*Id.* at 180. Justice Harlan dissented in part, arguing that “conversational privacy is a personal right, not a property right.” *Id.* at 194 (Harlan, J., concurring in part

cites, two majority opinions and one concurrence seem a paltry quantum of evidence when compared to numerous opinions that have cited and used the *Katz* test.<sup>208</sup> For example, cases like *United States v. Jacobsen*,<sup>209</sup> where the Court approved of law enforcement's warrantless penetration of a defendant's property to test its contents for drugs, would seem clearly in error.<sup>210</sup> Additionally, the case most commonly associated with the trespass test, *Olmstead*, is simply never cited except to note that the *Katz* decision overruled it.<sup>211</sup>

Finally, Justice Scalia's own words in two prior decisions undercut his assertions regarding the trespass doctrine.<sup>212</sup> In

and dissenting in part). Thus, according to Justice Harlan, the defendant did not have standing to object to a violation of other people's Fourth Amendment rights. *Id.*

208. A Westlaw search revealed that *Katz* has been cited in 150 Supreme Court opinions. Search results for "389 U.S. 347," WESTLAW, www.westlaw.com (sign in; then enter "389 U.S. 347" in search box; then follow "Citation References" hyperlink; then filter to cases; then filter to Supreme Court cases). *See, e.g.*, *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (applying the *Katz* reasonableness test); *United States v. Knotts*, 460 U.S. 276, 280–81 (1983) (same); *Smith v. Maryland*, 442 U.S. 735, 739 (1979) ("In determining whether a particular form of government-initiated electronic surveillance is a 'search' within the meaning of the Fourth Amendment, our lodestar is *Katz* . . ."); JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE, VOLUME ONE 71 (6th ed. 2013) ("In 2012, however, the Supreme Court surprised those who accepted the conventional wisdom (including four sitting members of the Court) by announcing that *Katz* did *not* displace the prior property-rights approach.").

209. 466 U.S. 109 (1984).

210. *See id.* at 125 ("[W]e conclude that . . . the field test was reasonable. The law enforcement interests justifying the procedure were substantial.").

211. *See, e.g.*, *City of Ontario v. Quon*, 560 U.S. 746, 759 (2010) (citing *Olmstead* solely for the purpose of noting that it was overruled by *Katz*); *California v. Hodari D.*, 499 U.S. 621, 632–33 (1991) (noting that *Olmstead* was overruled by *Katz*); *United States v. Jacobsen*, 466 U.S. 109, 138 (1984) (Brennan, J., dissenting) (same); *United States v. Knotts*, 460 U.S. 276, 281 (1983) ("[I]n *Katz* . . . the Court overruled *Olmstead* saying the Fourth Amendment reach cannot turn upon the presence or absence of a physical intrusion into any given enclosure." (citation omitted)); *United States v. White*, 401 U.S. 745, 748 (1971) (discussing how *Katz* overruled previous doctrines related to wiretapping such as the one articulated in *Olmstead*); DRESSLER & MICHAELS, *supra* note 210, at 69 (6th ed. 2013) (discussing how *Olmstead* was overruled by *Katz*).

212. *See* *Kyllo v. United States*, 533 U.S. 27, 32 (2001) ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."); *Minnesota v. Carter*, 525 U.S. 83, 92, 97 (1998) (Scalia, J., concurring) (arguing that the *Katz* test is "notoriously unhelpful" and

*Jones*, Justice Scalia restates a version of a comment he made in other opinions: “Consistent with this understanding, our Fourth Amendment jurisprudence was tied to common-law trespass, at least until the latter half of the 20th century.”<sup>213</sup> He also states, “Our later cases, of course, have deviated from that exclusively property-based approach.”<sup>214</sup> These comments in *Jones* are generally consistent with prior statements made by Justice Scalia, but his earlier statements were more forceful. In a concurring opinion in *Minnesota v. Carter*,<sup>215</sup> and a majority opinion in *Kyllo v. United States*,<sup>216</sup> Justice Scalia appeared far less convinced that the trespass doctrine was standing quietly on the sidelines, waiting to be sent into the game. In *Carter*, Justice Scalia rails against the *Katz* test, at least as a method of determining whether the Fourth Amendment applies in a given situation.<sup>217</sup> He never asserts, however, that the trespass doctrine is still in play.<sup>218</sup> In *Kyllo*, he seems to find a middle ground where, although not happy with the *Katz* test, he still applies it.<sup>219</sup> *Kyllo* provides some of the strongest indications that, at least at the time of the decision, Justice Scalia had accepted the fact that an independent trespass doctrine no longer existed.

In *Carter*, Justice Scalia concurred with the majority, which applied the *Katz* test to the case, but wrote separately.<sup>220</sup> His stated reason in writing a separate opinion was to express his view that the parties to the case had given “short shrift” to the text of

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reviewing the history and language of the Fourth Amendment without discussing trespass as a doctrine that should be applied).

213. See *Jones*, 565 U.S. at 404–05 (paraphrasing his comments from *Kyllo*, 533 U.S. at 32–35 and *Carter*, 525 U.S. at 91–99).

214. *Id.* at 405.

215. 525 U.S. 83 (1998).

216. 533 U.S. 27 (2001).

217. See *Carter*, 525 U.S. at 97–98 (Scalia, J., concurring) (describing *Katz* as “the notoriously unhelpful test adopted in a ‘benchmark’ decision”).

218. See *id.* (criticizing the *Katz* standard for determining Fourth Amendment violations without expressly mentioning the trespass doctrine).

219. See *Kyllo*, 533 U.S. at 34 (relying on the *Katz* test for determining “the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*”).

220. See *Carter*, 525 U.S. at 91 (Scalia, J., concurring).

the Constitution.<sup>221</sup> Justice Scalia believed the parties had done so by leaping “to apply the fuzzy standard of ‘legitimate expectation of privacy’—a consideration that is often relevant to whether a search or seizure covered by the Fourth Amendment is ‘unreasonable’—to the threshold question whether a search or seizure covered by the Fourth Amendment *has occurred*.”<sup>222</sup>

Although Justice Scalia concurred with the majority in the outcome of the case, it was for a very different reason.<sup>223</sup> In fact, Justice Scalia’s criticism of the “parties” in the case appears to also be leveled at the majority.<sup>224</sup> The majority repeatedly tied its conclusions to the *Katz* formulation.<sup>225</sup> Chief Justice Rehnquist uses the phrase “legitimate expectation of privacy” six times in his three pages of analysis of the case.<sup>226</sup> In the analysis, Chief Justice Rehnquist emphasized the connection between property and the Fourth Amendment, not as a separate test, but as a component of the *Katz* “legitimate expectation of privacy” test.<sup>227</sup>

Later in his concurring opinion, Justice Scalia criticized the dissent for arguing that the majority opinion failed to properly apply the *Katz* test.<sup>228</sup> As part of that criticism, Justice Scalia

221. *Id.* at 91.

222. *Id.* at 91–92.

223. *Id.* at 92–97. Justice Scalia’s argument in favor of the outcome in the case is based on an originalist approach to constitutional interpretation. He argues that the text of the Constitution provides a ready answer for whether the Fourth Amendment applies to the situation in *Carter*. *Id.* Since the search in the case did not involve the home of the defendants, they had no textual basis for claiming a Fourth Amendment violation. *Id.*

224. *See id.* at 111 (Ginsburg, J., dissenting) (determining Scalia’s purpose for writing separately was partly to critique the majority’s application and understanding of the text of the Fourth Amendment).

225. *See id.* at 85–92 (majority opinion) citing the *Katz* expectation of privacy).

226. *Id.* at 87–91.

227. *See id.* at 90 (“Property used for commercial purposes is treated differently for Fourth Amendment purposes from residential property. ‘An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual’s home.’”).

228. *See id.* at 97–98 (Scalia, J., concurring) (“The dissent believes that ‘our obligation to produce coherent results’ requires that we ignore [the Fourth Amendment], and apply instead [*Katz*].”).

expressed his view that the *Katz* test was “notoriously unhelpful” and “self-indulgent.”<sup>229</sup> He goes on to write:

[T]he only thing the past three decades have established about the *Katz* test (which has come to mean the test enunciated by Justice Harlan’s separate concurrence in *Katz* . . .) is that, unsurprisingly, those “actual (subjective) expectations of privacy” “that society is prepared to recognize as ‘reasonable,’ . . . bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”<sup>230</sup>

Despite this apparently damning critique of the *Katz* test, Justice Scalia claimed in a footnote to agree with Justice Harlan’s opinion at least in some respects.<sup>231</sup> In particular, Justice Scalia appears to agree with Justice Harlan’s statement in *Katz* that the protections provided by the Fourth Amendment to people, “requires reference to a ‘place.’”<sup>232</sup>

Justice Scalia’s concurrence is best understood as an advocacy piece against the *Katz* test. He asserts the test is inconsistent with the text of the Fourth Amendment, unhelpful and self-indulgent.<sup>233</sup> Although he claims in footnote three to be in some respects in harmony with the *Katz* test, that harmony is limited. Despite the focus of his concurrence, Justice Scalia never asserts that the trespass test is still viable and should be applied.<sup>234</sup>

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229. *Id.* at 97.

230. *Id.*

231. *See id.* at 98 n.3 (“I am entirely in harmony with [Justice Harlan’s concurring] opinion.”).

232. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967)).

233. *See id.* at 97 (criticizing *Katz* as a “notoriously unhelpful . . . self-indulgent test”).

234. It could be argued that Justice Scalia did not raise the trespass test in this case because it would not have resolved the issues at hand. To apply the trespass test would only produce the obvious answer that visiting someone else’s home did not make it your ‘property’ within the meaning of the Fourth Amendment. The *Carter* case would clearly turn on whether *Katz* was satisfied or not. However, that is not what Justice Scalia suggested. Instead he argued that the Fourth Amendment did not apply in the *Carter* case because to do so would stretch the language of the Fourth Amendment to the breaking point. *Id.* at 92. He argues that *Katz* should only apply when determining whether a search or seizure was reasonable, not when determining whether a search or seizure occurred. *Id.*

Next, Justice Scalia discussed the *Katz* formulation in *Kyllo v. United States*.<sup>235</sup> In that opinion, despite continuing to criticize the test, he nonetheless applied it.<sup>236</sup> The *Kyllo* decision is an important Fourth Amendment case for a number of reasons, but for the purposes of this discussion, it is important because it appears to include statements counter to the *Jones* case.<sup>237</sup> Of particular significance is Justice Scalia's statement stating that "[w]e have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."<sup>238</sup>

The most compelling aspect of Justice Scalia's criticism of *Katz* is his observation that the *Katz* test could be used to reduce privacy in places that were formerly protected under the trespass doctrine.<sup>239</sup> Correcting this potential flaw in the *Katz* test, however, does not require the trespass doctrine to exist independent of the *Katz* formulation. Rather than declaring the existence of a "dormant trespass doctrine,"<sup>240</sup> at least two better alternatives were present. First, Justice Scalia could have argued that the protections contained in the trespass doctrine were incorporated, or intended to be incorporated, as part of the *Katz* test. This line of argument would seem entirely consistent with Justice Harlan's opinion in *Katz*.<sup>241</sup> Further, the opinions that Justice Scalia cites in *Jones* would fit much more clearly as supportive of this theory rather than the one Justice Scalia

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235. *Kyllo v. United States*, 533 U.S. 27 (2001).

236. *See id.* at 33 (explaining how "a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable" (citing *Katz v. United States*, 389 U.S. 347, 361(1967))).

237. *Compare id.* at 32 ("We have since decoupled violation of a person's Fourth Amendment rights from trespassory violation of his property."), with *United States v. Jones*, 565 U.S. 400, 407 (2012) (supposing that *Katz* added to the breadth of possible Fourth Amendment violations).

238. *Kyllo*, 533 U.S. at 32.

239. *See Jones*, 565 U.S. at 411 (noting that using *Katz* exclusively "eliminates rights that previously existed").

240. *See id.* at 405 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test); *see also* cases cited *supra* note 182 and accompanying text (discussing Justice Scalia's statements regarding trespass in *Jones*).

241. *See Katz*, 389 U.S. at 361 (Harlan, J., concurring) (questioning "what protection [the Fourth Amendment] affords to . . . people. Generally, as here, the answer to that question requires reference to a 'place'").

describes in *Jones*. Second, he could have accepted that *Katz* overturned the trespass doctrine, but argued that was an error. Either way, it was unnecessary for Justice Scalia to assert that the trespass doctrine was merely an unused theory that could now be put into the Court's Fourth Amendment line-up.

c. *Illinois v. Caballes*

The final example of a non-credible use of stare decisis in a recent Fourth Amendment opinion is presented in Justice Stevens's majority opinion in *Illinois v. Caballes*.<sup>242</sup> *Caballes*, briefly discussed *supra*, dealt with the use of a dog sniff during a traffic stop.<sup>243</sup> Among the issues Justice Stevens discussed in *Caballes* was the impact of the *Kyllo* decision on the Court's opinion.<sup>244</sup> The Respondent in *Caballes* argued that *Kyllo* stood for the idea that the government could not use "non-intrusive" investigative techniques if such actions would reveal information that was contained in a private location.<sup>245</sup> Justice Stevens, who dissented in *Kyllo*, took the opportunity presented in writing the majority opinion in *Caballes* to, in effect, rewrite *Kyllo*.<sup>246</sup>

The *Kyllo* decision is one of several Fourth Amendment decisions by the Supreme Court that sought to confront the challenge created by technology's capacity to infringe on traditionally private places.<sup>247</sup> In *Kyllo*, law enforcement used a thermal imaging device to observe the relative heat escaping from

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242. 543 U.S. 405 (2005).

243. *Supra* notes 129–138 and accompanying text.

244. See *Caballes*, 543 U.S. at 409 (concluding that the decision is "entirely consistent" with *Kyllo*).

245. Brief for Respondent at 14, 15, 18, *Illinois v. Caballes*, 543 U.S. 405 (2005) (No. 03-923), 2004 WL 2097415.

246. See Timothy C. MacDonnell, *Orwellian Ramifications: The Contraband Exception to the Fourth Amendment*, 41 U. MEM. L. REV. 299, 316–17 (2010) [hereinafter MacDonnell, *Orwellian*] ("[Justice Stevens's] claim that the *Kyllo* case turned on the fact that the device in question could pick up lawful or intimate details as well as unlawful activity in the home is not supported by the opinion.")

247. See *Kyllo*, 533 U.S. at 34 ("We think that obtaining by . . . technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . constitutes a search.").

Kyllo's home and garage as compared to his neighbors.<sup>248</sup> This exam revealed that there was more heat escaping from Kyllo's home than that of his neighbors.<sup>249</sup> The government used this along with other information to secure a search warrant.<sup>250</sup> The search revealed that Kyllo had approximately 100 marijuana plants in his home.<sup>251</sup> The question before the Court was whether the use of the thermal-imaging device on Kyllo's home violated the Fourth Amendment.<sup>252</sup> The Court found that it did.<sup>253</sup>

The majority opinion was written by Justice Scalia and has been discussed previously.<sup>254</sup> However, one aspect of Justice Scalia's opinion not addressed was his discussion of intrusiveness. The government in *Kyllo* argued that the thermal imaging device "did not detect private activities occurring in private areas,"<sup>255</sup> and thus did not reveal "intimate details" of the home.<sup>256</sup> In response to this argument, Justice Scalia wrote:

The Fourth Amendment's protection of the home has never been tied to measurement of the quality or quantity of information obtained. In *Silverman*, for example, we made clear that any physical invasion of the structure of the home, "by even a fraction of an inch," was too much, . . . 365 U. S. at 512, and there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the nonintimate rug on the vestibule floor. In the

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248. *Id.* at 29.

249. *Id.* at 30.

250. *See id.* ("Based on tips from informants, utility bills, and the thermal imaging, a Federal Magistrate Judge issued a warrant authorizing a search of petitioner's home.").

251. *Id.*

252. *Id.* at 29.

253. *See id.* at 40 ("Where, as here, 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.").

254. *Supra* notes 216–219, 235–238 and accompanying text.

255. *Kyllo v. United States*, 533 U.S. 27, 37 (2001) (internal quotations omitted).

256. *Id.*

home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.<sup>257</sup>

Justice Scalia then went on to explain, “Limiting the prohibition of thermal imaging to ‘intimate details’ would not only be wrong in principle; it would be impractical in application.”<sup>258</sup> So, Justice Scalia identified two reasons that the “intimate detail” argument fails. First, all details of the home are considered intimate details.<sup>259</sup> Second, any effort to create an “intimate details” test would be virtually impossible to administer.<sup>260</sup>

Justice Stevens dissented in *Kyllo*.<sup>261</sup> Among his several arguments against the majority, Justice Stevens argued against Justice Scalia’s intimate details discussion.<sup>262</sup> In his attack, Justice Stevens claimed that the device used provided no details about the inside of the home, but only information about the exterior of the home.<sup>263</sup> In this section of his dissent, Justice Stevens seems to understand Justice Scalia’s argument regarding the asserted “intimate details” test.<sup>264</sup> Justice Stevens wrote:

the Court argues that the permissibility of “through-the-wall surveillance” cannot depend on a distinction between observing “intimate details” such as “the lady of the house [taking] her daily sauna and bath,” and noticing only “the non-intimate rug on the vestibule floor” or “objects no smaller than 36 by 36 inches.”<sup>265</sup>

In Justice Stevens’s majority opinion from *Caballes* he recast the *Kyllo* decision.<sup>266</sup> Justice Stevens wrote: “Critical to [*Kyllo*] was

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257. *Id.* (citation omitted).

258. *Id.* at 38.

259. *See id.* at 37 (“In the home . . . *all* details are intimate details.”).

260. *See id.* at 38–39 (describing the would-be difficulties in applying such a rule).

261. *Id.* at 41 (Stevens, J., dissenting).

262. *See id.* at 49–52 (criticizing Justice Scalia’s argument).

263. *See id.* at 50 (describing that the thermal images show the outside of the house).

264. *See generally id.* at 49–52.

265. *Id.* at 50.

266. *See Illinois v. Caballes*, 543 U.S. 405, 409 (2005) (“This conclusion is entirely consistent with our recent decision that the use of a thermal-imaging device to detect the growth of marijuana in a home constituted an unlawful

the fact that the device was capable of detecting lawful activity—in that case, intimate details in a home, such as ‘at what hour each night the lady of the house takes her daily sauna and bath.’”<sup>267</sup> There are several components of the above quote that are noteworthy. First, the question of whether the thermal imaging device in *Kyllo* could detect lawful or unlawful activity was simply not a matter of significance.<sup>268</sup> Second, although the Court discussed the concept of intimate details, Justice Scalia made clear that all details of the home are intimate.<sup>269</sup> Third, the example Justice Stevens provided implied that the decision turned on the distinction between an intimate and non-intimate detail when it did not.<sup>270</sup> Given Justice Stevens’s apparent commitment to this issue in *Kyllo* and *Caballes*,<sup>271</sup> his account of *Kyllo* appears weakly trustworthy.

In *Caballes*, Justice Stevens seems to be trying to achieve what he could not in his dissent from *Kyllo*. The question of whether law enforcement can use a “binary” search method to detect contraband in a traditionally protected area was clearly part

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search.”).

267. *Id.* at 409–10.

268. *See* *Kyllo v. United States*, 533 U.S. 27, 38–40 (2001) (noting that a limitation on only intimate details would be both wrong and “impractical” and there is a “firm line at the entrance to the house” regardless of the intimacy of the details discovered).

269. *See id.* at 37 (“In the home, our cases show, *all* details are intimate details, because the entire area is held safe from prying government eyes.” (emphasis in original)).

270. *See id.* at 50 (Stevens, J., dissenting) (stating that the imager was only able to identify heat emanating from the house and not able to “identify either the lady of the house [in her bath], the rug on the floor, or anything else inside the house” and therefore did not qualify as a Fourth Amendment violation).

271. *See id.* (stating that the majority assumes that the thermal imager could observe intimate details of the home); *see also* *Illinois v. Caballes*, 543 U.S. 405, 409–10 (2005) (“Critical to [the *Kyllo*] decision was the fact that the [thermal-imaging] device was capable of detecting lawful activity—in that case intimate details in a home, such as ‘at what hour each night the lady of the house takes her daily sauna and bath.’”).

of Justice Stevens's objective in *Caballes*.<sup>272</sup> In his dissent in *Kyllo*, Justice Stevens argued that the majority decision was too broad:

It is clear, however, that the category of "sense-enhancing technology" covered by the new rule, *ibid.*, is far too broad. It would, for example, embrace potential mechanical substitutes for dogs trained to react when they sniff narcotics. But in *United States v. Place*, 462 U. S. 696, 707 (1983), we held that a dog sniff that "discloses only the presence or absence of narcotics" does "not constitute a 'search' within the meaning of the Fourth Amendment," and it must follow that sense-enhancing equipment that identifies nothing but illegal activity is not a search either. Nevertheless, the use of such a device would be unconstitutional under the Court's rule . . . .<sup>273</sup>

The rewriting of *Kyllo* through *Caballes* would arguably permit sense-enhancing technology so long as it only revealed the presence or absence of a thing that was illegal to possess.<sup>274</sup> Under Justice Stevens's new formulation, which would distinguish between legal intimate detail activity and illegal non-intimate details, dog sniffs or their equivalent would be permissible.<sup>275</sup>

Consistent with the other cases discussed in this section, Justice Stevens's rewrite of the *Kyllo* decision was unnecessary, at least to achieve the outcome in the case. Justice Stevens could have easily argued that the dog sniff was permissible based on the lesser degree of privacy present in automobiles. This argument, coupled with the Court's line of cases applying the binary search doctrine or contraband exception,<sup>276</sup> would have provided an adequate basis

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272. See *Caballes*, 543 U.S. at 409 (concluding that "the use of a well-trained narcotics-detection dog . . . during a lawful traffic stop generally does not implicate legitimate privacy interests").

273. *Kyllo*, 533 U.S. at 47–48 (Stevens, J., dissenting).

274. See *Illinois v. Caballes*, 543 U.S. 405, 408 (2005) (explaining that "any interest in possessing contraband cannot be deemed 'legitimate,' and thus, governmental conduct that only reveals the possession of contraband 'compromises no legitimate privacy interest'").

275. See *id.* at 410 (concluding that dog sniffs "conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment"). *But see Florida v. Jardines*, 133 S. Ct. 1409, 1413 (2013) (addressing the use of a drug detection dog on the home).

276. See, e.g., *Indianapolis v. Edmond*, 531 U.S. 32, 48 (2000) (concluding that a roadblock checkpoint program was an improper search and detention but

to permit the dog sniff without reference to *Kyllo* or the need to rejigger the decision.

Each of the above cases demonstrates Justices reducing the persuasiveness of their opinions, whether majority or dissent, by asserting claims regarding precedent that are weakly credible or simply untenable. Not only were each of the three positions discussed above unsupportable, but they were also unnecessary. In each of the three cases the Justices' characterizations of precedent were unnecessary to the argument in favor of the outcome the Justice was advocating. Ultimately, the mischaracterization of the precedent only served to weaken the persuasiveness of the Justices' opinions.

## 2. Practical Wisdom

Despite describing ethos as “almost . . . the most authoritative form of persuasion,”<sup>277</sup> Aristotle's discussion of practical wisdom in *The Rhetoric* is barely a few lines.<sup>278</sup> Fortunately, he elaborated on the concept in another work, the *Nicomachean Ethics*.<sup>279</sup> In that work, Aristotle explained “[a]gain, the work of man is achieved only in accordance with practical wisdom as well as moral virtue;

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stating that a general canine sniff was not); *Florida v. White*, 526 U.S. 559, 566 (1999) (concluding that the Fourth Amendment did not require a warrant to seize a vehicle where the police had probable cause to believe the vehicle itself was contraband); *California v. Acevedo*, 500 U.S. 565, 580 (1991) (“The police may search an automobile and the containers within it [without a warrant] where they have probable cause to believe contraband or evidence is contained.”); *United States v. Jacobsen*, 466 U.S. 109, 121 (1984) (“[I]t is well-settled that it is constitutionally reasonable for law enforcement officials to seize ‘effects’ that cannot support a justifiable expectation of privacy without a warrant, based on probable cause to believe they contain contraband.”); *United States v. Place*, 462 U.S. 696, 707 (1983) (“[T]he [police dog] sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited.”). See generally MacDonnell, *Orwellian*, *supra* note 237.

277. ON RHETORIC, *supra* note 40, at 39.

278. See *id.* at 69 (translating *phronēsis* as practical wisdom).

279. See ARISTOTLE, NICOMACHEAN ETHICS bk. VI, at 168 (J.M. Mitchell ed., Rev. D.P. Chase trans., George Routledge & Sons, Limited 3rd ed.1910) (c. 384 B.C.E.) (“As for Practical Wisdom, we shall ascertain its nature by examining to what kind of persons we in common language ascribe it.”).

for virtue makes us aim at the right mark, and practical wisdom makes us take the right means.”<sup>280</sup> Scholars in the field of rhetoric have characterized Aristotle’s view on practical wisdom as including “practical intelligence”<sup>281</sup> or “prudence.”<sup>282</sup> In this Article, practical wisdom in the Fourth Amendment context means opinions that can be applied in a practical way on the streets and in the courtrooms of the United States.

This section will discuss two majority opinions and one concurrence. The first opinion is Justice Souter’s majority opinion in *Georgia v. Randolph*.<sup>283</sup> *Randolph* deals with whether police may enter a home without a warrant when one resident of a home consents and another does not.<sup>284</sup> The second opinion is Justice Kennedy’s majority opinion in *City of Ontario v. Quon*.<sup>285</sup> *Quon* dealt with an employee’s privacy in electronic communication when the Government issued the device being searched.<sup>286</sup> The third opinion is Justice Alito’s concurrence in *United States v. Jones*.<sup>287</sup> In each of the above opinions there is a serious question of how these cases will or would be applied either, by the police or the courts.

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280. *Id.* at bk. VI., at chpt. 12, 13, p. 1144a.

281. See ENCYCLOPEDIA OF RHETORIC 634 (Thomas O. Sloan et. al. eds., 2001) (explaining “rhetoric is an exercise of the practical intellect”).

282. *Id.* It is important to acknowledge that Aristotle’s discussion of practical wisdom in *Nicomachean Ethics* goes far beyond the use of rhetoric. Aristotle’s discussion of practical wisdom is part of a broader work on what it is to lead a fruitful life. It is also important to note that Aristotle’s discussion of practical wisdom is not as clearly separated from virtue as this Article approaches the subject.

283. 547 U.S. 103 (2006).

284. See *id.* at 106 (“The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other . . . is present at the scene and expressly refuses to consent.”).

285. 560 U.S. 746 (2010).

286. See *id.* at 750 (“This case involves the assertion by a government employer of the right . . . to read text messages sent and received on a pager the employer owned and issued to an employee.”).

287. 565 U.S. 400 (2012).

*a. Georgia v. Randolph*

*Georgia v. Randolph* was the first time the Supreme Court sought to resolve the circumstance where one resident gives police permission to search a home but another denies police entry.<sup>288</sup> In *Randolph*, the defendant's wife contacted police after a domestic dispute with her husband.<sup>289</sup> Police arrived and Mrs. Randolph informed them that the defendant was a drug user and there were drugs in the home.<sup>290</sup> The defendant denied being a drug user.<sup>291</sup> Police asked Mr. Randolph for permission to search the home, which he refused.<sup>292</sup> Police asked Mrs. Randolph for permission, which she granted.<sup>293</sup> The search revealed evidence of drug use in the room alleged to be Mr. Randolph's.<sup>294</sup> Mr. Randolph, who was indicted for possession of cocaine, challenged the search on Fourth Amendment grounds.<sup>295</sup> The trial court denied Mr. Randolph's motion, but that ruling was overturned on appeal.<sup>296</sup> The Supreme Court granted certiorari and upheld the Supreme Court of Georgia's ruling that the search violated the Fourth Amendment.<sup>297</sup>

Justice Souter, writing for the majority, concluded that the police could not conduct a warrantless search of a home based on the consent of one of the tenants if another tenant was present and refusing consent.<sup>298</sup> The practicality of the opinion can be

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288. The Supreme Court had already resolved several cases, including *United States v. Matlock*, 415 U.S. 164 (1974), that confirmed that the co-resident of a home could consent to a warrantless search of the residence he or she shared with another and evidence seized was admissible against the non-consenting resident. *Id.* at 174–76.

289. *Georgia v. Randolph*, 547 U.S. 103, 107 (2006).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.* at 107–08.

297. *Id.* at 123.

298. *See id.* at 123 (stating that “[Mr.] Randolph’s refusal is clear, and nothing in the record justifies the search on grounds independent of [Mrs.] Randolph’s consent”).

challenged both by how police would interpret and execute it and as precedent for future cases.

Justice Souter began his opinion by reemphasizing the importance of the home to the Court's Fourth Amendment jurisprudence.<sup>299</sup> He pointed out that the warrantless search of a home is *per se* unreasonable and any exceptions to this rule are "jealously and carefully drawn."<sup>300</sup> One such exception he discussed at length was the consent of a co-occupant.<sup>301</sup> He explained that although a co-occupant may grant consent, that consent cannot overcome the refusal of another physically present co-occupant.<sup>302</sup> The argument seems reasonable up to this point. Rather than basing his opinion on the foundation that one person's right to permit a search cannot trump another's right to refuse it, Justice Souter instead arrives at his conclusion based on "widely shared social expectations."<sup>303</sup> Further, Justice Souter insists on adding another wrinkle to the opinion. In order to avoid disturbing other Supreme Court precedent and in an attempt to connect the ruling more closely to the social expectation line of reasoning, Justice Souter requires that the resident refusing consent to a police search be present.<sup>304</sup>

The practicality of Justice Souter's opinion can be evaluated in at least three ways. First, is the decision clear and easily applied? Second, is it fashioned in such a way that it fulfills its purpose in light of human behavior? Third, is it built upon a line of reasoning that permits lower courts to apply the decision to future circumstances? Justice Souter's opinion misses the mark on two of these three objectives.

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299. *Id.* at 109.

300. *Id.* (quoting *Jones v. United States*, 357 U.S. 493, 499 (1958)).

301. *See id.* at 109 (explaining that the exception might include "the householder against whom evidence is sought, *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973), or a fellow occupant who shares common authority over property, when the suspect is absent").

302. *Id.* at 121.

303. *Id.* at 111.

304. *See id.* at 121–22 (stating that "there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it").

*Randolph's* greatest strength is its immediate clarity. The opinion lays down a bright—albeit narrow—rule for police to follow: In the circumstance where two residents are present and one gives permission to search a home and the other refuses, the police may not search without a warrant.<sup>305</sup>

Despite Justice Souter's reemphasis of the Court's precedent that warrantless searches of homes are usually per se unreasonable and that the exceptions to this rule are few and narrow,<sup>306</sup> his opinion does little to practically protect Fourth Amendment rights. By requiring that the defendant be physically present at the exact moment police are seeking entry based on another resident's consent,<sup>307</sup> there is little protection to the Fourth Amendment rights Justice Souter extolled. In addition to requiring an unlikely confluence of events to occur for a defendant to protect his or her Fourth Amendment rights, it limits the protection to a specific moment in time. Unless a defendant can remain home and always vigilant, police may simply return when the defendant is not home. Further, by requiring the defendant to, in effect, stand in the door and deny police entry, the *Randolph* opinion provides the perverse incentive to simply remove the defendant from the equation—which is exactly what occurred in *Fernandez v. California*.<sup>308</sup> Despite declaring that “[d]isputed permission is thus no match for this central value of the Fourth

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305. See *id.* at 122–23 (“A physically present inhabitant’s express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant.”).

306. *Id.* at 109.

307. *Id.* at 122–23.

308. 134 S. Ct. 1126 (2014). In *Fernandez*, the defendant told police they could not enter the home. *Id.* at 1130. Because law enforcement suspected Fernandez of committing domestic violence and other offenses against his wife, they arrested him. *Id.* An hour after the arrest, police asked Mrs. Fernandez for permission to search the home and she granted them permission. *Id.* Justice Alito, writing for the majority, took Justice Souter at his word and limited the *Randolph* case to exactly the circumstance where the non-consenting resident stands in the door preventing police from entering the home. *Id.* at 1137. *But see Georgia v. Randolph*, 547 U.S. 103, 121 (2006) (“So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in . . . complementary rules, one recognizing the co-tenant’s permission . . . [one] according dispositive weight to the fellow occupant’s contrary indication . . .”).

Amendment,”<sup>309</sup> Justice Souter’s opinion does little to actually protect those Fourth Amendment values.

At the conclusion of his opinion, Justice Souter explained that, to preserve the Court’s precedent in other consent cases, his opinion had to be constrained to circumstances where two residents are physically present.<sup>310</sup> Justice Souter appears, however, to overstate the demands of the Court’s precedent. The two cases Justice Souter cites are *Matlock v. United States*<sup>311</sup> and *Illinois v. Rodriguez*.<sup>312</sup> Each case dealt with a non-defendant apparent resident giving consent to police to conduct a warrantless search of the residence they shared with the defendant.<sup>313</sup> In *Matlock*, police detained the defendant in a police car outside the residence, but never asked for his permission to conduct a search.<sup>314</sup> In *Rodriguez*, the defendant was asleep in the residence when police entered.<sup>315</sup> What is noteworthy about both cases is that neither defendant had refused the police request for consent to search.<sup>316</sup> Thus, neither decision dictated that a defendant’s refusal to grant consent must be limited to standing at the door to block police entry. Justice Souter’s majority opinion resolves but a moment in time and encourages law enforcement to be minimally inventive to ensure a suspect is not able to literally stand in their way.

In addition to having a limited practical effect when applied by law enforcement, Justice Souter’s majority opinion is also practically limited as precedent. This practical limitation stems from Justice Souter’s reliance on “widely shared social

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309. *Randolph*, 547 U.S. at 115.

310. *See id.* at 120–22 (“If those cases are not to be undercut . . . we have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects . . .”).

311. 415 U.S. 164 (1974).

312. 497 U.S. 177 (1990).

313. *Id.* at 179; *Matlock*, 415 U.S. at 166.

314. *Matlock*, 415 U.S. at 166.

315. *Rodriguez*, 497 U.S. at 179.

316. *See id.* (explaining that Rodriguez was asleep in the apartment when the police were given consent to search and access to the apartment); *see also Matlock*, 415 U.S. at 166 (noting that police arrested Matlock in front of his home, but never asked him for his consent to search it—another occupant gave the consent to search).

expectations<sup>317</sup> rather than the long line of cases that focus on privacy in the home.

In *Randolph*, the only question in play was whether one resident could, through their consent, veto the nonconsenting resident's refusal.<sup>318</sup> Justice Souter declared they could not.<sup>319</sup> By tying his opinion to the "widely held social expectation"<sup>320</sup> that a person would not enter a home when given conflicting directions from residents of the home, lower courts have an answer to one question and nothing more. Additionally, there are multiple "widely held social expectations." Why limit the question to the social expectation of a confrontation at the front door? Is it any less a social expectation that people should not enter a home where they are not welcome? Or why not focus on the social expectation that when we tell the police they do not have consent to search our homes without a warrant, our home will not be searched without a warrant? Additionally, the *Randolph* opinion is a precedent built upon the shifting sands of "social expectations."<sup>321</sup> If the circumstances in *Randolph* were different regarding the two residents, would the Fourth Amendment rights of the nonconsenting resident change? In his dissent, Chief Justice Roberts points this out, stating "[t]he fact is that a wide variety of differing social situations can readily be imagined, giving rise to quite different social expectations."<sup>322</sup>

Because of these weaknesses, Justice Souter's opinion in *Randolph* has been strictly limited to the facts of the case. In *Fernandez v. California*, Justice Alito, writing for the majority, found that the Court's decision in *Randolph* only prevents police

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317. *Georgia v. Randolph*, 547 U.S. 103, 111 (2006).

318. *Id.* at 106. This question can of course, be turned on its head to ask whether the refusing resident vetoes the consenting resident's action. Chief Justice Roberts turned the question around this way in his dissent. *Id.* at 129 (Roberts, C.J., dissenting).

319. *See id.* at 142 (stating "that a physically present inhabitant's express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant").

320. *Id.* at 111.

321. *See id.* at 121 (providing the question in the case to be "whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenant's objection").

322. *Id.* at 129 (Roberts, C.J., dissenting).

from entering a home when the defendant is present and objecting to the warrantless search.<sup>323</sup> Further, in *Fernandez* the Court's decision made it entirely permissible for police to remove a nonconsenting resident and then proceed with a consent search.<sup>324</sup>

*b. The City of Ontario v. Quon*

Justice Kennedy's majority opinion in *City of Ontario v. Quon* presents a question of practical wisdom with regard to the precedential value of the opinion. In addition to resolving the case at hand, an appellate court—especially the United States Supreme Court—is expected to create clear precedent that lower courts can easily follow. Central to this activity is describing a rule and any limiting principles the Supreme Court expects lower courts to follow. In *Quon*, Justice Kennedy refused to choose between two different rules and thus left lower courts continuing to guess as to what the proper rule is.<sup>325</sup>

In *Quon*, a police officer brought a section 1983 action<sup>326</sup> against the City of Ontario, California, for violating his Fourth Amendment rights.<sup>327</sup> Officer Quon and other members of the police force were issued electronic pagers that allowed the officers to send text messages.<sup>328</sup> Officers were told the pagers were for work use only and were limited in how many text messages they

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323. See 134 S. Ct. 1126, 1136 (2014) (“If *Randolph* is taken at its word—that it applies only when the objector is standing in the door saying ‘stay out’ when officers propose to make a consent search—all of these problems [of how officers should treat objections] disappear.”).

324. See *id.* at 1134 (“The *Randolph* dictum is best understood not to require an inquiry into the subjective intent of officers who detain or arrest a potential objector but instead refer to situations in which the removal of the potential objector is not objectively reasonable.”).

325. See 560 U.S. 746, 757 (2010) (explaining that the two different approaches outlined in the plurality and Justice Scalia's concurring opinion in *O'Connor v. Ortega* lead to the same result in this case—without choosing one approach over the other).

326. 42 U.S.C. § 1983 (2012) (allowing civil actions for deprivation of constitutional and federal statutory rights by persons acting “under color of law”).

327. *Quon*, 560 U.S. at 753.

328. *Id.* at 751.

could send per week.<sup>329</sup> Officer Quon repeatedly exceeded his use of the pager and had to pay the overage fees several times.<sup>330</sup> Although Officer Quon's supervisor warned him about running over the text limit, he also told Officer Quon that he did not intend to audit the text messages to insure they were work related.<sup>331</sup> Eventually, Officer Quon's supervisor did audit the text messages and discovered abuses.<sup>332</sup> Based on that discovery Officer Quon was disciplined.<sup>333</sup> Officer Quon brought a section 1983 action against the City for a violation of the Fourth Amendment.<sup>334</sup>

The *Quon* case required the Court to resolve the question of what level of privacy the Fourth Amendment requires in the work place when the government is the employer.<sup>335</sup> The leading case in this area was *O'Connor v. Ortega*.<sup>336</sup> Justice Kennedy noted that the Court in *O'Connor* did not agree on the "analytical framework for Fourth Amendment claims against government employers."<sup>337</sup> He then went on to discuss at length the proposed framework provided by the plurality and Justice Scalia's concurrence in *O'Connor*.<sup>338</sup>

The *O'Connor* plurality declared that "[s]earches and seizures by government employers or supervisors of the private property of their employees . . . are subject to the restraints of the Fourth Amendment."<sup>339</sup> The plurality stated, however, that given the operational realities of some government offices, employees may

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329. *Id.* at 751–52.

330. *Id.* at 752.

331. *Id.*

332. *See id.* at 752–53 (discovering "that many of the messages sent and received on Quon's pager were not work related, and some were sexually explicit").

333. *Id.* at 753

334. *Id.*

335. *See id.* at 750 ("This case involves the assertion by a government employer of the right . . . to read text messages sent and received on a pager the employer owned and issued to an employee.").

336. 480 U.S. 709 (1987).

337. *City of Ontario v. Quon*, 560 U.S. 746, 756 (2010).

338. *See id.* at 756–57 (stating that the "four-Justice plurality concluded that the correct analysis has two steps" and "Justice Scalia, concurring in the judgment, outlined a different approach").

339. *O'Connor*, 480 U.S. at 715.

have no reasonable expectation of privacy.<sup>340</sup> Further, based on the wide variety of possible work environments such cases had to be resolved on a case-by-case basis.<sup>341</sup> The plurality also found that there are “special needs” present when the government is also an employer.<sup>342</sup> The “special needs” render the normal probable cause and warrant requirements impracticable when the government is engaged in “legitimate work-related, non-investigatory intrusions as well as investigations of work-related misconduct.”<sup>343</sup> The plurality substituted the usual requirement of probable cause with a standard of “reasonableness under all the circumstances.”<sup>344</sup>

In *O'Connor*, Justice Scalia wrote a concurrence where he challenged the method the plurality proposed.<sup>345</sup> Justice Scalia’s dissatisfaction with the plurality was two-fold. First, he rejected the value of a case-by-case approach as too vague and difficult for lower courts and law enforcement to follow.<sup>346</sup> Second, Justice Scalia asserted that whatever standard the plurality suggested would be the wrong one if it resulted in a conclusion that the Fourth Amendment did not generally apply to a government employee’s office.<sup>347</sup>

The plurality and Justice Scalia offer different methods of addressing searches by the government of the workplace. The plurality created a test that was highly fact dependent, both with

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340. *Id.* at 717.

341. *Id.* at 718.

342. *Id.* at 725.

343. *Id.*

344. *Id.* at 726. According to the plurality, this test is comprised of two steps: “first, one must consider ‘whether the . . . action was justified at its inception . . . second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place.’” *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968), and *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)).

345. *See id.* at 729 (Scalia, J., concurring) (“I disagree with the reason for the reversal given by the plurality opinion, and with the standard it prescribes for the Fourth Amendment inquiry.”).

346. *See id.* at 730 (“I would object to the formulation of a standard so devoid of content that it produces rather than eliminates uncertainty in this field.”).

347. *Id.* at 730–32. Justice Scalia did not suggest an iron-clad rule regarding government employee offices—he suggested that there may be some offices so “exposed to the public” that they would “not be subject to the Fourth Amendment.” *Id.* at 731.

regard to whether the Fourth Amendment would apply and whether the search was reasonable.<sup>348</sup> Justice Scalia clearly rejected the case-by-case approach, at least with regard to the question of whether the Fourth Amendment applied to government employee offices.<sup>349</sup> He ultimately concluded that when the government is an employer the special need doctrine should apply, so long as the search is work-related.<sup>350</sup>

Justice Kennedy's majority opinion in *Quon* manifests a timidity that calls into question the decision to grant certiorari in the first place. After describing the plurality in *O'Connor* and Justice Scalia's concurrence, Justice Kennedy explains that under either test the search in this case would be reasonable.<sup>351</sup> Using phrases like "were we to assume that inquiry into 'operational realities' were called for,"<sup>352</sup> "[e]ven if the Court were certain that the *O'Connor* plurality approach were the right one,"<sup>353</sup> and "with boundaries that we need not here explore,"<sup>354</sup> Justice Kennedy writes much but says little. In fact, Justice Kennedy wrote a two-page explanation of why the Court "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer."<sup>355</sup> He continued with the statement that "[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear."<sup>356</sup>

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348. See *id.* at 725–26 ("We hold . . . that public employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness under all the circumstances.")

349. *Id.* at 731 (Scalia, J., concurring).

350. See *id.* at 732 ("I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules . . . do not violate the Fourth Amendment.")

351. See *City of Ontario v. Quon*, 560 U.S. 746, 764–65 (2010) (stating "the search was reasonable under the approach of the *O'Connor* plurality" and "would satisfy the approach of Justice Scalia's concurrence").

352. *Id.* at 758.

353. *Id.* at 759.

354. *Id.* at 762.

355. *Id.* at 759. Justice Kennedy's explanation begins on 759 and ends on 761.

356. *Id.*

The *Quon* decision was published in 2010. It would be an overstatement to declare that pagers, even those capable of transmitting text messages, were an emerging technology in 2010. Justice Kennedy, however, while noting that in *Katz* the Court was able to rely on its own knowledge and experience to arrive at its conclusions, found that in the current case “[i]t is not so clear that courts at present are on so sure a ground.”<sup>357</sup> It is very likely that the Justices of the *Katz* Court were more comfortable with deciding a case involving a public telephone than the Justices of the *Quon* Court were when resolving an issue regarding a pager. But it is likely that the Justices in *Katz* knew no more about how a phone transmits messages than the *Quon* Court knew about how text pagers work. Further, since it seems likely that the average citizen (and certainly Officer Quon) knows no more about how text messages arrive at their proper destination than they understand how telephones work, the entire issue is beside the point. Finally, even if text pagers were a new technology and it mattered how the information was transmitted, we still expect the Supreme Court to resolve the issues.

*c. Justice Alito in United States v. Jones*

Justice Scalia’s majority opinion in *Jones* has already been discussed above.<sup>358</sup> As previously mentioned, the Court divided sharply on the question of what role the *Katz* test should play in resolving whether the government’s warrantless use of a GPS tracking device violated the Fourth Amendment.<sup>359</sup> Justice Alito wrote a concurring opinion arguing against the resurrection of the trespass test, claiming instead that the *Katz* test was the proper measure of whether and how the Fourth Amendment should be applied in the present and future.<sup>360</sup> The focus of this discussion of

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357. *Id.*

358. See generally *supra* Part III.A.1.b.

359. *United States v. Jones*, 565 U.S. 400, 402 (2012).

360. See *id.* at 422 (Alito, J., concurring) (reasoning that “*Katz v. United States* . . . finally did away with the old approach, holding that a trespass was not required for a Fourth Amendment violation”).

Justice Alito's concurrence is on his description and explanation of how the *Katz* test should be applied.

The core of Justice Alito's challenge to the majority opinion in *Jones* was his claim that tying the Court's Fourth Amendment analysis to "18th-century tort law . . . was unwise."<sup>361</sup> Instead, Justice Alito and the three Justices that joined in his concurrence argued the *Katz* test was the better method.<sup>362</sup> As part of his argument, Justice Alito agreed with the majority that "we must 'assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted'. . . . But it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case."<sup>363</sup> To illustrate this point Justice Alito wrote in a footnote, "The Court suggests that something like this [referring to the facts in *Jones*] might have occurred in 1791, but this would have required either a gigantic coach, a very tiny constable, or both—not to mention a constable with incredible fortitude and patience."<sup>364</sup>

Although Justice Alito was critical of the majority's method of resolving *Jones*, he agreed with the outcome.<sup>365</sup> He arrived at that conclusion by finding the government's actions violated Jones's reasonable expectation of privacy.<sup>366</sup> In his fourteen-page concurrence, Justice Alito devotes approximately a page to explaining how the *Katz* test should be applied to the facts in *Jones*, seeming to say that some warrantless GPS monitoring is

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361. *Id.* at 418–19.

362. *See id.* at 430 (arguing that the Court should apply "existing Fourth Amendment doctrine" of the *Katz* test, and "ask whether the use of GPS tracking in a particular case involved a degree of intrusion that a reasonable person would not have anticipated").

363. *Id.* at 420 (Alito, J., concurring) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

364. *Id.* at 420 n.3.

365. *See id.* at 431 ("For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed.")

366. *See id.* at 419 ("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.")

acceptable while others is not.<sup>367</sup> He wrote “[u]nder this approach [referring to the use of a GPS tracking device], relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable.”<sup>368</sup> He then explained, “[b]ut the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.”<sup>369</sup> Then, anticipating the obvious questions the above sentence begs, he wrote: “We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark”<sup>370</sup> and “[w]e also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy.”<sup>371</sup>

The practical application of Justice Alito’s formulation leaves significant gaps both for police and lower courts. Under his approach, warrantless GPS tracking of vehicles would be permissible, but only for a short-term.<sup>372</sup> But how short is short-term? Justice Alito stated it is unnecessary for the Court to answer that question.<sup>373</sup> Further, he suggests the nature of the offense will impact on the use of warrantless GPS tracking, but he offers no explanation of what offenses fall into his category of “most offenses”<sup>374</sup> and what offenses are “extraordinary.”<sup>375</sup> Justice Alito suggests a sliding scale of Fourth Amendment protection based on the offense being investigated, but he offers no precedent to

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367. *See id.* at 429–30 (discussing the perceived reasonableness of different types of monitoring).

368. *Id.* at 430.

369. *Id.*

370. *Id.*

371. *Id.* at 431.

372. *See id.* at 430 (“[R]elatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable.”).

373. *See id.* (“We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark.”).

374. *Id.*

375. *Id.* at 431.

support this proposed method.<sup>376</sup> Further, under this sliding scale approach, would there be offenses that were so minor that no degree of warrantless GPS monitoring would be appropriate?

In his book, *The Nature of the Judicial Process*,<sup>377</sup> Justice Cardozo wrote, “[t]here can be no wisdom in the choice of a path unless we know where it will lead.”<sup>378</sup> Later in the same book he explained “the common law is at bottom the philosophy of pragmatism”<sup>379</sup> and “[t]he rule that functions well produces a title deed to recognition.”<sup>380</sup> Both the *Randolph* and *Quon* majority opinions miss these core components of an effective judicial decision. In *Randolph*, Justice Souter’s opinion is impractical—it claims to protect the Fourth Amendment privacy rights of non-consenting residents against warrantless searches by police, but only if they are literally present at the moment of entry.<sup>381</sup> Implicit in the quote from Justice Cardozo is that a necessary step to a wise choice is making a choice. Justice Kennedy not only fails to make a choice, but he actually muddies the water. Of course, a definitive rule that is wrong is worse than an ambiguous rule, but if the Court cannot decide if a new rule is in order, it is better to leave well enough alone. Finally, Justice Alito’s formulation of how the Fourth Amendment should apply when law enforcement uses GPS devices<sup>382</sup> is so vague it would leave police and courts lost in the undecided margins of his opinion.

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376. See generally *id.* at 430–31.

377. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921).

378. *Id.* at 102.

379. *Id.*

380. *Id.* at 102–03.

381. See *Georgia v. Randolph*, 547 U.S. 103, 106 (2006) (“We hold that, in the circumstances here at issue, a physically present co-occupant’s stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him.”).

382. See *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J., concurring) (“[R]elatively 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)).

*B. Pathos*

In *The Rhetoric*, Aristotle acknowledges the importance of appeals to emotion in persuasion but does so grudgingly.<sup>383</sup> Some of this discomfort in the use of pathos-based persuasion undoubtedly comes from his teacher, Plato. Much of Plato's attack on rhetoric as a means to the truth centered on the heavy emphasis teachers of rhetoric often placed on manipulating an audience's emotions.<sup>384</sup> Despite Aristotle's discomfort, a significant portion of *The Rhetoric* is devoted to analyzing emotions and suggesting how appeals to emotions could be used in argument.<sup>385</sup>

Throughout the history of the study of rhetoric, emotional appeals have been unhappily recognized as effective.<sup>386</sup> The concern over persuasion through emotion has always been that emotion will overcome reason.<sup>387</sup> This concern seems especially relevant when considering the opinions of Supreme Court Justices.<sup>388</sup> The essence of judicial decision making includes a dispassionate weighing of the evidence in a case. The visual depiction of justice on the steps of the Supreme Court building includes an individual, blindfolded and carrying a set of scales.<sup>389</sup>

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383. See generally ON RHETORIC, *supra* note 40, at 32.

384. See HERRICK, *supra* note 42, at 53 ("Plato so successfully anticipates the major issues that attend rhetoric throughout its long history—issues like power, the potential for manipulation . . .").

385. See generally ON RHETORIC, *supra* note 40, at 113 (discussing "Propositions About the Emotions Useful to a Speaker in All Species of Rhetoric" in Chapters 2–11).

386. See Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1389 (2013) ("Pathetic argument is one of the acceptable modes of persuasion . . .").

387. See *id.* at 1412 ("[I]t is portrayed as crucially important to narrowly delineate that finite list and those proper roles, so that emotion doesn't encroach on the true preserve of law: which is reason." (quoting SUSAN A. BANDES, *THE PASSIONS OF LAW* 2 (1999))).

388. See Scharffs, *supra* note 84, at 754 ("Emotions such as anger, pity, fear, hate, and love affect the reasoning abilities and legal decisions of a judge or jury.").

389. Images of Justice depicted as a woman with scales appears several times within the Supreme Court building as well as outside. At least one image of Justice depicted in the Supreme Court building is without a blindfold and without scales. This is the image of Justice standing guard against evil. In this depiction, Justice also has a sword. OFF. CURATOR, SUPREME CT. U.S., FIGURES OF JUSTICE

The tradition of depicting “lady justice” with scales incorporates the expectation that legal decisions will be issued impartially after weighing both sides of a controversy.

Of course a fair and impartial opinion need not be emotionless.<sup>390</sup> Emotions influence Justices and they should use appeals to emotion in their opinions. To remove emotion from questions involving the Fourth Amendment would be to cut the Amendment away from its fundamental roots.<sup>391</sup> John Adams’s famous description of the impact of James Otis’s legal arguments against general warrants conveys the powerful emotions inherent in the Fourth Amendment.<sup>392</sup> So, Justices are called upon to walk a thin line when advocating their position. There is an expectation that any judge, and especially Supreme Court Justices, will be temperate in their opinions. I suggest that in the Fourth Amendment context, appeals to emotion are most legitimate when directed to the emotions that enliven the Amendment. These emotions include privacy, security,<sup>393</sup> and practicality. The Fourth Amendment protects deeply personal freedoms, but it qualifies that protection with the critical descriptive of reasonableness.<sup>394</sup>

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(2009), <https://www.supremecourt.gov/about/FiguresofJustice-9-11-2009-approved.pdf>.

390. See Greene, *supra* note 386, at 1395 (“There are several reasons to believe, however, that pathetic argument is at least sometimes an appropriate mode of persuasion in constitutional law.”).

391. See *id.* at 1400 (“Our assessment of the gravity of particular offenses and our sentencing practices reflect moral judgments that may be inseparable from the emotions those judgments both validate and produce.”).

392. See Thomas K. Clancy, *The Framers’ Intent: John Adams, His Era, and the Fourth Amendment*, 86 IND. L.J. 979, 1005 (2011) [hereinafter Clancy, *Framers’ Intent*]

Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against writs of assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.

(quoting JOHN ADAMS, *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES VOLUME 10* 247–48 (Charles Francis Adams ed., 1851)).

393. See CLANCY, *supra* note 23, at 77–83 (asserting that security, rather than privacy, is the central protection the Fourth Amendment was directed toward preserving).

394. See Clancy, *Framers’ Intent*, *supra* note 392, at 977 (“The first clause of the Fourth Amendment requires that a search or seizure not be ‘unreasonable.’ This is the ‘fundamental command’ of the Amendment . . . .” (quoting New Jersey

So, citizens are not protected against all governmental searches and seizures, only those that are unreasonable.<sup>395</sup> This becomes an important qualifier on emotional appeals, especially those based on individual privacy and security.

Below is a discussion of three recent Supreme Court opinions where Justices engaged in pathos-based arguments that seem wide of the mark. The first opinion discussed below is Justice Kennedy's majority opinion in *Maryland v. King*,<sup>396</sup> which addressed a state statute that permitted taking DNA samples of individuals arrested for felonies. The second opinion is Justice Thomas's opinion concurring in part and dissenting in part *Safford Unified School District v. Redding*,<sup>397</sup> which addressed the permissibility of a warrantless "strip search" of a public school child.<sup>398</sup> The third opinion is Justice Stevens's dissent in *Samson v. California*,<sup>399</sup> in which he argued against the permissibility of blanket search authorizations for parolees.<sup>400</sup>

### 1. Maryland v. King

Justice Kennedy wrote the majority opinion for the Court in *Maryland v. King*. In *King*, the Court took up the issue of whether a state statute authorizing the taking of a DNA swab of all defendants arrested for certain felonies violated the Fourth

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v. T.L.O., 469 U.S. 325, 340 (1985)).

395. *See id.* ("Reasonableness is the measure of both the permissibility of the initial decision to search and seize and the permissible scope of those intrusions.").

396. 133 S. Ct. 1958 (2013).

397. 557 U.S. 364 (2009).

398. *See id.* at 368 ("The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.").

399. 547 U.S. 843 (2006).

400. *See id.* at 857 (Stevens, J., dissenting) ("But neither *Knights* nor *Griffin* supports a regime of suspicionless searches, conducted pursuant to a blanket grant of discretion untethered by any procedural safe-guards, by law enforcement personnel who have no special interest in the welfare of the parolee or probationer.").

Amendment.<sup>401</sup> The defendant in *King* was convicted of rape based primarily on DNA evidence secured as a result of a DNA swab taken after he had been arrested for an unrelated crime.<sup>402</sup> Justice Kennedy, and four other Justices, determined that the statute did not violate the Fourth Amendment.<sup>403</sup> Aspects of Kennedy's majority opinion demonstrates a heavy emphasis on a pathos-based argument, however, the emotional appeal seems more directed at making the audience angry or outraged at the actions of the defendant, rather than stirring emotions related to the Fourth Amendment. Additionally, when Justice Kennedy does discuss the Fourth Amendment interests at stake in the taking of King's DNA, he describes the intrusion as minimal because the DNA was taken by use of a cheek swab.<sup>404</sup> This superficial discussion of intrusiveness seems to miss the emotive point of a DNA-based intrusion. In this way Justice Kennedy's pathos argument endangers his persuasiveness as much, if not more, than aids it.

Justice Kennedy opened his opinion in the following way:

In 2003 a man concealing his face and armed with a gun broke into a woman's home in Salisbury, Maryland. He raped her. The police were unable to identify or apprehend the assailant based

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401. *See King*, 133 S. Ct. at 1965 ("The Court of Appeals of Maryland, on review of King's rape conviction, ruled that the DNA taken when King was booked for the 2009 charge was an unlawful seizure because obtaining and using the cheek swab was an unreasonable search of the person.").

402. *See id.* ("Additional DNA samples were taken from him and used in the rape trial, but there seems to be no doubt that it was the DNA from the cheek sample taken at the time he was booked in 2009 that led to his first having been linked to the rape and charged with its commission.").

403. *See id.* at 1980

When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

404. *See id.* at 1977 ("By comparison to this substantial government interest and the unique effectiveness of DNA identification, the intrusion of a cheek swab to obtain a DNA sample is a minimal one.").

on any detailed description or other evidence they had, but they did obtain from the victim a sample of the perpetrator's DNA.<sup>405</sup>

Next, he wrote, "In 2009 Alonzo King was arrested in Wicomico County, Maryland, and charged with first- and second-degree assault for menacing a group of people with a shotgun."<sup>406</sup> As a reader, it is difficult to not imagine the plight of the victims in the case. Also, it is equally difficult to not feel outrage toward the defendant, who had committed the crimes of rape and menacing, both crimes committed with weapons.

After his powerfully emotive opening, Justice Kennedy's opinion rambles through an explanation of the Maryland law that authorized the taking of the DNA swab, the history of DNA and the national DNA database (CODIS), before coming to the question of whether taking the swab involved Fourth Amendment interests.<sup>407</sup> The objective of this discussion seems to be to lend credibility to the DNA database system. The effect of this discussion, however, is somewhat disorienting.

Ultimately Justice Kennedy relies upon the minimal physical intrusion of the DNA test coupled with the reduced privacy interest of individuals held in custody to justify the DNA program.<sup>408</sup> Since law enforcement investigatory needs are not a generally proper basis for conducting warrantless searches, Justice Kennedy asserts that the primary governmental need at play in *King* is for correctional personnel and the courts to be able to properly identify the defendant.<sup>409</sup> In his discussion of the importance of identification, Justice Kennedy writes, "[i]t is a common occurrence that 'people detained for minor offenses can turn out to be the most devious and dangerous criminals.'"<sup>410</sup> He then goes on to point out that police had stopped Timothy McVeigh, serial killer

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405. *Id.* at 1965.

406. *Id.*

407. *Id.* at 1966–68.

408. *See id.* at 1977–80 (discussing the government interest in identification, the reduced privacy of prisoners, and the minimal intrusion of the swab).

409. *See id.* at 1970 ("The legitimate government interest served by the Maryland DNA Collection Act is one that is well established: the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.")

410. *Id.* at 1971.

Joel Rifkin, and one of the 9/11 hijackers for traffic violations.<sup>411</sup> Here again, Justice Kennedy seems to draw on the audience's emotive responses. It would be hard to conjure three more reviled individuals in the collective awareness of citizens of the United States than Timothy McVeigh—the Oklahoma City Bomber, a 9/11 hijacker, and Joel Rifkin—a serial killer responsible for the deaths of at least seventeen women.<sup>412</sup> Although these examples are offered to support the claim that the police simply cannot know how dangerous the people they detain are, there appears to be the implication that these traffic stops were missed opportunities to stop heinous crimes, had police but known. Like Justice Kennedy's opening, this reference elicits strong emotions; but they are emotions that seem beside the Fourth Amendment point at hand.<sup>413</sup>

In addressing the Fourth Amendment privacy interest, Justice Kennedy begins by acknowledging that “[i]t can be agreed that using a buccal swab on the inner tissues of a person's cheek in order to obtain DNA samples is a search.”<sup>414</sup> From this point Justice Kennedy compares the buccal swab to other bodily search methods including a blood draw, taking of fingernail scrapings, and conducting a breathalyzer test.<sup>415</sup> Based on these points of comparison he concludes, “the intrusion of a cheek swab to obtain a DNA sample is a minimal one.”<sup>416</sup> Comparing the taking of blood, breath, and fingernail scrapings to an individual's DNA arguably

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411. *Id.* (quoting *Florence v. Bd. of Chosen Freeholders of Cnty. of Burlington*, 132 S. Ct. 1510, 1520 (2012)).

412. See generally John T. McQuiston, *Rifkin, at a Sentencing, Apologizes for 17 Murders*, N.Y. TIMES (Jan. 26, 1996), [http://www.nytimes.com/1996/01/26/nyregion/rifkin-at-a-sentencing-apologizes-for-17-murders.html?\\_r=0](http://www.nytimes.com/1996/01/26/nyregion/rifkin-at-a-sentencing-apologizes-for-17-murders.html?_r=0) (last visited Dec. 15, 2016) (on file with the Washington and Lee Law Review).

413. It could be argued that Justice Kennedy is employing a technique Aristotle described in *The Rhetoric*. Under this technique, in instances where an advocate's argument is weak, the advocate inflames the audience's emotions on a tangential issue from the outset. See ON RHETORIC, *supra* note 40, at 241 (“If you do not have a reason to give, say not that you are not unaware that what you say may seem incredible but [that] you are naturally this sort of [virtuous] person and [that] people never do believe [that] anyone willingly does anything except for some advantage.”).

414. *Maryland v. King*, 133 S. Ct. 1958, 1968–69 (2013).

415. *Id.* at 1969.

416. *Id.* at 1977.

misses an important emotive component of the issue at hand. It is well understood today that an individual's DNA is, in essence, their blueprint.<sup>417</sup> Justice Kennedy misses a powerful emotive point by focusing on the intrusion caused by the buccal swab rather than the intrusion caused by the government's seizure and retention of an individual's unique genetic sequence. Justice Kennedy does tangentially address this issue when explaining that the statute involved only allows DNA to be retained for identification purposes.<sup>418</sup>

## 2. Safford Unified School District No. 1 v. Redding

The second opinion discussed in this section is Justice Thomas's dissent in *Safford v. Redding*. The *Redding* case dealt with a lawsuit brought against the Safford School and several employees for violating a student's Fourth Amendment rights.<sup>419</sup> Although a majority of the Court ruled that a Fourth Amendment violation had occurred, Justice Thomas argued one did not.<sup>420</sup> The focus of this discussion is on Justice Thomas's failure to confront the powerful emotive roots of the Fourth Amendment that run counter to his position. Justice Thomas argued at length that public schools should be declared *in loco parentis* and thus be freed of the constraints of the Fourth Amendment.<sup>421</sup> In this argument

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417. See Brief for the Respondent at 45, *Maryland v. King*, 133 S. Ct. 1958 (2013) (No. 12-207), 2013 WL 315233 ("Our DNA is our blueprint: an individual's DNA contains . . . information about the subject's medical history and genetic conditions . . . [and] physical and behavioral characteristics, ranging from the subject's age, ethnicity, and intelligence to the subject's propensity for violence and addiction.").

418. See *King*, 133 S. Ct. at 1967 ("The Act also limits the information added to a DNA database and how it may be used. . . . No purpose other than identification is permissible[.]").

419. See *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 368 (2009) ("The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.").

420. See *id.* at 382 (Thomas, J., concurring in part and dissenting in part) ("Unlike the majority, however, I would hold that the search of Savana Redding did not violate the Fourth Amendment.").

421. *Id.* at 389.

he fails to adequately confront the facts of the case at hand and he fails to explain why the traditionally permissive and discretionary doctrine of *in loco parentis* should now be compulsory.

The majority, written by Justice Souter, described the issue in the case in the following way: “[W]hether a 13-year-old student’s Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.”<sup>422</sup> The prescription and over-the-counter drugs in this case were ibuprofen and naproxen, both of which are anti-inflammatory medications.<sup>423</sup>

The context of the search in *Redding* was as follows. School officials had received reports from students and at least one set of parents that some students were bringing weapons and prescription medication into school.<sup>424</sup> After receiving the report, a student went to school officials with a white pill he had gotten from another student, Marissa Glines.<sup>425</sup> The school nurse identified the pill as a prescription-strength ibuprofen.<sup>426</sup> A school official called Ms. Glines out of class.<sup>427</sup> At the same time, school officials confiscated a daily-planner notebook on Ms. Glines’ desk.<sup>428</sup> A search of the planner revealed several knives, a lighter, and a cigarette.<sup>429</sup> Ms. Glines told school officials that the daily planner belonged to Ms. Savana Redding, a thirteen-year-old student at the school.<sup>430</sup> Ms. Redding was called to the principal’s office and asked if the daily planner was hers.<sup>431</sup> She said it was, but she had lent

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422. *Id.* at 368 (majority opinion).

423. *See id.* (“Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation . . .”).

424. *Id.* at 373.

425. *See id.* at 372 (“On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him.”).

426. *See id.* (“Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription.”).

427. *Id.*

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 368.

it to a friend and she had no knowledge of the knives, lighter, or cigarette.<sup>432</sup> Ms. Redding's backpack was searched but nothing was found.<sup>433</sup> Next, she was taken to the school nurse's office where she was required to remove her clothes down to her underwear.<sup>434</sup> Her clothes (coat, shirt, pants, and socks) were searched and nothing was found.<sup>435</sup> Next, Ms. Redding was required to "pull her bra out and to the side and shake it, and to pull the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found."<sup>436</sup>

Ms. Redding's parents brought suit against the school for a violation of their daughter's Fourth Amendment rights.<sup>437</sup> At the trial the school and named defendants brought a summary judgement motion.<sup>438</sup> The District Court granted the motion and found there had been no Fourth Amendment violation.<sup>439</sup> The ruling was appealed and the Ninth Circuit held the strip search did violate the Fourth Amendment, but found qualified immunity should apply to all the named defendants except the assistant principal of the school who had order the searches be executed.<sup>440</sup> The Supreme Court granted certiorari and found there had been a Fourth Amendment violation but qualified immunity was proper for several defendants.<sup>441</sup> Justice Thomas dissented in part.<sup>442</sup>

At the heart of Justice Thomas's dissent is the argument that public schools should be declared *in loco parentis*, or in the place of parents, and thus be unconstrained in their ability to conduct

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432. *Id.*

433. *Id.*

434. *Id.* at 369.

435. *Id.*

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.*

440. *See id.* at 369–70 ("The upshot was reversal of summary judgment as to Wilson, while affirming the judgments in favor of Schwallier, the school nurse, and Romero, the administrative assistant, since they had not acted as independent decisionmakers.").

441. *Id.* at 379.

442. *See generally id.* at 382–403 (Thomas, J., concurring in part and dissenting in part).

searches.<sup>443</sup> Justice Thomas, quoting an earlier opinion, explains that under this doctrine parents delegate authority to schools to “command obedience, to control stubbornness, to quicken diligence, and to reform bad habits . . . . So empowered, schoolteachers and administrators had almost complete discretion to establish and enforce the rules they believed were necessary to maintain control over the classrooms.”<sup>444</sup> At first, this quote seems like one of those that are common to historical recitations of a doctrine, but this is not so. Instead Justice Thomas advocates for “the complete restoration of the common-law doctrine of *in loco parentis*.”<sup>445</sup> In the context of the *Redding* case he argues “[t]here can be no doubt that a parent would have had the authority to conduct the search at issue in this case”<sup>446</sup> and if this approach were adopted “the search of *Redding* would stand.”<sup>447</sup>

To support his argument Justice Thomas attempts to paint two pictures. First, of the case at hand, claiming that school officials in *Redding* acted in an “eminently reasonable” way.<sup>448</sup> Second, he paints a picture of the public schools in the United States as out of control.<sup>449</sup> The images are meant to establish first that the school officials in *Redding* acted reasonably, and second, that a return to *in loco parentis* is necessary.

In discussing the facts of the *Redding* case, Justice Thomas paints a grim picture of the middle school Ms. Redding attended and of Ms. Redding herself.<sup>450</sup> He notes that school officials were aware that “a few years ago” a student had obtained a prescription

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443. *See id.* at 383 (“This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of *in loco parentis* . . .”).

444. *Id.* at 398 (citations omitted).

445. *Id.*

446. *Id.* at 399.

447. *Id.*

448. *Id.* at 389.

449. *See id.* at 383 (“For nearly 25 years this Court has understood that [m]aintaining order in the classroom has never been easy, but in more recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985))).

450. *Id.* at 386.

drug from a classmate and become seriously ill.<sup>451</sup> As a result the school had created a strict policy regarding “drugs” in school.<sup>452</sup> According to Justice Thomas, this incident “a few years ago” created a “history of problems with students using and distributing prohibited and illegal substances on campus.”<sup>453</sup> Justice Thomas also discussed that school officials had found alcohol and cigarettes in the girl’s bathroom, thus establishing “[t]he school’s substance abuse problems had not abated by the 2003–2004 school year, which is when the challenged search of Redding took place.”<sup>454</sup> Turning next to Ms. Redding, Justice Thomas noted that school officials had “smelled alcohol” on her in the past, that she was alleged to have hosted a party where alcohol was served, and that she was suspected of being among a group of students “planning on taking the pills after lunch.”<sup>455</sup> In his discussion of the ibuprofen in this case Justice Thomas refers to it as “pills,” “drugs,” and “prescription pills.”<sup>456</sup>

Although it seems this portrayal is meant to conjure a fearful image, because of its heavy-handedness, it comes across more comic than dire. At one point, Justice Thomas attempts to confront the obvious question of the triviality of the drugs in question. He concedes “[a]dmittedly, the Ibuprofen and Naproxen at issue in this case are not the prescription painkillers at the forefront of the prescription-drug-abuse problem.”<sup>457</sup> However, from there he notes that it is possible to overdose on anti-inflammatory pills and people have been known to have allergic reactions to such medicines.<sup>458</sup> Rather than confronting the central question, whether school officials overreacted in conducting the search, Justice Thomas seems to argue that it was not an overreaction because ibuprofen

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451. *Id.* at 385.

452. *Id.*

453. *Id.*

454. *Id.* at 386.

455. *Id.*

456. *Id.*

457. *Id.* at 396.

458. *See id.* at 396–97 (“As nonsteroidal anti-inflammatory drugs (NSAIDs), they pose a risk of death from overdose . . . Moreover, the side-effects caused by the use of NSAIDs can be magnified if they are taken in combination with other drugs.”).

can kill.<sup>459</sup> Again, the emotive effect of this discussion is not to create concern or empathy for school officials, but to make Justice Thomas seem out of touch.

Justice Thomas concludes his discussion on the specifics of the *Redding* case with the statement:

In determining whether the search's scope was reasonable under the Fourth Amendment, it is therefore irrelevant whether the officials suspected Redding of possessing prescription-strength Ibuprofen, nonprescription-strength Naproxen, or some harder street drug . . . Reasonable suspicion that Redding was in possession of drugs in violation of [school] . . . policies, therefore, justified a search extending to any area where small pills could be concealed.<sup>460</sup>

This conclusion begs many questions. First, the categorical claim that the item a student possesses that is against school policy plays no part in a reasonableness analysis seems, well, unreasonable. Second, Justice Thomas seems to authorize a more invasive search than the one conducted in the case. After all, small pills can be hidden in body cavities.

The image Justice Thomas paints of public schools in the United States compared to the days of old is also noteworthy. Citing numerous earlier Supreme Court decisions, Justice Thomas continues the Court's tradition of declaring public schools out of control. Citing Court cases from 1975 and 1996, Justice Thomas writes "[f]or nearly 25 years this Court has understood, 'maintaining order in the classroom has never been easy, but in more recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.'<sup>461</sup> He goes on to quote studies that "[t]eenage abuse of over-the-counter and prescription drugs poses

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459. *See id.* at 397

If a student with a previously unknown intolerance to Ibuprofen or Naproxen were to take either drug and become ill, the public outrage would likely be directed toward the school for failing to take steps to prevent the unmonitored use of the drug. In light of the risks involved, a school's decision to establish and enforce a school prohibition on the possession of any unauthorized drug is thus a reasonable judgment.

460. *Id.* at 397–98.

461. *Id.* at 383.

an increasingly alarming national crisis”<sup>462</sup> and “44 percent of teens sa[id] drugs are used, kept or sold on grounds of their school.”<sup>463</sup> Justice Thomas goes on, stating “[t]eenagers are nevertheless apt to ‘believe the myth that these [prescription] drugs provide a medically safe high”<sup>464</sup> and that “prescription drugs have become ‘gateway drugs to other substances of abuse.”<sup>465</sup>

Although it cannot be denied that the public schools in the United States face a drug problem, once again Justice Thomas is too heavy-handed in his emotional appeal; especially given the drugs that were the subject of the case and the fact that the school was a middle school.<sup>466</sup> The image Justice Thomas paints plays out like a combination of the *Black Board Jungle*<sup>467</sup> and *Stand and Deliver*.<sup>468</sup> A reader is left to imagine drug deals being conducted in hallways, classrooms, and bathrooms. Further, no effort was made to distinguish between the problems of the nation’s high schools and middle schools. Based on Justice Thomas’s broad descriptions it would appear drug use is rampant from K–12. Justice Thomas finishes this discussion with a final, misaimed emotional appeal, “[b]y declaring the search unreasonable in this case, the majority has ‘surrender[ed] control of the American public school system to public school students.”<sup>469</sup>

As mentioned above, Justice Thomas’s solution to this problem is to have “the complete restoration of the common-law doctrine of

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462. *Id.* at 395.

463. *Id.*

464. *Id.* (quoting OFFICE OF NATIONAL DRUG CONTROL POLICY, TEENS AND PRESCRIPTION DRUGS: AN ANALYSIS OF RECENT TRENDS ON THE EMERGING DRUG THREAT 3 (2007), <http://files.eric.ed.gov/fulltext/ED495769.pdf>).

465. *Id.* at 396 (quoting THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, UNDER THE COUNTER: THE DIVERSION AND ABUSE OF CONTROLLED PRESCRIPTION DRUGS IN THE U.S. 4 (2005), [https://www.centeronaddiction.org/sites/default/files/Under-the-counter-the-diversion-and-abuse-of-controlled-prescription-drugs-in-the-us\\_0.pdf](https://www.centeronaddiction.org/sites/default/files/Under-the-counter-the-diversion-and-abuse-of-controlled-prescription-drugs-in-the-us_0.pdf)).

466. *See id.* at 385 (“In this instance, the suspicion of drug possession arose at a middle school . . .”).

467. *BLACKBOARD JUNGLE* (Metro-Goldwyn-Mayer 1955).

468. *STAND AND DELIVER* (Warner Bros. 1988).

469. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 398 (2009) (Thomas, J., concurring in part and dissenting in part).

in loco parentis.”<sup>470</sup> According to Justice Thomas, such authority would permit school officials to “command obedience, to control stubbornness, to quicken diligence, and to reform bad habits.”<sup>471</sup> Despite seeming to place far too rosy an outlook on the results of a return to *in loco parentis*, Justice Thomas’s view of how the doctrine would be employed is not entirely clear. *In loco parentis* was a permissive doctrine, which is to say the doctrine “assumes a voluntary delegation of parental authority.”<sup>472</sup> Thus, the doctrine was not fashioned for a system of “compulsory education.”<sup>473</sup> Further, as some of the sources Justice Thomas cites note, under the doctrine a parent “may also delegate part of his parental authority.”<sup>474</sup> This seems to say that each parent in a school could choose a different level of delegation—one parent might say you can search my child’s belongings but not her clothes, while another would say you can search as you please. But this is clearly not what Justice Thomas has in mind. Based on his opinion, Justice Thomas envisions the rule applying to all students unless parents, through their local school board, change the policy.<sup>475</sup> Quoting an earlier concurrence of his own, Justice Thomas writes, “[i]f parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.”<sup>476</sup> Emotively, this statement reads quite poorly. It has the ring of someone who does not care or someone who does not understand. Thus, Justice Thomas appears like Dickens’ Ebenezer Scrooge turning away gentlemen collecting for charities, “are there no work houses, are there no prisons?”<sup>477</sup> Or like Marie Antoinette

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470. *Id.*

471. *Id.*

472. Susan Stewart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 971 (2010).

473. *Id.* at 991.

474. *Redding*, 557 U.S. at 399 (Thomas, J., concurring in part and dissenting in part) (internal citation omitted).

475. *Id.* at 400.

476. *Id.* (quoting *Morse v. Frederick*, 551 U.S. 393, 419 (2009) (Thomas, J., concurring)).

477. CHARLES DICKENS, *A CHRISTMAS CAROL* 12 (1843). When the men point out to Scrooge that most poor people would rather die than go to a workhouse or

suggesting that if the peasants of France had no bread the crown should “let them eat cake.”<sup>478</sup> Beyond the immediate emotive problem with the statement, it would have the practical effect of granting greater Fourth Amendment protection to those who can send their children to private school or homeschool than those who cannot.

Although Justice Thomas’s concern for limiting the options available for schools to combat drugs and indiscipline in the classroom is a long recognized concern of the Supreme Court,<sup>479</sup> the *Redding* case was a poor vehicle for his argument. Justice Thomas appears to have missed the powerful emotions directly connected with the Fourth Amendment that are active in this case. In broad strokes, middle school officials conducted a strip search of a thirteen-year-old girl to find anti-inflammatory medication.<sup>480</sup> Justice Thomas’s efforts to justify these actions at once seemed out of touch with the essence of the Fourth Amendment while also seeming out of touch with the limited options many parents have with regard to their children’s education.

### 3. *Samson v. California*

The third opinion dealing with pathos is Justice Stevens’s dissent in *Samson v. California*.<sup>481</sup> The *Samson* case dealt with the warrantless and suspicionless search of a parolee under California law.<sup>482</sup> The majority in *Samson* found that “a condition of release can so diminish or eliminate a released prisoner’s reasonable expectation of privacy that a suspicionless search by a law enforcement officer would not offend the Fourth Amendment.”<sup>483</sup>

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prison, Scrooge states “then let them do so and decrease the surplus population.”

478. See RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS REQUESTED FROM THE CONGRESSIONAL RESEARCH SERVICE 253 (Suzy Platt ed., 1989) (stating that the author of the exact quote is unknown, but it is commonly attributed to Marie Antoinette).

479. *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 385–87 (2009) (Thomas, J., concurring in part and dissenting in part).

480. *Id.* at 374 (majority opinion).

481. 547 U.S. 843 (2006).

482. *Id.* at 846–47.

483. *Id.* at 847.

Justice Stevens, joined by Justices Souter and Breyer, dissented.<sup>484</sup> Justice Stevens's dissent is strongly emotive, drawing from a wide range of Fourth Amendment cases,<sup>485</sup> but failing to confront the core legal and emotive question posed by the facts of the case.

In *Samson*, the defendant was on parole from a conviction for being a felon in possession of a firearm.<sup>486</sup> On September 6, 2002, an officer recognized Mr. Samson and knew he was on parole.<sup>487</sup> The officer suspected that Mr. Samson was in violation of his parole.<sup>488</sup> He stopped Mr. Samson and asked him if he was current with his parole officer.<sup>489</sup> Mr. Samson said he was, and the officer verified that Mr. Samson was telling the truth.<sup>490</sup> At this point the officer conducted a search of Mr. Samson and found a small quantity of methamphetamine.<sup>491</sup> Mr. Samson brought a motion to suppress the evidence based on a violation of the Fourth Amendment.<sup>492</sup> The government countered that the search was permissible under California law, which required a parolee to agree in writing to submit to a search anytime and anywhere as a condition of release.<sup>493</sup> The motion was denied and Mr. Samson was convicted.<sup>494</sup> The California Court of Appeals affirmed the conviction and the Supreme Court granted certiorari to hear the case.<sup>495</sup> A majority of the Court affirmed the California court's conclusion that the Fourth Amendment had not been violated.<sup>496</sup>

Justice Stevens's dissent claimed that the majority opinion "sanctions . . . an unprecedented curtailment of liberty."<sup>497</sup> At the

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484. *Id.* at 857.

485. *See, e.g., Boyd v. United States*, 116 U.S. 616 (1886) (concluding that suspicionless searches are the very evil the Fourth Amendment prevents).

486. *Samson*, 547 U.S. at 846.

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.* at 847.

492. *Id.*

493. *Id.* at 846.

494. *Id.* at 847.

495. *Id.* at 846.

496. *Id.*

497. *Id.* at 857 (Stevens, J., dissenting).

heart of his opinion is the belief that the majority opinion is opening the door to arbitrary suspicionless searches and that “is the very evil the Fourth Amendment was intended to stamp out.”<sup>498</sup> Justice Stevens argues at length that the Court’s precedent dealing with parolees and the Fourth Amendment has never sanctioned suspicionless searches.<sup>499</sup> In describing the majority’s decision, he repeatedly calls it “unprecedented” and accuses the majority of engaging in reasoning that is “entirely circular.”<sup>500</sup> Justice Stevens concludes with the statement that “[t]he requirement of individualized suspicion, in all its iterations, is the shield the Framers selected to guard against the evils of arbitrary action, caprice, and harassment. To say that those evils may be averted without that shield is, . . . to pay lip service to the end while withdrawing the means.”<sup>501</sup>

Justice Stevens argues effectively and passionately against the majority opinion, but fails to address the strongest emotive component against his position. The California penal code section at issue in the case requires, as a condition of parole, parolees to “agree in writing to be subject to search or seizure by a parole officer or other peace officer at any time of the day or night, . . . with or without a search warrant and with or without cause.”<sup>502</sup> Thus, an inmate is faced with a choice: Agree to suspicionless searches anytime, anywhere, or stay in jail.

Justice Stevens gives this issue a glancing blow when he claims that the State of California cannot reduce a parolee’s legitimate expectations of privacy simply by announcing that parolees have no legitimate expectation of privacy.<sup>503</sup> Justice Stevens claims that this would be as if “the Government were suddenly to announce on nationwide television that all homes henceforth would be subject to warrantless entry.”<sup>504</sup> But is it really the same? Or put more specifically: Is it emotively the same?

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498. *Id.* at 858.

499. *Id.* at 857.

500. *Id.* at 857, 863.

501. *Id.* at 866.

502. *Id.* at 843 (quoting CAL. PENAL CODE § 3067(a) (West 2000)).

503. *Id.* at 861.

504. *Id.* at 863 (quoting *Smith v. Maryland*, 442 U.S. 735, 740–41 (1979)).

Mr. Samson was in jail for a crime involving a handgun.<sup>505</sup> He was given a choice regarding his confinement.<sup>506</sup> He could serve the remainder of his prison term in confinement or he could accept parole with the caveat that he would have to submit to searches without limitations.<sup>507</sup> This scenario is quite distinct from the government announcing that homes are no longer private.

One of the challenges for the dissent in *Samson* was that the majority did not rely on the consent doctrine to uphold the search.<sup>508</sup> Thus, the emotively strongest argument in favor of the search was not exactly in play. This fact seems to have made it more difficult for Justice Stevens to confront the emotively weak element of his position. Nonetheless, confronting that weakness was necessary to give the other aspects of his dissent traction.

In his dissent, Justice Stevens draws on many of the powerful pathos-based components of the Fourth Amendment. He discussed the Amendment's primary purpose of preventing the arbitrary execution of government powers through general warrants, the specter of the government shrinking privacy through declaration.<sup>509</sup> However, in order for these emotional themes to gain momentum, the strongest emotional argument in favor of the government's position must be confronted, even if not relied upon by the majority.

### C. Logos

From the classical era to modern times, rhetoricians have argued that logos, or appeals to reason and logic, are likely the most important of the modes of persuasion.<sup>510</sup> In the influential

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505. *Id.* at 846 (majority opinion).

506. *Id.* at 851.

507. *Id.*

508. *See id.* at 852 n.3 (“Because we find that the search at issue here is reasonable under our general Fourth Amendment approach, we need not reach the issue whether ‘acceptance of the search condition constituted consent . . . .’”).

509. *See id.* at 862 (Stevens, J., dissenting) (“In any event, the notion that a parolee legitimately expects only so much privacy as a prisoner is utterly without foundation.”).

510. *See generally* Edward M. Cope, *Introduction to ARISTOTLE'S RHETORIC WITH ANALYSIS NOTES AND APPENDICES* 99 (1867); HERRICK, *supra* note 42, at 21;

modern work on rhetoric by Ch. Perelman and L. Olbrechts-Tyteca, *The New Rhetoric*, the authors noted the “prestige of logical thought”<sup>511</sup> and how such arguments can give the advocate the appearance of “rigorous thought.”<sup>512</sup> Logic-based arguments are particularly appropriate to our common perception of “justice” in the United States. As discussed above, our symbols of justice, scales, blindfolded figures and grave unemotional judges dressed in black, convey the common image of judicial decision making as an objective, logically intensive event.<sup>513</sup> The arguments contained in the opinions of Supreme Court Justices are replete with references to logic and syllogism.<sup>514</sup>

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CH. PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC* 193–95 (1st ed. 1969) (discussing the power of quasi-logical arguments as distinguished from formal/mathematical argumentation).

511. PERELMAN & OLBRECHTS-TYTECA, *supra* note 510, at 194.

512. *Id.*

513. *Supra* note 389 and accompanying text.

514. Listed below are three examples from Fourth Amendment cases where Justices made express use of syllogisms in arguing their positions. The frequency with which Justices more broadly reference “logic” is much greater than the more technical term “syllogism.” The first is *Mapp v. Ohio*, 367 U.S. 643, 678 (1961) (Harlan, J., dissenting).

At the heart of the majority’s opinion in this case is the following syllogism: (1) the rule excluding in federal criminal trials evidence which is the product of an illegal search and seizure is “part and parcel” of the Fourth Amendment; (2) Wolf held that the “privacy” assured against federal action by the Fourth Amendment is also protected against state action by the Fourteenth Amendment; and (3) it is therefore “logically and constitutionally necessary” that the Weeks exclusionary rule should also be enforced against the States.

The second is *Berger v. New York*, 388 U.S. 41, 77 (1967) (Black, J., dissenting). On this premise of the changed command of the amendment, the Court’s task in passing on the use of eavesdropping evidence becomes a simple one. Its syllogism is this:

The Fourth Amendment forbids invasion of privacy and excludes evidence such invasion obtains; To listen secretly to a man’s conversations or to tap his telephone conversations invades his privacy; Therefore, the Fourth Amendment bars use of evidence eavesdropping or by tapping telephone wires.

The foregoing syllogism is faulty for at least two reasons: (1) the Fourth Amendment itself contains no provision that implies a purpose to bar evidence or anything else an “unreasonable search or seizure” secures; (2) the Fourth Amendment’s language, fairly construed, refers specifically to “unreasonable searches and seizures” and not to a broad

Although the importance of logical reasoning is at once obvious, it is also controversial. Much of the legal realism movement can be seen as a challenge to the primacy of logic as a way of judicial decision making.<sup>515</sup> Despite the tension between logical analysis and the practicalities/realities of human decision making, at least the appearance of logic is critical. In this section, I seek to discuss opinions where the internal logic of the Justice's opinion seems weak. This is distinct from when a Justice has relied on a precedent that does not support or weakly supports their position.

Below I discuss three opinions where the Justice's opinion demonstrates internally weak logic. The opinions contain a variety of potential informal logical fallacies. These fallacies include: the hasty generalization;<sup>516</sup> arguing from consequences,<sup>517</sup> the fallacy

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undefined right to "privacy" in general.

The third is *Samson v. California*, 547 U.S. 843, 861 (2006) (Stevens, J., dissenting). The Court is able to make this unprecedented move only by making another.

Coupling the dubious holding of *Hudson v. Palmer*, 468 U.S. 517, 104 S. Ct. 3194 (1984), with the bald statement that parolees have fewer expectations of privacy than probationers, the Court two-steps its way through a faulty syllogism and, thus, avoids the application of Fourth Amendment principles altogether. The logic, apparently, is this: Prisoners have no legitimate expectation of privacy; parolees are like prisoners; therefore, parolees have no legitimate expectation of privacy.

515. See Daniel Z. Epstein, *Rationality, Legitimacy, and the Law*, 7 WASH. U. JURIS. REV. 1, 2 (2014) (discussing the foundational challenge posed by the American legal realism movement).

516. See ALDISERT, *supra* note 7, at 195 (explaining the fallacy of the hasty generalization is "[a]lso called the fallacy of selected instances, it results from enumerating instances without obtaining a representative number to establish an inductive generalization").

517. DOUGLAS WALTON, *INFORMAL LOGIC: A PRAGMATIC APPROACH* 27 (2008). Walton notes that arguing from consequences may be valid in some circumstances, if the consequences are not relevant to the issue being discussed it is fallacious. *Id.* For example, an attorney who argues that you cannot find a defendant not guilty because it will cause wide spread rioting is arguing from consequences.

of composition;<sup>518</sup> and the fallacy of the non sequitur.<sup>519</sup> The first is Chief Justice Roberts's dissent in *Missouri v. McNeely*.<sup>520</sup> The *McNeely* case dealt with the exigent circumstances surrounding the taking of a blood sample from a suspected drunk driver.<sup>521</sup> The second is Justice Thomas's majority opinion in *Navarette v. California*.<sup>522</sup> *Navarette* addressed the minimum requirements necessary to conduct a reasonable suspicion detention based on an anonymous tip.<sup>523</sup> The third opinion is Justice Breyer's dissent in *Arizona v. Gant*.<sup>524</sup> The *Gant* case addressed a search incident to an arrest that occurs in an automobile.<sup>525</sup>

### 1. Missouri v. McNeely

In *Missouri v. McNeely*,<sup>526</sup> the Court was asked to resolve “whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases.”<sup>527</sup> In *McNeely*, a police officer observed the defendant driving erratically and speeding.<sup>528</sup> After *McNeely* was stopped, the officer noticed *McNeely*'s eyes were bloodshot, his speech was slurred, and he smelled of alcohol.<sup>529</sup> *McNeely* admitted to drinking alcohol that night and after failing

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518. See *id.* at 221 (“The fallacy of composition consists of reasoning improperly from a property of a member of a group to a property of the group itself.” (quoting JOSEPH GERARD BRENNAN, A HANDBOOK OF LOGIC 190 (1957))).

519. See *id.* at 203 (noting the non sequitur “is an argument that contains a conclusion that does not necessarily follow from the premises or any antecedent statement”).

520. 133 S. Ct. 1552 (2013).

521. *Id.* at 1556.

522. 134 S. Ct. 1683 (2014).

523. *Id.* at 1687.

524. 556 U.S. 332 (2009).

525. *Id.* at 332.

526. 133 S. Ct. 1552 (2013).

527. *Id.* at 1556.

528. *Id.*

529. *Id.*

a field sobriety test, he refused a breathalyzer test.<sup>530</sup> The officer then took McNeely to the hospital and asked if he would submit to a blood test, which McNeely refused.<sup>531</sup> The officer had a blood test done nonetheless.<sup>532</sup> The blood test determined that the Defendant's blood alcohol level was .154, far above Missouri's .08 legal limit.<sup>533</sup> The officer charged McNeely with drunk driving and at trial, McNeely moved to suppress the blood test.<sup>534</sup>

The trial court suppressed the blood test results and the government appealed the decision.<sup>535</sup> The case was directed to the Missouri Supreme Court, which affirmed the trial court's holding, stating this was "unquestionably a routine DWI case"<sup>536</sup> that did not merit the application of the exigent circumstances exception to the warrant requirement.<sup>537</sup> The case was appealed to the United States Supreme Court, which affirmed the lower court.<sup>538</sup>

Justice Sotomayor, writing for a majority of the Court, only answered the question presented of whether in drunk driving cases a per se rule on warrantless blood testing was justified.<sup>539</sup> In rejecting the proposed per se rule, Justice Sotomayor explained that despite the fact that in DUI cases, evidence of the crime, in the form of alcohol in the blood stream, is being destroyed as it is metabolized, the usual requirement of a totality of the circumstances analysis to determine exigencies would still be required.<sup>540</sup>

Chief Justice Roberts wrote an opinion concurring in part and dissenting in part and Justice Thomas wrote a dissent.<sup>541</sup> Justice

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530. *Id.* at 1557.

531. *Id.*

532. *Id.*

533. *Id.*

534. *Id.*

535. *Id.*

536. *Id.*

537. *Id.* at 1556.

538. *Id.* at 1558.

539. *Id.* at 1556.

540. *Id.* at 1568.

541. Chief Justice Roberts wrote an opinion that Justices Breyer and Alito joined. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part). Justice Thomas wrote a dissenting opinion that was not joined by anyone. *Id.* at

Thomas suggested that the proposed *per se* rule in DUI cases should be adopted.<sup>542</sup> Chief Justice Roberts suggested a rule that in effect split the difference between the majority's rule and Justice Thomas's opinion.<sup>543</sup>

Chief Justice Roberts began his dissent with a definitive statement that “[a] police officer reading this Court’s opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from a drunk driving suspect who has refused a breathalyzer test.”<sup>544</sup> He then proceeded to argue that the proper method of solving the controversy in the case would be to create what Justice Sotomayor described as “a modified *per se* rule.”<sup>545</sup> Under this modified rule an officer would be required to seek a warrant if there is “time to secure a warrant before blood can be drawn.”<sup>546</sup> If not, “the exigent circumstances exception applies by its terms, and the blood may be drawn without a warrant.”<sup>547</sup> Thus, under the Chief Justice’s proposed rule, police would be expected to pursue a warrant during the time it takes them to get a suspect from a traffic stop to a hospital. After that, the *per se* rule would apply and the blood could be drawn without a warrant.<sup>548</sup>

Contained in Chief Justice Roberts’s dissent are at least two logically questionable positions. First, that police officers will have “no idea—no idea—what the Fourth Amendment requires of him”<sup>549</sup> based on the majority opinion. Second, that based on the body’s natural metabolism of alcohol in the blood, exigent circumstances should be presumed in all DUI cases.<sup>550</sup>

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1574 (Thomas, J., dissenting).

542. *Id.* at 1579 (Thomas, J., dissenting).

543. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).

544. *Id.*

545. *Id.* at 1563 (majority opinion).

546. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).

547. *Id.*

548. *See id.* at 1563 (majority opinion) (arguing that Chief Justice Roberts’s opinion would create a *per se* rule “under which a warrantless blood draw is permissible if the officer could not secure a warrant . . . in the time it takes to transport the suspect to a hospital or similar facility”).

549. *Id.* at 1569 (Roberts, C.J., concurring in part and dissenting in part).

550. *Id.*

Chief Justice Roberts's opening line to his dissent is clearly intended to make a powerful emotive point. This is manifested in its directness and in the deliberate choice to repeat the words "no idea".<sup>551</sup> It is more than simply a pathos-based argument, it is, in effect, the conclusion to the syllogism of his argument. If we were to put the argument into syllogistic form (or more accurately in enthymeme form) it might look like this: Officers confronted with a DUI suspect who refuses a breathalyzer require clear guidance or they will have no idea of how to determine when they have adequate exigencies to permit a warrantless blood draw. The majority's totality of the circumstances test does not provide clear guidance. Thus, the majority's totality of the circumstances test leaves officers with no idea how to determine when they have adequate exigencies to permit a warrantless blood draw. But can this be true? And if it is true, is there not a larger problem? If the totality of the circumstances test does not work for the exigencies of a DUI case, why should it be adequate in any other exigent circumstances situation?

Chief Justice Roberts is arguably engaging in a fallacy of distraction—such fallacies divert the central argument from the issue at hand to the irrelevant, irrational, or emotional.<sup>552</sup> In this case, Chief Justice Roberts is deploying a variant on the fallacy of terror.<sup>553</sup> Such an argument suggests that if the course proposed by the opposing view is taken, disaster will ensue. Here the Chief Justice paints a picture of police officers lost in a sea of indecision, with "no idea, no idea" how to proceed.

It could also be argued that the Chief Justice has made a hasty generalization. Perhaps in some circumstances an officer would feel he or she has "no idea" how they should proceed in a DUI case involving a refusal to take a breathalyzer based on the totality of the circumstances, but this would seem the exception. The fallacy

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551. *Id.*

552. *See* ALDISERT, *supra* note 7, at 174 (explaining that the fallacy of distraction includes those that "shift attention from reasoned argument to other things that are always irrelevant, always irrational, and often emotional").

553. *See id.* at 188 (explaining that the fallacy of terror "makes an appeal to fear of exaggerated consequences in the event an adversary's argument prevails").

of a hasty generalization occurs when an advocate moves too quickly from a specific example to a general conclusion.<sup>554</sup>

Contrary to the Chief Justice's argument, there are many cases involving exigent circumstances and the totality of the circumstances test that provide clarity for officers regarding DUI refusal cases.<sup>555</sup> The entire body of exigent circumstances cases paints a picture of when an officer can pursue a warrantless blood draw.<sup>556</sup> First, the officer must have probable cause.<sup>557</sup> Second, "the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable."<sup>558</sup> Several Supreme Court cases have addressed the exigencies created by the danger of imminent destruction of evidence.<sup>559</sup> These cases seem explicit, requiring police to secure a warrant unless they "are truly confronted with a 'now or never' situation."<sup>560</sup>

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554. *Id.* at 195.

555. *See* *McDonald v. United States*, 335 U.S. 451, 456 (1948) ("We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative."); *see also* *Schmerber v. California*, 384 U.S. 757, 770 (1966) (stating that the natural dissipation of alcohol could be an exigent circumstance when combined with other factors); *Preston v. United States*, 376 U.S. 364, 367 (1964) (concluding the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence).

556. *See* cases cited *supra* note 555 (reiterating that the court must consider the totality of the circumstances in determining whether a delay to obtain a warrant would be detrimental).

557. *Winston v. Lee*, 470 U.S. 753, 759 (1985); *Schmerber v. California*, 384 U.S. 757, 768 n.12 (1966); *DRESSLER & MICHAELS*, *supra* note 210, at 179–82.

558. *Kentucky v. King*, 563 U.S. 452, 460 (2011).

559. *See id.* at 463 (stating warrantless entry to prevent the destruction of evidence is allowed); *Schmerber*, 384 U.S. at 769 (explaining an officer's fear in the delay for a warrant leading to the destruction of evidence); *see also McDonald*, 335 U.S. at 455 ("No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant."); *Johnson v. United States*, 333 U.S. 10, 15 (1948) (determining that there was no evidence under the threat of destruction). For a more complete discussion of the early history of the exigent circumstances exception applied to the destruction of evidence, see generally Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 HASTINGS L.J. 283 (1988).

560. *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013); *see also* *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973) ("Where there are exigent circumstances in

The second potential logical flaw in Chief Justice Roberts's dissent is that the natural metabolic process creates, in effect, exigent circumstances in every DUI refusal case. As the Chief Justice rightly points out, the exigent circumstances exception may apply when "there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant."<sup>561</sup> Again, placing this argument in syllogistic form it might be the following: Exigent circumstances exist when there is a compelling need to prevent the imminent destruction of any important evidence and no time to obtain a warrant; in all DUI breathalyzer refusal cases once a suspect is transported to a facility to draw blood there is a compelling need to prevent the imminent destruction of important evidence; thus there are exigent circumstances in every DUI breathalyzer refusal case once the suspect has been transported to a medical facility. This argument can be challenged based on its use of the term imminent.

In cases involving exigent circumstances based on destruction of evidence like *Ker v. California*,<sup>562</sup> or *Kentucky v. King*,<sup>563</sup> there is a focus on the speed and ease with which evidence can be destroyed. In a typical drug case, the evidence of criminal activity is capable of being quickly and easily destroyed. The capacity to quickly and easily destroy evidence is not present in most DUI breathalyzer refusal cases.<sup>564</sup> Individuals suspected of being intoxicated cannot choose to destroy the evidence immediately. According to the statistics the majority uses and dissenting opinions, the most rapid rate at which the body metabolizes alcohol is .025 per hour.<sup>565</sup> The legal limit for all states is .08.<sup>566</sup> Based on

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which police action literally must be 'now or never' to preserve the evidence of a crime, it is reasonable to permit the action withou[sic] prior judicial evaluation.").

561. *McNeely*, 133 S. Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part).

562. 374 U.S. 23 (1960).

563. 563 U.S. 452, 460 (2011).

564. *See id.* at 466 (stating that officers are required to make split-second judgments and in this case, occupants were moving around in a room filled with evidence).

565. *McNeely*, 133 S. Ct. at 1560; *id.* at 1570 (Roberts, C.J., concurring in part and dissenting in part).

566. *Id.* at 1571 (Roberts, C.J., concurring in part and dissenting in part).

these facts, the fastest an individual arrested for a DUI could metabolize all of the alcohol in their system would be more than three hours. Under the facts in *McNeely*, the defendant's BAC was .154 at the time of his warrantless blood draw.<sup>567</sup> Based on *McNeely*'s BAC, the soonest the alcohol would have been out of his blood stream is over six hours after the blood test.

Chief Justice Roberts addresses the argument that experts can present a regression analysis to a jury to explain how high a defendant's BAC was at the time of arrest, as opposed to when the blood was drawn.<sup>568</sup> In a footnote the Chief Justice asserts such "second-best evidence may prove useless . . . defense attorneys have objected to that evidence, courts have at times rejected it, and juries may be suspicious of it."<sup>569</sup> This is a weak counter. Defense attorneys regularly object to every test that would prove their client guilty and courts have at times rejected all sorts of tests. All the Justices on the Court have accepted the science surrounding how alcohol is metabolized and the range of rates at which it is metabolized.<sup>570</sup> Why should we expect less of jurors?

The logical premise of this second argument can be challenged as incorrectly categorizing all DUI breathalyzer refusal cases as involving the imminent destruction of evidence. The facts are arguably to the contrary. In the average DUI case, the evidence is preserved, at least for a predictable term of hours.

## 2. *Navarette v. California*

The second opinion in this section is Justice Thomas's majority opinion in *Navarette*. In the opinion, Justice Thomas addressed the standard for permitting a traffic stop based on reasonable suspicion supplied by an anonymous informant.<sup>571</sup> The focus of this discussion will be on Justice Thomas's conclusion that the anonymous tip in the case from a motorist claiming to have been

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567. *Id.* at 1557 (majority opinion).

568. *Id.* at 1572 (Roberts, C.J., concurring in part and dissenting in part).

569. *Id.* at 1572 n.1.

570. *Id.* at 1559 (majority opinion); *id.* at 1570–71 (Roberts, C.J., concurring in part and dissenting in part); *id.* at 1575 (Thomas, J., dissenting).

571. *Navarette v. California*, 134 S. Ct. 1683, 1686 (2014).

forced off the road by a particular truck provided reasonable suspicion to believe a crime was currently ongoing.<sup>572</sup> Justice Thomas's opinion illustrates the fallacy of composition.<sup>573</sup> This fallacy is described in Joseph Gerald Brennan's book *A Handbook of Logic*,<sup>574</sup> as "consist[ing] of reasoning improperly from a property of a member of a group to a property of the group itself."<sup>575</sup>

In *Navarette*, police received a 911 call from a motorist claiming to have been run off the road by another vehicle.<sup>576</sup> The caller gave a detailed description of the car, its license plate number, location, and direction.<sup>577</sup> Approximately thirteen minutes after the 911 call, a police cruiser spotted a car fitting the description and followed the car for five minutes, ultimately pulling it over.<sup>578</sup> As the officers approached the vehicle they smelled marijuana, and a subsequent search revealed thirty pounds of the drug.<sup>579</sup> At trial, the defendants moved to suppress the marijuana based on an illegal stop.<sup>580</sup> Specifically, the defendants argued that the anonymous caller did not provide an adequate basis to establish reasonable suspicion.<sup>581</sup> The trial court denied the motion, as did the California Court of Appeals.<sup>582</sup> The California Supreme Court refused to hear the case and the Supreme Court granted certiorari.<sup>583</sup> Justice Thomas, writing for the majority, affirmed the lower court rulings.<sup>584</sup>

In his majority opinion, Justice Thomas relies on a number of inferences to arrive at his conclusion.<sup>585</sup> One inference in particular

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572. *Id.* at 1692.

573. *See id.* at 1691 (relying on inferences related to reckless driving that the defendant must have been drunk).

574. JOSEPH GERARD BRENNAN, *A HANDBOOK OF LOGIC* (1957).

575. *Id.* at 190.

576. *Navarette*, 134 S. Ct. at 1686–87.

577. *Id.* at 1687.

578. *Id.*

579. *Id.*

580. *Id.*

581. *Id.*

582. *Id.*

583. *Id.*

584. *Id.* at 1692.

585. *See id.* at 1690 (concluding that the report of the witness in this case was

could be challenged, both from a logical perspective and because of the implications it signals for reasonable suspicion standards. That inference is Justice Thomas's conclusion that an allegation by one motorist that another motorist "ran them off the road" provides an adequate factual basis for a police stop based on reasonable suspicion of drunk driving.<sup>586</sup>

As Justice Thomas rightly discusses, in order for an officer to have the authority to stop a vehicle based on a reliable tip, there must be "reasonable suspicion that 'criminal activity may be afoot.'"<sup>587</sup> In *Navarette*, the anonymous tip was that the defendant's vehicle ran the reporting party off the road.<sup>588</sup> Based on that information alone, Justice Thomas concluded that reasonable suspicion existed that the driver of the vehicle described by the tipster was drunk.<sup>589</sup> Once again, to place Justice Thomas's reasoning in logical form: All vehicles that run other vehicles off the road provide adequate articulable facts to reasonably suspect the driver of the vehicle is intoxicated; the driver in *Navarette* allegedly ran the tipster off the road; thus reasonable suspicion existed to stop the defendants.

The difficulty with the above syllogism is that it appears to assume too much in the major premise. As mentioned above, the fallacy of composition occurs when too much is assumed about the whole of a group based on a characteristic of a member of the group.<sup>590</sup> This could also be described as a fallacy of hasty generalization—where a generalization is arrived at too quickly based on too few specific examples. In *Navarette*, the group or whole would be all those who drive in such a way as to run another

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reliable because the reporter called 911, and because her report was allegedly made shortly after the incident she was reporting). *But see id.* at 1694 (Scalia, J., dissenting) (challenging the majority's conclusions).

586. *See id.* at 1690 (majority opinion) ("We conclude that the behavior alleged by the 911 caller, 'viewed from the standpoint of an objectively reasonable police officer, amount[s] to reasonable suspicion' of drunk driving." (citing *Ornelas v. United States*, 517 U.S. 690, 696 (1996))).

587. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 30 (1968)).

588. *Id.* at 1687.

589. *Id.* at 1690–91.

590. *See* ALDISERT, *supra* note 7, at 221 (explaining the fallacy of composition as misapplying the tendency of a member of a group to the tendency of the group generally).

driver off the road. Some members of that group could be distracted drivers, texting or reading emails; some could be overly tired and falling asleep at the wheel; some could be angry drivers, purposely driving another person off the road due to a perceived slight; some could be intoxicated; and some could have just made an honest mistake and accidentally run another motorist off the road. Justice Thomas's logical error is compounded when the other facts of *Navarette* are considered. Although briefly mentioned in the the majority opinion, the dissent focused on the fact that after police encountered the defendant's truck, they followed the vehicle for five minutes.<sup>591</sup> During the five-minute pursuit the vehicle did not do anything suspicious.<sup>592</sup> These facts make the likelihood of drunk driving even less than one of the other possible explanations.<sup>593</sup>

The standard of reasonable suspicion has always been difficult to quantify. It is something less than probable cause but more than "a mere 'hunch.'"<sup>594</sup> However, it has always required a connection.<sup>595</sup> This is categorically distinct from the standard Justice Thomas provides in *Navarette*. Even if the standard was as low as a mere hunch, that hunch would need more than mere possibility: *Webster's Third New International Dictionary* describes a hunch as "a strong intuitive feeling."<sup>596</sup> There are no facts in *Navarette* to support even an intuitive feeling that the defendants in the case were drunk as opposed to any other reason for running another vehicle off the road.<sup>597</sup> In fact, the code that was broadcast to the responding police officers was not for drunk

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591. *Navarette v. California*, 134 S. Ct. 1683, 1696 (2014) (Scalia, J., dissenting).

592. *Id.*

593. *See id.* ("Consequently, the tip's suggestion of ongoing drunken driving (if it could be deemed to suggest that) not only went uncorroborated; it was affirmatively undermined.")

594. *Id.* at 1687 (majority opinion) (citing *Terry v. Ohio*, 392 U.S. 1, 27 (1968)).

595. *See Alabama v. White*, 496 U.S. 325, 330 (describing the amount and veracity of information required to justify reasonable suspicion).

596. *Hunch*, MERRIAM-WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1102 (1981).

597. *See Navarette v. California*, 134 S. Ct. 1683, 1695 (2014) (Scalia, J., dissenting) (stating that the anonymous caller never made an accusation of drunk driving, and that saying she was "[run] off the roadway" neither "assert[ed] that the driver was drunk nor even raise[d] the *likelihood* that the driver was drunk").

driving, but reckless driving.<sup>598</sup> Thus, Justice Thomas's reasoning fails because the major premise he relies on is faulty.

The standard of reasonable suspicion has been criticized as having steadily moved more and more in favor of law enforcement interests since *Terry v. Ohio*,<sup>599</sup> but Justice Thomas's formulation is a new leap further in that direction.<sup>600</sup> When the facts in *Terry* that provided reasonable suspicion are compared to the facts in *Navarette*, it can hardly be said that the *Navarette* majority is applying the same test as that which the majority applied in *Terry*.<sup>601</sup> In *Terry v. Ohio*, the officer observed two men repeatedly walk past the front of a store, look in the window, walk further down the street and then return, once again looking in the window of the same store.<sup>602</sup> This happened approximately a dozen times in the course of ten to twelve minutes.<sup>603</sup> The officer, suspicious that the men were reconnoitering the store for a robbery, stopped the men.<sup>604</sup> In *Terry*, there was a clear connection between the

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598. Joint Appendix at 20–31, *Navarette v. California*, 134 S. Ct. 1683 (2014) (No. 12-9490) 2013 WL 6115701. The 911 operator in the case stated, “I broadcasted it to the coastal units. So I would say, Attention, costal units. BOL for—well, in this case it was a reckless driver, 23103. And then give the information, the silver, the F150 pickup, etc.” Also, the responding officer acknowledged receiving the message regarding reckless driving, “I remember hearing dispatch of a reckless driver southbound on Highway 1. I don’t recall the exact location. It was at the north end of the area that I was supposed to cover and basically coming toward Fort Bragg.” *Id.* at 46.

599. 392 U.S. 1 (1968).

600. See David Cashman, Comment, *Criminal Law—Terry Searches Predicated on Nothing More Than Reasonable Suspicion that a Suspect is Armed and Dangerous—United States v. House*, 463 F. App'x 783 (10th Cir. 2012), 18 SUFFOLK J. TRIAL & APP. ADVOC. 151, 165 (2013) (“[S]ince *Terry*, courts have allowed officers ever more leeway . . . , often at the expense of the privacy rights of those being investigated . . . . [S]ubsequent [court] decisions have moved the law on stop and frisks steadily in the government’s favor.”).

601. Compare *Terry*, 392 U.S. at 8 (determining that there was reasonable suspicion of criminal activity where the officer personally witnessed behavior indicative of a “stake-out” over the course of a ten to twelve minute period), with *Navarette*, 134 S. Ct. at 1687 (determining that there was reasonable suspicion of drunk driving where the officers were responding to an anonymous tip of reckless driving and had not personally witnessed any behavior indicative of drunk or reckless driving over the course of a five minute period).

602. *Terry*, 392 U.S. at 5–6.

603. *Id.*

604. *Id.* at 6–7.

behavior the officer observed and the criminal activity he suspected was still afoot.

In *Navarette*, the criminal activity that was actually suspected had already been completed, reckless driving.<sup>605</sup> If the officers had observed behavior that made them suspect the defendants were continuing to engage in reckless driving, or if they observed additional facts that connected the alleged incident the tipster described to drunk driving, then reasonable suspicion would exist.<sup>606</sup> Even the examples Justice Thomas provided of past cases where courts have found reasonable suspicion to believe drunk driving was occurring provide more information than that in *Navarette*, such as “crossing over the center line on the highway and almost causing several head-on collisions,”<sup>607</sup> “‘driving all over the road’ and ‘weaving back and forth,’”<sup>608</sup> and “driving in the median.”<sup>609</sup> Compare this to the bare assertion in *Navarette* that the defendants’ car ran another car off the road.

Justice Thomas’s formulation in *Navarette* can be challenged as including an overly broad major premise and thereby expanding the *Terry* stop exception.<sup>610</sup> By equating factual conduct that could possibly be explained by criminal activity being afoot—rather than requiring the factual activity to create a reasonable suspicion of criminal activity—Justice Thomas has converted the reasonable suspicion test into a “reasonable possibility” test.

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605. See *supra* note 601 and accompanying text (explaining that the nature of the initial report was one of reckless driving, not drunk driving).

606. See *Navarette v. California*, 134 S. Ct. 1683, 1699 (2014) (Scalia, J., dissenting) (“Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck . . .”).

607. *Id.* at 1690 (majority opinion) (quoting *State v. Prendergast*, 83 P.3d 714, 715–16 (Haw. 2004)).

608. *Id.* at 1690–91 (quoting *State v. Golotta*, 837 A.2d 359, 361 (N.J. 2003)).

609. *Id.* at 1691 (quoting *State v. Walshire*, 634 N.W.2d 625, 626 (Iowa 2001)).

610. See *id.* at 1696 (Scalia, J., dissenting) (positing that an anonymous tip was enough to “counsel observation of the truck to see if it was driven by a drunken driver,” but not enough to justify a *Terry* stop).

## 3. Arizona v. Gant

The final opinion discussed in this section is also the shortest. Justice Breyer's dissent in *Arizona v. Gant* is a mere few hundred words, yet those few words underlie a question that stands at the crossroad of logic and judicial philosophy. The question raised in *Gant* is whether the doctrine of stare decisis can exceed the plain language of the Constitution.<sup>611</sup>

In *Arizona v. Gant*, the Supreme Court took up once again the scope of searches incident to arrest when the arrest is associated with a suspect in an automobile.<sup>612</sup> The question of what impact, if any, the fact that an individual is in, or was moments before in, a vehicle has occupied several Supreme Court decisions.<sup>613</sup> Prior to *Gant*, most courts believed that once an individual was arrested, the entirety of the passenger compartment of the vehicle could be searched.<sup>614</sup> Some argued this rule was logically at odds with the precedent that gave rise to the rule and the basic requirements of the Fourth Amendment.<sup>615</sup> Justice Stevens, writing for the majority, asserted that any conclusion that arresting the recent occupant of an automobile always gave police the right to search the vehicle without a warrant was incorrect.<sup>616</sup> Justice Stevens then explained the proper application of the Court's precedent was

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611. Compare *Arizona v. Gant*, 556 U.S. 332, 348 (2009) ("We have never relied on stare decisis to justify the continuance of an unconstitutional . . . practice."), with *id.* at 354–55 (Breyer, J., dissenting) ("Principles of *stare decisis* must apply, and those who wish this Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden.").

612. *Id.* at 336 (majority opinion).

613. See generally *Thornton v. United States*, 541 U.S. 615 (2004); *Knowles v. Iowa*, 525 U.S. 113 (1998); *New York v. Class*, 475 U.S. 106 (1986); *New York v. Belton*, 453 U.S. 454 (1981).

614. See *Gant*, 556 U.S. at 342–43 (highlighting that lower court decisions trend toward treating the search of a vehicle incident to arrest as "a police entitlement rather than as an exception" to the rule (citing *Thornton v. United States*, 541 U.S. 615, 624 (2004))).

615. See *id.* at 342 n.2 (referencing *United States v. Green*, 324 F.3d 375 (5th Cir. 2003); *United States v. Edwards*, 242 F.3d 928 (10th Cir. 2001); and *United States v. Vasey*, 834 F.2d 782 (9th Cir. 1987) as cases challenging a broad interpretation of *Belton*).

616. *Id.* at 343.

“[u]nder our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”<sup>617</sup>

Justice Breyer dissented from the majority.<sup>618</sup> The primary basis for his objection was that the majority appeared to be breaking from the doctrine of stare decisis without an adequate foundation.<sup>619</sup> Of particular significance to this discussion is Justice Breyer’s statement that “I . . . agree with Justice Stevens, . . . that the rule can produce results divorced from its underlying Fourth Amendment rationale.”<sup>620</sup> Despite this statement, Justice Breyer asserts that because this is not a case of first impression, the doctrine of stare decisis should carry the day.<sup>621</sup>

Justice Breyer’s short dissent is logically sound provided that he believes that stare decisis can trump the importance of fulfilling the rationale that gave birth to a line of constitutional precedent. Under this argument, fulfilling the objectives of clarity and stability could, in some circumstances, exceed a rationale that derives from the language of the Constitution. Thus, Justice Breyer’s view of constitutional interpretation would include a conditional major premise. That major premise could be something like the following: when interpreting the Constitution, the doctrine of stare decisis only sometimes fulfills constitutional rationales. However, if Justice Breyer were to reject such a major premise and agree that stare decisis must always fulfill and advance constitutional rationales, then his dissent is logically flawed.

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617. *Id.* at 346.

618. *Id.* at 354–55 (Breyer, J., dissenting).

619. *See id.* (“I have not found [the] burden [to justify a change of “well-established precedent”] met. Nor do I believe that the other considerations ordinarily relevant when determining whether to overrule a case are satisfied.”).

620. *Id.* at 354.

621. *See id.* (“The matter . . . is not one of first impression, and that fact makes a substantial difference . . . . Principles of stare decisis must apply . . .”).

IV. *Why These Weaknesses*

Persuasion is a complex process. There are multiple methods of achieving it and at least as many ways to be unsuccessful. It would be a dramatic overstatement to claim that all of the less than optimally persuasive Fourth Amendment opinions from the Roberts Court share a common cause or cluster of common causes. However, several of the opinions discussed in this Article appear to share some connections that may partially explain their weak persuasive force. These connections also have a rough correlation to weaknesses in one of the three forms of persuasion Aristotle identified. Weaknesses in ethos have a common connection related to the doctrine of stare decisis. Weaknesses in pathos arguments tend to appear when Justices focus on emotions other than the emotive touchstones of the Fourth Amendment. In the area of logically weak arguments, the common cause sometimes can be traced to what appears to be outcome-oriented logic. In the area of pathos and logos, weakness appears when a particular outcome in the case appears to drive the emotive- and logic-based arguments. The appearance of outcome-based opinion writing arguably violates a core tenant of classical persuasion—audience expectation.<sup>622</sup>

A core element of classical and modern rhetoric is that advocates are expected to modify their arguments for the audience they are attempting to persuade.<sup>623</sup> Part of that modification turns on what moves a particular audience, but some of that also turns on what the audience expects of the speaker.<sup>624</sup> Part of the

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622. See ON RHETORIC, *supra* note 40, at 148–56 (noting that Aristotle discusses adapting speeches to the character of the audience); PERELMAN & OLBRECHTS-TYTECA, *supra* note 510, at 30 (explaining the need to prepare speeches with the intended audience in mind); Richard Long, *The Role of Audience in Chaim Perelman's New Rhetoric*, 4 J. ADVANCED COMPOSITION 107, 107 (1983) [hereinafter Long, *The Role of Audience*] (“The rhetor . . . enters into communion with the audience, and, as a result of subsequent argumentative techniques, they act together.”).

623. See Long, *The Role of Audience*, *supra* note 622 at 107 (“The rhetor creates a presence by first analyzing how the audience thinks and acts and then stylistically re-creating the resulting information.”).

624. See ON RHETORIC *supra* note 40, at 152 (“[A]ll people receive favorably speeches spoken in their own character and by persons like themselves . . .”).

expectation of Supreme Court Justices, or any judge for that matter, is that they are not partisan.<sup>625</sup> As judges use pathos arguments in a heavy-handed way or logos arguments that appear ends-oriented, they tend to violate audience expectations.

### A. *Stare Decisis and Ethos*

The Supreme Court has described the doctrine of stare decisis as of “fundamental importance to the rule of law.”<sup>626</sup> Justices like Antonin Scalia and Stephen Breyer—both having dramatically different perspectives on constitutional interpretation—have expressed the need to respect the doctrine.<sup>627</sup> Professor Laurence Tribe described the doctrine as “a resolution to stand by rulings, at least presumptively, in the face of one’s belief that one probably would have decided differently.”<sup>628</sup>

Based on these descriptions, the doctrine of stare decisis is meant to constrain even the Supreme Court.<sup>629</sup> In some instances, under the pressure from this constraint Justices have reacted in two ways that result in less persuasive legal opinions. First,

625. See 46 AM. JUR. 2D *Judges* § 129 (2009) (“There is a strong presumption that judges are impartial participants in the legal process . . . . The law presumes that a judge is unbiased and unprejudiced.”).

626. *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987).

627. See STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW* 153–56 (2011) (discussing the power of stare decisis as arising from public reliance on precedent); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 411–12 (2012) (describing stare decisis as the “chief barrier against [any] . . . wrenching purge” of established constitutional doctrine).

628. LAURENCE H. TRIBE, *THE INVISIBLE CONSTITUTION* 208 (2008).

629. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 71 (1991) (predicting chaos if the Supreme Court were to “adopt a low level of deference to precedent”); Randy J. Kozel, *Stare Decisis as Judicial Doctrine*, 67 WASH. & LEE L. REV. 411, 412 (2010) (“[T]he Supreme Court has lauded stare decisis as possessing fundamental importance to the rule of law, promoting the evenhanded, predictable, and consistent development of legal principles, and contributing to the actual and perceived integrity of the judicial process.” (citations omitted)); Adam N. Steinman, *A Constitution for Judicial Law Making*, 65 U. PITT. L. REV. 545, 576 (2004) (addressing the significance of stare decisis on judicial lawmaking).

Justices proceed timidly, fearful of starting a line of precedent that is unwise or ending a line of precedent that may be of some use later.<sup>630</sup> Second, Justices misstate precedent, declaring that it supports their position when it does not or does so weakly.<sup>631</sup> Either of these reactions damage the persuasive force of a Justice's opinion, and in most instances, are not necessary to carry the Justice's argument.

The first tendency described above is for a Justice to resolve as little as possible in an opinion, thereby providing too little guidance to courts and law enforcement. The temptation to follow the minimalist path, especially in the area of Fourth Amendment jurisprudence, can be strong. Due to the frequency of Fourth Amendment litigation, both criminal and civil, a poorly constructed Fourth Amendment opinion often makes itself known quickly. It took less than eight years for *Georgia v. Randolph* to be limited to the narrowest range of influence by *Fernandez v. California*,<sup>632</sup> and *Thornton v. United States*<sup>633</sup> was clarified, if not partially overruled, by *Arizona v. Gant* in even less time.<sup>634</sup> The temptation to decide as little as possible in a Fourth Amendment opinion is further encouraged by the Court's "totality of the circumstances" test for determining reasonableness.<sup>635</sup> This sort of

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630. See *supra* Part III.2 (highlighting the tendency of the Supreme Court to proceed timidly in Fourth Amendment jurisprudence, thereby leading to a rule more fluid than concrete).

631. See *infra* text accompanying notes 637–639 (discussing the tendency of the Supreme Court to misstate precedent in order to avoid its application to the facts of the case).

632. See *Fernandez v. California*, 134 S. Ct. 1126, 1137 (2014) ("Putting the exception the Court adopted in *Randolph* to one side, the lawful occupant of a house or apartment should have the right to invite police to enter the dwelling and conduct a search." (citing *Georgia v. Randolph*, 547 U.S. 103 (2006))).

633. 541 U.S. 615 (2004).

634. See *Arizona v. Gant*, 556 U.S. 332, 352 (2009) (Scalia, J., concurring) ("Justice Stevens acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and *Thornton* adopted (As described above, I read those cases differently)." (citing *Thornton v. United States*, 541 U.S. 615 (2004))).

635. See *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (establishing totality of circumstances as the proper probable cause test because "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules").

test lends itself naturally to a case-by-case approach to Fourth Amendment jurisprudence.<sup>636</sup> The overly cautious approach can lead to a failure to commit to a particular rule in evaluation of a Fourth Amendment question, choosing a rule that is so narrowly tailored it only affects cases with virtually the same facts, or a refusal to end precedent that no longer has viability. The temptations are counterbalanced by adverse persuasive effects of the overly cautious approach. Opinions like Justice Kennedy's in *Quon* and Justice Alito's in *Jones* leave or would leave law enforcement and lower courts at a loss for determining how the Court intends they resolve related Fourth Amendment questions. Decisions like Justice Souter's in *Randolph* are so narrow that if the facts of a future case do not match nearly exactly to the precedent, lower courts are still unsure how to proceed. The primary harm to an opinion's persuasive force is seen in the area of practical wisdom.

The second tendency is for Justices to overstate or misstate a line of precedent or to seek to avoid the application of the precedent through a factual characterization of the case. This approach reveals just how powerful the pull of stare decisis can be. In opinions like Justice Scalia's *Jones* majority,<sup>637</sup> Justice Thomas's dissent in *Rodriguez*,<sup>638</sup> and Justice Stevens's majority in *Caballes*,<sup>639</sup> the holes in the use of precedent are readily apparent and often commented on at length by dissenting and concurring opinions. These deficiencies undercut the credibility of the Justice's opinion and thereby the persuasive force of the opinion's ethos. In the context of a Supreme Court opinion, it can be forcefully argued that an opinion that lacks adequate ethos is an opinion of little value.

One possible explanation for the tendency to misstate or overstate a line of precedent comes from a challenge inherent in the diversity of the Court's judicial philosophies. Stare decisis

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636. See *Terry v. Ohio*, 392 U.S. 1, 15 (1968) ("No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us.").

637. *United States v. Jones*, 565 U.S. 400, 402 (2012).

638. *Rodriguez v. United States*, 135 S. Ct. 1609, 1617 (2015) (Thomas, J., dissenting).

639. *Illinois v. Caballes*, 543 U.S. 405, 408 (2005).

binds, to a degree, future Supreme Courts regardless of the modality of interpretation the Court utilizes when establishing the precedent.<sup>640</sup> Thus, a committed originalist may be forced to build off of precedent that a committed realist established, and vice versa. The Court's Fourth Amendment jurisprudence has famously been called "a crazy quilt."<sup>641</sup> The tendency to have some disharmony in jurisprudence must be expected, especially when the Justices writing the opinions do so from very different philosophies.

### *B. Audience Expectation and Judicial Advocacy*

In addition to identifying three core components of rhetoric, Aristotle also advocated that any act of persuasion should be tailored to fit the audience to which it is being presented.<sup>642</sup> Most systematic approaches to persuasion place a special emphasis on the role of the audience. The sophists, Plato, Aristotle, and Cicero all included a focus on the audience, as do modern rhetorical theorists.<sup>643</sup>

In *The New Rhetoric*, Ch. Perelman and L. Olbrechts-Tyteca asserted that audience awareness is central to persuasion.<sup>644</sup> They

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640. See *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (discussing *stare decisis* as "a foundation stone of . . . law;" it is "more important that the . . . law be settled than that it be settled right." (citing *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2036 (2014); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932))).

641. PHILLIP A. HUBBART, *MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK* xix, xxii (2d ed., 2015).

642. See ON RHETORIC, *supra* note 40, at 148–56 (noting that Aristotle discusses adapting speeches to the character of the audience).

643. See *id.* at 148 ("In Plato's *Phaedrus* . . . Socrates argues that there cannot be a true art of speech without a knowledge of the soul (*psykh*), enabling a speaker to fit the appropriate argument to the soul of the hearer."); PERELMAN & OLBRECHTS-TYTECA, *supra* note 510, at 20 (discussing Aristotle's *Rhetoric*, as well as Cicero's proclamation to speak differently to the "coarse and ignorant" class of men than to "that other, enlightened and cultivated" class (quoting CICERO, *PARTITIONES ORATORIAE* § 90)); *id.* at 319, 495 (discussing the tendency of the sophists to focus on their prestige to gain the respect of the audience, as well as their tightly structured speeches designed to guide the audience).

644. PERELMAN & OLBRECHTS-TYTECA, *supra* note 510, at 6–7 ("What we preserve of the traditional rhetoric is the idea of the audience, an idea

proposed that audiences can be divided into a variety of groups: self, interlocutor, particular, and universal.<sup>645</sup> The audience of the self, as the category's title implies, means to persuade oneself.<sup>646</sup> The interlocutor is a single individual a speaker would address "in a dialogue."<sup>647</sup> A particular audience is that group of individuals who the author is directing a particular type of persuasion toward.<sup>648</sup> The universal audience is a theoretical construct.<sup>649</sup> If the universal audience existed, the illusory "reasonable men" and "reasonable women" described throughout the various disciplines of U.S. law would populate it.<sup>650</sup> The universal audience is moved primarily by reason.<sup>651</sup> The particular audience is affected by other influences, such as personal emotion, preexisting opinions, and values.<sup>652</sup> Perelman and Olbrechts-Tyteca suggest that by envisioning how to persuade the universal audience and then

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immediately evoked by the mere thought of a speech. Every speech is addressed to an audience and it is frequently forgotten that this applies to everything written as well.").

645. *See id.* at 20, 30–31 (highlighting several kinds of audience: the "universal audience," the "interlocutor," a "particular audience," and "the subject himself").

646. *See id.* at 40 (discussing the audience of self, or the "self-deliberating" audience).

647. *Id.* at 30.

648. *See id.* at 31, 39–40 (discussing the interlocutor and the particular audience, as well as the general tendency to tailor an argument based on the particular audience).

649. *See id.* at 20–21 ("Every social circle or milieu is distinguishable in terms of its dominant opinions and unquestioned beliefs, of the premises taken for granted without hesitation: these views form an integral part of its culture, and an orator wishing to persuade a particular audience must of necessity adapt himself to it.").

650. *See id.* at 32 ("Thus, maximally efficacious rhetoric, in the case of a universal audience, is rhetoric employing nothing but logical proof."); Alan D. Miller & Ronan Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 325–26 (2012) (defining the "reasonable person.").

651. PERELMAN & OLBRECHTS-TYTECA, *supra* note 510, at 32 ("Argumentation addressed to a universal audience must convince the reader that the reasons adduced are of a compelling character, that they are self-evident, and possess an absolute and timeless validity, independent of local or historical contingencies.").

652. *See id.* at 13–17 (discussing the need for a "contact of the minds" in order to facilitate effective discourse).

adapting that argument to a particular audience, an advocate can create an effective argument.<sup>653</sup>

One of the challenges the Justices of the Supreme Court face when writing persuasive opinions is the diversity of their audience. Although the “universal audience” as described in *The New Rhetoric* does not exist, the Supreme Court’s audience is perhaps closer to that ideal than the audiences for other political performative utterances. The Justices of the Court can be confident that their Fourth Amendment opinions will be read by their fellow justices, federal and state court judges, and lawyers who practice in the area affected by the opinion.<sup>654</sup> Depending on the opinion, the Justices must be prepared to have their opinions read by laypeople, the media, and politicians—in short, everyone and anyone in the United States. In this way, Supreme Court decisions are not unlike some speeches made by the President or the Speaker of the House of Representatives. Supreme Court opinions, however, must persuade future audiences as well.<sup>655</sup> The nature of the common law and the Court’s jurisprudence in general is that today’s majority opinion may be tomorrow’s dissent, and vice versa. Thus, the Supreme Court is called upon to address a widely diverse audience that is affected by the opinions and values of today, and the audience of tomorrow; particularly the Supreme Court justices of tomorrow, whose opinions and values are unknown.<sup>656</sup>

Because the Justices of the Supreme Court are called upon to write persuasive opinions for today and tomorrow, they must balance Aristotle’s components of rhetoric with special care. This suggests that the Justices avoid tethering their opinions too closely to transitory opinions or values. Opinions should be weighted toward enduring judicial values because the Court’s audience

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653. See *id.* at 19–47 (discussing the three audience groups and their relationships to one another generally in the construction of an argument).

654. See Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 688 (2015) [hereinafter Berger, *The Rhetoric*] (listing “lower courts, governmental officials, parties, lawyers, law students, law professors . . . , the media, the general public, and more” as audiences).

655. See *id.* (including “future Justices” as an audience).

656. *Id.*

expects judicial opinions to demonstrate those values.<sup>657</sup> Of particular concern is when a Justice appears outcome-oriented.

Recently Professor Eric Berger published an article that examines the rise of what he calls “The Rhetoric of Constitutional Absolutism.”<sup>658</sup> In the Article, Professor Berger explains that “constitutional absolutism” is the tendency of Justices of today’s Supreme Court to “pretend that answers are obvious.”<sup>659</sup> Professor Berger has suggested the rise of absolutism can be connected to strategic goals of the Justices,<sup>660</sup> internal Court mechanisms,<sup>661</sup> and psychological factors like the natural tendency for Justices to revert to the role of advocate.<sup>662</sup> It is Professor Berger’s last suggestion that I will discuss.

The desire to win an argument is a powerful motivator for human beings. Aristotle’s work on rhetoric notes that persuasion is an activity that humans engage in everyday in all manner of things.<sup>663</sup> Attorneys have been educated in persuasion and have often spent much of their professional lives perfecting the art and science of convincing an audience. Each of the Justices on the Supreme Court is a skilled attorney who has risen to the heights of the profession.<sup>664</sup> The publicity of the argument can accentuate the natural human desire to win an argument.<sup>665</sup> The more eyes

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657. See *id.* at 734 (asserting that “judges should explain their opinions with ‘reasoned elaboration’”).

658. *Id.* at 667.

659. *Id.* at 673.

660. See *id.* at 699 (referring to the “demosprudential” aims of Justices in the crafting of opinions).

661. See *id.* at 709 (discussing existing judicial and political structures that influence the crafting of Supreme Court opinions).

662. See *id.* at 716, 725 (discussing the psychological tendency to act and write as an advocate).

663. See ON RHETORIC, *supra* note 40, at 30 (“Rhetoric . . . [is] within the knowledge of all people . . . . [A]ll people, in some way, share in [rhetoric].”).

664. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, (Aug. 22, 2016), <https://www.supremecourt.gov/about/biographies.aspx> (last visited Dec. 15, 2016) (listing the sitting Supreme Court Justices and their individual legal experience) (on file with the Washington and Lee Law Review).

665. See Berger, *The Rhetoric*, *supra* note 654, at 723 (“[T]he writing process sometimes subconsciously leads a writer towards rhetorical absolutism as she tries to defend an outcome as persuasively as possible.”).

watching, the more an individual's ego is a factor. Because the legal academic community, lower court judges, and the media dissect and discuss every opinion Supreme Court Justices issue, the personal stakes can be high.<sup>666</sup>

The desire to “win” may influence a Justice to use a pathos-based argument that resonated with them personally, but in doing so, the Justice excites emotions disconnected with the Fourth Amendment. Justice Kennedy's use of an emotive argument in *Maryland v. King* illustrates this point.<sup>667</sup> The emotions Justice Kennedy evokes are empathy for the victim and outrage toward the defendant, but those emotions are fairly beside the Fourth Amendment point.

The desire to win can also impact a Justice's logic-based arguments. It has long been recognized that correct facts are not necessary for a logical syllogism to be formally correct.<sup>668</sup> Professor David Zaretsky has offered the following example: all heavenly bodies are made of cheese, the moon is a heavenly body, and thus the moon is made of cheese.<sup>669</sup> From a strict form perspective the above syllogism is correct.<sup>670</sup> So, a syllogism can be used to give any argument the appearance of validity.<sup>671</sup> Further, how an advocate crafts the major premise of the syllogism is often determinative of the syllogism's outcome. The selection of such a major premise, which demands a particular outcome, appears less a tool of valid logical analysis than a tool of advocacy.

As Plato, Aristotle, Cicero, Perelman and Olbrechts-Tyteca all acknowledge, persuasion ought to be tailored to a particular audience.<sup>672</sup> In the context of the Supreme Court, most of the

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666. This does not include the weight that history must also place on a Justice when writing an opinion. Justices like Marshall, Holmes, Story, Frankfurter, Brandeis, and Cardozo are well known and nearly revered.

667. See *supra* notes 401–404 and accompanying text (detailing the use of pathos in Justice Kennedy's opinion in *Maryland v. King*).

668. See Audio tape: DAVID ZAREFSKY, ARGUMENTATION: THE STUDY OF EFFECTIVE REASONING lecture 3 (2d ed., Teaching Company 2005) (illustrating how categorical syllogisms, which contain statements that relate different categories to one another, need only consist of two premises and a conclusion).

669. *Id.*

670. *Id.*

671. *Id.*

672. See *supra* notes 642–643 and accompanying text (discussing the need to

audience has a general expectation of how Justices should present their opinions. These expectations have been created and developed over the life of the United States. They are manifest in our symbols of judicial power and authority and the art that adorns the Supreme Court itself. Judges are expected to be balanced, without personal agenda, and demonstrate “reasoned elaboration”<sup>673</sup> in their written opinions.<sup>674</sup> This is not to say Justices should not advocate a position—rather it is to emphasize that they must advocate in a particular way or risk violating the expectations of their audience.

### V. Conclusion

The Fourth Amendment opinions of the Justices of the Roberts Court are, at their core, advocacy pieces. Through their opinions, Justices are called upon to convince their audience that they have done justice to the parties involved in a dispute, established a wise rule for future application, and extolled the virtues of the Fourth Amendment while condemning the vices that threaten it. These demands are high and quite arguably unrealistic. The only way that Justices can achieve this goal is through effective use of all the components of persuasion: appeals to credibility, emotion, and logic. These appeals must be tempered by the cultural expectations of judicial opinions issued by the Supreme Court. Those cultural expectations become part of the expectations of the Court’s audience. Thus, persuasive Supreme Court decisions not only use appeals to emotion, logic, and credibility, but they do so in an apparently balanced, judicious fashion.

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tailor rhetoric to the intended audience).

673. Berger, *The Rhetoric*, *supra* note 654, at 736.

674. See *supra* note 625 and accompanying text (describing the role of judges as nonbiased third-party arbiters).