and unpredictability already exist in the current regime, and any risk of overreach is justified to counteract the present judicial abdication.

Deference to corrections officers is good policy, but unfortunately the Court's discussion in *Florence* has expanded the policy such that it appears to be the central inquiry in cases of individual rights of prisoners. Remarkably, the Court has continued to rely on a poorly defined, unstudied deference to corrections officials in these cases. Given the critical constitutional interests at stake, the Court should seek to clarify the standard of deference available. The hard look review standard supplies an effective model for the Court to define the doctrine clearly and protect constitutional rights, while being mindful of security interests and respectful of corrections officers' expertise.

2. Qualified Immunity. — In the Fourth Amendment context, government officials have qualified immunity from lawsuits when their actions are not objectively unreasonable.[1] To assess a qualified immunity claim, courts generally ask whether, given the facts of the case and the state of the law, any reasonable officer could have taken the action to which the plaintiff objects.[2] An officer's subjective understanding or intent is irrelevant to the inquiry.[3] Given this structure, classifying objective facts versus subjective beliefs is crucial for many qualified immunity claims.[4] Last Term, in *Messerschmidt v. Millender*,[5] the Supreme Court clarified the distinction between the two. The Court held that an official's inferences from a factual record are subjective beliefs and therefore do not defeat the official's qualified immunity.[6] That holding carries significant implications for future cases, particularly insofar as it suggests that a new pseudo–rational basis test will govern in qualified immunity cases.

Augusta Millender, age seventy-three, was asleep in her home one morning when, at 5:00 a.m., police officers armed with Detective Curt Messerschmidt's search warrant forced open her door.[7] Messerschmidt had drafted the search warrant to find evidence against Millender's foster son, Jerry Bowen, regarding a domestic assault three weeks ear-

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1 *E.g.*, Malley v. Briggs, 475 U.S. 335, 341, 345 (1986).

2 *See, e.g.*, Groh v. Ramirez, 540 U.S. 551, 563–64 (2004); *Malley*, 475 U.S. at 344–45, 346 n.9 (denying immunity "if no officer of reasonable competence would have requested the warrant").

3 *See, e.g.*, Harlow v. Fitzgerald, 457 U.S. 800, 815–19 (1982); *see also* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

4 This classification's centrality in qualified immunity analysis makes precise definitions particularly important. This comment will use "subjective" to refer to an actor's knowledge, beliefs, or intentions and "objective" to refer to factors unrelated to any actor's state of mind, such as the facts listed in an affidavit.

5 132 S. Ct. 1235 (2012).

6 *See id.* at 1250–51.

7 Millender v. Cnty. of Los Angeles, No. CV 05-2298 DDP (RZx), 2007 WL 7589200, at *1, *6 (C.D. Cal. Mar. 15, 2007).

lier.[8] Bowen's girlfriend, Shelly Kelly, had decided to leave him, but was afraid that he would attack her if she did; unfortunately, she was right.[9] Bowen, a known gang member, appeared while Kelly was moving out. He tried to throw her over a second-floor railing, then bit her, and finally fired at her using a black sawed-off shotgun with a pistol grip.[10] Kelly narrowly escaped in her car and went to the police.[11] After investigating the assault, Messerschmidt prepared a search warrant for Millender's residence, where he believed Bowen was staying.[12] The warrant authorized a search for all firearms and gang paraphernalia on the premises.[13] Messerschmidt had two supervisors and a deputy district attorney review the warrant, then submitted it to a magistrate judge, who approved it.[14] When the police executed it, they came up essentially empty-handed.[15]

About a year and a half later, Millender and her daughter sued the County of Los Angeles, the county sheriff's department, Messerschmidt, and several other officers.[16] Millender claimed that the defendants had violated her Fourth Amendment rights by executing a warrant without probable cause and sought damages under 42 U.S.C. § 1983.[17] The defendants in turn asserted that they were entitled to qualified immunity.[18] The district court agreed with Millender: qualified immunity, it noted, protects officials from suit only when those officials acted reasonably under the circumstances.[19] Here, the court found, the warrant was unreasonably overbroad insofar as it autho-

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[8] *Id.* at *2.

[9] *Messerschmidt*, 132 S. Ct. at 1241. Kelly had originally asked police officers to oversee her move due to this fear; however, the officers with her were called away for an emergency, after which Bowen arrived, believing that Kelly had "called the cops" on him. *Id.*

[10] *Id.*

[11] *Id.*

[12] *See id.* at 1242–43.

[13] *Id.* at 1242. The warrant authorized a search for, inter alia, "[a]ll handguns, rifles, or shotguns of any caliber . . . . All caliber of ammunition . . . . Any firearm capable of firing or chambered to fire any caliber ammunition. . . . Articles of evidence showing street gang membership or affiliation with any Street Gang to include but not limited to any reference to 'Mona Park Crips' . . . . Any photographs or photograph albums depicting persons, vehicles, weapons or locations, which may appear relevant to gang membership . . . ." Millender v. Cnty. of Los Angeles, 620 F.3d 1016, 1021–22 (9th Cir. 2010) (en banc).

[14] *Messerschmidt*, 132 S. Ct. at 1243.

[15] *See id.* (noting that the evidence retrieved included only "Millender's shotgun, a California Social Services letter addressed to Bowen, and a box of .45–caliber ammunition").

[16] *Id.*; Millender v. Cnty. of Los Angeles, No. CV 05-2298 DDP (RZx), 2007 WL 7589200, at *1 (C.D. Cal. Mar. 15, 2007).

[17] *Messerschmidt*, 132 S. Ct. at 1241, 1243. The complaint also stated § 1983 claims arising under the Fourteenth Amendment for race discrimination and a set of supplemental state claims. Millender v. Cnty. of Los Angeles, 564 F.3d 1143, 1147 (9th Cir. 2009).

[18] *Millender*, 2007 WL 7589200, at *18.

[19] *See id.* at *26 (citing Wilson v. Layne, 526 U.S. 603, 614 (1999)); *see also* Groh v. Ramirez, 540 U.S. 551, 563–64 (2004); Malley v. Briggs, 475 U.S. 335, 344–45, 346 n.9 (1986).

rized a search for *any* firearms, given that Kelly had provided the police with evidence of only the one particular sawed-off shotgun that Bowen had used.[20] The court therefore concluded that the defendants were not entitled to qualified immunity and granted in part Millender's motion for summary judgment.[21]

A panel of the Ninth Circuit vacated the district court's decision and remanded the case for further proceedings.[22] Writing for the panel, Judge Callahan observed that even if the warrant was overbroad, Messerschmidt's reliance on it was reasonable in light of two main considerations. First, the warrant had been approved by a magistrate and other officials.[23] Second, Bowen's gang ties and criminal history made it reasonable to search for evidence of gang membership and gun possession, because those warrant provisions "arose out of the officer's particular concerns with Bowen, if not with the specific crime under investigation."[24] Since Messerschmidt's actions fell far short of the gross incompetence found in other warrant overbreadth cases, he was entitled to qualified immunity.[25] Judge Ikuta dissented, arguing that gang ties and gun ownership cannot give officials a "pass" to execute overbroad search warrants and that because Messerschmidt himself should have known that the warrant was overbroad, the fact that he got supervisors and a magistrate to sign off on it should not alter the result.[26]

The Ninth Circuit granted a rehearing en banc and reversed.[27] Judge Ikuta, this time writing for the majority,[28] offered generally the same arguments as in her panel dissent.[29] Judge Callahan, now dissenting, likewise reiterated many of her arguments.[30] Judge Silverman also dissented, emphasizing that even if the officers had made a mistake, their behavior was not so "entirely unreasonable" that they should not be entitled to qualified immunity.[31]

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[20] *Millender*, 2007 WL 7589200, at *20–23.

[21] *Id.* at *23.

[22] *Millender*, 564 F.3d at 1151.

[23] *Id.* at 1149–50.

[24] *Id.* at 1150.

[25] *See id.* at 1150–51. Judge Fernandez wrote a brief concurrence, observing that even though the warrant was almost certainly overbroad, the various levels of approval Messerschmidt obtained showed that reliance on it was reasonable. *See id.* at 1151–52 (Fernandez, J., concurring).

[26] *See id.* at 1154–55 (Ikuta, J., dissenting).

[27] Millender v. Cnty. of Los Angeles, 620 F.3d 1016, 1020 (9th Cir. 2010) (en banc).

[28] Judge Ikuta was joined by Chief Judge Kozinski and Judges Rymer, Graber, Fisher, Rawlinson, Bybee, and Smith.

[29] *See Millender*, 620 F.3d at 1028–34.

[30] *Id.* at 1035 (Callahan, J., dissenting). Judge Callahan was joined by Judge Tallman. Judge Callahan also added that basing a qualified immunity decision on such close scrutiny of the warrant's contents would generate a large volume of unwanted litigation. *See id.*

[31] *Id.* at 1050 (Silverman, J., dissenting). Judge Silverman was also joined by Judge Tallman.

The Supreme Court reversed. Writing for the Court, Chief Justice Roberts[32] explained that "the threshold for establishing [that officials' actions were objectively unreasonable] is a high one, and it should be," and that Millender had not reached that threshold.[33] Several possible explanations showed that the warrant's provisions were not unreasonable. The firearms search, for instance, could be justified by the fact that Bowen was a known gang member who had fired a presumably illegal gun in public in an attempted murder; police therefore could reasonably conclude that he had other illegal guns or that he might make another attempt on Kelly's life with another gun.[34] And the gang evidence search could be justified by the possibility that an officer could have believed that Bowen's true motive was to keep Kelly from telling the police about his gang activity,[35] or that gang paraphernalia could help to link Bowen to any other evidence found in the home,[36] or that evidence of gang membership could be used to impeach Bowen at trial.[37] Importantly, these possibilities could be inferred from the warrant itself and did not depend on the officers' personal knowledge of the case.[38] Furthermore, the Chief Justice explained, the approval of the warrant by both supervisors and a magistrate, though not a perfect guarantee, was at least a significant factor suggesting that the relevant officials acted reasonably.[39] Finally, Chief Justice Roberts distinguished the defective warrant at issue from that in *Groh v. Ramirez*[40] by observing that Messerschmidt's warrant was not facially defective such that "just a simple glance" could have revealed the constitutional flaw.[41] Since the warrant's flaw was apparent only "upon a close parsing" of its language, this case was not one of those "rare" instances in which a reasonable official would have found the warrant facially defective, and the officers remained entitled to qualified immunity.[42]

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[32] Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito. Justice Breyer wrote a short concurrence explaining that he agreed with the majority's conclusions, but emphasizing that he did so primarily due to the unique and persuasive combination of facts in the case. *See Messerschmidt*, 132 S. Ct. at 1251 (Breyer, J., concurring).

[33] *Id.* at 1245 (majority opinion).

[34] *Id.* at 1246.

[35] *Id.* at 1247.

[36] *Id.* at 1248.

[37] *Id.*

[38] *See id.* at 1245 n.2 (criticizing Justice Sotomayor's dissent for relying on facts other than those derived from the warrant and its attached affidavits).

[39] *Id.* at 1249–50.

[40] 540 U.S. 551 (2004).

[41] *Messerschmidt*, 132 S. Ct. at 1250 (quoting *Groh*, 540 U.S. at 564) (internal quotation marks omitted). In *Groh*, the officer preparing the warrant had inadvertently entered a description of the house to be searched instead of the property or persons to be seized. 540 U.S. at 554.

[42] *Messerschmidt*, 132 S. Ct. at 1250–51.

Justice Kagan concurred in part and dissented in part. She explained that both the majority and the dissent went too far to the extremes — the majority by granting qualified immunity for both the firearms search and the gang paraphernalia search, and the dissent by arguing that it should be denied for both.[43] Instead, Justice Kagan would have split the two issues. With respect to the gun search, she observed that "[p]erhaps gang ties plus possession of an unlawful gun plus use of that gun to commit a violent assault do not add up to" probable cause, but since the officers' decision was at least reasonable in light of precedent, it was protected by qualified immunity.[44] With respect to the gang paraphernalia search, however, Justice Kagan disagreed with the majority. "Contra the Court's elaborate theory-spinning," she noted, there was no record evidence establishing probable cause to link the domestic assault to gang membership, meaning that the warrant had no basis for its search for gang paraphernalia.[45] Therefore, the officers were not entitled to qualified immunity for that element of the search. Finally, Justice Kagan argued that the majority improperly accepted the warrant's approval by supervisors and the magistrate judge as evidence of reasonability.[46] Instead, she maintained, such approval should carry little or no weight, since supervisors are part of the prosecution team and not independent judges, and since officers are responsible for their own conduct, regardless of whether a magistrate sanctions it.[47]

Justice Sotomayor dissented.[48] She began by arguing that there was no reasonable basis to justify the search for gang paraphernalia. First, she observed that none of the evidence in the record, including Messerschmidt's deposition and various police forms, indicated that the police had any belief whatsoever that the crime was gang-related.[49] Second, Justice Sotomayor noted that the majority's explanation that the evidence obtained could have been used for impeachment at trial leads with equal force to impermissible "general searches" for anything that could possibly be used for a prosecution.[50] Next, she argued that

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[43] *Id.* at 1251 (Kagan, J., concurring in part and dissenting in part).

[44] *Id.*

[45] *Id.* at 1251–52. Justice Kagan went on to reject the majority's contention that gang paraphernalia could link Bowen to any evidence found in the home. This rationale proved too much, she argued, since it would justify searches for any of a suspect's belongings in any location where police had probable cause to believe that the suspect may have stayed. *See id.* at 1252.

[46] *See id.*

[47] *See id.*

[48] Justice Sotomayor was joined by Justice Ginsburg.

[49] *See Messerschmidt*, 132 S. Ct. at 1254–55 (Sotomayor, J., dissenting).

[50] *Id.* at 1256; *see also* Orin Kerr, *Probable Cause of What? A Comment on* Messerschmidt v. Millender, SCOTUSBLOG (Feb. 23, 2012, 9:45 AM), http://www.scotusblog.com/2012/02/probable-cause-of-what-a-comment-on-messerschmidt-v-millender/ (arguing that *Messerschmidt* might expand officials' searching authority by allowing searches for impeachment evidence).

the firearms search was equally unjustified because, as with the gang paraphernalia search, clear record evidence showed that the officers had no belief that there were other illegal weapons present.[51] Without any nexus between "all firearms" and the particular domestic assault under investigation, the warrant was clearly overbroad and the officers' actions unreasonable and thus undeserving of qualified immunity.[52] Finally, Justice Sotomayor argued that the majority was wrong to give weight to the warrant's approval by other actors. The reasonability of an officer who drafts a warrant is assessed not when executing it, she maintained, but when submitting it to the magistrate for approval.[53] Thus, by submitting a warrant that he should have known was overbroad, Messerschmidt acted unreasonably, and the magistrate's ultimate approval was irrelevant to that conclusion.[54]

The holding in *Messerschmidt* has significant implications for future cases. While precedent indicates that subjective factors are irrelevant to the qualified immunity determination, it does not identify precisely which factors are subjective and which are objective. *Messerschmidt* clarifies this area of law by showing that an officer's inferences based on known facts are subjective. The Court's decision to classify such inferences as subjective factors will have important impacts on the way that courts analyze qualified immunity cases in the future, in particular by suggesting that a pseudo–rational basis test should govern.

Supreme Court precedent establishes fairly clearly that subjective intent is irrelevant to the qualified immunity inquiry. That rule derives directly from the Court's first substantial discussion of qualified immunity in its modern form, the 1982 case of *Harlow v. Fitzgerald*.[55] In *Harlow*, the Court noted that qualified immunity, previously known as "'good faith' immunity," traditionally had both an objective and a subjective component;[56] it then went on to discard the subjective component, which asked whether the officer had acted in bad faith.[57]

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[51] *See Messerschmidt*, 132 S. Ct. at 1258 (Sotomayor, J., dissenting).

[52] *See id.* at 1258–59.

[53] *See id.* at 1259–60.

[54] *See id.*

[55] 457 U.S. 800 (1982); *see also* Jennifer E. Laurin, Essay, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 699 (2011) (describing *Harlow*'s creation of a "new standard" that still governs today).

[56] *Harlow*, 457 U.S. at 815 (quoting Gomez v. Toledo, 446 U.S. 635 (1980)).

[57] *Id.* at 816–18. The Court was motivated by the desire to resolve more qualified immunity cases at summary judgment; after all, immunity from suit becomes irrelevant if the officer seeking it must go all the way to trial to prove that he has immunity, since he will still have to bear the burdens of litigation when doing so. *See, e.g.*, *id.* at 818; Ivan E. Bodensteiner, *Congress Needs to Repair the Court's Damage to § 1983*, 16 TEX. J. C.L. & C.R. 29, 43 (2010); Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 602 (1989).

Malice, then, was irrelevant; only "objective" factors would matter in future suits.[58]

The Court's later decisions left murky, however, precisely which factors constituted irrelevant indicators of intent and which were valid indicators of objective reasonability.[59] In *Malley v. Briggs*,[60] for example, the Court held that an "objective reasonableness" standard would govern qualified immunity cases, yet it simultaneously explained that qualified immunity would not protect "those who knowingly violate the law"[61] — a rather subjective inquiry that did not readily square with *Harlow*'s purely objective test.[62] The next Term, the Supreme Court provided clarification in *Anderson v. Creighton*,[63] noting:

> [T]he determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause . . . will often require examination of *the information possessed by the searching officials*. . . . The relevant question in this case, for example, is the objective (albeit fact-specific) question whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law *and the information the searching officers possessed*.[64]

After *Anderson*, then, it was clear that an officer's knowledge of pure facts was relevant to qualified immunity, whereas that officer's intentions were not; the open question was simply where to draw the line between the two.[65] Specifically, where would factual inferences based on the officer's knowledge fall?

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[58] *See Harlow*, 457 U.S. at 817–19; *cf.* Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.").

[59] This comment focuses on officers' knowledge and beliefs regarding the facts of the case. It is worth noting, however, that another area of ambiguity in the early development of qualified immunity doctrine, which received far more attention than questions regarding officers' knowledge of facts, was whether officers' knowledge of the *law* was relevant. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1750 n.96 (1991) (discussing the subjective component in terms of knowledge "of the relevant legal standard"); Kinports, *supra* note 57, at 616. *Messerschmidt*'s application, however, appears limited to questions of fact, not questions of law. *See, e.g.*, *Messerschmidt*, 132 S. Ct. at 1246–47 (examining the factual bases for the officers' belief that probable cause existed rather than the legal rationale they used to conclude that it did).

[60] 475 U.S. 335 (1986).

[61] *Id.* at 341.

[62] *See* Herring v. United States, 129 S. Ct. 695, 701 (2009) (admitting that the application of subjective language in *United States v. Leon*, 468 U.S. 897 (1984), to *Harlow*'s objective standard was "perhaps confusing[]"); Laurin, *supra* note 55, at 727–28; A. Allise Burris, Note, *Qualifying Immunity in Section 1983 &* Bivens *Actions*, 71 TEX. L. REV. 123, 163 (1992) ("*Harlow*'s concern for eliminating inquiries into malice may shield even those who knowingly violate the law.").

[63] 483 U.S. 635 (1987).

[64] *Id.* at 641 (emphasis added).

[65] *See* Laurin, *supra* note 55, at 728 ("*Anderson* can perhaps be best understood as distinguishing between what in criminal law terms might be described as 'knowing' versus 'purposeful' or 'intentional' mental states."); *cf.* Graham v. Connor, 490 U.S. 386, 397 (1989) ("As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive force case is an objec-

The *Messerschmidt* Court had two main options for classifying those inferences. It could have declared that factual inferences are part of the officer's knowledge, so a warrant unsupported by those inferences would be unreasonable and the officer would not be entitled to qualified immunity.[66] Alternatively, it could have declared that factual inferences are an officer's subjective beliefs, meaning that they have no bearing on whether the officer retains immunity. The majority adopted the latter approach.[67] In so doing, the Court gave clearer definition to the scope of "objective" reasonability, and that clearer definition will have substantial impacts on other aspects of qualified immunity jurisprudence.

For example, the classification of an officer's inferences explains the disagreement between the majority and the dissent regarding the relevance of a magistrate's approval, which suggests that the distinction may have some bearing on the weight courts give to such approval in future cases. For the dissent, the officers' actions were objectively unreasonable because the officers themselves knew (or should have known) as much: Messerschmidt requested a warrant to search for all evidence of gang paraphernalia, for instance, even though he admitted that there was no "reason to believe that the assault on Kelly was any sort of gang crime."[68] Similarly, the approval by superiors and a magistrate had no bearing on objective reasonability because Messerschmidt already knew (or should have known) that the warrant was unreasonable.[69] For the majority, however, the officers' subjective personal knowledge was merely a "conclusion" irrelevant to the reasonability inquiry.[70] Instead, the majority effectively imagined a reasonable officer confronted with only the objective facts of the case — namely, the warrant and attached affidavits — and concluded that this officer could reasonably have believed the warrant to be valid for any number of reasons.[71] For such an officer, the various approvals would

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tive one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.").

66 *See* 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.2(b), at 38 (4th ed. 2004) (observing that the "distinction" between irrelevant subjective legal conclusions and relevant factual conclusions is a very "fine" one but may have some arguments in its favor).

67 *See Messerschmidt*, 132 S. Ct. at 1248 n.6 (distinguishing *Anderson* by noting that Messerschmidt's beliefs about the relevance of other guns or gang membership were "conclusion[s]" rather than "information" (emphasis omitted)).

68 *Id.* at 1254 (Sotomayor, J., dissenting) (quoting trial court record).

69 *See id.* at 1260 ("In cases in which it would be not only wrong but unreasonable for any well-trained officer to seek a warrant, allowing a magistrate's approval to immunize the police officer's unreasonable action retrospectively makes little sense.").

70 *See id.* at 1248 n.6 (majority opinion).

71 *See id.* at 1246–49; *see also id.* at 1250 ("The question in this case is not whether the magistrate erred in believing there was sufficient probable cause to support the scope of the warrant

provide strong additional evidence of reasonability, because they would represent independent judgments concurring in the conclusion that the warrant is valid.[72] In such a case, it is sensible to grant the officer qualified immunity, since that officer relied on the approval of experts with substantially more legal training than he or she had, which is precisely the result that courts seek to encourage.[73] When an officer's factual inferences are discounted, approval by magistrates and superiors provides a very strong indication of objectively reasonable behavior.

Additionally, the restrictive definition of "objective" will allow courts to look to hypothetical explanations to conclude that an official's action was reasonable despite the official's own beliefs. This approach is evident in Chief Justice Roberts's novel application of an analogue of the traditional rational basis test.[74] Specifically, Chief Justice Roberts offered explanations that may have been reasonable when considered in isolation but ran directly counter to record evidence, such as the notion that Messerschmidt could have concluded that Bowen's acts were gang-related.[75] By departing so significantly from the actual facts established in the record in order to propose possible reasonable explanations, the majority highlighted the objective nature of its inquiry and demonstrated that this pseudo–rational basis test should govern future cases. Indeed, this inquiry is so "objective" that it may even discount police officers' experiences and training,[76] sug-

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he issued. It is instead whether the magistrate so obviously erred that any reasonable officer would have recognized the error.").

[72] *See id.* at 1249–50.

[73] *See* United States v. Leon, 468 U.S. 897, 913–14 (1984) ("Because a search warrant 'provides the detached scrutiny of a neutral magistrate, . . .' we have expressed a strong preference for warrants . . . ." (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977))).

[74] For the quintessential articulation of the rational basis test, see *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 487–88, 491 (1955).

[75] *See Messerschmidt*, 132 S. Ct. at 1257 (Sotomayor, J., dissenting) (calling the majority's analysis "akin to a rational-basis test"); *see also id.* at 1251 (Kagan, J., concurring in part and dissenting in part) (deriding the majority's approach as "elaborate theory-spinning"); *cf.* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (finding retirement law rational regardless of the logic actually used in creating it and despite arguments that the enacted statute was inconsistent with Congress's explicit intentions).

[76] Messerschmidt was an officer in a "specialized unit" that "investigat[ed] gang related crimes and arrest[ed] gang members"; he had "been involved in 'hundreds of gang related incidents, contacts, and or arrests'" and had "received specialized training in the field of gang related crimes" and "gang related shootings." *Messerschmidt*, 132 S. Ct. at 1242 (quoting Joint Appendix at 53–54, *Messerschmidt*, 132 S. Ct. 1235 (No. 10-704)) (internal quotation marks omitted). By simply ignoring the conclusions that Messerschmidt, as an expert, formed on the case and substituting its own, the Court suggested that the objective inquiry is so objective that even the expertise derived from an officer's training should be irrelevant to a court's conclusions about the reasonability of his decision. *See* 2 LAFAVE, *supra* note 66, § 3.2(b), at 38–39 ("[I]t might be contended that a purely objective test as to what factually occurred would deprive the probable cause standard of an essential point of reference — the perspective of the particular officer. If *that* officer's factual

gesting that judges are equally well equipped to determine the implications of fact patterns.[77]

Lower courts have already begun to apply forms of this new pseudo–rational basis standard.[78] As this trend continues, future plaintiffs in § 1983 cases alleging Fourth Amendment violations will need to show that it is not possible to provide any rational justification for the officials' actions.[79] Those actions are divorced from the officials' own reasoning; only the actual conduct, not the thought processes behind it, must be justified through the pseudo–rational basis test in order for the officials to retain qualified immunity.

Though its distinction between objective facts and subjective conclusions appears explicitly only in a footnote, *Messerschmidt*'s holding in this regard will have substantial impacts on other areas of qualified immunity jurisprudence. Specifically, it is likely to alter the impor-

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conclusions are to give way to a determination of whether the events would afford 'some other officer probable cause,' then that officer's expertise, experience, opportunity and ability to utilize his senses, and the like, might also be disregarded in favor of those characteristics in some mythical officer."); *cf.* Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 753 (2010) ("Allowing probable cause to turn on what a particular police officer knew, based on her training and on-the-job experience, injects a subjective inquiry into the analysis.").

[77] This suggestion is not necessarily a bad one — it is consonant, after all, with the general idea in Fourth Amendment jurisprudence that an independent judge's opinion is more reliable than a police officer's. *See, e.g.*, Malley v. Briggs, 475 U.S. 335, 346 n.9 (1986) ("It is a sound presumption that 'the magistrate is more qualified than the police officer to make a probable cause determination' . . . ." (quoting Brief for Petitioners at 33, *Malley*, 475 U.S. 335 (No. 84-1586))); *Leon*, 468 U.S. at 913–14 ("[T]he detached scrutiny of a neutral magistrate . . . is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer . . . ." (quoting *Chadwick*, 433 U.S. at 9)). *But see* Groh v. Ramirez, 540 U.S. 551, 563 (2004) ("It is incumbent on the officer executing a search warrant to ensure the search is lawfully authorized . . . ."). But while courts may indeed have an advantage over police officers in determining that probable cause exists, police may sometimes have an advantage in determining that probable cause does *not* exist, by virtue of their specialized, expert analysis of a case's facts. The Court's approach may overlook this distinction.

[78] *See, e.g.*, Southerland v. City of New York, 681 F.3d 122, 132–33 (2d Cir. 2012) (Raggi, J., dissenting from the denial of rehearing en banc) (relying on *Messerschmidt* in arguing that social worker could reasonably have concluded from facts available that children were in imminent danger from their father); McColley v. Cnty. of Rensselaer, No. 1:08-CV-01141 (LEK/DRH), 2012 WL 1589022, at *17 (N.D.N.Y. May 4, 2012) (relying on *Messerschmidt* in holding that even though certain defendants were present throughout the investigation process and thus arguably "should have been aware" of the factual deficiencies in a warrant application, those defendants were still entitled to qualified immunity because some other reasonable officer could have believed the warrant to be sufficient); *see also Southerland*, 681 F.3d at 124 (Raggi, J., dissenting from the denial of rehearing en banc) ("To the extent that five *judges* of this court hold that view of probable cause, it can hardly be said that no reasonable *child welfare worker* could have thought likewise." (emphases added)).

[79] This change may in fact be part of a larger trend in which plaintiffs will find it increasingly difficult to recover damages for constitutional violations. *Cf.* Minneci v. Pollard, 132 S. Ct. 617, 620 (2012) (holding that *Bivens* actions, the equivalent of § 1983 suits for constitutional violations by federal officers, cannot proceed when state tort law provides adequate remedies for injuries).

tance of various types of evidence, as indicated by its substantial reliance on supervisors' and a magistrate's approval, and to introduce a new, more objective mode of analysis akin to a rational basis test for qualified immunity. *Messerschmidt* therefore will certainly have an influence — perhaps a deciding one — on the outcomes of many future qualified immunity cases.

3. Search and GPS Surveillance. — The Fourth Amendment prohibits "unreasonable searches,"[1] but the Supreme Court has struggled to craft a doctrine that adequately protects that right, guides lower courts, and applies flexibly in novel situations.[2] Justice Harlan's test from *Katz v. United States*,[3] defining a "search" as government conduct that violates a "reasonable expectation of privacy,"[4] has predominated for over four decades. However, commentators roundly criticize that test and yearn for a reinvigorated doctrine.[5] Last Term, in *United States v. Jones*,[6] the Supreme Court held that attaching a Global Positioning System (GPS) device to a car and tracking its movements for a month is a Fourth Amendment "search."[7] Justice Alito's concurrence reached this conclusion under *Katz*,[8] but Justice Scalia's majority opinion applied a test based on physical trespass.[9] Prudent opinions in this context should balance judicial minimalism with incremental doctrinal reform and the accretion of surplus reasons. On these terms, Justice Scalia's majority and Justice Alito's concurrence are too minimalist and insufficiently generative. Justice Sotomayor's separate concurrence does best. Striving for a minimalist holding, Justice Sotomayor also reflects expansively in dicta on *Katz*, offering ideas for reform and preserving a full doctrinal toolkit for posterity.

In 2004, a police task force grew suspicious that Antoine Jones, the proprietor of a District of Columbia nightclub, was trafficking in narcotics.[10] After an investigation using traditional techniques, officers obtained a warrant from a federal district court to use a GPS electron-

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1 U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

2 *See* Richard H. Fallon, Jr., *The Supreme Court, 1996 Term — Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 57–58 (1997) (arguing that "[a] crucial mission of the Court is to *implement* the Constitution successfully," in addition to finding its "meaning," *id.* at 57).

3 389 U.S. 347 (1967).

4 *Id.* at 360 (Harlan, J., concurring). The *Katz* test requires both (1) an actual, subjective expectation of privacy, and (2) an objective expectation recognized as reasonable by society. Smith v. Maryland, 442 U.S. 735, 740 (1979).

5 *See, e.g.*, Peter P. Swire, Katz *Is Dead. Long Live* Katz., 102 MICH. L. REV. 904, 923 (2004) (arguing that the Court should "create a new life for *Katz*" to address new technologies).

6 132 S. Ct. 945 (2012).

7 *Id.* at 949.

8 *Id.* at 962–64 (Alito, J., concurring in the judgment).

9 *Id.* at 949 (majority opinion).

10 *Id.* at 948. The joint task force included both federal and District of Columbia officers. *Id.*