

**CRIMINAL PROCEDURE:  
CONSTITUTIONAL CONSTRAINTS  
UPON  
INVESTIGATION AND PROOF**

**(SIXTH EDITION)  
2011 SUPPLEMENT**

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1940-2005**

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# JUSTICES OF THE UNITED STATES SUPREME COURT<sup>1</sup>

	(1) <sup>2</sup>	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)
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1960			Goldberg (1962-65) <sup>4</sup>					White (1962-93)	
1970	Burger (1969-86)		Fortas (1965-69)		Marshall (1967-91)				
1980		Powell (1972-87)	Blackmun (1970-94)	Stevens (1975-2010)			Rehnquist (1972-86)		O'Connor (1981-2006)
1990	Rehnquist (1986-2005)	Kennedy (1988-present)				Scalia (1986-present)			
2000			Breyer (1994-present)		Thomas (1991-present)		Souter (1990-2009)	Ginsburg (1993-present)	
	Roberts (2005-present)			Kagan (2010-present)			Sotomayor (2009-present)		Alito (2006-present)

1. Starting with membership as of 1958
2. Chief Justice
3. Year of Appointment
4. Years on Court

## CHAPTER FOUR

### INSERT on page 162, after note (3):

(4 ) Suppose that state law authorizes the issuance of a citation for an offense but forbids the arrest of an offender. Are an arrest and a search incident to arrest for that offense unreasonable under the Fourth Amendment? In *Virginia v. Moore*, 553 U.S. 164, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008), the issue was “whether a police officer violates the Fourth Amendment by making an arrest based on probable cause but prohibited by state law.” Officers had arrested Moore for driving with a suspended license, a misdemeanor. Upon searching him, they found crack cocaine and cash on his person. Under state law, driving with a suspended license was “not an arrestable offense except as to those who ‘fail or refuse to discontinue’ the violation, and those whom the officer reasonably believes to be likely to disregard a summons, or likely to harm themselves or others.” Moore moved to suppress the narcotics, claiming that because the arrest was not valid, the Fourth Amendment required suppression. A trial judge denied the motion, convicted Moore of possession of cocaine with intent to distribute, and sentenced him to a 5-year prison term. The Virginia Supreme Court reversed the conviction, reasoning “that since the arresting officers should have issued Moore a citation under state law, and the Fourth Amendment does not permit search incident to citation, the arrest search violated the Fourth Amendment.”

The Supreme Court reversed in an 8-1 ruling. The Court found no historical support for Moore’s claim that the constitutionality of an arrest depends on its validity under state law. “[T]raditional standards of reasonableness” also furnished no support for Moore’s contention. The balance of relevant interests had already led the Court to conclude that probable cause to believe that a person has committed even a minor offense in an officer’s presence renders an arrest constitutionally reasonable. Other precedents also “counsel[ed] against changing th[e] calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires.” In general, “when States go above the Fourth Amendment minimum, the Constitution’s protections concerning search and seizure remain the same.”

According to the Court, an arrest based on probable cause serves interests sufficient to justify the seizure whether or not the state has chosen to forego the option of arrest. In addition, the interest in readily administrable rules—*i.e.*, “the need for a bright-line constitutional standard”—supports a refusal to tie the constitutionality of an arrest to the dictates of state law. Finally, linking reasonableness to state law would cause Fourth Amendment protections to vary based on the time and place of an arrest, an undesirable state of affairs. For all these reasons, “[w]hen officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest.” An arrest based on probable cause is a “lawful arrest,” and a search of an arrestee incident to a lawful arrest is constitutionally reasonable. Consequently, the search of Moore’s person did not violate the Fourth Amendment, and the narcotics found on his person were not subject to suppression.

INSERT on page 170, after note (4):

ARIZONA v. GANT

556 U.S. \_\_\_\_, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009)

JUSTICE STEVENS delivered the opinion of the Court.

. . . .

I

On August 25, 1999, acting on an anonymous tip that the residence at 2524 North Walnut Avenue was being used to sell drugs, Tucson police officers Griffith and Reed knocked on the front door and asked to speak to the owner. Gant answered the door and, after identifying himself, stated that he expected the owner to return later. The officers left the residence and conducted a records check, which revealed that Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license.

When the officers returned to the house that evening, they found a man near the back of the house and a woman in a car parked in front of it. After a third officer arrived, they arrested the man for providing a false name and the woman for possessing drug paraphernalia. Both arrestees were handcuffed and secured in separate patrol cars when Gant arrived. The officers recognized his car as it entered the driveway, and Officer Griffith confirmed that Gant was the driver by shining a flashlight into the car as it drove by him. Gant parked at the end of the driveway, got out of his car, and shut the door. Griffith, who was about 30 feet away, called to Gant, and they approached each other, meeting 10-to-12 feet from Gant's car. Griffith immediately arrested Gant and handcuffed him.

Because the other arrestees were secured in the only patrol cars at the scene, Griffith called for backup. When two more officers arrived, they locked Gant in the backseat of their vehicle. After Gant had been handcuffed and placed in the back of a patrol car, two officers searched his car: One of them found a gun, and the other discovered a bag of cocaine in the pocket of a jacket on the backseat.

Gant was charged with two offenses—possession of a narcotic drug for sale and possession of drug paraphernalia (*i.e.*, the plastic bag in which the cocaine was found). He moved to suppress the evidence seized from his car on the ground that the warrantless search violated the Fourth Amendment. . . .

The trial court . . . denied the motion to suppress. Relying on the fact that the police saw Gant commit the crime of driving without a license and apprehended him only shortly after he exited his car, the court held that the search was permissible as a search incident to

arrest. A jury found Gant guilty on both drug counts, and he was sentenced to a 3-year term of imprisonment.

After protracted state-court proceedings, the Arizona Supreme Court concluded that the search of Gant’s car was unreasonable within the meaning of the Fourth Amendment. . . . Relying on . . . *Chimel* [*v. California*], the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and evidence preservation. 216 Ariz., at 4, 162 P.3d, at 643. When “the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer,” the court concluded, a “warrantless search of the arrestee’s car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.” *Id.*, at 5, 162 P.3d, at 644. . . .

The dissenting justices would have upheld the search of Gant’s car based on their view that “the validity of a . . . search [under *New York v. Belton*]. . . clearly does not depend on the presence of the *Chimel* rationales in a particular case.” *Id.*, at 8, 162 P.3d, at 647. . .

The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision’s clarity and its fidelity to Fourth Amendment principles. We therefore granted the State’s petition for certiorari.

## II

Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.” *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted). Among the exceptions to the warrant requirement is a search incident to a lawful arrest. The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.

In *Chimel*, we held that a search incident to arrest may only include “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” [395 U.S. 752, 763, 89 S.Ct. 2034 (1969)]. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.

In *Belton*, we considered *Chimel*'s application to the automobile context. A lone police officer in that case stopped a speeding car in which Belton was one of four occupants. While asking for the driver's license and registration, the officer smelled burnt marijuana and observed an envelope on the car floor marked "Supergold"—a name he associated with marijuana. Thus having probable cause to believe the occupants had committed a drug offense, the officer ordered them out of the vehicle, placed them under arrest, and patted them down. Without handcuffing the arrestees,<sup>1</sup> the officer "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other" and searched the vehicle, including the pocket of a jacket on the backseat, in which he found cocaine. [453 U.S. 454, 456, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981)].

....

In its brief [in *Belton*], the State argued that the Court of Appeals erred in concluding that the jacket was under the officer's exclusive control. Focusing on the number of arrestees and their proximity to the vehicle, the State asserted that it was reasonable for the officer to believe the arrestees could have accessed the vehicle and its contents, making the search permissible under *Chimel*. Brief in No. 80-328, at 7-8. The United States, as *amicus curiae* in support of the State, argued for a more permissive standard, but it maintained that any search incident to arrest must be "substantially contemporaneous" with the arrest—a requirement it deemed "satisfied if the search occurs during the period in which the arrest is being consummated and before the situation has so stabilized that it could be said that the arrest was completed." Brief for United States as *Amicus Curiae* in *New York v. Belton*, O.T.1980, No. 80-328, p. 14. There was no suggestion by the parties or *amici* that *Chimel* authorizes a vehicle search incident to arrest when there is no realistic possibility that an arrestee could access his vehicle.

After considering these arguments, we held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. *Belton*, 453 U.S., at 460, 101 S.Ct. 2860 (footnote omitted). That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.'" *Ibid*.

....

### III

. . . *Belton* . . . has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the

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1. The officer was unable to handcuff the occupants because he had only one set of handcuffs. See Brief for Petitioner in *New York v. Belton*, O.T.1980, No. 80-328, p. 3 (hereinafter Brief in No. 80-328).

vehicle at the time of the search. This reading may be attributable to Justice Brennan's dissent in *Belton*, in which he characterized the Court's holding as resting on the "fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car." 453 U.S., at 466, 101 S.Ct. 2860. Under the majority's approach, he argued, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car" before conducting the search. *Id.*, at 468, 101 S.Ct. 2860.

Since we decided *Belton*, Courts of Appeals have given different answers to the question whether a vehicle must be within an arrestee's reach to justify a vehicle search incident to arrest, but Justice Brennan's reading of the Court's opinion has predominated. . . . JUSTICE SCALIA has . . . noted that, although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in "this precise factual scenario . . . are legion." [*Thornton v. United States*, 541 U.S. 615, 628, 124 S.Ct. 2127 (2004)] (opinion concurring in judgment) (collecting cases). Indeed, some courts have upheld searches under *Belton* "even when . . . the handcuffed arrestee has already left the scene." 541 U.S., at 628, 124 S.Ct. 2127 (same).

Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search. To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it "in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at 460, n. 3, 101 S.Ct. 2860. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.<sup>4</sup>

Although it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Thornton*, 541 U.S., at 632, 124 S.Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 324, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001); *Knowles v. Iowa*, 525

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4. Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. Cf. 3 W. LaFave, *Search and Seizure* §7.1(c), p. 525 (4th ed. 2004) (hereinafter LaFave) (noting that the availability of protective measures "ensur[es] the nonexistence of circumstances in which the arrestee's 'control' of the car is in doubt"). But in such a case a search incident to arrest is reasonable under the Fourth Amendment.

U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998). But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case. Unlike in *Belton*, which involved a single officer confronted with four unsecured arrestees, the five officers in this case outnumbered the three arrestees, all of whom had been handcuffed and secured in separate patrol cars before the officers searched Gant's car. Under those circumstances, Gant clearly was not within reaching distance of his car at the time of the search. An evidentiary basis for the search was also lacking in this case. Whereas *Belton* and *Thornton* were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant's car. Cf. *Knowles*, 525 U.S., at 118, 119 S.Ct. 484. Because police could not reasonably have believed either that Gant could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search in this case was unreasonable.

#### IV

. . . . The State argues that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle.

For several reasons, we reject the State's argument. First, the State seriously undervalues the privacy interests at stake. Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection, see *Knowles*, 525 U.S., at 117, 119 S.Ct. 484. It is particularly significant that *Belton* searches authorize police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space. A rule that gives police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

At the same time as it undervalues these privacy concerns, the State exaggerates the clarity that its reading of *Belton* provides. Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a "bright line." See 3 LaFave, § 7.1(c),

at 514-524.

Contrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests. Under our view, *Belton* and *Thornton* permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is "dangerous" and might access the vehicle to "gain immediate control of weapons." *Id.*, at 1049, 103 S.Ct. 3469 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820-821, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. Unlike the searches permitted by JUSTICE SCALIA's opinion concurring in the judgment in *Thornton*, which we conclude today are reasonable for purposes of the Fourth Amendment, *Ross* allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. Cf. *Maryland v. Buie*, 494 U.S. 325, 334, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding).

These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis. For these reasons, we are unpersuaded by the State's arguments that a broad reading of *Belton* would meaningfully further law enforcement interests and justify a substantial intrusion on individuals' privacy.

V

Our dissenting colleagues argue that the doctrine of *stare decisis* requires adherence to a broad reading of *Belton* even though the justifications for searching a vehicle incident to arrest are in most cases absent. The doctrine of *stare decisis* is of course "essential to the respect accorded to the judgments of the Court and to the stability of the law," but it does not compel us to follow a past decision when its rationale no longer withstands "careful analysis." *Lawrence v. Texas*, 539 U.S. 558, 577, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. And we would be particularly loath to uphold an

unconstitutional result in a case that is so easily distinguished from the decisions that arguably compel it. The safety and evidentiary interests that supported the search in *Belton* simply are not present in this case. Indeed, it is hard to imagine two cases that are factually more distinct, as *Belton* involved one officer confronted by four unsecured arrestees suspected of committing a drug offense and this case involves several officers confronted with a securely detained arrestee apprehended for driving with a suspended license. This case is also distinguishable from *Thornton*, in which the petitioner was arrested for a drug offense. . . .

We do not agree with the contention in JUSTICE ALITO’S dissent (hereinafter dissent) that consideration of police reliance interests requires a different result. Although it appears that the State’s reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the *Chimel* exception. Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State’s version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. If it is clear that a practice is unlawful, individuals’ interest in its discontinuance clearly outweighs any law enforcement “entitlement” to its persistence. . . .

The dissent also ignores the checkered history of the search-incident-to-arrest exception. [The Court then recounted the vacillation in its own interpretation of the breadth of the exception.] . . . Notably, none of the dissenters in *Chimel* or the cases that preceded it argued that law enforcement reliance interests outweighed the interest in protecting individual constitutional rights so as to warrant fidelity to an unjustifiable rule.

The experience of the 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that decision is unfounded. We now know that articles inside the passenger compartment are rarely “within ‘the area into which an arrestee might reach,’” 453 U.S., at 460, 101 S.Ct. 2860, and blind adherence to *Belton*’s faulty assumption would authorize myriad unconstitutional searches. The doctrine of *stare decisis* does not require us to approve routine constitutional violations.

## VI

Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. The Arizona Supreme Court correctly held that this case involved an unreasonable search. Accordingly, the judgment of the State Supreme Court is affirmed.

*It is so ordered.*

JUSTICE SCALIA, concurring.

. . . . When an arrest is made in connection with a roadside stop, police virtually always have a less intrusive and more effective means of ensuring their safety [than a search of the vehicle]—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car.

Law enforcement officers face a risk of being shot whenever they pull a car over. But that risk is at its height at the time of the initial confrontation; and it is *not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car. I observed in *Thornton* that the government had failed to provide a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle, 541 U.S., at 626, 124 S.Ct. 2127; Arizona and its *amici* have not remedied that significant deficiency in the present case.

. . . .

JUSTICE STEVENS acknowledges that an officer-safety rationale cannot justify all vehicle searches incident to arrest, but asserts that that is not the rule *Belton* and *Thornton* adopted. (. . . I read those cases differently). JUSTICE STEVENS would therefore retain the application of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), in the car-search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle so long as the “arrestee is within reaching distance of the passenger compartment at the time of the search.” *Ante*, at \_\_\_\_\_. I believe that this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least where dangerous suspects are not involved) in order to conduct a vehicle search. In my view we should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases. I would hold that a vehicle search incident to arrest is *ipso facto* “reasonable” only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred. Because respondent was arrested for driving without a license (a crime for which no evidence could be expected to be found in the vehicle), I would hold in the present case that the search was unlawful.

JUSTICE ALITO insists that the Court must demand a good reason for abandoning prior precedent. That is true enough, but it seems to me ample reason that the precedent was badly reasoned and produces erroneous (in this case unconstitutional) results. . . .

JUSTICE ALITO argues that there is no reason to adopt a rule limiting

automobile-arrest searches to those cases where the search's object is evidence of the crime of arrest. I disagree. This formulation of officers' authority both preserves the outcomes of our prior cases and tethers the scope and rationale of the doctrine to the triggering event. *Belton*, by contrast, allowed searches precisely when its exigency-based rationale was least applicable: The fact of the arrest in the automobile context makes searches on exigency grounds *less* reasonable, not more. . . .

No other Justice, however, shares my view that application of *Chimel* in this context should be entirely abandoned. It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by JUSTICE STEVENS. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

JUSTICE BREYER, dissenting.

I agree with JUSTICE ALITO that *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), is best read as setting forth a bright-line rule that permits a warrantless search of the passenger compartment of an automobile incident to the lawful arrest of an occupant—regardless of the danger the arrested individual in fact poses. I also agree with JUSTICE STEVENS, however, that the rule can produce results divorced from its underlying Fourth Amendment rationale. For that reason I would look for a better rule—were the question before us one of first impression.

The matter, however, is not one of first impression, and that fact makes a substantial difference. The *Belton* rule has been followed not only by this Court in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004), but also by numerous other courts. Principles of *stare decisis* must apply, and those who wish this Court to change a well-established legal precedent—where, as here, there has been considerable reliance on the legal rule in question—bear a heavy burden. I have not found that burden met. Nor do I believe that the other considerations ordinarily relevant when determining whether to overrule a case are satisfied. I consequently join JUSTICE ALITO's dissenting opinion with the exception of Part II-E.

JUSTICE ALITO, with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join, and with whom JUSTICE BREYER joins except as to Part II-E, dissenting.

Twenty-eight years ago, in *New York v. Belton*, 453 U.S. 454, 460, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981), this Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” (Footnote omitted.) Five years ago, in *Thornton v. United States*, 541 U.S. 615, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)—a

case involving a situation not materially distinguishable from the situation here—the Court not only reaffirmed but extended the holding of *Belton*, making it applicable to recent occupants. . . .

To take the place of the overruled precedents, the Court adopts a new two-part rule under which a police officer who arrests a vehicle occupant or recent occupant may search the passenger compartment if (1) the arrestee is within reaching distance of the vehicle at the time of the search or (2) the officer has reason to believe that the vehicle contains evidence of the offense of arrest. *Ante*, at \_\_\_\_\_. The first part of this new rule may endanger arresting officers . . . . The second part of the new rule is taken from JUSTICE SCALIA’S separate opinion in *Thornton* without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges for some time to come. The Court’s . . . reasoning undermines *Chimel*. I would follow *Belton*, and I therefore respectfully dissent.

## I

Although the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so.

In *Belton*, . . . [t]he Court acknowledged that articles in the passenger compartment of a car are not always within an arrestee’s reach, but “[i]n order to establish the workable rule this category of cases requires,” the Court adopted a rule that categorically permits the search of a car’s passenger compartment incident to the lawful arrest of an occupant. 453 U.S., at 460, 101 S.Ct. 2860.

The precise holding in *Belton* could not be clearer. The Court stated unequivocally: “[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” *Ibid.* (footnote omitted).

Despite this explicit statement, the opinion of the Court in the present case curiously suggests that *Belton* may reasonably be read as adopting a holding that is narrower than the one explicitly set out in the *Belton* opinion, namely, that an officer arresting a vehicle occupant may search the passenger compartment “when the passenger compartment is within an arrestee’s reaching distance.” *Ante*, at \_\_\_\_\_, \_\_\_\_\_ (emphasis in original). . . .

. . . . In *Thornton*, the Court recognized the scope of *Belton*’s holding. See 541 U.S., at 620, 124 S.Ct. 2127. . . . This “bright-line rule” has now been interred.

## II

Because the Court has substantially overruled *Belton* and *Thornton*, the Court must explain why its departure from the usual rule of *stare decisis* is justified. . . . [T]he Court

has said that a constitutional precedent should be followed unless there is a “special justification” for its abandonment. *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). Relevant factors identified in prior cases include whether the precedent has engendered reliance, whether there has been an important change in circumstances in the outside world, whether the precedent has proved to be unworkable, whether the precedent has been undermined by later decisions, and whether the decision was badly reasoned. These factors weigh in favor of retaining the rule established in *Belton*.

A

*Reliance.* . . . [T]he Court has recognized that reliance by law enforcement officers is . . . entitled to weight. . . .

. . . . The *Belton* rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent. It is likely that, on the very day when this opinion is announced, numerous vehicle searches will be conducted in good faith by police officers who were taught the *Belton* rule.

. . . . The Court states that “[w]e have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice,” *ante*, at \_\_\_\_, but . . . cites no authority for the proposition that *stare decisis* may be disregarded or provides only lesser protection when the precedent that is challenged is one that sustained the constitutionality of a law enforcement practice.

. . . .

B

*Changed circumstances.* Abandonment of the *Belton* rule cannot be justified on the ground that the dangers surrounding the arrest of a vehicle occupant are different today than they were 28 years ago. The Court claims that “[w]e now know that articles inside the passenger compartment are rarely ‘within “the area into which an arrestee might reach,”” *ante*, at \_\_\_\_, but surely it was well known in 1981 that a person who is taken from a vehicle, handcuffed, and placed in the back of a patrol car is unlikely to make it back into his own car to retrieve a weapon or destroy evidence.

C

*Workability.* The *Belton* rule has not proved to be unworkable. On the contrary, the rule was adopted for the express purpose of providing a test that would be relatively easy for police officers and judges to apply. The Court correctly notes that even the *Belton* rule is not perfectly clear in all situations. Specifically, it is sometimes debatable whether a search is or is not contemporaneous with an arrest, but that problem is small in comparison with the

problems that the Court's new two-part rule will produce.

The first part of the Court's new rule—which permits the search of a vehicle's passenger compartment if it is within an arrestee's reach at the time of the search—reintroduces the same sort of case-by-case, fact-specific decisionmaking that the *Belton* rule was adopted to avoid. As the situation in *Belton* illustrated, there are cases in which it is unclear whether an arrestee could retrieve a weapon or evidence in the passenger compartment of a car.

Even more serious problems will also result from the second part of the Court's new rule, which requires officers making roadside arrests to determine whether there is reason to believe that the vehicle contains evidence of the crime of arrest. What this rule permits in a variety of situations is entirely unclear.

#### D

*Consistency with later cases.* The *Belton* bright-line rule has not been undermined by subsequent cases. On the contrary, that rule was reaffirmed and extended just five years ago in *Thornton*.

#### E

*Bad reasoning.* The Court is harshly critical of *Belton*'s reasoning, but the problem that the Court perceives cannot be remedied simply by overruling *Belton*. *Belton* represented only a modest—and quite defensible—extension of *Chimel*, as I understand that decision.

....

Unfortunately, *Chimel* did not say whether “the area from within which [an arrestee] might gain possession of a weapon or destructible evidence” is to be measured at the time of the arrest or at the time of the search, but unless the *Chimel* rule was meant to be a specialty rule, applicable to only a few unusual cases, the Court must have intended for this area to be measured at the time of arrest.

This is so because the Court can hardly have failed to appreciate the following two facts. First, in the great majority of cases, an officer making an arrest is able to handcuff the arrestee and remove him to a secure place before conducting a search incident to the arrest. Second, because it is safer for an arresting officer to secure an arrestee before searching, it is likely that this is what arresting officers do in the great majority of cases. (And it appears, not surprisingly, that this is in fact the prevailing practice.) Thus, if the area within an arrestee's reach were assessed, not at the time of arrest, but at the time of the search, the *Chimel* rule would rarely come into play.

Moreover, if the applicability of the *Chimel* rule turned on whether an arresting

officer chooses to secure an arrestee prior to conducting a search, rather than searching first and securing the arrestee later, the rule would “create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer.” *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (CADDC 1996). .

...

I do not think that this is what the *Chimel* Court intended. Handcuffs were in use in 1969. The ability of arresting officers to secure arrestees before conducting a search—and their incentive to do so—are facts that can hardly have escaped the Court’s attention. I therefore believe that the *Chimel* Court intended that its new rule apply in cases in which the arrestee is handcuffed before the search is conducted.

The *Belton* Court, in my view, proceeded on the basis of this interpretation of *Chimel*. Again speaking through Justice Stewart, the *Belton* Court reasoned that articles in the passenger compartment of a car are “generally, even if not inevitably” within an arrestee’s reach. 453 U.S., at 460, 101 S.Ct. 2860. This is undoubtedly true at the time of the arrest of a person who is seated in a car but plainly not true when the person has been removed from the car and placed in handcuffs. Accordingly, the *Belton* Court must have proceeded on the assumption that the *Chimel* rule was to be applied at the time of arrest. And that is why the *Belton* Court was able to say that its decision “in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.” 453 U.S., at 460, n. 3, 101 S.Ct. 2860. Viewing *Chimel* as having focused on the time of arrest, *Belton*’s only new step was to eliminate the need to decide on a case-by-case basis whether a particular person seated in a car actually could have reached the part of the passenger compartment where a weapon or evidence was hidden. For this reason, if we are going to reexamine *Belton*, we should also reexamine the reasoning in *Chimel* on which *Belton* rests.

## F

The Court, however, does not reexamine *Chimel* and thus leaves the law relating to searches incident to arrest in a confused and unstable state. The first part of the Court’s new two-part rule—which permits an arresting officer to search the area within an arrestee’s reach at the time of the search—applies, at least for now, only to vehicle occupants and recent occupants, but there is no logical reason why the same rule should not apply to all arrestees.

The second part of the Court’s new rule, which the Court takes uncritically from JUSTICE SCALIA’S separate opinion in *Thornton*, raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search “reason to believe” rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest? It is true that an arrestee’s vehicle is probably more likely to contain evidence of the crime of arrest than of some other crime, but if reason-to-believe is the governing standard for an evidence-gathering search

incident to arrest, it is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime other than the crime of arrest.

Nor is it easy to see why an evidence-gathering search incident to arrest should be restricted to the passenger compartment. The *Belton* rule was limited in this way because the passenger compartment was considered to be the area that vehicle occupants can generally reach, but since the second part of the new rule is not based on officer safety or the preservation of evidence, the ground for this limitation is obscure.<sup>2</sup>

### III

. . . . I would . . . leave any reexamination of our prior precedents for another day, if such a reexamination is to be undertaken at all. In this case, I would simply apply *Belton* and reverse the judgment below.

---

2. I do not understand the Court's decision to reach the following situations. First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. The Court's decision in this case does not address the question whether in such a situation a search of the passenger compartment may be justified on the ground that the occupants who are not arrested could gain access to the car and retrieve a weapon or destroy evidence. Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene. The decision in this case, as I understand it, does not address that situation either.

**INSERT on page 196, after note (4):**

(5) In *Michigan v. Fisher*, 558 U.S. \_\_\_\_, 130 S.Ct. 546 (2009), officers who were responding “to a complaint of a disturbance” were directed “to a residence where a man was ‘going crazy.’” They “found a household in considerable chaos.” A pickup truck, fenceposts, and windows were damaged, and there was blood on the truck, on one of the doors to the house, and on clothing inside the house. Officers could see “Fisher, inside the house, screaming and throwing things.” He did not respond to their knock. Upon seeing a cut on his hand, they asked if “he needed medical attention,” but he “ignored these questions and demanded, with accompanying profanity, that the officers go to get a search warrant.” One officer “pushed the front door partway open and ventured” inside, but when he could see “Fisher pointing a long gun at him,” he retreated. Fisher was charged with “assault with a dangerous weapon and possession of a firearm during the commission of a felony.” The trial court granted his motion to suppress the officer’s “statement that Fisher pointed a rifle at him,” evidence that was allegedly the product of the home entry. The Michigan Court of Appeals affirmed the ruling.

In a *per curiam* opinion joined by seven Justices, the Supreme Court reversed, concluding that the appellate court’s decision was “contrary to” *Brigham City v. Stuart*. According to the Court, *Brigham City* had held that “‘the need to assist persons who are seriously injured or threatened with such injury’” was an “exigency” that justified a warrantless home entry. Officers may enter a home to provide assistance to an occupant who is injured or to prevent an imminent injury, and their authority “does not depend on [their] subjective intent or the seriousness of any crime” being investigated. It exists when there is “‘an objectively reasonable basis for believing,’ that ‘a person within [the house] is in need of immediate aid.’” The “emergency aid exception” justified the entry in *Fisher*. Officers who “were responding to a report of a disturbance . . . encountered a tumultuous situation in the house” after finding “signs of a recent injury . . . outside.” They witnessed “violent behavior inside” the home—“Fisher screaming and throwing things”—and it was “reasonable to believe that [his] projectiles might have a human target . . . or that [he] would hurt himself in the course of his rage.” Contrary to the court of appeals’s reasoning, the officers did “not need ironclad proof of ‘a likely serious, life-threatening’ injury.” The lower court erred by replacing the requisite “objective inquiry into appearances with [a] hindsight determination that there was in fact no emergency.” Officers could enter under the “emergency aid exception” because “it was reasonable to believe that Fisher had hurt himself (albeit nonfatally) and needed treatment that in his rage he was unable to provide, or that Fisher was about to hurt, or had already hurt, someone else.”

**INSERT on page 199, after Note (1):**

(1a) The question in *Kentucky v. King*, 563 U.S. \_\_\_\_, 131 S.Ct. 1849, \_\_\_\_ L.Ed.2d \_\_\_\_ (2011), was whether the exigent circumstances exception to the search warrant rule “applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence.” More generally, the issue was whether there are circumstances in which officers may not rely on an exigency generated by their own conduct to justify the warrantless entry of a home. In *King*, officers “smelled marijuana smoke emanating from [an] apartment.” When they “banged” loudly on the door of the apartment and announced that they were the police, they immediately heard “‘people inside moving,’ and ‘[i]t sounded as [though] things were being moved inside the apartment.’” These sounds “led the officers to believe that drug-related evidence was about to be destroyed.” After the officers announced that they were going to enter, one officer “kicked in the door.” In the front room, the officers found three people, including “a guest who was smoking marijuana.” While searching the apartment, they discovered and seized contraband narcotics, “cash, and drug paraphernalia.” The trial court held that the exigent circumstances exception applied, and the accused entered a conditional guilty plea. The Kentucky Supreme Court reversed, assuming that possible evidence destruction did give rise to an exigency, but holding that the exigency “could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence.”

In an opinion joined by eight members of the Court, Justice Alito first described the exigent circumstances doctrine. He then noted that lower courts had “developed an exception to the exigent circumstances rule, the so-called ‘police-created exigency’ doctrine,” which precludes a warrantless entry when officers have “‘created’ or ‘manufactured’” the circumstances that necessitate immediate action. In the majority’s view, the tests promulgated by lower courts—each of which required “more than simple causation”—were constitutionally defective. One standard precluded reliance on exigencies arising in response to deliberate conduct that officers employed in bad faith to circumvent the need for a warrant. This “subjective approach” was “fundamentally inconsistent with [the Court’s] Fourth Amendment jurisprudence,” which generally prescribes reliance on “objective factors, rather than subjective intent.” Another approach barred a warrantless entry based on an exigency that was a “reasonably foreseeable” consequence of officers’ tactics. This standard was inconsistent with precedent and “would create unacceptable and unwarranted difficulties for . . . officers . . . [and] judges.” A third test precluded application of the exigency exception when officers have probable cause to search, but choose to knock on the door and speak to an occupant or to obtain consent rather than applying for a search warrant. The Justices believed that this standard would “unjustifiably interfere[] with legitimate law enforcement strategies” which for “many entirely proper reasons” may lead officers not to secure warrants as soon they have “the bare minimum of evidence needed to establish probable cause.” Another approach, which suggested that officers improperly generate an exigency if their methods are “‘contrary to standard or good law enforcement practices (or to the policies or practices of their jurisdictions),’” failed to furnish adequate

guidance “on matters that are the province of . . . law enforcement agencies.” Finally, the criterion proposed by the defendant—that “officers impermissibly create an exigency when they ‘engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable’”—was “nebulous and impractical,” introducing “subtleties” that would make it “extremely difficult for police officers” or judges to determine when conduct was constitutional.

According to the majority, the correct constitutional standard followed from the “principle” that “warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. . . . [T]he exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where . . . the police [do] not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.” In other words, “the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment.” (In a footnote, the Court appeared to qualify the “threatened violation of the Fourth Amendment” alternative, asserting that “[t]here is a strong argument . . . that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted.” Because “no such actual threat was made” in *King*, the Court had “no need to reach that question.”)

The majority opined that its approach “provides ample protection for” Fourth Amendment “privacy rights.” When officers knock on doors without warrants, they “do no more than any private citizen may do.” Moreover, an “occupant has no obligation to open the door or to speak,” and “even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.” Those “who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.”

Like the Kentucky Supreme Court, the Justices did “not decide whether exigent circumstances existed” in *King*, noting that the state court could “better address[]” that issue on remand. Assuming the existence of an exigency, the Court could find “no evidence that the officers either violated the Fourth Amendment or threatened to do so prior” to entering King’s apartment. Banging loudly on the door and announcing that they were the police “was entirely consistent with the Fourth Amendment.” There was no evidence that the officers voiced an intent to break down the door if it was not opened voluntarily and “no evidence of a ‘demand’ of any sort, much less a demand that amount[ed] to a threat to violate the Fourth Amendment.” If such evidence did exist, the state courts could consider it on remand. Based on the record before it, the Court held that the assumed exigency did justify the warrantless entry.

Justice Ginsburg, the sole dissenter, asserted that homes were entitled to more protection. In her view, officers “who could pause to gain the approval of a neutral magistrate” should not be able to “dispense with the need to get a warrant by themselves creating exigent circumstances[.]” She “would not allow an expedient knock to override the warrant requirement.” Because “securing a warrant was entirely feasible,” she saw “no reason to contract the Fourth Amendment’s dominion.”

## CHAPTER FIVE

### INSERT on page 414, after note (2):

(3) In *Arizona v. Johnson*, 555 U.S. \_\_\_\_, 129 S.Ct. 781, 172 L.Ed.2d 694 (2009), officers stopped a car because the vehicle registration had been suspended, a civil infraction that justified a citation. Johnson was a passenger in the rear seat. An officer asked him to get out of the car after observing suspicious behavior and receiving suspicious responses to her inquiries. Because the officer believed that Johnson might have a weapon, she patted him down and found a gun. A trial judge denied a motion to suppress the gun and a jury convicted Johnson of unlawful possession of a firearm. The Arizona Court of Appeals reversed, deeming the patdown unlawful because the encounter had become “consensual.” According to that court, an officer may not perform a weapons frisk during a consensual encounter even if she has reason to suspect the individual is armed and dangerous.

A unanimous Supreme Court reversed. The Court asserted that to frisk an individual who is the subject of a lawful investigatory stop, a “police officer must reasonably suspect that the person stopped is armed and dangerous.” An officer who properly stops a vehicle for a traffic infraction seizes the vehicle and all of the occupants. The seizure of a passenger is lawful even though there is no additional reason to believe that he or she is “involved in criminal activity.” Previous decisions, in recognition of the fact that traffic stops are particularly dangerous encounters, had authorized officers to automatically remove both drivers and passengers from vehicles. “To justify a patdown of [either a] driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”

According to the Court, after officers stop a vehicle to investigate a traffic violation, “[t]he temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop. Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.” In addition, “[a]n officer’s inquiries into matters unrelated to the justification for the traffic stop . . . do not convert the encounter into something other than a lawful seizure, so long as those inquiries do not measurably extend the duration of the stop.”

In this case, the encounter with Johnson had *not* become consensual because “[n]othing . . . would have conveyed to [him] that, prior to the frisk, the traffic stop had ended or that he was otherwise free” to leave. The lower court had assumed that the officer “had reasonable suspicion that Johnson was armed and dangerous.” In these circumstances, the officer “surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, she was not permitting a dangerous person to get behind her.” In sum, as long as the frisk of Johnson was based on a reasonable suspicion that he was armed and dangerous, it was constitutionally valid.

**INSERT on page 445, after note (2):**

(3) In *Safford Unified School District #1 v. Redding*, 557 U.S. \_\_\_\_, 129 S.Ct. 2633, 174 L.Ed.2d 354 (2009), the Court held that a strip search of a 13-year-old student by school officials looking for “forbidden prescription and over-the-counter drugs” violated the Fourth Amendment “[b]ecause there were no reasons to suspect the drugs presented a danger or were concealed in [the student’s] underwear.” A school rule prohibited the “nonmedical use, possession or sale” of ““prescription or over-the-counter drug[s].”” Under *T.L.O.*, a “reasonable suspicion” that a student has violated such a rule justifies a school search. Reasonable suspicion, a “lesser standard” than probable cause, can “be described as a moderate chance of finding evidence of wrongdoing.” In addition, *T.L.O.* declared it necessary that ““the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place.’ The scope will be permissible . . . when it is ‘not excessively intrusive in light of the age and sex of the student and the nature of the infraction.’”

The facts known were “enough to justify a search of [the student’s] backpack and outer clothing.” These searches were “not excessively intrusive.” While “[t]he exact label for” the further search of the student’s person was “not important,” it could fairly be described as a “strip search.” The fact that the women conducting the search “did not see anything” was irrelevant. The “very fact” that the student, in accord with their instructions, “pull[ed] her underwear away from her body in the presence of two officials who were able to see her necessarily exposed breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.”

For this search, “the content of the suspicion failed to match the degree of intrusion.” The pills sought were “prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers” that posed a “limited threat.” There was “no reason to suspect that large amounts,” that might be dangerous, were being distributed. Nor was there a specific reason for suspecting the student of “hiding common painkillers in her underwear.” The “categorically extreme intrusiveness” of this type of search “requires some justification in suspected facts.” According to the Court, “what was missing . . . was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [the searched student] was carrying pills in her underwear. . . . [T]he combination of these deficiencies was fatal to finding the search reasonable.”

In sum, the concern with limiting “a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.”

## CHAPTER EIGHT

INSERT on page 633, after NOTE (3):

### J. D. B. v. NORTH CAROLINA

564 U.S. \_\_\_\_, 131 S.Ct. 2394, \_\_\_\_ L.Ed.2d \_\_\_\_ (2011)

JUSTICE SOTOMAYOR delivered the opinion of the Court.

....

I  
A

Petitioner J. D. B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J. D. B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J. D. B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J. D. B.'s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J. D. B.'s middle school and seen in J. D. B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J. D. B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J. D. B. about the break-ins. Although DiCostanzo asked the school administrators to verify J. D. B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J. D. B.'s grandmother.

The uniformed officer interrupted J. D. B.'s afternoon social studies class, removed J. D. B. from the classroom, and escorted him to a school conference room. There, J. D. B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J. D. B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J. D. B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J. D. B.’s family life. DiCostanzo asked, and J. D. B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J. D. B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J. D. B. for additional detail about his efforts to obtain work; asked J. D. B. to explain a prior incident, when one of the victims returned home to find J. D. B. behind her house; and confronted J. D. B. with the stolen camera. The assistant principal urged J. D. B. to “do the right thing,” warning J. D. B. that “the truth always comes out in the end.”

Eventually, J. D. B. asked whether he would “still be in trouble” if he returned the “stuff.” In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going to court” regardless. DiCostanzo then warned that he may need to seek a secure custody order if he believed that J. D. B. would continue to break into other homes. When J. D. B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.”

After learning of the prospect of juvenile detention, J. D. B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J. D. B. that he could refuse to answer the investigator’s questions and that he was free to leave. Asked whether he understood, J. D. B. nodded and provided further detail, including information about the location of the stolen items. Eventually J. D. B. wrote a statement, at DiCostanzo’s request. When the bell rang indicating the end of the schoolday, J. D. B. was allowed to leave to catch the bus home.

## B

Two juvenile petitions were filed against J. D. B., each alleging one count of breaking and entering and one count of larceny. J. D. B.’s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J. D. B. had been “interrogated by police in a custodial setting without being afforded *Miranda* warning[s],” and because his statements were involuntary under the totality of the circumstances test. After a suppression hearing at which DiCostanzo and J. D. B. testified, the trial court denied the motion, deciding that J. D. B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J. D. B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J. D. B. delinquent.

A divided panel of the North Carolina Court of Appeals affirmed. *In re J. D. B.*, 196 N.C.App. 234, 674 S.E.2d 795 (2009). The North Carolina Supreme Court held, over two dissents, that J. D. B. was not in custody when he confessed, “declin[ing] to extend the test for custody to include consideration of the age . . . of an individual subjected to questioning by police.” *In re J. D. B.*, 363 N.C. 664, 672, 686 S.E.2d 135, 140 (2009).

We granted certiorari to determine whether the *Miranda* custody analysis includes

consideration of a juvenile suspect's age. 562 U.S. —, 131 S.Ct. 502, 178 L.Ed.2d 368 (2010).

II  
A

Any police interview of an individual suspected of a crime has “coercive aspects to it.” *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (*per curiam*). Only those interrogations that occur while a suspect is in police custody, however, “heighte[n] the risk” that statements obtained are not the product of the suspect’s free choice. *Dickerson v. United States*, 530 U.S. 428, 435, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000).

By its very nature, custodial police interrogation entails “inherently compelling pressures.” *Miranda*, 384 U.S., at 467, 86 S.Ct. 1602. Even for an adult, the physical and psychological isolation of custodial interrogation can “undermine the individual’s will to resist and ... compel him to speak where he would not otherwise do so freely.” *Ibid*. Indeed, the pressure of custodial interrogation is so immense that it “can induce a frighteningly high percentage of people to confess to crimes they never committed.” *Corley v. United States*, 556 U.S. —, —, 129 S.Ct. 1558, 1570, 173 L.Ed.2d 443 (2009) (slip op., at 16) (citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C.L.Rev. 891, 906–907 (2004)); see also *Miranda*, 384 U.S., at 455, n. 23, 86 S.Ct. 1602. That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful Convictions of Youth et al. as *Amici Curiae* 21–22 (collecting empirical studies that “illustrate the heightened risk of false confessions from youth”).

Recognizing that the inherently coercive nature of custodial interrogation “blurs the line between voluntary and involuntary statements,” *Dickerson*, 530 U.S., at 435, 120 S.Ct. 2326, this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination. [A suspect ““must be warned”” of his rights and the Government must “show” that he “waived his rights.”] . . . .

Because these measures protect the individual against the coercive nature of custodial interrogation, they are required ““only where there has been such a restriction on a person’s freedom as to render him “in custody.””” *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (*per curiam*) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977) (*per curiam*) ). As we have repeatedly emphasized, whether a suspect is “in custody” is an objective inquiry.

“Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry:

was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995) (internal quotation marks, alteration, and footnote omitted).

See also *Yarborough v. Alvarado*, 541 U.S. 652, 662–663, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004); *Stansbury*, 511 U.S., at 323, 114 S.Ct. 1526; *Berkemer v. McCarty*, 468 U.S. 420, 442, and n. 35, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to “examine all of the circumstances surrounding the interrogation,” *Stansbury*, 511 U.S., at 322, 114 S.Ct. 1526, including any circumstance that “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave,” *id.*, at 325, 114 S.Ct. 1526. On the other hand, the “subjective views harbored by either the interrogating officers or the person being questioned” are irrelevant. *Id.*, at 323, 114 S.Ct. 1526. The test, in other words, involves no consideration of the “actual mindset” of the particular suspect subjected to police questioning. *Alvarado*, 541 U.S., at 667, 124 S.Ct. 2140; see also *California v. Beheler*, 463 U.S. 1121, 1125, n. 3, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (*per curiam*).

The benefit of the objective custody analysis is that it is “designed to give clear guidance to the police.” *Alvarado*, 541 U.S., at 668, 124 S.Ct. 2140. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. . . . [T]he objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person’s subjective state of mind.

## B

The State and its *amici* contend that a child’s age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child’s age “would have affected how a reasonable person” in the suspect’s position “would perceive his or her freedom to leave.” *Stansbury*, 511 U.S., at 325, 114 S.Ct. 1526. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child’s age is far “more than a chronological fact.” *Eddings v. Oklahoma*, 455 U.S. 104, 115, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). It is a fact that “generates commonsense conclusions about behavior and perception.” *Alvarado*, 541 U.S., at 674, 124 S.Ct. 2140 (BREYER, J., dissenting). Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children “generally are less mature and responsible than adults,” *Eddings*,

455 U.S., at 115–116, 102 S.Ct. 869; that they “often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” *Bellotti v. Baird*, 443 U.S. 622, 635, 99 S.Ct. 3035, 61 L.Ed.2d 797 (1979) (plurality opinion); that they “are more vulnerable or susceptible to . . . outside pressures” than adults, *Roper [v. Simmons]*, 543 U.S. [551,] 569, 125 S.Ct. 1183 [(2005)]; and so on. Addressing the specific context of police interrogation, we have observed that events that “would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.” *Haley v. Ohio*, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (plurality opinion). Describing no one child in particular, these observations restate what “any parent knows”—indeed, what any person knows—about children generally. *Roper*, 543 U.S., at 569, 125 S.Ct. 1183.<sup>5</sup>

. . . . The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. Like this Court’s own generalizations, the legal disqualifications placed on children as a class—*e.g.*, limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Indeed, even where a “reasonable person” standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, “[a]ll American jurisdictions accept the idea that a person’s childhood is a relevant circumstance” to be considered. Restatement (Third) of Torts § 10, Comment *b*, p. 117 (2005).

As this discussion establishes, “[o]ur history is replete with laws and judicial recognition” that children cannot be viewed simply as miniature adults. *Eddings*, 455 U.S., at 115–116, 102 S.Ct. 869. We see no justification for taking a different course here. So long as the child’s age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances “unknowable” to them, *Berkemer*, 468 U.S., at 430, 104 S.Ct. 3138, nor to “anticipat[e] the frailties or idiosyncrasies” of the particular suspect whom they question, *Alvarado*, 541 U.S., at 662, 124 S.Ct. 2140 (internal quotation marks omitted). The same “wide basis of community experience” that makes it possible, as an objective matter, “to determine what is to be expected” of children in other contexts, Restatement (Second) of Torts § 283A, at 15, likewise makes it possible to know what to expect of children subjected to police questioning.

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5. Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, *e.g.*, *Graham v. Florida*, 560 U.S. \_\_\_\_, \_\_\_\_, 130 S.Ct. 2011, 2026, 176 L.Ed.2d 825 (2010) (slip op., at 17) (“[D]evelopments in psychology and brain science continue to show fundamental differences between juvenile and adult minds[.]”).

In other words, a child’s age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person’s understanding of his freedom of action. *Alvarado*, holds, for instance, that a suspect’s prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. 541 U.S., at 668, 124 S.Ct. 2140. Because the effect in any given case would be “contingent [on the] psycholog[y]” of the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis. *Ibid.* A child’s age, however, is different. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are “most susceptible to influence,” *Eddings*, 455 U.S., at 115, 102 S.Ct. 869, and “outside pressures,” *Roper*, 543 U.S., at 569, 125 S.Ct. 1183—considering age in the custody analysis in no way involves a determination of how youth “subjectively affect[s] the mindset” of any particular child, Brief for Respondent 14.<sup>7</sup>

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect’s age. This case is a prime example. Were the court precluded from taking J. D. B.’s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to “do the right thing”; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

. . . [T]he effect of the schoolhouse setting [cannot be disentangled from the identity of the person questioned. . . . Without asking whether the person “questioned in school” is a “minor,” [post at \_\_\_\_ (opinion of ALITO, J.)], the coercive effect of the schoolhouse setting is unknowable.

. . . .

. . . [W]e hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its

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7. Thus, contrary to the dissent’s protestations, today’s holding neither invites consideration of whether a particular suspect is “unusually meek or compliant,” *post*, at \_\_\_\_ (opinion of ALITO, J.), nor “expan[ds]” the *Miranda* custody analysis, *post*, at \_\_\_\_, into a test that requires officers to anticipate and account for a suspect’s every personal characteristic, see *post*, at \_\_\_\_-\_\_\_\_.

inclusion in the custody analysis is consistent with the objective nature of that test.<sup>8</sup> This is not to say that a child's age will be a determinative, or even a significant, factor in every case. Cf. [*Alvarado*, 541 U.S., at 669, 124 S.Ct. 2140]. (O'Connor, J., concurring) (explaining that a state-court decision omitting any mention of the defendant's age was not unreasonable under AEDPA's deferential standard of review where the defendant "was almost 18 years old at the time of his interview"); *post*, at \_\_\_\_ (suggesting that "teenagers nearing the age of majority" are likely to react to an interrogation as would a "typical 18-year-old in similar circumstances"). It is, however, a reality that courts cannot simply ignore.

### III

The State and its *amici* offer numerous reasons that courts must blind themselves to a juvenile defendant's age. None is persuasive.

....

The State . . . argues that age is irrelevant to the custody analysis because it "go[es] to how a suspect may internalize and perceive the circumstances of an interrogation." Brief for Respondent 12. But the same can be said of every objective circumstance that the State agrees is relevant to the custody analysis: Each circumstance goes to how a reasonable person would "internalize and perceive" every other. See, *e.g.*, *Stansbury*, 511 U.S., at 325, 114 S.Ct. 1526. Indeed, this is the very reason that we ask whether the objective circumstances "add up to custody," *Keohane*, 516 U.S., at 113, 116 S.Ct. 457, instead of evaluating the circumstances one by one.

In the same vein, the State and its *amici* protest that the "effect of . . . age on [the] perception of custody is internal," Brief for Respondent 20, or "psychological," [Brief for United States as *Amicus Curiae* 21 (hereinafter U.S. Brief)]. But the whole point of the custody analysis is to determine whether, given the circumstances, "a reasonable person [would] have felt he or she was . . . at liberty to terminate the interrogation and leave." *Keohane*, 516 U.S., at 112, 116 S.Ct. 457. Because the *Miranda* custody inquiry turns on the mindset of a reasonable person in the suspect's position, it cannot be the case that a circumstance is subjective simply because it has an "internal" or "psychological" impact on perception. Were that so, there would be no objective circumstances to consider at all.

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8. This approach does not undermine the basic principle that an interrogating officer's unarticulated, internal thoughts are never—in and of themselves—objective circumstances of an interrogation. See *supra*, at \_\_\_\_; *Stansbury v. California*, 511 U.S. 318, 323, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (*per curiam*). Unlike a child's youth, an officer's purely internal thoughts have no conceivable effect on how a reasonable person in the suspect's position would understand his freedom of action. See *id.*, at 323–325, 114 S.Ct. 1526; *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Rather than "overtur[n]" that settled principle, *post*, at \_\_\_\_, the limitation that a child's age may inform the custody analysis only when known or knowable simply reflects our unwillingness to require officers to "make guesses" as to circumstances "unknowable" to them in deciding when to give *Miranda* warnings, *Berkemer*, 468 U.S., at 430–431, 104 S.Ct. 3138.

. . . [T]he State next argues that a child’s age must be excluded from the analysis in order to preserve clarity. Similarly, the dissent insists that the clarity of the custody analysis will be destroyed unless a “one-size-fits-all reasonable-person test” applies. *Post*, at \_\_\_\_\_. In reality, however, ignoring a juvenile defendant’s age will often make the inquiry more artificial, and thus only add confusion. And in any event, a child’s age, when known or apparent, is hardly an obscure factor to assess. Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child’s age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. . . . The same is true of judges, including those whose childhoods have long since passed. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age. They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

There is, however, an even more fundamental flaw with the State’s plea for clarity and the dissent’s singular focus on simplifying the analysis: Not once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial “brighter.” Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. *Berkemer*, 468 U.S., at 441, 104 S.Ct. 3138; see *ibid.* (acknowledging the “occasional . . . difficulty” police officers confront in determining when a suspect has been taken into custody). But we have rejected that “more easily administered line,” recognizing that it would simply “enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.” *Ibid.*; see also *ibid.*, n. 33.

Finally, the State and the dissent suggest that excluding age from the custody analysis comes at no cost to juveniles’ constitutional rights because the due process voluntariness test independently accounts for a child’s youth. To be sure, that test permits consideration of a child’s age, and it erects its own barrier to admission of a defendant’s inculpatory statements at trial. But *Miranda*’s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. To hold, as the State requests, that a child’s age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults.

\* \* \*

The question remains whether J. D. B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J. D. B.’s age at the time. The

judgment of the North Carolina Supreme Court is reversed, and the case is remanded for proceedings not inconsistent with this opinion.

*It is so ordered.*

JUSTICE ALITO, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The Court's decision in this case . . . is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

*Miranda*'s prophylactic regime places a high value on clarity and certainty. Dissatisfied with the highly fact-specific constitutional rule against the admission of involuntary confessions, the *Miranda* Court set down rigid standards that often require courts to ignore personal characteristics that may be highly relevant to a particular suspect's actual susceptibility to police pressure. This rigidity, however, has brought with it one of *Miranda*'s principal strengths—"the ease and clarity of its application" by law enforcement officials and courts. See *Moran v. Burbine*, 475 U.S. 412, 425–426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). A key contributor to this clarity, at least up until now, has been *Miranda*'s objective reasonable-person test for determining custody.

*Miranda*'s custody requirement is based on the proposition that the risk of unconstitutional coercion is heightened when a suspect is placed under formal arrest or is subjected to some functionally equivalent limitation on freedom of movement. . . . [I]n the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined.

Many suspects, of course, will differ from this hypothetical reasonable person. Some, including those who have been hardened by past interrogations, may have no need for *Miranda* warnings at all. And for other suspects—those who are unusually sensitive to the pressures of police questioning—*Miranda* warnings may come too late to be of any use. That is a necessary consequence of *Miranda*'s rigid standards, but it does not mean that the constitutional rights of these especially sensitive suspects are left unprotected. A vulnerable defendant can still turn to the constitutional rule against *actual* coercion and contend that that his confession was extracted against his will.

Today's decision shifts the *Miranda* custody determination from a one-size-fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today's decision by arbitrarily distinguishing a suspect's age from

other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory.

....

Safeguarding the constitutional rights of minors does not require the extreme makeover of *Miranda* that today’s decision may portend.

I

....

No less than other facets of *Miranda*, the threshold requirement that the suspect be in “custody” is “designed to give clear guidance to the police.” *Yarborough v. Alvarado*, 541 U.S. 652, 668, 669, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004). Custody under *Miranda* attaches where there is a “formal arrest” or a “restraint on freedom of movement” akin to formal arrest. *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983) (*per curiam*) (internal quotation marks omitted). This standard is “objective” and turns on how a hypothetical “reasonable person in the position of the individual being questioned would gauge the breadth of his or her freedom of action.” *Stansbury v. California*, 511 U.S. 318, 322–323, 325, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) (*per curiam*) (internal quotation marks omitted).

Until today, the Court’s cases applying this test have focused solely on the “objective circumstances of the interrogation,” *id.*, at 323, 114 S.Ct. 1526, not the personal characteristics of the interrogated. *E.g.*, *Berkemer, supra*, at 442, and n. 35, 104 S.Ct. 3138. Relevant factors have included such things as where the questioning occurred, how long it lasted, what was said, any physical restraints placed on the suspect’s movement, and whether the suspect was allowed to leave when the questioning was through. The totality of *these* circumstances—the external circumstances, that is, of the interrogation itself—is what has mattered in this Court’s cases. Personal characteristics of suspects have consistently been rejected or ignored as irrelevant under a one-size-fits-all reasonable-person standard.

....

II

In light of this established practice, there is no denying that, by incorporating age into its analysis, the Court is embarking on a new expansion of the established custody standard. And since *Miranda* is this Court’s rule, “not a constitutional command,” it is up to the Court

“to justify its expansion.” Cf. *Arizona v. Roberson*, 486 U.S. 675, 688, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (KENNEDY, J., dissenting). This the Court fails to do.

In its present form, *Miranda*’s prophylactic regime already imposes “high cost[s]” by requiring suppression of confessions that are often “highly probative” and “voluntary” by any traditional standard. *Oregon v. Elstad*, 470 U.S. 298, 312, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985). Nonetheless, a “core virtue” of *Miranda* has been the clarity and precision of its guidance to “police and courts.” *Withrow v. Williams*, 507 U.S. 680, 694, 113 S.Ct. 1745, 123 L.Ed.2d 407 (1993) (internal quotation marks omitted). This increased clarity “has been thought to outweigh the burdens” that *Miranda* imposes. *Fare [v. Michael C.]*, 442 U.S. [707], 718, 99 S.Ct. 2560 [(1979)]. The Court has, however, repeatedly cautioned against upsetting the careful “balance” that *Miranda* struck, *Moran, supra*, at 424, 106 S.Ct. 1135, and it has “refused to sanction attempts to expand [the] *Miranda* holding” in ways that would reduce its “clarity.” See [*New York v.] Quarles*, 467 U.S. [649], 658, 104 S.Ct. 2626 [(1984)] (citing cases). Given this practice, there should be a “strong presumption” against the Court’s new departure from the established custody test. In my judgment, that presumption cannot be overcome here.

A

. . . . I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult. . . . It is no less a “reality,” however, that many persons *over* the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person. Yet the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants.

Indeed, it has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules, including the same custody requirement, as those who are unusually resistant to police pressure. *Miranda*’s rigid standards are both overinclusive and underinclusive. They are overinclusive to the extent that they provide a windfall to the most hardened and savvy of suspects, who often have no need for *Miranda*’s protections. And *Miranda*’s requirements are underinclusive to the extent that they fail to account for “frailties,” “idiosyncrasies,” and other individualized considerations that might cause a person to bend more easily during a confrontation with the police. See *Alvarado*, 541 U.S., at 662, 124 S.Ct. 2140 (internal quotation marks omitted). Members of this Court have seen this rigidity as a major weakness in *Miranda*’s “code of rules for confessions.” See 384 U.S., at 504, 86 S.Ct. 1602 (Harlan, J., dissenting). But if it is, then the weakness is an inescapable consequence of the *Miranda* Court’s decision to supplement the more holistic voluntariness requirement with a one-size-fits-all prophylactic rule.

That is undoubtedly why this Court’s *Miranda* cases have never before mentioned “the suspect’s age” or any other individualized consideration in applying the custody standard. See *Alvarado, supra*, at 666, 124 S.Ct. 2140. And unless the *Miranda* custody rule is now to be radically transformed into one that takes into account the wide range of

individual characteristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different from these other personal characteristics.

Why, for example, is age different from intelligence? Suppose that an officer, upon going to a school to question a student, is told by the principal that the student has an I.Q. of 75 and is in a special-education class. Are those facts more or less important than the student's age in determining whether he or she "felt ... at liberty to terminate the interrogation and leave"? See *Thompson v. Keohane*, 516 U.S. 99, 112, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995). An I.Q. score, like age, is more than just a number. *Ante*, at \_\_\_\_ ("[A]ge is far 'more than a chronological fact' "). And an individual's intelligence can also yield "conclusions" similar to those "we have drawn ourselves" in cases far afield of *Miranda*. *Ante*, at \_\_\_\_.

How about the suspect's cultural background? Suppose the police learn (or should have learned, see *ante*, at \_\_\_\_ ) that a suspect they wish to question is a recent immigrant from a country in which dire consequences often befall any person who dares to attempt to cut short any meeting with the police. Is this really less relevant than the fact that a suspect is a month or so away from his 18th birthday?

The defendant's education is another personal characteristic that may generate "conclusions about behavior and perception." *Ante*, at \_\_\_\_ (internal quotation marks omitted). Under today's decision, why should police officers and courts "blind themselves," *ante*, at \_\_\_\_, to the fact that a suspect has "only a fifth-grade education"? Alternatively, what if the police know or should know that the suspect is "a college-educated man with law school training"? See *Crooker v. California*, 357 U.S. 433, 440, 78 S.Ct. 1287, 2 L.Ed.2d 1448 (1958), overruled by *Miranda, supra*, at 479, and n. 48, 86 S.Ct. 1602. How are these individual considerations meaningfully different from age in their "relationship to a reasonable person's understanding of his freedom of action"? *Ante*, at \_\_\_\_ . The Court proclaims that "[a] child's age . . . is different," *ante*, at \_\_\_\_, but the basis for this *ipse dixit* is dubious.

I have little doubt that today's decision will soon be cited by defendants—and perhaps by prosecutors as well—for the proposition that all manner of other individual characteristics should be treated like age and taken into account in the *Miranda* custody calculus. . . .

In time, the Court will have to confront these issues, and it will be faced with a difficult choice. It may choose to distinguish today's decision and adhere to the arbitrary proclamation that "age . . . is different." *Ante*, at \_\_\_\_ . Or it may choose to extend today's holding and, in doing so, further undermine the very rationale for the *Miranda* regime.

If the Court chooses the latter course, then a core virtue of *Miranda*—the “ease and clarity of its application”—will be lost. *Moran*, 475 U.S., at 425, 106 S.Ct. 1135. However, even today’s more limited departure from *Miranda*’s one-size-fits-all reasonable-person test will produce the very consequences that prompted the *Miranda* Court to abandon exclusive reliance on the voluntariness test in the first place: The Court’s test will be hard for the police to follow, and it will be hard for judges to apply.

The Court holds that age must be taken into account when it “was known to the officer at the time of the interview,” or when it “would have been objectively apparent” to a reasonable officer. *Ante*, at \_\_\_\_\_. . . . In many cases, courts will presumably have to make findings as to whether a particular suspect had a sufficiently youthful look to alert a reasonable officer to the possibility that the suspect was under 18, or whether a reasonable officer would have recognized that a suspect’s I.D. was a fake. The inquiry will be both “time-consuming and disruptive” for the police and the courts. See *Berkemer*, 468 U.S., at 432, 104 S.Ct. 3138 (refusing to modify the custody test based on similar considerations). It will also be made all the more complicated by the fact that a suspect’s dress and manner will often be different when the issue is litigated in court than it was at the time of the interrogation.

Even after courts clear this initial hurdle, further problems will likely emerge as judges attempt to put themselves in the shoes of the average 16-year-old, or 15-year-old, or 13-year-old, as the case may be. Consider, for example, a 60-year-old judge attempting to make a custody determination through the eyes of a hypothetical, average 15-year-old. Forty-five years of personal experience and societal change separate this judge from the days when he or she was 15 years old. And this judge may or may not have been an average 15-year-old. . . .

Take a fairly typical case in which today’s holding may make a difference. A 16½-year-old moves to suppress incriminating statements made prior to the administration of *Miranda* warnings. . . . [T]he judge will be required to determine whether the differences between a typical 16½-year-old and a typical 18-year-old with respect to susceptibility to the pressures of interrogation are sufficient to change the outcome of the custody determination. Today’s opinion contains not a word of actual guidance as to how judges are supposed to go about making that determination.

## C

Petitioner and the Court attempt to show that this task is not unmanageable by pointing out that age is taken into account in other legal contexts. . . . [N]egligence is generally a question for the jury, the members of which can draw on their varied experiences with persons of different ages. It also involves a *post hoc* determination, in the reflective atmosphere of a deliberation room, about whether the defendant conformed to a standard of care. The *Miranda* custody determination, by contrast, must be made in the first instance by police officers in the course of an investigation that may require quick decisionmaking.

Equally inapposite are the Eighth Amendment [cruel and unusual punishment] cases the Court cites in support of its new rule. Those decisions involve the “judicial exercise of independent judgment” about the constitutionality of certain punishments. *E.g.*, [*Graham v. Florida*, 560 U.S.], at \_\_\_\_, 130 S.Ct., at 2026. Like the negligence standard, they do not require on-the-spot judgments by the police.

....

III

... [T]here are other, less disruptive tools available to ensure that minors are not coerced into confessing.

As an initial matter, the difficulties that the Court’s standard introduces will likely yield little added protection for most juvenile defendants. Most juveniles who are subjected to police interrogation are teenagers nearing the age of majority. These defendants’ reactions to police pressure are unlikely to be much different from the reaction of a typical 18-year-old in similar circumstances. A one-size-fits-all *Miranda* custody rule thus provides a roughly reasonable fit for these defendants.

In addition, many of the concerns that petitioner raises regarding the application of the *Miranda* custody rule to minors can be accommodated by considering the unique circumstances present when minors are questioned in school. The *Miranda* custody rule has always taken into account the setting in which questioning occurs, restrictions on a suspect’s freedom of movement, and the presence of police officers or other authority figures.<sup>21</sup>

Finally, in cases like the one now before us, where the suspect is much younger than the typical juvenile defendant, courts should be instructed to take particular care to ensure that incriminating statements were not obtained involuntarily. . . . If *Miranda*’s rigid, one-size-fits-all standards fail to account for the unique needs of juveniles, the response should be to rigorously apply the constitutional rule against coercion to ensure that the rights of minors are protected. There is no need to run *Miranda* off the rails.

\* \* \*

The Court rests its decision to inject personal characteristics into the *Miranda* custody inquiry on the principle that judges applying *Miranda* cannot “blind themselves to ... commonsense reality.” *Ante*, at \_\_\_\_, \_\_\_\_, \_\_\_\_-\_\_\_\_, \_\_\_\_\_. But the Court’s shift is fundamentally at odds with the clear prophylactic rules that *Miranda* has long enforced. *Miranda* frequently requires judges to blind themselves to the reality that many un-Mirandized custodial confessions are “by no means involuntary” or coerced. *Dickerson*,

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12. The Court thinks it would be “absur[d]” to consider the school setting without accounting for age, *ante*, at \_\_\_\_, but the real absurdity is for the Court to require police officers to get inside the head of a reasonable minor while making the quick, on-the-spot determinations that *Miranda* demands.

530 U.S., at 444, 120 S.Ct. 2326. It also requires police to provide a rote recitation of *Miranda* warnings that many suspects already know and could likely recite from memory. Under today's new, "reality"-based approach to the doctrine, perhaps these and other principles of our *Miranda* jurisprudence will, like the custody standard, now be ripe for modification. Then, bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.

I respectfully dissent.

**INSERT on page 653, at the end of note (1):**

In *Florida v. Powell*, 559 U.S. \_\_\_\_, 130 S.Ct. 1195 (2010), the Court again found that warnings not phrased in the exact terms prescribed in *Miranda* were sufficient. In *Powell*, officers warned a suspect of the right to remain silent and that anything he said could be used in court. They then told him, ““You have the right to talk to a lawyer before answering any of our questions.”” After apprising him of an indigent’s entitlement to appointed counsel, they concluded by stating, ““You have the right to use any of these rights at any time you want during this interview.”” The Florida Supreme Court found these warnings deficient because they did not inform the suspect of his entitlement to have counsel present during questioning. The Supreme Court disagreed, concluding that the warnings ““satisfied”” what *Miranda* deemed ““an absolute prerequisite to interrogation””—that a suspect be informed of his right to consult with a lawyer *and* his right to have a lawyer present during interrogation. Although the ““four warnings . . . require[d] are invariable,”” the words used to communicate “the essential information” may vary, as long as they ““reasonably “conve[y] to [a suspect] his rights as required by *Miranda*.””” *Powell* was first informed that he “could consult with a lawyer before answering any particular question” and then was told “that he could exercise that right while the interrogation was underway. In combination, the two warnings reasonably conveyed [his] right to have an attorney present, not only at the outset of interrogation, but at all times.” Upon hearing these warnings, a suspect was not likely to believe that he had “to exit and reenter the interrogation room” whenever he wished to consult with a lawyer about a question. “Instead, [he] would likely assume that he must stay put in the interrogation room and that his lawyer would be there with him the entire time.” Consequently, “[a]lthough the warnings were not the *clearest possible* formulation of *Miranda*’s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading.”

Justice Stevens, joined by Justice Breyer, dissented, opining that the “more natural reading of the warning . . . given, which (1) contained a temporal limit and (2) failed to mention [the] right to the presence of counsel in the interrogation room, [was] that [the suspect] only had the right to consult with an attorney before the interrogation began.” Because an “intelligent suspect could reasonably conclude that all he was provided was a one-time right to consult with an attorney, not a right to have an attorney present with him in the interrogation room at all times,” the dissenting Justices believed that “the warning at issue . . . did not reasonably convey” the content prescribed by *Miranda*.

**INSERT on page 660, after *North Carolina v. Butler*:**

(1) *Berghuis v. Thompkins*, 560 U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_ (2010), involved a contention that the defendant's words and acts were not sufficient to waive his *Miranda* right to remain silent. A five-Justice majority disagreed, observing that *Miranda* "waivers can be established even absent formal or express statements of waiver" and that "[a]n 'implicit waiver' of the 'right to remain silent' is sufficient." *Butler* held that "a waiver . . . may be implied through 'the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver.'" More specifically, "[w]here the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." *Miranda* does impose a "formalistic and practical" rule regarding warnings, but "does not impose a formalistic waiver procedure that a suspect must follow to relinquish [his] rights. As a general proposition, the law can *presume* that an individual who, with a full understanding of his or her rights, acts in a manner inconsistent with their exercise has made a deliberate choice to relinquish the protection those rights afford." (Emphasis added.) Put simply, "a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police." The majority's application of this rule in *Thompkins* made it apparent that officers need not ask whether a suspect understands *Miranda* warnings and that the prosecution need not prove that a suspect expressly asserted his understanding. The requisite "understanding" can also be inferred from the circumstances.

*Thompkins* also maintained that the "police were not allowed to question him until they obtained a waiver first." The majority concluded that the principle allowing waivers to be inferred from conduct was "inconsistent with a rule that requires a waiver at the outset." *Miranda*'s "requirements are met if a suspect receives adequate . . . warnings, understands them, and has an opportunity to invoke the rights *before giving any answers or admissions*." (Emphasis added.) Consequently, "after giving a *Miranda* warning, police may interrogate a suspect who has neither invoked nor waived his or her *Miranda* rights." A waiver may be secured *after* interrogation begins.

Justice Sotomayor, joined by Justices Stevens, Ginsburg, and Breyer, dissented. In their view, *Thompkins*'s "refusal to sign . . . an acknowledgment that he understood his . . . rights evince[d], if anything, an intent not to waive [his] rights," and the fact that "approximately 2 hours and 45 minutes of interrogation" preceded his inculpatory response weighed strongly against a waiver finding. More important, the majority's "principles flatly contradict[ed the Court's] longstanding views that 'a valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained,' and that '[t]he courts must presume that a defendant did not waive his rights.'" The majority had "dilut[ed] . . . the prosecution's burden of proof to the bare fact that a suspect made inculpatory statements after *Miranda* warnings were given and understood." A requirement that the government prove "a course of conduct beyond the inculpatory statements themselves [was]

critical to ensuring that those statements are voluntary.” The majority had “turn[ed] *Miranda* upside down” by “legally presum[ing]” that suspects “have waived their rights even if they have given no clear expression of their intent to do so.”

**INSERT on page 693, after NOTE (4):**

(5) In *Berghuis v. Thompkins*, 560 U.S. \_\_\_\_, \_\_\_\_ S.Ct. \_\_\_\_ (2010), a defendant argued that he had invoked his right “to remain silent by not saying anything” for a considerable period of time while officers attempted to interrogate him. A five-Justice majority found this contention “unpersuasive,” concluding that a suspect must unambiguously invoke the right to remain silent. In the majority’s view, “there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel.” Both rights “protect the privilege against compulsory self incrimination by requiring an interrogation to cease when either right is invoked.” Moreover, a requirement that the right to remain silent be invoked “unambiguously” yields “an objective inquiry” that avoids problems of proof and provides guidance for officers. A rule that officers must stop interrogation after ambiguous acts or statements would require them “to make difficult decisions.” Moreover, such a rule could lead to the “[s]uppression of a voluntary confession,” which “would place a significant burden on society’s interest in prosecuting criminal activity” while only adding “marginally to *Miranda*’s goal of dispelling the compulsion.” In *Thompkins*, the suspect “did not say that he wanted to remain silent or that he did not want to talk with the police[,] . . . simple, unambiguous statements” that “would have invoked his “right to cut off questioning.””

In a dissent authored by Justice Sotomayor, four Justices asserted that the majority’s “clear-statement rule . . . invites police to question a suspect at length—notwithstanding his persistent refusal to answer questions—in the hope of eventually obtaining a single inculpatory response which will suffice to prove waiver of rights.” They maintained that the “clear-statement rule is . . . a poor fit for the right to silence” because a warning of the right to remain silent is “unlikely to convey that [a suspect] must speak (and must do so in some particular fashion) to ensure the right will be protected.” The majority’s decision “turn[ed] *Miranda* upside down” by requiring “suspects [to] . . . unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak.” According to the dissenters, when a suspect ambiguously invokes the right to remain silent, the appropriate question is whether officers ““scrupulously honored”” the suspect’s right to cut off questioning.

**INSERT on page 700, before PROBLEMS:**

In *Maryland v. Shatzer*, 559 U.S. \_\_\_\_, 130 S.Ct. 1213 (2010), the question was “whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*.” In 2003, while incarcerated for an unrelated offense, the accused was interviewed about allegations that he had sexually abused his three-year-old son. Upon being given *Miranda* warnings, he “declined to speak without an attorney,” and the detective “ended the interview.” In 2006, two and a half years later, after the police department had received additional allegations concerning “the same incident,” another detective interviewed the defendant at the prison. After receiving the *Miranda* warnings, the defendant waived his rights and made an incriminating admission in response to interrogation. Five days later, after another set of warnings and a written waiver, he submitted to a polygraph examination and made another incriminating statement in response to questioning before requesting an attorney. He was charged with a number of sex offenses. Before trial, the judge denied a motion to suppress the statements made on both occasions. After a bench trial, the judge “found Shatzer guilty of sexual child abuse of his son.” The Court of Appeals reversed, holding that the incriminating statements were barred by the *Edwards* doctrine.

The Supreme Court held that *Edwards* did not require exclusion of the statements in these circumstances. According to the Court, the “rationale” of *Edwards* is that after a suspect requests counsel, a waiver prompted by the authorities “‘is itself the product of the ‘inherently compelling pressures’ and not the purely voluntary choice of the suspect.’” It rests on an “assumption . . . that the subsequent requests for interrogation” after a request for counsel “pose a significantly greater risk of coercion.” The “increased risk” is the product of two factors—“the police’s persistence in trying to get the suspect to talk” and “the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated—pressure likely to ‘increase as custody is prolonged.’” Because “the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis,” the Court must “‘justify its expansion’ . . . ‘by reference to its prophylactic purpose’” and must apply it “only” to situations “where its benefits outweigh its costs.”

The presumption announced in *Edwards* has two benefits: it conserves judicial resources and it preserves “‘the integrity of an accused’s choice to communicate with police only through counsel,’” by preventing the authorities from “‘badgering’” a suspect who has asked for counsel into waiving his right. The latter benefit is “measured by the number of coerced confessions [the rule] suppresses that otherwise would have been admitted.” The Court found it “easy to believe that a suspect may be coerced or badgered” into a waiver in cases where a suspect is “held in uninterrupted pretrial custody.” However, when “a suspect has been released from his pretrial custody” after a request for counsel “and has returned to his normal life for some time before [a subsequent] attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced.” When released, a suspect has not remained “isolated,” has “likely been able to

seek advice from an attorney, family members, and friends,” and “knows . . . that he need only demand counsel” to end the interrogation “and that investigative custody does not last indefinitely.” To think that a suspect in those circumstances would be worn down by an inquiry about whether he wishes to waive his right to counsel “is far fetched.” A “change of heart is less likely” the result of “badgering” than of “further deliberation in familiar surroundings [that] has caused him to believe . . . that cooperating with the investigation is in his interest.” Consequently, the “extension of *Edwards* . . . would not significantly increase the number of genuinely coerced confessions excluded.” On the other hand, extension would increase the costs of the rule by excluding some voluntary confessions and deterring “officers from even trying to obtain” others.

In the Court’s view, the “only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects.” Without that endpoint, there would be an “eternal” bar to officer-initiated interrogation following requests for counsel, a bar with “disastrous” consequences. (The Court highlighted another possible endpoint—a “purely arbitrary time-limit”—but refused to address whether the passage of time alone could extinguish *Edwards* protection.) Ordinary *Miranda* protections, rather than the extra prophylaxis furnished by *Edwards*, will “adequately ensure” respect for a “suspect’s desire to have an attorney present . . . when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.” The Court deemed “it appropriate to specify” the minimal time needed, selecting “14 days” because that period “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.” In addition, a “14-day limitation” is sufficient to discourage “police abuse” of “a break-in-custody rule.”

*Shatzer* presented “an additional issue”—whether a suspect’s “release[] back into the general prison population . . . constitutes a break in *Miranda* custody.” After observing that it had “never decided whether incarceration constitutes custody for *Miranda* purposes,” the Court concluded, for a number of reasons, that “lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.” When “released back into the general prison population,” convicts who “live in prison” merely “return to . . . accustomed surroundings and daily routine,” regaining the “control they had over their lives prior to the interrogation.” They “are not isolated with their accusers,” but, instead, “live among other inmates, guards, and workers, and often can receive visitors and communicate with” outsiders. In addition, the “detention . . . is relatively disconnected from their prior unwillingness to cooperate in an investigation.” Put simply, the “inherently compelling pressures’ of custodial interrogation end[] when [a prisoner] return[s] to his normal life.”

In sum, “[b]ecause *Shatzer* experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* [did] not mandate suppression of his . . . statements.”

Justice Thomas concurred in part and in the judgment, but rejected “the Court’s arbitrary 14-day rule,” concluding that even this extension of *Edwards* was not justifiable. He would have terminated the “presumption of involuntariness” as soon as “custody ends.”

Justice Stevens concurred in the judgment but also disagreed “with the Court’s newly announced rule.” He did not believe that a 14-day break should always eliminate the presumption created by *Edwards* and he concluded that the “many problems with the Court’s new rule [were] exacerbated” in situations involving incarcerated suspects.

## CHAPTER TEN

### INSERT on page 747, at the end of the second paragraph of note (3):

In *Montejo v. Louisiana*, 556 U.S. \_\_\_\_, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009), the Court considered “the scope and continued viability of the [*Michigan v. Jackson*] rule,” which it described as “forbidding police to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding.” A five-Justice majority decided that it was time to overrule *Jackson*, concluding that the “marginal benefits of” its “prophylactic rule” were “dwarfed by its substantial costs.” The holding of *Jackson* had actually been two-pronged. First, the Court had determined that a request for counsel at an arraignment was an effective invocation of the Sixth Amendment right to counsel defined by the *Massiah* doctrine. The Court had also decided that once an accused invoked his Sixth Amendment entitlement to assistance, a waiver of the right to assistance of counsel was not possible if the subsequent encounter was police-initiated. This latter holding extended the doctrine of *Edwards v. Arizona* (a *Miranda* decision) to Sixth Amendment contexts.

The impact of the Court’s decision to overrule *Jackson* is not entirely clear. The majority definitively rejected the conclusion that a request for counsel at an arraignment is an invocation of the right to counsel for purposes of police questioning. A suspect’s request for counsel at an arraignment no longer impedes the ability of law enforcement officers to initiate efforts to obtain a waiver of counsel and secure disclosures from an unassisted accused. The *Montejo* majority also appeared to reject *Jackson*’s adoption of a Sixth Amendment analogue to the *Edwards* rule—*i.e.*, a rule forbidding police initiation of communications if an accused clearly requests counsel for purposes of interactions with the police. The Court suggested that such a request for counsel does not alter the Sixth Amendment waiver analysis. According to the majority, the *Edwards* doctrine, which deems waivers invalid when police initiate custodial interrogation after a suspect clearly invokes the right to counsel, adequately responds to the only defensible objective of *Jackson*—to prevent police officers from “badgering” suspects into changing their minds about relying on counsel. In the majority’s view, there is simply no need for “*Jackson*’s fourth story of prophylaxis.”

Is there any difference between the protection provided by *Edwards* and the protection furnished by an analogous Sixth Amendment doctrine that would restrict efforts to secure waivers of the *Massiah* right to counsel? In thinking about this question, keep in mind that *Edwards*, a branch of the *Miranda* doctrine, is strictly limited to cases involving custodial interrogation.

**INSERT on page 748, as an addition at the end of note (4):**

In *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008), the Court further explored the question of when the Sixth Amendment right to counsel attaches. Rothgery was arrested for being a felon in possession of a firearm. He made an initial appearance before a magistrate who concluded that there was probable cause to believe he had committed the offense. The County did not appoint counsel for him until six months later, after he had been indicted. Soon thereafter, his attorney demonstrated that he had not previously been convicted of a felony, and the indictment was dismissed. Rothgery filed a federal civil rights claim, alleging that his right to counsel had attached upon his initial appearance and that the County's failure to appoint counsel within a reasonable time thereafter had violated the Sixth Amendment. The district court granted summary judgment for the County and the Court of Appeals affirmed, ruling that Rothgery's right to counsel had not attached at his initial appearance because prosecutors were not aware of or involved in the process at that stage.

The Supreme Court reversed. According to the Court, it was "wrong" to conclude that the initiation of adversary proceedings depends "on whether the prosecutor had a hand in starting" the process. In prior decisions, *Brewer v. Williams* and *Michigan v. Jackson* (see note (3), *supra*), the Court had concluded that the act of "bringing a defendant before a court for initial appearance signals a sufficient commitment to prosecute and marks the start of adversary judicial proceedings." Whether or not a prosecutor is involved, the relationship between the state and an individual is sufficiently adversarial to trigger attachment of the right to legal assistance when an individual makes an "initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction." This point in the criminal process, in fact, "marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." Because Rothgery had appeared before a magistrate, had been informed of the charge contained in the complaint filed by the police, and had been released on bond, his constitutional right to the assistance of counsel had attached.

The Court declared that the question of whether attachment occurs at a particular event is entirely distinct from the question of whether that event is a "critical stage" of the prosecution at which an accused is entitled to assistance. The Court also observed that once the right has attached, "counsel must be appointed within a reasonable time . . . to allow for adequate representation at any critical stage before trial, as well as at trial itself."

## CHAPTER FOURTEEN

**INSERT on page 984, after note (5)(b):**

### HERRING v. UNITED STATES

**555 U.S. \_\_\_\_\_, 129 S.Ct. 695, 172 L.Ed.2d 496 (2009)**

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Fourth Amendment forbids “unreasonable searches and seizures,” and this usually requires the police to have probable cause or a warrant before making an arrest. What if an officer reasonably believes there is an outstanding arrest warrant, but that belief turns out to be wrong because of a negligent bookkeeping error by another police employee? The parties here agree that the ensuing arrest is still a violation of the Fourth Amendment, but dispute whether contraband found during a search incident to that arrest must be excluded in a later prosecution.

Our cases establish that such suppression is not an automatic consequence of a Fourth Amendment violation. Instead, the question turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct. Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence.

#### I

On July 7, 2004, Investigator Mark Anderson learned that Bennie Dean Herring had driven to the Coffee County Sheriff’s Department to retrieve something from his impounded truck. Herring was no stranger to law enforcement, and Anderson asked the county’s warrant clerk, Sandy Pope, to check for any outstanding warrants for Herring’s arrest. When she found none, Anderson asked Pope to check with Sharon Morgan, her counterpart in neighboring Dale County. After checking Dale County’s computer database, Morgan replied that there was an active arrest warrant for Herring’s failure to appear on a felony charge. Pope relayed the information to Anderson and asked Morgan to fax over a copy of the warrant as confirmation. Anderson and a deputy followed Herring as he left the impound lot, pulled him over, and arrested him. A search incident to the arrest revealed methamphetamine in Herring’s pocket, and a pistol (which as a felon he could not possess) in his vehicle.

There had, however, been a mistake about the warrant. The Dale County sheriff’s computer records are supposed to correspond to actual arrest warrants, which the office also maintains. But when Morgan went to the files to retrieve the actual warrant to fax to Pope, Morgan was unable to find it. She called a court clerk and learned that the warrant had been recalled five months earlier. Normally when a warrant is recalled the court clerk’s office or a judge’s chambers calls Morgan, who enters the information in the sheriff’s computer

database and disposes of the physical copy. For whatever reason, the information about the recall of the warrant for Herring did not appear in the database. Morgan immediately called Pope to alert her to the mixup, and Pope contacted Anderson over a secure radio. This all unfolded in 10 to 15 minutes, but Herring had already been arrested and found with the gun and drugs, just a few hundred yards from the sheriff's office.

Herring was indicted in the District Court for the Middle District of Alabama for illegally possessing the gun and drugs, violations of 18 U.S.C. §922(g)(1) and 21 U.S.C. §844(a). He moved to suppress the evidence on the ground that his initial arrest had been illegal because the warrant had been rescinded. The Magistrate Judge recommended denying the motion because the arresting officers had acted in a good-faith belief that the warrant was still outstanding. . . . The District Court adopted the Magistrate Judge's recommendation, and the Court of Appeals for the Eleventh Circuit affirmed.

The Eleventh Circuit found that the arresting officers in Coffee County "were entirely innocent of any wrongdoing or carelessness." The court assumed that whoever failed to update the Dale County sheriff's records was also a law enforcement official, but noted that "the conduct in question [wa]s a negligent failure to act, not a deliberate or tactical choice to act." [T]he Eleventh Circuit concluded that . . . the evidence was . . . admissible under the good-faith rule of *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405 (1984).

. . . .

## II

. . . . For purposes of deciding this case . . . we accept the parties' assumption that there was a Fourth Amendment violation. The issue is whether the exclusionary rule should be applied.

## A

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," but "contains no provision expressly precluding the use of evidence obtained in violation of its commands," *Arizona v. Evans*, 514 U.S. 1, 10, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995). Nonetheless, our decisions establish an exclusionary rule that, when applicable, forbids the use of improperly obtained evidence at trial. . . .

In analyzing the applicability of the rule, *Leon* admonished that we must consider the actions of all the police officers involved. 468 U.S., at 923, n. 24, 104 S.Ct. 3405 ("It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination"). The Coffee County officers did

nothing improper. Indeed, the error was noticed so quickly because Coffee County requested a faxed confirmation of the warrant.

The Eleventh Circuit concluded, however, that somebody in Dale County should have updated the computer database to reflect the recall of the arrest warrant. The court also concluded that this error was negligent, but did not find it to be reckless or deliberate. That fact is crucial to our holding that this error is not enough by itself to require “the extreme sanction of exclusion.” *Leon, supra*, at 916, 104 S.Ct. 3405.

B

1. The fact that a Fourth Amendment violation occurred—*i.e.*, that a search or arrest was unreasonable—does not necessarily mean that the exclusionary rule applies. *Illinois v. Gates*, 462 U.S. 213, 223, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Indeed, exclusion “has always been our last resort, not our first impulse,” *Hudson v. Michigan*, 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006), and our precedents establish important principles that constrain application of the exclusionary rule.

First, the exclusionary rule is not an individual right and applies only where it “result[s] in appreciable deterrence.” *Leon, supra*, at 909, 104 S.Ct. 3405 (quoting *United States v. Janis*, 428 U.S. 433, 454, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976)). . . .

In addition, the benefits of deterrence must outweigh the costs. *Leon, supra*, at 910, 104 S.Ct. 3405. . . . The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free—something that “offends basic concepts of the criminal justice system.” *Leon, supra*, at 908, 104 S.Ct. 3405. . . .

. . . .

. . . . [I]n [*Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995)], we applied th[e] good-faith rule to police who reasonably relied on mistaken information in a court’s database that an arrest warrant was outstanding. . . . *Evans* left unresolved “whether the evidence should be suppressed if police personnel were responsible for the error,” an issue . . . that we now confront.

2. The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct. As we said in *Leon*, “an assessment of the flagrancy of the police misconduct constitutes an important step in the calculus” of applying the exclusionary rule. 468 U.S., at 911, 104 S.Ct. 3405. Similarly, in [*Illinois v. Krull*] we elaborated that “evidence should be suppressed ‘only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.’” [480 U.S. 340, 348-349, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)] (quoting *United States v. Peltier*, 422 U.S. 531, 542, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975)).

Anticipating the good-faith exception to the exclusionary rule, Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.” The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L. Rev. 929, 953 (1965) (footnotes omitted); see also *Brown v. Illinois*, 422 U.S. 590, 610-611, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975) (Powell, J., concurring in part) (“[T]he deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of Fourth Amendment rights”).

Indeed, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. In *Weeks*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652, a foundational exclusionary rule case, the officers had broken into the defendant’s home (using a key shown to them by a neighbor), confiscated incriminating papers, then returned again with a U.S. Marshal to confiscate even more. *Id.*, at 386, 34 S.Ct. 341. Not only did they have no search warrant, which the Court held was required, but they could not have gotten one had they tried. They were so lacking in sworn and particularized information that “not even an order of court would have justified such procedure.” *Id.*, at 393-394, 34 S.Ct. 341. *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920), on which petitioner repeatedly relies, was similar; federal officials “without a shadow of authority” went to the defendants’ office and “made a clean sweep” of every paper they could find. *Id.*, at 390, 40 S.Ct. 182. Even the Government seemed to acknowledge that the “seizure was an outrage.” *Id.*, at 391, 40 S.Ct. 182.

Equally flagrant conduct was at issue in *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), which . . . extended the exclusionary rule to the States. Officers forced open a door to Ms. Mapp’s house, kept her lawyer from entering, brandished what the court concluded was a false warrant, then forced her into handcuffs and canvassed the house for obscenity. 367 U.S., at 644-645, 81 S.Ct. 1684. An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place. And in fact since *Leon*, we have never applied the rule to exclude evidence obtained in violation of the Fourth Amendment, where the police conduct was no more intentional or culpable than this.

3. To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.<sup>4</sup>

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4. We do not quarrel with JUSTICE GINSBURG’s claim that “liability for negligence . . . creates an incentive to act with greater care,” and we do not suggest that the exclusion of this evidence could have *no* deterrent effect. But our cases require any deterrence to “be weighed against the ‘substantial social costs exacted by the exclusionary rule,’” *Illinois v. Krull*, 480 U.S. 340, 352-353, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) (quoting *Leon*, 468 U.S., at 907, 104 S.Ct. 3405), and here exclusion is not worth the cost.

....

Both this case and *Franks* [*v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978),] concern false information provided by police. Under *Franks*, negligent police miscommunications in the course of acquiring a warrant do not provide a basis to rescind a warrant and render a search or arrest invalid. Here, the miscommunications occurred in a different context—after the warrant had been issued and recalled—but that fact should not require excluding the evidence obtained.

The pertinent analysis of deterrence and culpability is objective, not an “inquiry into the subjective awareness of arresting officers,” Reply Brief for Petitioner 4-5. We have already held that “our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the search was illegal” in light of “all of the circumstances.” *Leon*, 468 U.S., at 922, n. 23, 104 S.Ct. 3405. These circumstances frequently include a particular officer’s knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer’s knowledge and experience, *Ornelas v. United States*, 517 U.S. 690, 699-700, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996), but not his subjective intent, *Whren v. United States*, 517 U.S. 806, 812-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

4. We do not suggest that all recordkeeping errors by the police are immune from the exclusionary rule. In this case, however, the conduct at issue was not so objectively culpable as to require exclusion. In *Leon* we held that “the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion.” 468 U.S., at 922, 104 S.Ct. 3405. The same is true when evidence is obtained in objectively reasonable reliance on a subsequently recalled warrant.

If the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation. We said as much in *Leon*, explaining that an officer could not “obtain a warrant on the basis of a ‘bare bones’ affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search.” *Id.*, at 923, n. 24, 104 S.Ct. 3405 (citing *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971)). [F]ears that our decision will cause police departments to deliberately keep their officers ignorant are thus unfounded.

The dissent also adverts to the possible unreliability of a number of databases not relevant to this case. In a case where systemic errors were demonstrated, it might be reckless for officers to rely on an unreliable warrant system. But there is no evidence that errors in Dale County’s system are routine or widespread. Officer Anderson testified that he had never had reason to question information about a Dale County warrant, and both Sandy Pope and Sharon Morgan testified that they could remember no similar miscommunication ever

happening on their watch. . . . Because no such showings were made here, the Eleventh Circuit was correct to affirm the denial of the motion to suppress.

Petitioner’s claim that police negligence automatically triggers suppression cannot be squared with the principles underlying the exclusionary rule, as they have been explained in our cases. In light of our repeated holdings that the deterrent effect of suppression must be substantial and outweigh any harm to the justice system, *e.g.*, *Leon*, 468 U.S., at 909-910, 104 S.Ct. 3405, we conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” *Id.*, at 907-908, n. 6, 104 S.Ct. 3405 (internal quotation marks omitted). In such a case, the criminal should not “go free because the constable has blundered.” *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the Court by Cardozo, J.).

The judgment of the Court of Appeals for the Eleventh Circuit is affirmed.

*It is so ordered.*

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE BREYER join, dissenting.

Petitioner Bennie Dean Herring was arrested, and subjected to a search incident to his arrest, although no warrant was outstanding against him, and the police lacked probable cause to believe he was engaged in criminal activity. The arrest and ensuing search therefore violated Herring’s Fourth Amendment right “to be secure . . . against unreasonable searches and seizures.” The Court of Appeals so determined, and the Government does not contend otherwise. The exclusionary rule provides redress for Fourth Amendment violations by placing the government in the position it would have been in had there been no unconstitutional arrest and search. The rule thus strongly encourages police compliance with the Fourth Amendment in the future. The Court, however, holds the rule inapplicable because careless recordkeeping by the police—not flagrant or deliberate misconduct—accounts for Herring’s arrest.

I would not so constrict the domain of the exclusionary rule and would hold the rule dispositive of this case: “[I]f courts are to have any power to discourage [police] error of [the kind here at issue], it must be through the application of the exclusionary rule.” *Arizona v. Evans*, 514 U.S. 1, 22-23, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995) (STEVENS, J., dissenting). The unlawful search in this case was contested in court because the police found methamphetamine in Herring’s pocket and a pistol in his truck. But the “most serious impact” of the Court’s holding will be on innocent persons “wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base.” *Id.*, at 22, 115 S.Ct. 1185.

I

A warrant for Herring’s arrest was recalled in February 2004, apparently because it had been issued in error. The warrant database for the Dale County Sheriff’s Department, however, does not automatically update to reflect such changes. A member of the Dale County Sheriff’s Department—whom the parties have not identified—returned the hard copy of the warrant to the County Circuit Clerk’s office, but did not correct the Department’s database to show that the warrant had been recalled. The erroneous entry for the warrant remained in the database, undetected, for five months.

On a July afternoon in 2004, Herring came to the Coffee County Sheriff’s Department to retrieve his belongings from a vehicle impounded in the Department’s lot. Investigator Mark Anderson, who was at the Department that day, knew Herring from prior interactions: Herring had told the district attorney, among others, of his suspicion that Anderson had been involved in the killing of a local teenager, and Anderson had pursued Herring to get him to drop the accusations. Informed that Herring was in the impoundment lot, Anderson asked the Coffee County warrant clerk whether there was an outstanding warrant for Herring’s arrest. The clerk, Sandy Pope, found no warrant.

Anderson then asked Pope to call the neighboring Dale County Sheriff’s Department to inquire whether a warrant to arrest Herring was outstanding there. Upon receiving Pope’s phone call, Sharon Morgan, the warrant clerk for the Dale County Department, checked her computer database. As just recounted, that Department’s database preserved an error. Morgan’s check therefore showed—incorrectly—an active warrant for Herring’s arrest. Morgan gave the misinformation to Pope, who relayed it to Investigator Anderson. Armed with the report that a warrant existed, Anderson promptly arrested Herring and performed an incident search minutes before detection of the error.

. . . . The sole question presented . . . is whether evidence the police obtained through the unlawful search should have been suppressed. The Court holds that suppression was unwarranted because the exclusionary rule’s “core concerns” are not raised by an isolated, negligent recordkeeping error attenuated from the arrest. *Ante*, at \_\_\_, \_\_\_. In my view, the Court’s opinion underestimates the need for a forceful exclusionary rule and the gravity of recordkeeping errors in law enforcement.

II  
A

The Court states that the exclusionary rule is not a defendant’s right; rather, it is simply a remedy applicable only when suppression would result in appreciable deterrence that outweighs the cost to the justice system.

The Court’s discussion invokes a view of the exclusionary rule famously held by renowned jurists Henry J. Friendly and Benjamin Nathan Cardozo. Over 80 years ago,

Cardozo . . . suggested that in at least some cases the rule exacted too high a price from the criminal justice system. See *People v. Defore*, 242 N.Y. 13, 24-25, 150 N.E. 585, 588-589 (1926). [He] questioned whether the criminal should “go free because the constable has blundered.” *Id.*, at 21, 150 N.E., at 587.

Judge Friendly later elaborated on Cardozo’s query. . . . Judge Friendly suggested that deterrence of police improprieties could be “sufficiently accomplished” by confining the rule to “evidence obtained by flagrant or deliberate violation of rights.” [The Bill of Rights as a Code of Criminal Procedure, 53 Calif. L.Rev. 929, 953 (1965)]; *ante*, at \_\_\_\_.

## B

Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. *Evans*, 514 U.S., at 18, 115 S.Ct. 1185 (STEVENS, J., dissenting). Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” *Ibid.* (internal quotation marks omitted); see Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 Colum. L.Rev. 1365 (1983). I share that vision of the Amendment.

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment’s prohibitions “are observed in fact.” *Id.*, at 1389; see Kamisar, *Does (Did) (Should) The Exclusionary Rule Rest On A “Principled Basis” Rather Than An “Empirical Proposition”?* 16 Creighton L.Rev. 565, 600 (1983). The rule’s service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable. See *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568-569, 91 S.Ct. 1031, 28 L.Ed.2d 306 (1971).

Beyond doubt, a main objective of the rule “is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.” *Elkins v. United States*, 364 U.S. 206, 217, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960). But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.” *United States v. Calandra*, 414 U.S. 338, 357, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (Brennan, J., dissenting).

The exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation. See *Mapp v. Ohio*, 367 U.S. 643, 652, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (noting “the obvious futility of relegating the Fourth Amendment to the protection of other remedies”). Civil liability will not lie for “the vast majority of [F]ourth [A]mendment violations—the frequent infringements motivated by commendable

zeal, not condemnable malice.” Stewart, 83 Colum. L.Rev., at 1389. Criminal prosecutions or administrative sanctions against the offending officers and injunctive relief against widespread violations are an even farther cry. See *id.*, at 1386-1388.

III

The Court maintains that Herring’s case is one in which the exclusionary rule could have scant deterrent effect and therefore would not “pay its way.” *Ante*, at \_\_\_ (internal quotation marks omitted). I disagree.

A

The exclusionary rule, the Court suggests, is capable of only marginal deterrence when the misconduct at issue is merely careless, not intentional or reckless. See *ante*, at \_\_\_, \_\_\_. The suggestion runs counter to a foundational premise of tort law—that liability for negligence, *i.e.*, lack of due care, creates an incentive to act with greater care. . . .

That the mistake here involved the failure to make a computer entry hardly means that application of the exclusionary rule would have minimal value. “Just as the risk of *respondeat superior* liability encourages employers to supervise . . . their employees’ conduct [more carefully], so the risk of exclusion of evidence encourages policymakers and systems managers to monitor the performance of the systems they install and the personnel employed to operate those systems.” *Evans*, 514 U.S., at 29, n. 5, 115 S.Ct. 1185 (GINSBURG, J., dissenting).

Consider the potential impact of a decision applying the exclusionary rule in this case. As earlier observed, the record indicates that there is no electronic connection between the warrant database of the Dale County Sheriff’s Department and that of the County Circuit Clerk’s office, which is located in the basement of the same building. When a warrant is recalled, one of the “many different people that have access to th[e] warrants,” must find the hard copy of the warrant in the “two or three different places” where the department houses warrants, return it to the Clerk’s office, and manually update the Department’s database. The record reflects no routine practice of checking the database for accuracy, and the failure to remove the entry for Herring’s warrant was not discovered until Investigator Anderson sought to pursue Herring five months later. Is it not altogether obvious that the Department could take further precautions to ensure the integrity of its database? The Sheriff’s Department “is in a position to remedy the situation and might well do so if the exclusionary rule is there to remove the incentive to do otherwise.” 1 W. LaFave, *Search and Seizure* §1.8(e), p. 313 (4th ed. 2004).

B

Is the potential deterrence here worth the costs it imposes? In light of the paramount importance of accurate recordkeeping in law enforcement, I would answer yes, and next explain why, as I see it, Herring's motion presents a particularly strong case for suppression.

Electronic databases form the nervous system of contemporary criminal justice operations. In recent years, their breadth and influence have dramatically expanded. Police today can access databases that include not only the updated National Crime Information Center (NCIC), but also terrorist watchlists, the Federal Government's employee eligibility system, and various commercial databases. Moreover, States are actively expanding information sharing between jurisdictions. As a result, law enforcement has an increasing supply of information within its easy electronic reach.

The risk of error stemming from these databases is not slim. Herring's *amici* warn that law enforcement databases are insufficiently monitored and often out of date. Brief for *Amicus* EPIC 13-28. Government reports describe, for example, flaws in NCIC databases, terrorist watchlist databases, and databases associated with the Federal Government's employment eligibility verification system.

Inaccuracies in expansive, interconnected collections of electronic information raise grave concerns for individual liberty. "The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base" is evocative of the use of general warrants that so outraged the authors of our Bill of Rights. *Evans*, 514 U.S., at 23, 115 S.Ct. 1185 (STEVENS, J., dissenting).

### C

The Court assures that "exclusion would certainly be justified" if "the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests." *Ante*, at \_\_\_\_\_. This concession provides little comfort.

First, by restricting suppression to bookkeeping errors that are deliberate or reckless, the majority leaves Herring, and others like him, with no remedy for violations of their constitutional rights. . . .

Second, I doubt that police forces already possess sufficient incentives to maintain up-to-date records. The Government argues that police have no desire to send officers out on arrests unnecessarily, because arrests consume resources and place officers in danger. The facts of this case do not fit that description of police motivation. Here the officer wanted to arrest Herring and consulted the Department's records to legitimate his predisposition.<sup>6</sup>

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6. It has been asserted that police departments have become sufficiently "professional" that they do not need external deterrence to avoid Fourth Amendment violations. See Tr. of Oral Arg. 24-25; cf. *Hudson v. Michigan*, 547 U.S. 586, 598-599, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006). But professionalism is a sign of

Third, even when deliberate or reckless conduct is afoot, the Court’s assurance will often be an empty promise: How is an impecunious defendant to make the required showing? If the answer is that a defendant is entitled to discovery (and if necessary, an audit of police databases), see Tr. of Oral Arg. 57-58, then the Court has imposed a considerable administrative burden on courts and law enforcement.<sup>7</sup>

IV

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule. The rule “is needed to make the Fourth Amendment something real; a guarantee that does not carry with it the exclusion of evidence obtained by its violation is a chimera.” *Calandra*, 414 U.S., at 361, 94 S.Ct. 613 (Brennan, J., dissenting). . . .

JUSTICE BREYER, whom JUSTICE SOUTER joins, dissenting.

I agree with JUSTICE GINSBURG and join her dissent. I write separately to note one additional supporting factor that I believe important. In *Arizona v. Evans*, 514 U.S. 1, 115 S.Ct. 1185, 131 L.Ed.2d 34 (1995), we held that recordkeeping errors made by a court clerk do not trigger the exclusionary rule, so long as the police reasonably relied upon the court clerk’s recordkeeping. *Id.*, at 14, 115 S.Ct. 1185; *id.*, at 16-17, 115 S.Ct. 1185 (O’Connor, J., concurring). The rationale for our decision was premised on a distinction between judicial errors and police errors, and we gave several reasons for recognizing that distinction.

. . . .

Distinguishing between police recordkeeping errors and judicial ones not only is consistent with our precedent, but also is far easier for courts to administer than THE CHIEF JUSTICE’S case-by-case, multifactored inquiry into the degree of police culpability. I therefore would apply the exclusionary rule when police personnel are responsible for a recordkeeping error that results in a Fourth Amendment violation.

. . . .

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the exclusionary rule’s efficacy—not of its superfluity.

7. It is not clear how the Court squares its focus on deliberate conduct with its recognition that application of the exclusionary rule does not require inquiry into the mental state of the police. See *ante*, at \_\_\_\_; *Whren v. United States*, 517 U.S. 806, 812-813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

**INSERT immediately after the preceding opinion, *Herring v. United States*:**

(1) In *Davis v. United States*, 564 U.S. \_\_\_\_, 131 S.Ct. 2419, \_\_\_\_ L.Ed.2d \_\_\_\_ (2011), the Court recognized yet another variety of the good-faith exception to Fourth Amendment suppression, holding “that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.” In *Davis*, officers searched a vehicle incident to the arrests of recent occupants. At the time, extant Eleventh Circuit precedent interpreting *New York v. Belton* authorized that vehicle search. Two years later, the Supreme Court decided *Arizona v. Gant*, which interpreted *Belton* narrowly, thereby restricting the scope of vehicle searches incident to arrest. Under *Gant*, the search in *Davis* violated the Fourth Amendment. The question before the Court was whether the evidence obtained from that search was subject to exclusion.

All members of the Court agreed that the Fourth Amendment rule announced in *Gant* was retroactively applicable to *Davis*, which was not yet final on appeal when *Gant* was decided. Thus, the vehicle search in *Davis* was unconstitutional. A six-Justice majority, however, concluded that *Gant*’s retroactive application did not mean that exclusion was an appropriate remedy for the violation in *Davis*. Whether the exclusionary rule was applicable depended on whether the deterrent benefits of suppression outweighed the social costs. Relying on prior good-faith exception decisions, the majority decided that when officers rely upon binding appellate precedent authorizing a search, the deterrent premises of the exclusionary rule and the balance of costs and benefits dictate the admission of any evidence obtained. Consequently, “when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply.” (The majority did reserve the question of whether the Court might, “in a future case, . . . recognize a limited exception to the good-faith exception for a defendant who obtains a judgment overruling one of [the Supreme Court’s] Fourth Amendment precedents.” In other words, a defendant who persuades the Court to overturn its own previously binding decision that authorized an officer’s search might be entitled to exclusion even though the officer was objectively reasonable in relying on that precedent.)

In the course of endorsing this new variation on the good-faith theme, the majority relied upon and reaffirmed dicta in *Herring v. United States* regarding the need for official “culpability” as a predicate for suppression. According to the majority, “‘deliberate,’ ‘reckless,’ or ‘grossly negligent’ disregard for Fourth Amendment rights” can justify suppression, but when conduct is either objectively reasonable or “involves only simple, ‘isolated’ negligence . . . exclusion cannot ‘pay its way.’” “[I]solated,’ ‘nonrecurring’ police negligence . . . lacks the culpability required to justify the harsh sanction of exclusion.” The Fourth Amendment violation in *Davis* was neither “deliberate enough” nor “culpable enough” to justify suppression. Because the “behavior” of the officers “was not wrongful,” the exclusionary rule could “have no application.”

Justice Sotomayor concurred in the judgment, agreeing that a limited good-faith exception was justifiable when officers rely upon binding appellate precedent specifically

authorizing or sanctioning their conduct. In her view, however, “whether an officer’s conduct can be characterized as ‘culpable’ is not itself dispositive.” She expressed concern that the culpability criterion endorsed in the majority opinion could result in suspension of the exclusionary rule in cases “where its application would appreciably deter Fourth Amendment violations.” According to Justice Sotomayor, whether suppression is justified “when the governing law is unsettled” is “a different question” not resolved in *Davis*.

Justice Breyer authored a dissent joined by Justice Ginsburg. He contended that the retroactive applicability of *Gant* meant that the remedy of exclusion was applicable in *Davis*. In addition, he observed that what constitutes “binding appellate precedent” for purposes of the new exception was far from clear and raised issues of “workability.” Finally, and most significantly, the dissent took issue with the implications of the majority’s culpability premise, expressing a “fear that the Court’s opinion will undermine the exclusionary rule.” According to Justice Breyer, “if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer’s conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was ‘deliberate, reckless, or grossly negligent,’ then the ‘good faith’ exception will swallow the exclusionary rule.” The ultimate result will be “a watered-down Fourth Amendment [that] offer[s] its protection against only those searches and seizures that are *egregiously* unreasonable.”

**INSERT on page 1006, in place of note (3):**

(3) In *Kansas v. Venstris*, 556 U.S. \_\_\_\_\_, 129 S.Ct. 1841, 173 L.Ed.2d 801 (2009), the Court held that incriminating statements obtained by a jailhouse informant in violation of the *Massiah* doctrine—statements the informant deliberately elicited from an accused—are admissible to impeach the defendant’s trial testimony. According to the majority, “[w]hether otherwise excluded evidence can be admitted for purposes of impeachment depends upon the nature of the constitutional guarantee that is violated.” Unlike the impeachment use of a coerced confession, which itself violates both the right to due process of law and the Fifth Amendment privilege against compulsory self-incrimination, the introduction of statements obtained in violation of *Massiah* does not itself deprive the defendant of a constitutional entitlement. The *Massiah* Court extended the trial right to counsel to pretrial confrontations “to ensure that police manipulation does not render counsel entirely impotent—depriving the defendant of” effective representation prior to the ultimate confrontation at trial. “[T]he *Massiah* right is a right to be free of uncounseled interrogation, and is infringed at the time of the interrogation.” Put otherwise, deprivation of the Sixth Amendment right to assistance of counsel occurs when and *only* when the government confronts an accused without counsel before trial and secures incriminating admissions.

Like the Fourth Amendment exclusionary rule, *Massiah*’s suppression doctrine is a deterrent sanction. Whether exclusion is called for is a question about “the scope of the remedy for a violation that has already occurred.” As under the Fourth Amendment and *Miranda*, the balance of interests tips in favor of an exception for impeachment use. Suppression from the government’s case in chief furnishes ample deterrence of future right to counsel deprivations, and the costs to the truthfinding process of suppression for impeachment purposes outweigh any additional deterrent benefits that might result. “[T]he game of excluding tainted evidence for impeachment purposes is not worth the candle.”

Two Justices dissented. In their view, *Massiah* had held that the *use* of deliberately elicited statements constituted a violation of the Sixth Amendment and that holding was a correct interpretation of the right to the assistance of counsel. “While the constitutional breach beg[ins] at the time of interrogation, the State’s use of th[e] evidence [it obtains] at trial compound[s] the violation. The logic that compels the exclusion of the evidence during the State’s case in chief extends to any attempt by the State to rely on the evidence, even for impeachment. The use of ill-gotten evidence during any phase of criminal prosecution does damage to the adversarial process—the fairness of which the Sixth Amendment was designed to protect.” According to the dissenters, the majority’s refusal to recognize that the “constitutional harm” occurs upon admission of the evidence at trial was, quite simply, “[i]nexplicabl[e]” and “lamentable.” The majority had “privileged the prosecution at the expense of the Constitution.”

## Appendix A

### THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

\* \* \*

ARTICLES IN ADDITION TO, AND AMENDMENT OF,  
THE CONSTITUTION OF THE UNITED STATES OF AMERICA,  
PROPOSED BY CONGRESS, AND RATIFIED BY THE  
SEVERAL STATES, PURSUANT TO THE FIFTH  
ARTICLE OF THE ORIGINAL CONSTITUTION.\*

#### AMENDMENT I [1791].

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

#### AMENDMENT II [1791].

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

#### AMENDMENT III [1791].

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

#### AMENDMENT IV [1791].

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.

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\*. The first ten Amendments to the United States Constitution are commonly referred to as the "Bill of Rights."

**AMENDMENT V [1791].**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**AMENDMENT VI [1791].**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

**AMENDMENT VII [1791].**

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

**AMENDMENT VIII [1791].**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**AMENDMENT IX [1791].**

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

**AMENDMENT X [1791].**

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

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**AMENDMENT XIV [1868].**

**SECTION 1.** All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

\* \* \*

**SECTION 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.