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Developments in Policy Article

Fourth Amendment Trends and the Supreme Court’s October 1999 Term

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Kate Nepveu,‖ Clay M. West¶

I. INTRODUCTION

The Fourth Amendment remains one of the most vital and relevant areas of constitutional law, since the “right... against unreasonable searches and seizures”\(^1\) can touch our lives in a number of ways. Almost everyone has been on the receiving end of law enforcement’s attention, or knows someone who has—whether in a customs inquiry, a stop for a traffic violation, or a full pat-down search—and therefore knows that it is a nerve-wracking experience at best. Those applying the Fourth Amendment, such as law enforcement officials or prosecutors, also know that complying with the Fourth Amendment often requires hard decisions under pressure in areas where the courts themselves are unclear. From either perspective, the Fourth Amendment is a complex and central part of the interaction between citizens and the government.

This centrality means that judicial treatment of the Fourth Amendment affects wide areas of society. While individual cases may, on their own, seem insignificant outside of their narrow holdings, in context, they may signal broad changes in the way courts value privacy, law enforcement, and their interactions. This Developments in Policy Article therefore assesses the current state of the Fourth Amendment by examining the Supreme Court’s October 1999 Term.

First, the Article provides an overview of the Court’s recent Fourth Amendment jurisprudence, which has been steadily tilting in favor of law enforcement. Then, it analyzes each of the October 1999 Term’s Fourth Amendment cases. Two of these cases ask what a person can reasonably expect to be private: \textit{Flippo v. West Virginia}\(^2\) examines warrantless searches of crime scenes, while \textit{Bond v. United States}\(^3\) examines luggage squeezing. The other

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1. U.S. CONST. amend. IV.
2. Flippo v. West Virginia, 120 S. Ct. 7 (1999).
two consider the contours of investigatory "stop and frisks" under *Terry v. Ohio*\(^4\): *Illinois v. Wardlow*\(^5\) inquires whether flight from law enforcement justifies a *Terry* stop, while *Florida v. J.L.*\(^6\) asks the same question regarding anonymous tips. Finally, the Article analyzes the cases, arguing that the Supreme Court has *not*—contrary to first appearances—changed its approach to the Fourth Amendment, but continues to value law enforcement's interests more highly than individuals' privacy interests. It suggests that these outcomes are strongly influenced by a deference to precedent; where precedent is no guide, they are influenced by a tendency for the Court to examine the facts through the eyes of only some of the characters involved. Finally, the Article concludes with a look at the Fourth Amendment cases before the Court in the October 2000 Term.

II. BACKGROUND

To evaluate the significance of the October 1999 Term, it is necessary to know the context in which the cases were heard. This section thus provides an overview of the Supreme Court's evolving Fourth Amendment jurisprudence, of which the central issue is the definition of reasonable. In recent decisions, the Court appears to have shifted how it determines what is reasonable: It focuses less on the individual's expectation of privacy and affords greater deference to law enforcement interests.

A. Justice Harlan's "Reasonable Expectation of Privacy" Formulation

The Fourth Amendment functions as the cornerstone of protection against unjustified government intrusions into the privacy of citizens.\(^7\) Widespread agreement exists among criminal procedure scholars that the central purpose of the Fourth Amendment is to protect privacy, and that the protection should increase as the privacy intrusion increases.\(^8\) By proscribing "unreasonable searches and seizures," the Amendment ensures that unreasonable government intrusions do not interfere with our lives.

Although individual privacy rights stand at the core of the Fourth Amendment, an individual's interest in her privacy is not absolute: The government

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7. The complete text of the Fourth Amendment reads:
   "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
   U.S. CONST. amend. IV.
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interest in effective law enforcement also determines reasonableness. For instance, if a sufficiently strong government interest exists, a warrantless search can pass constitutional muster, even if the search intrudes on an individual’s reasonable expectation of privacy. Herein lies the most formidable challenge of the Fourth Amendment—striking the appropriate balance between an individual’s privacy interest and the government’s interest in detecting illegal activity.

The Court set forth the appropriate criteria for this balancing test in the 1960s, when the nation began to experience “an explosion of national concern over gaining control over [the] growing ability of the government and private investigators to snoop.” As a result, the Court ushered in an era of enhanced deference to the individual. One of the first cases signaling this new approach was Silverman v. United States. In Silverman, the Court held that warrantless eavesdropping via an electronic device violated the Fourth Amendment, because the device invaded the occupant’s premises. This preoccupation with privacy invasion would characterize the Court’s Fourth Amendment jurisprudence for the next two decades.

The most significant jurisprudential shift, however, came in 1967 with Justice Harlan’s concurrence in the seminal Fourth Amendment case, Katz v. United States. In Katz, the Court held it unconstitutional for law enforcement agents to plant an eavesdropping device outside a public telephone booth. The main significance of Katz derives from Justice Harlan’s “expectation of privacy” test for warrantless searches. Harlan wrote that the Fourth Amendment imposes 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.’” This test affords great deference to societal norms, as only private areas recognized by society are protected by the Amendment. Harlan clarified these two requirements when he distinguished between the home and open areas:

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.

Harlan’s formulation quickly emerged as the standard for evaluating Fourth

11. Id. at 510-12.
12. Id.
14. Id. at 350-53.
15. Id. at 361 (Harlan, J., concurring).
16. Id. (citing Hester v. United States, 265 U.S. 57 (1924)).
Amendment reasonableness. 17

Post-Katz decisions have focused on the privacy invasion to determine whether a search or seizure violated a “reasonable expectation of privacy.” Harlan’s approach has produced fairly predictable and logical results. Since people generally expect privacy in certain types of spaces, as Harlan noted, the law tends to focus on the area a person is in when protecting that expectation. People also expect greater privacy in certain places and areas; for that reason, “the law affords a kind of graded protection to individual privacy.”18 In the words of one commentator, “[e]xpectations of privacy that society is prepared to recognize as legitimate have, at least in theory, the greatest protection; diminished expectations of privacy are more easily invaded; and subjective expectations of privacy that society is not prepared to recognize as legitimate have no protection.”19

Several decisions reflect these gradations. The area of greatest privacy expectation is one’s home, embodied in the long-standing principle that a “man’s home is his castle.”20 Consequently, police can search a private home only if they have probable cause and a warrant obtained in advance.21 Similarly, the Fourth Amendment protects a guest when visiting the home of another because of the guest’s high expectation of privacy.22

The home has the greatest level of privacy expectation; all other areas invoke a weaker level of expectation. For example, as the Court observed in South Dakota v. Opperman,23 while persons have a privacy interest in their cars, “the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home.”24 Searches of cars, therefore, can be made if the officer has probable cause to believe the car contains evidence

17. Although a concurrence, Justice Harlan’s opinion has been relied upon more heavily than the majority opinion, and Harlan’s “reasonable expectation of privacy” test has been embraced as “the primary framework for analyzing Fourth Amendment challenges.” Aaron Larks-Stanford, Comment, The Warrantless Use of Thermal Imaging and “Intimate Details”: Why Growing Pot Indoors and Washing Dishes Are Similar Activities Under the Fourth Amendment, 49 CATH. U. L. REV. 575, 583 (2000) (citations omitted); Andrew D. Morton, Comment, Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation, 147 U. PA. L. REV. 1435, 1459 (1999) (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 125 (2d ed. 1992)).
18. Stuntz, supra note 8, at 1265-66.
20. E.g., DAVID H. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND 85-88 (1972) (discussing the historical acceptance of the tenet that a “man’s home is his castle”).
22. Minnesota v. Olson, 495 U.S. 91 (1990); Jones v. United States, 362 U.S. 257 (1960). Jones established the proposition that “a person can have a legally sufficient interest in a place other than his own home so that the Fourth Amendment protects him from unreasonable governmental intrusions into that place.” Rakas v. Illinois, 439 U.S. 128, 141-42 (1978).
24. Id. at 367 (footnote omitted). Examples of the reduced privacy expectation in automobiles are the subjection of cars to pervasive and continuing regulation, inspection, and police stops. Id. at 367-68.
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of a crime, a lower standard than for searches of homes.\(^{25}\) When the privacy expectation is even lower than the expectation in a car, reasonable suspicion alone will justify a search. For instance, *Terry v. Ohio*\(^{26}\) held that police officers can stop and frisk a person if they have reasonable suspicion of some criminal activity and that the person may be armed.\(^{27}\) People have a lower expectation of privacy in items kept on their person than in items secured in their car, which, in turn, is lower than in items secured in their home.

Most post-*Katz* decisions denying the existence of a "reasonable expectation of privacy" make some logical sense. For example, while a person has a legitimate privacy expectation in her own possessions left in her own car,\(^ {28}\) she likely expects little privacy if she leaves her belongings in someone else's car, and indeed, the Court has refused to recognize a legitimate privacy expectation in that situation.\(^ {29}\) Likewise, a person's trash abandoned at the curb is not considered private: "It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public."\(^ {30}\) For similar reasons, objects and activities occurring in open fields do not have a legitimate privacy expectation.\(^ {31}\) Prisoners lack a reasonable expectation of privacy in items in their cells,\(^ {32}\) since prisoners retain a diminished expectation of privacy in general.\(^ {33}\) Finally, although a person might have a strong privacy expectation in her phone conversations,\(^ {34}\) she has no privacy expectation in the mere numbers dialed.\(^ {35}\)

**B. The Rehnquist Court's Shift**

In recent years, however, the pendulum has swung away from *Katz*.\(^ {36}\) The Rehnquist Court has embraced a critical modification of Harlan's formulation. While maintaining the same terminology of balancing the privacy intrusion and the government interest, recent decisions have afforded greater leeway to the

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27. *Id.* at 20-27.
33. Several decisions have affirmed that prisoners forfeit certain rights because of their criminal acts, and, as a consequence, retain a diminished privacy interest. *E.g.*, Jones v. Murray, 962 F.2d 302, 307 (4th Cir. 1992) (observing that prisoners enjoy a diminished expectation of privacy); People v. Wealer, 636 N.E.2d 1129, 1136 (Ill. App. Ct. 1994) (observing that sex offenders have a minimal privacy interest in their own identity).
36. Morton, *supra* note 17, at 1460-64.
government interest. Initially, this balancing began by looking at the individual whose privacy interest may have been violated; the analysis in modern decisions, however, seems to look from the perspective of the law enforcement agents whose actions are challenged. One commentator has observed that the Court, in assessing the privacy expectation, seems more focused on the subject matter of the case. As a consequence, individual privacy rights have become less relevant in criminal investigations.

The Court’s 1989 decision in Florida v. Riley seemed to mark the beginning of this doctrinal shift. Riley reviewed a warrantless search in which police, traveling in a helicopter at an altitude of roughly 400 feet, peered into a greenhouse in an individual’s backyard and detected marijuana plants. In upholding the constitutionality of the search, the Court clearly departed from the spirit of Harlan’s “expectation of privacy” test. Writing for the majority, Justice White acknowledged that the defendant “no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation.” Yet, White opined that “[b]ecause the sides and roof of his greenhouse were left partially open, . . . [the defendant] could not reasonably have expected that his greenhouse was protected from public or official observation from a helicopter had it been flying within the navigable airspace for fixed-wing aircraft.” Thus, the Riley Court seemed to examine the defendant’s “expectation of privacy” more from law enforcement’s perspective than from the defendant’s perspective.

Automobile stops are one area in which the Court’s jurisprudential shift has been particularly evident. In the mid-1990s, the Court handed down two decisions involving automobile stops that afforded enhanced deference to law enforcement interests. Ohio v. Robinette addressed the search of a car after a traffic stop. The Court held that, although the police never informed the suspect he could decline the search and depart, the search was nonetheless vol-

37. Ken Gormley, One Hundred Years of Privacy, 1992 WIS. L. REV. 1335, 1370.
38. One judge has suggested that the Court’s increased deference to law enforcement should not be surprising in light of the country’s war on drugs. Daniel T. Gillespie, Bright-Line Rules: Development of the Law of Search and Seizure During Traffic Stops, 31 LOY. U. CHI. L.J. 1, 3 (1999).
40. Id. at 448-49.
41. Id. at 450. In this sense, Riley is different from California v. Ciraolo, 476 U.S. 207 (1986), an earlier marijuana-growing case that also upheld an aerial observation. In Ciraolo, the Court stated that a ten-foot fence around a backyard may have “manifested a subjective expectation of privacy from all observations of [the defendant’s] backyard, or . . . merely a hope that no one would observe his unlawful gardening.” Ciraolo, 476 U.S. at 211-12. Ciraolo clearly foreshadows Riley, but it stopped short of stating that the defendant had exhibited an actual expectation against public inspection.
42. Riley, 488 U.S. at 450-51.
43. For a more detailed discussion of these cases and their impact, see generally David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271 (1997).
45. Id. at 35-36.
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...untary and, therefore, permissible under the Fourth Amendment. In the other case, Maryland v. Wilson, the Court considered whether a police officer, during a traffic stop, has the authority to order passengers out of the car. The Court upheld the search, noting that the "additional intrusion on the passenger is minimal" and "the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver or passenger."

More than any other recent Term, the October 1998 Term demonstrated this increased deference to law enforcement interests. The Court addressed several cases invoking Fourth Amendment issues. With two exceptions, the Court's rulings were pro-law enforcement. Moreover, both decisions favoring the privacy interest contained law enforcement interests that were either weak or less than obvious.

Minnesota v. Carter perhaps best demonstrates the Court's new direction. In Carter, the Court held that while in the apartment of a business acquaintance, a person does not have a reasonable expectation of privacy; this was a step back from the 1990 Minnesota v. Olson, which held that an overnight guest does have a legitimate expectation of privacy when in someone else's home. Olson more closely resembled Justice Harlan's approach to Fourth Amendment scrutiny and was very restrictively interpreted in Carter. Additionally, the Court in Carter observed that because the case involved a commercial transaction, the expectation of privacy was diminished. It is not clear why such a sharp difference exists between overnight guests and non-overnight guests. In both situations, the host has invited another person into his home, is present in the home with the guest, and is engaged in consensual activity. Societal expectations seem to indicate that a non-overnight guest has acquired a reasonable expectation of privacy.

Other cases from the 1998 Term demonstrated great deference to law enforcement interests by refusing to establish an expectation of privacy in surprising areas. In Wyoming v. Houghton, the Court permitted a search of a passenger's purse inside an automobile, claiming that the passenger had a re-

46. Id. at 35, 40. The Court opined that it would be "unrealistic to require police officers to always inform detainees that they are free to go before a consent to search may be deemed voluntary." Id. at 40.
47. Maryland v. Wilson, 519 U.S. 408 (1997).
48. Id. at 410-11.
49. Id. at 415.
50. Id. at 413.
52. Id. at 89-91.
54. Id. at 98-99.
duced expectation of privacy. However, common experience suggests that many women consider the contents of their purses strongly personal and private. In addition to downplaying the privacy interest, the Court emphasized the strong government interest in searching the purse, observing that the government’s ability to secure evidence would be “appreciably impaired” without the ability to search all contents of the car.

The Court again trivialized an expectation of privacy in *Florida v. White*. Here, the Court held that police do not need a warrant to seize an automobile if they have probable cause to believe that the automobile is forfeitable contraband, even in the absence of exigent circumstances and if the probable cause determination was made several months earlier. Justice Thomas, writing for the Court, observed that while “the police lacked probable cause to believe that respondent’s car contained contraband, they certainly had probable cause to believe that the vehicle itself was contraband.” Therefore, the Court granted significant deference to the law enforcement interest in obtaining forfeitable contraband and minimal deference to a person’s privacy right in her property, such as the contents of her car.

Only two decisions from the 1998 Term favored the privacy interest, and these cases both involved circumstances where the law enforcement interest was unclear. In *Wilson v. Layne*, the Court reviewed the constitutionality of media “ride-alongs,” in which members of the media accompany police officers during the execution of search and arrest warrants in private homes. The Court held the “ride-alongs” unconstitutional, relying on a semblance of the traditional approach. Chief Justice Rehnquist, writing for a unanimous Court, opined that the Fourth Amendment “embodies [a] centuries-old principle of respect for the privacy of the home.” Yet, much of the opinion emphasized that the Court was unable to find a compelling government interest for this activity—such as the reporters aiding in the execution of the warrant or assisting the law enforcement officers in any manner—since if a third party can aid law enforcement in the execution of a warrant, its presence does not violate the

58. *Id.* at 303.
59. *Id.* at 304-05.
61. *Id.* at 563-66.
62. *See id.* at 565.
63. *Id.* at 564-65 (citation omitted).
65. *Id.* at 610.
66. The Court rejected several justifications for the policy, most of which were based on alleged benefits to the public and the public’s right to know. The potential government interests, such as publicizing law enforcement activities and the deterrent effect of televised crack-downs, were largely speculative. *Id.* at 612-13.
67. *Id.* at 611.
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Fourth Amendment. Wilson thus suggests that this deference to privacy rights might be overlooked given a strong enough government interest.

Knowles v. Iowa was the other decision of the 1998 Term coming out on the side of the privacy interest. In Knowles, the Court refused to extend its “search incident to arrest” exception to citations for speeding, overturning the search of a motorcyclist who was cited for speeding but not arrested. The Court’s reasoning, however, was based more on the minimal law enforcement interest in the search than on the individual’s expectation of privacy. In particular, Chief Justice Rehnquist, writing for the Court, stated that the historic rationales for the “search incident to arrest” doctrine were not applicable. In addition, the Court may have seen Knowles as setting limits beyond which police should not venture.

It is safe to conclude that the Court’s recent jurisprudence, and in particular the holdings of the 1998 Term, have seriously limited the scope of a “reasonable expectation of privacy.” It is unlikely that the Katz Court would have arrived at the same result as the Rehnquist Court in some recent Fourth Amendment cases. The current Court seems much more reluctant to apply its longstanding presumption that warrantless seizures, in most circumstances, violate the Fourth Amendment. The Court has taken a more permissive view of privacy invasions, as it seems far more preoccupied with the law enforcement interest than previous Courts were. Individuals seem to retain a “reasonable expectation of privacy” only when a government interest fails to justify intruding upon that privacy.

C. Looking to the Future

The Court’s new approach to Fourth Amendment reasonableness has caused some trepidation. Much like the technology explosion of the 1960s,
modern technology is empowering new investigative techniques, and thus, privacy rights may be more important than ever. Advocates of privacy rights—such as Justice Powell—fear that law enforcement’s use of new surveillance technology translates into a fierce attack on privacy rights, and therefore Fourth Amendment jurisprudence must be modified accordingly.

With this shifting jurisprudence in mind, this Article now turns its attention to the Court’s October 1999 Term. In its most recent Term, the Court granted certiorari to several cases that raised important Fourth Amendment questions. Did the Court continue to grant broad discretion to law enforcement interests at the expense of an individual’s privacy interest? Has the Court continued to retreat from Katz’s approach, which saw an individual’s expectation of privacy as central to a Fourth Amendment inquiry?

III. FLIPPO V. WEST VIRGINIA

Adultery, homosexuality, pornography, a lover’s quarrel, and murder: Flippo v. West Virginia provides all the necessary ingredients for an extension of the Court’s 1978 Mincey v. Arizona ruling, which disallowed a murder scene exception to the Fourth Amendment’s prohibition on warrantless searches. Flippo relies strongly on Mincey’s precedent in providing Fourth Amendment protection to crime scenes—even a rented cabin where a homicide took place—absent an emergency.

A. The Case and its Holding

In 1996, during a vacation in a state park with his wife, James Michael Flippo placed a frantic 911 call to report that the couple had been attacked. When police arrived at the cabin where the Flippos were staying, they discovered Flippo with severe wounds to his head and legs and his wife dead from a head wound. Though Flippo was taken into custody and no emergency situation existed, the police proceeded to search the cabin for over 16 hours without obtaining a warrant. On a table near the body of Flippo’s wife, the police dis-

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77. SCOTT, supra note 9, at 62.
80. Flippo v. West Virginia, 120 S. Ct. 7 (1999).
82. Flippo, 120 S. Ct. at 8.
83. Id. at 7.
84. Id.; cf. State v. Faretra, 750 A.2d 166, 169 (N.J. Super. Ct. App. Div. 2000) (noting that police may make a warrantless search after a crime has taken place for the limited purpose of rendering aid to a crime victim, apprehending the suspect, or securing the crime scene).
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covered a closed—though unlocked—briefcase.85 Inside were photographs of a
man in various states of undress—later alleged to be Flippo’s lover and a
member of the congregation of which Flippo was a minister.86 At trial, the
prosecution used these photographs as evidence of Flippo’s infidelity, arguing
that his wife’s discovery of them supplied his motive to kill her.87 The trial
court rejected Flippo’s motion to suppress the photographs as the fruit of a
warrantless search, claiming that the police officers were acting well within the
bounds of the Fourth Amendment in conducting an investigation of everything
found within the crime scene.88 On appeal, the Supreme Court of Appeals of
West Virginia denied its discretionary review of the case.89

The U.S. Supreme Court reversed the trial court. It noted that warrantless
searches by police are contrary to Fourth Amendment protections against un-
reasonable searches unless they fall within one of the narrow exceptions
spelled out in Katz v. United States.90 Although at trial West Virginia attempted
to invoke a number of exceptions to justify the search,91 specifically plain
view,92 exigent circumstances,93 and inventory,94 the trial court relied exclu-
sively on the presumption that it was “within the law” for police to search
“anything and everything found within the crime scene area.”95 The trial court
made no attempt to distinguish the case from Mincey, which specifically re-
jected a crime-scene exception to the requirement of a warrant before con-
ducting an extensive non-emergency search.96 In reversing the trial court, the
Court quite plainly held that Mincey controlled here, and that absent an emer-
gency situation with a person in need of immediate aid, no additional crime
scene exception to the Fourth Amendment will be recognized.97 The Court de-
clined to consider whether Flippo’s 911 call to the police constituted implicit
consent to the search.98

85. Flippo, 120 S. Ct. at 8.
86. Id. at 7 n.1.
87. Id.
88. Id. at 8.
89. Flippo v. State, No. 982196 (W. Va. Jan. 13, 1999). Flippo appealed his conviction directly to
West Virginia’s highest court because West Virginia has no immediate appellate court system.
91. Flippo, 120 S. Ct at 7.
95. Flippo, 120 S. Ct. at 8 (citing App. A to Pet. for Cert., at 3).
96. Mincey, 437 U.S. at 395.
97. Flippo, 120 S. Ct. at 8.
98. Id. at 9.
B. A Fourth Amendment Analysis of Flippo: Privacy Concerns Versus Law Enforcement Interests

The protection of privacy rights is at the core of the Fourth Amendment reasonableness requirement. In balancing the interests of individuals and law enforcement, the Court has traditionally weighted the scales toward privacy rights by focusing on the expectation of privacy at the time and place of the search. Recently, however, much more deference has been paid to the law enforcement objectives at hand, with correspondingly less paid to the potential intrusion into privacy. *Flippo* is one of the increasingly rare times when the Court sided with privacy interests.

1. Privacy Concerns: A Closed Container Within a Cabin

The Supreme Court’s Fourth Amendment jurisprudence surrounding warrantless searches relies heavily on the expectation of privacy that accompanies a person’s home or personal belongings. In fact, *Mincey* established that neither shooting a police officer nor a subsequent arrest forfeited the defendant’s privacy interest inside his apartment. The Court carefully distinguished between the defendant’s reduced privacy right in his person after an arrest and a reduced right of privacy in his entire home. Unlike the facts in *Mincey*, however, Flippo and his wife were vacationing in a cabin in a state park, not staying in their house or apartment. Thus, the privacy interest guaranteed by the Fourth Amendment, which is strongest in the home, was somewhat reduced. Further, recent jurisprudence has indicated that short-term guests lack the same privacy expectation as long-term guests.

However, Flippo was not a social invitee, but rather had a rental contract for the cabin where he and his wife were staying. Thus, the privacy interest involved seems similar to that in a hotel room, and stronger than that of a person traveling in a vehicle or walking down the street. Moreover, the photographs and negatives in question were found in a closed (but unlocked)
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briefcase.\textsuperscript{107} Since the briefcase brings this case within the traditional jurisprudence of closed containers, Flippo’s expectation of privacy was likely at its maximum.\textsuperscript{108} Even the “exploratory” touching of a soft-sided bag in an overhead bin on a cross-country bus intrudes into a passenger’s legitimate expectation of privacy.\textsuperscript{109} Flippo’s photos were discovered in a hard-sided briefcase, fully closed, and inside a permanent cabin, indicating a strong expectation of privacy similar to that of Mincey.\textsuperscript{110} This strong privacy interest and close analogy to precedent likely weighed heavily on the Court’s analysis in this case.

2. Law Enforcement Interests: A Reasonable Search?

What remains then is whether the police officers’ search\textsuperscript{111} was reasonable because of the law enforcement interest in the search.\textsuperscript{112} Fourth Amendment jurisprudence does create a limited crime scene exception when an emergency situation exists because officers need to give aid to victims or apprehend the perpetrator.\textsuperscript{113} While the killer in Flippo could still have been at large, the police officers neither had victims that required immediate attention within the cabin nor required entry to secure the area.\textsuperscript{114} Two other exceptions to Fourth Amendment search doctrine—exigent circumstances\textsuperscript{115} and inventory\textsuperscript{116}—also did not apply given the non-emergency nature of the search. Finally, West Virginia argued that the plain view exception\textsuperscript{117} controls, and since the briefcase

\begin{itemize}
\item \textsuperscript{107} Flippo, 120 S. Ct. at 7.
\item \textsuperscript{108} Bond v. United States, 120 S. Ct. 1462 (2000).
\item \textsuperscript{109} Id. at 1465.
\item \textsuperscript{110} Flippo, 120 S. Ct. at 7.
\item \textsuperscript{111} It is undisputed that the officers’ activities were a search for Fourth Amendment purposes, because of the officers’ extensive 16-hour search of the cabin and the opening of the briefcase. Flippo, 120 S. Ct. at 7.
\item \textsuperscript{112} The Court declined to consider whether Flippo consented to the search by calling 911. Flippo, 120 S. Ct. at 7. A very high standard exists to prove that consent to a search was obtained, especially when the legality of the search rests on that consent. Robinson v. Commonwealth, 524 S.E.2d 171, 174 (Va. Ct. App. 2000) (citing Johnson v. Commonwealth, 496 S.E.2d 143, 149-50 (Va. Ct. App. 1998)). Namely, the state must show that the suspect voluntarily gave consent, not simply that she submitted “to a claim of lawful authority.” Florida v. Royer, 460 U.S. 491, 497 (1983); Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). West Virginia argued that the 911 call met this standard, and therefore that the trial court’s decision should be upheld. Flippo, 120 S. Ct. at 8. Thus, the consent issue could have significantly affected the constitutionality of the search, if the Court had addressed it.
\item \textsuperscript{114} Flippo, 120 S. Ct. at 7.
\item \textsuperscript{115} Mincey, 437 U.S. at 392 (1978).
\item \textsuperscript{116} South Dakota v. Opperman, 428 U.S. 364, 382-83 (1976) (Powell, J., concurring) (describing searches which are conducted not to discover evidence of a crime, but simply to itemize the contents of an automobile or other area, as exempt from the normal Fourth Amendment search restrictions).
\item \textsuperscript{117} Tyler, 436 U.S. at 499 (holding that once law enforcement officers enter a building for an emergency purpose, they may seize evidence in plain view).
\end{itemize}
was out in the open, the search was justified. However, while the briefcase itself may have been out in the open, the photographs and negatives within it certainly were not. Since no exceptions to the Fourth Amendment applied, there was only a weak law enforcement justification for a warrantless search of Flippo’s cabin. Thus, the strong privacy interest outweighed the slight law enforcement interest, and the Supreme Court held the search unconstitutional.

However, the law enforcement interest in searching crime scenes is very jealously guarded by police and a number of state courts—notwithstanding the Court’s clear messages in Mincey and Flippo. Just a few months after Flippo was decided, a New Jersey Superior Court allowed an officer to search what turned out to be a “chop shop” garage simply because he had reason to believe there may have been burglars inside. Faretra declined to read Flippo so broadly as to exclude shorter, plain-view searches by police, hinging its reasoning on the fact that the officer had made a plain-view observation of incriminating evidence rather than conducting an extensive warrantless search. Although Faretra attempted to highlight its reliance on the plain view exception to warrantless search doctrine, ultimately its reasoning rests on the fact that—as in Faretra—the search was not extensive.

If Mincey is only applied to searches of a certain judicially-defined length, then its influence will be greatly lessened. Indeed, its very existence may have limited the protection provided in Flippo. Since the incriminating evidence in Flippo was inside a closed container, the Court had the option of basing its decision on either or both of Mincey’s prohibition of murder scene exceptions or its closed container jurisprudence. By relying solely on Mincey, the Court both showed its reliance on settled precedent and chose to base its opinion on a single form of protection for privacy rights—a form that, as seen, allows for greater flexibility on the part of courts to continue allow law enforcement interests to dominate.

C. Fourth Amendment Developments

Flippo v. West Virginia was decided per curiam, demonstrating an increasingly rare consensus among the Court regarding the limits of Fourth Amendment doctrine. This decision demonstrates two things in its three pages.

118. Flippo, 120 S. Ct. 7 at 8.
120. Id.
121. Id. (“Here, we are not presented with an extensive crime scene search.... Thus the proscribed crime-scene exception does not apply to these facts.”).
122. Flippo, 120 S. Ct at 7.
123. A person who keeps an item in a closed container generally has indicated an expectation of privacy in that item. E.g., Bond v. United States, 120 S. Ct. 1462 (2000); but see Wyoming v. Houghton, 526 U.S. 295 (1999) (allowing the search of a car passenger’s purse because of the reduced expectation of privacy in items found in cars).
Developments in Policy

First, it exemplifies the Court's usual concern that its precedent and institutional role be respected. The trial court essentially ignored the very closely analogous Mincey v. Arizona, an obvious error that the Court was unlikely to allow. Second, it highlights the added protections available to persons within a dwelling—be it an apartment or rented cabin—versus when walking on the street or traveling within their automobiles. Flippo had the advantage of keeping his photographs both within a closed container and inside his rented cabin—a double and very traditional expectation of privacy that the Court was unable to overlook. Notwithstanding the shortfall of Flippo—namely that the length of the search was too highly emphasized, allowing courts to distinguish shorter searches with Fourth Amendment violations equivalent to those here—it does illustrate a greater degree of sympathy by the Justices for searches within a dwelling rather than of travelers in an automobile or on the street. By reaffirming Mincey, the Court demonstrated that upholding a non-controversial precedent can trump its tendency to defer to law enforcement interests.

IV. BOND v. UNITED STATES

In Bond v. United States,124 Steven Dewayne Bond, a Greyhound passenger, appealed his conviction on drug possession charges on the ground that Border Patrol Agent Cantu, who discovered a brick of methamphetamine in his bag, violated his Fourth Amendment rights against unreasonable searches and seizures. The Supreme Court agreed and reversed the conviction. Although this case appears to be a noticeable departure from the Court's increasing deference toward law enforcement interests, the result is hard to reconcile with the Court's precedents and legal standards. While civil libertarians might applaud the result, its potential to reshape Fourth Amendment law is substantially diluted by the sketchy reasoning on which the case rests and the questions it avoids. At best, the case may prove to be nothing more than an aberration. At worst, the analysis it employs may undermine privacy interests even more in the long run.

A. The Facts

Following routine procedures, the Greyhound bus with Mr. Bond on board stopped at a permanent Border Patrol checkpoint in Sierra Blanca, Texas. Border Patrol Agent Cantu boarded the bus to check the passengers' immigration status. After having satisfied himself that the passengers were lawfully in the United States, Agent Cantu began walking toward the bus's exit. As he walked, he squeezed passengers' soft luggage stored above the seats. As he approached Bond's seat, he felt a bag that had "a brick-like object in it."125 He later ex-

125. Id. at 1465 (Breyer, J., dissenting).
plained that he felt “the edges of [a] brick in the bag.” He then squeezed the bag. Upon questioning, Bond admitted that the bag belonged to him and allowed Agent Cantu to open it. Agent Cantu then discovered a brick of methamphetamine wrapped in duct tape and rolled in a pair of pants. Bond was subsequently charged and convicted of conspiracy to possess methamphetamine and possession with intent to distribute methamphetamine.

B. The Court’s Opinion

The question before the Court was whether the evidence should have been suppressed due to Agent Cantu’s warrantless search. The Court answered in the affirmative, with two Justices dissenting, holding that the manipulation of the bag was a “search” within the meaning of the Fourth Amendment. Chief Justice Rehnquist, writing for the majority, wrote that because Bond used an opaque bag and placed it directly above his seat, he had exhibited an actual expectation of privacy. That expectation, moreover, was “one that society is prepared to recognize as reasonable.”

While “a bus passenger clearly expects that his bag may be handled[, he] does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner.”

The Chief Justice’s entire opinion spans only three pages. The analysis itself consists of a single paragraph. At first glance, the question the case presents seems to be nothing more than a straightforward application of Fourth Amendment principles. Upon closer examination, however, the opinion left unanswered many difficult questions and studiously avoided even raising these intractable problems.

Most notably, the majority opinion discussed exploratory tactile searches in a vacuum without reference to context. Examine closely the Court’s categorical language:

When a bus passenger places a bag in an overhead bin, he expects that other passengers or bus employees may move it for one reason or another. Thus, a bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. . . . We therefore hold that the agent’s physical manipulation of petitioner’s bag violated the Fourth Amendment.

What is left unspoken, of course, is that not all bus passengers traveling under

126. Id.
127. Id. at 1465. In determining whether something constitutes a search for Fourth Amendment purposes, the Court asks the following two questions: 1) whether the individual, by his conduct, has exhibited an actual expectation of privacy; 2) whether the individual’s expectation of privacy is “one that society is prepared to recognize as reasonable.” Smith v. Maryland, 442 U.S. 735, 740 (1979).
128. Bond, 120 S. Ct. at 1465 (quoting Smith, 442 U.S. at 740).
129. Id.
130. Id.
Developments in Policy

...all circumstances have the same expectations and that not all such expectations are objectively reasonable. Passengers traveling on a bus route that is known to be crowded may well expect their bags to be not simply handled, but squeezed, just as Bond's bag was. This situation is entirely plausible where passengers have to stack their luggage on top of other passengers' bags. Just as a grocer packs the sturdiest item first and places the lighter items on top, a considerate fellow traveler may well need to squeeze another passenger's bag to see whether the bag lying underneath—and the objects contained within—is strong enough to support the weight of her own bulkier piece of luggage. It is therefore not surprising that “the trial court, which heard the evidence, saw nothing unusual, unforeseeable, or special about this agent's squeeze.”

The Court's language seems to create nothing less than a per se rule, prompting Justice Breyer's criticism in his dissenting opinion that the majority opinion would lead to “a constitutional jurisprudence of 'squeezes.'” If the Court was serious about its reasonableness inquiry, it could not possibly have been blind to such contextual nuances. Overturning the lower courts' factual findings without so much as providing an explanation further validates Justice Breyer's concern that the Court is merely creating yet another ad hoc exception in its patchwork Fourth Amendment jurisprudence.

Compounding the problem, the Court carelessly conflated two concepts—(1) the degree of intrusiveness of a search and (2) what constitutes a reasonable expectation of privacy—that by no means always go together. Distinguishing California v. Ciraolo and Florida v. Riley, the Court emphasized that these cases “involve only visual, as opposed to tactile observation. Physically invasive inspection is simply more intrusive than purely visual inspection.” The Court contrasted those cases with Terry v. Ohio, which noted that “a careful tactile exploration of the outer surfaces of a person's clothing all over his or her body is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and is not to be undertaken lightly.”

While it is generally true that the more intrusive the search, the less reasonable it is for a passenger to have expected it—and thus the more likely it is for the search to be held unconstitutional—intrusiveness is not equivalent to a passenger's reasonable expectations. If, as the Court claimed, the question is

131. Id. at 1466 (Breyer, J., dissenting).
132. Id. at 1467.
135. Bond, 120 S. Ct. at 1464 (emphasis added).
137. Bond, 120 S. Ct. at 1464 (quoting Terry, 392 U.S. at 17-18) (emphasis added).
whether a reasonable passenger anticipates a certain type of invasion, focusing too intently on intrusiveness may lead to the wrong answer.

To understand the difference between intrusiveness and expectation, compare Bond with United States v. Place,\(^138\) in which the Supreme Court held that the use of specially-trained dogs to sniff passengers' bags for hidden drugs was not a search.\(^139\) A line of reasoning focusing on the intrusiveness of a search well supports the Court's holdings in both cases. Because a "tactile exploration" of a piece of luggage is more physically intrusive than a brief sniff test by a dog, the latter can still be allowed even if the former violates Fourth Amendment guarantees.

However, if the reasonableness inquiry is taken seriously—as the Court claimed to, but did not—and asks what a passenger should reasonably expect in terms of possible invasion of her privacy by members of the public, exactly the opposite answer is reached. Having luggage manipulated and squeezed by other passengers, whether it violates a passenger's reasonable expectation of privacy or not, is surely much more ordinary than encountering dog owners who let their dogs roam at large to "sniff at other's bags."\(^140\) To press the point even further, it is almost impossible to maintain with a straight face that a passenger should anticipate that, in the course of her travel, specially-trained dogs will be present at passenger terminals, oblivious to everything except passengers' baggage. If this is so, why should the police be allowed to employ sniff dogs but not permitted to squeeze passengers' bags, especially when the Court has long said that, in answering the question about what constitutes a reasonable expectation of privacy, whether the invasion is carried out by law enforcement officials or members of the general public makes no difference?\(^141\) Because the Bond Court was blind to the distinction between intrusiveness and reasonableness and focused almost exclusively on the former factor at the expense of the latter, it failed to see that these two cases cannot be reconciled on a reasonable expectation of privacy theory.

Its failure to do so carries important implications. Cases that are now decided in favor of individuals' privacy interests may well come down differently if an intrusiveness analysis is employed. Consider United States v. Taborda.\(^142\)

\(^{138}\) United States v. Place, 462 U.S. 696 (1983); see Bond, 120 S. Ct. at 1466-67 (Breyer, J., dissenting) (discussing Place's implications for the Bond majority's reasonableness analysis). For a powerful general argument that the touchstone of the Fourth Amendment is reasonableness and that the Court has given short shrift to the reasonableness inquiry in its Fourth Amendment jurisprudence, see generally AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1-45 (1997); Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757 (1994).

\(^{139}\) Place, 462 U.S. at 696-97.

\(^{140}\) Bond, 120 S. Ct. at 1466 (Breyer, J., dissenting).

\(^{141}\) E.g., California v. Greenwood, 486 U.S. 35, 41 (1988) ("The police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public."), cited in Bond, 120 S. Ct. at 1467 (Breyer, J., dissenting).

\(^{142}\) United States v. Taborda, 635 F.2d 131 (2d Cir. 1980).
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in which the Second Circuit held that any enhanced viewing by means of a telescope into the interior of a home impairs a legitimate expectation of privacy. While it is debatable whether there is any "reasonable expectation of privacy with respect to what can be seen by means of a long-familiar and generally used optical instrument," there can be no debate that an observation by telescope is not "physically intrusive." If degree of intrusiveness is the test, as Bond's language suggests, the complexities of the case dissolve immediately, and law enforcement interests dominate. The observation does not violate the Fourth Amendment, because the observers are hundreds of feet away. However, if reasonableness is the test, there is a higher probability that individuals' rights to privacy will be protected, as illustrated by the Second Circuit's disposition of the case.

In looking to the next Term, the importance of this distinction looms even larger. In September 2000, the Supreme Court agreed to decide whether law enforcement officials' use of a thermal imaging device to detect illicit drug-cultivation activities is a search within the meaning of the Fourth Amendment. If the intrusiveness reasoning prevails, the Court will likely reach the same conclusion as the Ninth Circuit, namely that the device "intruded into nothing" and therefore did not violate the Fourth Amendment. However, the long-term result may well be to eviscerate the meaning of the Fourth Amendment through a technological evasion.

The Court in the past has dealt with the impact of technological advances on the Fourth Amendment. In Katz v. United States the Court was emphatic in noting that the Fourth Amendment "protects people, not places." The practical consequences of focusing solely on intrusiveness is to overturn sub silentio this commitment to look at the purpose and abide by the spirit of the Amendment.

V. ILLINOIS V. WARDLOW

In Illinois v. Wardlow, the Supreme Court essentially held that flight from a police officer, by itself, justifies an investigative stop under Terry v. Ohio. While there is something to be said for the common sense of this holding, the decision still raises troubling questions about police power and privacy. Like Bond, in Wardlow the Court considered the facts from a particu-

143. Id. at 141 (Dumauld, J., dissenting).
145. Id. at 1046.
147. Id. at 351.
lar viewpoint, and the outcome was influenced greatly as a result.

A. The Facts and Lower Court Decisions

Illinois v. Wardlow arose out of a motion to suppress a handgun that was found during a Terry stop-and-frisk search. The following are the only facts that appear in the record: In 1995, two uniformed police officers were driving in the last car of a four-car caravan when they observed Wardlow standing near the front of a building with a white plastic bag. Wardlow, who was not violating any laws at the time, looked in the police officers' direction and then fled. One of the officers stopped Wardlow and frisked him, before asking any questions. The officer felt a handgun inside the plastic bag, opened it, saw the gun, and then arrested Wardlow. The trial court denied Wardlow's motion to suppress the handgun, and Wardlow was subsequently convicted of unlawful use of a weapon by a felon.\footnote{150. People v. Wardlow, 678 N.E.2d 65, 66 (Ill. App. Ct. 1997).}

The Appellate Court of Illinois suppressed the gun and accordingly overturned Wardlow's conviction.\footnote{151. Id. at 68.} It stated that the record did not support that Wardlow was in a high crime area,\footnote{152. Id. at 67.} and consequently Wardlow's flight alone was not enough to justify an investigative stop.\footnote{153. Id. at 68.} However, the court was careful to limit its holding: "[W]e do not hold that the presence of a suspect in a high crime location, together with his subsequent flight from the police, is never grounds for a Terry stop. . . . To pass constitutional muster, however, the high crime area should be a sufficiently localized and identifiable location."\footnote{154. Id.} The Supreme Court of Illinois affirmed, but on different grounds.\footnote{155. Id.} It stated that the undisputed testimony of a police officer established that Wardlow was in a high crime area.\footnote{156. Id. at 486.} However, the court affirmed, because "an individual's flight upon the approach of a police vehicle patrolling a high-crime area . . . is insufficient to create a reasonable suspicion of involvement in criminal conduct."\footnote{157. Id.} Since the arresting officer lacked "specific facts corroborating the inference of guilt gleaned from [the] defendant's flight,"\footnote{158. Id. at 489.} the stop was unjustified and the conviction had to be overturned.
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B. The Supreme Court’s Opinion

The U.S. Supreme Court overturned the Illinois Supreme Court’s decision, finding that the arresting officer had a reasonable suspicion on which to base his stop of Wardlow.\(^{159}\) In doing so, Chief Justice Rehnquist’s terse opinion for the five-Justice majority never explicitly stated that flight alone is sufficient for a *Terry* stop; however, the Court’s language certainly conveys that impression. For instance, the Court characterized “headlong flight” as “the consummate act of evasion,” stating that while “it is not necessarily indicative of wrongdoing . . . it is certainly suggestive of such.”\(^{160}\) The Court also distinguished this case from *Florida v. Royer*,\(^{161}\) which held that a person stopped by a police officer for questioning has the right to go about her business if she does not wish to respond;\(^{162}\) flight, the Court said, is “simply not a mere refusal to cooperate,” but “just the opposite” of going on with one’s business.\(^{163}\) Further, though the Court acknowledged the existence of innocent reasons for flight, it characterized a *Terry* stop as a “far more minimal intrusion” than an arrest,\(^{164}\) thus strongly implying that the risk is acceptable given flight’s highly suspicious nature.

In upholding Wardlow’s conviction, the Court also noted that being in a high-crime area is relevant to the *Terry* analysis.\(^{165}\) This awareness of the circumstances of the stop was part of the Court’s overall emphasis on “commonsense judgments and inferences about human behavior” as determining the lawfulness of *Terry* stops where flight is involved.\(^{166}\)

In contrast to the Court’s brief opinion, Justice Stevens, in dissent, discussed at length his agreement with what he characterized as the Court’s refusal to adopt a per se rule on flight and investigative stops.\(^{167}\) Justice Stevens cataloged possible innocent reasons for flight, such as fear of being arrested as a suspect, unwillingness to be a witness, fear of danger from criminal activity,


\(^{160}\) Id.


\(^{162}\) Id. at 497-98.

\(^{163}\) *Wardlow*, 120 S. Ct. at 676.

\(^{164}\) Id. at 677.

\(^{165}\) Id. at 676 (citing *Adams v. Williams*, 407 U.S. 143 (1972)).

\(^{166}\) Id.

\(^{167}\) Both parties asked for per se rules. *Illinois* asked for a per se rule holding that unprovoked flight from an identified police officer was always grounds for an investigative stop. Brief for Petitioner at 5, *Illinois v. Wardlow*, 120 S. Ct. 673 (2000) (No. 98-1036), available at 1999 WL 451857 (“Petitioner contends that a person’s unprovoked flight at the mere sight of a police officer is such innately and objectively suspicious behavior that it alone justifies a temporary investigative stop.”). *Wardlow* asked for a per se rule that flight, standing alone, was never sufficient grounds. Brief for Respondent at 4, available at 1999 WL 607000 (“[T]he fact that a person in an undefined area flees from police is an insufficiently articulated basis for a *Terry* stop.”). As discussed, Illinois came closest to getting its wish. *Supra* text accompanying notes 159-164.
and fear of danger from confrontations between the police and criminals.\textsuperscript{168} Another reason, particularly for minorities and residents of high crime areas, is fear of the police themselves.\textsuperscript{169} In extensive footnotes, Justice Stevens cited a number of studies documenting these fears.\textsuperscript{170} Referring to the majority's statement that scientific certainty of guilt cannot be demanded of officers and judges,\textsuperscript{171} Stevens pointed out that scientific certainty of innocence cannot be demanded either.\textsuperscript{172} Justice Stevens thus lauded the totality of the circumstances test for all \textit{Terry} stops.\textsuperscript{173}

Justice Stevens's acknowledged point of difference with the Court was the application of the law to the facts of the case. Stevens saw too few facts to support a finding that the stop was reasonable: the officer could not recall whether his car was marked; there was no evidence whether the other vehicles in the caravan were marked or the other officers were in uniform; and it was not clear if other people were in the area of the arrest, if that area was the caravan's destination, how fast the officers were driving, or if the other vehicles in the caravan had already gone past.\textsuperscript{174} (Stevens noted that the Illinois Appellate Court even refused to infer a relationship between Wardlow's flight and the police officers' driving by.\textsuperscript{175}) Additionally, the other contextual elements, such as the plastic bag, the time of day, and the lack of any called-in report of activity in the area, did not support the stop.\textsuperscript{176} Finally, the area's high crime rate "arguably makes an inference of guilt less appropriate, rather than more so," because "many factors providing innocent motivations for unprovoked flight are concentrated in high crime areas."\textsuperscript{177} At any rate, the fact of a high crime area is "a fact too generic" to provide the specific reasons that justify a \textit{Terry} stop.\textsuperscript{178} Justice Stevens summed up his viewpoint by saying, "I am not persuaded that the mere fact that someone standing on a sidewalk looked in the direction of a passing car before starting to run is sufficient to justify a forcible stop and frisk."\textsuperscript{179}

\textsuperscript{168} Id. at 680 (Stevens, J., dissenting).
\textsuperscript{169} Id. at 680-81.
\textsuperscript{170} Id. at 680-82 nn.7-12.
\textsuperscript{171} Id. at 676.
\textsuperscript{172} Id. at 681-82.
\textsuperscript{173} Id. at 682 ("[T]he Court is surely correct in refusing to embrace either \textit{per se} rule offered by the parties. The totality of circumstances, as always, must dictate the result.").
\textsuperscript{174} Id. at 683-84.
\textsuperscript{175} Id. at 684.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id.
C. Analysis: Characterizing Parties and Precedent

The crucial difference between Chief Justice Rehnquist and Justice Stevens' opinions seems to be, quite simply, their attitude toward law enforcement. For instance, the Court spoke almost entirely from the point of view of the officers when describing the facts, stating, for instance, that "it was not merely [Wardlow's] presence in an area of heavy narcotics trafficking that aroused the officers' suspicion but his unprovoked flight upon noticing the police." The Court looked at the police officers' reactions to Wardlow, and very rarely at Wardlow's reactions to the police. There is one nod to the perspective of the person stopped, the acknowledgment that it is "undoubtedly true" that "there are innocent reasons for flight from police"; however, the Court immediately went on to note that this fact does not necessarily mean that the Fourth Amendment is violated. In contrast, Justice Stevens extensively catalogued those innocent reasons in his dissenting opinion, viewing the situation through the eyes of the person on the street and not those of the police officer. The two viewpoints are not mutually exclusive, and both make common sense, but the two opinions restrict themselves to just one side of the story.

The viewpoints of the Justices naturally correspond to the skepticism with which they greeted the officers' contention that they based their search of Wardlow on a reasonable suspicion. Justice Stevens argued that the record was factually insufficient to support the conviction; he cited about a dozen facts that either were not mentioned on the record or were not, in his view, suspicious. The Court discussed none of these omissions, apparently considering none of them significant, but instead found that "commonsense judgments and inferences about human behavior" justified the stop. One's choice of viewpoint is naturally linked to one's perspective, particularly in an adversarial proceeding.

A related difference between the opinions is their characterization of Terry stops. The Court characterized Terry as holding that "an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." Justice Stevens, on the other hand, described Terry far more narrowly, claiming that it provides "only a 'narrowly drawn authority' that is 'limited to that which is necessary for the discovery of weapons,'" and noting that "a Terry
frisk 'is a serious intrusion upon the sanctity of the person.' By characterizing Terry in this way, Justice Stevens brought out an issue the Court deliberately avoided: the implications of a frisk taking place during the Terry stop.

Clearly, the more invasive the intrusion, the more seriously the Court will scrutinize the justification for it. The Court claimed it “express[ed] no opinion as to the lawfulness of the frisk independently of the stop” because the Court had not granted certiorari on that question. However, the Court’s language does suggest approval of the police officer’s frisk; it stated that the officer “immediately conducted a protective pat-down search for weapons because in his experience it was common for there to be weapons in the near vicinity of narcotics transactions.”

Indeed, Justice Stevens took it for granted that the frisk is part and parcel of the stop, stating that he did not feel that unprovoked flight “is sufficient to justify a forcible stop and frisk.” Realistically, it does seem likely that most people stopped under Terry may be frisked, if someone like Wardlow—suspected of a narcotics offense, not a violent crime—may be. Why did the Court downplay Terry’s emphasis on frisks and the strong possibility of frisks in cases like Wardlow’s? By claiming that frisks are not an issue, the Court greatly reduced the level of intrusion into an individual’s privacy. With the privacy interest thus minimized, the majority was more easily able to adopt law enforcement’s point of view, to the exclusion of the defendant’s. This analysis does not suggest causation; that is, the Court was not necessarily describing Terry in a narrow way in order to reach the result it wanted. However, the confluence of these attitudes is another example of the Court’s recent tendency to restrict the scope of the Fourth Amendment’s protections.

In sum, Wardlow expanded the ability of the police to make Terry stops by allowing unprovoked flight to serve as a basis for an investigatory stop. Further, such stops are almost certain to be accompanied by frisks, increasing the effective power of the police and the intrusion on the individual’s privacy. The Court did not state any of these inferences outright, however, and by not drawing the obvious conclusion, it avoided balancing the more serious privacy interest in a pat-down search against the law enforcement interest that it is clearly inclined to favor. Wardlow took a selective approach to the points of view it considered, both in terms of the actors in the case and its characterization of precedent, and thereby reached a result that, on the whole, benefits law
VI. FLORIDA V. J.L.

In *Florida v. J.L.*, the Supreme Court unanimously determined that an anonymous tip that a person is carrying a gun is insufficient to justify a police officer’s stop and frisk of that person. This case built on existing precedent to specify another situation in which privacy rights would be protected.

A. The Case and Its Holding

In October 1995, the Miami-Dade Police Department received an anonymous call stating that “a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.” Officers arrived at the bus stop and saw three black males, of whom one, fifteen-year-old J.L., was wearing a plaid shirt. One of the officers stopped J.L., frisked him, and seized a gun from his pocket. J.L. was charged with carrying a concealed firearm without a license and with possessing a firearm while under the age of 18. The trial court granted J.L.’s motion to suppress the gun as the fruit of an unlawful search. The Florida Court of Appeal reversed, and the Supreme Court of Florida quashed the intermediate decision and held the search invalid under the Fourth Amendment.

Under *Terry v. Ohio* and its progeny, a police officer is permitted to perform a stop-and-frisk search if that officer “has reason to believe that he is dealing with an armed and dangerous individual.” Initially, the Court was skeptical that an anonymous tip could create the necessary reasonable suspicion to support a *Terry* stop, noting that “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.” However, it subsequently recognized that “there are situations in which an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.”

Writing for the Court in *J.L.*, Justice Ginsburg reasoned that “[t]he anonymous tip concerning J.L. provided no predictive information and therefore left the police without means to test the informant’s knowledge or credibility.”

193. *Id.* at 1377.
194. *Id.*
198. *Id.* at 27.
201. *Id.* at 1379.
Ginsburg explained that even when an anonymous tip accurately describes a subject's location and appearance, such a tip "does not show that the tipster has knowledge of concealed criminal activity," and therefore does not contain sufficient indicia of reliability to create a reasonable suspicion.\textsuperscript{202} The \textit{J.L.} Court refused to modify \textit{Terry}'s requirement of reasonable suspicion by creating a "firearm exception" under which "a tip alleging an illegal gun would justify a stop and frisk even if the accusation would fail standard pre-search reliability testing."\textsuperscript{203} 

This unanimous holding did not stray far from precedent. In \textit{Alabama v. White}, the Court had decided that an anonymous tip met the reasonable suspicion standard because it accurately predicted details of a suspect's future actions.\textsuperscript{204} The \textit{White} Court warned, however, that it was a "close case,"\textsuperscript{205} and apparently the anonymous tip in \textit{J.L.}—which predicted nothing at all—went over the line into unreliability. Both Justice Ginsburg's opinion for the Court and Justice Kennedy's concurrence discussed issues similar to \textit{White}'s concern about the unreliability of bare-boned anonymous tips. These concerns are examined next.

\textbf{B. Tip Reliability and "Reasonable Suspicion"}

Whether an anonymous tip meets the "reasonable suspicion" standard depends on the reliability of the tip. In his concurring opinion, Justice Kennedy described why anonymous tips pose a unique reliability problem: "If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity."\textsuperscript{206} Kennedy concluded that with anonymous tips, "the risk of fabrication becomes unacceptable."\textsuperscript{207} 

Kennedy suggested ways that an anonymous tip might acquire the requisite reliability for a stop-and-frisk search. First, the tip might be reliable if the same anonymous tipster had given reliable tips on other occasions.\textsuperscript{208} Second, the tip might acquire reliability if it accurately predicted some future conduct of the alleged criminal.\textsuperscript{209} Kennedy reasoned, "if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before

\begin{itemize}
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.}
\item \textsuperscript{204} \textit{White}, 496 U.S. at 332.
\item \textsuperscript{205} \textit{Id.}
\item \textsuperscript{206} \textit{J.L.}, 120 S. Ct. at 1381 (Kennedy, J., concurring).
\item \textsuperscript{207} \textit{Id.}
\item \textsuperscript{208} \textit{Id.}
\item \textsuperscript{209} \textit{Id.}
\end{itemize}
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us.”210 In this example, “there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity.”211

Alternatively, an “anonymous” tip might acquire sufficient reliability if it is less than completely anonymous. Kennedy described a scenario where “an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring.”212 In such a situation, “a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response.”213 Kennedy also suggested that if the police had the ability to trace anonymous telephone informants, and the public was aware of this ability, lying tipsters would be discouraged and anonymous tips would tend to be more reliable.214

In summary, Justices Ginsburg and Kennedy agreed that tipster reliability determines whether an anonymous tip meets the “reasonable suspicion” standard. Police officers who receive an anonymous tip over the telephone know practically nothing about the tipster and therefore have no grounds on which to judge the tipster’s credibility. Justice Kennedy suggested various ways in which the tipster could acquire credibility: through giving tips that later proved accurate, predicting future behavior of the suspect, or personally appearing to the police but remaining anonymous.

C. Police Reliability

Two significant issues lurked in the background of Florida v. J.L. These issues were mentioned in briefs submitted by the parties and amici and were considered by the Justices during oral argument, but were not squarely addressed by either of the opinions. First is the issue of law enforcement’s reliability. Second is the question of whether “reasonable suspicion” depends in part on the gravity of the threatened harm.

Justice Ginsburg, writing for the Court, did not discuss whether the reliability of the police—in addition to the reliability of the tip—was considered in deciding the case. If police are justified in performing a stop-and-frisk search on the basis of an anonymous tip, unscrupulous officers might fabricate tips before or after the search. When required to account for performing an illegal search, an officer could explain that she had received an anonymous tip that described the suspect’s appearance and stated that the suspect was carrying a gun. Because such a tip would bear so little information, and would be placed anonymously, tip fabrication would require only that the officer remember the

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210. Id.
211. Id.
212. Id.
213. Id.
214. Id.
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suspect’s actual location and appearance when asked to justify the search. Further, with so few details, it might be difficult to expose an officer’s lie. An alternative method of fabrication would be to have one police officer call another with an anonymous tip; as one Justice remarked during oral argument, “it would be pretty neat for the tipster to be another policeman.”

Justice Kennedy seemed to suggest this issue by writing that “even if the officer’s testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued.” Kennedy’s apparent concern about police reliability is consistent with his suggestions as to how an anonymous tip may become reliable. If the tipster had called in the past and left accurate tips, there would possibly be some records of the police having received the earlier tips, considered them, and acted on them. Just as an officer might lie in saying that she received an anonymous phone call, so might she lie in stating that an anonymous individual drove up and gave a tip in person. However, where “an unnamed person driv[es] a car the police officer later describes” and provides a tip, the officer will have to fabricate more information—what the person looked like, what sort of car she was driving, and where the meeting occurred—thus subjecting the officer’s lie to a greater risk of exposure on cross-examination. In the same manner, police could fabricate after the search a tip that made some accurate predictions, but such a fabrication would again require a more complex lie. Finally, the use of instant caller identification or voice recording of telephone tips leaves a record that discourages police fabrication. Indeed, these devices do more to vouch for the reliability of police than the reliability of the tipster, who might not even know about them. Despite these ways in which the safeguards for tip reliability also serve as safeguard for police reliability, neither Justice Ginsburg nor Justice Kennedy explicitly raised the issue of whether police reliability was a factor to be weighed in deciding the outcome of the case.

D. Gravity of Harm and “Reasonable Suspicion”

A second significant question presented to the Court in J.L. was whether the gravity of the threatened harm is relevant to meeting the reasonable suspicion standard. In determining whether there was reasonable suspicion to justify a stop-and-frisk search on the basis of an anonymous tip, the majority and concurring opinions focused primarily on the issue of reliability. The Court specifically declined to address whether reasonable suspicion might also be determined by the gravity of the threatened harm:

216. J.L., 120 S. Ct. at 1381 (emphasis added).
217. Id.
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The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk.218

Justice Ginsburg’s statement seems to suggest that there are indeed circumstances where the threatened harm overrides the traditional requirements of reliability.

In refusing to answer the gravity-of-harm question in Florida v. J.L., the Court walked a tightrope between following its prior “probable cause” jurisprudence and allowing law enforcement greater flexibility to respond to risks of violence. On one hand, to admit that gravity of harm was a factor of reasonable suspicion would set apart the reasonable suspicion doctrine from the probable cause standard required for full-fledged searches. The probable cause requirement, derived from the Fourth Amendment’s prohibition against “unreasonable” searches and seizures, does not become less stringent even when law enforcement believes that the suspect may cause serious harm.219

On the other hand, the case of Florida v. J.L. made its way through the courts during a time of alarming gun violence in schools. Among the incidents were the April 1999 shootings at Columbine High School, mentioned by one Justice during oral argument,220 in which thirteen people were killed and twenty-three wounded before the two armed students killed themselves.221 Oral argument before the Supreme Court was held on February 29, 2000, the same day a six-year-old boy allegedly shot and killed a six-year-old classmate at Buell Elementary School in Mount Morris Township, Michigan.222

Although the Court refused to provide a clear statement on the gravity-of-harm issue, it addressed anxieties about future school shooting sprees by remarking that the decision does not prevent school administrators from searching students, based on anonymous tips, to protect the safety of other students at

218. Id. at 1380.
219. One Justice highlighted this jurisprudential problem during oral argument:
We don’t say, [in determining whether the probable cause standard has been met,] if there’s a really serious threat to the public involved you don’t need the same degree of probable cause.
We haven’t said that. . . . But if the principle is valid I don’t know why it wouldn’t apply to [the reasonable suspicion standard] as to [the probable cause standard].
J.L. transcript, supra note 215, at *6-7.
220. Id. at *38.
222. E.g., Peter Slevin and William Claiborne, First-Grader Kills Classmate, CHIC. SUN-TIMES, Mar. 1, 2000, at 28; Peggy Walsh-Sarnecki et al., First-Grade Girl Shot and Killed in Michigan School by 6-Year-Old Classmate, DETROIT FREE PRESS, Mar. 1, 2000, LEXIS, News Directory.
schools. Justice Ginsburg stated that the Court did not “hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished . . . such as schools, cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.”223 Despite the “serious threat that armed criminals pose to public safety”224 and the recent rash of school yard shooting sprees—a fact raised during oral argument but not mentioned in the opinions—the Court recognized that “an automatic firearm exception to our established reliability analysis would rove too far.... enabling any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun.”225 Overall, by remaining well within the constraints of precedent and not allowing recent public tragedies to affect its institutional role, the Court supported existing privacy rights by refusing to hold that the gravity of the threatened harm had any bearing on the calculation of “reasonable suspicion.”

VII. CONCLUSION

A superficial look at the October 1999 Term might indicate that the Court was more receptive to privacy interests than it has been in recent years. After all, three of the four cases held that an individual’s privacy interest should trump law enforcement’s interest. Flippo rejected a general crime scene exemption to the Fourth Amendment’s warrant requirement.226 Bond refused to allow law enforcement officials to search passengers’ luggage by squeezing the bags’ outsides.227 Florida v. J.L. held that an anonymous tip that simply described a person’s race, approximate age, and clothing did not justify a Terry stop-and-frisk search.228 Only Wardlow came out in favor of law enforcement, holding that unprovoked flight justified a Terry stop.229 Indeed, one popular account characterized the decisions as “a modest reversal” in the Court’s trend of favoring law enforcement, stating that these cases “suggest the court has become increasingly suspicious about some new, aggressive techniques police are using to counter drugs and gun violence.”230

However, this superficial assessment overlooks the two key elements that color the Supreme Court’s analysis of the Fourth Amendment: precedent and point of view. Viewed in this light, the Court has not retreated from its recent
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trend of favoring law enforcement.

The first of these elements is precedent. Both *Flippo*\(^ {231} \) and *Florida v. J.L.*\(^ {232} \) are very similar to prior decisions of the Court, decisions that happened to be rendered when the Court had a more expansive notion of the Fourth Amendment’s protections. In *Flippo*, the Court simply reversed a decision that “squarely conflict[ed] with *Mincey v. Arizona*,” which was a 1978 case that “rejected the contention that there is a ‘murder scene exception’” to the Fourth Amendment.\(^ {233} \) The precedent of *Mincey* was so clear that the Court decided the case per curiam, the only one of this Term’s Fourth Amendment cases to have done so. Likewise, *Florida v. J.L.* rested firmly on an established line of cases requiring indicia of reliability in a tip before police perform an investigatory stop.\(^ {234} \) The Court simply looked at the facts to determine whether this case possessed “the moderate indicia of reliability present in *White,*” and then held that it did not.\(^ {235} \) It also declined to modify its precedent, rejecting a “firearm exception”\(^ {236} \) to the rule of *White*.

The Court’s deference to precedent is well known. Perhaps the best known statement of this interest is found in *Planned Parenthood v. Casey*,\(^ {237} \) which upheld *Roe v. Wade*.\(^ {238} \) In Section III of the Court’s opinion, Justices O’Connor, Kennedy, and Souter spent fifteen pages discussing the importance of stare decisis,\(^ {239} \) concluding that “[a] decision to overrule Roe’s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court’s legitimacy, and to the Nation’s commitment to the rule of law.”\(^ {240} \) A similar tribute to stare decisis, complete with lukewarm support for the precedent being upheld, can be found in the recent *Dickerson v. United States*,\(^ {241} \) which rejected a challenge to the famed *Miranda v. Arizona*\(^ {242} \) Chief Justice Rehnquist, writing for the Court, held that Congress could not override *Miranda* with legislation\(^ {243} \) because *Miranda* announced a constitutional

\(^{231}\) Flippo v. West Virginia, 120 S. Ct. 7 (1999).


\(^{233}\) *Flippo*, 120 S. Ct. at 8.

\(^{234}\) *J.L.*, 120 S. Ct. at 1378 (citing Alabama v. White, 496 U.S. 325, 329 (1990); Adams v. Williams, 407 U.S. 143, 146-47 (1972)).

\(^{235}\) Id. at 1379.

\(^{236}\) Id.


\(^{239}\) Casey, 505 U.S. at 854-69. Though some of the joint opinion in *Casey* was not joined by a majority, Part III was joined by Justices Stevens and Blackmun and therefore is part of the opinion of the Court. Id. at 843.

\(^{240}\) Id. at 869.

\(^{241}\) Dickerson v. United States, 120 S. Ct. 2326 (2000).


Further, "[w]hether or not we would agree with Miranda’s reasoning and its resulting rule, were we deciding the issue in the first instance, the principles of stare decisis weigh heavily against overruling it now." Justice Scalia reacted to the majority’s treatment of stare decisis by writing a blistering dissent accusing the Court of engaging in intellectual dishonesty and power-grabbing; one might disagree with the strength of Justice Scalia’s feeling and still agree that Dickerson is hard to reconcile, at best, with prior Supreme Court cases characterizing Miranda as an extra-constitutional rule. Deference to precedent is the strongest, and perhaps the only, explanation for the result in Dickerson.

Thus, the Court has shown reluctance to deviate from its settled precedent even when it clearly disapproves of the substance of that precedent. It is therefore unsurprising that it would spurn challenges to fairly uncontroversial decisions such as Mincey and White. Since the Court’s institutional biases explain its apparent lean toward privacy interests in Flippo and J.L., they offer little insight into the Court’s present direction when faced with new situations.

The other two cases, Wardlow and Bond, indicate how the Court treats Fourth Amendment issues that are not closely governed by precedent: Its decisions are strongly molded by the Court’s choosing to assume one particular point of view out of a number of options. This pattern is most evident in Wardlow, which was an open question; no prior Supreme Court precedent addressed whether flight satisfied the criteria for a Terry stop. There, the Court and Justice Stevens spoke from entirely different perspectives on the issue: The Court viewed the street encounter almost solely through the eyes of the arresting officer, while Justice Stevens extensively catalogued the things

244. Dickerson, 120 S. Ct. at 2336.
245. Id.
246. Justice Scalia claimed that “a majority of the Court does not believe” that custodial interrogation without Miranda warnings violates the Constitution, id. at 2337, and only upheld Miranda to “impose its Court-made code upon the States” in a “very Cheops’ Pyramid . . . of judicial arrogance,” id. at 2348.
247. E.g., Michigan v. Tucker, 417 U.S. 433 (1974) (majority opinion by Rehnquist, J.); see also Linda Greenhouse, A Turf Battle’s Unlikely Victim, N.Y. TIMES, June 27, 2000, at A20 (noting that “Chief Justice Rehnquist’s opinion for the court . . . was notable because it placed him so strikingly against type . . . [as] one of [Miranda’s] most outspoken critics”).
250. Scholars have noted this tendency in the Court’s opinions on other subjects. For instance, one author points out that McCleskey v. Kemp, 481 U.S. 279 (1987), "review[ed] the claim of racially biased capital sentencing with no reference to the perspective of blacks, either as crime victims or as victims of discrimination"; the majority looked only at the perspectives of criminal defendants, criminal justice decision makers, law enforcement, and legislatures. Peggy C. Davis, Popular Legal Culture: Law as Microaggression, 98 YALE L.J. 1559, 1573 (1989). Davis goes on to note that while the dissent spoke powerfully from the defendant’s viewpoint, it still did not consider other victims of racial discrimination, id. at 1574-75.
251. In this regard, Wardlow is unlike Florida v. J.L., where prior cases had discussed anonymous and known tips.
that might have been going through the defendant’s mind as he fled. In *Bond* as well, the Court clearly envisioned a particular sort of encounter, which seems to have influenced its perhaps surprising decision. In talking about a person’s privacy expectation in his personal luggage, the Court thought only of the situation in the case, and, as discussed, it failed to acknowledge that traveling experiences might differ. Travel by bus, train, or plane is something that all of the Justices almost certainly have experienced; thus, they are more likely to easily imagine themselves in the place of the defendant, watching some strange person squeeze his luggage to figure out what is inside—contextual imagining that leads the Court to acknowledge the strength of people’s privacy interest in their bags. One might speculate that, as seems highly likely, the Justices making up the majority in *Wardlow* have never feared or run from the police in their lives, and thus never even think of flight as something other than “certainly suggestive” of wrongdoing. Thus, it seems that when the Court is not constrained by its institutional bias towards stare decisis, its reasoning is colored by a tendency to see the facts from a limited number of viewpoints—to the possible exclusion of recognizing the full complexity of the contextual problems it confronts.

With this analysis in mind, the October 2000 Term presents several intriguing cases. As this Article goes to press, the Court has granted certiorari to five Fourth Amendment cases, which have serious implications both in themselves and as battlegrounds for the competing interests of precedent and point of view.

For instance, the shadow of *Katz v. United States* hangs heavily over the most recent case to be granted certiorari, *United States v. Kyllo*. Like *Katz*, *Kyllo* considers whether use of a new technology—in this case, a thermal imaging device—violated an individual’s expectation of privacy. The Court of Appeals in *Kyllo* held that the defendant did not have a subjective expectation of privacy in the levels of heat emitted from his home, but that even if he had, that expectation would not have been objectively reasonable. It there-

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252. *Supra* text accompanying notes 180-182.
254. *Wardlow*, 120 S. Ct. at 676.
257. *Kyllo* was arrested for and convicted of manufacturing marijuana. Part of the evidence against him was a thermal image of his home, which showed high heat loss from one area of Kyllo’s home; the police interpreted this as indicating that Kyllo was using high intensity lights to grow marijuana indoors. *Id.* at 1043-44. The court noted that a thermal imaging device “passively records [and] act[s] much like a camera.” *Id.* at 1044.
258. *Id.* at 1046 (“Kyllo made no attempt to conceal these emissions, demonstrating a lack of concern with the heat emitted and a lack of subjective privacy expectation in the heat.”).
259. *Id.* at 1047 (“[W]e cannot conclude that this surveillance was ‘so revealing of intimate details as to raise constitutional concerns.’” (quoting Dow Chemical Co. v. United States, 476 U.S. 227, 238
fore found that the thermal image did not violate the Fourth Amendment. Judge Noonan, in dissent, claimed that the majority completely failed to put themselves in the homeowner's shoes when analyzing his subjective privacy expectation. Noonan also reached back to *Katz* to argue that this subjective expectation is reasonable: "[I]n *Katz*, the focus [was] on the phone conversation, not on . . . the vibrations actually picked up by the bug," and like phone conversations, there are many heat-generating activities that are innocent and have a reasonable expectation of privacy. Will the Supreme Court seize on the point of view espoused by the Court of Appeals' majority in order to distinguish *Katz* and favor law enforcement, or will the impulse to cleave to a seminal case prove stronger? The fact that *Katz* is not under direct attack, as *Dickerson* was, may make the desire to uphold precedent less strong; the more accurate parallel may be to *Wardlow*, where the general principle (reasonable suspicion in one, expectation of privacy in the other) meets a novel set of facts (unprovoked flight, thermal imaging) and is restricted as a result. This case will be closely watched, deservedly, to determine if the spirit of *Katz* will animate the Court's look at present-day technology.

*Atwater v. City of Lago Vista* is another case in which precedent and questions of point-of-view ought to mix interestingly. Atwater was arrested, handcuffed, and jailed for an hour because she and her children were not wearing seat belts. The arresting officer apparently had a prior history of animosity towards Atwater. A divided Court of Appeals, hearing the case en banc, held that because the arrest was based on probable cause, and because it was not "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests," the arrest did not violate the Constitution. However, neither the majority's precedents nor the dissent's are directly on point, thus making it more likely that the highly striking

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260. Id.
261. Id. at 1049 (arguing that "[t]he homeowner's expectation is directed to the privacy of the interior of his home," and heat emissions are only observable by "amplification of the senses by technology" which "defeat[s] the homeowner's expectation") (Noonan, J., dissenting).
262. Id. at 1050.
263. Judge Noonan listed as examples "the use of a sauna in a sauna room; the making of ceramics in a kiln in the basement; the hothouse cultivation of orchids, poinsettias or other plants in a domestic greenhouse." Id.
266. Id. at 244.
267. Id. at 248 (Wiener, J., dissenting).
268. Id. at 244-45.
269. *E.g.*, id. at 251 n.3 (noting that the majority relies on dicta in *Whren v. United States*, 517 U.S. 806, 818 (1996), that addressed a traffic stop only, not an arrest) (Wiener, J., dissenting); id. at 248-50 (finding that there was no legitimate government interest in arresting Atwater by applying *Terry* and cases regarding positive reasons to arrest a person).
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facts of the case may sway the Court’s analysis. Like traveling with luggage in Bond, driving is a very common experience, and the Justices may very well have either personal experience with traffic stops or the ability to imagine them, and therefore may be inclined to empathize with the defendant. 270

City of Indianapolis v. Edmond 271 is a significant case in which, unusually, precedent has already determined the specific point of view the Court takes. At issue are drug roadblocks, in which police stop cars at roadblocks, ask the drivers for driver’s licenses and registrations, look through the car windows, and have a drug-sniffing dog smell the outside of the car. 272 Here, the approach to precedent will likely determine the outcome of the case, because though precedent requires an inquiry into the “subjective intrusion—the generating of concern or even fright on the part of lawful travelers,” 273 the Court has already stepped into the traveler’s shoes and decided that the intrusiveness of roadblock stops is acceptable, 274 though not unanimously. 275

The Supreme Court can choose from two very different approaches to its jurisprudence in the Court of Appeals’ decision in Edmond. Chief Judge Posner, writing for the majority, presumed that the Supreme Court’s Fourth Amendment jurisprudence is based on the principle that reasonable searches “ordinarily must be based on individualized suspicion of wrongdoing”; 276 he concluded that the Indianapolis roadblock was unlawful because it did not fit any exceptions to this principle, including other roadblock cases. 277 Judge Easterbrook, on the other hand, argued that “[i]nterpretation of the fourth

270. For an example of empathizing with the defendant, see Justice Reynaldo Garza’s dissenting remark: “I have been a Texas lawyer for over sixty years and a Article III judge in Texas for over thirty-eight years. I think I can take judicial notice of the fact that in a regular traffic stop . . . the usual procedure . . . is to give the accused a citation.” Id. at 246.


272. Id. at 661.


274. Mich. Dep’t of State Police v. Sitz, 496 U.S. 444, 453 (1990) (upholding sobriety checkpoints because, in part, the level of intrusion is “appreciably less in the case of a checkpoint stop” than for a roving stop (quoting Martinez-Fuerte, 478 U.S. at 558)).

275. Id. at 463-466 (Stevens, J., dissenting) (arguing that because the checkpoints in Sitz were set up by surprise and almost always operated at night, they were more intrusive than the fixed border checkpoints in Martinez-Fuerte).

276. Edmond, 183 F.3d at 662 (quoting Chandler v. Miller, 520 U.S. 305, 313-14 (1997)).

277. Chief Judge Posner finds four exceptions:

The first exception, illustrated by the roadblock set up to catch a fleeing criminal, is when there is a suspect . . . but it is infeasible to avoid an indiscriminate search and seizure of other persons . . . . The second exception, illustrated by the hypothetical dynamite case, is where no specific person is under suspicion but the circumstances make it impossible to prevent a crime without an indiscriminate search. The third exception is the regulatory search, the objective of which is to protect a specific activity rather than to operate as an adjunct to general criminal law enforcement. The last exception is the prevention of illegal importation whether of persons (a power limited to the federal government) or of goods.

Id. at 665-66 (citations omitted).
amendment is not a model of intellectual consistency," and therefore "[t]o figure out how to handle a roadblock case, we must look at how the Supreme Court has handled other roadblock cases." He applied these roadblock cases to find that, under their balancing tests, the Indianapolis roadblocks are constitutional. There are a number of possible reasons why the Court might favor one of these views over the other, but since the Court has already settled the point-of-view question, the question of precedent will be dispositive.  

The two remaining cases are considered briefly. *Illinois v. McArthur* considers whether a police officer may prevent a person from re-entering his residence unsupervised while waiting for a search warrant, in order to preserve evidence inside the residence. The case offers the Court an opportunity to revisit *Segura v. United States*, an opinion that also dealt with securing an apartment while waiting for a search warrant, but that lacked a clear holding. The final Fourth Amendment case before the Court is *Ferguson v. City of Charleston*. The plaintiffs in this case challenged a state hospital program that tested pregnant women for cocaine use, without their consent or knowledge, if they were suspected of drug use; positive results were sometimes reported to law enforcement. The Fourth Circuit held that the tests were reasonable under the special needs doctrine, which recognizes that there are "special governmental needs, beyond the normal need for law enforcement" which sometimes permit warrantless searches. Unfortunately, though *Ferguson* is an important and interesting case, the special needs doctrine is somewhat outside the scope of this Article. However, a key dispute in the Court of Appeals opinion was the goal of the policy. The majority, upholding the policy, characterized it as seeking solely to improve the health of new-

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278. *Id.* at 668 (Easterbrook, J., dissenting).  
279. *Id.* at 669.  
280. As this Article was going to press, the Court held oral arguments in *Edmond*. According to one news report, "[d]uring a spirited discussion ... the justices also wrestled with the fact that none of their previous roadblock decisions precisely corresponds with the situation in this case." Charles Lane, *Court Hears Argument Over Anti-Drug Tactics*, WASH. POST, Oct. 4, 2000, at A19.  
282. *Id.* at 95.  
284. Part IV of the opinion contained the holding ("We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." *Id.* at 810), but was joined by only Justice O'Connor.  
286. *Id.* at 474-75. The plaintiffs had also challenged the program on Title VI, privacy, and state tort grounds, all of which were rejected. *Id.* at 476. Certiorari was sought only on the Fourth Amendment issue. Brief for Petitioners at 19 n.14, *Ferguson v. City of Charleston* (U.S. 2000) (No. 99-936).  
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...the dissent argued that the policy-makers were primarily focused on law enforcement and thus the special needs doctrine did not support the searches. The Court’s assumption of some or all of the parties’ points-of-view is likely to influence its views on the special needs doctrine’s application, and as already seen, the Court has tended to side with the government recently. Being a pregnant cocaine user, unlike being a traveler with luggage or, perhaps, a car driver, seems less likely to be an exception to this trend.

What does the future hold for the Fourth Amendment? If the October 1999 Term is any indication, quite simply, it holds more of the same. Despite the superficial indications, the Rehnquist Court continues to weigh law enforcement interests more heavily than privacy interests, except when precedent or a moment of personal empathy with the defendant constraints it. However, since the Justices appear to draw on their own experiences when choosing which shoes to put themselves in, these moments of personal empathy—of truly understanding the context of a person’s privacy expectation and actions—are fairly rare. Thus, unless the Court’s personnel or temperament changes, it will likely continue to restrict the scope of Fourth Amendment freedoms.

288. Id. at 475 n.3 ("[T]he record is abundantly clear that [the policy-makers] were motivated by a desire to protect the health of children born" at the hospital.).

289. Id. at 484 ("[I]t nevertheless is clear from the record that an initial and continuing focus of the policy was on the arrest and prosecution of drug-abusing mothers. . .") (Blake, J., dissenting).