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Fourth Amendment Right to Privacy: When Is It Reasonable to Search a Minor?

Ashley Moruzzi

FOURTH AMENDMENT RIGHT TO PRIVACY: WHEN IS IT REASONABLE TO SEARCH A MINOR?

SUPREME COURT OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

Matter of Jamal S.[1]
(decided December 4, 2014)

I. INTRODUCTION

An individual's fundamental right to privacy is one of few that are essential to protect a person's dignity.[2] Because of the nature of this right, it is critical for government actors to stay within the limits of their authority when imposing on an individual's privacy right.[3] This privacy right originated from the Fourth Amendment of the United States Constitution, which grants individuals "the right . . . to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[4] Article 1, section 12 of the New York State Constitution affords individuals a right to be protected from unreasonable searches and seizures, which uses language indistinguishable from the Fourth Amendment.[5]

Although the right to be free from governmental intrusion and control upon everyday life is important, it is not an absolute right. Assuming the individual has a reasonable expectation of privacy, only searches and seizures that are unreasonable are prohibited.[6] Gen-

[1] 999 N.Y.S.2d 7 (App. Div. 1st Dep't 2014).

[2] Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602, 613-14 (1989). Fourth Amendment protections apply only to intrusions by government actors or those private parties who act as an "instrument or agent of the Government." *Id.*

[3] *Id.*

[4] U.S. CONST. amend. IV.

[5] N.Y. CONST. art. I, § 12.

[6] U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

erally, an unreasonable search is one performed without a warrant.[7] In order for law enforcement to obtain a warrant probable cause must be present.[8] Without first obtaining a warrant, a search and seizure is presumptively unreasonable.[9] There are, however, several exceptions to the warrant requirement and, if applicable, then a warrantless search and seizure does not violate the constitutional right to privacy. On the other hand, if the search and seizure was unlawful and violated an individual's constitutional right, then the exclusionary rule may apply to remedy the violation.[10] When the exclusionary rule applies, evidence acquired in violation of a defendant's constitutional right may be inadmissible at a criminal trial against such defendant.[11] This rule of law, grounded in the Fourth Amendment, serves as a deterrent to police officers and prosecutors who may unlawfully gather evidence against a defendant.[12]

In the recent decision of *Matter of Jamal S.*, the court for the New York Appellate Division for the First Department focused on two issues. The first issue was whether the defendant was lawfully arrested because of his status as a minor.[13] This issue is relevant because if the defendant was lawfully arrested, as opposed to being detained, the officers acted reasonably when searching the defendant incident to the arrest. The court, however, held that the defendant was unlawfully arrested because the defendant was a minor, and that the defendant was being held for temporary detention.[14] Since the warrantless search incident to the arrest exception did not apply because the defendant was not lawfully arrested, the court then addressed the second issue: whether the defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated when police officers asked the defendant to remove his shoes, which

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[7] Katz v. United States, 389 U.S. 347, 357 (1967).

[8] *Id.*

[9] *Id.*

[10] Herring v. United States, 555 U.S. 135, 139 (2009).

[11] *Id.*

[12] Mapp v. Ohio, 367 U.S. 643, 648, 651 (1961).

[13] N.Y. CRIM PROC. LAW §140.10 (McKinney 2013); Family Ct. Act §305.2(2); N.Y. PENAL LAW §240.20(7) (McKinney 2105). The Criminal Procedure Law allows officers to arrest a person for committing any offense in their presence; however, the Family Court Act supersedes this when dealing with minors, and only as to minor who are arrested for a crime. The Penal Law at issue in this case applies to disorderly conduct, which is classified as only a violation.

[14] *Matter of Jamal S.*, 999 N.Y.S.2d at 9.

ultimately led to the discovery of a gun.[15] The court held that the search of the defendant's shoes was unreasonable because the police officers lacked reasonable suspicion to believe that the defendant presented a danger. Therefore, the defendant's Fourth Amendment right to be free from unreasonable searches was violated. This Note will first discuss the facts and procedural background of *Matter of Jamal S.* in Section II. It will then address both issues by analyzing the relevant Federal and New York State law in Sections III and IV and then applying the relevant law to *Matter of Jamal S.* in Section V.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *MATTER OF JAMAL S.*

Police officers approached the defendant, Jamal, for riding his bicycle in the wrong direction on a one-way street.[16] Their intentions were to issue a summons for the violation; however, Jamal informed the police officers that he did not have any identification. He also informed the police officers that he was sixteen years old.[17] Subsequently, he was patted down, handcuffed, and brought to the police precinct to be identified and issued a summons.[18]

When the defendant arrived at the precinct he was again frisked, and neither of these two preliminary searches revealed any contraband.[19] The defendant was then detained for twenty minutes, at which time he disclosed to the police officers that he was only fifteen years old. Upon learning this information, the police officers informed the defendant's mother of her son's whereabouts and told her to come in the morning.[20]

The defendant was then placed in a juvenile room awaiting his mother's arrival. As part of police procedure to assure that individuals in their custody are not hiding contraband, a different officer asked Jamal to remove his belt, shoelaces, and shoes. The officer's request was not based on any "reason to expect that Jamal had anything on him."[21] As a result, the officer found a gun inside of Jamal's

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[15] *Id.* at 10.
[16] *Matter of Jamal S.*, 999 N.Y.S.2d at 8.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Matter of Jamal S.*, 999 N.Y.S.2d at 8.

right shoe after Jamal removed it.[22]

The appellate division held in a 3-2 decision that the police search, which led to the discovery of a firearm in Jamal's shoe, was unreasonable and that the weapon should have been suppressed as evidence.[23]

The majority provided two reasons to support its holding. First, the defendant was unlawfully arrested because he was a minor.[24] The court reasoned that an arrest of a minor leading to a search might only be conducted when the minor is taken into custody for behavior that would constitute a crime if the minor were an adult.[25] The court found that this was not applicable under the facts in the present case because Jamal was arrested and being charged with disorderly conduct under New York Penal Law § 240.20(7), which is not a crime but a violation.[26] Therefore, because the underlying arrest was non-criminal, the request to remove his shoes was unjustified because it was intrusive under the circumstances.[27]

The court also provided an alternative reason to support its holding. The court stated that even if the arrest of the defendant was justifiable due to the defendant's inability to produce identification, thus making it impossible to issue a summons on the spot, the gun was still uncovered as a result of an unreasonable search.[28] The court's main conclusion for deeming the search unreasonable was because the defendant had already been searched during two pat down frisks, both prior to the search in question and no illegal contraband had been detected. Therefore, due to the preliminary searches, the police officers had no reason to believe that the defendant concealed contraband or was a threat to anyone's safety, and should not have conducted the third search of the defendant's shoes.[29]

However, the dissent had a different opinion in the present case. The dissent first found that the defendant was lawfully arrested because the police officers reasonably believed that the defendant was an adult based in part upon the defendant lying about his age.

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[22] *Id.*
[23] *Id.*
[24] *Id.* at 9.
[25] *Id.*
[26] *Matter of Jamal S.*, 999 N.Y.S.2d at 9.
[27] *Id.*
[28] *Id.*
[29] *Id.* at 10.

Second, the dissent found that the defendant was arrested for a non-traffic offense of disorderly conduct and was unable to produce identification.[30] The dissent concluded that it was lawful for the officers—who were under the impression that the defendant was an adult—to take the defendant into custody because it was impractical for them to issue a summons without identification.

In addition, the dissent also found that the majority failed to provide support as to why the search violated the defendant's legitimate expectation of privacy.[31] Further, requiring the defendant to remove his shoes was reasonable because the state has an interest to protect not only the officers and other people in the jail, but the defendant himself.[32] The dissent further concluded that requiring the defendant to remove his shoes was not considered a strip search and, therefore, was not an unreasonable measure in the interest of safety precautions.[33] The prior pat down frisks of the defendant did not make the subsequent search unreasonable because case law allows a further search when an individual is being detained in a precinct.[34] The last point made by the dissent is that if the court allows this search to be unlawful, it would go against public policy and chaos could have occurred in the present case and in future similar cases.[35]

III. THE FEDERAL APPROACH

The Fourth Amendment safeguards an individual's right to be free from unreasonable searches and seizures.[36] Specifically, it shields people from "arbitrary and invasive acts by officers of the

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[30] *Id.* at 10-12.

[31] *Matter of Jamal S.*, 999 N.Y.S.2d at 10.

[32] *Id.* at 13.

[33] *Id.* at 12. *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 375 (2009). The Court stated:

> The indignity of the search does not, of course, outlaw [a strip search], but it does implicate the rule of reasonableness as stated in *T.L.O.*, 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, that is, when it is not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

Id. (internal quotations omitted).

[34] *Matter of Jamal S.*, 999 N.E.2d at 12-13.

[35] *Id.*

[36] U.S. CONST. amend. IV.

Government or those acting at their direction."[37] This fundamental right to privacy is guaranteed only when there is state action, meaning searches and seizures conducted by the government or its agents; it does not protect individuals against intrusions by a private party.[38]

A. Step One: Was It a Search of an Individual's Person or Property?

The Supreme Court in *Katz v. United States*,[39] an influential case relating to Fourth Amendment jurisprudence, defined a search as an infringement by the government of a person's fundamental privacy interest, as opposed to an invasion of a person's property.[40] "The Fourth Amendment protects people and not simply 'areas' against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure."[41] The Supreme Court later adopted a new definition of a search and recognized that the Fourth Amendment only applies when a person has a reasonable expectation of privacy.[42] For a person to have a reasonable expectation of privacy, "there is a twofold requirement, [sic] first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable."[43]

Courts will determine whether the defendant had a subjective

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[37] *Skinner*, 489 U.S. at 613-14.

[38] *Id.*

[39] 389 U.S. 347 (1967).

[40] *Id.* at 353.

[41] *Id.*

[42] U.S. v. Jacobsen, 466 U.S. 109, 113 (1984). This two prong test was first articulated by Justice Harlan in his concurring opinion in *Katz*. The Supreme Court later adopted Harlan's test in *Jacobsen*. *Id.* at 113.

[43] *Katz*, 389 U.S. at 361 (Harlan, J., concurring). In *Katz v. United States*, the defendant was in a public phone booth with the door shut behind him and believed that his phone conversation would be private from any government intrusion. *Id.* Although the defendant was in a public phone booth, the booth was considered "a temporar[y] private place whose momentary occupants' expectations [include] freedom from intrusion." *Id.* The Supreme Court held that the defendant had a subjective expectation of privacy because he closed the door showing that he did not want to expose himself to the public. *Id.* The Supreme Court also held that "the Fourth Amendment protects people and not simply areas against unreasonable searches and seizures." *Id.* The defendant placed himself in an enclosed structure; therefore, he established a subjective expectation of privacy. *Katz*, 389 U.S. at 361.

expectation of privacy by looking at the defendant's conduct, specifically whether the defendant sought to preserve something as private.[44] However, when a person does not take precautions to keep his property private, and a person "knowingly exposes [his property] to the public, even in his own home or office, [he] is not a subject of Fourth Amendment protection."[45] When the defendant does not protect his or her property from being accessed by the public or a third party, he has no subjective expectation of privacy.

B. Step Two: Was It Reasonable under the Circumstances?

Further, a search only occurs if the subjective expectation of privacy by the individual is also a reasonable expectation by society's standards.[46] To determine what society recognizes as reasonable, the courts use an objective standard. They look to what a reasonable person under the circumstances would expect.[47]

Courts "are guided by established principles" when determining when a reasonable expectation of privacy does or does not exist.[48] The Supreme Court has already acknowledged that the Fourth Amendment does not safeguard all expectations of privacy but only those that society views as "legitimate." Additionally, the Court has determined that in some settings, even if a person has a subjective expectation of privacy, a reasonable expectation of privacy does not exist in society's view.[49]

The reasonableness of a search is determined by considering the totality of the circumstances. In *Bell v. Wollfish*,[50] the Supreme Court established factors to be considered when determining the reasonableness of a given search or seizure: "the scope of the particular intrusion, the manner in which it is conducted, the justification for in-

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[44] *Katz*, 389 U.S. at 351.

[45] *Id.* at 351.

[46] *Id.* at 361 (Harlan, J., concurring).

[47] *Id.*

[48] United States v. Mannino, 635 F.2d 110, 113 (2d Cir. 1980).

[49] Oliver v. United States, 466 U.S. 170 (1984) (stating that the protection provided by the Fourth Amendment does not extend to open fields because a reasonable person should not expect privacy "for activities conducted out-of-doors in fields").

[50] Bell v. Wolfish, 441 U.S. 520 (1979).

itiating it, and the place in which it is conducted."[51] All four factors must be considered collectively.[52]

The Supreme Court in *Vernonia School District 47J v. Acton*,[53] decided the issue of whether subjecting school children to drug tests in order for the children to participate in extracurricular activities violated the Fourth Amendment. The Supreme Court stated, "what expectations are legitimate varies, of course, with context depending upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park."[54] The Court then declared that the individuals' relationship with the State must be taken into account as well.[55] It is also imperative when determining the reasonableness of a search under the totality of circumstances to ascertain whether it occurred on private property versus public property, or to an individual on probation as opposed to someone who was not.[56] This is significant because if the government's interest outweighs the individual's privacy interest, then the individual may not have a reasonable expectation of privacy.[57]

In *United States v. Edwards*,[58] the issue before the Court was whether a warrantless search and seizure of the defendant's clothing, which occurred ten hours after the defendant's arrest, was reasonable under the Fourth Amendment. In *Edwards*, the defendant was arrested for attempting to break into a Post Office. He forced open a window, leaving behind paint chips on the windowsill. Police officers the next morning had to purchase substitute clothing for the defendant, so that they could seize the defendant's clothing he was wearing at the time and since his arrest to search for evidence of the crime.[59]

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[51] *Id.* at 559.

[52] *Id.*

[53] 515 U.S. 646 (1995).

[54] *Id.* at 654.

[55] *Id.*

[56] *Id.*; *see* Griffin v. Wisconsin., 483 U.S. 868 (1987) (holding that a probationer has a reduced expectation of privacy, which justified a warrantless search of his home by his probation officer, based on a special need to protect the community); *see also* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (finding that when the defendants discarded their property "in an area particularly suited for public inspection . . . respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded . . . [as] the police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public").

[57] *Id.*

[58] 415 U.S. 800 (1974).

[59] *Id.* at 801-02.

This investigation revealed paint chips, which matched the samples that had been taken from the window at the Post Office.[60]

The defendant argued that the search of his clothing was unconstitutional under the Fourth Amendment because "the administrative process and the mechanics of the arrest ha[d] come to a halt," therefore, making the search unreasonable without a warrant.[61] The defendant claimed that ultimately the evidence should not have been introduced at trial.[62] However, the Supreme Court held that the search was reasonable.[63] The Court reasoned that "while the legal arrest of a person should not destroy the privacy of his premises, it does for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."[64]

The purpose of a procedural search must be based on a general suspicion or an extreme need to protect the public's safety. The people subjected to the procedural search must also have a minimal expectation of privacy.[65] State agents may conduct a procedural search without specific suspicion of an individual as long as these considerations are true.[66] The Ninth Circuit Court of Appeals recognized in *Way v. County of Ventura*,[67] that not all procedural search policies are reasonable. However, the search is reasonable if it is "reasonably related to the detention facility's interest in maintaining security."[68] This finding is based on *Bell v. Wollfish*, where the Supreme Court acknowledged "the difficulty of operating a detention facility safely, the seriousness of the risk of smuggled weapons and contraband, and the deference we owe jail officials' exercise of

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Edwards*, 415 U.S. at 801-02.

[64] *Id.* at 808-10.

[65] Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602 (holding that there was no individualized suspicion to drug test railroad employees, but because drug tests were only taken from employees following a major train accident, the accident constituted general suspicion).

[66] *Skinner*, 489 U.S. 602.

[67] Way v. Cnty. of Ventura, 445 F.3d 1157 (9th Cir. 2006). In *Way*, the defendant was arrested for a misdemeanor and was strip-searched before she entered the jail's general population based on a procedural policy. The scope of the intrusion was a "frightening and humiliating invasion" by state actors. *Id.* at 1160.

[68] *Id.*

judgment in adopting and executing policies necessary to maintain institutional security."[69]

C. Step Three: Was There an Exception to the Warrant Requirement?

Even if it has been determined that the search performed by the government was unreasonable without a warrant, several exceptions may apply. The relevant exception discussed in *Jamal S.* was the presence of exigent circumstances. Courts have held that a warrantless search does not violate the Fourth Amendment if an exigent circumstance exists.[70] Exigent circumstances are an exception to the Fourth Amendment that allow law enforcement to legally search "persons, houses, papers, and effects" without a warrant.[71] In order for an exigent circumstance to apply, the situation must require imminent action. The three main types of exigent circumstances are: (1) the hot pursuit of a fleeing felon; (2) the destruction of evidence; and (3) being presented with a safety risk.[72] Of these three, "the risk of danger to the police or other persons" is discussed in *Jamal S.*[73]

IV. THE NEW YORK APPROACH

The Fourth Amendment's protection against unreasonable searches and seizures has been incorporated through the Fourteenth Amendment's Due Process Clause and made applicable to the states.[74] The police power left to the states permits states to provide its citizens with broader protection than the United States Constitution provides. Article 1, section 12 of the New York State Constitution affords its citizens the right to be free from unreasonable searches and seizures, using identical language to the Fourth Amendment.[75]

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[69] *Id.* at 1161.

[70] United States v. Gallo-Roman, 816 F.2d 76, 79 (2d Cir. 1987).

[71] *Id.* "Exigent circumstance refer generally to those situations in which law enforcement officers will be unable or unlikely to effectuate an arrest, search or seizure for which probable cause exists, unless they act swiftly, even though the officers have not obtained prior judicial authorization." *Id.*

[72] *Id.*

[73] Minnesota v. Olsen, 495 U.S. 91, 100 (1990).

[74] Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[75] N.Y. Const. art. I, § 12. It states:

With respect to the protection against unreasonable searches and seizures, the New York Court of Appeals "has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution."[76]

New York State also recognizes several exceptions to the warrant requirement, including exigent circumstances. However, because the New York Constitution affords greater privacy protection than federal law, the main difference between the New York State approach and the federal approach is that New York State courts are more inclined to decide that whenever there is an infringement on an individual by the government of an area where a reasonable expectation of privacy exists, a search has occurred irrespective of whether the investigative approach was mainly nonintrusive.[77]

New York State case law has established that police officers have the authority to frisk an individual who cannot produce identification upon being lawfully stopped and, therefore, must be brought into the police precinct.[78] The New York Court of Appeals has held in *People v. Ellis*,[79] that "once it be[comes] evident that [the] defendant [cannot] be issued a summons on the spot because of his inability to produce any identification, the officers [are] warranted in arresting him to remove him to the police station and in frisking him before doing so."[80] In *Ellis*, the defendant was driving without his headlights on and was subsequently pulled over.[81] At this time, the police officer asked the defendant for his license and rental agreement, because the license plates indicated to the police officer that the car was rented.[82] The defendant could not produce either. The police officer then asked for any form of identification, and the defendant could not produce that either. The police officer then decided to take the de-

> [T]he 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.

Id.

[76] People v. Robinson, 767 N.E.2d 638, 642 (N.Y. 2001).

[77] People v. Dunn, 564 N.E.2d 1054, 1058 (N.Y. 1990).

[78] People v. Ellis, 465 N.E.2d 826 (N.Y. 1984).

[79] 465 N.E.2d 826, 827-28 (N.Y. 1984).

[80] *Id.*

[81] *Id.*

[82] *Id.*

fendant to the precinct so that he could be identified and issued a summons.[83] Before entering the police vehicle, a pat down of the defendant revealed his possession of bullets and marijuana.[84] The police then further searched the defendant's glove compartment and found a loaded gun. The court ruled that the defendant was lawfully brought to the police precinct because of his inability to produce identification, and that the evidence found by the officers was obtained through a lawful search of the defendant and his car.

Under the exigent circumstance doctrine, the risk of danger is not limited strictly to the criminal area. In *People v. Molnar*,[85] the New York Court of Appeals provided an example of the criminal arena as the extreme of "shooting in progress or a hostage held."[86] This example was further discussed in *Molnar*, in which the facts state that the defendant "had words" with his girlfriend which led to the defendant taking his girlfriend's life in a brutal manner.[87] After the woman's death, the defendant left her body in a closet in his apartment.[88] As her body began to decompose, it released a rotting odor which alerted the defendant's neighbors, and ultimately led them to call the police.[89] After the police arrived and made every effort to contact the defendant but failed, the police decided to have maintenance personnel pry the door open.[90] Once inside, police noticed vermin throughout the entire apartment, the windows completely black as they were covered with flies, and a pair of socks bulging from the closet.[91] The police then discovered the decomposed body covered in maggots.[92]

The defendant argued that the police did not have a warrant to enter his apartment and, therefore, his Fourth Amendment rights were violated and that all the evidence obtained must be suppressed.[93] However, the New York Court of Appeals held that exigent circum-

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[83] *Id.*
[84] *Ellis*, 465 N.E.2d at 828.
[85] 774 N.E.2d 738 (N.Y. 2002).
[86] *Id.* at 741.
[87] *Id.* at 738-39.
[88] *Id.*
[89] *Id.*
[90] *Molnar*, 774 N.E.2d at 738-39.
[91] *Id.* at 738-39.
[92] *Id.* at 739.
[93] *Id.* at 739-40.

stances existed because the police were "acting as public servants in the name of protecting public health and safety."[94] The Court of Appeals affirmed because the search was reasonable and denied the defendant's motion to suppress the evidence.[95]

Like federal precedent, New York case law also permits warrantless inventory searches.[96] An inventory search is a search established by a police agency that is conducted according to a "single familiar standard or procedure."[97] An inventory search must satisfy two elements for it to be held reasonable. First, "the relationship between the search procedure adopted and the governmental objectives that justify the intrusion" must be reasonable.[98] Second, there must be adequate "controls on the officer's discretion."[99]

In *People v. Galak*,[100] a police officer saw a car parked near a closed automobile shop with two people inside. The police officer checked the license plate number and discovered that the license plates belonged to another vehicle and that the registration had expired.[101] At this point, officers questioned the driver and the passenger, revealing that neither had a valid license. The officers then, following department protocol, impounded the vehicle.[102] Once impounded, the police officers searched the passenger compartment and found a dagger, a black jack, and an ignition device owned by the defendant.[103] The defendant argued that although the officer followed the departmental procedure, the department's standard procedure itself was unreasonable and in violation of the Fourth Amendment.[104] The New York Court of Appeals held that the police exceeded their discretion when they set up this inventory policy and, therefore, the search was invalid under the Constitution.[105]

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[94] *Id.* at 742.
[95] *Molnar*, 774 N.E.2d at 739-40.
[96] People v. Galak, 610 N.E.2d 362, 365 (N.Y. 1993).
[97] *Id.* at 365.
[98] *Id.*
[99] *Id.*
[100] 610 N.E.2d 362, 365 (N.Y. 1993).
[101] *Id.* at 365.
[102] *Galak*, 610 N.E.2d at 365.
[103] *Id.* at 362.
[104] *Id.*
[105] *Id.*

V. APPLICATION

As discussed above, courts apply a balancing test when determining whether a search is reasonable. The test consists of weighing the individual's expectations of privacy against the state's interests in crime prevention and safety. If the government's interest outweighs the individual's privacy interest, a warrantless search may be deemed reasonable. Although this sounds like a simple formula, many factors are considered by the courts when determining the reasonableness of a given search.

A. Reasonableness of the Arrest

The outcome in *Jamal S.* may differ depending on whether the federal or New York State approach is applied. Although New York law permits police officers to "arrest a person for any 'offense' that is committed in the [their] presence,"[106] officers are prohibited to comply with this law if the person is a minor. In such case, law enforcement must then follow the Family Court Act, which only allows police officers to take minors into custody if they have committed a crime. "The term 'crime' includes only misdemeanors and felonies, not violations."[107] Therefore, the application of the first issue presented by the court in *Jamal S.*, whether the defendant was lawfully arrested, might vary from the federal approach.

The court in *Jamal S.* held that the arrest of the defendant for failure to provide identification was unreasonable based on New York Penal Law § 240.20(7), which made it unlawful to arrest a minor for the underlying offense at issue. The majority's holding is consistent with *Ellis*. Like the defendant in *Ellis*, the defendant in *Jamal S.* was brought to the police precinct to be identified and summonsed after failing to produce identification.[108] The majority in *Jamal S.*, however, distinguished *Ellis* and found that its reasoning should not be used to uphold the arrest. The court came to this conclusion because the defendant in *Ellis* was an adult who had committed a traffic infraction, whereas the defendant in *Jamal S.* was a minor and only charged with a violation.

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[106] *Matter of Jamal S.*, 999 N.Y.S.2d at 9.

[107] *Id.*

[108] *Id.* at 8.

Although the majority's statement about the defendant being minor is correct, the police officers were unaware that the defendant was a minor at the time he was arrested. In fact, the arresting officers had reason to believe that the defendant was an adult because he had lied about his age.[109] It was only after the defendant was arrested and after a prolonged period of time at the police precinct did the defendant finally reveal that he was not an adult. Once the officers were informed of the defendant's minor status, they changed their rationale for the search, no longer seeking to place the defendant under arrest, but rather detaining him until his mother's arrival. Thus, the initial arrest of the defendant was not unwarranted by law enforcement.

B. Reasonableness of the Search inside the Police Precinct

The defendant in *Jamal S.* argued that the search of his shoe was unreasonable because officers had previously patted him down and had not discovered contraband.[110] Therefore, being required to remove his shoes was unnecessarily intrusive because the officers had no reasonable basis to believe that the defendant posed a threat to their safety. This argument is similar to that made by the defendant in *Edwards*, who claimed the later search of his clothing conducted by the officers was unreasonable because he had been previously searched incident to arrest.[111] However, in *Edwards*, the Supreme Court found that the state had a compelling government interest in preserving safety and evidence of a crime and held that the search was reasonable. The same rationale should have applied in the *Jamal S.* When the police officers brought the defendant to the precinct, the government had a compelling interest in preventing means of escape and uncovering weapons to secure the safety of all persons within the jail. At the same time, the defendant was detained in an area with a diminished interest in privacy due to his own conduct. Based on the following, the court in *Jamal S.* should have found that the government's interest in safety outweighed whatever limited privacy interest the defendant had regarding the contents inside his shoes, making the search reasonable.

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[109] *Id.*

[110] *Id.* at 10.

[111] *Edwards*, 415 U.S. at 801-02.

Although many searches are deemed reasonable because the law enforcement obtained a warrant, not obtaining one should not necessarily invalidate the government's conduct because "[t]he touchstone of the Fourth Amendment is reasonableness—not the warrant requirement."[112] The majority in *Jamal S.* supported its holding by relying on *Molnar* to show that the search was unreasonable because no exigent safety risk existed necessitating a warrantless search of the defendant's shoes.[113] As previously noted, the majority in *Jamal S.* failed to provide an analysis of the competing interests of the defendant and the State as they applied in *Molnar*. Had the court applied such analysis, it may have found that the government had a substantial interest in maintaining order within its jails to assure the safety of the officers, those being held in police custody, as well as the defendant himself.

1. Exception to the Warrant Requirement

The first inquiry when determining whether a warrantless search is reasonable is to determine whether an exception to the warrant requirement can be applied. In *Molnar*, the defendant contested the emergency exception to the warrant requirement because the officers waited an hour before breaking into his apartment. The New York Court of Appeals in *Molnar* balanced the competing interests of the individual and the government and held that the intrusion was reasonable because the emergency exception to the warrant requirement applied, despite the delay.[114] In contrast, the court in *Jamal S.* contradicted the precedent set forth in *Molnar* when it found that a safety risk did not exist because "Jamal was continuously in police custody."[115] The *Jamal S.* court concluded that the safety risk was not imminent because time had elapsed. This conclusion is contrary to *Molnar*, which held that under certain conditions a delayed search will not necessarily lessen the exigent safety risk. In *Molnar*, a main reason behind the court's decision to apply the exception was that it would have been difficult for the officers to obtain a search warrant while also dealing with the danger in a timely manner. This is com-

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[112] *Molnar*, 774 N.E.2d at 739 (internal quotations omitted).
[113] *Matter of Jamal S.*, 999 N.Y.S.2d at 9-10.
[114] *Molnar*, 774 N.E. 739.
[115] *Jamal S.*, 999 N.Y.S.2d at 10.

parable to *Jamal S.* because it would be unreasonable to expect officers to obtain a search warrant for every person being detained to ensure their safety.

2. Place

Assuming the exigent circumstance exception does not apply, the search in *Jamal S.* was still reasonable under the totality of the circumstances. *Molnar* is similar to *Jamal S.* because both defendants argued that an area in which they had a high expectation of privacy had been unjustly invaded by law enforcement. Both a person's body and a person's home are areas that have a high expectation of privacy. Although the home is a place where a person has an increased expectation of privacy, the defendant in *Molnar* had a diminished expectation of privacy due to the odor emanating from his house. The place where the search occurred in *Jamal S.* was subject to two levels of scrutiny to determine its reasonableness. First, the search in *Jamal S.* took place inside a jail precinct, a place with a lesser expectation of privacy compared to the home in *Molnar*.[116] A jail precinct is state-owned and operated, and a person being detained within a state precinct is not usually there without reason. The second level of scrutiny pertains to what was being searched, which in this case was the defendant's shoes. The search of the shoes should not have been found unconstitutional based on the totality of the circumstances. In *Jamal S.* and *Molnar*, both defendants had a diminished expectation of privacy while the government's interest in safety exceeded the defendants' interests.

3. Manner and Scope

The police officers in *Molnar* acted in a reasonable manner by first attempting to contact the defendant in numerous ways before entering his apartment; when this failed, the officers reasonably contacted maintenance personnel. Once inside the apartment, the officers acted reasonably because they were not overly invasive; the stench made it obvious that something was decomposing in the home and the socks of the dead woman visibly protruded from the closet.[117]

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[116] *Id.* at 9.

[117] *Molnar*, 774 N.E.2d at 739.

Similar to the officers in *Molnar*, the police officers in *Jamal S.* acted in a reasonable manner and scope. The search that the officers conducted of the defendant's shoes was not overly intrusive.[118] The officers asked the defendant himself to remove his own shoes, so that the officers would be able to see if the detainee had concealed any weapons or contraband.[119]

4. Justification

The officers in *Molnar* had justification for the search because the defendant lived in an apartment building, which he rented, surrounded by neighbors. The neighbors alerted the police about the stench, and it is the officers' job to protect public health and safety. The justification for the search in *Jamal S.* was similar to *Molnar* because the reason for the officer's request for the defendant to remove his shoes was to protect the general population within the jail, including any other detainees and the officers themselves.[120] If officers were not permitted to ask detainees to remove their shoes, it would be difficult to maintain order and ensure safety. The majority in *Jamal S.* emphasized that the defendant was a minor and this fact was a major reason behind the unreasonable search.[121] However, this fact could be even more of a justification to conduct the search. As a minor, the defendant was committed to the temporary custody of the State as a guardian until his mother arrived to pick him up. The majority in the present case failed to recognize that police officers were responsible for the safety and protection of the defendant himself while he was being detained.[122]

5. Routine Procedure

The majority opinion in *Jamal S.* cited *Galak* for the proposition that the fact that a procedure is standard does not necessarily mean that it is reasonable. However, the majority used this case in-

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[118] Searching a person's shoe has been recognized as a limited search and does not rise to the level of a strip search, which would be unreasonable. *Matter of Jamal S.*, 999 N.Y.S.2d at 12.

[119] *Id.* at 9.

[120] *Id.* at 12.

[121] *Id.*

[122] *Vernonia*, 515 U.S. at 654.

correctly because its argument was based on the Supreme Court's decision in *Colorado v. Bertine*,[123] which held that "reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment . . . ."[124] Both cases, *Bertine* and *Galak*, involved police department standard procedures regarding inventory searches, specifically as to impounded vehicles, in contrast to *Jamal S* where the standard procedure regarded searching those in its custody. However, if the majority were to compare the standard procedure at issue to similar standard procedures, the court may have found the search reasonable.

The standard procedure must satisfy two elements for it to be found reasonable.[125] The customary procedure adopted must relate to and justify the intrusion by law enforcement. In addition, the standard procedure cannot offer law enforcement too much discretion. The standard procedure of having a defendant remove his belt, shoelaces, and shoes, to protect the safety of those in the jail precinct, including the defendant himself, meets both elements of this test. In addition, a reasonable inventory procedure does not permit officers to exercise their own discretion in its application. There is little, if any, discretion involved in the request to "remove your belt, shoelaces, and shoes" as this procedure is extremely forthright.

VI. CONCLUSION

Both the Federal and New York State Constitutions prohibit unreasonable searches and seizures performed by the government. However, determining what is reasonable is not simple. As this Note demonstrates, finding a balance between people's privacy rights and the government's interest in protecting the people can be a complicated undertaking. The court in *Jamal S.* established a dangerous precedent by deeming the search of the detainee's shoes unreasonable, notwithstanding the fact that the defendant was only a minor. As a matter of public policy, the court erred in determining that the search was unreasonable, and should not have banned the search of the defendant's shoes in police stations. Further, if the New York Court of Appeals where to affirm the Appellate Division, the court

[123] 479 U.S. 367 (1987).

[124] *Id.* at 374.

[125] *Galak*, 610 N.E.2d at 365.

would be approving a precedent that invites minors to hide weapons or illegal contraband in their shoes. Police officers will not be permitted to ask minors who are detained to remove their shoes, and minors will be able to place illegal items in their shoes without fear of discovery. Thus, one can conclude that this holding may promote concealing contraband, instead of discouraging it. Affirming the Appellate Division jeopardize law enforcement safety because the ability to maintain order in its jails and precincts would be greatly diminished.

Overall, it is reasonable to believe that society is not prepared to recognize that a person has an expectation of privacy regarding what is inside his shoes while being detained in a police precinct. Contrary to the majority's conclusion in *Jamal S.*, the officers' conduct did not violate the defendant's right to be free from unreasonable searches and seizures under federal or New York State law.

*Ashley Moruzzi**

* J.D. Candidate 2016, Touro College Jacob D. Fuchsberg Law Center; B.A. 2013, Major in Political Science, Minor in History and English, University at Albany. I would like to thank Professors Gary Shaw and Thomas Schweitzer for their guidance and advice in writing this Note. I would also like to thank Matthew Ingber and Allison Dolzani for all of your dedication, patience and assistance. I am extremely appreciative to have met you both. I would like to thank the members of the *Touro Law Review* for all the hard work that has been devoted throughout the year. Lastly, I would like to thank my family for all of their support and motivation they have given me throughout my law school career, especially my Mother and Father.