JUSTICE ALITO ON CRIMINAL PROCEDURE

HON. ANDREW S. OLDHAM*

Justice Alito's criminal procedure jurisprudence reflects a commitment to administrable "rules" instead of fuzzy, hard-to-apply "standards."[1] Criminal procedure rules allow the relevant actors to understand the law and conform their actions to it. Rules are also easier for inferior-court judges to apply. Standards, in contrast, often obscure rather than answer the hardest questions. They can leave police, prosecutors, citizens, and judges with little idea of what the law really requires.[2] Justice Alito's criminal procedure decisions thus evoke his late colleague's mantra that "the rule of law is the law of rules."[3]

But only to a point. Taken to its extreme, a rules-focused approach can devolve into a heady exercise in hyperformalism, entirely disconnected from the real world. And Justice Alito often reminds us that law has no meaningful purpose when it stops comporting with the reality of everyday life.[4] For Justice Alito, that's as true in criminal procedure as it is in other areas of law.[5]

This chapter considers two hallmarks of Justice Alito's criminal procedure jurisprudence. First, it explains Justice Alito's understanding of where the criminal procedure rubber hits the real-world road. Call it pragmatism; call it common sense; call it practicality. Whatever you call it, Justice Alito's criminal procedure decisions evince an unflagging concern for how any given precedent will affect ordinary people making everyday decisions. Second, it explains how Justice Alito's focus on real-world consequences affects his approach to reconsidering precedents and setting new ones.

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[1] *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 561–62 (1992) ("One can think of the choice between rules and standards as involving the extent to which a given aspect of a legal command should be resolved in advance or left to an enforcement authority to consider. Thus, advance determination of the appropriate speed on expressways under normal conditions . . . [is] 'rule-like' when compared to asking an adjudicator to attach whatever legal consequence seems appropriate in light of whatever norms and facts seem relevant.").

[2] Contrast Justice Alito's appreciation for simple, easy-to-understand rules with Justice Breyer's (putatively) pragmatic "enthusiasm for judicial minimalism, in the form of narrow decisions that leave the hardest questions *un*decided." Cass R. Sunstein, *Justice Breyer's Pragmatic Constitutionalism*, 115 YALE L.J. 1719, 1729 (2006) (emphasis added) (in the administrative-law context).

[3] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

[4] *See* Collins v. Virginia, 138 S. Ct. 1663, 1681 (2018) (Alito, J., dissenting) ("An ordinary person of common sense would react to the Court's decision the way Mr. Bumble famously responded when told about a legal rule that did not comport with the reality of everyday life. If that is the law, he exclaimed, 'the law is a ass—a idiot.'" (quoting CHARLES DICKENS, OLIVER TWIST 277 (1867))).

[5] *Cf., e.g.*, Bostock v. Clayton Cnty., Georgia, 140 S. Ct. 1731, 1766 (2020) (Alito, J., dissenting) (framing the textualist question as: "How would the terms of a statute have been understood by ordinary people at the time of enactment?").

I. CRIMINAL PROCEDURE PRAGMATISM

To unpack Justice Alito's understanding of criminal procedure rules and pragmatics, let's begin with the Fifth Amendment. The Court has long held that the Fifth Amendment's right against self-incrimination bars involuntary confessions.[6] Until 1966, the Court's approach to that question turned on a fact-specific evaluation of the circumstances surrounding the defendant's confession.

That approach, however useful in individual cases, had a weakness: It was fundamentally a standard, and it did very little to establish a legal rule for *future* cases. And that meant courts (and everyone else) had a hard time drawing lines between voluntary and involuntary confessions. Was the suspect intelligent? Was he sick at the time of the interview? Was he well-educated? Had he had prior police run-ins? &c.[7]

Partially because the voluntariness inquiry was so hard for everyone to apply, the Court fashioned a "prophylactic rule" in *Miranda v. Arizona*.[8] A prophylactic rule is a way of protecting an underlying constitutional guarantee by imposing *extra*-constitutional requirements on the relevant set of actors.[9] The underlying guarantee in *Miranda* was (mainly) the Fifth Amendment's ban on involuntary confessions. The extra-constitutional requirements were *Miranda*'s judge-made procedural rules—for example, the requirement to inform a suspect of his right to remain silent before interrogating him. And the relevant actors were, of course, police interrogators. If the police break the *Miranda* rules—and they really are *rules*, not standards[10]—then the resulting confession is almost always inadmissible.

As with so many criminal procedure doctrines, however, *Miranda* shifted (rather than settled) the rules-versus-standards question. Specifically, after *Miranda*, the question became: *When* must police administer the prophylactic warnings? At one level, the answer is easy. *Miranda*'s safeguards apply to suspects who are in custody. But when is someone in custody? Well, if the police have formally arrested someone, that, too, is easy. But even without a formal arrest, if police have created a "restraint on freedom of movement of the degree associated with" an arrest, then the suspect is likewise in custody.[11]

At least initially, the Court's custody cases turned on *objective* factors. The relevant question was, essentially, whether a "reasonable man" in the suspect's shoes would consider himself free

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[6] Bram v. United States, 168 U.S. 532, 542 (1897); *see also* LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) (discussing the origins of the right against self-incrimination).

[7] *See* J.D.B. v. North Carolina, 564 U.S. 261, 284–86 (2011) (Alito, J., dissenting) (documenting cases that analyzed a wide variety of factors indicating "voluntariness").

[8] 384 U.S. 436 (1966); *see also* Michigan v. Tucker, 417 U.S. 433, 445–46 (1974) (casting *Miranda* as prophylactic).

[9] *See* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 1 (2001) (discussing various definitions of the phrase "prophylactic rule" and concluding, "I prefer defining the term to refer to doctrinal rules self-consciously crafted by courts for the instrumental purpose of improving the detection of and/or otherwise safeguarding against the violation of constitutional norms."). *But see id.* at 25–28 (arguing the concept is not helpful).

[10] *See, e.g.*, Dickerson v. United States, 530 U.S. 428, 444 (2000) (holding that *Miranda* created a bright-line constitutional rule that Congress cannot statutorily abrogate and emphasizing that "experience suggests that the totality-of-the-circumstances test which [Congress] seeks to revive is more difficult than *Miranda* for law enforcement officers to conform to, and for courts to apply in a consistent manner").

[11] Stansbury v. California, 511 U.S. 318, 322 (1994) (internal quotation omitted).

to end his interaction with the police and go on his way.[12] The officer's and suspect's *subjective* thoughts, beliefs, and feelings were simply irrelevant.

That brings us to *J.D.B. v. North Carolina*.[13] In coordination with school administrators, a police officer had pulled a 13-year-old from class and talked with him in a school conference room.[14] Without giving *Miranda* warnings, the officer asked the student about a couple of home break-ins.[15] The student confessed to the break-ins, and he eventually admitted to the crimes in juvenile court.[16] The key question was whether the student had been in custody when he confessed.

The Court didn't actually answer that question, but it held the North Carolina Supreme Court had erred by applying the ordinary, objective "custody" test without accounting for the student's age.[17] The majority emphasized that disregarding a suspect's age in the custody analysis would result in significant inaccuracies: As a matter of common sense, a child is likely more susceptible to implied coercion than an otherwise-similar adult would be.[18] Therefore, the majority "h[e]ld 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," it must be part of the custody analysis.[19]

Justice Alito's dissent, joined by three other Justices, countered that the Court was ignoring *Miranda*'s prophylactic nature.[20] Remember that *Miranda* replaced a system that asked only whether a particular confession was, as a matter of actual fact, "voluntary."[21] And whatever its faults, *Miranda*'s chief virtue is that it's a rule everyone, especially the police, can understand and apply.[22]

The Court's decision muddied the gateway custody question by taking into account the suspect's age—not always an easy thing to quickly and reliably ascertain in the course of routine policing. And that was a step toward "undermin[ing] the very rationale for the *Miranda* regime."[23] Further, Justice Alito explained, the majority's rule will "generate time-consuming satellite litigation over a reasonable officer's perceptions" of a suspect's youthfulness. And it's impossible to understand why a suspect's youth could be relevant to the custody analysis while other characteristics—including intelligence, education, occupation, prior experience with law enforcement, mental health, &c.—unquestionably are not. And more fundamentally, the entire thrust of *Miranda*—and especially of the (formerly) purely objective "custody" test—is to lay down an administrable rule. If accuracy was the sole concern, after all, we'd be right back to the totality-of-the-circumstances voluntariness inquiry. In short, Justice Alito's *J.D.B.* dissent was based on the principle that there aren't any perfectly accurate rule-solutions to problems of

[12] *Id.* at 324–25.
[13] 564 U.S. 261 (2011).
[14] *Id.* at 265–66.
[15] *Id.* at 266.
[16] *Id.* at 267.
[17] *See id.* at 281.
[18] *See id.* at 271–75.
[19] *Id.* at 277.
[20] *Id.* at 282 (Alito, J., dissenting).
[21] *See id.* at 284–85 (Alito, J., dissenting).
[22] *See id.* at 281–83; *see also* Caminker, *supra* note 10 (discussing *Dickerson*).
[23] *J.D.B.*, 564 U.S. at 292.

criminal procedure. Insofar as the Court wants a rule, and a prophylactic one at that, good-enough answers sometimes must suffice.

Justice Alito's plurality opinion in *Salinas v. Texas*,[24] another Fifth Amendment case, was rooted in similar concerns. The suspect in that case (who was undisputedly *not* in custody at the time) had voluntarily talked with a police officer who was investigating a double murder.[25] He willingly answered the officer's questions—until the officer asked "whether his shotgun would match the shells recovered at the scene of the murder."[26] Rather than answer, the suspect clammed up, "looked down at the floor, shuffled his feet," and showed other signs of nervousness.[27]

The question was whether the prosecution had violated the Fifth Amendment's guarantee against self-incrimination by arguing at trial that the defendant's reaction suggested guilt. The plurality opinion said no, and the reason was simple. The well-established rule says a suspect not in custody must affirmatively invoke his right against self-incrimination—merely remaining quiet isn't good enough.[28] There are a few exceptions to that rule.[29] But none applied here. Full stop.

Justice Breyer's dissent urged a more fact-sensitive approach—surely it would be wise to consider "the circumstances of the particular case" to determine whether a suspect *implicitly* invoked the right.[30] But Justice Alito disagreed. Why depart from existing precedents in a way that will leave police officers and suspects without concrete guidance in any given case? And even in court, Justice Breyer's standards-focused approach would create difficult "line-drawing problems" harmful to the rule of law.[31] Far better to stick with the usual rule and apply it straightforwardly to the case at hand.

These cases are only a sampling.[32] Nevertheless, they illustrate Justice Alito's preference for rules over standards, and they reflect a deep appreciation of the workaday issues that face lower-court judges, prosecutors, and police. Those individuals face enough difficult, thorny problems as it is. The least judges can do is explain the rules of the game clearly and in plain English.

But as much as Justice Alito appreciates clear rules of the game, he also understands the playing field—both factual and legal—in any given case. And he often uses that knowledge in an effort to prevent the Court from making doctrinal messes.

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[24] 570 U.S. 178 (2013).

[25] *Id.* at 181.

[26] *Id.* at 182 (plurality opinion) (quotation omitted).

[27] *Id.* (quotation omitted).

[28] *See id.* at 183 (citing Minnesota v. Murphy, 465 U.S. 420, 427 (1984)).

[29] *See id.* at 184–185.

[30] *Id.* at 201–02 (Breyer, J., dissenting).

[31] *Id.* at 190–91 (plurality opinion) (also responding to the dissent's charge that the plurality's rule would itself be hard to administer).

[32] *See, e.g.*, Byrd v. United States, 138 S. Ct. 1518 (2018) (Alito, J., concurring) (short concurrence identifying the relevant questions informing whether a defendant can bring a Fourth Amendment claim in an evident attempt to keep the doctrine as clean as possible); Birchfield v. North Dakota, 579 U.S. 438 (2016) (majority opinion) (applying ordinary Fourth-Amendment rules in the drunk-driving context without distorting the doctrine); Yeager v. United States, 557 U.S. 110 (2009) (Alito, J., dissenting) (arguing, among other things, that the majority's rule would be too hard to apply).

A series of cases about the Federal Sentencing Guidelines illustrates this strand of Justice Alito's jurisprudence. The basic point of the Guidelines was to create "a system that diminishes sentencing disparit[ies]" among similarly situated offenders.[33] In *United States v. Booker*, just before Justice Alito joined the Court, the Court held that Congress had violated the Sixth Amendment's guarantee of trial by jury by making the Guidelines mandatory on sentencing courts.[34] The *Booker* Court "excise[d]" the offending statutory provisions in an attempt to fix the problem without totally undermining the Guidelines' goal of uniform sentencing.[35] The result: The Guidelines remain, but they're no longer mandatory on sentencing courts.

Gall v. United States[36] came two years later. The Court had to decide, in essence, how much flexibility a post-*Booker* district judge has to depart from the Guidelines when imposing a sentence.[37] The Court held that sentences get reviewed only under the highly deferential abuse-of-discretion standard—and it imposed little-to-no obligation on district judges to give serious weight to the Guidelines.[38]

Justice Alito's dissent contended that the majority was unduly sapping all the Guidelines' vitality. In his view, "a district court must give the policy decisions that are embodied in the Sentencing Guidelines at least some significant weight in making a sentencing decision."[39]

Justice Alito began by pointing out that *Booker* was ambiguous: It clearly held that the Guidelines were only "advisory," but it hedged about whether courts have much of an obligation to consider them on the way to sentencing decisions. And Justice Alito emphasized the fundamental principle of the Guidelines: Sentencing judges had been exercising too much discretion, and Congress attempted to remove that discretion entirely.[40]

But this is where Justice Alito's vast understanding of criminal procedure came into play. He accounted for something six of the other Justices apparently did not: *Booker* was a decision *about the Sixth Amendment jury right*.[41] That means *Booker* justifies undoing Congress's discretion-eliminating choice only to the extent Congress's choice conflicts with the Sixth Amendment. Thus, Justice Alito concluded, the only permissible approach is to read the ambiguous *Booker* opinion narrowly: *Booker* held the Guidelines aren't mandatory, but it didn't hold the Guidelines have no force whatsoever. And it *certainly* didn't hold that "sentencing judges need only give lipservice" to them, in Justice Alito's words.[42]

This is the kind of insight that appears obvious when you say it out loud. Yet Justice Alito was the only one to point it out at the time. And he noticed the issue because he understood how the Constitution, the statute, the Court's doctrine, and the trial-level sentencing system fit

[33] United States v. Booker, 543 U.S. 220, 250 (2005).

[34] *See id.* at 230–32.

[35] *See id.* at 258–59.

[36] 552 U.S. 38 (2007).

[37] *See id.* at 40–41 (majority opinion).

[38] *See id.* at 51.

[39] *Id.* at 61 (Alito, J., dissenting).

[40] *Id.* at 63–64.

[41] *Compare id.* at 64 (Alito, J., dissenting) ("[I]n reading the *Booker* remedial opinion, we should not forget the decision's constitutional underpinnings. *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury."), *with id.* at 40–60 (majority opinion) (not even using the phrase "Sixth Amendment").

[42] *See id.* at 63 (Alito, J., dissenting).

together.[43] In a series of related cases following *Gall*, Justice Alito continued making this point—often, but not always, as a lone voice crying out in the wilderness.[44]

Or take the Sixth Amendment's Confrontation Clause, which guarantees a defendant's right "to be confronted with the witnesses against him."[45] Justice Alito wrote the plurality opinion in *Williams v. Illinois*,[46] which implicated the Confrontation Clause's application to expert testimony and DNA evidence. Justice Alito first concluded that the Clause doesn't "bar an expert from expressing an opinion based on facts about a case that have been made known to the expert but about which the expert is not competent to testify."[47] And second, he explained that the Clause allows prosecutors to introduce expert-produced DNA evidence.[48]

Because the decision was so badly splintered—with four opinions total—Justice Alito's reasoning for the plurality didn't become binding precedent.[49] But that doesn't make it unimportant. To the contrary, it fended off the dissenters from expanding the Clause's scope. *Williams* thus illustrates that a non-precedent is sometimes better than a bad one.[50]

The dissent's approach sounded mainly in formalism and originalism. The dissenters advocated for a significant expansion of *Crawford v. Washington*,[51] an opinion written by Justice Scalia which itself expanded the Court's existing Confrontation-Clause precedents on purportedly originalist grounds.[52] In response, Justice Alito put on his own formalist and originalist tour de force, countering the dissent point-by-point.

But he also displayed a canny sense for the practical realities of expert testimony and DNA testing. Right up top, he noted that "[i]f DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable."[53] And when the dissent faulted the plurality for allowing abusive expert testimony, Justice Alito pointed to an interlocking web of existing "safeguards to prevent such abuses."[54] When Justice Thomas and the dissent each appealed to history, Justice Alito countered that they were overlooking the way DNA testing actually works: A team of technicians follows established procedures, with no incentive to reach "anything other than [] scientifically sound and reliable" results, and without any clue whether a given result will

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[43] *See id.* at 66.

[44] Kimbrough v. United States, 552 U.S. 85 (2007) (Alito, J., dissenting) (alone); Cunningham v. California, 549 U.S. 270 (2007) (Alito, J., dissenting) (joined by Justices Kennedy and Breyer); Pepper v. United States, 562 U.S. 476 (2011) (Alito, J., concurring in part and dissenting in part) (alone).

[45] U.S. CONST. amend. VI.

[46] 567 U.S. 50 (2012).

[47] *See id.* at 56 (plurality opinion).

[48] *See id.* at 58 (plurality opinion).

[49] *See id.* at 120 (Kagan, J., dissenting) (discussing the Court's disagreement over the plurality's reasoning).

[50] *Cf.* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 330 (2009) (Kennedy, J., joined by the Chief Justice and Justices Breyer and Alito, dissenting) (lamenting the Court's formalistic extension of the Confrontation Clause to forensic analysts' testimony).

[51] 541 U.S. 36 (2004).

[52] *See id.* at 49–69.

[53] *Williams*, 567 U.S. at 58 (plurality opinion).

[54] *Id.* at 127–28 (Kagan, J., dissenting); *id.* at 79–80 (plurality opinion).

incriminate or exonerate any particular individual.[55] In sum, history matters, but so does context: "[T]he use at trial of a DNA report prepared by a modern, accredited laboratory bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate."[56]

Justice Alito has employed a similar approach in other areas. In one Fourth Amendment case, he criticized the Court for giving an "arbitrary" answer to "a question not really presented by the facts in this case."[57] In another, he pointed to the Court's refusal to apply "nearly a century['s]" worth of precedents and its decision to invent a new rule instead.[58] In the Fifth-Amendment context, he's attempted to mitigate (what he sees as) majority-created doctrinal messes by urging lower courts to apply existing precedents as narrowly as possible in the future.[59] And in another Sixth Amendment case, he used his knowledge of trial procedure as a way to limit the scope of the Court's holding.[60] The common refrain is that each case has its nuances, and it's worthwhile to take the time to understand them. Why change the law when attending to the facts is enough?

II. CRIMINAL PROCEDURE MODESTY

A second hallmark of Justice Alito's criminal procedure jurisprudence is its modesty. Thus, for example, he is often reluctant to overturn precedent. But Justice Alito's modesty does not stop there. Judicial innovation—even when consistent with existing precedent—often raises more questions than it answers, rendering the law less clear. And each innovation complicates an already intricate mosaic of criminal procedure doctrine. In an area where proposals for groundbreaking shifts abound—among lawyers and jurists of all persuasions—Justice Alito's opinions consistently argue for a cautious approach to legal change.

Let's start with Justice Alito's deference to precedent (or *stare decisis*[61]). Two of his dissenting opinions—one shortly after his elevation to the Supreme Court and one closer to the time of this writing—provide useful guideposts.

The first case is *Arizona v. Gant*,[62] decided during Justice Alito's third full term on the Court. The case involved a recurring question: When police arrest an occupant or recent occupant of a vehicle, may they search the vehicle without a warrant?[63] In the 1981 decision of *New York v. Belton*, the Court had 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."[64]

The *Belton* decision had been widely understood to permit police officers, pursuant to a lawful arrest, to secure arrestees (*e.g.*, in the back of a patrol car) and then search the passenger

[55] *Id.* at 113–18 (Thomas, J., concurring); *id.* at 134–35 (Kagan, J., dissenting); *id.* at 84–86 (plurality opinion).

[56] *Id.* at 86 (plurality opinion) (quotation omitted).

[57] Rodriguez v. United States, 575 U.S. 348, 370 (2015) (Alito, J., dissenting).

[58] Collins v. Virginia, 138 S. Ct. 1663, 1681–83 (2018) (Alito, J., dissenting).

[59] *See* Yeager v. United States, 557 U.S. 110, 133–36 (2009) (Alito, J., dissenting).

[60] *See* Rothgery v. Gillespie Cnty., 554 U.S. 191, 213–18 (2008) (Alito, J., concurring).

[61] *Stare decisis* is Latin for "to stand by things decided," and refers to the principle that courts should follow earlier judicial decisions when the same issue arises in subsequent litigation. *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[62] 556 U.S. 332 (2009).

[63] *See id.* at 335.

[64] 453 U.S. 454, 460 (1981).

compartment of their vehicles.[65] But the *Gant* majority changed course and narrowed the circumstances where warrantless vehicle searches are permissible. The Court held that police may search an arrestee's vehicle only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.[66]

Justice Alito vigorously dissented. He lamented that the majority's novel, bipartite test "is virtually certain to confuse law enforcement officers and judges for some time to come."[67] And he highlighted the perverse consequences that he believed would flow from the majority's new rule. For example, he argued that *Gant* would often "endanger arresting officers" by making them choose between searching the car *before* securing the arrestee and losing the right to search the car at all.[68]

But the brunt of this dissent criticized the majority for departing from *Belton*'s rule without adequate justification. Here Justice Alito focused on the doctrine of *stare decisis*, which requires the Court to find "a special justification" to abandon a prior decision.[69] The Court is supposed to consider a number of factors in deciding whether a special justification exists, including reliance on the precedent, its workability, and whether it was badly reasoned.[70]

Justice Alito's dissent gave particular attention to reliance interests. This was an important jurisprudential move because, prior to *Gant*, most Justices considered reliance relevant in cases involving property and contract rights—but not in cases involving "procedural and evidentiary rules."[71] Justice Alito nonetheless identified substantial reliance reasons that, he argued, supported keeping the *Belton* rule. For example, he noted that police academies had been teaching the *Belton* rule to officers for more than a quarter century.[72] And given the relative frequency of vehicle-occupant arrests, numerous searches—some of which would be the subject of pending litigation when *Gant* was decided—had been conducted in reliance on the Court's guidance in *Belton*.[73] The Court's decision thus threatened to "cause the suppression of evidence gathered in many searches carried out in good-faith reliance on well-settled case law."[74] And it would force thousands of law enforcement officers to unlearn an established rule and replace it with the Court's new (and more complex) guidance.

Justice Alito's *stare decisis* analysis, including his concerns about reliance interests, obviously did not persuade a majority in *Gant*. But *Davis v. United States*[75]—decided two years later—provides an interesting coda that arguably vindicates his view. *Davis* involved a vehicle search that took place in 2007, two years before *Gant* was decided. Because the officers searched the arrestee's vehicle after securing him in a patrol car, the search would have been permissible under

[65] *Gant*, 556 U.S. at 341.
[66] *Id.* at 343.
[67] *Id.* at 356 (Alito, J., dissenting).
[68] *Id.* at 355.
[69] *Id.* at 358 (quotation omitted).
[70] *Id.*
[71] Payne v. Tennessee, 501 U.S. 808, 828 (1991).
[72] *Gant*, 556 U.S. at 359 (Alito, J., dissenting).
[73] *Id.*
[74] *Id.* at 356.
[75] 564 U.S. 229 (2011).

Belton but was unconstitutional under *Gant*. Justice Alito wrote for a six-Justice majority, holding that the exclusionary rule[76] did not apply to the fruits of the search. The Court also held, more broadly, that "searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."[77] The Court's reasoning was based on the premise that "suppression would do nothing to deter police misconduct in these circumstances, and . . . it would come at a high cost to both the truth and the public safety."[78] So, while Justice Alito's emphasis on reliance interests in *Gant* didn't win him that battle, they contributed to victory in a different war—the war over applying the exclusionary rule to reasonable, good-faith searches.

Next consider *Ramos v. Louisiana*,[79] a 2020 case involving the Sixth Amendment right to trial by jury. *Ramos* overturned the 1972 case of *Apodaca v. Oregon*[80] and held that the Sixth Amendment requires a *unanimous* jury verdict to convict a defendant of a felony.[81] Justice Alito again dissented on *stare decisis* grounds. And he again emphasized reliance interests—though this time he focused on two States (Louisiana and Oregon), which were the only two that relied on *Apodaca* to allow non-unanimous jury verdicts.[82]

As Justice Alito explained: "What convinces me that *Apodaca* should be retained are the enormous reliance interests of Louisiana and Oregon."[83] Perhaps most interestingly, he contrasted *Ramos* with other landmark Supreme Court decisions that overturned precedent, like *Janus v. AFSCME*,[84] arguing that the States' reliance interests in *Ramos* far exceeded the reliance interests in cases like *Janus*. In so doing, Justice Alito again flipped the conventional wisdom—that reliance interests for *stare decisis* purposes are at their apex in the realm of contract and property—on its head. He forecasted a "tsunami" of litigation arising from the *Ramos* decision, requiring countless retrials and requiring the evaluation of endless jury-unanimity claims on both direct and collateral review.[85] And he suggested that avoiding these kinds of structural shocks to our criminal justice system should be a central tenet of *stare decisis*—even more so than protecting contract and property interests. For Justice Alito, then, *stare decisis* is first and foremost a tool to promote systemic stability and the public good, rather than a protection for individual stakeholders and a thumb on the scale for vested interests.

Although only articulated in dissent, Justice Alito's view of *stare decisis* and reliance interests in the criminal procedure context has proved influential. For example, partially in response to Justice Alito, the Court later held that the *Ramos* rule didn't apply retroactively to cases on

[76] The exclusionary rule is a judge-made doctrine that often renders evidence obtained in violation of a defendant's Fourth Amendment rights inadmissible in subsequent criminal proceedings. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[77] *Davis*, 564 U.S. at 232.

[78] *Id*.

[79] 140 S. Ct. 1390 (2020).

[80] 406 U.S. 404 (1972).

[81] *Ramos*, 140 S. Ct. at 1397.

[82] *Id.* at 1425–26 (Alito, J., dissenting).

[83] *Id.* at 1436 (Alito, J., dissenting).

[84] 138 S. Ct. 2448 (2018) (overruling *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), and holding that imposing union "agency fees" on nonconsenting public-sector employees violates the First Amendment).

[85] *Ramos*, 140 S. Ct. at 1436 (Alito, J., dissenting).

collateral review.[86] And Justice Alito's defense of *stare decisis* carried the day in *Gamble v. United States*,[87] where his majority opinion rejected a request to overturn the "separate sovereigns" doctrine that permits both a State and the federal government to try a defendant for the same crime without offending the Double Jeopardy Clause.[88]

Justice Alito's modesty does not just counsel restraint in reconsidering precedent; it also counsels against broad judicial innovations in the absence of precedent. I should first explain what I mean by "judicial innovation." Justice Scalia colorfully depicted the judicial penchant for innovation in his explanation of how the common law evolves. As he noted, common-law judicial doctrines tend to develop in a peculiar fashion, "rather like a Scrabble board."[89] This is because, under the rule of *stare decisis*, it's very hard to *erase* a prior decision, but it's easy to add *qualifications* to it. Justice Scalia captured the attractiveness and the technique of judicial innovation as follows:

> [T]he great judge—the Holmes, the Cardozo—is the man (or woman) who has the intelligence to discern the best rule of law for the case at hand and then the skill to perform the broken-field running through earlier cases that leaves him free to impose that rule: distinguishing one prior case on the left, straight-arming another one on the right, high-stepping away from another precedent about to tackle him from the rear, until (bravo!) he reaches the goal—good law.[90]

By judicial innovation, then, I mean adding another word (*i.e.*, rule) to the Scrabble board of precedent instead of merely applying the words already on the board. In theory, ever since the landmark 1938 decision of *Erie Railroad Company v. Tompkins*,[91] federal courts have abjured common-law rulemaking except in a few narrow enclaves.[92] But the common-law mode of judging continues to have great appeal and influence in American jurisprudence, including in constitutional interpretation.[93] And the common-law methodology is particularly influential in the criminal procedure context, where the relevant constitutional commands—like no "unreasonable searches and seizures"[94]—leave ample room for elaboration.

Against this backdrop, many of Justice Alito's opinions provide powerful critiques of judicial innovation. Take, for example, *United States v. Jones*.[95] There, the Court considered whether it was an "unreasonable search" under the Fourth Amendment to surreptitiously attach a GPS tracking device to a suspect's vehicle without a warrant and to monitor the vehicle's movements on public streets.[96] All nine Justices agreed that the search was unreasonable. But they forcefully disagreed about why.

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[86] *See* Edwards v. Vannoy, 141 S. Ct. 1547 (2021).
[87] 139 S. Ct. 1960 (2019).
[88] *See id.* at 1962.
[89] Antonin Scalia, A Matter of Interpretation 8 (1997).
[90] *Id.* at 9.
[91] 304 U.S. 64 (1938).
[92] *See* Andrew S. Oldham, *Sherman's March (in)to the Sea*, 74 TENN. L. REV. 319, 374–77 (2007).
[93] *See, e.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).
[94] U.S. CONST. amend. IV.
[95] 565 U.S. 400 (2012).
[96] *See id.* at 402.

Perhaps ironically, it was Justice Scalia—often the critic of judicial innovation in other contexts—who proposed the more innovative approach in *Jones*. The historical standard, based on the landmark 1967 case of *Katz v. United States*,[97] was that a search was unconstitutional if it violated a suspect's "reasonable expectation of privacy."[98] But Justice Scalia's majority opinion declined to apply the *Katz* test, instead formulating an additional and separate rule that a warrantless trespass to a person's house or chattels constitutes an unreasonable search if done to obtain information.[99]

Justice Alito concurred in the judgment. He argued the Court should have simply applied the *Katz* test, and he criticized the majority's new approach as a "highly artificial" exercise "based on 18th-century tort law."[100] Notably, he agreed that the *Katz* test has its flaws. For example, its reasoning is circular (a search is constitutionally "unreasonable" if it violates one's "reasonable expectation of privacy"), it turns on judicial hindsight, and it is tainted by subjectivity.[101] Justice Alito nonetheless argued that, for all its faults, Katz was superior to the majority's new qualification. The latter, he worried, would create substantial confusion and disruption in Fourth Amendment law. For example, since the majority's new test was tied to the notion of "trespass" under state property law, would the Fourth Amendment's protections now vary from State to State?[102] This and several other facets of the majority's new inquiry would confuse the law until their eventual clarification in further cases.

At bottom, *Jones* was about how to apply the 1791 constitutional prohibition on "unreasonable searches" to a 2012 case involving new and advanced surveillance technology. Justice Alito thought it unwise for the Court to manufacture a new test to adapt the Fourth Amendment's "reasonableness" standard to these changed circumstances. Instead, he argued that if legal innovation was appropriate, it should come from a legislative body, which "is well situated to gauge changing public attitudes, to draw detailed lines, and to balance privacy and public safety in a comprehensive way."[103]

Justice Alito has shown this same skepticism of judicial innovation in other criminal procedure cases. *Florida v. Jardines*,[104] for example, decided a year after *Jones*, asked whether it violated the Fourth Amendment to use a drug-sniffing dog on a homeowner's porch to investigate the contents of the home without a warrant.[105] The majority said yes, again expounding a trespass-based theory. Justice Alito again disagreed, urging that *Katz* (for all its faults) was better than judicial innovation.[106]

The blockbuster 2018 case of *Carpenter v. United States*[107] brought the Court's longstanding differences over judicial innovation in constitutional criminal procedure to a head. The issue was

[97] 389 U.S. 347 (1967).
[98] *Jones*, 565 U.S. at 406.
[99] *Id.* at 408, 408 n.5.
[100] *Id.* at 418–19 (Alito, J., dissenting).
[101] *Id.* at 427 (Alito, J., dissenting).
[102] *See id.* at 425–26 (Alito, J., dissenting).
[103] *Id.* at 429–30 (Alito, J., dissenting).
[104] 569 U.S. 1 (2013).
[105] *Id.* at 3.
[106] *See id.* at 17 (Alito, J., dissenting).
[107] 138 S. Ct. 2206 (2018).

whether the Government conducts a "search" for Fourth Amendment purposes when it accesses historical cell phone records (called "cell site location information" or "CSLI") that provide information about the user's past locations.[108] CSLI surveillance can be particularly comprehensive and invasive: In *Carpenter* itself, for example, the Government scrutinized the suspect's movement over 127 days through 12,898 location points.[109] But existing Fourth Amendment doctrine did not support holding that CSLI surveillance constitutes a search, for two reasons. First, this kind of investigation involves subpoenaing records rather than actual, physical searching—and subpoenas are generally subject to less Fourth Amendment scrutiny (a point Chief Justice Roberts contests in dissent). Second, the Government searched property belonging to a third party—the cell phone company—rather than searching the suspect's own property. The majority sidestepped these doctrinal obstacles and held that accessing CSLI constitutes a search.[110] It based its decision on "the unique nature of cell phone location information," and noted that declining to extend Fourth Amendment protections to CSLI would permit "tireless and absolute surveillance" of anyone with a cell phone.[111]

Justice Alito dissented. Despite "shar[ing] the Court's concern about the effect of new technology on personal privacy," he thought it unwise to depart from established Fourth Amendment principles in order to adapt the doctrine to the threats posed by new technology.[112] And he reiterated and expanded on his concerns about the dangers of judicial innovation. Specifically, he predicted that the principles underlying *Carpenter* would require "all sorts of qualification and limitations that have not yet been discovered" in order to prevent a wholesale revolution in Fourth Amendment law.[113] These qualifications would "mak[e] a crazy quilt of the Fourth Amendment"—or, to return to our earlier metaphor, add needless complexity and word jumbles to the Scrabble board.[114] For the Supreme Court to create this complexity, Justice Alito argued, was unnecessary and irresponsible. The proper course would have been to allow Congress and the States to choose how to adapt the law to the challenges of privacy in the digital age.

One final case warrants discussion because it demonstrates Justice Alito's firm commitment to judicial caution even in the face of particularly repugnant facts. In *Pena-Rodriguez v. Colorado*,[115] the Court considered the scope of the evidentiary rule against admitting juror testimony to impeach jury verdicts. This rule predates the Founding. It provides that once a jury delivers its verdict, the losing party can't offer juror testimony to cast doubt on the regularity of the jury deliberations in an effort to set aside the verdict.[116] This rule exists to shield jury deliberations from public scrutiny and to avoid post-verdict harassment of jurors. And the Court has applied it broadly: In one case, it held the rule excluded evidence even of the jury's rampant alcohol,

[108] *Id.* at 2211.
[109] *Id.* at 2212.
[110] *Id.* at 2223.
[111] *Id.* at 2218, 2220.
[112] *Id.* at 2246 (Alito, J., dissenting).
[113] *Id.* at 2261 (Alito, J., dissenting).
[114] *Id.* (Alito, J., dissenting) (quotation omitted).
[115] 137 S. Ct. 855 (2017).
[116] *See* Fed. R. Evid. 606(b).

marijuana, and cocaine use during a criminal trial.[117] But in *Pena-Rodriguez*, the Court held that the Sixth Amendment requires the no-impeachment rule to give way where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a defendant.[118]

Justice Alito dissented. He began by characterizing the majority's intentions as "admirable" and stating that "even a tincture of racial bias can inflict great damage" on the criminal justice system.[119] But after a lengthy survey of the history of and justifications for the no-impeachment rule, he concluded that the Court's creation of a constitutional exception to no-impeachment rules—for the first time—was improper. He went on to predict that the majority's doctrinal innovation would invite the practical harms that no-impeachment rules were designed to prevent. And he concluded by "question[ing] whether our system of trial by jury can endure this attempt to perfect it."[120]

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Perhaps Justice Alito's criminal procedure jurisprudence can best be summed up by his reflection in the Fourth Amendment case *Manuel v. City of Joliet*:[121] "A well-known medical maxim—'first, do no harm'—is a good rule of thumb for courts as well."[122] This judicial philosophy has proved as influential as it is modest. Justice Alito's pragmatic and cautious approach to criminal procedure has crept into the Court's handling of all sorts of doctrines, from *Miranda* and the exclusionary rule to the Confrontation Clause and sentencing. His influence here, as in so many other areas, will be felt for decades to come.

[117] *See* Tanner v. United States, 483 U.S. 107, 115–16 (1987).
[118] *Pena-Rodriguez*, 137 S. Ct. at 869.
[119] *Id.* at 875 (Alito, J., dissenting).
[120] *Id.* at 885 (Alito, J., dissenting).
[121] 137 S. Ct. 911 (2017).
[122] *Id.* at 929 (Alito, J., dissenting).