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Warrantless Misdemeanor Arrests and the Fourth Amendment

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I. INTRODUCTION

At common law, warrantless arrests for misdemeanors[1] could be made only for offenses that involved a breach of the peace[2] and that were committed in the presence of the person making the arrest.[3] In addition, the arrest

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1. Throughout this article the term misdemeanor will be used to encompass all offenses of less than felony grade including violations, infractions, and the like.

New Jersey abolished the felony/misdemeanor distinction effective September 1, 1979, and now divides crimes into four degrees. New Jersey continues, however, to recognize misdemeanors and high misdemeanors. *See* N.J. STAT. ANN. § 2C:43-1 (West 1987).

Maine abolished the felony/misdemeanor distinction by statute in 1976 but nonetheless has different rules governing arrests for different categories of offenses. *See, e.g.*, ME. REV. STAT. ANN. tit. 17A, § 15 (West Supp. 1992); *see also* State v. Carey, 412 A.2d 1218, 1221 (Me. 1980) (observing that title 17A, § 15(1)(A) permits warrantless arrests for certain minor offenses "not normally committed in the officer's presence but where the legislature for practical or policy reasons" gave police officers felony-type arrest powers. These include drug offenses where "evidence may be destroyed or otherwise lost if an immediate" arrest is not made or for other offenses "where the officer reasonably believes the suspect" will injure others or will "otherwise not be apprehended").

2. The common law arrest authority extended to breaches of the peace immediately threatened. *See, e.g.*, Pavish v. Meyers, 225 P. 633, 634 (Wash. 1924) ("[A] peace officer may, without a warrant therefor, arrest one who, in his presence, breaches the peace or threatens so to do."); Hughes v. State, 238 S.W. 588, 596 (Tenn. 1922) ("[A]n officer may lawfully arrest a person if a breach of the peace is threatened in his presence . . . [and] it is not necessary for the officer to see and know that the law is being violated."); *see also* Carroll v. United States, 267 U.S. 132, 157 (1925) ("[A] peace officer[,] like a private person[,] has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence.") (quoting HALSBURY'S LAWS OF ENGLAND vol. 9, part III, at 612.).

It has been said that "[t]he reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace." *Carroll*, 267 U.S. at 157; People v. Phillips, 30 N.E.2d 488, 489 (N.Y. 1940) (same); People *ex rel.* Robison v. Haug, 37 N.W. 21, 25 (Mich. 1888) (this exception "has only been allowed by reason of the immediate danger to the safety of the community against crimes of violence . . . . Assaults and riotous conduct make up the largest part of the list.").

3. Commonwealth v. Mekalian, 194 N.E.2d 390, 391-92 (Mass. 1963) (quoting Commonwealth v. Gorman, 192 N.E. 618, 619 (Mass. 1934)) (holding arrest improper because it "was without a warrant and there was no breach of the peace"); *Phillips*, 30 N.E.2d at 489 ("The common law did not authorize the arrest of persons guilty or suspected of misdemeanors, except in cases of an actual breach of the peace. . . .") (quoting STEPHEN'S HISTORY OF THE CRIMINAL LAW OF ENGLAND, p. 193); *see also*

had to be made at the time of the offense or as soon thereafter as possible.[4] Over the last century, the common law rule has suffered considerable erosion[5] as most American jurisdictions have expanded the power of police officers to make warrantless misdemeanor arrests.[6]

Boucher v. Town of Southbridge, 679 F. Supp. 131, 133 (D. Mass. 1988) (stating that this was "the common law rule concerning warrantless arrests for misdemeanors").

4. *See, e.g., Mekalian*, 194 N.E.2d at 391-92 (quoting *Gorman*, 192 N.E. at 619) (the offense and the arrest must form one continuous act); Oleson v. Pincock, 251 P. 23, 26 (Utah 1926) ("At common law the officer could only make an arrest for a misdemeanor . . . if he did so at the time the offense was committed."); State v. Lewis, 33 N.E. 405, 407 (Ohio 1893) (where a peace officer "acts upon view [to arrest for a misdemeanor], he is required to act promptly"); Hawkins v. Lutton, 70 N.W. 483, 485 (Wis. 1897) ("[A]rrest must be made at the time of the offense, or immediately after its commission."); *see also Boucher* 679 F. Supp. at 133 (same); Commonwealth v. Conway, 316 N.E.2d 757, 759 (Mass. App. Ct. 1974) (citing authorities); EDWARD C. FISHER, LAWS OF ARREST § 87, at 190-91 (1987); Horace A. Wilgus, *Arrest Without A Warrant* (pt. 2), 22 MICH. L. REV. 673, 701 (1924) ("immediate and continuous pursuit.").

5. *See* Peter G. Hastings, Note, *Arrest Without A Warrant in New England*, 40 B.U. L. REV. 58, 60 (1960) (observing that statutes in the New England states "have tended to lower the common law standards required to arrest for" misdemeanors); *see also* authorities cited *infra* note 8.

6. At common law, arrest powers did not vary "according to whether the person responsible for the arrest was a citizen or a police officer, because the inception of the common law of arrest antedated the creation of professional police forces." B. JAMES GEORGE, CONSTITUTIONAL LIMITATIONS ON EVIDENCE IN CRIMINAL CASES 28 (Supp. 1973). Arrests by private persons continue to be governed by the common law rule in some jurisdictions. *See, e.g.*, State v. Hart, 539 A.2d 551, 554 (Vt. 1987) ("Private citizens may not arrest for misdemeanors committed in their presence unless the misdemeanor constitutes a breach of the peace."); Radloff v. National Food Stores, Inc., 123 N.W.2d 570, 571 (Wis. 1963) (private persons may arrest for a misdemeanor committed in their presence only "where the public security requires it" to protect against acts which involve or threaten violence); MISS. CODE ANN. § 99-3-7 (1972 and Supp. 1993) ("a private person may arrest . . . without warrant, for . . . a breach of the peace threatened or committed in his presence.")

Many jurisdictions have expanded the common law powers of private citizens to make arrests. Even in these jurisdictions, however, private persons generally have far more limited powers to arrest than do peace officers. *See, e.g.*, 725 ILL. COMP. STAT. ANN. 5/107-3 (Smith-Hurd 1993) ("Any person may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed."); KY. REV. STAT. ANN. § 431.005(4) (Michie/Bobbs-Merrill Supp. 1992) ("A private person may make an arrest when a felony has been committed in fact and he has probable cause to believe that the person being arrested has committed it."); LA. CODE CRIM. PROC. ANN. art. 214 (West 1991) ("A private person may make an arrest when the person arrested has committed a felony, whether in or out of his presence.");

Most American jurisdictions have eliminated the breach of the peace[7] requirement and now allow police officers to make warrantless arrests for all

N.C. GEN. STAT. § 15A-404 (1988) ("No private person may arrest another person except as provided in G.S. 15A-405 [relating to assisting law enforcement officers]. . . . A private person may detain another person when he has probable cause to believe that the person detained has committed in his presence: (1) A felony, (2) A breach of the peace, (3) A crime involving physical injury to another person, or (4) A crime involving theft or destruction of property."); OHIO REV. CODE ANN. § 2935.04 (Anderson 1992) ("When a felony has been committed, or there is reasonable ground to believe that a felony has been committed, any person without a warrant may arrest another whom he has reasonable cause to believe is guilty of the offense, and detain him until a warrant can be obtained."); S.C. CODE ANN. § 17-13-10 (Law. Co-op. 1985) (any person may arrest "[u]pon (a) view of a felony committed, (b) . . . (c) view of a larceny committed"); S.D. CODIFIED LAWS ANN. § 23A-3-3 (1988) ("(1) For a public offense . . ., committed or attempted in his presence; or (2) For a felony which has been in fact committed. . . ."); UTAH CODE ANN. § 77-7-3 (1990) ("A private person may arrest another: (1) For a public offense committed or attempted in his presence; or (2) When a felony has been committed and he has reasonable cause to believe the person arrested has committed it."); *see also* ALA. CODE § 15-10-7 (1982); ARIZ. REV. STAT. ANN. § 13-3884 (1989); D.C. CODE ANN. § 23-582 (1989); IDAHO CODE § 19-604 (1987); IND. CODE ANN. § 35-33-1-4 (Burns 1985); MICH. COMP. LAWS ANN. § 764.16 (West Supp. 1993); MONT. CODE ANN. § 46-6-502 (1991); NEV. REV. STAT. § 171.126 (1991); N.Y. CRIM. PROC. LAW §§ 140.35-.40 (Consol. 1986); N.D. CENT. CODE § 29-06-20 (1991); OKLA. STAT. ANN. tit. 22, § 202 (West 1992); OR. REV. STAT. § 133.225 (1991); S.D. CODIFIED LAWS ANN. § 23A-3-3 (1988); TENN. CODE ANN. § 40-7-109 (1990); WYO. STAT. § 7-8-101 (1977).

7. Precisely what constitutes a breach of the peace has not always been clear. *See* CHARLES E. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 61 (13th ed. 1989) (citing cases). Courts in some jurisdictions have said that every violation of a criminal law is a breach of the peace. *See, e.g.*, State *ex rel.* Thompson v. Reichman, 188 S.W. 225, *on reh'g* 188 S.W. 597, 602 (Tenn. 1916).

misdemeanors committed in the arresting officer's presence.[8] Most jurisdictions, however, retain the in-the-presence rule in some form.[9]

A few jurisdictions have statutes that appear to authorize warrantless misdemeanor arrests only if the offense for which the arrest is made was committed in the arresting officer's presence.[10] Many jurisdictions have a

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8. *See* FISHER, *supra* note 4, at 181; J. Terry Roach, Comment, *The Presence Requirement and the "Police-Team" Rule in Arrest for Misdemeanors*, 26 WASH. & LEE L. REV. 119, 119 (1969).

In 1924, Professor Wilgus observed that "[i]t is impossible to . . . enumerate the great number of . . . misdemeanors or breaches of ordinances for which peace officers may arrest, without a warrant, if committed in their presence." Wilgus, *supra* note 4, at 706.

In 1927, it was "said that seven states grant to peace officers, though not to private persons, a privilege to arrest without a warrant for any misdemeanor committed in their presence." Francis H. Bohlen and Harry Shulman, *Arrest With and Without a Warrant*, 75 U. PA. L. REV. 485, 486 (1927). By 1967, it could be said that "most modern statutes have enlarged the powers of arrest without warrant to extend to any offense committed in the presence of the arresting officer." FISHER, *supra* note 4, at 181.

9. Whether an offense took place "in-the-presence" of the arresting officer is a frequent subject of litigation. See WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(c), at 405-411 (2d ed. 1987) (hereinafter SEARCH AND SEIZURE), for an extensive discussion and citation of cases. Generally, a misdemeanor is said to have occurred in a police officer's presence if the officer "is made aware of its commission by one or more of his physical senses." Roach, *supra* note 8, at 120 n.8. The "in-the-presence" requirement is sometimes interpreted as meaning that the officer must be certain as to the identity of the offender. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 242-43 (1965) [hereinafter ARREST].

Many jurisdictions have long held that the "in-the-presence" requirement is satisfied if the arresting officer learns of the offense from other officers in whose presence it was committed. *See, e.g.*, People v. Dixon, 222 N.W.2d 749, 751-52 (Mich. 1974); Main v. McCarty, 15 Ill. 442, 443 (1854); *see also* Roach, *supra* note 8 (discussing Maryland law). *But see* Penn v. Commonwealth, 412 S.E.2d 189, 191 (Va. Ct. App. 1991) (citing cases holding to the contrary but rejecting "the 'police-team qualification for warrantless misdemeanor arrests'").

10. *See, e.g.*, W. VA. CODE § 62-10-9 (Supp. 1993) ("Sheriffs and [their deputies may] . . . make arrests for any crime for which a warrant has been issued . . . and . . . without a warrant for all violations of any of the criminal laws of the United States, or of this state, when committed in their presence."); *see also* W. VA. CODE § 15-5-18 (1991) (permitting peace officers to "arrest without a warrant any person violating or attempting to violate in such officer's presence any order, rule or regulation made pursuant to this article."); *id.* § 62-10-6 (Supp. 1993) (constables); *id.* § 62-10-8 (special police officers); P.R. LAWS ANN. tit. 33 §§ 4194, 4493 (1983); *id.* tit. 34, App. II R. 7, 11 (1991); *cf.* ME. REV. STAT. ANN. tit. 17A, § 15 (West 1983 & Supp. 1993) (permitting a law enforcement officer to arrest without a warrant "any person

general in-the-presence rule[11] and, in addition, authorize warrantless arrests for misdemeanors not committed in the arresting officer's presence if specified circumstances exist[12] or if the arrest is for specified misdemeanors.[13]

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who has committed in his presence or is committing in his presence any Class D or Class E crime."); N.J. STAT. ANN. § 39:5-25 (West 1990) (constable, sheriff's officer, police officer, and peace officer may "arrest any person violating in his presence any provision of chapter 3 of this title."); *id.* § 40A:14-152 (West 1993) (municipal police officers); *id.* § 53:2-1 (West 1986) (state police).

11. In most jurisdictions where there appears to be a requirement that a misdemeanor, in fact, be committed in the arresting officer's presence, the courts have held that it is sufficient if the officer reasonably believes that the person to be arrested is committing a misdemeanor. *See* FISHER, *supra* note 4, at 194-95 (citing cases).

12. *See, e.g.*, CONN. GEN. STAT. § 54-1f (1993) ("(a) Peace officers . . . shall arrest, without previous complaint and warrant, any person for any offense in their jurisdiction, when the person is taken or apprehended in the act or on the speedy information of others . . . ; (b) [certain peace officers] shall arrest, without previous complaint and warrant, any person who the officer has reasonable grounds to believe has committed or is committing a felony."); GA. CODE ANN. § 17-4-20 (Harrison Supp. 1993) (warrantless arrests may be made by an officer if "the offense is committed in his presence or within his immediate knowledge; if the offender is endeavoring to escape; if the officer has probable cause to believe that an act of family violence . . . has been committed; or for other cause there is likely to be failure of justice for want of a judicial officer to issue a warrant."); IOWA CODE § 804.7 (1993) ("1. For a public offense committed or attempted in the peace officer's presence. 2. Where a public offense has in fact been committed, and the peace officer has reasonable ground for believing that the person to be arrested has committed it."); S.C. CODE ANN. § 17-13-30 (Law. Co-op. 1985) ("The sheriffs and deputy sheriffs of this State may arrest without warrant any person and all persons who, within their view, violate any of the criminal laws of this State if such arrest be made at the time of such violation of law or immediately thereafter."); *id.* § 23-5-40; *id.* § 23-10-60 (deputy sheriffs may arrest without a warrant "upon view or upon prompt information or complaint"); UTAH CODE ANN. § 77-7-2 (1990) ("A peace officer . . . may, without a warrant, arrest a person: (1) for any public offense committed or attempted in the presence of any peace officer . . . (3) When he has reasonable cause to believe the person has committed a public offense, and there is reasonable cause for believing the person may: (a) flee or conceal himself to avoid arrest; (b) destroy or conceal evidence of the commission of the offense; or (c) injure another person or damage property belonging to another person."); WYO. STAT. § 7-2-102 (Supp. 1993) ("(b) A peace officer may arrest a person without a warrant when: (i) Any criminal offense is being committed in the officer's presence by the person to be arrested; (ii) [felony offenses]; (iii) The officer has probable cause to believe that a misdemeanor has been committed, that the person to be arrested has committed it and that the person, unless immediately arrested: (A) Will not be apprehended; (B) May cause injury to himself or others or damage to property; or (C) May destroy or conceal evidence of the commission of the misdemeanor.").

13. *See, e.g.*, ALA. CODE § 15-10-3 (Supp. 1993) ("(a) An officer may arrest any person without a warrant, on any day and at any time for: (1) Any public offense committed or breach of the peace threatened in his presence; (2) When a felony has been committed . . . (7) When he has reasonable cause to believe that a felony or misdemeanor has been committed by the person arrested in violation of a protection order . . . (8) Whenever an offense involves family violence . . . ."); ALASKA STAT. § 12.25.030 (Supp. 1993) ("(a) A private person or a peace officer without a warrant may arrest a person (1) for a crime committed or attempted in the presence of the person making the arrest; (2) when the person has committed a felony . . . "; (b)(2) [for certain offenses involving children and] "when the victim is a spouse or former spouse of the person who committed the crime; a parent, grandparent, child, or grandchild of the person who committed the crime . . . . "); ARK. CODE ANN. § 16-81-106 (Michie Supp. 1993) ("(b) A certified law enforcement officer may make an arrest: . . . (2)(A) Without a warrant, where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony. (B) . . . a certified law enforcement officer may arrest a person for a misdemeanor without a warrant if the officer has probable cause to believe that the person has committed battery upon another person and the officer finds evidence of bodily harm, and the officer reasonably believes that there is danger of violence unless the person alleged to have committed the battery is arrested without delay."); FLA. STAT. ANN. § 901.15 (West Supp. 1993) (a law enforcement officer may arrest a person without a warrant when: "(1) The person has committed a felony or misdemeanor or violated a municipal or county ordinance in the presence of the officer . . . (6) There is probable cause to believe that the person has [violated a protective order] . . . (7)(a) . . . committed an act of domestic violence"); IDAHO CODE § 19-603 (Supp. 1993) ("A peace officer . . . may, without a warrant, arrest a person: 1. For a public offense committed or attempted in his presence. . . . 6. When at the scene of a domestic disturbance there is reasonable cause to believe . . . that the person arrested has committed an assault or battery. 7. When there is reasonable cause to believe . . . that the person arrested has committed [a crime aboard an aircraft]. . . ."); IOWA CODE § 804.7 (1993) ("1. For a public offense committed or attempted in the peace officer's presence. . . . 5. If the peace officer has reasonable grounds for believing that domestic abuse . . . has occurred and has reasonable grounds for believing that the person to be arrested has committed it."); KY. REV. STAT. ANN. § 431.005 (Michie/Bobbs-Merrill Supp. 1992) ("(1) A peace officer may make an arrest: . . . (d) Without a warrant when a misdemeanor . . . has been committed in his presence; or (e) Without a warrant [for certain other crimes not committed in his presence] . . . (2) (a) . . . without a warrant [where there is] danger or threat of danger [to a family member]"); MICH. COMP. LAWS ANN. § 764.15 (West Supp. 1993) ("(1) A peace officer, without a warrant, may arrest a person in the following situations: (a) When a felony, misdemeanor, or ordinance violation is committed in the peace officer's presence . . . (j) When the peace officer has reasonable cause to believe that the person was . . . [driving while intoxicated] (k) When the police officer has reasonable cause to believe that . . . [certain other violations have occurred]."); MINN. STAT. ANN. § 629.34 (West Supp. 1993) ("(c) A peace officer . . . [may] make an arrest without a warrant . . . under the following circumstances: (1) When a public offense has been committed or

attempted in the officer's . . . presence; . . . (5) Under the circumstances [under which felony arrests are permitted], when the offense is a gross misdemeanor . . . ."); NEV. REV. STAT. § 171.124 (1991) ("[A] peace officer . . . may, without a warrant, arrest a person: (a) For a public offense committed or attempted in his presence; (b) [For a gross misdemeanor on the same terms as for felonies]"); OHIO REV. CODE ANN. § 2935.03 (Anderson 1993) (police shall "arrest and detain, until a warrant can be obtained, a person found violating . . . a law of this state, [or] an ordinance of a municipal corporation" and persons whom "there is reasonable ground to believe [have committed] . . . an offense of violence, the offense of criminal child enticement . . . the offense of public indecency . . . the offense of domestic violence . . . a theft offense . . . or a felony drug abuse offense . . . ."); OKLA. STAT. ANN. tit. 22 § 196 (West 1992) ("A peace officer may, without a warrant, arrest a person: 1. For a public offense, committed or attempted in his presence; . . . 5. When he has probable cause to believe that the party was driving . . . a motor vehicle involved in an accident . . . and was under the influence . . . ; 6. Anywhere, including his place of residence, if the peace officer has probable cause to believe the person within the preceding four (4) hours has committed an act of domestic abuse . . . ."); PA. R. CRIM. P. 101 (1989) (criminal proceedings may be initiated by arrest without a warrant when the offence is a misdemeanor committed in the presence of the police officer making the arrest; or . . . when the offense is a misdemeanor not committed in the presence of the police officer making the arrest, when such arrest without a warrant is specifically authorized by statute."); S.D. CODIFIED LAWS ANN. § 23A-3-2 (1988) ("A law enforcement officer may, without a warrant, arrest a person: (1) For a public offense, other than a petty offense, committed or attempted in his presence; or (2) Upon probable cause that a felony or Class 1 misdemeanor has been committed and the person arrested committed it, although not in the officer's presence."); TENN. CODE ANN. § 40-7-103 (Supp. 1993) ("An officer may, without a warrant, arrest a person (1) For a public offense committed or a breach of the peace threatened in his presence . . ." or for certain traffic offenses and acts of domestic violence); TEX. CRIM. PROC. CODE ANN. art. 14.01 (West 1977) ("(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view."); TEX. CRIM. PROC. CODE ANN. art. 14.03 (West Supp. 1993) ("(a) Any peace officer may arrest, without warrant: (1) persons found in suspicious places and under circumstances which reasonably show that such persons have been guilty of some felony or breach of the peace, or threaten, or are about to commit some offense against the laws; (2) persons who the peace officer has probable cause to believe have committed [various offenses]"); VA. CODE ANN. § 19.2-81 (Michie 1990) (officers "may arrest, without a warrant, any person who commits any crime in the presence of such officer" and may also arrest without a warrant for certain traffic violations); WASH. REV. CODE ANN. § 10.31.100 (West 1990) ("A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (8) of this section" relating to certain crimes including domestic abuse, violations of various traffic laws, and other certain other offenses); *see also* ARK. CODE ANN. § 16-81-113 (Michie Supp. 1991) (provides for warrantless arrests for domestic abuse); MINN. STAT. ANN. § 629.341 (West Supp. 1993) (allowing

Many jurisdictions authorize warrantless misdemeanor arrests if there is probable cause to believe that a misdemeanor was committed in the arresting officer's presence.[14] Most of these jurisdictions also permit warrantless arrests on probable cause for misdemeanors not committed in the officer's presence if there is probable cause to believe that specified circumstances exist[15] and/or if the arrest is for a specified misdemeanor.[16]

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warrantless arrests for domestic violence); 18 PA. CONS. STAT. ANN. § 3929(d) (1983) (retail theft); S.D. CODIFIED LAWS ANN. § 23A-3-2.1 (Supp. 1993) (defining circumstances under which a warrantless arrest is permitted for certain violations of protective orders ar acts of domestic violence); VA. CODE ANN. § 19.2-81.1 (Michie 1990) (allowing correctional officers to arrest without a warrant for certain offenses); *id.* § 19.2-81.3 (Supp. 1993) (allowing warrantless arrests for assaults against family or household members); WYO. STAT. § 7-20-102 (Supp. 1993) (permits warrantless arrests where a peace officer "has probable cause to believe that" domestic violence has occurred).

14. *See, e.g.*, CAL. PENAL CODE § 836 (West 1985 & Supp. 1993) ("(a) A peace officer . . . without a warrant, may arrest a person whenever . . . (1) The officer has reasonable cause to believe that the person to be arrested has committed a public offense in the officer's presence. (2) The person arrested has committed a felony . . . ."); *id.* § 836.5 (West 1985) ("A public officer may arrest without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a misdemeanor in his presence . . . ."); *see also* Cherry v. Williams, 316 P.2d 880, 881 (N.M. 1957) (warrantless misdemeanor arrest is lawful if the defendant's conduct "appeared reasonably . . . to amount to a disturbance of the peace, or to be otherwise unlawful in its nature [and it] . . . was in the presence of the" arresting officer); *infra* notes 15 and 16 (citing statutes).

15. *See, e.g.*, KAN. STAT. ANN. § 22-2401 (1988) ("(c) The officer has probable cause to believe that the person is committing or has committed: (1) A felony; or (2) a misdemeanor, and the law enforcement officer has probable cause to believe that: (A) The person will not be apprehended or evidence of the crime will be irretrievably lost . . . (B) the person may cause injury to self or others or damage to property . . . (d) Any crime, except a traffic infraction, has been or is being committed by the person in the officer's view."); MONT. CODE ANN. § 46-6-311 (1991) ("probable cause to believe that the person is committing an offense or that the person has committed an offense and existing circumstances require immediate arrest. (2) . . . Arrest is the preferred response in domestic abuse cases involving injury to the victim, use or threatened use of a weapon, violation of a restraining order, or other imminent danger to the victim."); NEB. REV. STAT. § 29-404.02 (1989) ("a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed: (1) A felony; (2) A misdemeanor and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer . . ."); N.H. REV. STAT. ANN. § 594:10 (1986 & Supp. 1992)

(An officer may arrest without a warrant "whenever (a) He has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence; or . . . (c) He has probable cause to believe that the person to be arrested has committed a misdemeanor or violation, and, if not immediately arrested, such person will not be apprehended, will destroy or conceal evidence of the offense, or will cause further personal injury or damage to property."); N.C. GEN. STAT. § 15A-401 (Supp. 1992) ("(b)(1) . . . An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence. (2) . . . An officer may arrest without a warrant any person who the officer has probable cause to believe: a. Has committed a felony; or b. Has committed a misdemeanor, and: 1. Will not be apprehended unless immediately arrested, or 2. May cause physical injury to himself or others, or damage to property unless immediately arrested . . . ."); R.I. GEN. LAWS § 12-7-3 (1981) ("reasonable cause to believe that such person is committing or has committed a misdemeanor or a petty misdemeanor, and the officer has reasonable ground to believe that such person cannot be arrested later or may cause injury to himself or others or loss or damage to property unless immediately arrested."); VT. R. CRIM. P. 3(a) (Supp. 1992) ("A law enforcement officer may arrest without a warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer . . . (3) when the officer has probable cause to believe that a person has committed a misdemeanor and the person has refused to identify himself or herself . . . (4) when the officer has probable cause to believe a person has committed a misdemeanor and, if not immediately arrested, will cause personal injury or damage to property.").

16. *See, e.g.*, DEL. CODE ANN. tit. 11, § 1904 (1987) ("(a) An arrest by a peace officer without a warrant for a misdemeanor is lawful whenever he has reasonable ground to believe that the person to be arrested has committed a misdemeanor: (1) In his presence; (2) Out of his presence and without the State . . . ; (3) Out of his presence and within the State for the crime of shoplifting . . . ;(4) Out of his presence and within the State for any misdemeanor involving physical injury or the threat thereof or any misdemeanor involving illegal sexual contact or attempted sexual conduct."); D.C. CODE ANN. § 23-581 (1989 & Supp. 1993) ("(a)(1) A law enforcement officer may arrest, without a warrant having previously been issued therefor— . . . (B) a person who he has probable cause to believe has committed or is committing an offense in his presence; (C) a person who he has probable cause to believe has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may . . . ."); IND. CODE ANN. § 35-33-1-1(a) (Burns Supp. 1993) ("A law enforcement officer may arrest a person when the officer has: . . . (4) Probable cause to believe the person is committing or attempting to commit a misdemeanor in the officer's presence; (5) Probable cause to believe that the person has committed a battery resulting in bodily injury under IC 35-42-2-1 . . . ; (6) Probable cause to believe that the person violated IC 35-46-1-15.1"); KAN. STAT. ANN. § 22-2401 (1988) ("probable cause to believe that the person is committing or has committed: . . . (2) a misdemeanor . . . and probable cause to belive that (C) the person has intentionally inflicted bodily harm to another person."); MD. ANN. CODE art. 27, § 594B (Supp. 1993) ("(a) A police officer may arrest without a warrant any

A few jurisdictions have completely eliminated the in-the-presence requirement.[17] These jurisdictions allow warrantless arrests for both felonies

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person who commits, or attempts to commit, any felony or misdemeanor in the presence of, or within the view of, such officer. (b) . . . any person whom the officer may reasonably believe to have committed . . . [a felony or misdemeanor in the officer's presence or within the officer's view]. . . . (d) . . . if: (1) The officer has probable cause to believe that: (i) The person battered the person's spouse . . . (e)(1) That an offense listed in subsection (f) of this section has been committed . . . ."); NEB. REV. STAT. § 29-404.02 (1989) (reasonable cause to believe that the person to be arrested "has committed . . . (3) One or more of the following acts to one or more household members . . . ."); N.H. REV. STAT. ANN. § 594:10 (1986 & Supp. 1992) ("I. An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is lawful whenever: (a) He has probable cause to believe that the person to be arrested has committed a misdemeanor or violation in his presence; or (b) He has probable cause to believe that the person to be arrested has within the past 6 hours committed abuse . . . or has within the past 6 hours violated a temporary or permanent protective order . . . ."); N.C. GEN. STAT. § 15A-401(b)(2) (Supp. 1992) ("An officer may arrest without a warrant any person who the officer has probable cause to believe . . . c. Has committed a misdemeanor under G.S.#14-72.1."); N.D. CENT. CODE § 29-06-15 (1991) ("1. A law enforcement officer, without a warrant, may arrest a person: a. For a public offense, committed or attempted in the officer's presence . . . when . . . the officer's senses reasonably indicates to the officer that a crime was in fact committed or attempted in the officer's presence. . . . e. For . . . [certain] public offenses, not classified as felonies and not committed in the officer's presence . . . . f. On a charge . . . of driving . . . a vehicle while under the influence of alcoholic beverages. g. For the offense of violating a protection order . . . or for an assault involving domestic violence . . . ."); OR. REV. STAT. § 133.310(1) (1991) ("(1) A peace officer may arrest a person without a warrant if the officer has probable cause to believe that the person has committed . . . : (a) A felony, (b) A Class A misdemeanor . . . (d) Reckless driving . . . (e) Driving while under the influence . . . (g) Criminal driving . . . . (i) Any other offense in the officer's presence except traffic infractions . . . and violations."); VT. R. CRIM. P. 3(a) (Supp. 1993) ("A law enforcement officer may arrest without warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer . . . . (2) when the officer has probable cause to believe a person has [violated a protective order or assaulted a family or household member] . . . ."); *see also* NEB. REV. STAT. § 29-402 (1989) (allowing warrantless arrest by any person "if a petit larceny or a felony has been committed . . . ."); N.M. STAT. ANN. § 31-1-7 (Michie 1984) (allowing warrantless arrest at scene of domestic disturbance by officer who has probable cause to believe an act of domestic violence has occurred); UTAH CODE ANN. § 77-7-13 (1990) ("theft of goods held or displayed for sale").

17. Elimination of the in-the-presence requirement has been urged by many commentators. *See, e.g.*, FISHER, *supra* note 4, at 182-83; Roach, *supra* note 8, at 127 (arguing that the in-the-presence requirement "should be eliminated.").

and misdemeanors if there is probable cause to believe that the person to be arrested has committed a crime.[18]

Only a few American jurisdictions still substantially follow the common law rule limiting warrantless misdemeanor arrests to breaches of the peace committed in the arresting officer's presence, and even these permit some minor exceptions.[19] Most states, however, have not relaxed the common law

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18. *See, e.g.*, COLO. REV. STAT. § 16-3-102 (1990) ("(1) A peace officer may arrest a person when: (a) He has a warrant commanding that such person be arrested; or (b) Any crime has been or is being committed by such person in his presence; or (c) He has probable cause to believe that an offense was committed and has probable cause to believe that the offense was committed by the person to be arrested."); HAW. REV. STAT. § 803-3 (1985) ("Anyone in the act of committing a crime, may be arrested by any person present, without a warrant."); *id.* § 803-5(a) ("probable cause to believe that such person has committed any offense, whether in the officer's presence or otherwise."); 725 ILL. COMP. STAT. ANN. 5/107-2 (Smith-Hurd 1993) ("(1) A peace officer may arrest a person when: (a) He has a warrant . . . ; or . . . (c) He has reasonable grounds to believe that the person is committing or has committed an offense."); LA. CODE CRIM. PROC. ANN. art. 213 (West Supp. 1993) ("A peace officer may, without a warrant, arrest a person when: . . . (3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer. . . ."); MO. REV. STAT. § 43.195 (1986) ("Any member of the Missouri state highway patrol may arrest on view, and without a warrant, any person he sees violating or who he has reasonable grounds to believe has violated any law of this state relating to the operation of motor vehicles."); *id.* § 544.216 (an officer "may arrest on view, and without a warrant, any person he sees violating or who he has reasonable grounds to believe has violated any law of this state, including a misdemeanor."); N.Y. CRIM. PROC. LAW § 140.10 (Consol. 1986) ("a police officer may arrest a person for: (a) Any offense when he has reasonable cause to believe that such person has committed such offense in his presence; and (b) A crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise."); WIS. STAT. ANN. § 968.07 (West 1985 & Supp. 1992) ("(1) A law enforcement officer may arrest a person when: (a) He has a warrant . . . (d) There are reasonable grounds to believe that the person is committing or has committed a crime."); *see also* ARIZ. REV. STAT. ANN. § 13-3883(A)(4) (Supp. 1993) (permitting warrantless arrests on probable cause for a felony, a misdemeanor committed in the officer's presence, and if "[a] misdemeanor or a petty offense has been committed and [there is] probable cause to believe the person to be arrested has committed the offense," but providing for issuance of a notice to appear where a misdemeanor arrest was not based on acts committed in the presence of the arresting officer).

Even in those states, occasional decisions refer to the common law rule as if it were the law. *See, e.g.*, People v. Lagle, 558 N.W.2d 514, 517 (Ill. 1990).

19. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 21 (West 1993) (permitting warrantless arrests for driving while intoxicated); MISS. CODE ANN. § 99-3-7 (Supp. 1993) ("(1) An officer or private person may arrest any person without warrant, for

requirement that warrantless misdemeanor arrests must be made as soon as possible.[20]

Recently, the trend away from the common law rule has accelerated. Many states, in an effort to encourage arrests in domestic abuse cases, now allow officers to arrest without a warrant if they have probable cause to believe that the person to be arrested has committed a misdemeanor that is an

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an indictable offense committed, or a breach of the peace threatened or attempted in his presence; or when a person has committed a felony . . . . (3) Any law enforcement officer may arrest a person without a warrant when he has probable cause to believe that the person has, within twenty-four (24) hours of such arrest, knowingly committed a misdemeanor which is an act of domestic violence or knowingly violated provisions of a protective order . . . ."); Commonwealth v. Mekalian, 194 N.E.2d 390, 391-92 (Mass. 1963) (quoting Commonwealth v. Gorman, 192 N.E. 618, 619 (Mass. 1934)) (holding arrest improper because it "was without a warrant and there was no breach of the peace."); *see also* Hastings, *supra* note 5, at 71, 83, 86 (stating that the common law rule was the law in Massachusetts, Rhode Island, and Vermont); *cf.* TENN. CODE ANN. § 40-7-103 (1990) ("(a) An officer may, without a warrant, arrest a person: (1) For a public offense committed or a breach of the peace threatened in his presence . . . (6) At the scene of a traffic accident . . . (7) . . . [in response to a domestic violence call]"); State v. Hurtado, 529 A.2d 1000, 1006-08 (N.J. Super. Ct. App. Div. 1987) (Skillman J., dissenting), *rev'd on dissent*, 549 A.2d 428 (N.J. 1988) (holding that statute limited warrantless arrests for ordinance violations to cases involving disorderly conduct or a "breach of the peace.").

In 1927 one authority observed that until 1925 "the statements both of judicial decisions and textbooks were substantially unanimous to the effect that there was no privilege to arrest without a warrant for a misdemeanor other than a breach of the peace, except in the case of a few misdemeanors such as 'night walking' and 'riding armed' for which authority to arrest without a warrant had been given by statutes so ancient that the statutory origin of the privilege had been forgotten and the privilege regarded as substantially one at common law." Bohlen and Shulman, *supra* note 8, at 485-86.

20. FISHER, *supra* note 4, at 188. *See, e.g.*, FLA. STAT. ANN. § 901.15 (West Supp. 1993) ("An arrest for the commission of a misdemeanor or the violation of a municipal ordinance shall be made immediately or in fresh pursuit."); S.C. CODE ANN. § 17-13-30 (Law. Co-op. 1985) (a sheriff who makes a warrantless arrest of a person who has violated a criminal law must do so "at the time of such violation of law or immediately thereafter."); VT. R. CRIM. P. 3(a) (Supp. 1993) (An officer who arrests without a warrant for a crime committed in his presence shall do so "while the crime is being committed or without unreasonable delay thereafter."); *see also* Commonwealth v. Conway, 316 N.E.2d 757, 759 (Mass. App. Ct. 1974); Oleson v. Pincock, 251 P. 23, 26 (Utah 1926) (noting that "[u]nder some statutes . . . the rule is less strict [and] . . . the arrest must be made at the time the offense is committed, or within a reasonable time thereafter, or upon fresh and immediate pursuit of the offender.") (quoting 5 C.J.S. 406, § 31); *cf.* ME. REV. STAT. ANN. tit. 17A, § 15.2 (1983).

act of domestic violence.[21] Similar laws allow warrantless arrests when there is probable cause to believe that the person to be arrested violated a protective order.[22]

The United States Supreme Court has never decided whether any aspects of the common law ban on warrantless misdemeanor arrests are required by

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21. *See, e.g.*, ALA. CODE § 15-10-3 (Supp. 1993) ("(a) An officer may arrest any person without a warrant, on any day and at any time . . . (8) Whenever an offense involves family violence . . . ."); IDAHO CODE § 19-603 (Supp. 1993) ("A peace officer . . . may, without a warrant, arrest a person: . . . 6. When at the scene of a domestic disturbance there is reasonable cause to believe, based upon physical evidence observed by the officer or statements made in the presence of the officer upon immediate response to a report of a commission of such a crime, that the person arrested has committed an assault or battery."); IOWA CODE § 804.7 (1993) ("A peace officer may make an arrest . . . without a warrant . . . 5. If the peace officer has reasonable grounds for believing that domestic abuse . . . has occurred and has reasonable grounds for believing that the person to be arrested committed it."); N.M. STAT. ANN. § 31-1-7 (Michie 1984) ("a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that the person has committed an assault or a battery upon a family or household member."); *see also* ARK. CODE ANN. § 16-81-113 (Michie Supp. 1993) (provides for warrantless arrests for domestic abuse); MINN. STAT. ANN. § 629.341 (West Supp. 1993) (allowing warrantless arrests for domestic violence); MISS. CODE ANN. § 99-3-7(3) (Supp. 1992) (warrantless arrests permissible for acts of domestic violence); OKLA. STAT. ANN. tit. 22, § 40.3B (West Supp. 1994) (warrantless arrests permissible on probable cause for acts of domestic abuse "within the preceding four (4) hours"); *id.* tit. 22 § 196 (West 1992) (same); S.D. CODIFIED LAWS ANN. § 23A-3-2.1 (Supp. 1993); WYO. STAT. § 7-20-102 (Supp. 1992) (permits warrantless arrests where a peace officer "has probable cause to believe that" domestic violence has occurred).

22. *See, e.g.*, ALA. CODE § 15-10-3 (Supp. 1993) ("(a) An officer may arrest any person without a warrant, on any day and at any time . . . (7) When he has reasonable cause to believe that a felony or misdemeanor has been committed by the person arrested in violation of a protective order . . . ."); FLA. STAT. ANN. § 901.15 (West Supp. 1993) ("(6) There is probable cause to believe that the person has [violated a protective order]"); N.H. REV. STAT. ANN. § 594.10 (1986 & Supp. 1992) ("(1) An arrest by a peace officer without a warrant on a charge of a misdemeanor or a violation is lawful whenever: . . . (b) He has probable cause to believe that the person to be arrested . . . has within the last six hours violated a temporary or permanent protective order . . . ."); N.D. CENT. CODE § 29-06-15 (1991) ("1. A law enforcement officer, without a warrant, may arrest a person: . . . g. For the offense of violating a protection order . . . ."); VT. R. CRIM. P. 3 (Supp. 1993) ("(a) A law enforcement officer may arrest without a warrant a person . . . (2) When the officer has probable cause to believe the person has [violated a protective order] . . . ."); *see also* MICH. COMP. LAWS ANN. § 764.15b (West Supp. 1993) (allowing warrantless arrests for violations of "injunctive orders").

the Constitution.[23] In fact, very few courts have said anything significant about the relationship between the Fourth Amendment and the common law rule.[24] This Article will examine the constitutional questions raised by the

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23. *See* Welsh v. Wisconsin, 466 U.S. 740, 756 (1984) (White, J., dissenting) (noting that the Court has "never held that a warrant is constitutionally required to arrest for nonfelony offenses occurring out of the officer's presence" and stating that this rule "is not grounded in the Fourth Amendment."); *see also* Maryland v. Macon, 472 U.S. 463, 471 (1985) ("We leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials.").

24. Most statements of the common law rule governing warrantless arrests for misdemeanors omit the requirement that the arrest be made immediately. *But see* Commonwealth v. Conway, 316 N.E.2d 757, 759 (Mass. App. Ct. 1974). However, most statements of the common law rule refer to the necessity of a breach of the peace committed in the arresting officer's presence. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 156-57 (1925) ("In cases of misdemeanor, a peace officer like a private person has at common law no power of arresting without a warrant except when a breach of the peace has been committed in his presence or there is reasonable ground for supposing that a breach of the peace is about to be committed or renewed in his presence.") (quoting HALSBURY'S LAWS OF ENGLAND, Vol. 9, part III, at 612.); Higbee v. City of San Diego, 911 F.2d 377, 379 n.2 (9th Cir. 1990) ("At common law a peace officer was allowed to arrest only for a breach of the peace committed in his presence."); Howes v. State, 503 P.2d 1055, 1058 (Alaska 1972) ("At common law a police officer was authorized to arrest without a warrant anyone who had committed a misdemeanor in his presence amounting to a breach of the peace."); Shanley v. Wells, 71 Ill. 78, 82 (1873) (a "policeman has no authority to make an arrest without a warrant" except for a felony or breach of the peace); Prosser v. Parsons, 141 S.E.2d 342, 345 (S.C. 1965) ("At common law . . . peace officers had the power and authority to arrest without warrant felons or persons reasonably suspected of having committed a felony and also those who had committed a misdemeanor in his presence which amounted to a breach of the peace."); SEARCH AND SEIZURE, *supra* note 9, § 5-1(b), at 396 ("The common law rule with respect to misdemeanors was . . . [that a] warrant was required except when a breach of the peace occurred in the presence of the arresting officer."); Hastings, *supra* note 5, at 61, 66, 71, 83, 86 (stating that this was the common law rule in Connecticut, Maine, Massachusetts, Rhode Island, and Vermont); Wilgus, *supra* note 4, at 673-74, 703-06; *see also* TORCIA, *supra* note 7, § 60, at 297-98 (citing cases). Some authorities state the common law rule in a way that omits any mention of the breach of the peace requirement. *See, e.g.*, *Welsh*, 466 U.S. at 756 ("At common law 'a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest.'") (White, J., dissenting) (*quoting* United States v. Watson, 423 U.S. 411, 418 (1976)); Bad Elk v. United States, 177 U.S. 529, 534 (1900) ("[A]n officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."); Kurtz v. Moffitt, 115 U.S. 487, 498-99 (1885) ("By the

continuing expansion of the power to make warrantless arrests for misdemeanors.

II. THE ORIGIN OF THE COMMON LAW RULE

The rule barring warrantless misdemeanor arrests originated in England. In 1710, in *Regina v. Tooley*,[25] Lord Holt summarized the English rule with the statement that "a constable cannot arrest, but when he sees an actual breach of the peace; and if the affray be over, he cannot arrest."[26] In 1835, in *Cook v. Nethercote*,[27] it was said:

> If, however, there had been an affray, and that affray were over, then the constable had not and ought not to have the power of apprehending the persons engaged in it; for the power is given him by law to prevent a breach of the peace; and where a breach of the peace has been committed, and was over, the constable must proceed in the same way as any other person, namely; by obtaining a warrant from a magistrate.[28]

A similar rule barred warrantless misdemeanor arrests by private citizens. In a decision that one authority referred to as "[t]he leading case holding that a private person may not arrest for a misdemeanor without a warrant,"[29] an English court held "that a private person could not justify giving another into custody on suspicion of a misdemeanor."[30] Even if a misdemeanor took place in another's presence, that person could not make an arrest if no breach of the peace was involved.[31] Moreover, a citizen could not justify a wrongful arrest by showing probable cause or a good faith, reasonable belief that the arrestee was guilty. Instead, it needed to be shown that the arrestee actually was guilty.[32]

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common law of England, neither a civil officer nor a private citizen had the right without a warrant to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."); ARREST, *supra* note 9, at 17-19.

25. 2 Lord Raymond 1296, 92 Eng. Rep. 349 (1710).

26. 2 Lord Raymond at 1301, 92 Eng. Rep. at 352.

27. 6 Car. & P. 741, 172 Eng. Rep. 1443 (1835).

28. 6 Car. & P. at 744, 172 Eng. Rep. at 1445.

29. Wilgus, *supra* note 4, at 707.

30. Fox v. Gaunt, 3 Barn & Ad. 798, 799, 110 Eng. Rep. 293 (1832). *But cf.* Holyday v. Oxenbridge, 79 Eng. Rep. 805 (1631) (holding that one person could arrest another who was a common gambler and who had cheated him using false dice).

31. Mathews v. Biddulph, 3 Man. & G. 390, 133 Eng. Rep. 1195 (1841).

32. Wilgus, *supra* note 4, at 708 (citing cases).

The English common law "permitted immediate arrest of those committing or threatening to commit a breach of the peace in order to protect the people of the community from acts of violence. But after the disturbance was over, the primary reason for permitting restraint of the offenders disappeared."[33] Arrests were "made not so much for the purpose of bringing the offender to justice as in order to preserve the peace, and the right to arrest was accordingly limited to cases in which the person to be arrested was taken in the act or immediately after its commission."[34]

III. JUDICIAL TREATMENT OF WARRANTLESS MISDEMEANOR ARRESTS

A. State and Lower Federal Courts

With the growth of organized police forces in the late nineteenth and early twentieth centures,[35] most American jurisdictions attempted to expand the common law arrest powers. Because the Fourth Amendment was not considered applicable to the states until the United States Supreme Court's 1949 decision in *Wolf v. Colorado*,[36] challenges to these efforts were almost always based on state constitutions and were heard in the state courts. Few early decisions considered the impact of the Fourth Amendment on warrantless misdemeanor arrests.

33. FISHER, *supra* note 4, at 188.

34. People v. Phillips, 30 N.E.2d 488, 489 (N.Y. 1940) (citing cases); *see also* FISHER, *supra* note 4, at 188-89.

35. Police officers were "unknown to the common law." State v. Freeman, 86 N.C. 683, 684 (1882).

36. 338 U.S. 25 (1949).

Only a few courts have found attempts to eliminate the breach of the peace requirement constitutionally unacceptable.[37] Most courts have found no constitutional bar to the elimination of this requirement.[38]

The judicial response to attempts to eliminate the in-the-presence requirement has been mixed. Several state courts have held unconstitutional statutes purporting to authorize warrantless arrests for misdemeanors not

37. *See, e.g.*, Pinkerton v. Verberg, 44 N.W. 579, 582-83 (Mich. 1889) (holding unconstitutional a law that permitted warrantless arrests "upon view, [of] any person found in the act of committing any offense against the laws of the state; . . . Any law which would place the keeping and safe conduct of another in the hands of even a [peace officer] . . . , unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our constitution guaranties. . . . An arrest for [a] misdemeanor, without a warrant, by one who does not see the offense committed, is illegal."); *see also* Stittgen v. Rundle, 74 N.W. 536, 537 (Wis. 1898) (observing, in a civil action for false imprisonment, that the jury was correctly instructed that arrest without a warrant is lawful only for felonies and "breaches of the peace committed in the presence of the officer," but noting that the ordinance which supposedly authorized the arrest was not introduced in evidence)); *cf.* Staker v. United States, 5 F.2d 312, 314 (6th Cir. 1925) ("[I]t may be questioned whether, in cases of misdemeanor, a peace officer or a private person has any power of arresting without a warrant, except when a breach of peace has been committed in his presence, or there is reasonable ground for supposing that a breach of peace is about to be committed or renewed in his presence.").

38. *See, e.g.*, Burroughs v. Eastman, 59 N.W. 817, 819-20 (Mich. 1894) (upholding right of peace officers to make warrantless arrests for offenses not involving breach of the peace committed in their presence) (citing numerous cases where "the power to authorize arrest on view for offenses not amounting to breaches of the peace has been affirmed"); Oleson v. Pincock, 251 P. 23, 25 (Utah 1926) (holding valid, without questioning its constitutionality, a statute which was "broader than the common law, since it provides that one may be arrested for any public offense if committed or attempted in the presence of the officer."); White v. Kent, 11 Ohio St. 550, 554 (1860) (ordinance authorizing the arrest upon view, without a warrant, of any person violating the ordinance is valid); *see also* Higbee v. City of San Diego, 911 F.2d 377, 379 & n.2 (9th Cir. 1990) ("court cases and statute[s] . . . allow arrest for *any offense* committed in the presence of the police officer. . . . This practice has never been successfully challenged and stands as the law of the land.").

committed in the presence of the arresting officer.[39] Other courts have upheld statutes that removed the in-the-presence requirement.[40]

Courts that have ruled on the constitutional issues raised by attempts to expand the power to make warrantless misdemeanor arrests have not always clearly explained their holdings. Frequently, their opinions contain more rhetoric than analysis. In the early part of this century, state courts that refused to permit the expansion of the common law powers of arrest sometimes took the position that expanded powers to make warrantless arrests gave the police unfettered discretion to act on vague and arbitrary grounds and

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39. *See, e.g., Ex parte* Rhodes, 79 So. 462, 462-63 (Ala. 1918) (holding unconstitutional statute which the court said authorized misdemeanor arrests without a warrant "on a mere verbal request of any . . . citizen"); *In re* Kellam, 41 P. 960, 961 (Kan. 1895) (holding unconstitutional a statute which purported to authorize warrantless arrests for misdemeanors not committed in the officer's presence); Polk v. State, 142 So. 480, 481 (Miss. 1932) (holding statute unconstitutional "in so far as it authorizes an arrest, without a warrant, for a misdemeanor not committed in the presence of the officer making the arrest . . ."); Gunderson v. Struebing, 104 N.W. 149, 151 (Wis. 1905) (stating, in a civil action for false imprisonment that city council "could authorize its police officers to arrest without warrant only in cases where, independent of its charter, such arrest might be made" and holding invalid, as being contrary to "the principles of the common law" an ordinance which purported to authorize the arrest without a warrant of persons suspected of misdemeanors not committed in the presence of the arresting officer).

40. *See, e.g.*, Hanser v. Bieber, 197 S.W. 68, 70 (Mo. 1917) (statute which was "held to authorize a police officer . . . to arrest for a misdemeanor not committed in his presence provided he has reasonable ground to suspect that the offense has been committed" is a proper recognition of the fact "that greater power should be given police officers to preserve the peace and arrest offenders in cities . . . ."); Lurie v. District Attorney of Kings County, 288 N.Y.S.2d 256, 261 (N.Y. Sup. Ct. 1968) ("An arrest by a police officer or a private person for a misdemeanor or offense not committed 'in their presence' violates no constitutional standard, state or federal.").

The Michigan courts had difficulty with this question. In People *ex rel.* Robison v. Haug, 37 N.W. 21 (Mich. 1888), the court stated that "in accordance with constitutional principles, as construed everywhere, . . . no arrest can be made without warrant except in cases of felony or in cases of breaches of the peace committed in the presence of the arresting officer" and declared unconstitutional a statute that authorized warrantless misdemeanor arrests and stated that "this statute is practically, if carried out, a general warrant itself . . . ." *Id.* at 25. A few years later in *Burroughs*, the same court maintained that in other states "the power to authorize arrest on view for offenses not amounting to breaches of the peace has been affirmed" and stated that there are apparently no cases "in which the contrary doctrine has been asserted." *Borroughs*, 59 N.W. at 819. However, in Tillman v. Beard, 80 N.W. 248, 248 (Mich. 1899), the court stated that "[o]fficers are justified in arresting without a warrant only in cases of felony and breaches of the peace. This is elementary. It is needless to cite authorities."

were, "in effect, a revival of the odious general warrants."[41] Other state courts held that such arrests ran afoul of state constitutional prohibitions on unreasonable searches and seizures.[42] Most courts discussed the difficulties inherent in arresting officers relying on hearsay[43] and emphasized the common law bar on warrantless arrests except for offenses committed in the view of the officer and in cases of a felony actually committed.[44]

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41. *In re* Kellam, 41 P. at 961 (holding unconstitutional a statute which purported to authorize warrantless arrests for misdemeanors not committed in the officer's presence because such arrests would be unreasonable and because the statute gave to the police arbitrary power to exercise at their discretion and was, "in effect, a revival of the odious general warrants."); *see also People ex rel. Robison*, 37 N.W. at 25-26 (declaring statute unconstitutional that provided for searches and seizures without a legal warrant and stating that "this statute is practically, if carried out, a general warrant itself."); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. Q. 221 (1989); *cf.* Trupiano v. United States, 334 U.S. 699, 705 (1948) (stating that "[w]arrants of arrest are designed to meet the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime").

The essence of the argument that warrantless misdemeanor arrests are akin to general warrants seems to be that expanded warrantless arrest powers confer on the police the power to make arrests on vague and undefined grounds which is the same kind of unfetterd discretion and arbitrary power conferred by general warrants. *See* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 286 (1984); *cf.* Boyd v. United States, 116 U.S. 616, 625-27 (1886). Warrantless arrests, however, unlike activities based on a general warrant, must still be based on probable cause. *See* United States v. Watson, 423 U.S. 411, 415-416 (1976).

42. *See, e.g., Polk*, 142 So. at 481 ("The statute in so far as it authorizes an arrest, without a warrant, for a misdemeanor not committed in the presence of the officer making the arrest, violates section 23 of the Constitution . . ." prohibiting unreasonable seizures or search.); *Ex parte* Rhodes, 79 So. at 463-67 (citing cases); *see also In re* Kellam, 41 P. at 961.

It has been suggested that warrantless misdemeanor arrests might offend due process because they can result in imprisonment without conviction of crime. *See* Thomas R. Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 U. CIN. L. REV. 321, 333 (1979).

43. *See, e.g., In re* Kellam, 412 P. at 961 ("If an arrest cannot be made or justified on a warrant resting only on hearsay or belief, how can an arrest for a petty offense without a warrant upon the mere suspicion of an officer, not resting even on hearsay or belief be justified?"); *People ex rel. Robison*, 37 N.W. at 25 (if the legislature could evade the constitutional requirement that there be a sworn showing of facts personally known to the affiant that established probable cause, "by providing for searches and seizures without legal warrant the provision would be useless").

44. *See, e.g., In re* Kellam, 412 P. at 961 (characterizing as unreasonable and therefore unconstitutional a statute which purported to authorize warrantless arrests for

Most courts that have considered the question in recent years have held that the Fourth Amendment does not prohibit warrantless arrests for misdemeanors not committed in the arresting officers' presence even when such arrests are barred by state law.[45] In 1986, however, a Seventh Circuit opinion suggested that such arrests may violate the United States Constitution.[46]

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misdemeanors not committed in the officer's presence, but noting that such arrests have always been permissible for felonies "on account of the gravity of such offenses"); *Pinkerton*, 44 N.W. at 582-83 (emphasizing the historical bar on such arrests); *see also Gunderson*, 104 N.W. at 151 (holding invalid, as being contrary to "the principles of the common law" an ordinance which purported to authorize the arrest without a warrant of persons suspected of misdemeanors not committed in the presence of the arresting officer).

45. *See, e.g.*, Fields v. City of South Houston, Tex., 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant [to arrest] for misdemeanors not occurring in the presence of the arresting officer."); *see also Higbee*, 911 F.2d at 379; Barry v. Fowler, 902 F.2d 770, 772 (9th Cir. 1990); Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1974); United States v. Mayo, 792 F. Supp. 768, 770-71 & n.2 (M.D. Ala. 1992) (upholding warrantless home entry to arrest for misdemeanor and stating that "[s]tates remain free to expand the power to arrest without warrant . . . as long as the Constitution's requirement of probable cause is met."); Boucher v. Town of Southbridge, 679 F. Supp. 131, 133 (D. Mass. 1988) (holding that warrantless arrest for the misdemeanor of driving while intoxicated did not "violate federal constitutional law" and observing that other courts have "recognize[d] that the Fourth Amendment does not prohibit such arrests if they are based on probable cause."); Wilson v. Walden, 586 F. Supp. 1235, 1237 (W.D. Mo. 1984) (stating, without analysis, that "there is no constitutional requirement . . . that officers procure a warrant before making an arrest for a misdemeanor violation."); Diamond v. Marland, 395 F. Supp. 432, 439 (S.D. Ga. 1975) (stating, without analysis, that "[t]he Fourth Amendment does not prohibit arrests [for misdemeanors] committed outside the presence of the arresting . . . officer"); Penn v. Commonwealth, 412 S.E.2d 189, 193 (Va. Ct. App. 1991), *aff'd*, 420 S.E.2d 713 (Va. 1992) (holding, without analysis, that "there is no fourth amendment violation for misdemeanor arrests committed outside the presence of the arresting state officer."); State v. Lee, 763 P.2d 385, 386-87 (Okla. Crim. App. 1988) (stating that "the necessity of a warrant to make a misdemeanor arrest for a crime not committed in the presence of an officer is a requirement imposed by statute, and not the federal Constitution," and holding that statute permitting warrantless arrest, did not, "at least as applied to these facts . . . authorize the unreasonable seizure of a person.").

46. *See* Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 441 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987) (noting that the Supreme Court has never ruled on this question but suggesting that the historical bar on such arrests may be "a useful guide" to their constitutionality).

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B. The United States Supreme Court

The United States Supreme Court has never decided whether the Constitution requires any aspects of the common law rule that barred most warrantless misdemeanor arrests. In fact, only a few Supreme Court decisions have even commented on this question, and then only in passing.

In 1900, in *Bad Elk v. United States*,[47] the Court considered an appeal by a defendant who had been convicted of murdering one of three police officers who were attempting to arrest him without a warrant. In reversing the conviction, the Court, observing that there was no evidence that the defendant had committed an offense of any kind, said that the attempt to arrest him was illegal and concluded that the defendant "was undoubtedly prejudiced" by a jury charge that had suggested that he had no right to resist "an attempted illegal arrest."[48] The Court noted that "an officer, at common law, was not authorized to make an arrest without a warrant, for a mere misdemeanor not committed in his presence."[49]

In 1925, in *Carroll v. United States*,[50] the defendants contended that two bottles of liquor were improperly introduced into evidence at their trial. The defendants argued that if an arrest is made as a result of a seizure, "the right of seizure should be limited by the common law rule as to the circumstances justifying an arrest without a warrant for a misdemeanor."[51] The Court alluded to "the common-law rule" that a police officer may "only arrest without a warrant one guilty of a misdemeanor if committed in his presence,"[52] but avoided addressing the legality of the arrest. Instead, the Court

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47. 177 U.S. 529 (1900). In Kurtz v. Moffitt, 115 U.S. 487, 498-99 (1885), the Court observed in passing that "[b]y the common law of England, neither a civil officer nor a private citizen had the right . . . to make an arrest for a crime not committed in his presence, except in the case of felony, and then only for the purpose of bringing the offender before a civil magistrate."

48. *Bad Elk*, 177 U.S. at 537-38. The Court stated that the jury should have been instructed that the defendant had "the right to use such force as was absolutely necessary to resist an attempted illegal arrest." *Id.* at 537.

49. *Id.* at 534. The Court stated that "[w]e do not find any statute of the United States or of the State of South Dakota giving any right to these men to arrest an individual without a warrant on a charge of misdemeanor not committed in their presence." *Id.* at 535.

50. 267 U.S. 132 (1925).

51. *Id.* at 156.

52. *Id.* at 156-57. Two years after *Carroll* it was said that "[i]t is difficult to see how the *Carroll* case can be taken as authority for the proposition that an arrest can be made by a peace officer without warrant for a misdemeanor less than a breach of the peace," but noted that "the case has been taken to stand for that proposition by some Federal courts." *See* Bohlen & Shulman, *supra* note 8, at 488.

held that the liquor was properly seized because the officers had probable cause to believe that the defendants were carrying liquor in their car.[53]

Except for one passing reference in 1948 to a Washington state statute,[54] the Supreme Court did not again mention warrantless arrests[55] for misdemeanors until 1976. In *United States v. Watson*,[56] the Court upheld a warrantless, public felony arrest made pursuant to a federal law authorizing "arrests without warrant for felonies" if there are "reasonable grounds to believe that the person to be arrested has committed or is committing such a felony."[57] The majority took the position that the Court's prior cases construing the Fourth Amendment reflected "the ancient common-law rule that a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."[58] In addition, the majority observed that the rule "authorizing felony arrests on probable cause, but without a warrant, has survived substantially intact . . . in almost all of the States," was the rule recommended by the American Law Institute, and "is the rule Congress has long directed its principal law

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53. *Carroll*, 267 U.S. at 161-62. Justice McReynolds noted in dissent that the Court was not "now concerned with . . . whether by apt words Congress might have authorized the arrest without a warrant. It has not attempted to do this." *Id.* at 164 (McReynolds, J., dissenting).

54. In Johnson v. United States, 333 U.S. 10 (1948), the Court stated in passing that narcotics agents could have made a warrantless arrest of the defendant only "for a crime committed in the presence of the arresting officer or for a felony of which he had reasonable cause to believe defendant guilty." *Id.* at 15. In a footnote the Court observed that this was "the Washington [state] law," and said that "[s]tate law determines the validity of arrests without warrant." *Id.* at 15 n.5. The Court said nothing about the Washington law's constitutionality.

In a 1946 case, Justice Frankfurter, in dissent, stated that "[t]he common law rule restricted arrest without warrant for a misdemeanor to those acts which were breaches of the peace." Davis v. United States, 328 U.S. 582, 610 n.4 (1946) (Frankfurter J., dissenting).

55. In 1975, in Gerstein v. Pugh, 420 U.S. 103 (1975), the Court held that the Fourth Amendment requires that a person arrested without a warrant be given a prompt, fair, and reliable judicial "determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Id.* at 114; *see also* County of Riverside v McLaughlin, 111 S. Ct. 1661, 1670 (1991) (holding that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with . . . *Gerstein*.").

56. 423 U.S. 411 (1976).

57. *Id.* at 415 (quoting 18 U.S.C. § 3061(a)(3)). *See generally* Ralph J. Colleli, Jr., *Recent Development, Warrantless Arrests by Police Survive a Constitutional Challenge*—United States v. Watson, 14 AM. CRIM. L. REV. 193 (1976).

58. *Watson*, 423 U.S. at 418.

enforcement officers to follow."[59] The Court noted the advantages of arrest warrants,[60] but specifically declined to transform its preference for such warrants "into a constitutional rule when the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances."[61]

In *Welsh v. Wisconsin*,[62] the Court held unconstitutional a warrantless entry into a suspect's home to arrest him for a civil traffic offense.[63] Justice Brennan's opinion for the Court focused on whether any exigencies were present that might have justified a warrantless arrest and stated that "an important factor to be considered when determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made."[64] In dissent, Justice White took note of the common law rule barring warrantless arrests for misdemeanors not committed in the arresting officer's presence and expressed the view that this rule "is not grounded in the Fourth Amendment."[65] The majority, however, never mentioned this rule. Instead, Justice Brennan stated that the majority's approach was "required by the Fourth Amendment prohibition on 'unreasonable searches and seizures.'"[66]

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59. *Id.* at 421-23.

60. The Court observed that the judgments of law enforcement officers "about probable cause may be more readily accepted where backed by a warrant." *Id.* at 423.

61. *Id.*

62. 466 U.S. 740 (1984).

63. *Id.* at 754. The majority opinion by Justice Brennan noted that warrantless home arrests, even with probable cause, are barred absent exigent circumstances. Justice Brennan's opinion implicitly acknowledged the existence of probable cause and analyzed the entry largely in terms of whether exigent circumstances were present. It concluded that a warrantless entry into a person's home to effectuate that person's arrest "should rarely be sanctioned" if the arrest is to be made for a "minor offense." *Id.* at 753.

64. *Id.*

65. *Id.* at 756 (White, J., dissenting); *see also* SEARCH AND SEIZURE, *supra* note 9, § 5.1, at 403 (citing Street v. Surdyka, 492 F.2d 368 (4th Cir. 1974), for the proposition that "the common law requirement of a warrant for a misdemeanor not occurring in the presence . . . is . . . not grounded in the Fourth Amendment.").

66. *Welsh*, 466 U.S. at 753. In Maryland v. Macon, 472 U.S. 463 (1985), the Court stated "[w]e leave to another day the question whether the Fourth Amendment prohibits a warrantless arrest for the state law misdemeanor of distribution of obscene materials." *Id.* at 471.

IV. THE CONSEQUENCES OF AN ARREST

Any arrest has a profound and long-lasting effect on the arrestee.[67] Even if an arrest is for a minor offense, and charges against the arrestee are ultimately dropped or the arrestee is acquitted, the records of the arrest probably will be retained and disseminated.[68] Moreover, widespread public feeling that "where there's smoke, there's fire" often leaves a cloud of suspicion hanging over an arrestee even if no conviction follows.[69] The

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67. Often, an arrest will have far more serious consequences than a search. *See* United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) ("A search may cause only annoyance and temporary inconvenience to the law-abiding citizen .... An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent."); Chimel v. California, 395 U.S. 752, 776 (1969) (White, J., dissenting) ("[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises."); Edward L. Barrett, Jr., *Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 46-47 n.2; *see also* Foley v. Connelie, 435 U.S. 291, 298 (1978) ("An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained.")

68. *See, e.g.*, 20 ILL. COMP. STAT. ANN. 2630/3(A) (Smith-Hurd 1993) (requiring retention of arrest information and its dissemination "to peace officers of the United States, of other states or territories, of the Insular possessions of the United States, of foreign countries duly authorized to receive the same, [and] to all peace officers of the State of Illinois."); Barrett, *supra* note 67, at 47 n.2; Donald L. Dorenberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1114 (1980) (observing that arrest records are generally maintained even when the arrestee is acquitted or the charges against him dismissed); Lawrence G. Newman, Note, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 852-53 (1971). *But cf.* N.Y. CRIM. PROC. LAW § 160.50 (McKinney's 1992) (specifying procedures for the return of fingerprints and photographs and providing that if a criminal action terminates in favor of an accused the record shall be sealed).

Some courts have held that because a disproportionate number of blacks are arrested, the use of arrest records is discriminatory. *See, e.g.*, Gregory v. Litton Systems, Inc., 316 F.Supp. 401, 403 (C.D. Cal. 1970), *judgment modified by* 472 F.2d 631 (9th Cir. 1972) (Title VII); *see also* Carter v. Gallagher, 452 F.2d 315, 326 (8th Cir. 1971) (due process).

69. *See In re* Fried, 161 F.2d 453, 458-59 (2d Cir. 1947), *cert. denied*, 331 U.S. 858 (1947) ("The stigma [of a wrongful arrest] cannot be easily erased . . . [and] is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal."); *see also* Newman, *supra* note 68, at 864-65 (discussing uses of arrest records outside the criminal justice system).

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result will often be lost employment opportunities and future law enforcement scrutiny.[70]

A custodial arrest[71] is an especially "awesome and frightening" experience.[72] The arrestee is abruptly constrained[73] and usually searched,[74] even

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70. *See* United States v. Serubo, 604 F.2d 807, 817 (3d Cir. 1979) ("[A]n indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo."); Thomas v. E.J. Korvette, Inc., 329 F. Supp. 1163, 1166-69 (E.D. Pa. 1971), *rev'd*, 478 F.2d 471 (3rd. Cir. 1973) (acknowledging that former security manager who was charged with employee theft but found not guilty, was thereafter unable "to obtain employment in the security field."); *cf.* Dowling v. United States, 493 U.S. 342, 344-45 (1990) (holding that the mere fact that a person has been acquitted of a particular offense does not necessarily render evidence of that offense inadmissible as part of the prosecution's case-in-chief in a subsequent prosecution for another offense); Smith v. State, 409 So.2d 455, 457 (Ala. Crim. App. 1981) (same).

Some employers will not hire applicants who have a record of arrests for anything other than minor traffic violations. *See, e.g.*, *Gregory*, 316 F. Supp. at 403.

Applicants for most professional licenses, including bar applicants, must ordinarily acknowledge all arrests without regard to their final disposition. *See generally*, Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 520-21 (1985).

71. Most authorities agree that there is a difference between custodial arrests and arrests made by means of a ticket or a summons. *See, e.g.*, People v. Dandrea, 736 P.2d 1211, 1215 n.7 (Colo. 1987) (en banc) (distinguishing between protective custody and custodial arrests and stating that "[a]n arrest of a person upon probable cause of having committed a crime for the purpose of taking the person to police facilities for booking is considered a 'custodial arrest'."); Pittman v. State, 541 So.2d 583, 585 (Ala. Crim. App. 1989) (a traffic stop and "requiring a motorist to sit in a patrol car while the officer completes . . . [a ticket] does not constitute a custodial arrest"); *see also* Gustafson v. Florida, 414 U.S. 260, 266 (1973) (noting several times that defendant was searched incident to his custodial arrest); United States v. Robinson, 414 U.S. 218, 235 n.6 (1973) (emphasizing that search was incident to a full custody arrest as opposed to the simple issuance of a notice of violation). *But see* Robbins v. California, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) ("I am not familiar with any difference between custodial arrests and any other kind of arrests.").

72. *See* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE, § 120.1, Commentary at 290-91 (1975) ("Being arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening."); *cf.* Gerstein v. Pugh, 420 U.S. 103, 114 (1975) ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest.").

73. *See* ALI MODEL CODE, *supra* note 72, Commentary at 291 (observing that an arrest is ordered "on the spot" by a policeman who "stands ready then and there to back [it] up with force.").

74. *See, e.g.*, *Chimel*, 395 U.S. at 762-68 (recognizing right to search incident to arrest and defining permissible scope of such searches).

if the arrest is for a minor offense.[75] He is then forcibly taken to an unfamiliar place, booked,[76] fingerprinted,[77] photographed,[78] searched more extensively,[79] and held in jail,[80] possibly under unsanitary and unsafe conditions,[81] until, and unless, he can obtain his release. The arrestee may

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75. *See, e.g.*, Gustafson v. Florida, 414 U.S. 260, 266 (1973) (full search incident to arrest permissible where defendant was subjected to custodial arrest for driving without a valid operator's license in his possession); *Robinson*, 414 U.S. at 236 (full search incident to custodial arrest permissible where defendant was arrested for driving after revocation); *see also* Salken, *supra* note 41, at 223.

76. *See* Wainwright v. City of New Orleans, 392 U.S. 598, 605 (1968) (Warren, C.J., dissenting) (observing that "booking" is required in most jurisdictions and describing "booking" as "an administrative record of an arrest . . . made on the police 'arrest book' indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense for which he was arrested, and other information"); ARREST, *supra* note 9, at 379-82 (discussing booking procedures).

77. *See, e.g.*, N.Y. CRIM. PROC. LAW § 160.10 (McKinney's 1992).

78. *See, e.g.*, State v. Klinker, 537 P.2d 268, 275 (Wash. 1975); 20 ILL. COMP. STAT. ANN. 2630/2 (Smith-Hurd 1993) ("The Department [of State Police] shall procure and file for record . . . photographs, . . . measurements, descriptions and information of all persons who have been arrested [in this state]."); *see also* Newman, *supra* note 68, at 850-51 ("The practice of taking fingerprints, photographs, and other identification data of every person arrested by local, state, and federal law enforcement officers . . . is well established.").

79. *See, e.g.*, Illinois v. Lafayette, 462 U.S. 640 (1983) (upholding station house search of person arrested for disorderly conduct). *But cf.* State v. Jetty, 579 P.2d 1228, 1229-30 (Mont. 1978) (where "local resident, [was] arrested at 3 a.m. for failure to pay an overdue one dollar parking ticket" and never booked, it was unconstitutional to search him for weapons and contraband prior to placing him in a holding cell).

Occasionally, persons arrested for minor offenses have been stripped searched. *See, e.g.*, Hill v. Bogan, 735 F.2d 391 (10th Cir. 1984) (holding unreasonable strip search of person detained for a traffic offense); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (holding unreasonable strip search of person briefly detained for nondangerous misdemeanors).

80. *See, e.g.*, Schmidt v. Richman Gordman, Inc., 215 N.W.2d 105, 111 (Neb. 1974) (plaintiffs were "confined in the local jail for 3 1/2 to 4 hours, fingerprinted and 'mugged' for permanent FBI records, charged with a criminal offense, and compelled to retain counsel for their defense").

81. Mireya Navarro, *As Suspects Wait, the Fear of Tuberculosis Rises*, N.Y. TIMES, Jan. 30, 1992, at B1 (observing that persons held in New York City jails are at risk of contracting tuberculosis); *see* William Glaberson, *Trapped in the Terror of New York's Holding Pens*, N.Y. TIMES, March 23, 1990, at A1.

One author has expressed the view that the in-the-presence requirement for misdemeanor arrests grew out of an early nineteenth century recognition of "[t]he deplorable conditions of jails and the resulting need to protect individuals from mistaken or arbitrary arrest." Roach, *supra* note 8, at 120 n.8 (citing David Kauffman,

suffer emotional distress[82] and public humiliation,[83] and may lose contact with family and friends.[84] He may lose time from work and will probably be required to retain an attorney and spend money on bail.[85] If the detention is at all prolonged, he may lose his job or suffer other adverse consequences.[86]

If a person charged with a misdemeanor is subjected to a custodial arrest, that arrest is likely to be the major consequence suffered by that person.[87] Because the consequences of an arrest are so severe,[88] substantial civil damages have been awarded to persons improperly arrested for minor offenses.[89] Some jurisdictions bar custodial arrests for some minor offens-

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The Law of Arrest in Maryland, 5 MD. L. REV. 125 (1941)). It is more likely that the "in the presence" exception for warrantless misdemeanor arrests "was essentially a narrowly drawn exigent-circumstances exception." *Watson,* 423 U.S. at 440 n.8 (Marshall, J., dissenting).

82. *See Thomas,* 329 F. Supp at 1169 (noting that wrongfully arrested plaintiff suffered injury to his feelings, humiliation, and embarrassment); *see also* Salken, *supra* note 41 at 257 (noting the "indignity, powerlessness, and inconvenience occasioned by a custodial arrest").

83. *See, e.g.,* Lykken v. Vavreck, 366 F. Supp. 585, 596 (D. Minn. 1973); *Thomas,* 329 F. Supp at 1169; *see also* Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 440 (7th Cir. 1986), *cert. denied,* 481 U.S. 1028 (1987) (noting the "sheer embarrassment" of an arrest).

84. *See, e.g.,* Duran v. Elrod, 542 F.2d 998, 1000 (7th Cir. 1976).

85. If an arrestee is released on bail the "release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Gerstein,* 420 U.S. at 114.

86. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and imperil his family relationships." *Id.* at 114.

A custodial arrest may be particularly burdensome when the it takes place away from the arrestee's home. *See* Oleson v. Pincock, 251 P. 23, 25 (Utah 1926).

87. *Gramenos,* 797 F.2d at 441; *see also* Arthur Mendelson, *Arrest for Minor Traffic Offenses,* 19 CRIM. L. BULL. 501, 502, 505 (1983) (citing cases where individuals were "arrested, handcuffed, searched, and jailed" for minor traffic violations and noting the "unreasonableness of arresting someone for a trivial traffic offense since it is not a crime [and], the penalty is only a fine").

88. It has been suggested that the Court is simply not realistic about the impact of an arrest on the arrestee. Tracy Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously,* 77 CORNELL L. REV. 723, 768 (1992).

89. *See, e.g., Thomas,* 329 F. Supp. at 1169-71, ($750,000 jury verdict, including $250,000 actual damages, reduced on appeal to compensatory damages of $100,000 and $50,000 in punitive damages); Gaszak v. Zayre of Illinois, Inc., 305 N.E.2d 704, 711-12 (Ill. App. Ct. 1973) ($10,500 verdict); *Schmidt,* 215 N.W.2d at 111 ($10,500 verdict reduced on appeal to $10,000).

es[90] or permit them only under limited circumstances.[91] Moreover, it has been suggested that the Constitution bars custodial arrests for certain minor offenses.[92]

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90. *See, e.g.*, OR. REV. STAT. § 810.410(3) (1991) ("A police officer: (a) shall not arrest a person for a traffic infraction."); TEX. REV. CIV. STAT. ANN. art. 6701d, § 148 (1977 & Supp. 1993) (mandatory to issue a summons for speeding and for consuming an alcoholic beverage while driving); VT. R. CRIM. P. 3(c) (1993) ("A law enforcement officer acting without a warrant who is authorized to arrest a person for a misdemeanor . . . shall . . . issue a citation to appear . . . in lieu of arrest."); *cf.* Robbins v. California, 453 U.S. 420, 450 (1981) ("[S]tate or local regulations may in some cases prohibit police officers from taking persons into custody for violation of minor traffic laws.").

91. *See, e.g.*, Burton C. Agata, *Searches and Seizures Incident to Traffic Violations—A Reply to Professor Simeone*, 7 ST. LOUIS U. L.J. 1 (1962) ("[T]he right to make a summary arrest [should] be confined to a limited type of serious cases . . . ."); Wayne R. LaFave, *"Seizures" Typology; Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 441-42 (1984) (suggesting the need for such limits); Salken, *supra* note 41, at 251 n.189 (citing statutes); *see also* MINN. R. CRIM. P. 6.01 subd 1(1)(2) (1993); ALI MODEL CODE, *supra* note 72, at § 120.2. Courts have also imposed limits. *See, e.g.*, State v. Hehman, 578 P.2d 527, 528 (Wash. 1978) ("We hold as a matter of public policy that custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs [a] promise to appear . . . ."); State v. Klinker, 537 P.2d 268, 278 (Wash 1975) (en banc) ("where there is no special need for arrest . . . , issuance of an arrest warrant . . . is constitutionally impermissible."); J.E.G. v. C.J.E., 360 N.E.2d 1030, 1033 (Ind. 1977) ("[A]n arrest is reasonable only when the public good, which may be furthered by its utilization, outweighs the deprivation of an individual's liberty.").

92. "[T]he Supreme Court has so far avoided passing upon this question." SEARCH AND SEIZURE, *supra* note 9, § 5.1(h), at 436. However, in *Gustafson*, 414 U.S. at 266-67, Justice Stewart observed in a concurring opinion, that "[i]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments." Others have made similar suggestions. *See, e.g.*, *Robinson*, 414 U.S. at 238 n.2 (Powell, J., concurring); Barnett v. United States, 525 A.2d 197 (D.C. 1987); Salken, *supra*, note 41, at 223, 253-54 (arguing that custodial arrests for minor traffic violations are unconstitutional because they "are identical to the unlimited and arbitrary power of the court's messengers and customs inspectors that led to the adoption of the Fourth Amendment" [were not] "accepted practice at the time the constitution was adopted," and [because] "in all cases other than intoxication, where the driver can identify himself, the individual's interest in being free from seizure outweighs the government's interest in enforcing the traffic laws through custodial arrest."); *cf.* Davis v. Mississippi, 394 U.S. 721, 727-28 (1969) (suggesting that the need for custody is a relevant factor in assessing reasonableness); Terry v. Ohio, 392 U.S. 1, 28-29 (1968) ("[T]he Fourth Amendment proceeds as much by limitations upon

V. WARRANTLESS MISDEMEANOR ARRESTS AND THE FOURTH AMENDMENT

A. Preliminary Considerations

Misdemeanor arrests, like all arrests, are constitutional under the Fourth Amendment only if there is probable cause to believe that the person to be arrested committed a crime.[93] Probable cause has been defined[94] in various ways, but recent case law indicates that the existence of probable cause is

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the scope of governmental action as by imposing preconditions upon its initiation."); Bacon v. United States, 449 F.2d 933, 943 (9th Cir. 1971) (arrest of a material witness is permissible only if there is probable cause to believe "that it may become impracticable to secure his presence by subpoena"); State v. Brady, 388 N.W.2d 151, 155 (Wis. 1986) (arrest of a material witness violated the Fourth Amendment where there was no showing that it was impracticable to secure his attendance by subpoena). *But cf.* Thomas v. State, 583 So.2d 336, 338-39 (Fla. Dist. Ct. App. 1991), *decision approved by* Thomas v. State, 614 So. 2d. 468 (Fla. 1993) (not improper to arrest defendant for violating ordinance requiring bells or gongs on bicycles).

93. SEARCH AND SEIZURE, *supra* note 9, § 3.1(b), at 545 (quoting Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 687 (1961)); *see also* FED. R. CRIM. P. 4(a) (an arrest warrant may issue when there is "probable cause to believe that an offense has been committed and that the defendant has committed it").

94. Probable cause is "an exceedingly difficult concept to objectify." *See* SEARCH AND SEIZURE, *supra* note 9, § 3.2(a), at 556 (quoting Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971)). Probable cause is sometimes defined in terms of the state of mind that should be possessed by the police officer about to engage in, or by the judicial officer about to authorize, a Fourth Amendment activity. *See, e.g.*, Beck v. Ohio, 379 U.S. 89, 91 (1964) (probable cause exists when "the facts and circumstances within their [arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that . . . [the person to be arrested] had committed or was committing an offense."); Carroll v. United States, 267 U.S. 132, 161 (1925) ("The substance of all the definitions [of probable cause] is a reasonable ground for belief in guilt.") (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)). Probable cause has also been defined in terms of probabilities. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 231-32 (1983); Brinegar v. United States, 338 U.S. 160, 175 (1949) ("In dealing with probable cause however, as the very name implies, we deal with probabilities."). Finally, probable cause has been said to be "the best compromise that has been found for accommodating these often opposing interests," in safeguarding "citizens from rash and unreasonable interferences with privacy" and in seeking "to give fair leeway for enforcing the law." *Brinegar*, 338 U.S. at 176; *see also* Dunaway v. New York, 442 U.S. 200, 214 (1979).

determined by examining the "totality of the circumstances."[95] In *Illinois v. Gates*,[96] the Supreme Court said that probable cause is a "'practical, nontechnical conception' . . . [that] . . . deal[s] . . . with probabilities."[97] It is "a fluid concept—turning on the assessment of probabilities in particular factual contexts."[98]

The fluid nature of probable cause suggests that the risk of mistaken misdemeanor arrests could be reduced by requiring a higher level of probability as a precondition to misdemeanor arrests.[99] Such a standard would be consistent with the notion that probable cause is a compromise for

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95. *See Gates*, 462 U.S. at 238; *see also* Tennessee v. Garner, 471 U.S. 1, 8-9 (1985) (citing United States v. Place, 462 U.S. 696, 703 (1983), Winston v. Lee, 470 U.S. 753, 760 (1985), Hayes v. Florida, 470 U.S. 811, 814 (1985), Florida v. Royer, 460 U.S. 491, 500 (1983), Cupp v. Murphy, 412 U.S. 291, 296 (1973), Davis v. Mississippi, 394 U.S. 721, 727 (1969), Camara v. Municipal Court, 387 U.S. 523, 531 (1967), Schmerber v. California, 384 U.S. 757, 767 (1966), and Ker v. California, 374 U.S. 23, 33 (1963), as cases where "the question was whether the totality of the circumstances justified a particular sort of search or seizure.").

96. 462 U.S. 213 (1983).

97. *Id.* at 231 (quoting *Brinegar*, 338 U.S. at 175-76).

98. *Id.* at 232.

99. There is no inherent reason that probable cause must mean the same thing in every setting. *See* Albert W. Altschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 252 (1984) (suggesting that probable cause as to one thing might be different from probable cause as to another); *see also* Llaguno v. Mingey, 763 F.2d 1560, 1564-66 (7th Cir. 1985) (suggesting the appropriateness of a variable level of probable cause in criminal investigations, depending in some cases on the seriousness of the offense). Few cases suggest that a higher standard of probable cause should apply where a police activity is directed against a minor offense. Higher standards have been suggested, however, where a Fourth Amendment activity is highly intrusive. *See, e.g.*, Berger v. New York, 388 U.S. 41, 69 (1967) (Stewart, J., concurring) ("Only the most precise and rigorous standard of probable cause should justify an intrusion of [the kind involved here]."); Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 441 (7th Cir. 1988), *cert. denied*, 481 U.S. 1028 (1987). Moreover, some cases suggest that a lower standard of probable cause is appropriate where serious offenses are concerned. *See, e.g.*, *Llaguno*, 763 F.2d at 1564-66; United States v. Adams, 484 F.2d 357, 359 (7th Cir. 1973); *see also* Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH J.L. REF. 465, 503-04 (1984); and *infra* note 177 (citing authorities).

In *Camara*, it was held that a warrant for certain kinds of administrative searches could be issued on the basis of a type of probable cause different from the probable cause required for ordinary searches and seizures. *Camara*, 387 U.S. at 538-39. In Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987), however, the Court pointed to *Camara* as a case where "we use[d] . . . [probable cause] as referring not to a quantum of evidence, but merely to a requirement of reasonableness."

balancing competing interests.[100] By defining an offense as a misdemeanor, the legislature makes an implicit statement that the governmental interest in arresting and convicting people of that offense is relatively minor.[101] Thus, evidence that might be sufficient to justify actions directed at serious offenders might not be sufficient to justify actions directed against minor offenders.[102] The Supreme Court, however, has rejected the notion of a variable standard of probable cause,[103] and has said that a "single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect

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100. *See Dunaway*, 442 U.S. at 208 (the requirement of probable cause represents "the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the fourth amendment"); *Brinegar*, 338 U.S. at 176 (probable cause has been said to be "the best compromise that has been found for accommodating these often opposing interests" in safeguarding "citizens from rash and unreasonable interferences with privacy" and in seeking "to give fair leeway for enforcing the law.").

101. *See* State v. Flowers, 441 So. 2d 707, 713 n.1 (La. 1983) ("The governmental or public interest in the prevention of serious or violent crimes, and the quick apprehension of those who commit this type of offense is generally stronger than that which exists when an individual commits, or is suspected of having committed, a nonviolent or possessory offense."); *see also* Welsh v. Wisconsin, 466 U.S. 740, 750-54 (1984); Lankford v. Superior Court of Los Angeles County, 729 P.2d 822, 829 (Cal. 1987).

102. *See* Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Standard of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 138 (1989).

It could be argued that where the offense under investigation is minor, the consequences of conviction are reduced and government activities directed at apprehension and conviction are less hostile and more readily justified. *Cf.* SEARCH AND SEIZURE, *supra* note 9, § 9.1(d) at 342 (stating in the context of stop and frisk theory, that "it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious"); *see also* Ronald F. Wright, Note, *The Civil and Criminal Methodologies of the Fourth Amendment*, 93 YALE L.J. 1127, 1136 & n.51 (1984) (suggesting that if the reasoning of *Camara v. Municipal Court* were applied to criminal law enforcement activities the requirements for Fourth Amendment activities would be more demanding when the activities were directed at serious offenses and less demanding when the activities were directed toward minor offenses).

103. *See, e.g.*, New York v. P.J. Video, 475 U.S. 868, 875 (1986) (holding that "an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally"); *see also Griffin*, 483 U.S. at 877 n.4 (pointing to *Camara* as an illustration of where "we use" probable cause to refer "not to a quantum of evidence, but merely to a requirement of reasonableness").

on and balance the social and individual interests involved in the specific circumstances they confront."[104]

The risk of erroneous misdemeanor arrests could also be reduced by enhancing the trustworthiness of the information on which such arrests are based. "[P]robable cause[,] is dependent upon both the content of information possessed by police and its degree of reliability."[105] Limiting warrantless misdemeanor arrests to those offenses committed in the arresting officer's presence insures that those arrests will not be made on the basis of hearsay or on the basis of information received from third parties.[106] Viewing the in-the-presence requirement as a necessary element of probable cause would appear, however, to be inconsistent with the Supreme Court's view that "rigid legal rules are ill-suited" to probable cause determinations.[107] If, as the Court has said, the reliability of information and the basis of an informant's knowledge are merely "relevant considerations in the totality of circumstances analysis,"[108] then the commission of the offense outside the officer's

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104. *Dunaway*, 442 U.S. at 213-14.

105. Alabama v. White, 496 U.S. 325, 330 (1990).

106. *See Gramenos*, 797 F.2d at 441 (making certain that "the officer has seen the crime committed . . . greatly reduces the chance of mistaken arrest"); People v. Dixon, 222 N.W.2d 749, 751 (Mich. 1974) ("Whatever may have been its historical origins, we perceive the principal present day importance of the presence requirement to be that a police officer may not utilize information received from third persons as a basis for a warrantless misdemeanor arrest."); Penn v. Commonwealth, 412 S.E.2d 189, 191 (Va. Ct. App. 1991), *aff'd*, 420 S.E.2d 713 (Va. 1992) ("The purpose behind the presence requirement is to prevent officers from making warrantless misdemeanor arrests based on information received from third parties."); *see also* United States v. Watson, 423 U.S. 411, 426-27 n.1 (1976) (Powell, J., concurring) (observing that there is no reason to require a warrant where an offense is committed in the officer's presence; "such an arrest presents no danger that an innocent person might be ensnared, since the officer observes both the crime and culprit with his own eyes."); Trupiano v. United States, 334 U.S. 699, 705 (1948) (the dangers of unlimited and unreasonable arrests "are not present where a felony plainly occurs before the eyes of an officer of the law."); Roach, *supra* note 8, at 120 n.8 (suggesting that the in-the-presence requirement arose out of a "need to protect the individual from mistaken or arbitrary arrest"); *cf.* People v. Donnelly, 691 P.2d 747, 749 (Colo. 1984) (no probable cause for arrest where there was no showing that citizen informant "had a basis, through observation or otherwise, for the conclusion").

It is clear that hearsay can be used to establish probable cause. FED R. CRIM. P. 4(b), 41(c)(1); Draper v. United States, 358 U.S. 307, 312-13 & n.4 (1959).

107. *Gates*, 462 U. S. at 232.

108. *See id.* at 230 ("[A]n informant's 'veracity,' 'reliability,' and 'basis of knowledge' are all highly relevant in determining the value of his report."); Roach, *supra* note 8, at 125 ("The presence requirement . . . [seems] to be but one method by which 'probable cause' can be found.").

presence should militate against the presence of probable cause, but should not inevitably be fatal.

Even if a seizure is premised on probable cause, it may nonetheless be unconstitutional because it was not conducted pursuant to a warrant.[109] Moreover, because "the Fourth Amendment's protections against 'unreasonable . . . seizures' includes seizures of the person,"[110] a seizure may be unconstitutional because it is unreasonable.[111]

The Supreme Court has had great difficulty in settling on a single theory as to the precise relationship between the reasonableness clause and the warrant clause.[112] As Justice Scalia observed in a concurring opinion in

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109. *See, e.g., Welsh*, 466 U.S. at 750; Payton v. New York, 445 U.S. 573, 587 (1980). The use of a warrant may, in some cases, *reduce* the protections afforded by the probable cause requirement. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 109 (1965) ("the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants"); *see also Watson*, 423 U.S. at 423 (same).

110. California v. Hodari D., 111 S. Ct. 1547, 1549 (1991).

111. *See e.g.* Tennessee v. Garner, 471 U.S. 1 (1985); *see also Payton*, 445 U.S. at 586 (stating that "searches and seizures inside a home without a warrant are presumptively unreasonable.").

112. Numerous observers have commented on the inability of the Supreme Court to settle on a single theory as to the precise relationship between the reasonableness clause and the warrant clause. *See, e.g.*, Daniel M. Harris, *The Supreme Court's Search and Seizure Decisions of the 1982 Term: the Emergence of A New Theory of the Fourth Amendment*, 36 BAYLOR L. REV. 41, 41-46 (1984); James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55, 81-82 (1977); Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 871-73 (1985) (noting two lines of decisions); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing The Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 398 (1988) ("The Court's basic inability to agree on when to use a reasonableness standard instead of traditional probable cause evidences its failure in defining the relationship between the warrant and reasonableness clauses."); Wasserstrom, *The Court's Turn*, *supra* note 102, at 131-40; Wasserstrom, *supra* note 41, at 281-82; Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 48, 70 (1974) (noting the "constantly shifting relationship between the amendment's two clauses" and observing that "[t]he Courts have said little of lasting significance about the relationship between the two clauses").

The Court sometimes refers to both theories in the same case. *See, e.g.*, United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (stating that "[o]ur focus in this area of Fourth Amendment law has been on the question of the 'reasonableness' of the type of governmental intrusion involved," but then noting "the overarching principle of 'reasonableness' embodied in the Fourth Amendment"); South Dakota v. Opperman 428 U.S. 364, 369-70, 373 n.5 (1976) (seemingly espousing both theories

1991, the Court's "jurisprudence [has] lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."[113] On some occasions, the Court has appeared to take the position that all Fourth Amendment activities must be reasonable and that the Fourth Amendment's requirements of probable cause and a warrant bear on what is reasonable.[114] On other occasions, the Court has suggested that reasonableness is a distinct analytic approach to Fourth Amendment problems that is appropriate only in certain settings.[115] In recent years, it appears that the

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in the same opinion).

113. California v. Acevedo, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring).

114. *See, e.g.*, Steagald v. United States, 451 U.S. 204, 222 (1981) ("[I]n order to render the instant search reasonable under the Fourth Amendment, a search warrant was required."); United States v. United States Dist. Court, 407 U.S. 297, 315-18 (1972) (stating that reasonableness is a term which derives content and meaning through reference to the warrant clause, and arguing that "the definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause."); Illinois v. Lafayette, 462 U.S. 640, 644 n.1 (1983) (stating that the Court has explained Cooper v. California, 386 U.S. 58, 61 (1967), as a case where "the Court held the test to be, not whether it was reasonable to procure a search warrant, *but whether the search itself was reasonable.*"); Dalia v. United States, 441 U.S. 238, 257 (1979) (a search authorized by a warrant must be reasonable); *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) ("The Fourth Amendment . . . proscribe[s] . . . only those [searches and seizures] that are unreasonable . . . . In most criminal cases, . . . a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."); Winston v. Lee, 470 U.S. 753, 767 (1985) (ruling that a Fourth Amendment activity may be unreasonable even if supported by probable cause); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (stating that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable."); *cf. Steagald*, 451 U.S. at 224; (Rehnquist J., dissenting) ("Here, as in all Fourth Amendment cases, 'reasonableness is still the ultimate standard.'") (quoting *Camara*, 387 U.S. at 539); United States v. Place, 462 U.S. 696, 721 (1983) (Blackmun, J., concurring) ("I am concerned, however, with what appears to me to be an emerging tendency on the part of the Court to convert the *Terry* decision into a general statement that the Fourth Amendment requires only that any seizure be reasonable"); Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring).

Occasionally, the Court has implied that reasonableness should be determined by *ad hoc* balancing in each individual case. *See* United States v. Rabinowitz, 339 U.S. 56 (1950), *overruled by* Chimel v. California, 395 U.S. 752 (1969); *see also* Wasserstrom, *supra* note 41, at 321 (suggesting that some members of the Court want to return to this interpretation).

115. *See, e.g.*, *Opperman*, 428 U.S. at 370 n.5 (stating that "[t]he standard of probable cause is peculiarly related to criminal investigations, not routine, non-criminal procedures . . . [where the] analysis centers upon the reasonableness of the procedure"); *see also Payton*, 445 U.S. at 584-85 (emphasizing that the amendment contains

preference for a warrant has won out rhetorically while the reasonableness requirement has won out in practice.[116]

B. Warrantless Misdemeanor Arrests and the Fourth Amendment's Reasonableness Requirement

1. Reasonableness and the Common Law

a. Generally

In 1991, in *California v. Hodari D.*,[117] the Supreme Court acknowledged that it has often looked to the common law in evaluating the reasonableness of police activity for Fourth Amendment purposes.[118] As long ago as 1925, in *Carroll v. United States*,[119] the Court said that "[t]he Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted."[120] In *Gerstein v. Pugh*,[121] the Court observed that "the common law . . . has guided interpretation of the Fourth Amendment."[122] In *Payton v. New York*,[123] the Court placed great emphasis on the historical bar on warrantless felony arrests in the home and constitutionalized that rule even though many states did not follow it.[124]

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two separate clauses and stating that "the warrantless arrest of a person is a species of seizure required by the Amendment to be reasonable"). If reasonableness is a distinct approach to only some Fourth Amendment problems, it is necessary to first categorize the intrusion in question to decide if it is sufficiently distinct from other kinds of intrusions or other kinds of interests to warrant this distinct approach. *See generally*, LaFave, *supra* note 91.

116. *See Acevedo*, 111 S. Ct. at 1992-93 (Scalia, J., concurring).

117. 111 S. Ct. 1547 (1991).

118. *See id.* at 1551 n.2 (observing that "[w]e have consulted the common-law to explain the meaning of seizure. . . ."); *see also* Tennessee v. Garner, 471 U.S. 1, 13 (1985) ("[T]his Court has often looked to the common law in evaluating the reasonableness, for Fourth Amendment purposes, of police activity."); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 748 (Boston, Hilliard, Gray & Company 1833) (the Fourth Amendment "is little more than the affirmance of a great constitutional doctrine of the common law.").

119. 267 U.S. 132 (1925).

120. *Id.* at 149 (quoted with approval in United States v. Ramsey, 431 U.S. 606, 619 n.14 (1977)).

121. 420 U.S. 103 (1975).

122. *Id.* at 114.

123. 445 U.S. 573 (1980).

124. *Id.* at 591-98. The Court held that the Fourth Amendment "prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in

In *United States v. Watson*,[125] the Supreme Court relied heavily on historical practices in upholding a warrantless felony arrest made by Postal Inspectors pursuant to a statute that authorized such arrests. The Court referred to "the common-law rule authorizing [public] arrests without a warrant,"[126] and emphasized that "cases construing the Fourth Amendment . . . reflect the ancient common-law rule that a peace officer was permitted to arrest without a warrant *for a misdemeanor or felony committed in his presence* as well as for a felony not committed in his presence if there was reasonable ground for making the arrest."[127] Similarly, in *Steagald v. United States*,[128] the Court observed that "[t]he common law may, within limits, be instructive in determining what sorts of searches the Framers of the Fourth Amendment regarded as reasonable."[129] In holding that a search warrant was required before the police could enter the home of one person in order to search for another person for whom they had an arrest warrant,[130]

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order to make a routine felony arrest." *Id.* at 576. The majority stated that "[t]he common-law understanding of an officer's authority to arrest sheds light on the obviously relevant, if not entirely dispositive, consideration of what the Framer's of the [Fourth] Amendment might have thought to be reasonable." *Id.* at 591. The majority concluded that "the issue is not one that can be said to have been definitively settled by the common law at the time the Fourth Amendment was adopted." *Id.* at 598.

Justice White, writing for the dissent, agreed that "the common law of searches and seizures . . . is highly relevant to the present scope of the Fourth Amendment." *Id.* at 604 (White, J., dissenting). Justice White also mentioned that "the background, text, and legislative history of the Fourth Amendment demonstrate that [it] . . . preserved common-law rules of arrest." *Id.* at 611. He concluded that "it was not considered generally unreasonable at common law for officers to break doors to effect a warrantless felony arrest" and concluded that "the Fourth Amendment was [not] intended to outlaw the types of police conduct at issue in the present cases." *Id.*

125. 423 U.S. 411 (1976).

126. *Id.* at 420. *See generally* Horace A. Wilgus, *Arrest Without a Warrant* (pt. 1), 22 MICH. L. REV. 541, 549-50 (1924).

127. *Watson*, 423 U.S. at 418 (emphasis added) (citing cases).

128. 451 U.S. 204 (1981).

129. *Id.* at 217.

130. There is strong reason to believe that the common law recognized only limited authority to search private premises. *See* Barrett, *supra* note 67, at 50 (citing authorities); *see also* Davis v. United States, 328 U.S. 582, 603 (1946) (Frankfurter J., dissenting) (referring to the "early English doctrine [that] even search warrants by appropriate authority could issue only for stolen goods"). However, the common law granted relatively broad authority to enter private premises, even without a warrant, to make an arrest. *See* Payton v. New York, 445 U.S. 573, 603-15 (1980) (White, J., dissenting) (discussing common law right to arrest); Miller v. United States, 357 U.S. 301, 306-09 (1958) (same).

the Court said that "the history of the Fourth Amendment strongly suggests that its Framers would not have sanctioned the instant search."[131]

Other decisions also reflect the impact that the Supreme Court's sense of historical practices has had on its Fourth Amendment jurisprudence.[132] The Court has not, however, "simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage,"[133] nor has it adopted what Justice Scalia has termed the "first principle" of Fourth Amendment jurisprudence—the notion that "the 'reasonableness requirement' of the Fourth Amendment affords the protection that the common law afforded . . . includ[ing] the requirement of a warrant."[134] Rather, the Court has said that the Fourth Amendment's prohibi-

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131. *Steagald,* 451 U.S. at 220. The dissent took the position that warrantless entries into the home of one person to effect the arrest of another were acceptable at common law because warrantless entries "into the home of the subject of the arrest warrant himself" were acceptable. *Id.* at 230 (Rehnquist J., dissenting).

132. *See, e.g.*, United States v. Ramsey, 431 U.S. 606, 619 n.14 (1977); United States v. Edwards, 415 U.S. 800, 804-05 n.6 (1974) (noting "the established and routine custom of permitting a jailer to search the person who is being processed for confinement."); *cf.* Street v. Surdyka, 492 F.2d 368, 371-72 (4th Cir. 1974) (stating that "the Supreme Court has interpreted the fourth amendment in light of the law that existed when the Bill of Rights was adopted," but declining to interpret the Fourth Amendment to prohibit a warrantless misdemeanor arrest, because, *inter alia*, "[t]he difference between felonies and misdemeanors is no longer as significant as it was at common law.").

History has also been said to be relevant in other Constitutional settings. *See, e.g.*, Ford v. Wainwright, 477 U.S. 399 (1986) (holding that the Eighth Amendment bars the execution of a person while he or she is insane and emphasizing that the execution of the insane was barred at common law); Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1922) (Fourteenth Amendment was not intended to destroy historical state law practices); *Ex parte* Wilson, 114 U.S. 417 (1885) (holding that the constitutional requirement of indictment for infamous crimes extends to statutory crimes permitting imprisonment for a term of years at hard labor even though that punishment was unknown when the Constitution was adopted).

133. *Garner,* 471 U.S. at 13 (quoting *Payton,* 445 U.S. at 591 n.33); *Steagald,* 451 U.S. at 217 n.10 (same).

134. *Acevedo,* 111 S. Ct. at 1993 (Scalia, J., concurring); *cf.* Bram v. United States, 168 U.S. 532, 544 (1887) (the Fourth and Fifth Amendments "contemplated perpetuating, in their full efficacy . . . principles of humanity and civil liberty, which had been secured in the mother country only after years of struggle."). In a similar vein, it has been argued that the Confrontation Clause was intended to constitutionalize the common law hearsay rule. 5 JOHN HENRY WIGMORE, EVIDENCE § 1397, at 155-85 (1902) (Chadbourn rev. 1974).

tion against unreasonable searches and seizures "must be interpreted 'in light of contemporary norms and conditions.'"[135]

b. *The Felony/Misdemeanor Distinction*

The Supreme Court has had difficulty determining how the felony/misdemeanor distinction relates to the Fourth Amendment. In *United States v. Hensley*,[136] the Supreme Court found the distinction useful and held that the police may stop a person on the basis of a reasonable suspicion that the person "was involved in or is wanted in connection with a completed felony."[137] A few months later, however, in *Tennessee v. Garner*,[138] the Court characterized the felony/misdemeanor distinction as "highly technical," "minor," and "arbitrary."[139] The Court observed that many misdemeanors involve conduct more dangerous than that involved in many felonies,[140] and rejected the argument that deadly force should be permitted to effect the seizure of any felon because such seizures were permitted at common law.[141] Instead, before such force may be used to prevent the escape of a suspect, an officer must have probable cause to arrest the suspect and "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[142]

In a 1974 decision, the Fourth Circuit held that the Fourth Amendment should not "be interpreted to prohibit warrantless arrests for misdemeanors committed outside an officer's presence."[143] The court reached this result in significant part because it believed that the felony/misdemeanor distinction "is no longer as significant as it was at common law."[144]

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135. *Steagald*, 451 U.S. at 217 n.10 (quoting *Payton*, 445 U.S. at 591 n.33).

136. 469 U.S. 221 (1985).

137. *Id.* at 229. The *Hensley* Court did not decide that *Terry* stops for non-felonies were impermissible. It simply declined to decide whether warrantless "*Terry* stops to investigate all past crimes, however serious, are permitted." *Id.* at 229.

138. 471 U.S. 1 (1985).

139. *Id.* at 14, 20.

140. *Id.* at 14; *see also* Welsh v. Wisconsin, 466 U.S. 740, 761 (1984) (White, J., dissenting) (suggesting that "a bright-line distinction between felonies and misdemeanors is untenable.").

141. *Garner*, 471 U.S. at 8-15. The Court emphasized, however, that the common law forbade "the use of deadly force to apprehend a misdemeanant, condemning such action as disproportionately severe." *Id.* at 15.

142. *Id.* at 11.

143. Street v. Surdyka, 492 F.2d 368, 372 (4th Cir. 1972); *see also Welsh*, 466 U.S. at 756 (White, J., dissenting).

144. *Street*, 492 F.2d at 372; *see also Welsh*, 466 U.S. at 761 (White, J., dissenting) ("The category of misdemeanors today includes enough serious offenses to

Despite its flaws, the felony/misdemeanor[145] distinction should be accorded constitutional significance. The distinction has deep roots in the common law[146] and in search and seizure law.[147] It also comports with

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call into question" the felony-misdemeanor line); United States v. Watson, 423 U.S. 411, 438-40 (1976) (Marshall, J., dissenting) (noting that "a felony at common law and a felony today bear only slight resemblance . . . only the most serious crimes were felonies at common law, and many crimes now classified as felonies . . . were treated as misdemeanors."); Carroll v. United States, 267 U.S. 132, 158 (1925) ("[T]he difference in punishment between felonies and misdemeanors . . . [u]nder our present . . . statutes . . . is much less important [than at common law]."); FISHER, *supra* note 4, at 182 ("Under modern conditions and theories of penology a felony is not necessarily any more heinous or harmful to the public than a misdemeanor.").

145. There is no universal definition of felony. Many jurisdictions look to the possible sentence. *See, e.g.*, 18 U.S.C. § 1(1) (1988) ("Any offense punishable by death or by a term exceeding one year is a felony."); ALA. CODE § 13A-1-2(4) (1982) ("an offense for which a sentence . . . in excess of one year is authorized"); GA. CODE ANN. § 26-401 (Harrison 1986) ("a crime punishable by death, by imprisonment for life, or by imprisonment for more than twelve months"); 730 ILL. COMP. STAT. ANN. 5/5-1-9 (Smith-Hurd 1993) ("an offense for which a sentence to death or to a term of imprisonment in a penitentiary for one year or more is provided"); MICH. COMP. LAWS ANN. § 761.1(g) (West Supp. 1993) ("a violation of a penal law . . . for which the offender . . . may be punished by death or by imprisonment for more than 1 year, or an offense expressly designated by law to be a felony"); MO. REV. STAT. § 556.016 (1986) ("death or imprisonment . . . in excess of one year"); N.Y. PENAL LAW § 10.00 (McKinney 1988) ("an offense for which a sentence to a term of imprisonment in excess of one year may be imposed"); WASH. REV. CODE. ANN. § 9A.04.040 (West 1988) ("A crime is a felony if it is so designated . . . or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year."); *see also* OHIO REV. CODE ANN. § 2901.02(E) (Anderson 1993) ("any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty").

In those jurisdictions where the definition of felony depends on the place of incarceration, the practical definition of felony is often the same as in jurisdictions which use the one year approach "since state correction codes commonly provide for imprisonment in the penitentiary if a sentence exceeds one year and for imprisonment in jail if the sentence is for one year or less." WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 1.2, at 10 n.3 (2d ed. 1992). *See, e.g.*, FLA. STAT. ANN. § 775.08 (West 1992) (defining felony as an offense punishable by death or imprisonment in the state penitentiary and further stating that "[a] person shall be imprisoned in the state penitentiary for each sentence which . . . exceeds one year").

Justice White, who said that the distinction is "untenable," *Welsh*, 466 U.S. at 761, also observed that felonies can fairly be said to be "the most serious crimes." *See* Payton v. New York, 445 U.S. 573, 616-17 (1980) (White, J., dissenting).

146. At common law, there were three categories of crime: treason, felonies, and misdemeanors. WAYNE R. LAFAVE & AUSTIN H. SCOTT, CRIMINAL LAW § 1.6, at 30

contemporary norms. The felony/misdemeanor distinction has been said to be "[t]he most important classification of crimes in general use in the United States."[148] The applicability of many rules of criminal procedure outside the Fourth Amendment setting "depend[s] upon whether the crime in question is a felony or a misdemeanor."[149] In some jurisdictions, pretrial procedures such as discovery,[150] indictments,[151] preliminary hearings,[152] and others[153] are required only if the charged crime is a felony. Whether a

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n.1 (2d ed. 1986). Felonies were defined as crimes that resulted in "a total forfeiture of the offender's lands, or goods, or both," upon conviction. Kurtz v. Moffitt, 115 U.S. 487, 499 (1885); *see also Garner*, 471 U.S. at 13 n.11. The term misdemeanor was applied to "all offenses other than treason or felony." ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 15 (3d ed. 1991).

147. *See, e.g., Watson*, 423 U.S. at 418-20 (discussing common law distinction); *Garner*, 471 U.S. at 11-15 (same); *Payton*, 445 U.S. at 573; Barrett, *supra* note 67, at 71 ("For felonies an officer may break, upon Process, and oath—i.e. by a special Warrant to Search Such House . . . .") (quoting QUINCY'S MASS. REP. 471 (1765) (speech of James Otis)); 2 W. HAWKINS, A TREATISE OF THE PLEAS TO THE CROWN, ch. 14 § 1 at 136 (8th ed. 1824) (suggesting that the hot pursuit doctrine was limited to felons or other serious offenders).

148. LAFAVE & SCOTT, *supra* note 146, at 30; *cf.* Horace A. Wilgus, *Arrest Without a Warrant* (pt. 1), 22 MICH. L. REV. 541, 569-70 (1924) (discussing the differences between felonies and misdemeanors in England).

149. LAFAVE & SCOTT, *supra* note 146, at 31. A felony offender may also be subject to extended imprisonment under habitual felony offender laws. *See, e.g.*, ALA. CODE § 13A-5-9 (1982); FLA. STAT. ANN. § 775.084 (West 1992).

150. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-86 (West 1985) (depositions of witnesses permissible only in felony cases); People v. Khan, 483 N.E.2d 1030, 1035 (Ill. App. Ct. 1985) ("Illinois Supreme Court rules regarding discovery are not applicable in misdemeanor cases.").

151. ALA. CONST. art. I, § 8 (grand jury is unnecessary in misdemeanor cases); R.I. CONST. art. I, § 7 (indictment or information is required for all felony prosecutions); 725 ILL. COMP. STAT. ANN. 5/111-2 (Smith-Hurd 1993) ("(a) All prosecution of felonies shall be by information or by indictment . . . (b) All other prosecutions may be by indictment, information or complaint."); *see also* State v. Hollis, 750 S.W.2d 674, 675 (Mo. Ct. App. 1985) (the same strictness in charging is not required for misdemeanors as for felonies).

152. *See, e.g.*, FED. R. CRIM. P. 5(b) (mandating special rules for the initial appearance if the defendant is charged with "a misdemeanor . . . triable by a United States magistrate."); ALA. CODE § 15-11-1 (1982); 725 ILL. COMP. STAT. ANN. 5/109-3.1 (Smith-Hurd 1993) (mandating special procedures for preliminary hearings in felony cases); MD. CTS. & JUD. PROC. CODE ANN. § 4-304 (1989); OR. REV. STAT. § 135.070 (1991) (if defendant is charged with a felony, the magistrate must read the information and inform the defendant of his rights before the preliminary hearing).

153. *See, e.g.*, ALA. CODE § 12-12-3 (1986) (no right to a jury trial in

defendant is charged with a felony or a misdemeanor may also affect the proceedings during trial[154] and may determine the court in which the offense is tried.[155]

The felony/misdemeanor distinction is important in substantive criminal law. In many jurisdictions, certain acts are criminal only if engaged in by convicted felons[156] or if done in order to commit a felony[157] or to harbor or conceal a felon.[158] Conversely, homicide may be justifiable if done to resist a felony, but not otherwise.[159]

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misdemeanor cases tried in district court); ARK. CODE. ANN. § 10-43-102 (Michie 1987) (permitting the arrest of material witnesses in felony cases); 725 ILL. COMP. STAT. ANN. 5/103-1(c) (Smith-Hurd 1993) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched . . . ."); NEV. REV. STAT. § 173.175 (1991) (if indictment or information is for a felony, bail must be increased); *id.* § 178.484 (1991) (if a person is arrested for a felony, the court may require surrender of passport before pretrial release).

154. *See, e.g.*, ALA. CODE § 15-16-21 (1982); MO. SUP. CT. R. 27 (1993) (mandating different trial procedures for misdemeanors and felonies); NEB. REV. STAT. § 29-2001 (1989) (misdemeanant, but not felon, may be tried in absentia); NEV. REV. STAT. § 175.141 (1991) (if indictment or information is for a felony, the clerk must read it and state the defendant's plea to the jury).

155. *See, e.g.*, VA. CONST. art. I. § 8 ("Laws may be enacted providing for the trial of offenses not felonious by a court not of record without a jury . . . ."); ALA. CODE § 12-11-30 (1986) (circuit court has exclusive original jurisdiction over all felony prosecutions); *id.* § 12-12-32 (1986) (district court has exclusive original jurisdiction over misdemeanors); KY. REV. STAT. ANN. § 24A.110 (Michie/Bobbs-Merrill 1992).

156. *See, e.g.*, 18 U.S.C. app. § 1202(a)(1) (1988) (unlawful for convicted felon to possess a firearm); FLA. STAT. ANN. § 790.23 (West 1992) (same); NEV. REV. STAT. § 202.360 (1991) (same).

157. *See, e.g.*, 720 ILL. COMP. STAT. ANN. 5/19-1(a) (Smith-Hurd 1993) ("A person commits burglary when without authority he knowingly enters . . . a building . . . with intent to commit therein a felony or theft."); UTAH CODE ANN. § 76-4-203 (1993) (crime to solicit a person to commit an act which is a felony); *see also* LaFave & Scott, *supra* note 146, § 7.5 (discussing the felony-murder doctrine).

158. *See, e.g.*, CAL. PENAL CODE § 32 (West 1988) (defining "accessories" as those who harbor, conceal, or aid a felon); MASS. GEN. LAWS ANN. ch 274, § 4 (West 1990) (same); MISS. CODE ANN. § 97-1-5 (1972) (same); N.M. STAT. ANN. § 30-22-4 (Michie Supp. 1984) (same); WIS. STAT. ANN. § 946.47 (West 1982) (harbors or aids a felon with the intent to prevent apprehension).

159. *See, e.g.*, ARK. CODE ANN. § 5-2-607 (Michie 1987); CAL. PENAL CODE § 197 (West 1988); IDAHO CODE § 18-4009 (1987); MISS. CODE. ANN. § 97-3-15 (1972); *see also* 720 ILL. COMP. STAT. ANN. 5/7-2 (Smith-Hurd 1993) (use of force in defense of a dwelling is justified if "(b) necessary to prevent the commission of a

The felony/misdemeanor distinction is important outside the criminal law. Some states have recognized conviction of a felony as a ground for divorce.[160] Convicted felons are often subject to disbarment and the loss of other professional licenses,[161] and are sometimes rendered ineligible to vote,[162] serve on juries,[163] or hold public office.[164] Some states require convicted felons to register their presence in the jurisdiction.[165]

In his *Watson* dissent, Justice Marshall suggested that because felonies at common law and felonies today bear only a slight resemblance to one another, the common law felony/misdemeanor distinction is largely irrelevant to "modern interpretation of our Constitution."[166] In Marshall's view, adoption of the common law rule would mean that an arrest warrant would be required only if a crime was a misdemeanor at common law.[167]

In fact, reliance on the felony/misdemeanor distinction should not inevitably result in a rule that an arrest warrant is required only if a crime was

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felony in the dwelling.").

160. *See, e.g.*, ALASKA STAT. § 25.24.050 (1991); IDAHO CODE § 32-603 (1983); 750 ILL. COMP. STAT. ANN. 5/401(a)(1) (Smith-Hurd 1993) ("convict[ion] of a felony or other infamous crime"); N.D. CENT. CODE § 14-05-03 (1991); S.D. CODIFIED LAWS ANN. § 25-4-2 (1992); TEX. FAM. CODE ANN. § 3.04 (West 1993); VA. CODE ANN. § 20-91 (Michie 1992).

161. *See, e.g.*, ME. REV. STAT. tit. 32, § 12273 (West 1992) (public accountants certificate may be suspended or revoked upon "[c]onviction of a felony"); N.Y. JUD. LAW § 90(4)(a) (McKinney 1983) ("Any. . . attorney who shall be convicted of a felony . . . shall upon such conviction, cease to be an attorney . . . ."); OHIO BAR R. § 5-(A)(1) (1993) (Any Justice, judge, or attorney convicted of a felony "shall be subject to an indefinite suspension.").

162. *See, e.g.*, ARK. CONST. art. III, § 2 (no person shall be deprived of the right to vote "except for the commission of a felony at common law"); VA. CONST. art. II, § 1; ARIZ. REV. STAT. ANN. § 16-101 (Supp. 1993); KAN. STAT. ANN. § 21-4615 (1988).

163. *See, e.g.*, 28 U.S.C. § 1865(b)(5) (1988) (a person who has a felony charge pending against him or who has been convicted of a felony in state or federal court is ineligible to serve on a jury.); ALASKA STAT. § 09.20.020 (1983); ARIZ. REV. STAT. ANN. § 21-201 (1990); KAN. STAT. ANN. § 21-4615 (1988); MO. REV. STAT. § 561.026(3) (1986); UTAH CODE § 78-46-7 (1993).

164. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-904 (1987); KAN. STAT. ANN. § 21-4615 (1988); MO. REV. STAT. § 561.021.1(1), (2) (1986); *see also* COLO. REV. STAT. § 18-1-105(3) (1986) ("Every person convicted of a felony . . . shall be disqualified from holding any office of honor . . . .").

165. *See, e.g.*, FLA. STAT. ANN. § 775.13 (West 1992); *see also* ALA. CODE § 13A-11-181 (1982) (a person convicted of two or more felonies must register with the sheriff in his or her county of residence).

166. *Watson*, 423 U.S. at 438 (Marshall, J., dissenting).

167. *Id.* at 440-41.

a misdemeanor at common law. Offenses can be and have been reclassified,[168] even at common law. What is constitutionally important is not whether a particular crime was a felony or a misdemeanor at common law, but whether the common law made a distinction between felonies and misdemeanors.[169] It is the distinction that the Constitution should be said to recognize, not the crimes encompassed within the distinction.[170] Through the use of that distinction, as Justice Marshall recognized, the common law tempered "the public need for the most certain and immediate arrest of criminal suspects with the requirement of magisterial oversight to protect against mistaken insults to privacy [and] decreed that only in the most serious of cases could the warrant be dispensed with."[171] That balance should continue to be reflected in a rule that requires a warrant for most misdemeanor arrests.[172]

2. Reasonableness and the Balancing of Interests

The Supreme Court has observed that "[w]hat is reasonable depends upon all of the circumstances surrounding the search or seizure."[173] A determination of reasonableness requires that courts "consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[174] This must be balanced "against the importance of the governmental interests alleged to justify the

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168. *See, e.g., Watson,* 423 U.S. at 440-41 n.9 (Marshall, J., dissenting); Burroughs v. Eastman, 59 N.W. 817, 819-20 (Mich. 1894); *see also Garner,* 471 U.S. at 14 (observing that "[m]any crimes classified as misdemeanors, or nonexistent, at common law are now felonies."); FISHER, *supra* note 4, at 182 ("The dividing line between the two is nebulous at best.").

169. An analogy might be found in Katz v. United States, 389 U.S. 347 (1967). In California v. Hodari D., 111 S.Ct. 1547 (1991), the Court observed that "*Katz* stands for . . . the proposition that items which could not be subject to seizure at common law (*e.g.*, telephone conversations) can be seized under the Fourth Amendment. That is quite different from saying that what constitutes an arrest (a seizure of the person) has changed." *Id.* at 1551 n.3.

170. *But see* Wilgus, *supra* note 148, at 569 (suggesting that in England "'felony' could not be defined, only *felonies* enumerated.").

171. *Watson,* 423 U.S. at 441-42 (Marshall, J., dissenting).

172. *Cf. Ex parte* Wilson, 114 U.S. 417, 426-29 (1885). "What punishments shall be considered as infamous may be affected by the changes of public opinion from one age to another." *Id.* at 427.

173. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

174. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

intrusion."[175] Indeed, the Court has frequently said that "the balancing of competing interests . . . [is] the key principle of the Fourth Amendment."[176]

One relevant factor in evaluating the importance of the government's interest is the nature and seriousness of the crime under investigation.[177] In

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175. Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983); United States v. Hensley, 469 U.S. 221, 228 (1985) (the test of reasonableness involves balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion"); *see also* Bell v. Wolfish, 441 U.S. 520, 559 (1979) (Reasonableness can only be determined by balancing "the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.").

176. *Garner*, 471 U.S. at 8 (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)); *see also* Dunaway v. New York, 442 U.S. 200, 219 (1979) (White, J., concurring).

The Court has recently observed that "regardless of the terminology used, the precise content of most of the Constitution's civil-liberties guarantees rests upon an assessment of what accommodation between governmental need and individual freedom is reasonable." Anderson v. Creighton, 483 U.S. 635, 643-44 (1987).

177. *See* United States v. United States Dist. Court, 407 U.S. 297, 309, 321-22 (1972) (implicitly acknowledging that the nature of some kinds of crime renders those crimes subject to different kinds of treatment for Fourth Amendment purposes); Roaden v. Kentucky, 413 U.S. 496, 502-04 (1973) (special protections attach where First Amendment materials are the subject of a search or seizure); Stanford v. Texas, 379 U.S. 476, 485-86 (1965) (same); *But cf.* New York v. P.J. Video Inc., 475 U.S. 868 (1986).

More specifically, a wide range of Fourth Amendment activities directed toward more serious offenses or motivated by more serious concerns should, in general, be viewed more sympathetically while activities directed against minor offenses should be severely restricted. Wasserstrom, *The Court's Turn*, *supra* note 102, at 138; *see also* Folk, *supra* note 42, at 331 ("The state's interest in solving a crime should be a function of the seriousness of the crime; so the state's interest in investigating crimes should decrease as the seriousness of the crime diminishes."). A few cases have recognized this fact. *See, e.g.*, Gumz v. Morrisette, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring) (noting the notorious difficulties in defining reasonableness and observing that "[r]easonableness is an open-ended approach . . . [which] calls for an objective balancing of the harms from the arrest or search against the potential harms to effective law enforcement of delaying the action or not acting at all. The graver the crime and the more exigent the circumstances, the more the police can do—whether that means searching on a lesser probability of finding something, entering a dwelling at night, or tearing a house apart in search of evidence."), *cert. denied*, 475 U.S. 1123 (1986), *overruled by* Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987); *see also* Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (holding that the seriousness of the crime under

Welsh v. Wisconsin,[178] the Court observed that the penalty that attaches to an offense is the best indication of the government's interest in convicting people of that offense,[179] and explicitly held that the seriousness of the offense for which an arrest is being made is "an important factor to be considered when determining whether any exigency exists" that would justify a warrantless home arrest.[180] The next year in *United States v. Hensley*,[181] a unanimous Court held that the police may stop a person on the basis of a reasonable suspicion that the person "was involved in or is wanted in connection with a completed felony."[182] The *Hensley* Court did not limit such stops to felonies. Rather, it merely declined to decide whether warrantless "*Terry* stops to investigate all past crimes, however serious, are permitted."[183]

In *Tennessee v. Garner*,[184] the Court held that deadly force may not be used to arrest a suspect simply because there is probable cause to believe that she committed a felony.[185] Instead, before such force may be used to prevent the escape of a suspect, an officer must have probable cause to arrest the suspect and "probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[186]

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investigation "may affect the judgment of what is reasonable . . . police behavior"); State v. Flowers, 441 So. 2d 707, 713 n.1 (La. 1983), *cert. denied*, 466 U.S. 945 (1984) ("Heightened public interest in the case of serious or violent crimes can tip the scales in favor of the reasonableness of the police conduct."); Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 47 (1988) (observing that a fully rational approach to search and seizure problems "would allow consideration of degrees of probability and incorporate other considerations as well such as . . . the seriousness of the crime under investigation"); *infra* note 99 (citing authorities).

It could also be argued that where minor offenses are concerned, the reduced consequences to the individual render the intrusion less hostile and hence more readily justified. *Cf.* SEARCH AND SEIZURE, *supra* note 9, § 9.1(d), at 342 (stating, in the context of stop and frisk theory, that "it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious"); *see also* Camara v. Municipal Court, 387 U.S. 523, 530 (1967); Wright, *supra* note 102, at 1136 n.51.

178. 466 U.S. 740 (1984).

179. *Id.* at 754 & n.14.

180. *Id.* at 753.

181. 469 U.S. 221 (1985).

182. *Id.* at 229.

183. *Id.* at 229.

184. 471 U.S. 1 (1985).

185. *Id.* at 11.

186. *Id.*

In *Graham v. Connor*,[187] the Court held that all claims that a law enforcement officer used excessive force in effecting a "seizure" should be analyzed under the Fourth Amendment's reasonableness standard in light of the facts and circumstances of each case.[188] Reasonableness, said the Court, must be determined from all the facts and circumstances, "including the severity of the crime at issue."[189]

Numerous cases in state courts[190] and in lower federal courts[191] have

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187. 490 U.S. 386 (1989).

188. *Id.* at 395.

189. *Id.* at 396; *see also* George E. Dix, *Means of Executing Searches and Seizures as Fourth Amendment Issues*, 67 MINN. L. REV. 89 (1982).

It has been suggested that Winston v. Lee, 470 U.S. 753 (1985), implicitly recognized that the seriousness of the offense is relevant to reasonableness analysis. *See* Wasserstrom, *The Court's Turn*, *supra* note 102, at 138. In *Winston*, the Court held that in the absence of a "compelling need" a defendant could not be subject to surgery in order to retrieve a bullet which was lodged inside him and which there was probable cause to believe would be useful evidence against him. *Winston*, 470 U.S. at 766. The Court said that the police "plainly had probable cause to . . . search" and observed that a judge had in fact authorized the search after an adversary hearing. *Id.* at 763 & n.6. The Court did not expressly state that the seriousness of the offense was a relevant factor in determining reasonableness and did not reach the question of whether such a search could be compelled absent an adversary hearing. *Id.* However, Justice Brennan's opinion for the majority observed that the reasonableness of such intrusions "depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure." *Id.* at 760.

190. *See, e.g.*, People v. Scott, 578 P.2d 123, 127 (Cal. 1978) (where probable cause exists to believe that a bodily intrusion will yield relevant evidence, the court should only issue a warrant if the balance of other factors, including "the seriousness of the underlying criminal offense," so suggests); People v. Sirhan, 497 P.2d 1121, 1140 (Cal. 1972), *cert. denied*, 410 U.S. 947 (1973) ("the 'gravity of the offense' is an appropriate factor to take into consideration" in determining whether an emergency existed that justified the searching officers' decision to forego obtaining a warrant); State v. Niblock, 631 P.2d 661, 666 (Kan. 1981) ("the seriousness of the alleged offense" is a relevant factor "in evaluating police conduct in making a warrantless arrest"); *see also* People v. Johnson, 93 Cal. Rptr. 534, 537 (Ct. App. 1971) ("the seriousness of the offense allegedly committed" is relevant to whether police officers had probable cause to arrest kidnapper described by child's mother); People v. Sanders, 374 N.E.2d 1315, 1317-18 (Ill. App. Ct. 1978) (applying factors from Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970), including the seriousness of the crime, to invalidate warrantless entry to arrest person suspected of burglary which is not "a grave offense of violence"); State v. Foster, 237 S.E.2d 589, 592 (S.C. 1977).

191. *See, e.g.*, Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) ("[T]he fact that a multiple murderer is on the loose . . . may affect the judgment of what is reasonable. . . . Probable cause . . . describes not a point but a zone, within which the

recognized, in various Fourth Amendment contexts, that the seriousness of the offense under investigation bears on whether a particular Fourth Amendment activity is reasonable.[192] These cases, like *Welsh*, *Garner*, *Hensley*, and *Graham*, suggest that the less serious the offense under investigation, the greater the limits the Constitution imposes on the kind of actions the government can take to investigate the offense and to seize the offender.[193]

Because a determination of reasonableness requires a balancing of interests, the constitutionality of warrantless arrests on probable cause for misdemeanors committed outside the officer's presence can be determined only by looking at the costs and benefits of such a rule.[194] The costs of a

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graver the crime the more latitude the police must be allowed."); United States v. Holland, 510 F.2d 453, 455 (9th Cir. 1975), *cert. denied*, 422 U.S. 1010 (1975) (quoting Arnold v. United States, 382 F.2d 4, 7 (9th Cir. 1967)) ("The reasonableness of . . . [an] on-the-scene detention is determined by all the circumstances [including] . . . [t]he seriousness of the offense."); Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (holding that in determining whether exigent circumstances justify a warrantless entry into a home to make an arrest, one factor to be considered is whether a grave offense, particularly a crime of violence, is involved); *see also* United States v. Jarvis, 560 F.2d 494, 498 (2d Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (following *Dorman*).

192. The seriousness of the offense is relevant in virtually every area of criminal procedure. *See e.g.*, United States v. Loud Hawk, 474 U.S. 302 (1986) (adopting a four factor test, including the seriousness of the offense, for use in weighing speedy trial claims against delays occasioned by interlocutory appellate review); Duncan v. Louisiana, 391 U.S. 145 (1968) (the right to jury trial in state court only applies where a defendant is charged with a serious offense); Argersinger v. Hamlin, 407 U.S. 25 (1972) (the right to appointed counsel only attaches if the defendant is to be sentenced to incarceration).

In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), the Court suggested that the magnitude of the harm that a Fourth Amendment activity is intended to avert is relevant to Fourth Amendment analysis. The Court ruled that railroad employees could be tested for drug use without a warrant and without individualized suspicion, because the evil against which such efforts were directed was not simply the violation of criminal laws against the possession of drugs, but the "far more dangerous wrong" of performing "certain sensitive tasks while under the influence of those substances." *Id.* at 633.

193. *Cf.* Note, *Search & Seizure in the Supreme Court, Shadows on the Fourth Amendment*, 28 U. CHI. L. REV. 664, 677 (1961) ("the detection of minor crimes might legitimize only minor invasions of privacy.").

194. *Cf. Steagald*, 451 U.S. at 222; *see also* Note, *The Supreme Court, Leading Cases*, 99 HARV. L. REV. 120, 245 (1985) (*Garner* suggests that the reasonableness of seizures should be determined by weighing "the infringement of the individual's interests caused by the police conduct against the governmental interests served by such conduct.").

rule barring warrantless arrests for misdemeanors committed outside the arresting officer's presence are likely to be low. As Justice White observed in his dissent in *Welsh v. Wisconsin*,[195] the seriousness of the offense is clearly relevant to whether "the delay that attends the warrant-issuance process will endanger officers or other persons. The seriousness of the offense with which a suspect may be charged also bears on the likelihood that he will flee and escape apprehension if not arrested immediately."[196] In addition, the seriousness of the offense affects the likelihood that the suspect might commit new offenses or destroy evidence while the police are obtaining a warrant.

Minor offenders have less to fear from conviction than serious offenders. Moreover, the activities of minor offenders are less likely than the activities of serious offenders to come to the attention of the police and to generate police interest. For these and other reasons, people who have committed minor crimes have a reduced incentive to take steps to avoid apprehension and conviction and are less likely than serious offenders to commit additional crimes, destroy evidence, resist arrest, flee, or resort to violence in an effort to escape prosecution.[197]

The costs of a rule barring most warrantless misdemeanor arrests are far outweighed by the advantages that flow from a warrant requirement. First, the need to obtain a warrant may cause the police, because of the inconvenience involved, to refrain altogether from making some arrests.[198] Second, if

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195. 466 U.S. 740 (1984).

196. *Id.* at 759 (White, J., dissenting). *But cf. Garner*, 471 U.S. at 14 (characterizing "the assumption that a 'felon' is more dangerous than a misdemeanant" as "untenable").

197. *See infra* notes 271-77 and accompanying text. *But cf. infra* note 289 (citing authorities).

198. *See* Bohlen & Shulman, *supra* note 8, at 490 ("The privilege to arrest without a warrant will undoubtedly lead to officers taking into custody persons for offenses which, though actually committed . . . are . . . deemed too insignificant to warrant prosecution."); *see also* Donald Dripps, *Living with Leon*, 95 YALE L.J. 906, 926-29 (1986).

Although "[t]he purpose of the Fourth Amendment is not the defeat of certain criminal laws," *id.* at 920, "there . . . are public interests in not incarcerating persons accused of minor regulatory offenses [who cannot make bail] solely on account of their indigency and in not exacerbating existing problems of prison overcrowding." State v. Hurtado, 529 A.2d 1000, 1008 (N.J. Super. Ct. App. Div. 1987) (Skillman, J., dissenting), *rev'd on dissent*, 549 A.2d 428 (N.J. 1988). The Supreme Court observed some time ago that "[t]he processing of misdemeanors, in particular, and the early stages of prosecution generally are marked by delays that can seriously affect the quality of justice." Gerstein v. Pugh, 420 U.S. 103, 122 n.23 (1975). Moreover, in many cases of minor criminality the offender and society might be better off if the crime had never been detected and the offender never prosecuted. *See* David A.J.

some minor offenders cannot be arrested except pursuant to a warrant, high speed vehicle pursuits and other dangerous activities directed toward the immediate apprehension of such offenders will be pointless, and therefore discouraged.[199] Third, a warrant requirement insures that inferences of criminality will "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[200] Magistrate review should reduce the incidence of unjustified arrests.[201] Fourth, a warrant requirement prevents "hindsight from affecting the evaluation of the reasonableness of "an arrest.[202] Because it compels "a contemporaneous recordation of the factors on whose basis . . . action is being taken,"[203] a warrant requirement reduces the risk of "post hoc manipulation of the facts" and the risk that "even if the police are paragons of virtue," facts will not be accurately recalled or reported months after the event.[204] Fifth, if police officers are able to show a warrant before making an arrest, "the perception of unlawful or intrusive police conduct," and the risk

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Richards, *Liberalism, Public Morality, and Constitutional Law: Prolegomenon to a Theory of the Constitutional Right to Privacy,* 51 LAW & CONTEMP. PROBS. 123, 143 (1988) (noting that many laws creating victimless crimes "may be subject to cogent criticism on the ground that they cause more social evil and injustice than they remedy.").

199. *See, e.g.*, State v. Blake, 468 N.E.2d 548, 549-53 (Ind. Ct. App. 1984); State v. Koziol, 338 N.W.2d 47, 47-48 (Minn. 1983).

200. Johnson v. United States, 333 U.S. 10, 14 (1948).

201. *See* Payton v. New York, 445 U.S. 573, 585-86 n.4, 602 n.55 (1980). Even those who view the warrant requirement as largely meaningless concede that "magistrates screen out at least a few searches." Wasserstrom & Seidman, *supra* note 177, at 34. *But cf.* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 893 (1991) ("while requiring warrants . . . reduce[s] the odds of police mistake in applying the relevant legal standards, it . . . creates additional opportunities for error by magistrates. . . . Requiring warrants therefore may lead to *more* bad searches than would a simple system of police decisionmaking followed by after-the-fact review.").

202. *See* South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring); Harris, *supra* note 112, at 62.

203. JOHN HART ELY, DEMOCRACY AND DISTRUST 172-73 (1981); *see also* YALE KAMISER, WAYNE R. LAFAVE AND JEROLD H. ISRAEL, MODERN CRIMINAL PROCEDURE, 213 (7th ed. 1990) (asking rhetorically whether arrest warrants can be justified "on the ground that, at least the police must make a record before the event of the basis for their actions?")

204. Wayne R. LaFave, *Being Frank About the Fourth, On* Allen's *"Process of 'Factualization' in the Search and Seizure Cases,"* 85 Mich. L. Rev. 427, 459 (1986); *see also* Beck v. Ohio, 379 U.S. 89, 96 (1964) (An "after-the-event justification for the arrest . . . [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment."); Stuntz, *supra* note 201, at 893.

of resistance, is reduced by the assurances implicitly given to the individual being arrested "of the lawful authority of the . . . officer . . . and the limits of his power."[205] Sixth, because of the Court's preference for warrants, some arrests that might be invalidated if conducted without a warrant might be upheld if conducted pursuant to a warrant.[206] Other arrests will be upheld because of the deference given the magistrate's judgment by reviewing courts.[207] Seventh, the good faith exception announced in *United States v. Leon*,[208] suggests that some activities conducted pursuant to a warrant will be upheld while similar activities will be invalidated if conducted without a warrant.[209] Eighth, officers making an arrest pursuant to a warrant are, in most cases, immune from civil liability for their actions even if the warrant turns out to be invalid.[210] Ninth, a warrant requirement for most misdemeanor arrests is likely to enhance respect for the law. Few people are likely to object to warrantless arrests of murderers and other serious offenders. Many people, however, might be offended by warrantless arrests of gamblers, trespassers, speeders, and other minor offenders.[211] Tenth, pretext arrests

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205. Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)); *see also* Skinner v. Railway Labor Executives' Ass'n., 489 U.S. 602, 621-22 (1989); City of Middlesburg Heights v. Theiss, 501 N.E.2d 1226 (Ohio Ct. App. 1985) (assuming that warrantless entry to arrest for disorderly conduct was unlawful but upholding convictions of occupants for assault and resisting arrest).

206. *See Gates*, 462 U.S. at 237 n.10 (quoting in part from United States v. Ventresca, 380 U.S. 102, 109 (1965)); *see also* Jones v. United States, 362 U.S. 257, 270 (1960) (suggesting that where a warrant is obtained reviewing courts should accept evidence of a less "judicially . . . persuasive character than would have justified an officer in acting on his own without a warrant."); United States v. Alvarez, 810 F.2d 879, 883 (9th Cir. 1987) (observing that in FED. R. CRIM. P. 41(c)(2) Congress "has stated its strong preference for the use of warrants" and stating that "when warrants are used, a defendant's ability to challenge a search or seizure is severely limited.").

207. *See Gates*, 462 U.S. at 238-39 (quoting *Jones*, 362 U.S. at 271)) ("[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.").

208. 468 U.S. 897 (1984).

209. *See* Dripps, *supra* note 198, at 944-47 (discussing whether the good faith exception announced in *Leon* extends to warrantless activities).

210. *See* Anderson v. Creighton, 483 U.S. 635, 644-45 (1987); *see also* United States v. Ross, 456 U.S. 798, 823 n. 32 (1982) (officers acting pursuant to a warrant gain "the protection that a warrant would provide to them in an action for damages brought by an individual claiming that the" police acted unconstitutionally).

211. *See* Folk, *supra* note 42, at 334 (observing that "[t]o the extent that the community views a custodial arrest with its accompanying stigma and inconvenience as disproportionate to the underlying offense, the arrest creates disrespect for the law."). *See also* Gordon B. Baldwin, Welsh v. Wisconsin—*A View From Counsel*, 68

should present few problems if the law imposes a more demanding warrant requirement when the offense under investigation is less serious. The pretext problem almost always arises in the context of police officers arresting a suspect for a minor crime in order to investigate that suspect for some more serious offense.[212] Only on very rare occasions are police officers likely to make a warrantless arrest for a felony when their real purpose is to investigate a lesser offense.[213]

An examination of the costs and benefits of a rule that bars warrantless arrests for misdemeanors committed outside the officer's presence suggests that such a rule is required by the Fourth Amendment's reasonableness

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MARQ. L. REV. 623, 645 (1985) (suggesting that if, in *Welsh v. Wisconsin*, the Court had upheld warrantless home arrests for minor offenses, many observers would have been outraged).

212. Over fifty years ago the Supreme Court held that "[a]n arrest may not be used as a pretext to search for evidence." United States v. Lefkowitz, 285 U.S. 452, 467 (1932); *see also* Lykken v. Vavreck, 366 F. Supp. 585, 593 (D. Minn. 1973) (citing cases); People v. Flanagan, 391 N.Y.S.2d 907 (N.Y. App. Div. 1977). Similarly, some courts have held that a valid arrest for a minor crime cannot be used as a pretext to interrogate a suspect about some other crime. United States v. Causey, 818 F.2d 354, 358-61, *reh'g granted*, 822 F.2d 511, *rev'd*, 834 F.2d 1179 (5th Cir. 1987); People v. Griffin, 510 N.E.2d 1311, 1314-15 (Ill. App. Ct. 1987). Other courts, however, have said that a stop is valid whatever the officers' motives as long as there was a legal basis for that stop. *See, e.g.*, United States v. Hawkins, 811 F.2d 210, 212-15 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987), *and superseded by statute as stated in* United States v. Dombrowski, 877 F.2d 520 (7th Cir. 1989); *see also* Salken, *supra* note 41 at 237-38 nn.121-127 (citing cases). More recently, the Supreme Court, in Scott v. United States, 436 U.S. 128, 141 (1978), appeared to reject the relevance of the officer's motive in Fourth Amendment situations.

Professor Burkoff has written extensively on the pretext problem. *See, e.g.*, John M. Burkoff, *The Pretext Search Doctrine Returns After Never Leaving*, 66 U. DET. L. REV. 363 (1989); John M. Burkoff, *The Pretext Search Doctrine, Now You See It, Now You Don't*, 17 U. MICH. J.L. REF. 523 (1984); John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 114 (1982).

Misuse of the power to arrest would occur less frequently if custodial arrests for traffic and other minor offenses were constitutionally impermissible. *See generally* Salken, *supra* note 41; *see also* Wayne R. LaFave, *"Case-by-Case Adjudication," versus "Standardized Procedures," The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 141-42.

213. *See* ARREST, *supra* note 9, at 30; *cf. Payton*, 445 U.S. at 618 (White, J., dissenting) (it is unlikely that police would use the power to make warrantless entries to arrest "as a pretext to justify an otherwise invalid warrantless search."). Still rarer will be the occasions on which a prosecutor will overcharge in order to save a case. *See* Yale Kamisar, *'Comparative Reprehensibility' and the Fourth Amendment Exclusionary Rule,'* 86 MICH. L. REV. 1, 13-14 (1987).

requirement and more broadly by "the balancing of competing interests"[214] that is at the core of the Fourth Amendment. The Supreme Court has said that it is reasonable for a police officer to unilaterally decide to subject a person to the severe consequences of arrest for a serious crime—a felony. There the public interest in apprehending the offender is great. Misdemeanors, however, are relatively less important than felonies. It is therefore appropriate that additional safeguards be imposed and hurdles leaped before an individual can be subjected to the indignity and inconvenience of an arrest for a misdemeanor.[215]

Courts have held that strip searches of persons detained for minor offenses are unreasonable under the Fourth Amendment.[216] Given the

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214. *Garner*, 471 U.S. at 8 (quoting *Summers*, 452 U.S. at 700 n.12).

215. *See* People v. Hughes, 49 Cal. Rptr. 767, 771 (Ct. App. 1966) ("Traditionally, the law has imposed on the police a more restricted field of action where mere misdemeanors were involved than where felonious conduct was sought to be prevented or punished."); People v. Strelow, 292 N.W.2d 517, 521 (Mich. Ct. App. 1980) ("Preventing the escape of a fleeing felon may necessarily prevail over the interests the statute [requiring knocking before entering] was designed to protect. Employing the same balancing test, the less serious nature of a misdemeanor offense militates against extending the hot pursuit exception to justify unannounced entry" into a private residence); Hastings, *supra* note 5, at 60 ("Since there is a natural tendency for society to demand less protection for the person who causes the greatest harm, the powers of arrest for a felony are invariably broader than those governing arrest for a misdemeanor.").

216. *See e.g.*, Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) ("[H]ere, the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees' privacy interests, the searches cannot be considered 'reasonable'."); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir. 1981), *cert. denied sub. nom.*, Clements v. Logan, 455 U.S. 942 (1982) (strip search of jailed DWI suspect was unreasonable and unconstitutional because it "bore no discernible relationship to security needs . . . when balanced against the ultimate invasion of personal rights involved"); *see also* Hill v. Bogans, 735 F.2d 391, 393-95 (10th Cir. 1984) (following *Logan* and holding that the Fourth Amendment was violated by strip search of driver who was arrested on an apparently outstanding bench warrant—which had in fact been withdrawn—relating to a speeding ticket); *cf.* United States v. Torres, 751 F.2d 875, 882-83 (7th Cir. 1984) (suggesting that the use of highly intrusive techniques such as television surveillance inside a house should be barred where minor offenses are involved). *But cf.* Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding practice of strip searching Federal prison inmates after every contact visit with a person from outside the institution).

Many jurisdictions now bar strip searches for minor offenses. *See, e.g.*, COLO. REV. STAT. § 16-3-405 (1990) ("No person arrested for a traffic or a petty offense shall be strip searched . . . . "); 725 ILL. COMP. STAT. ANN. 5/103-1(c) (Smith-Hurd 1993) ("No person arrested for a traffic, regulatory or misdemeanor offense, except in

profound impact of an arrest on an arrestee, and the state's relatively minor interest in any particular misdemeanor arrest,[217] it may also be unreasonable, absent an actual breach of the peace occurring in the presence of the officer, for a police officer not to obtain a warrant before arresting a person suspected of a misdemeanor.[218]

Ultimately, as with any balancing test, it is possible only to identify the factors to be balanced. The weight assigned to any particular factor depends on the value system of the person doing the weighing. Current practice, however, also suggests that the Constitution mandates some aspects of the common law rule governing warrantless misdemeanor arrests.

3. Reasonableness and Current Practices Among the States

In *United States v. Watson*,[219] the Supreme Court, in the course of holding that a warrantless public felony arrest on probable cause was permissible, observed that "almost all the States" authorized felony arrests on probable cause but without a warrant.[220] In *Garner v. Tennessee*,[221] the Court observed that in "evaluating the reasonableness of police procedure under the Fourth Amendment, we have also looked to prevailing rules in individual jurisdictions."[222] Other decisions have also suggested that current practices among the states can provide some indication of what is reasonable under the Fourth Amendment.[223] Given the diversity of views in the states

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cases involving weapons or a controlled substance, shall be stripped searched . . . .").

217. Maclin, *supra* note 88, at 767.

218. *See* State v. Hurtado, 529 A.2d 1000, 1008 (N.J. Super. Ct. App. Div. 1987) (Skillman, J., dissenting), *rev'd on dissent*, 549 A.2d 428 (N.J. 1988) ("[S]ome offenses . . . do not pose a sufficiently grave threat to the public welfare to warrant even the temporary detention of an alleged offender pending the posting of bail."); *cf.* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (Stevens, J., concurring).

219. 423 U.S. 411 (1976).

220. *Id.* at 422.

221. 471 U.S. 1 (1985).

222. *Id.* at 15-16.

223. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Wolf v. Colorado, 338 U.S. 25 (1949); *see also* Payton v. New York, 445 U.S. 573 (1980). The Court has also looked to the practices of the states in other areas. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 789-92 (1982) (reviewing state laws and observing that "only a small minority of jurisdictions—eight—allow the death penalty to be imposed solely because the defendant . . . participated in a robbery in the course of which a murder was committed"); Burch v. Louisiana, 441 U.S. 130 (1979) (referring to the near uniform judgment of the nation as a reason to hold unconstitutional a provision that misdemeanors could be tried to the jury of six, five of whom must concur); Coker v. Georgia, 433 U.S. 584, 594-96 (1977).

regarding warrantless misdemeanor arrests, current practice provides only limited guidance. Currently, most states allow police to make warrantless arrests on probable cause for misdemeanors committed in the arresting officer's presence. In addition, most states permit warrantless misdemeanor arrests under certain exigent circumstances, variously defined,[224] and for certain specific offenses, such as domestic abuse, driving while intoxicated, theft, and assault.[225] Only a small minority of states permit warrantless misdemeanor arrests on the same terms as felony arrests.[226]

In *Garner*, the Court found a "long-term movement . . . away from the rule that deadly force may be used against any fleeing felon."[227] There has been similar long-term movement away from the breach of the peace requirement. In *Garner*, however, the trend was toward greater protection for the individual. Here, the trend has been toward less protection for the individual, and consequently, may have less constitutional significance than did the trend acknowledged in *Garner*.

The long-standing existence of a statute or practice does not immunize that practice from constitutional attack.[228] Nevertheless, "when the constitutional standard is as amorphous as the word 'reasonable' . . . custom and contemporary norms necessarily play such a large role in the constitutional analysis."[229] Legislative action certainly provides some indication of what a community views as reasonable.[230]

Given the widespread acceptance of the notion that warrantless misdemeanor arrests are justified under some circumstances, a fair compromise could be found in the rule contained in the Model Code of Pre-Arraignment Procedure which authorizes an arrest without a warrant if the officer has:

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224. *See, e.g., supra* notes 12 & 15 (citing statutes).

225. *See, e.g., supra* notes 13, 16, 21, & 22 (citing statutes).

226. *See, e.g., supra* note 18 (citing statutes).

227. Tennessee v. Garner, 471 U.S. 1, 18 (1985).

228. *See* Walz v. Tax Comm'r, 397 U.S. 664, 678 (1970); *see also Watson*, 423 U.S. at 430 (Powell, J., concurring).

229. *Payton*, 445 U.S. at 600.

230. *See, e.g., Watson*, 423 U.S. at 416 ("Because there is a 'strong presumption of constitutionality due to an act of Congress, especially when it turns on what is 'reasonable,'' '[o]bviously the Court should be reluctant to decide that a search thus authorized by Congress was unreasonable' . . . .") (quoting United States v. Di Re, 332 U.S. 581, 585 (1948)); *see also* Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment* 46 GEO. WASH. L. REV. 529, 566 (1978) (observing that public evaluation of government action influences judicial evaluation of Fourth Amendment reasonableness); *cf.* Wasserstrom, *supra* note 41, at 303 n.226.

> reasonable cause to believe that . . . [a] person has committed
>
> (a) a felony;
>
> (b) a misdemeanor, and the officer has reasonable cause to believe that such person
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> (i) will not be apprehended unless immediately arrested; or
>
> (ii) may cause injury to himself or others or damage to property unless immediately arrested; or
>
> (c) a misdemeanor or petty misdemeanor in the officer's presence.[231]

The rule contained in the Model Code merely adds two exigent circumstances[232] to the in-the-presence requirement.[233] It may also be necessary to recognize other exigencies. For example, the possibility of escape,[234] the failure of a person to identify himself,[235] and the need to preserve evidence might well be reasons that justify proceeding without a warrant. Although the creation of more exceptions might make it more difficult for police officers and courts to follow the law,[236] those difficulties

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231. ALI MODEL CODE, *supra* note 72, at § 120.1.

232. An exception for situations where the offense was committed out of the officer's presence and the offender could not "be apprehended unless immediately arrested," was proposed in 1936 as part of the Uniform Arrest Act § 6(1)B (1936). *See* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 345 (1942). At first glance such an exception makes sense. A "pedestrian on the street and . . . [a] car on the highway will not obligingly preserve their status quo." United States v. Kansco, 252 F.2d 220, 224 (2d Cir. 1958). Nonetheless, the exception seems questionable. Permitting instant pursuit of minor offenders risks high speed automobile chases and possible death or injury. State v. Harding, 508 A.2d 471, 476 (Me. 1986) (Violette, J. dissenting).

233. Justice Marshall has expressed the view that the "in the presence" exception for warrantless misdemeanor arrests "was essentially a narrowly drawn exigent-circumstances exception." *Watson*, 423 U.S. at 440 n.8 (citing Carroll v. United States, 267 U.S. 132, 157 (1925)).

234. *See* ALI MODEL CODE, *supra* note 72, at § 120.1, Commentary at 290 (observing that "[i]n a number of jurisdictions, the possibility of escape justifies dispensing with the in-presence requirement.").

235. *See* VT. R. CRIM. P. 3 (Supp. 1993) ("A law enforcement officer may arrest without a warrant a person whom the officer has probable cause to believe has committed a crime in the presence of the officer . . . (3) When the officer has probable cause to believe that a person has committed a misdemeanor and the person has refused to identify himself or herself. . . .").

236. *Cf. Watson*, 423 U.S. at 423-24 (choosing not "to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circum-

should be minimal given the extensive experience both have had with exigent circumstances in the warrantless home entry setting.[237]

C. *The Warrant Clause*

1. Generally

On numerous occasions, the Supreme Court has indicated that it prefers that searches and seizures be conducted pursuant to a warrant.[238] The Court has said that the requirement of a warrant as a precondition to arrest ensures that inferences of criminality will "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."[239] In this way, a proper balance will be struck between privacy and public need,[240] and "the individual's legitimate expectation of privacy [is protected] against the overzealous police officer."[241] Arrest warrants are designed to reduce "the dangers of unlimited and unreasonable arrests of persons who are not at the moment committing any crime."[242]

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stances").

237. *See generally* William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations— Warrantless Entries Into Premises, The Legacy of* Welsh v. Wisconsin, 38 U. KAN. L. REV. 439 (1990).

238. *See, e.g.*, United States v. Leon, 468 U.S. 897, 913-14 (1984); Texas v. Brown, 460 U.S. 730, 735 (1983) ("Our cases hold that procedure by way of a warrant is preferred"); Gerstein v. Pugh, 420 U.S. 103, 113 (1975) (observing that "the Court has expressed a preference for the use of arrest warrants when feasible."); United States v. Ventresca, 380 U.S. 102, 106-07, 109 (1965).

239. Johnson v. United States, 333 U.S. 10, 14 (1948), *quoted with approval in* Welsh v. Wisconsin, 466 U.S. 740, 748 n.10 (1984); *see also* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) ("A warrant . . . provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified . . . .").

240. Zurcher v. Stanford Daily, 436 U.S. 547, 565 (1978) (the warrant requirement struck the balance between privacy and public need and "the preconditions for a warrant; probable cause, specificity . . . and overall reasonableness, should afford sufficient protection."); *see also* Camara v. Municipal Court, 387 U.S. 523, 539 (1967) ("The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest.").

241. South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J., concurring); *see also* Beck v. Ohio, 379 U.S. 89, 96 (1964) (a warrantless arrest "bypasses the safeguards provided by an objective predetermination of probable cause.").

242. Trupiano v. United States, 334 U.S. 699, 705 (1948).

The warrant requirement has been said to serve three other purposes. First, it "prevent[s] hindsight from coloring the evaluation of the reasonableness of a search or seizure."[243] Second, it "greatly reduces the perception of unlawful or intrusive police conduct," and perhaps the risk of resistance or violence, "by assuring 'the individual whose property is searched or seized of the lawful authority of the . . . officer, his need to [act] . . . and the limits of his power . . . .'"[244] Third, it limits the scope of the intrusion.[245]

The Supreme Court continues to profess fidelity to the warrant requirement,[246] and has sometimes said that a warrant should be obtained whenever practicable.[247] The Court has recognized, however, that even though

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243. United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976); *Opperman*, 428 U.S. at 383 (Powell, J., concurring); Harris, *supra* note 112, at 62 ("requiring the police to commit themselves to a theory of probable cause prior to the search lessens the risk that they will search first and then invent a basis for probable cause afterwards depending on what was discovered.").

244. Illinois v. Gates, 462 U.S. 213, 236 (1983) (quoting in part United States v. Chadwick, 433 U.S. 1, 9 (1977)); *see also Skinner*, 489 U.S. at 621-22 ("An essential purpose of the warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents. A warrant assures the citizen that the intrusion is authorized by law . . . .").

245. Coolidge v. New Hampshire, 403 U.S. 443, 467 (1971).

246. *See, e.g.*, California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) (holding that police may conduct a warrantless search of "an automobile and containers within it where they have probable cause to believe contraband or evidence is contained" therein but stating that "[i]t remains a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions'") (quoting Mincey v. Arizona, 437 U.S. 385, 390 (1978), and quoting Katz v. United States, 389 U.S. 347, 357 (1967)); *Skinner*, 489 U.S. at 619 ("Except in certain well-defined circumstances, a search or seizure in . . . a [criminal] case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."); Segura v. United States, 468 U.S. 796, 810 (1984) (holding that it is not constitutionally unreasonable to secure "a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought" but "reaffirm[ing] . . . that, absent exigent circumstances, a warrantless search . . . is illegal.").

247. *See, e.g., Gerstein*, 420 U.S. at 113 n.12 (quoting United States v. United States Dist. Court, 407 U.S. 297, 316 (1972) (observing that "[i]n terms that apply equally to arrests, we described the 'very heart of the Fourth Amendment directive' as a requirement that 'where practical, a governmental search and seizure should'" be pursuant to a warrant); Terry v. Ohio, 392 U.S. 1, 20 (1968); *Beck*, 379 U.S. at 96.

It has been said that "the supposed 'general rule' that a warrant is always required does not appear to have any basis in the common law." *Acevedo*, 111 S.Ct.

"[m]aximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest," such a requirement would impose "an intolerable handicap for legitimate law enforcement,"[248] and over the years, the warrant requirement has become riddled with exceptions.[249]

2. Reasons for Dispensing with Warrants

The Supreme Court has articulated several broad justifications for dispensing with the warrant requirement when ordinary, law enforcement motivated, Fourth Amendment activities are involved.[250] First, the warrant requirement has been deemed inapplicable when, because exigent circumstances are present, "'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the [Fourth Amendment activity].'"[251] Second, the warrant requirement has been deemed inapplicable when there is a reduced expectation of privacy in a particular place to be searched or in a

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at 1993 (Scalia, J., concurring).

248. *Gerstein*, 420 U.S. at 113.

249. *See Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring) (noting that "the 'warrant requirement' had become so riddled with exceptions that it was basically unrecognizable. In 1985, one commentator cataloged nearly 20 such exceptions") (citing Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985)); *see also* Texas v. Brown, 460 U.S. 730, 735-36 (1983) (plurality opinion) (listing ten exceptions to the warrant requirement); Robert M. Bloom, *The Supreme Court and Its Purported Preference for Search Warrants*, 50 TENN. L. REV. 231, 235, 259 (1983) (arguing that the Court's stated preference for a search warrant has become largely meaningless except with respect to searches of homes, offices, and private communications); LaFave, *Being Frank About the Fourth*, *supra* note 204, at 460 ("[I]t is fair to say that warrantless searches and seizures are the norm and that resort to the warrant process is the exception."). *But cf. Welsh*, 466 U.S. at 749-50 (stating that "decisions of this Court . . . have emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated.'" (quoting United States v. United States Dist. Court, 407 U.S. 297, 318 (1972)).

250. The Court has also permitted exceptions "when 'special needs', beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." *Skinner*, 489 U.S. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987), and quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

251. *Skinner*, 489 U.S. at 623 (quoting *Camara*, 387 U.S. at 533); *T.L.O.*, 469 U.S. at 340 (same); *see also* United States v. United States Dist. Court, 407 U.S. 297, 315 (1972); SEARCH AND SEIZURE, *supra* note 9, § 4.1(a), at 119 (referring to this as "the so-called emergency doctrine.").

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thing to be seized.[252] Third, the Court has consistently viewed certain police intrusions as more serious than others and has held that "the warrant process is necessary only for the more serious ones."[253] Fourth, the Court has held that in some cases the need for a clear-cut or bright-line rule outweighs the arguments for a warrant.[254] Fifth, in *United States v. Watson*, [255] the Court declined to transform its preference for a warrant "into a constitutional rule" barring warrantless public arrests on probable cause "when the judgment of the Nation and Congress has for so long been to authorize [such] . . . arrests."[256] Sixth, the Court has held that "no warrant is necessary when there is little or nothing for the magistrate to decide."[257] Finally, it has been suggested that the Court's willingness to carve out exceptions to the warrant requirement is influenced by a desire "not to overburden the warrant-issuing process."[258]

a. Frustration of Purpose

The purpose of misdemeanor arrests has changed over the years. The common law permitted warrantless misdemeanor arrests only when a breach of the peace was committed in the presence of the arresting officer and immediate arrest was therefore necessary to "protect the people of the community from acts of violence."[259] It was assumed that the public safety

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252. *See, e.g.*, California v. Carney, 471 U.S. 386, 392 (1985); United States v. Chadwick, 433 U.S. 1, 12-13 (1977); *see also* Bell v. Wolfish, 441 U.S. 520, 556-57 (1979); United States v. United States Dist. Court, 407 U.S. 297, 315 (1972); *cf. Griffin*, 483 U.S. at 875 (the supervision of probationers is a "special need" of the state which permits "a degree of impingement upon privacy that would not be constitutional if applied to the public at large").

253. SEARCH AND SEIZURE, *supra* note 9, § 4.1(a), at 121.

254. *Acevedo*, 111 S.Ct. at 1990; *Watson*, 423 U.S. at 423 (observing that a contrary rule would "encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances").

255. 423 U.S. 411 (1976).

256. *Id.* at 423. It has been suggested that the rule that a warrant is not required when a felony arrest is made in a public place is not necessarily inconsistent with the "whenever practicable" test because the volume of arrests is so great that it would not be practical to require a warrant for each one. LaFave, *Being Frank About the Fourth*, *supra* note 204, at 472.

257. SEARCH AND SEIZURE, *supra* note 9, at § 4.1(a), at 121. *See, e.g.*, *Skinner*, 489 U.S. at 622 ("[I]n light of the standardized nature of the tests [at issue] and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.").

258. SEARCH AND SEIZURE, *supra* note 9, at § 4.1(a), at 119.

259. FISHER, *supra* note 4, at 188; *see also* Carroll v. United States, 267 U.S.

did not require the immediate arrest of other misdemeanants. If their prosecution was deemed desirable a summons or warrant could issue.[260] In contrast, the common law assumed all felons were persons whose arrest was necessary to protect the community. As the Supreme Court observed in 1925, "the reason for arrest without warrant on a reliable report of a felony was because the public safety and the due apprehension of criminals charged with heinous offenses required that such arrests should be made at once without a warrant."[261]

The seriousness of the underlying offense is clearly relevant to whether "the delay that attends the warrant-issuance process will endanger officers or other persons."[262] When "felonies or crimes involving a threat to public safety" are concerned, "it is in the public interest that the crime be solved and the suspect detained as promptly as possible."[263] This is not true, however, with most misdemeanors.

Today, misdemeanor arrests are made for many reasons.[264] Some, no doubt, are made to protect the public.[265] In most such cases, the need to protect the public is evident from the commission of a misdemeanor in the officer's presence involving a breach of the peace. A bar on warrantless

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132, 157(1925); Commonwealth v. Huffman, 430 N.E.2d 1190, 1191 n.4 (Mass. 1982) (observing that "[c]ertain crimes observed by officers create their own exigent circumstances. For example, should an officer observe a murder or other violent disturbance in progress, exigent circumstances would be apparent."); *cf.* Reardon v. Wroan, 811 F.2d 1025, 1028-29 (7th Cir. 1987) (burglary in progress is an exigent circumstance); United States v. Campbell, 581 F.2d 22, 25 (2d Cir. 1978) (same); ALI MODEL CODE, *supra* note 72, § 120.1, Commentary at 290 n.4.

260. FISHER, *supra* note 4, at 189.

261. *Carroll*, 267 U.S. at 157; *see also* FISHER, *supra* note 4, at 188 ("At the time the arrest powers were being formulated . . . [p]ersons charged with felony were presumed to be desperate characters, likely to do violence to members of the public, so must be apprehended by any and all means.").

262. *Welsh*, 466 U.S. at 759 (White, J., dissenting). *But cf. Garner*, 471 U.S. at 14 (characterizing "the assumption that a 'felon' is more dangerous than a misdemeanant" as "untenable").

263. United States v. Hensley, 469 U.S. 221, 229 (1985).

264. Many arrests for minor offenses are made for purposes other than prosecution. ARREST, *supra* note 9, at 437 (discussing arrests made to serve "deterrent, rehabilitative, or punitive functions . . . with full intention by the arresting officers that prosecution shall not follow."). *See generally, id.* at 437-89; *see also* People v. Lee, 502 N.E.2d 399, 404 (Ill. App. Ct. 1986) (observing that "arrests may serve an investigative purpose"); State v. Weist, 730 P.2d 26, 29 (Or. 1986) (observing that a warrant might issue for purposes other than the investigation of crime.).

265. But *cf.* FISHER, *supra* note 4, at 188 ("It must be emphasized that this reason has largely disappeared in modern times.").

misdemeanor arrests in other cases would not seriously endanger the public because the public safety is not usually threatened by persons who have committed misdemeanors in the past and are now going about their lawful business.

Even when a violent felony is involved, the public safety is less threatened by a person who committed a past crime but who now is "going about his lawful business than it is by a suspect who is currently in the process of violating the law."[266] Persons who have committed misdemeanors are probably less likely to commit new offenses than are persons who have committed felonies. If they do commit new offenses, the costs to society are likely to be low.[267] Of course, some minor offenders will continue to violate the law until apprehended. A few may cause substantial harm in the aggregate by their repeated conduct. Other minor offenders may graduate to more serious offenses. Many minor offenders, however, will simply continue going about their lawful business until and unless apprehended.

In the course of the last century, arrest has come to be viewed primarily as a means of making the arrestee available to answer a charge or accusation against him.[268] This view of arrest has led to the expansion of the common law power to arrest for misdemeanors. There is, however, rarely a need to arrest misdemeanor suspects quickly. Although other factors besides the seriousness of the offense are relevant in determining whether there is a need to apprehend an offender quickly,[269] "[t]he seriousness of the offense . . .

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266. *Hensley*, 469 U.S. at 228. The *Hensley* Court held that a *Terry* stop is permissible if the officer making the stop reasonably suspects that the person stopped is wanted for investigation of a felony, but declined to decide whether warrantless "*Terry* stops to investigate all past crimes, however serious, are permitted." *Id.* at 229.

In *Payton*, the dissenters argued that warrantless felony arrests in the home were not barred by the Fourth Amendment but recognized that "[a]t common law, absent exigent circumstances, [warrantless] entries to arrest could be made only for felony." *Payton*, 445 U.S. at 616 (White, J., dissenting).

267. *But cf. Garner*, 471 U.S. at 14 (observing that "numerous misdemeanors involve conduct more dangerous than many felonies").

268. *See* Thomas v. State, 583 So.2d 336, 338 (Fla. Ct. App. 1991), *decision approved by* 614 So. 2d 468 (Fla. 1993).

269. *See, e.g.*, Dorman v. United States, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (en banc); *see also* United States v. Diaz, 814 F.2d 454, 458-59 (7th Cir.), *cert. denied*, 484 U.S. 857 (1987) (acknowledging that the gravity of the offense is an important factor in determining whether an exigency exists that justifies a warrantless home entry, but stating that no exigency exists "'simply because there is probable cause to believe that a serious crime has been committed'") (quoting Welsh v. Wisconsin, 466 U.S. 740, 753 (1984)); Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) (same); State v. Girard, 555 P.2d 445, 447 (Or. 1976) (allowing warrantless arrest of burglary suspects inside private dwelling despite the presence of two officers

[clearly] bears on the likelihood that . . . [an offender] will flee and escape apprehension if not arrested immediately."[270]

Minor offenders have less to fear from conviction than serious offenders. Consequently, minor offenders have less incentive to flee, to resist arrest by force, or to engage in other activities that endanger police officers or others.[271] For most minor offenders, the costs and risks of serious efforts to flee or otherwise evade arrest are prohibitive given the minimal likelihood of apprehension and the minor consequences of conviction.[272] Moreover, there is often little prospect of successful flight. In many misdemeanor cases, particularly those that occur in the officer's presence, the identity of the suspect is known or at least strongly suspected.[273] Finally, while serious offenders are generally aware that their activities have generated police interest, minor offenders sometimes do not even know they have committed an offense.[274] For all these reasons, it is unlikely that significant numbers

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because of the likelihood that the suspects would try to destroy evidence or escape and observing that the ability of the officers to prevent an escape while they obtained a warrant was problematical given the wide range of factors involved including "the size of the house, the number of exits, [and] the proximity of the house to cover").

270. Welsh v. Wisconsin, 466 U.S. 740, 759 (1984) (White, J., dissenting).

271. *See* FISHER, *supra* note 4, at 189 (observing that at common law persons accused of breaches of the peace were "not considered likely to resort to desperate measures to escape punishment, as was quite likely to be the case of one who had conmmitted a felony"); *see also* SEARCH AND SEIZURE, *supra* note 9, § 6.1(f) at 605, nn.179-185 (citing cases, all of which appear to have involved felonies, where "prompt entry to arrest is called for in order to minimize the risk that someone will be injured or killed.").

272. *See* LAFAVE & ISRAEL, *supra* note 145, § 1.4 at 28 ("the vast majority" of defendants whose cases started as misdemeanors "will be sentenced to a fine and/or some form of community service.").

The overwhelming majority of minor offenses are tried in state court. Many of these are traffic-related and result only in small fines. Even in the federal system, where more serious offenses are involved, from 1980 through 1986 less than half of all non-drug, non-violent offenders convicted in federal court received prison sentences. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1988, at 5.26 (1989).

273. *See, e.g., Welsh*, 466 U.S. at 743; State v. Koziol, 338 N.W.2d 47, 48 (Minn. 1983); State v. Hitch, 23 Ohio Misc. 2d 29, 30 (Clermont County Ct. 1985); *see also* Mendelson, *supra* note 87, at 504 ("it makes no sense to arrest someone for a noisy muffler where there is reliable identification and reasonable assurance that the ticket will be obeyed").

274. *See, e.g.*, People v. Strelow, 292 N.W.2d 517, 520 (Mich. Ct. App. 1980) (stating that "[t]he defendant testified that he was unaware of the speeding violation. . . . [W]e are therefore not persuaded that Mr. Strelow was cognizant of the officer's purpose").

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of minor offenders will flee or escape apprehension if the police must obtain a warrant before effecting their arrest.[275]

Minor offenders are less likely than serious offenders to use the delay involved in obtaining a warrant to destroy evidence. In many misdemeanor cases there is no evidence to destroy.[276] In many other misdemeanor cases all the evidence has long since been gathered. In those few cases in which evidence remains to be gathered, minor offenders are probably less likely than serious offenders to be alert to the need to destroy evidence and are less likely to actually do so.[277]

In his concurring opinion in *United States v. Watson*,[278] Justice Powell suggested that in some cases a warrant requirement for felony arrests would "severely hamper" law enforcement because the police might want to delay an arrest while they collect further evidence of the arrestee's guilt. If, however, they delayed in obtaining a warrant and the need arose to arrest quickly "they would risk a court decision that the subsequent exigency did not excuse their

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275. *See* David Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125, 152 (1941) ("Since misdemeanors are ordinarily not serious, [the] chances that the misdemeanant will flee before a warrant is obtained are slim."); *see also* YALE KAMISAR, WAYNE R. LAFAVE, & JEROLD ISRAEL, MODERN CRIMINAL PROCEDURE 213 (7th ed. 1990) (speaking in terms of offenders generally and observing that "'the risk is negligible that the defendant will suddenly flee between the time the police solve the case and the time which would be required to obtain and serve an arrest warrant.'"); SEARCH AND SEIZURE *supra* note 9, at § 6.1(b), 573 & n.50 (same, noting that it is unlikely that "prospective arrestees, as a class, pose the same risk of disappearance as objects believed to be in a moving vehicle"). *But cf.* Unites States v. Hensley, 469 U.S. 221, 229 (1985) (stating that "[r]estraining police action until after probable cause is obtained . . . might . . . enable the suspect to flee in the interim and to remain at large"); *infra* note 289 (citing authorities).

In appropriate cases escape can be prevented while the police obtain a warrant. *See, e.g.*, Jones v. Lewis, 874 F.2d 1125, 1131 (6th Cir. 1989) ("Arguably" the police had the suspect "cornered and need only have secured the premises, perhaps with the help of back-up officers, while seeking an arrest warrant."); *see also* McDonald v. United States, 335 U.S. 451, 455 (1948) (no exigency because, among other reasons, "[o]fficers were there to apprehend petitioners in case they tried to leave."); State v. McNeal, 251 S.E.2d 484, 489 (W. Va. 1978) ("Surely four of the five police officers could have guarded the personal residence while the fifth sought a warrant").

276. *See, e.g.*, People v. Mercurio, 88 Cal. Rptr 750, 751 (Ct. App. 1970) ("A traffic violation ordinarily involves no tangible property; hence no implement or fruit of the crime or infraction will be found . . . [by a] search.").

277. *See* State v. Lloyd, 606 P.2d 913, 919 (Haw. 1980) ("[N]ot every suspect . . . will attempt to escape or destroy valuable, albeit illicit, merchandise."). In some cases, the police could take steps to prevent the destruction or loss of evidence. *See* Steagald v. United States, 451 U.S. 204, 221 (1981).

278. 423 U.S. 411 (1976).

failure to get a warrant."[279] If the officers procured a warrant as soon as they had probable cause, argued Powell, a court might later decide "that the warrant had grown stale by the time it was used."[280]

In fact, "the chances of an *arrest* warrant becoming 'stale' are rather remote."[281] Ordinarily, if probable cause to arrest exists, it "will continue to exist for the indefinite future."[282] Moreover, once an arrest warrant is obtained there is ordinarily no need to execute it immediately.[283] Although the police rarely investigate reports of misdemeanors,[284] if further investigation were warranted,[285] officers who feared a suspect might suddenly flee or destroy evidence could first obtain a warrant and then proceed with their investigation.

The costs of requiring an arrest warrant for misdemeanors committed outside an officer's presence are likely to be low. If a person is outside an officer's presence, arrest, even without a warrant, takes some time. The delay required to obtain a warrant rarely will add significant time or make it more difficult to apprehend and prosecute a person who committed a misdemeanor outside the arresting officer's presence. Moreover, most minor crimes go unreported. Even when minor crimes are brought to the attention of the police, they are unlikely to have the time or inclination to investigate them.[286] As a result, "[i]n practice the usual misdemeanor arrest takes place

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279. *Id.* at 431 (Powell, J., concurring).

280. *Id.* at 431-32.

281. SEARCH AND SEIZURE, *supra* note 9, § 5.1(b) at 402; *see also Watson*, 423 U.S. at 451 (Marshall, J., dissenting).

282. *Watson*, 423 U.S. at 449 (Marshall, J., dissenting). Probable cause to search, in contrast, exists at a particular point in time. SEARCH AND SEIZURE, *supra* note 9, § 3.1(b) at 546, § 3.7 at 75. Consequently a search warrant can easily become stale. *Id.* § 3.7(a) at 75-88.

283. *Watson*, 423 U.S. at 451 n.16 (Marshall, J., dissenting); *see also* FED. R. CRIM. P. 4; *cf.* FED. R. CRIM. P. 41(c) (search warrant is good for 10 days).

284. Police disinterest stems in part from the fact that witnesses to, and victims of, misdemeanors often lose interest in prosecution or repudiate their complaints. *See* Kauffman, *supra* note 275, at 152-53.

285. *See* Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 440 (7th Cir. 1986) (noting that in some cases "[t]he police may discover, to their dismay, that when they do not conduct an investigation, they cannot get a conviction.").

286. *See supra* note 284. In 1987 less than 20% of property crimes known to the police were cleared by arrest. UNITED STATES DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, at 510, Table 4.18 (1988). Often, the police make a conscious decision not to arrest minor offenders. *See generally* ARREST, *supra* note 9, at 61-164.

when the officer sees a person commit an act constituting a misdemeanor."[287]

The costs of requiring a warrant to arrest for all misdemeanors that do not involve a breach of the peace, even those committed in an officer's presence, would be somewhat higher. For one thing, when an offense occurs in a police officer's presence and that officer is powerless to make an arrest, the officer's inaction may generate disrespect for the law and lead to low morale among law enforcement officers. Moreover, the broader the warrant requirement imposed, the more likely it is that some convictions will be lost because a warrant will not be sought or, if sought, will not be issued.[288] A few other convictions will be lost because suspects will flee, destroy evidence, or do other things that preclude their apprehension or conviction during the time consumed in obtaining a warrant.[289] As the Supreme Court recently observed, however, "there is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of all of us."[290] Moreover, the minor nature of the offense suggests that the cost to society of lost convictions for that offense will be low.[291]

A warrant requirement is likely to result in far more lost arrests than lost convictions. A warrant requirement reduces the likelihood that the police will make pretext arrests, use arrests as a harassment tactic, or make unfounded or ill-advised arrests, or make other kinds of arrests that are not likely to result

287. ARREST, *supra* note 9, at 236.

288. *See* Bohlen & Shulman, *supra* note 8, at 490.

289. In 1969, one author argued that "[w]ith the existent speed and availability of transportation, criminals can quickly leave the scene of the crime .... The presence requirement thus shackles police efficiency." Roach, *supra* note 8, at 126-27; *see also* FISHER, *supra* note 4, at 183. *But cf. supra* note 275 (citing authorities). It is the out-of-town offender, who cannot know what "conduct contravenes some regulation which the wisdom of the local Solons deems necessary," who is likely to suffer the most severe consequences if arrested. Bohlen & Shulman, *supra* note 8, at 491-92.

290. Arizona v. Hicks, 480 U.S. 321, 329 (1987).

291. *See* State v. Flowers, 441 So.2d 707, 713 n.1 (La. 1983), *cert. denied*, 466 U.S. 945 (1984) ("The governmental or public interest in the prevention of serious or violent crimes, and the quick apprehension of those who commit this type of offense is generally stronger than that which exists when an individual commits, or is suspected of having committed, a nonviolent or possessory offense."); *see also* Welsh v. Wisconsin, 466 U.S. 740, 750-54 (1984); Langford v. Superior Court of Los Angeles County, 729 P.2d 822, 829 (Cal.), *cert. denied sub nom.*, Gates v. Langdorf, 484 U.S. 824 (1987).

in conviction.[292] Given the profound impact of an arrest on the arrestee, the loss of a few convictions is a small price to pay for this reduction in arrests.

An arrest warrant requirement for most misdemeanors will have minimal impact on crime control goals for another reason. The Supreme Court has consistently held that the illegality of an arrest has no effect on a subsequent prosecution.[293] If an arrest was made on probable cause but without a warrant and a court finds that a warrant should have been obtained, the only result will be the suppression of whatever evidence was obtained in the course of any search conducted incident to the arrest. In the case of most minor offenses such searches often turn up nothing. Thus, the failure to comply with a warrant requirement for misdemeanor arrests will rarely affect the outcome of any prosecution.

b. Reduced Expectations of Privacy

Two Justices who concurred in *Watson* made references to the distinction between arrest in a public place and a "warrantless arrest in a private home or other place where the person has a reasonable expectation of privacy."[294] Although a person's location is relevant to that person's privacy expectations if searched,[295] a seizure of a person is no less a seizure[296] simply because

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292. Many arrests for minor offenses are made for purposes other than prosecution. *See generally* ARREST, *supra* note 9 at 437-89. Many other arrests are not followed by prosecution. *See* LAFAVE & ISRAEL, *supra* note 145, §1.4 at 21-22 & n.4 (noting that 30% to 50% of felony arrests are dropped as a result of pretrial screening and suggesting that a high percentage of misdemeanor cases also are rejected but observing that "available statitstics . . . are quite sparse"). Of course, some arrestees are tried and found not guilty. *See, e.g.*, Gramenos v. Jewel Cos., Inc., 797 F.2d 432, 434 (7th Cir. 1986).

293. *See, e.g.*, United States v. Crews, 445 U.S. 463, 474 (1980); Frisbie v. Collins, 342 U.S. 519, 522 (1952); *Ex parte* Johnson, 167 U.S. 120, 126 (1897) ("[A] forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offence, and presents no valid objection to his trial in such court"); Cook v. Hart, 146 U.S. 183, 192 (1892) (stating that "this court will not interfere to relieve persons who have been arrested and taken by violence from the territory of one State to that of another"); Mahon v. Justice, 127 U.S. 700, 705 (1888) (forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court); Ker v. Illinois, 119 U.S. 436 (1886) (defendant arrested in Peru and brought back to the United States). *But see* United States v. Tuscanino, 500 F.2d 267, 269 (2d Cir. 1974).

294. *Watson*, 423 U.S. at 432-33 (Powell, J., concurring); *see also id.* at 433 (Stewart, J., concurring).

295. Katz v. United States, 389 U.S. 247, 351 (1967), *quoted with approval in*

Maryland v. Garrison, 480 U.S. 79, 90 (1985) (Blackmun, J., dissenting); *see also* New York v. Berger, 482 U.S. 691, 700 (1987) (owner of commercial premises has an expectation of privacy therein but it "is less than" he has in his home and "is particularly attenuated" in closely regulated industries); California v. Carney, 471 U.S. 386, 391 (1985) (one's expectation of privacy in a motor vehicle "is significantly less than that relating to one's home or office"); *cf.* Maryland v. Macon, 472 U.S. 463, 469 (1985) (no "reasonable expectation of privacy in areas of the store where the public was invited to enter and transact business"); Oliver v. United States, 466 U.S. 170, 176-81 (1984) (no legitimate expectation of privacy in open fields).

In some locations a person may have no privacy interest whatever as against a search of his person. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 556-58 (1979) (observing that a person confined in a detention facility certainly has a "diminished" expectation of privacy and may have none at all).

Intrusions into the human body are governed by special rules. *See, e.g.*, Winston v. Lee, 470 U.S. 753, 766-67 (1985) (requiring a "compelling need" before surgical intrusions into the body can be made. "Where the Court has found a lesser expectation of privacy . . . or where the search involves a minimal intrusion on privacy interests, . . . the Fourth Amendment protections are correspondingly less stringent. . . . [W]hen the State seeks to intrude upon an interest in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search 'reasonable'."); *see also* Schmerber v. California, 384 U.S. 757 (1966) (holding that ordinary search incident to arrest theory could not justify involuntarily taking blood from a motorist who had been arrested for DUI). Although it characterized the search in question as "a minor bodily intrusion" the *Schmerber* court stated that the "interests in human dignity and privacy which the Fourth Amendment protects" require a "clear indication" that such an intrusion will turn up incriminating evidence before it may be undertaken. *Id.* at 769-70. The Court said the intrusion at issue was one which "involves virtually no risk, trauma, or pain," but found it significant that it was performed "by a physician in a hospital environment according to accepted medical practices." *Id.* at 771.

296. The Court has found it difficult to formulate a definition of seizure. *See* Wayne R. LaFave, *Pinguitinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?* 1991 U. ILL. L. REV. 729. In 1990, a majority of the Court said that a seizure occurs "when there is governmental termination of freedom of movement *through means intentionally applied.*" Michigan Dep't. of State Police v. Sitz, 496 U.S. 444, 450 (1990) (quoting Brower v. County of Inyo, 489 U.S. 593 (1989)). The next year, a seven person majority indicated that a necessary, though not sufficient, condition for a seizure is whether, in view of all the circumstances, "a reasonable person would have believed that he was not free to leave." California v. Hodari D., 111 S. Ct. 1547, 1551 (1991) (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)). Two months later, six of those seven members of the Court said that when a person's freedom of movement is restricted by a factor independent of police conduct, a seizure has occurred if taking into account all the circumstances, "the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" Florida v. Bostick,

it occurs in a public place.[297] "[T]he Fourth Amendment protects people, not places,"[298] and a person is "[u]nquestionably . . . entitled to the protection of the Fourth Amendment as he walk[s] down the street."[299]

When people are in their homes they have, in addition to the right to be free from unreasonable seizures of their persons, a right to be free from unreasonable entries into their home.[300] Looking at the matter from a different perspective, arrest in a home is a two step process that invades two separate interests: First, there is the initial intrusion into the home; and second, there is "the actual seizure or arrest of the suspect."[301] In contrast,

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111 S. Ct. 2382, 2387 (1991) (quoting Michigan v. Chesternut, 486 U.S. 567, 569 (1988)).

297. *Cf.* Gerald G. Ashdown, *The Fourth Amendment and "The Legitimate Expectation of Privacy,"* 34 VAND. L. REV. 1289, 1304-05 (1981); *see also* Alan J. Statman, Note, Watson *and* Santana*: Death Knell for Arrest Warrants?*, 28 SYR. L. REV. 787, 795-99 (1977).

Being in a public place does, of course, reduce one's expectations of privacy vis-a-vis others viewing one's person. *See* United States v. Dionisio, 410 U.S. 1, 14 (1973) ("No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world."); *see also* People v. Whitaker, 476 N.E.2d 294, 296 (N.Y. 1985) (one has "no reasonable expectation of privacy in physical characteristics constantly exposed to the public.").

298. *Katz*, 389 U.S. at 351.

299. Terry v. Ohio, 392 U.S. 1, 9 (1968).

300. *See* Payton v. New York, 445 U.S. 573, 588-89 (1980) ("To be arrested in the home involves not only the invasion attendant to all arrests but also an invasion of the sanctity of the home.") (quoting United States v. Reed, 572 F.2d 412, 423 (2nd Cir.), *cert. denied sub. nom.*, Goldsmith v. United States, 439 U.S. 913 (1978)). *But cf.* ALI MODEL CODE, *supra* note 72, § 120.6, Commentary at 307 ("[I]t is far from clear that an arrest in one's home is so much more threatening or humiliating than a street arrest.").

301. *See* Statman, *supra* note 297, at 798; *see also* Steagald v. United States, 451 U.S. 204 (1981) (holding that the Fourth Amendment requires that police officers who search the house of one person in order to execute a warrant for the arrest of another person, must obtain a warrant to search the third party's home).

In *Payton*, the Court held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton*, 445 U.S. at 603.

In United States v. Santana, 427 U.S. 38 (1976), the defendant, who had just sold heroin to an informant and whom the police had probable cause to arrest for that offense, retreated from her doorway into the vestibule of her home when she observed the police approaching. The officers arrested her inside and the Court, in upholding the arrest, stated that while in the doorway "[s]he was not in an area where she had any expectation of privacy," but rather was "as exposed to public view . . . as if she

an arrest in a public place involves only a one step process and invades only one kind of interest.

Because the Supreme Court considers intrusions into the home the principal evil against which the Fourth Amendment is directed, a warrant is necessary, absent exigent circumstances, before the police may enter a private home to arrest a person for either a felony[302] or a misdemeanor.[303] When exigent circumstances exist, however, the right of the police to enter a private home without a warrant is diminished if the arrest is to be made for a minor offense.[304] This is so because the privacy interest remains the same while the government's interest in making the arrest decreases as the seriousness of the offense decreases. This same balance of interests suggests that a warrant is a more appropriate prerequisite to a public arrest for a misdemeanor than for a public arrest for a felony. As with home entries, the privacy interest, although of a different kind, remains constant while the government's interest in making the arrest decreases as the seriousness of the offense decreases.

Occasional suggestions have been made that one's expectations of privacy can be reduced or lost by taking advantage of that privacy to commit illegal acts.[305] Generally, however, courts have rejected this argument[306] and warrantless arrests for all misdemeanors cannot be justified on the theory that arrestees have a reduced expectation of privacy merely because they are suspected of having committed a crime.[307]

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had been standing completely outside her house." *Id.* at 42. Therefore, said the majority, her arrest was analogous to that which was approved in *Watson* and "her act of retreating into her house could [not] thwart an otherwise proper arrest," because "[t]his case, involv[ed] . . . a true .... 'hot pursuit' sufficient to justify the warrantless entry into Santana's house." *Santana*, 427 U. S. at 42-43. The officer's right to arrest, "set in motion in a public place," was not lost by reason of her attempt to "escap[e] . . . to a private place." *Id.* at 43.

302. *See, e.g.*, Payton v. New York, 445 U.S. 573 (1980).

303. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740 (1984).

304. *See, e.g., id. See generally* Schroeder, *supra* note 237, at 458-86.

305. *See, e.g.*, United States v. Torres, 751 F.2d 875, 883 (7th Cir. 1984) ("There is no right to be let alone while assembling bombs in safe houses."); Timothy E. Grady, Note, *Warrantless Entry to Arrest: A Practical Solution to a Fourth Amendment Problem*, 1978 U. ILL. L.F. 655, 669 n.87 (observing that the argument that "one who has narcotics in his home had abused the privacy of his home by committing a crime . . . could be expanded to apply a diminished expectation of privacy when an individual has committed a felony").

306. *See, e.g.*, United States v. Whaley, 779 F.2d 585, 591 n.8 (11th Cir. 1986) (one's privacy expectations in his home are not destroyed simply because one has committed a serious crime there), *cert. denied*, 479 U.S. 1055 (1987); Elliotte v. Commonwealth, 372 S.E.2d 416, 418 (Va. Ct. App. 1988) (same).

307. To hold that a person's expectations of privacy are reduced because he is

At least one court has said that a person suspected of a jailable offense has a lesser expectation of privacy than a person suspected of a nonjailable offense.[308] If privacy expectations decline as the penalty for a suspected offense rises, a warrant requirement would be more appropriate for misdemeanor arrests than for felony arrests.

c. *The Seriousness of the Intrusion*

The Supreme Court has said that intrusions into the home are the principle evil against which the Fourth Amendment was directed.[309] Consequently, the Court has generally required agents of the government to obtain a warrant before entering a residence.[310] The Supreme Court has said that some other intrusions are less serious. For example, the Court has said that seizures of property are generally less intrusive than searches because "a seizure affects only the person's possessory interests; a search affects a person's privacy interests."[311] The Court has also said that a on-arrest seizure, such as a *Terry* stop,[312] is "surely less intrusive" than a search.[313]

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suspected of having engaged in illegal activities would "convict the suspect even before the evidence against him was gathered." Mincey v. Arizona, 437 U.S. 385, 391 (1978).

308. *See* State v. Ellinger, 725 P.2d 1201, 1204 (Mont. 1986) (distinguishing *Welsh* on the ground, among others, that a Montana resident charged with drunk driving has a lesser expectation of privacy than a Wisconsin resident charged with the same offense because driving under the influence is a "jailable offense" in Montana).

309. *See, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 748 (1984); Payton v. New York, 445 U.S. 573, 589-90 (1980); *see also* Segura v. United States, 468 U.S. 796, 810 (1984) ("[T]he home is sacred in Fourth Amendment terms not primarily because of the occupants' *possessory* interests in the premises, but because of their *privacy* interests in the activities that take place within.").

310. *See, e.g.*, *Welsh*, 466 U.S. at 749 (holding unconstitutional defendant's warrantless misdemeanor arrest inside his home and stating that "searches and seizures inside a home without a warrant are presumptively unreasonable") (quoting *Payton*, 445 U.S. at 586); *Payton*, 445 U.S. at 589-90.

311. *Segura*, 468 U.S. at 806, 810 (holding that it was not unreasonable, where officers had probable cause, for them to wait in defendant's apartment for 19 hours to prevent the destruction or removal of evidence while a search warrant was being sought and stating that "the heightened protection we accord privacy interests is simply not implicated where a *seizure* of premises, not a search, is at issue.").

312. The term *Terry* stop generally refers to stops of short duration undertaken on the basis of reasonable suspicion. *See generally* SEARCH & SEIZURE, *supra*, note 9 at §§ 9.1-9.3.

313. Michigan v. Summers, 452 U.S. 692, 701 (1981).

Some cases suggest that arrests are less serious intrusions than are searches.[314] Many authorities recognize, however, that custodial arrests are ordinarily more intrusive than searches.[315] A search may result in physical damage to the premises and emotional distress to the occupants or owners,[316] but these people are generally free, even if something incriminating is found, to go about their business once the search is concluded. A custodial arrest, however, will have a long-lasting impact on the arrestee.[317]

The impact of a warrantless arrest is lessened somewhat because a person arrested without a legal warrant cannot be held for a significant period unless there is a determination that there was probable cause to arrest.[318] The record of the arrest will already have been made, however, and no decision that the arrestee "should go free can come quickly enough to erase the invasion of his privacy that already will have occurred."[319]

Although the Supreme Court considers seizures of property to be minor intrusions, the Court has held that in the absence of exigent circumstances or special needs, a warrant is necessary before such a seizure can be conducted.[320] Similarly, absent exigent circumstances, a warrant should be required before an arrest can be made.

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314. *See, e.g.*, State v. Heinz, 480 A.2d 452, 460 (Conn. 1984) (noting that "because arrests are inherently less apt to be intrusive than are searches, there is a difference in the constitutional standards by which probable cause to arrest and probable cause to search are measured.").

315. *See, e.g.*, United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) ("A search may cause only annoyance and temporary inconvenience to the law-abiding citizen . . . . An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent."); Chimel v. California, 395 U.S. 752, 776 (1969) (White, J., dissenting) ("[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises."); Barrett, *supra* note 67, at 47 ("By comparison [to the consequences of an arrest,] the consequences to a law-abiding citizen of an illegal search are minor.").

316. *See* Steven Duke, *Making Leon Worse*, 95 YALE L.J. 1405, 1419 n.104 (1986) ("A home search can inflict embarrassment or pain on the searchees, and opportunities to confiscate or even steal drugs, money or other valuables are substantial.").

317. *See supra* notes 67-88 and accompanying text.

318. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 113-14 (1975); *see also* County of Riverside v. McLaughlin, 111 S. Ct. 1661, 1670 (1991) (stating that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement").

319. *See, e.g.*, *Watson*, 423 U.S. at 428 (Powell, J., concurring).

320. Arizona v. Hicks, 480 U.S. 321, 326-27 (1987).

d. The Need for a Clear-Cut Rule

In *Watson*, the Court observed that Congress had "plainly decided against conditioning warrantless arrest power on proof of exigent circumstances."[321] The Court opined that allowing warrantless felony arrests on probable cause was a reasonable alternative to allowing prosecutions to be encumbered "with endless litigation with respect to the existence of exigent circumstances."[322]

In the case of serious offenses, exigencies of one kind or another may be present so frequently that it is simpler and more effective to allow arrests in all cases to be based on probable cause alone, "especially since that issue can be determined very shortly after the arrest."[323] When minor offenses are concerned, however, exigencies of one kind or another are likely to be present only infrequently.[324] Consequently, a bright line rule governing all misdemeanor arrests would require dispensing with the warrant requirement in the vast majority of misdemeanor cases (and losing the protections it affords) or, alternatively, imposing a warrant requirement in cases which such a requirement would clearly be damaging to law enforcement interests.

In *Berkemer v. McCarty*,[325] the Court observed that "[t]he police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony."[326] The *Berkemer* Court added that often the nature of an arrestee's offense "may depend upon circumstances unknowable to the police, such as whether a suspect has previously committed a similar offense or has a criminal record of some other kind . . ."[327] or it "may turn

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321. *Watson*, 423 U.S. at 423.

322. *Id.* at 423.

323. SEARCH AND SEIZURE, *supra* note 9, § 5.1(b) at 400 (quoting Chimel v. California, 395 U.S. 752, 759 (1969) (White, J., dissenting)).

324. *Cf. Watson*, 423 U.S. at 440 n.8 (Marshall, J., dissenting) (stating that the "in the presence" exception for warrantless misdemeanor arrests "was essentially a narrowly drawn exigent-circumstances exception") (citing Carroll v. United States, 267 U.S. 132, 157 (1925)).

325. 468 U.S. 420 (1984).

326. *Id.* at 430; *cf.* Newberry v. State, 493 So.2d 995, 996-98 (Ala. 1986) (holding that a statute was not unconstitutional because the range of prescribed punishments was such that the accused could not know at the time of his arrest whether he was charged with a felony or with a misdemeanor).

327. *Burkermer*, 468 U.S. at 430-31; *see also* Tennessee v. Garner, 471 U.S. 1, 20 (1985) ("An officer is in no position to know . . . the precise value of property stolen, or whether the crime was a first or second offense."). *See, e.g.*, 625 ILL. COMP. STAT. ANN. 5/11-501(d)(1) (Smith-Hurd 1993) (third or subsequent drunk driving offense is a felony); N.Y. VEH. & TRAF. LAW § 1193(1)(C) (McKinney 1993) (second drunk driving offense is a felony); OHIO REV. CODE ANN. § 2903.07(B) (Anderson 1987) (second negligent vehicular homicide offense is a felony).

upon events yet to happen, such as whether a [person] . . . dies."[328] Different warrant requirements for misdemeanors and felonies could leave the police wondering in some cases whether they need a warrant to make a particular arrest.[329] The result could be warrants unnecessarily sought and arrests invalidated because needed warrants were not obtained.

Extending *Watson* to permit warrantless public arrests for all offenses would eliminate the problems that arise when police officers find it difficult to identify the offense for which an arrest will be made. In fact, some observers have argued that these kinds of difficulties are a reason to abandon the common law warrant requirement for most misdemeanor arrests.[330] These arguments are not compelling. Because there are advantages to obtaining an arrest warrant even if one is not necessary,[331] the police, in close cases, should simply do so. Few convictions are likely to be lost because of the time consumed in obtaining a warrant and few arrests will be invalidated because of the failure to do so.

When an arrest warrant is obtained prior to an arrest, advance notice of the offense for which the arrest is to be made will ordinarily be necessary to obtain the warrant.[332] Further, an arrest generally will be valid if the police had probable cause to believe that the person arrested committed *some* crime.[333] If the police choose to proceed without a warrant, the burden

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328. *Burkemer*, 468 U.S. at 431.

329. *See* ALI MODEL CODE, *supra* note 72, § 120.1, Commentary at 290 ("[T]he distinction between felony and misdemeanor is often technical, requiring a judgment not easily made in the field by a police officer.").

Because the vast majority of private citizens are unlikely to have any clear idea whether a particular act is a felony or a misdemeanor, the right of private citizens to arrest should probably turn on the nature of the offense, for example, whether it is a breach of the peace, or a larceny. See Kauffman, *supra* note 275, at 150.

330. *See, e.g.*, FISHER, *supra* note 4, at 182-83; *see also* N.Y. CRIM. PROC. LAW § 140.10 (Consol. 1986), Commission Staff Notes (suggesting that this was a reason for abolishing the in-the-presence requirement).

331. *See Watson*, 423 U. S. at 423.

332. *See* FISHER, *supra* note 4, at 105 ("The warrant must set forth facts sufficient to constitute a violation of the law, in words adequate to apprise the accused of the crime with which he is charged."); *see also* State v. McGowan, 90 S.E.2d 703, 704 (N.C. 1956) ("A valid warrant of arrest must . . . identify the person charged.").

333. *See, e.g.*, R.I. GEN. LAWS, § 12-7-5 (1981) ("If a lawful cause of arrest exists, the arrest shall be lawful even though the officer made the arrest on improper ground."); Hatcher v. State, 410 N.E.2d 1187, 1189 (Ind. 1980) (search incident to arrest valid where police officer had probable cause to arrest defendant for armed robbery but instead arrested him for disorderly conduct—for which she had no probable cause); *see also* People v. Corrigan, 473 N.E.2d 140, 142-44 (Ill. App. Ct. 1985) (search incident to arrest valid where police had probable cause to arrest

should be on the government, given the Supreme Court's stated preference for warrants, to show that a warrantless arrest was justified because the police had probable cause to believe that the suspect had committed a felony.

e. History and Current Practices

In holding that a warrantless public felony arrest on probable cause was constitutionally permissible, the *Watson* Court emphasized that the common law rule authorizing such arrests had "survived substantially intact . . . in almost all of the States," was recommended by the American Law Institute, and "is the rule Congress has long directed its principal law enforcement officers to follow."[334] In a similar vein, the common law in-the-presence requirement, although often modified, has survived in some form "in almost

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defendant for DUI and various ordinance violations but instead arrested him for riding his bicycle in the roadway—for which they had no probable cause); *see also* United States *ex rel.* Frasier v. Henderson, 464 F.2d 260, 263 (2d Cir. 1972) (arrest upheld where police had probable cause to believe that a serious crime had been committed, but could not "determine precisely what that crime was"); State v. Copeland, 727 P.2d 1342, 1346 (N.M. Ct. App. 1986) (same); ALI MODEL CODE, *supra* note 72, § 120.1(2) ("An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed."); *cf.* People v. Mitchell, 360 N.W.2d 158, 161 (Mich. Ct. App. 1984) (where probable cause exists to believe a suspect is guilty of one of several alternative felonies an arrest may be made for any one).

A few courts have suggested that the crime for which an "arrest is made and a crime for which probable cause exists [should be] . . . in some fashion related." *See* United States v. Atkinson, 450 F.2d 835, 838 (5th Cir. 1971) (quoting Mills v. Wainwright, 415 F.2d 787, 790 (5th Cir. 1969)); *see also* Wainwright v. City of New Orleans, 392 U.S. 598, 606 & n.6 (1968) (Warren, C.J., dissenting); *cf.* ALA. CODE § 15-10-4 (1982) (requiring statement at time of warrantless arrest of the officer's "authority and the cause of arrest"); United States v. Davis, 328 U.S. 582, 610-11 n.4 (1946) (Frankfurter, J., dissenting) (quoting with approval from an English Court of Appeal decision, Leachinsky v. Christie, 1 K.B. 124, 135 (1946), which held that "[t]he legality of arrest turns on the justification which the arresting officer gives at the time of arrest."); Walker v. City of Mobile, 508 So. 2d 1209, 1214 (Ala. Crim. App. 1987), *cert. denied*, 508 So. 2d 1209 (Ala. 1987) (restating ALA. CODE § 15-10-4, cited *supra*). *But cf.* United States v. Di Re, 332 U.S. 581, 592 (1948) (declining to decide whether "an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable cause to believe any felony found in the statute books had been committed.").

In England the law appears to be "that if a man is arrested on one charge he is entitled to his release the moment the prosecution of that charge is abandoned." *Davis*, 328 U.S. at 610 n.4 (Frankfurter, J., dissenting) (quoting *Leachinsky*, 1 K.B. at 135).

334. *Watson*, 423 U.S. at 421-23.

all of the States."[335] Only a small minority of states permit warrantless misdemeanor arrests on the same terms as felony arrests.[336] Moreover, the in-the-presence requirement was recommended, with modifications for exigent circumstances, by the American Law Institute.[337]

History and current practices both suggest that absent exigent circumstances warrantless arrests should not be permitted for misdemeanors committed outside the arresting officer's presence. Current practices, however, do not suggest that the breach of the peace requirement should be deemed constitutionally required. That requirement, although firmly rooted in the common law, has been abandoned in almost every American jurisdiction.[338]

f. Absence of Facts for a Magistrate to Evaluate

The Supreme Court has consistently held that "no warrant is necessary when there is little or nothing for the magistrate to decide."[339] Misdemeanor arrests, however, are clearly not an area in which the magistrate has "little or nothing" to decide. Whether there is sufficient evidence to justify an arrest is a traditional area of inquiry for magistrates and judges.

g. Overloading the Warrant Process

Professor LaFave suggests that the Supreme Court's willingness to carve out exceptions to the warrant requirement is influenced by a desire "not to overburden the warrant-issuing process."[340] As an abstract proposition, it is probably true that "a greatly expanded warrant system" might turn the warrant procedure into even more of a "mechanical routine" than it already is.[341] Many jurisdictions, however, require an officer to obtain a warrant as a precondition to most misdemeanor arrests. There is no evidence that the

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335. *Watson*, 423 U.S. at 423. *See supra* notes 10-16.

336. *See supra* note 18.

337. ALI MODEL CODE, *supra* note 72, § 120.1; *see also supra* notes 231-33 and accompanying text.

338. *See supra* notes 7-8 and accompanying text.

339. SEARCH AND SEIZURE, *supra* note 9, § 4.1(a) at 121. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 622 (1989) ("[I]n light of the standardized nature of the tests [at issue] and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.").

340. SEARCH AND SEIZURE, *supra* note 9, § 4.1(a) at 119.

341. *See id.* § 4.1(a) at 120; *see also* Wayne R. LaFave, *Further Ventures into the "Quagmire"*, 8 CRIM. L. BULL. 9, 28 (1972).

judiciary has been overburdened in those jurisdictions,[342] or that the warrant system there has been turned into more of a mechanical routine than it already is.[343]

h. Gerstein-McLaughlin *Hearings as a Substitute for a Warrant Requirement*

Even in felony cases, the Supreme Court has recognized the value of an independent determination of probable cause. In *Gerstein v. Pugh*,[344] the Court held that the Fourth Amendment requires that a person arrested without a warrant be given a prompt, fair, and reliable judicial "determination of probable cause as a prerequisite to extended restraint of liberty following arrest."[345] The Court observed that prolonged detention following arrest may imperil a "suspect's job, interrupt his source of income, and impair his family relationships."[346] It noted, however, that once a suspect is in custody, the reasons that justified proceeding without a warrant evaporate and "[t]here is no longer any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate."[347]

In the Supreme Court's most recent pronouncement on warrantless arrests, *County of Riverside v. McLaughlin*,[348] Justice O'Connor's opinion for the majority noted that *Gerstein* acknowledged that "prolonged detention" based on unfounded suspicion may unjustly "imperil [a] suspect's job, interrupt his source of income, and impair his family relationships."[349] Her opinion observed that the *Gerstein* Court balanced these consequences against

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342. *Cf.* Payton v. New York, 445 U.S. 573, 602 (1980) (noting that the parties had argued "about the practical consequences of a warrant requirement as a precondition to a felony arrest in the home" and concluding that "[i]n the absence of any evidence that effective law enforcement has suffered in those States that already have such a requirement . . . we are inclined to view such arguments with skepticism.").

343. *See infra* notes 356-57 and accompanying text.

344. 420 U.S. 103 (1975).

345. *Id.* at 114.

346. *Id.*

347. *Id.* The Court found historical support for its decision "in the common law that has guided interpretation of the Fourth Amendment." *Id.* at 114; *cf.* State v. Freeman, 86 N.C. 683, 685-86 (1882) (when a police officer apprehends an offender he must "carry him at once before a justice or other tribunal having jurisdiction"). *But cf.* Douglass v. Barber, 28 A. 805, 806 (R.I. 1894) (officer who makes warrantless arrest for a minor offense committed in his presence need not subsequently procure a warrant to validate it).

348. 111 S. Ct. 1661 (1991)

349. *Id.* at 1668 (quoting *Gerstein*, 420 U.S. at 114).

the state's interest in "taking into custody those persons who are reasonably suspected of having engaged in criminal activity,"[350] and concluded that "the competing interests articulated in *Gerstein*" justify a rule that "judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with . . . *Gerstein*."[351]

Prompt *Gerstein* hearings are not an adequate substitute for a warrant in misdemeanor cases. In *Watson*, Justice Marshall observed that *Gerstein* provides the "best protection possible against less-than-probable-cause warrantless arrests based on exigent circumstances."[352] Under ordinary circumstances, however, *Gerstein* does not provide the best possible protection against "less-than-probable-cause warrantless arrests." As the Court recognized in *Gerstein*, the best protection against unjustified arrest is "a magistrate's review of the factual justification prior to any arrest."[353]

Gerstein and *McLaughlin* held that the balance of interests that is at the heart of the Fourth Amendment requires the equivalent of a warrant soon after arrest when the offense is serious and the need for quick police action is great. That same balance of interests demands a warrant *before* the arrest when the offense is minor and there are no exigent circumstances that suggest a need for immediate action. The danger that persons suspected of serious crimes "will escape or commit further crimes while the police submit their evidence to a magistrate,"[354] may justify the possibility of wrongful arrest and detention inherent in the warrantless arrest of such offenders. That possibility cannot be justified, however, when the offense is minor and there is no significant danger "that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate."[355]

The burden imposed by a warrant requirement for most misdemeanor arrests is minimal, while the right protected is weighty. The value of a warrant requirement is reduced somewhat because many judges and "magistrates perform only a cursory review of . . . warrant application[s],"[356] while

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350. *Id.* at 1668.

351. *Id.* at 1670. *Gerstein* and *McLaughlin* apply to warrantless misdemeanor arrests. *See* White v. Taylor, 954 F.2d 539,, 546 (5th Cir. 1992).

352. United States v. Watson, 423 U.S. 411, 448 (1976) (Marshall, J., dissenting).

353. *Gerstein*, 420 U.S. at 113.

354. *Id.* at 114.

355. *Id. See also supra* notes 267-75 and accompanying text.

356. Wasserstrom, *The Court's Turn*, *supra* note 102, at 135. Many observers have commented on the "'rubber stamp' quality of magistrate review of warrant applications." *See, e.g.*, Wasserstrom & Seidman, *supra* note 177, at 34 (citing authorities). The Supreme Court, however, has said it is "not convinced this is a problem of major proportions." United States v. Leon, 468 U.S. 897, 916 n.14 (1984).

others lack the legal training necessary to screen warrant applications effectively.[357] Nonetheless, a warrant can provide some protection against unjustified misdemeanor arrests,[358] and, unless there are exigent circumstances, a warrant should be required if an arrest is sought to be made for a misdemeanor committed outside the officer's presence.

D. The Requirement of an Immediate Arrest

Most statements of the common law rule omit the requirement that a warrantless arrest for a misdemeanor must be made at the time of the offense or as soon thereafter as possible. In 1967, however, one author observed that even in those states that have abolished the breach of the peace requirement, "the rule persists that such arrest must be made immediately or 'upon fresh pursuit' of the offender."[359] That author argued that this requirement is "illogical."[360]

In fact, the requirement of an immediate arrest serves two important purposes. First, at common law the failure to take prompt action was conclusive evidence that there was no necessity to take the offender into custody.[361] This premise remains true; there is rarely a need to take the offender into custody in cases involving minor offenses.[362] Second, the kind

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357. *See* Shadwick v. City of Tampa, 407 U.S. 345, 346 (1977) (rejecting the argument that magistrates must be lawyers and holding that court clerks who are not lawyers may issue warrants).

358. *See supra* notes 198, 200-06 and accompanying text.

359. FISHER, *supra* note 4, at 182; *see also id.* §§ 86 & 87, at 187-91. *See, e.g.*, FLA. STAT. ANN. § 901.15(1) (West Supp. 1993) ("An arrest for the commission of a misdemeanor or the violation of a munincipal ordinance shall be made immediately or in fresh pursuit."); VT. R. CRIM. P. 3(a) (Supp. 1993) ("arrest shall be made while the crime is being committed or without unreasonable delay thereafter"); *see also* Commonwealth v. Conway, 316 N.E.2d 757, 759 (Mass. App. Ct. 1974). *But see* Main v. McCarty, 15 Ill. 441, 443 (1854) (an arrest for an offense involving a breach of the peace need not be made immediately).

360. FISHER, *supra* note 4, at 182.

361. *Id.* at 189. The "reason for arrest for misdemeanors without warrant at common law was promptly to suppress breaches of the peace." Carroll v. United States, 267 U.S. 132, 157 (1925).

362. State v. Hurtado, 529 A.2d 1000, 1008 (N.J. Super. Ct. App. Div. 1987), (Skillman, J., dissenting), *rev'd on dissent*, 549 A.2d 428 (N.J. 1988) (even given the "public interest in securing the presence at trial of any alleged offender . . . some offenses do not pose a sufficiently grave threat to the public welfare to warrant even the temporary detention of an alleged offender . . . . Furthermore, since there inevitably will be some persons who will be unable to post bail, there are also public interests in not incarcerating persons accused of minor regulatory offenses solely on

of conduct that many misdemeanors criminalize is so insignificant that the actor may not realize she has engaged in the prohibited conduct and she may not recall having done so even if she realized it at the time.[363] A delayed arrest may impair the arrestee's ability to defend herself.[364]

If arrest is not possible at the time of the offense or immediately thereafter there should ordinarily be sufficient time to obtain a warrant.[365] Therefore, a warrant requirement in those cases is not likely to impose any significant costs on law enforcement interests.[366] The balancing of competing interests suggests that warrantless misdemeanor arrests are constitutionally unreasonable unless made immediately.[367] In addition, there has been "little trend toward relaxing the requirement of immediate arrest."[368] The common law rule, the balance of interests, and current practices all strongly suggest that immediate arrest is required by the Constitution's command that all searches and seizures be reasonable.[369]

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account of their indigency and in not exacerbating existing problems of prison overcrowding.").

It has been observed that at common law "there were no swift means . . . to escape the law, and . . . no compelling reason" to do so. FISHER, *supra* note 4, at 189. Today, there are still "no compelling reason[s]" for a misdemeanor suspect to flee. *See supra* notes 271-75 and accompanying text.

Some jurisdictions bar custodial arrests for some minor offenses, *see supra* note 90, or permit them only under limited circumstances, *see supra* note 91. It has been suggested that the Constitution bars custodial arrests for some minor offenses, *see supra* note 92.

363. Most drivers would have great difficulty, for example, remembering the speed at which they were traveling at a given point a few hours earlier.

364. *But cf.* People v. Lawson, 367 N.E.2d 1244, 1248 (Ill. 1977) (rejecting defendant's arguments that delayed arrests caused them to be unable to remember and assist in their defense and noting that there is no constitutional right to be arrested once a violation has occurred (citing Hoffa v. United States, 385 U.S. 293, 310 (1966)).

365. Some courts have held that the failure to obtain a warrant where there was sufficient time and opportunity to do so invalidates a misdemeanor arrest. *See, e.g.*, Yancey v. Fidelity & Casualty Co. of New York, 100 S.E.2d 653, 655-56 (Ga. Ct. App. 1957).

366. *See supra* notes 262-87 and accompanying text.

367. *Cf.* County of Riverside v. McLaughlin, 111 S.Ct. 1661, 1670 (1991) ("Taking into account the competing interests articulated in *Gerstein*, we believe that . . . judicial determinations of probable cause within 48 hours of arrest" are constitutionally reasonable).

368. FISHER, supra note 4, at 188.

369. *Cf. McLaughlin*, 111 S.Ct. at 1672 (Scalia, J., dissenting) (arguing that the Constitution "preserves for our citizens the traditional protections against unlawful arrest afforded by the common law" including the right of prompt production before a magistrate).

VI. CONCLUSION

At common law, no person could be arrested for a misdemeanor unless the offense involved a breach of the peace and was committed in the presence of the person making the arrest. In addition, the common law required that the arrest be made as soon as possible. Over the years this rule has slowly been eroded and arrest powers have been expanded in response to the demands of laws enforcement officials and interest groups. This erosion should be stopped and some version of the common law rule should be constitutionalized.

The state's interest in prosecuting people suspected of misdemeanors is, because they are misdemeanors, minor. The consequences of a custodial arrest are profound and long-lasting. Over a half century ago, two authors observed that "[t]he passion of modern legislatures for the regulation of the most intimate concerns of every-day life is notorious" and opined that it was unfair and unnecessary to subject individuals, particularly travelers, to the risk of being arrested on sight because their conduct contravened some local regulation.[370] These views remain valid today.

Because almost every state has discarded the breach of the peace requirement, current practices suggest that aspect of the common law rule should not be consitutionalized. The in-the-presence rule, however, is another matter. Most states impose the in-the-presence requirement in at least some cases. The justifications that the Supreme Court has given for dispensing with the warrant requirement suggest that absent exigent circumstances, the Constitution requires a warrant when an arrest is made for a misdemeanor committed outside the arresting officer's presence. The balancing of competing interests, "the key principle of the Fourth Amendment,"[371] also suggests that absent exigent circumstances, warrantless arrests for misdemeanors committed outside the arresting officer's presence are constitutionally unreasonable. Finally, the common law, to which the Supreme Court has consistently looked to determine the extent of the Fourth Amendment's protections, suggests that some version of the in-the-presence rule is constitutionally required.

The courts should rule that absent exigent circumstances,[372] warrantless arrests for misdemeanors committed outside the arresting officer's presence are unreasonable and violate the Fourth Amendment. In addition, the courts should rule that the Constitution demands that warrantless misdemeanor arrests be made at the time of the offense or as soon thereafter as possible.

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370. *See* Bohlen & Shulman, *supra* note 8, at 491-92.

371. Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981) (quoting Dunaway v. New York, 442 U. S. 200, 219 (1979) (White, J., concurring).

372. Future litigation can determine the precise meaning of exigent circumstances.