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Probable Cause with Teeth

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PROBABLE CAUSE WITH TEETH

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Introduction

The Supreme Court has not provided much clarity about how much evidence is enough to support a finding of probable cause. It has said that probable cause is more than a mere suspicion and less than proof necessary to convict, i.e., proof beyond a reasonable doubt.[1] This, however, tells us little since "more than a mere suspicion" is any amount of suspicion over zero, which is not much evidence at all, and "proof beyond a reasonable doubt" is the highest evidentiary standard—enough to convince a jury to convict someone. In 1983, a plurality of the Court provided us with a little more guidance with respect to how much evidence is necessary for probable cause. In *Texas v. Brown*, Justice Rehnquist moved the needle significantly when he wrote that probable cause "does not demand any showing that such a belief be correct or more likely true than false."[2] According to Justice Rehnquist and three other Justices more than three decades ago, probable cause means less certainty than the preponderance of the evidence standard that governs in civil cases.

Since 1983, lower courts and legal scholars alike have repeated Justice Rehnquist's statement on probable cause as if it were well settled law. In repeating this language, few have acknowledged that *Texas v. Brown* was just a plurality opinion—Justice Rehnquist was not able to get four other Justices to agree with him in 1983 that probable cause means something less than a preponderance of the evidence.[3] More importantly, since 1983, a majority of the Court has

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[1] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[2] Texas v. Brown, 460 U.S. 730, 742 (1983).

[3] The issue before the Supreme Court was whether the seizure of a balloon fell within the plain view doctrine. Texas v. Brown, 460 U.S. 730, 732–33 (1983). Nonetheless, hundreds of lower courts have repeated Justice Rehnquist's language as if it were settled law. *See infra* notes - .

never repeated Justice Rehnquist's statement that probable cause is something less than a preponderance of the evidence.

This Article argues that Justice Rehnquist's musings on the meaning of probable cause in *Texas v. Brown* should not be followed. Just how much evidence is necessary to support a finding of probable cause is an important question since probable cause is all that is required to validate an arrest in a public place.[4] Once a law enforcement officer has validly arrested an individual and taken the arrestee into custody, that arrest gives the officer the authority to conduct a full search of the arrestee's person,[5] including a search of any containers found on the arrestee.[6] Incident to that lawful custodial arrest, the officer can also search anything within the arrestee's wingspan or grabbing distance.[7] If the arrestee is an occupant or recent occupant of a vehicle, the officer can search the passenger compartment of the vehicle if the arrestee is unsecured and within reaching distance of the passenger compartment or if the officer has reason to believe there is evidence of the crime of arrest in the vehicle.[8] As part of the booking process, an arrestee can be subjected to a strip search prior to being introduced into the jail's general population even if there is no particularized reason to suspect the arrestee of hiding contraband or evidence in his or her body cavities.[9] If the arrest is for a serious offense, an officer may collect the arrestee's DNA without a warrant without violating the

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[4] United States v. Watson, 423 U.S. 411 (1976) (holding that a warrantless arrest in public based on probable cause did not violate the Fourth Amendment). Probable cause is also needed for an arrest warrant, which gives an officer the authority to arrest an individual in his or her own home. Payton v. New York, 445 U.S. 573 (1980).

[5] United States v. Robinson, 414 U.S. 218 (1973).

[6] *Id.* This rule, however, does not apply to smartphones. If the officer finds a smartphone on the arrestee's person, the officer must get a search warrant before searching that smartphone. Riley v. California, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."). For excellent commentary on cell phone searches and the Fourth Amendment prior to the *Riley* decision, *see* Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008).

[7] Chimel v. California, 395 U.S. 752 (1969). Lower courts have interpreted the term "wingspan" very liberally. *See, e.g.*, United States v. Tejada, 524 F.3d 809, 811–12 (7th Cir. 2008) (finding that an entertainment center in the living room was within the defendant's grabbing distance, even though defendant was handcuffed, lying face down, and surrounded by police officers in the kitchen at the time of the search); United States v. Nascimento, 491 F.3d 25, 50–51 (1st Cir. 2007) (finding that a cabinet in a closet eight to ten feet away was within the defendant's immediate control); *see also* Watkins v. United States, 564 F.2d 201, 203, 205 (6th Cir. 1977) (permitting officers to seize a gun under a mattress in a bedroom after officers escorted arrestee into that bedroom).

[8] Arizona v. Gant, 556 U.S. 332 (2009).

[9] Florence v. Board of Chosen Freeholders, 566 U.S. 318 (2012).

Fourth Amendment.[10] That individual's DNA can then be checked against DNA collected in past unsolved crimes—even though the individual has not yet been tried, let alone found guilty of any crime.[11] Aside from the collection of DNA, all of the above can be done even if one is only arrested for a minor offense, including a minor traffic offense punishable by only a fine with no jail time.[12] In short, probable cause gives the officer the authority to do a whole lot more than just arrest an individual and take that individual into custody. This is particularly concerning when one considers that on average, law enforcement officers in the United States make 29,000 arrests each day.[13]

While this Article focuses on the probable cause standard for arrests, probable cause is also the level of justification required for many other things besides an arrest. Consider all the ways probable cause matters for purposes of criminal investigation. Perhaps most obviously, probable cause is the standard for issuance of a warrant to search or arrest.[14] The Fourth Amendment explicitly states, "no Warrants shall issue, but upon probable cause . . ."[15] As a general matter, probable cause is also required for warrantless searches.[16] Probable cause is needed before an officer can conduct a warrantless

[10] Maryland v. King, 569 U.S. 435, 465–66 (2013) ("When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment").

[11] To allay concerns raised by some legislators and the public defender's office, proponents of Maryland's law allowing police to collect DNA samples from persons arrested for serious crimes "agreed to a provision that requires that suspects' DNA be thrown out if they are acquitted or their cases are dropped." Ian Duncan, *Police in Md. holding DNA on people not convicted of crimes*, BALTIMORE SUN (Feb. 28, 2013, 10:00 PM), https://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-dna-databases-20130228-story.html; Md. Code Ann., Pub. Safety § 2-504(d)(2)(i) ("If all qualifying criminal charges are determined to be unsupported by probable cause: (i) the DNA sample shall be immediately destroyed").

[12] Atwater v. City of Lago Vista, 532 U.S. 318 (2001). *See also* Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in* Atwater v. City of Lago Vista, 79 Miss. L.J. 115 (2009) (examining Justice Sandra Day O'Connor's dissent in *Atwater v. City of Lago Vista*).

[13] Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1953 (2018) ("There are on average about 29,000 arrests per day in this country") (slip opinion at 9), *citing* U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT, CRIME IN THE UNITED STATES, 2016 (2017).

[14] U.S. CONST. amend. IV. The U.S. Supreme Court equates probable cause to search with probable cause to arrest. William C. Moul, *Probable Cause: The Federal Standard*, 25 OHIO ST. L.J. 502, 513 (1964).

[15] *Id.*

[16] New Jersey v. TLO, 469 U.S. 325, 340 (1985) ("Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred.").

search of a motor vehicle under the automobile exception to the warrant requirement.[17] Probable cause is needed before an officer can make a warrantless entry into a home under the exigent circumstances exception to the warrant requirement.[18] Probable cause is needed for a plain view search or seizure.[19] Probable cause enables an officer to shoot a fleeing felon. If an officer has probable cause to believe a fleeing felon poses a threat of serious physical harm to the officer or others, that officer can even use deadly force to stop the suspect.[20] If an officer has probable cause to believe a driver has committed a civil traffic offense, the officer may pull over the driver even if the real reason for the stop was because the officer had a mere hunch that the driver was engaged in criminal activity and even if the officer based this hunch on the driver's race.[21] When an individual has been arrested and taken into custody without an arrest warrant, a judicial determination of probable cause is needed to continue holding the individual.[22] Recently, the Supreme Court held that probable cause to arrest will defeat most claims of retaliatory arrest.[23]

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[17] Carroll v. United States, 267 U.S. 132, 155–56, 162 (1925) (holding that a warrantless seizure of an automobile based upon probable cause to believe the vehicle contains contraband liquor does not contravene the Fourth Amendment); United States v. Ross, 456 U.S. 798, 800 (1982) (a warrantless search of an automobile under the automobile exception properly includes a probing search of compartments and containers within the automobile so long as officers have legitimately stopped the vehicle and have probable cause to believe contraband is concealed somewhere within the vehicle).

[18] Kirk v. Louisiana, 536 U.S. 635, 638 (2002) ("noting that police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home.").

[19] Arizona v. Hicks, 480 U.S. 321, 326 (1987) (holding that probable cause is required in order to invoke the plain view doctrine).

[20] Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force" if, where feasible, some warning has been given).

[21] Whren v. United States, 517 U.S. 806, 819 (1996) (the lower court's finding that the officers had probable cause to believe that petitioners had violated the traffic code made the stop reasonable under the Fourth Amendment).

[22] *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975) ("[The State] must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.").

[23] Nieves v. Bartlett, ___ U.S. ____ (2019) (holding that probable cause will generally defeat a claim of retaliatory arrest). If a case involves an arrest pursuant to an official policy of retaliation, probable cause to arrest will not categorically bar a defendant from claiming retaliatory arrest. Lozman v. City of Riviera Beach, 585 U.S. ____, ____ (2018) (slip op. at 10). For an excellent critique of the Nieves v. Bartlett decision, *see* Garrett Epps, *John Roberts Strikes a Blow Against Free Speech*, THE ATLANTIC, June 3, 2019, *available at* https://www.theatlantic.com/ideas/archive/2019/06/nieves-v-bartlett-john-

Beyond the Fourth Amendment search and seizure context, probable cause is all that is needed for a prosecutor to charge an individual with a crime.[24] Probable cause is also all that is needed before a grand jury can issue an indictment.[25] Probable cause is also the standard applied by a magistrate judge deciding at a preliminary hearing whether to bind over the defendant for trial.[26] Clarifying and strengthening the meaning of probable cause is thus important, not only because it will help protect innocent individuals from the harms of a custodial arrest, but also because it can help protect individuals against unjust searches and prosecutions.

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roberts-protects-police/590881/ or https://perma.cc/Z7CB-AMTD (noting that the *Nieves* decision "will make it harder to hold officers to account when they—as we all know they sometimes do—arrest citizens in retaliation for speech they don't like" even though the First Amendment makes clear that "[a]n individual should not face official retaliation for engaging in 'protected speech' alone, even when that speech is unpleasant or hostile").

[24] Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

[25] Federal grand jurors are told that probable cause is "[t]he finding necessary in order to return an indictment against a person accused of a federal crime" and that "[a] finding of probable cause is proper only when the evidence presented to the grand jury, without any explanation being offered by the accused, persuades 12 or more grand jurors that a federal crime has probably been committed by the person accused." HANDBOOK FOR FEDERAL GRAND JURORS ("The grand jury . . . does not determine guilt or innocence, but only whether there is probable cause to believe that a crime was committed and that a specific person or persons committed it"). For an excellent discussion of probable cause as the standard to indict or bind over a defendant for trial, *see* William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511 (2016) (arguing that probable cause is problematic and should be abandoned as the standard used in grand jury indictments and preliminary hearings).

[26] Barber v. Page, 390 U.S. 719, 725 (1968) (holding that the function of a preliminary hearing is "determining whether probable cause exists to hold the accused for trial"). In *Morrissey v. Brewer*, the Court noted that probable cause in the parole revocation context is akin to probable cause in the preliminary hearing context, and defined probable cause as a reasonable ground to believe. Morrissey v. Brewer, 408 U.S. 471, 485 (1972) (noting that when a parolee has been accused of violating parole, the parolee is entitled to an inquiry and "[s]uch an inquiry should be seen in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions"). While the Supreme Court has never suggested that probable cause in the preliminary hearing context is more stringent than probable cause in the arrest context, one lower court has suggested that probable cause in the context of a preliminary hearing requires a higher showing than probable cause in the arrest context. Williams v. Kobel, 789 F.2d 463, 469 (7th Cir. 1986) ("it is clear to us that the probable cause determination at the preliminary hearing is far more stringent and far more concerned with legal technicalities than the probable cause determination made by an arresting officer").

Recent arrests of African Americans for conduct that rarely leads to police intervention when non-African Americans are involved in similar activity highlight the need for more attention to the question of what is required to constitute probable cause to arrest an individual. Such incidents include the April 2018 arrest of two African American men at a Philadelphia Starbucks store[27] and the arrest of twenty-one African American partygoers in a vacant house in Northeast D.C. that culminated in a 2018 Supreme Court decision on probable cause.[28] Accordingly, one of the goals of this Article is to shed light on the Supreme Court's very unclear probable cause jurisprudence. Adding clarity to the law, however, is not the only objective of this Article. The primary objective of this Article is to persuade lower courts not to follow Justice Rehnquist's description of probable cause in *Texas v. Brown*.

This Article proceeds in three parts. Part I provides an overview of the Supreme Court's modern jurisprudence on probable cause.[29] Two themes frame the analysis in this part: (1) the Court's lack of clarity regarding the meaning of probable cause, and (2) the Court's tendency in its probable cause jurisprudence to defer to the government instead of the individual who was searched or arrested.

Part II focuses on Justice Rehnquist's statement in *Texas v. Brown* that probable cause does not demand a showing that the officer's belief in criminal activity be "more likely true than false." I show that almost every single lower court that has considered the meaning of probable cause has repeated this language as if it were settled law. Even a few prominent legal scholars have cited this language as if it were settled law.

Part III argues that *Texas v. Brown* should not be viewed as settled law for several reasons. First, thirty-five years ago, Justice Rehnquist was only able to get three other Justices to sign onto his opinion. *Texas v. Brown* was just a plurality opinion, and his statement on the showing required for a finding of probable cause was not necessary to the judgment.

Second, Justice Rehnquist's view of probable cause is wrong as a matter of history, precedent, and logic. It is wrong as a matter of history because it goes against the framers' desire to constrain the discretion of searching officials. It is wrong as a matter of precedent because prior to *Texas v. Brown*, the Supreme Court had never suggested that the degree of belief associated with probable cause is less than a preponderance of the evidence. Moreover, since *Texas v.*

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[27] *See infra* text accompanying notes ___ - ____.

[28] District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

[29] For a more complete history of the Court's probable cause jurisprudence, *see* Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951 (2003) (noting that the Supreme Court's probable cause jurisprudence predates the Warren Court's *Aguilar* and *Spinelli* decisions).

Brown was decided in 1983, a majority of the Court has never endorsed Justice Rehnquist's stunted characterization of probable cause. The Court has been quite steadfast in its view that judicial magistrates have broad discretion when assessing whether an officer had probable cause to arrest or search. It is also wrong as a matter of logic since the term probable cause itself suggests that it must be probable, i.e., more likely than not, that the person being arrested has committed a crime. When an officer says I have probable cause to believe a crime has been committed and that A committed that crime, the officer is essentially claiming he has reasonable grounds for believing that A committed a crime or that there is a fair probability that A committed a crime. It simply does not make logical sense to say at the same time that this means the officer thinks there is a less than 50-50 chance that A has committed a crime.

Finally, Justice Rehnquist's view of probable cause allows for, and perhaps even encourages, racial disparity in arrests. Lowering the threshold of certainty needed for probable cause makes it easier for officers to arrest individuals. Police officers, however, cannot arrest every single person for whom they have probable cause to arrest and, necessarily, will exercise their discretion in choosing who they actually arrest. While law enforcement officers may not intend to discriminate on the basis of race, racial stereotypes are likely to color their perceptions of who seems suspicious to them and who, therefore, is worthy of arrest. An extremely low threshold of certainty for probable cause means the bulk of these arrests will be deemed justifiable. Racial disparity in arrests is something the law should seek to avoid.

When Justice Rehnquist suggested thirty-five years ago in *Texas v. Brown* that probable cause to arrest an individual or search one's property need not be correct or even more likely than not, he significantly lowered the bar for probable cause. Probable cause should be more robust for the protection of all civilians. Lower courts should reject the definition of probable cause from *Texas v. Brown*. Rather than follow Justice Rehnquist's view that probable cause does not require more than fifty percent certainty, judicial officers deciding whether there is probable cause to arrest an individual should insist on a more robust showing. At least in most cases, before an officer can execute a custodial arrest, he or she should have more than a fifty-fifty certainty that the individual has committed the offense for which she or he is being arrested. If probable cause turns on probabilities, as the Supreme Court has often stated, it ought to mean that it is at least probable, i.e., more likely than not, that a crime has been committed and that the individual being arrested committed that crime.

I

The Supreme Court's Modern Jurisprudence on Probable Cause

A. Incapable of Precise Definition

In many respects, the Supreme Court has not provided much guidance on the meaning of probable cause. Indeed, it has stated that "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible."[30] According to the Court, "The probable cause standard is incapable of precise definition or quantification into percentages because it deals with *probabilities* and depends on the totality of the circumstances."[31] According to the Court, probable cause "is a fluid concept—turning on the assessment of *probabilities* in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[32] Along these lines, the Court has stated, "probable cause is a flexible, common-sense standard."[33]

One problem with these pronouncements is that they offer very little guidance to courts and police officers in practice. As Ronald Bacigal notes, "[t]he inability to formulate clear rules or precise probability levels governing probable cause has [led] the Court to adopt one over-arching rule for the police—just use your common sense and act reasonably."[34] What constitutes acting reasonably, however, is subjective. What may seem reasonable to one person may seem completely unreasonable to another.[35]

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[30] Ornelas v. United States, 517 U.S. 690, 695 (1996).

[31] Maryland v. Pringle, 540 U.S. 366, 371 (2003) (emphasis added).

[32] Illinois v. Gates, 462 U.S. 213, 232 (1983) (emphasis added).

[33] Texas v. Brown, 460 U.S. 730, 742 (1983).

[34] Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 318 (2004).

[35] As Justice Thurgood Marshall noted in objecting to the standard of reasonableness for establishing a claim of ineffective assistance of counsel adopted by the majority in *Strickland v. Washington*, "To tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney,' is to tell them almost nothing." Strickland v. Washington, 466 U.S. 668, ___ (1984) (Marshall, J., dissenting). *See also* Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 218 U. ILL. L. REV. 629, 655 (noting that reasonableness in the context of assessing a police officer's use of force "is such an open-ended standard; alone, it provides little-to-no guidance to the jury"); Dan Kahan et al., *Whose Eyes Are You Going to Believe*? Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (finding that 1,350 Americans who viewed a dashcam videotape of a high-speed police chase that ended with the officer ramming his patrol car into the Respondent's car, rendering him a quadriplegic, disagreed over whether the officer's use of force was reasonable and that their disagreements tracked their

Somewhat more definitively, the Court has explained that "[p]robable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[36] The Court has also said that "'[t]he substance of all the definitions' of probable cause is a *reasonable ground* for belief of guilt."[37] Moreover, "this belief of guilt must be particularized with respect to the person to be searched or seized."[38] In other words, probable cause to arrest an individual requires a reasonable ground for believing that an offense has been or is being committed and that a particular person—the person being arrested—is responsible for committing that offense. Just how much certainty is sufficient to constitute "a reasonable ground" that a crime has been committed and that the person to be arrested committed that crime, however, is not so clear. It just needs to be somewhere between more than a mere suspicion and less than proof necessary to convict.[39]

B. Deference to the Government

Not only has the Supreme Court provided a very mushy definition of probable cause that appears to require not much in the way of certainty, but also, on almost every single question involving probable cause, the Court has ruled in favor of the government rather than the defendant. Cases in which the Court has deferred to the government on issues involving probable cause include (1)

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overall cultural values with individuals valuing individualism and hierarchy tending to see the officer's use of force as reasonable and those favoring communitarian values tending to see the officer's use of force as unreasonable); CYNTHIA LEE, MURDER AND THE REASONABLE MAN PASSION AND FEAR IN THE CRIMINAL COURTROOM 154 (NYU Press 2003) (using the Bernhard Goetz case to show how reasonable people can disagree about whether a defendant acted reasonably in self-defense, noting that the predominantly white jury that acquitted Bernhard Goetz, a Caucasian man who shot at four black youths on a New York subway in 1984 after two of them approached him and asked him for $5, of all the charges against him except illegal possession of a firearm "obviously felt he acted reasonably when he shot the youths in response to a request for money" but nine years later, "an all-minority six-person civil jury, composed of four blacks and two Hispanics, [rejected his claim of self-defense and] found Goetz liable to Darryl Cabey, the boy who was paralyzed after Goetz shot him in the spine, and ordered him to pay Cabey $43 million in damages").

[36] Brinegar v. United States, 338 U.S. 160, 175–76 (1949).

[37] *Id.*

[38] Maryland v. Pringle, 540 U.S. 366, 695 (2003).

[39] Brinegar v. United States, 338 U.S. 160, 175 (1949) (noting that probable cause "means less than evidence which would justify condemnation" but "more than bare suspicion").

situations where the policer officer did not have probable cause as to the crime of arrest, but where a court found post-hoc probable cause for some other offense, (2) probable cause based on informant tips, (3) probable cause established by dog sniffs, and (4) probable cause based on a common enterprise theory between occupants of a car in which drugs were found.

1. Wrong Crime or Wrong Person, No Problem

The Court has held that if police arrest an individual for a crime for which they lacked probable cause to arrest, that arrest nonetheless is valid if police had probable cause to arrest the individual for a different crime.[40] In *Devenpeck v. Alford*, police arrested a man named Jerome Alford for recording his conversations with them during a traffic stop.[41] Alford was taken to jail where he was charged with violating the State Privacy Act.[42] However, Alford's recording of his conversation with the officers was not a crime under the State Privacy Act.[43] Accordingly, a state trial court dismissed the charge because the officers were wrong in thinking that secretly recording a conversation with a police officer violated the State Privacy Act.[44]

Alford sued the officers for unlawful arrest and false imprisonment, alleging that the officers arrested him without probable cause in violation of the Fourth Amendment and the Fourteenth Amendment.[45] Even though it was clear that the officers lacked probable cause to arrest Alford for recording his conversation with them, the jury found in favor of the officers after being instructed that for respondent to prevail on either his federal or state law claim, he had to demonstrate that petitioners arrested him without probable cause, and that probable cause exists "if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime."[46]

The Ninth Circuit Court of Appeals reversed on the ground that the officers could not have had probable cause to arrest Alford for violating the State Privacy Act because "[t]ape recording officers

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[40] Devenpeck v. Alford, 543 U.S. 149, 125 S. Ct. 588 (2004).
[41] *Id.* at 592. **[need to replace with pincite to 543 U.S. 149 rather than 125 S. Ct. 588]**
[42] *Id.*
[43] *Id.* at 593. **[need to replace with pincite to 543 U.S. 149 rather than 125 S. Ct. 588]**
[44] *Id.*
[45] *Id.* at 592. **[need to replace with pincite to 543 U.S. 149 rather than 125 S. Ct. 588]**
[46] *Id.* at 151.

conducting a traffic stop is not a crime in the state of Washington."[47] The Court of Appeals rejected the officers' claim that the arrest of Alford was valid since they had probable cause to arrest Alford for other crimes, namely impersonating a law enforcement officer and obstructing a law enforcement officer, because these other crimes were not closely related to the offense for which Alford was actually arrested.[48]

The Supreme Court reversed the Ninth Circuit, noting that a "warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe a criminal offense has been or is being committed."[49] The Court explained that the probable cause inquiry is an objective inquiry and that the "arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."[50] In short, the Court agreed with the government's position that if a court (or jury) decides after the fact that there was probable cause to arrest the defendant for a crime other than the crime of arrest, the arrest will be valid even if the arresting officer did not realize at the time that he had probable cause to arrest for the other offense.

Additionally, the Court has held that if police have probable cause to arrest one person (A) for a crime and they arrest the wrong person (B), mistakenly but reasonably believing that B is A, their arrest of B is valid.[51] It has also held that probable cause to arrest or search can be based on evidence that would be inadmissible at trial.[52]

2. Informant Tips

Another example of the Court favoring the government over the defendant is reflected in its treatment of probable cause in the informant context. Initially, the Court applied a two-prong test for probable cause in cases where police were relying in part or in whole on an informant's tip to establish probable cause. Under the *Aguilar-Spinelli* test,[53] the government had to establish (1) the informant's basis of knowledge or "the particular means by which [the

[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] Hill v. California, 401 U.S. 797, 802 (1971).
[52] Brinegar v. United States, 338 U.S. 160, 173 (1949) (finding that evidence excluded at trial was properly admitted at the suppression hearing where the issue was whether the officer had probable cause to search).
[53] Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969).

informant] came by the information given in his report,"[54] and (2) the informant's veracity.[55] In other words, the government had to show why the informant was credible or why the information the informant had provided to police was trustworthy or reliable.[56]

In 1983, the Court in *Illinois v. Gates* did a complete about-face, abandoning the *Aguilar-Spinelli* test in favor of a "totality of the circumstances" test for determining probable cause in informant cases.[57] Writing for the Court, Justice Rehnquist acknowledged that an informant's veracity, reliability and basis of knowledge were all "highly relevant in determining the value of his report,"[58] but noted that these factors should not be "understood as entirely separate and independent requirements to be rigidly exacted in every case."[59] Instead, basis of knowledge and veracity "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' . . . ."[60]

In support of the Court's decision to abandon the *Aguilar-Spinelli* test,[61] Justice Rehnquist explained that "probable cause is a fluid concept—turning on the assessment of probabilities in

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[54] Illinois v. Gates, 462 U.S. 213, 228 (1983) (describing the basis of knowledge prong in the two-pronged Aguilar-Spinelli test). *See also* Aguilar v. Texas, 378 U.S. 108, 114 (1964) ("the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were").

[55] Illinois v. Gates, 462 U.S. 213. The Court in Gates notes that an informant's "veracity" is an important factor in determining the weight of an informant's tip, without defining the term. The term "veracity" generally refers to a person's truthfulness. *See, e.g.,* United States v. Abel, 469 U.S. 45, 55 (1984) (referring to veracity as "character for truthfulness or untruthfulness" in the context of Federal Rule of Evidence 608); *veracity*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "veracity" as "habitual regard for and observance of the truth; truthful nature" and "[c]onsistency with the truth; accuracy").

[56] *See* Spinelli v. United States, 393 U.S. 410, 415 (1969) ("[The magistrate] must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar's tests without independent corroboration?").

[57] Illinois v. Gates, 462 U.S. 213, 230 (1983). Previously, the *Spinelli* Court had expressly rejected a totality of the circumstances approach. *See Spinelli*, 393 U.S. at 415 ("We believe . . . that the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis."). For a defense of the *Illinois v. Gates* decision, *see* Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 J. L. REFORM 465 (1984) (arguing that the Court in Illinois v. Gates correctly abandoned the Aguilar-Spinelli two-pronged test).

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 238 ("we conclude that it is wiser to abandon the 'two-pronged test' established by our decisions in *Aguilar* and *Spinelli*").

particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."[62] While *Illinois v. Gates* was a case about probable cause in the informant context, its language about probable cause being a fluid concept not readily reducible to bright line rules has been repeated in many other cases not involving informant tips.[63]

Justice Rehnquist provided a list of examples of cases where the government could prevail in establishing probable cause under its new totality of the circumstances test where it would not have prevailed under the *Aguilar-Spinelli* test. "If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip."[64] Justice Rehnquist continued, "Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."[65]

One problem with not requiring a showing of both basis of knowledge and veracity is that an unquestionably honest citizen, strong on the veracity prong, without any basis of knowledge can be badly mistaken. For example, on September 12, 2002,[66] approximately one year after the attacks on the World Trade Center and Pentagon that took place on September 11, 2001, [67] an unquestionably honest citizen named Eunice Stone reported to police a conversation she overheard and found very disturbing when

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[62] *Id.* at 232.

[63] *See, e.g.*, United States v. Carroll, 750 F.3d 700, 703 (7th Cir. 2014); United States v. Colbert, 605 F.3d 573, 576 (8th Cir. 2010); Brown v. City of New York, 201 F. Supp. 3d 328, 331 (E.D.N.Y. 2016); United States v. Valentine, 517 F. Supp. 2d 816, 820 (W.D. Va. 2007).

[64] *Id.* at 233.

[65] *Id.* at 233-34.

[66] *See* David M. Halbfinger, *Terror Scare In Florida: False Alarm, But Televised*, N.Y. TIMES (Sept. 14, 2002), https://www.nytimes.com/2002/09/14/us/terror-scare-in-florida-false-alarm-but-televised.html.

[67] On September 11, 2001, terrorists flew planes into the World Trade Center in New York City and the Pentagon in Northern Virginia. *See* James Barron, *Thousands Feared Dead as World Trade Center Is Toppled*, N.Y. TIMES (Sept. 11, 2001), https://www.nytimes.com/2001/09/11/national/thousands-feared-dead-as-world-trade-center-is-toppled.html. Another plane crashed in Pennsylvania. *See id.* More than 2,997 people died as a result of the 9/11 attacks. *See* Aaron Katersky, *The 9/11 toll still grows: More than 16,000 Ground Zero responders who got sick found eligible for awards*, ABC NEWS (Sept. 10, 2018, 5:35 AM), https://abcnews.go.com/beta-story-container/US/911-toll-growsl-16000-ground-responders-sick-found/story?id=57669657.

eating at a Shoney's restaurant in Calhoun, Georgia.[68] According to Stone, three men who appeared to be of Middle Eastern descent were laughing and joking about what happened on September 11, 2001. Stone told police one of the men said, "If they mourn September 11, what will they think about September 13?"[69] and another spoke about "bringing down" something.[70] Stone also claimed the men were speaking in a foreign language like Arabic.[71]

Stone grabbed a crayon, followed the men when they left the restaurant, wrote down the license plate numbers of their cars, and then called the Georgia State Patrol to report what she heard.[72] Police caught up with the men just outside of Naples, Florida.[73] The men were arrested, handcuffed, then detained for more than seventeen hours while police searched their cars, finding nothing indicating a plot to commit a terroristic act against the United States.[74]

It turns out the three men Stone thought were terrorists were actually medical students on their way to Larkin Community Hospital in South Miami, where they were hoping to begin a series of nine-week rotations.[75] Their entire conversation was in English, not Arabic, since only one of the men knew a bit of Arabic.[76] While all three men were of Middle Eastern descent,[77] they all were legally in the United States, and two of the three men were U.S. citizens.[78] "Bringing down" something referred to a car that one of the students

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[68] *See* Vikram Amar, *The Golden Rule of Racial Profiling*, L.A. TIMES (Sept. 22, 2002), http://articles.latimes.com/2002/sep/22/opinion/op-amar22 ("Stone, by all accounts, had no incentive to victimize the men. More generally, she does not seem like the kind of person to purposefully lie to the police."). *See also* Halbfinger, *supra* note 66 (noting that Stone overheard this conversation while dining at a Shoney's restaurant in Calhoun, Georgia).

[69] *See* Halbfinger, *supra* note 66.

[70] Amar, *supra* note 68.

[71] *See Terror scare men: 'We want our dignity back'*, CNN (Sept. 17, 2002, 9:19 AM), http://edition.cnn.com/2002/US/09/17/fla.students.talk/index.html.

[72] *See* Halbfinger, *supra* note 66.

[73] *See id.*

[74] *See id.*; *see also* Press Release, American-Arab Anti-Discrimination Committee, ADC Calls for Thorough Investigation of Terror False Alarm in Florida (Sept. 17, 2002), http://www.adc.org/adc-calls-for-thorough-investigation-of-terror-false-alarm-in-florida/ (expressing serious concern about the circumstances leading to the arrest and seventeen hour detention of three medical students heading to Larkin Community Hospital in South Miami to begin training and noting that the men believed Eunice Stone's concerns were prompted by their Middle Eastern and Muslim appearance)

[75] Halbfinger, *supra* note 66.

[76] *Terror scare men*, *supra* note 71 (noting that the medical students told CNN that only one of them understands and speaks Arabic).

[77] *See* Halbfinger, *supra* note 66.

[78] Amar, supra note 68; Halbfinger, *supra* note 66.

wanted to bring down to Miami.[79] Even though the police finally released the men from police custody, the hospital decided to revoke their internships because of the controversy over the reported conversation they had at the Shoney's restaurant.[80]

Under the *Illinois v. Gates* test, a strong showing on one prong can make up for a weak showing on the other prong. In this case, if a court had to assess whether the government had the requisite probable cause to arrest the men, the government could make a strong showing on the veracity prong since they had a witness who appeared of unquestionable honesty with no apparent motive to lie about what she heard. The problem was that the witness had no basis for knowing what she claimed to know. She was not a friend or colleague of the three men with intimate knowledge of their plans. She had not observed the men engaging in any criminal activity. She had simply overheard a conversation that she mistakenly thought was a plot to commit a terrorist act. According to *Illinois v. Gates*, the government's very weak showing of basis of knowledge could be overcome by its strong showing on the veracity front.

In explaining how to apply the new totality of circumstances approach to probable cause, Justice Rehnquist also emphasized that it was unnecessary for judicial officers to find an informant's information trustworthy or the informant credible as long as the informant gives a lot of detail and claims the information is based on first-hand knowledge: "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."[81]

In his dissent, Justice Brennan provided a hypothetical, posed originally by Justice White, concurring in *Spinelli v. United States,* illustrating how a tipster might give police a lot of detail and claim first-hand knowledge that person is involved in criminal activity, but it would not be wise to find probable cause to believe there was evidence of a crime in the place in question:

> [Suppose] a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But

[79] Amar, *supra* note 68. *See also Terror scare men*, *supra* note 71 (noting that one of the medical students told CNN that he was the only one of the three that hadn't yet purchased a car, "[s]o the plan was that once we get to Miami I would buy a car before classes started, and I said that in case I don't find one in Miami, I could have one shipped down from Kansas City").

[80] *See Terror scare men*, *supra* note 71.

[81] Illinois v. Gates, 462 U.S. 213, 234 (1983).

> what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable.[82]

Hypotheticals aside, a person with an axe to grind or grudge can provide false details to police in order to harass another person. For example, in September 2012, Kenny Smith called police and falsely told them that a man named Christopher Shell was on a particular U.S. Airways flight from Philadelphia to Dallas-Fort Worth international Airport and had liquid explosives with him.[83] Based on this tip, police asked the pilot of that flight to bring the plane down.[84] Shell "was on his way to Dallas to celebrate his 29th birthday on Thursday when his US Airways flight was turned around and forced to return to Philadelphia."[85] Shell was taken off the plane at gunpoint and detained while the plane and his luggage were searched.[86] No

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[82] *Id.* at 282 (Brennan, J., dissenting).

[83] Christina Ng & Richard Esposito, *Plane Bomb Hoax to "Avenge" Compromising Photos, Cops Say*, ABC NEWS (Sept. 7, 2012, 10:58 AM), https://abcnews.go.com/US/plane-bomb-hoax-avenge-compromising-facebook-photos-cops/story?id=17182136#.UFtQbK45iko [https://perma.cc/5RXS-USLC]; *see also* Tim Jimenez, Diana Rocco & Elizabeth Hur, *Philadelphia Man Charged With Fake Report Of Bomb Aboard Airliner*, CBS PHILADELPHIA (Sept. 7, 2012, 8:09 PM), https://philadelphia.cbslocal.com/2012/09/07/philadelphia-man-charged-with-fake-report-of-bomb-aboard-airliner/ (reporting that Smith called in the tip from a payphone using the name "George Michaels"); *Victim of Philadelphia plan explosives hoax later arrested in Texas*, FOX NEWS (last updated Nov. 29, 2015), https://www.foxnews.com/us/victim-of-philadelphia-plane-explosives-hoax-later-arrested-in-texas (reporting that police at Philadelphia International Airport received the call around 7:30 AM, and later turned the investigation over to the FBI); Richard Esposito & Christina Ng, *Police: Angry Ex-Girlfriend Triggered US Airways Bomb Hoax*, ABC NEWS (Sept. 6, 2012, 9:53 AM), https://abcnews.go.com/US/police-angry-girlfriend-triggered-us-airways-bomb-hoax/story?id=17170280 (reporting that Shell had "been sped through security by a friend at the airport" and had posted to Facebook that "getting through security had been a breeze," which caught the FBI's attention and led to "bomb techs, cops, FBI agents and K-9 dogs descend[ing] on the plane and conduct[ing] a full search").

[84] Ng & Esposito, *Plane Bomb Hoax to "Avenge" Compromising Photos*, *supra* note 83.

[85] *Id.*

[86] *Id.*; *see also* Esposito & Ng, *Police: Angry Ex-Girlfriend Triggered US Airways Bomb Hoax*, *supra* note 83 (reporting that Shell was questioned, and both his luggage and the plane were searched, but no explosives were found).

explosives were found either on the plane, in Shell's luggage, or on Shell himself.[87] After being searched and interrogated, Shell was released.[88] Police later discovered that Smith had called in the tip because he was angry at Shell for posting photos of his (Smith's) girlfriend (who was Shell's ex-girlfriend) on Facebook.[89] While police certainly had sufficient justification to take Shell off the plane and temporarily detain him while they searched him and his luggage to confirm whether the tipster's information was correct,[90] arresting Shell—a man who was not carrying liquid explosives on the plane but was simply trying to take a flight to Dallas to celebrate his birthday—would not have been appropriate.[91] Yet under the totality of the circumstances test announced in *Illinois v. Gates*, a court could conclude that police had probable cause to arrest Shell since the caller had provided police with details of alleged wrongdoing and claimed first-hand knowledge that Shell was carrying liquid explosives on the plane.

3. Dog Sniffs

The Supreme Court's jurisprudence on dog sniffs in the Fourth Amendment context is another example of the Court favoring the government over the defendant. In *Florida v. Harris*,[92] the issue before the Court was whether an alert by a drug detection dog during a traffic stop establishes probable cause to search a vehicle.[93] The Florida Supreme Court had held that the officer lacked probable

[87] Ng & Esposito, *Plane Bomb Hoax to "Avenge" Compromising Photos*, *supra* note 83.
[88] *Id.*
[89] *Id.* Smith was arrested and charged with conveying false and misleading information to police. *Id.*
[90] *See* Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (noting that as a general matter, police must have constitutional grounds, i.e., reasonable suspicion of criminal activity, to forcibly stop an individual before they can frisk the individual upon reasonable suspicion that the individual is armed and dangerous, but that "the right to frisk must be immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence").
[91] While declining to set forth a bright-line test for delineating between temporary detentions of the persons for which reasonable suspicion is all that is required and de facto arrests for which probable cause is required, the Supreme Court has held that a de facto arrest can take place even if police do not formally place an individual under arrest. Florida v. Royer, 460 U.S. 491, 503, 495 (1983) (finding that defendant Royer was arrested before he was formally placed under arrest even though only 15 minutes had elapsed between from the time the detectives initially approached respondent until his arrest upon the discovery of the contraband). Accordingly, even if Shell was not formally placed under arrest, being handcuffed and led off the plane at gunpoint, then detained while the plane and his luggage were searched, may have constituted a de facto arrest.
[92] Florida v. Harris, 133 S. Ct. 1050 (2013).
[93] *Id.* at 1053.

cause to search the defendant's vehicle in large part because the State failed to establish that the dog in question was reliable. The Florida Supreme Court explained that in order to establish probable cause when relying on a drug detection dog's alert, "[t]he State must present . . . the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the officer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability."[94]

The Supreme Court reversed, rejecting the Florida Supreme Court's ruling that the State had failed to establish probable cause, explaining that "[t]he test for probable cause is not reducible to 'precise definition or quantification.'"[95] "All we have required [for probable cause] is the kind of 'fair probability' on which 'reasonable and prudent [people], not legal technicians, act."[96] The Court explained that in evaluating probable cause, "we have consistently looked to the totality of the circumstances" and "have rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."[97] In listing the types of evidence the State had to produce in order to establish probable cause in the dog sniff context, the Florida Supreme Court had, in the Supreme Court's view, imposed an overly rigid rule, making it too difficult for the State to establish probable cause. As it had done in *Illinois v. Gates*, the Court eschewed bright line rules that would have required the government to provide objective evidence of reliability in favor of a less precise standard of probable cause that would allow the trial court to find in favor of the government whenever it was inclined to do so.

4. Cars as Places Where Occupants Engage In Common Criminal Enterprises

Another example of the Supreme Court favoring the government in a decision involving probable cause can be found in *Maryland v. Pringle*, in which the Court held that an officer who lawfully stops and searches a car with three occupants, finding drugs and money within, has probable cause to arrest all three occupants of the vehicle for possession of the drugs if all three occupants refuse to admit ownership of the drugs.[98] In *Pringle*, an officer stopped a car for

[94] *Id.* at 1055.
[95] *Id.*
[96] *Id.*
[97] *Id.* at 1055–56.
[98] Maryland v. Pringle, 540 U.S. 370, 372 (2003).

speeding around 3:16 a.m.[99] The officer saw that there were three men in the car: the driver, a front-seat passenger, and a back-seat passenger.[100] The officer asked for and received consent from the driver to search the vehicle.[101] Upon searching the car, the officer found $763 in the glove compartment and five plastic baggies containing cocaine hidden behind the backseat armrest.[102] The officer asked the three men who owned the drugs and money and told them that if no one admitted to ownership of the drugs, he was going to arrest them all.[103] None of the men admitted to owning the cash or drugs, so the officer arrested all three men and transported them to the police station.[104] Later that morning, Pringle, the front-seat passenger, admitted that the cocaine belonged to him and that he intended to sell the cocaine or use it for sex.[105] Pringle told police that the two others in the car did not know about the drugs and they were released.[106]

Before his trial for possession of cocaine with intent to distribute, Pringle moved to suppress his confession as the fruit of an illegal arrest. The trial court denied Pringle's motion, finding that the officer had probable cause to arrest Pringle.[107] Pringle was convicted of possession of cocaine with intent to distribute, and sentenced to ten years in prison.[108] The Court of Appeals of Maryland reversed Pringle's conviction, holding that the mere finding of cocaine in the backseat armrest of a car was insufficient to establish probable cause to arrest the front seat passenger of a car for possession of cocaine given that there was also someone in the driver's seat and another person in the backseat at the time of the arrest.[109]

The Supreme Court reversed the Court of Appeals of Maryland. Writing for a unanimous Court, Justice Rehnquist noted that it was uncontested that upon finding the five glassine baggies, the officer had probable cause to believe a felony had been committed and

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[99] *Id.* at 368.
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 368–69.
[105] *Id.* at 369.
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] Pringle v. State, 805 A.2d 1016, 1027 (Md. 2002) ("Without additional facts available to the officer at that time that would tend to establish petitioner's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when petitioner was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.").

therefore the sole question before the Court was whether the officer had probable cause to believe Pringle had committed that crime.[110] After repeating what the Court had said before about probable cause being "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules"[111] and "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances,"[112] but not the not more likely than not language from his plurality opinion in *Texas v. Brown*, Justice Rehnquist noted:

> In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was $763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.[113]

In light of these facts, Justice Rehnquist concluded:

> We think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[114]

Rejecting Pringle's argument that it was improper to suggest probable cause existed from the mere fact that he was found in a car with drugs, Justice Rehnquist opined that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."[115] Justice Rehnquist continued:

> Here we think it was reasonable for the officer to infer a common enterprise among the three men. The quantity of the drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.[116]

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[110] Pringle, 540 U.S. at 370.
[111] *Id.* at 370–71.
[112] *Id.* at 371.
[113] *Id.* at 371–72.
[114] *Id.* at 372.
[115] *Id.* at 373, *citing* Wyoming v. Houghton, 526 U.S. 295 (1999).
[116] *Id*.

Even though the Court could have easily concluded that it was more likely that the drugs found in the backseat armrest belonged either to the driver of the car or to the passenger in the backseat, the Court found there was probable cause to arrest Pringle as well as the driver and the backseat passenger because occupants of a car found with drugs within are likely to be involved in a common criminal enterprise.[117]

C. Open Questions

As the foregoing discussion indicates, the Supreme Court has said a great deal about probable cause. Nonetheless, the Court has left unanswered a few questions. For example, the Court has never clearly decided whether probable cause to arrest requires probable cause on each and every element of the offense of arrest. Additionally, it has never clearly decided whether the amount of certainty required for a finding of probable cause should vary depending upon the gravity of the offense.

1. Whether Probable Cause to Arrest Requires Probable Cause on Each and Every Element of the Offense of Arrest

One question that remains open even though the Supreme Court seems inclined to decide this question in a defendant-friendly manner is whether probable cause to arrest requires probable cause for each and every element of the arrest offense.[118] In *District of Columbia v. Wesby*, twenty-one people who were attending a party at a house that did not belong to the person who invited them were arrested for unlawful entry, i.e., trespass.[119] One argument advanced by sixteen of the partygoers who challenged their arrest (Respondents) was that the police needed probable cause on each and every element of the offense of arrest.[120] Respondents argued the police did not have reasonable grounds to believe they knew or had reason to know that they were there without permission, and that

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[117] *Id.*

[118] Corbin Houston, Note, *Probable Cause Means Probable Cause: Why the Circuit Courts Should Uniformly Require Officers to Establish Probable Cause for Every Element of an Offense*, 2016 U. CHI. L. FORUM 809, 813 (noting that the Supreme Court has not yet addressed whether probable cause must be proven for every element of the offense of arrest and that the lower courts are split over this question).

[119] District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

[120] Initial Brief of Appellee-Respondent, District of Columbia et al v. Wesby, 2017 U.S. S. Ct. Briefs LEXIS 2419, *10-11 (July 12, 2017).

without probable cause on the mens rea element of unlawful entry, the police lacked probable cause to arrest the partygoers for unlawful entry.[121]

Without explicitly taking a position on this issue, the Court appeared to accept Respondents' claim that to establish probable cause, the government had to show that the police officers had probable cause on each and every element of the offense of arrest since the Court spent the bulk of its opinion explaining why the officers had good reason to believe that the partygoers knew or had reason to know that they were at the house without the owner's permission.[122]

2. Whether the Court Should Adopt a Sliding Scale or Fluctuating Standard of Probable Cause?

Another question that the Court has not yet addressed is whether the quantum of evidence or certainty needed for a finding of probable cause should vary depending upon the gravity of the offense at issue. In other words, if the offense in question is a very serious offense, should police be able to make a showing of probable cause on less proof than would be necessary if the offense in question were not as grave an offense?

The closest the Court has come to addressing this issue came in a case involving the question of whether police had reasonable suspicion to stop and frisk a young black man standing at a bus stop, not a case in which the issue was whether the police had probable cause to support an arrest. Reasonable suspicion of criminal activity is what is needed for police to conduct a stop or a brief, temporary detention of a person.[123] Reasonable suspicion requires less certainty than probable cause to arrest.[124]

In *Florida v. J.L*, police received an anonymous tip that a young black male standing at a particular bus stop, wearing a plaid shirt, was carrying a handgun. [125] Based on the tip, the police went to the bus stop in question where they saw three black males, one of whom was in a plaid shirt.[126] One of the officers went up to J.L., the male

[121] *Id.* at *19–20.
[122] District of Columbia v. Wesby, 138 S. Ct. 577 (2018).
[123] Terry v. Ohio, 392 U.S. 1, 30 (1968).
[124] *See* United States v. Sokolow, 490 U.S. 1, 7 (1989) (reasoning that "the level of suspicion for a *Terry* stop is obviously less demanding than that for probable cause"); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (stating that the reasonable suspicion standard applies "when law enforcement officials must make a limited intrusion on less than probable cause").
[125] Florida v. J.L., 529 U.S. 266 (2000).
[126] *Id.* at 268.

in the plaid shirt, told him to put his hands up on the bus stop, frisked him, and found a gun in his pocket.[127]

J.L., who was fifteen years old at the time, was charged with carrying a concealed firearm without a license and possessing a firearm while under the age of eighteen.[128] He moved to suppress the gun as the product of an unlawful search.[129] The trial court granted his motion, the intermediate court of appeals reversed, and the Florida Supreme Court overruled the intermediate court of appeals, holding the search invalid under the Fourth Amendment.[130] The Supreme Court affirmed, holding that the officers lacked a reasonable suspicion to justify the stop and frisk.[131] The Court felt it was particularly significant that the anonymous tip in this case contained only identifying information but no predictive information, i.e., information about future movements of third parties.[132]

Writing for the Court, Justice Ginsburg left open the possibility that the Court might allow a finding of reasonable suspicion on similar facts if the crime in question were a more serious offense than illegal possession of a firearm, stating, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[133] If the Court were to go one step further and formally recognize a fluctuating standard of reasonable suspicion, varying the level of proof needed to establish reasonable suspicion depending on the gravity of the offense at issue, it would be hard-pressed not to do so in the probable cause context.

Aside from Justice Ginsburg's suggestion in *Florida v. J.L.* that the Court might be open to a fluctuating standard of reasonable suspicion, which might be interpreted by some as possible support for a fluctuating standard of probable cause, the only other time a U.S. Supreme Court Justice has expressed support for a fluctuating standard of probable cause occurred seventy years ago. In 1949, Justice Jackson, dissenting in *Brinegar v. United States*, provided perhaps the strongest defense from the Supreme Court so far of the view that the amount of certainty necessary for a finding of probable cause should differ depending on the crime at issue:

> [I]f we are to make judicial exceptions to the Fourth Amendment . . ., it seems to me they should depend somewhat upon the

[127] *Id.*
[128] *Id.* at 269.
[129] *Id.*
[130] *Id.*
[131] *Id.* at 272.
[132] *Id.* at 271.
[133] *Id.* at 273–74.

> gravity of the offense. If we assume, for example that a child is kidnaped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[134]

Writing in 1949, which was seventy years ago, Justice Jackson was alone in arguing that police should be given more leeway to search when the underlying offense is a vicious crime and less leeway when the underlying crime is less serious. Since 1949, the Court has not once expressed support for Justice Jackson's view that the amount of certainty needed for probable cause should fluctuate based on the gravity of the offense at issue.

In recent years, however, a growing number of prominent legal scholars have argued that the Fourth Amendment should pay attention to the underlying crime at issue. Despite Justice Jackson's failure to convince his colleagues on the Supreme Court to adopt a fluctuating standard of probable cause, the dominant view in legal scholarship today appears to be that the Fourth Amendment pays too little attention to the gravity of the underlying offense as reflected in the substantive criminal law and that in ignoring distinctions among crimes, the Fourth Amendment is problematically transsubstantive.[135] Most legal scholars who have addressed this issue have argued for a sliding scale approach under which the Fourth Amendment would give the police more authority to search and seize and require less certainty when dealing with more serious offenses than when dealing with less serious offenses.[136] A few

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[134] Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

[135] William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 843, 847 (2001) ("Fourth Amendment law is transsubstantive: it applies the same standard to [O.J.] Simpson's case as to the case of Lance and Susan Gates, an Illinois couple who were charged with selling marijuana out of their house, and whose appeal gave the Supreme Court the opportunity to define (or redefine) probable cause").

[136] *See*, *e.g.*, Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1958 (2004) (arguing "[c]onstitutional Law shouldn't be forced into unitary rules that underprotect rights when the government interest in preventing a crime is minor, or underprotect government power when the interest is great"); Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011)

scholars have made similar arguments in the specific context of probable cause, arguing that courts should employ a sliding scale approach to probable cause, decreasing the amount of certainty required for a finding of probable cause the more serious the crime and increasing the amount of certainty for less serious crimes.[137]

(suggesting crime severity should be incorporated into Fourth Amendment doctrine); Richard Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 420 (2003) (arguing that legal scholars failed to help U.S. Supreme Court reach a correct result in *Atwater* because few emphasized the importance of offense severity in reasonableness balancing analysis); 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) (arguing that warrantless searches should be prohibited in investigations of nonserious crimes); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (suggesting that the exclusionary rule should not apply to a short list of very serious offenses, including treason, espionage, murder, armed robbery, and kidnapping unless the police action shocks the conscience); Stuntz, *supra* note 135, at 848 (suggesting courts should take "differences among crimes into account when making probable cause determinations"). *See* also Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1647 (1998) (suggesting that courts should find an 'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated."). A few scholars oppose sliding scale approaches to the Fourth Amendment based upon the gravity of the crime. *See, e.g.,* Yale Kamisar, "*Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11-26 (1987) (providing numerous arguments against proposals for a serious crime exception to the exclusionary rule); Erik Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753, 784 (2002) ("sliding scale approaches to the Fourth Amendment (or criminal procedure doctrine in general) contain a variety of flaws or limitations, particularly when applied to drug crimes"); Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Test or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 81 (2014) (noting that "the Court has steered clear of this amorphous, ad hoc [sliding scale] approach [to probable cause] which 'could only produce more slide then scale'"), *citing* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393-94 (1974) (arguing that adopting a sliding scale approach would convert the Fourth Amendment "into one immense Rohrshach blot" and would provide little or no guidance to police). *See also,* Christopher Slobogin, *The World without a Fourth Amendment*, 39 UCLA L. REV. 1, 51-52 (1991) ("Even assuming that the seriousness of past harm can be measured in any meaningful way, the seriousness of the crime . . ., by itself, should be irrelevant to the degree of certainty police must have before the act ").

[137] *See, e.g.* Andrew Manuel Crespo, *Probable Cause Pluralism*, ___ YALE L.J. ___ (forthcoming) (arguing that courts should embrace a pluralist view of probable cause that recognizes different analytic methods and standards of proof in different cases); Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 323 (2004) (arguing that "the fiction of one uniform definition of probable cause must be replaced with a flexible sliding scale that takes account of the severity of the intrusion and the magnitude of the threat "); Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951,

II

How Probable is Probable Cause?

As noted above, the Court has not been terribly clear about how much proof is necessary for a finding of probable cause. In terms of quantifying the amount of certainty needed for probable cause, the only thing a majority of the Court has stated definitively is that probable cause "'means less than evidence which would justify condemnation' or conviction" but "more than bare suspicion."[138] This, however, does not provide much guidance since this just suggests that probable cause is more than a hunch but less than proof beyond a reasonable doubt. As Craig Lerner notes, "[T]he Court's statement that probable cause is more than a suspicion and less than beyond a reasonable doubt places it somewhere between .0% and 90%, which, when all is said and done, is not all that helpful."[139]

In 1983, a plurality of the Court provided perhaps the clearest statement to date as to where probable cause lies on the spectrum of certainty of guilt in a case about whether an officer's seizure of contraband found in a car during a traffic stop fell within the plain view doctrine. In *Texas v. Brown*, Justice Rehnquist moved the needle significantly by stating that probable cause "does not demand any showing that such a belief be correct or more likely true than false."[140] Under this definition, probable cause does not have to rise

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1014 (2003) (arguing that probable cause should be recast within a reasonableness framework and noting that "[t]he idea that probable cause—though famously touted as a single standard— may in fact fluctuate is not an altogether alien notion in the case law"). Judge Richard Posner, who retired in 2017, also expressed support for a fluctuating standard of probable cause. *See* Llaguno v. Mingey, 760 3F 2nd 1560, 1565 (7th Cir. 1985) ("Probable cause— the area between bare suspicion and virtual certainty— describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed"). *But see* Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789 (2013) (arguing that the amount of certainty needed for probable cause should not vary with the gravity of the offense and proposing instead that courts assign a minimum percentage of certainty needed for a finding of probable cause). *Compare* Orin Kerr, *Why Courts Should Not Quantify Probable Cause* in THE POLITICAL HEART OF CRIMINAL PROCEDURE: ESSAYS ON THEMES OF WILLIAM J. STUNTZ (Klarman et al. ed 2012) (arguing that the Court should not specify exactly how much probability constitutes a "fair" probability sufficient for a finding of probable cause and should continue to let lower courts intuit whether probable cause exists).

[138] Brinegar v. United States, 338 U.S. 160, 175 (1949).

[139] Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 996 (2003).

[140] Texas v. Brown, 460 U.S. 730, 742 (1983). The Texas v. Brown case was a case concerning the scope and applicability of the plain view doctrine. *Id.* at 733

to the level of more than a feather over fifty percent certainty, but constitutes something less than the preponderance of the evidence necessary for a plaintiff to prevail in a civil lawsuit. In short, according to Justice Rehnquist's description of probable cause in *Texas v. Brown*, the amount of certainty needed for probable cause is not much certainty at all.

A. Lower Courts

Since 1983, hundreds of court opinions have repeated Justice Rehnquist's statement in *Texas v. Brown* that probable cause does not demand a showing that the officer's belief was more likely than not as if this pronouncement were settled law.[141] Every federal Circuit Court of Appeals, except for the Third Circuit, and numerous state Supreme Courts have repeated this language. For example, in *McReynolds v. State*, in explaining the meaning of probable cause, the Supreme Court of Indiana wrote:

> The Supreme Court in *Texas v. Brown* attempted to provide some guidance as to when the evidentiary value is immediately apparent, holding that the third requirement [of the plain view doctrine] is met if the officer has probable cause to associate the property with criminal activity This standard merely required: "that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand a showing that such a belief be correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required."[142]

Similarly, in *Williams v. Commonwealth*, the Supreme Court of Kentucky repeated this language from *Texas v. Brown* in describing the proof necessary for a finding of probable cause as if it was settled law that probable cause does not mean more likely than not:

> As the United States Supreme Court has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of

("Because of apparent uncertainty concerning the scope and applicability of this [plain view] doctrine, we granted certiorari.").

[141] A search for lower court cases repeating this language turned up over 450 cases. Memorandum from Stephanie Hansen to Cynthia Lee dated [date] (on file with author).

[142] McReynolds v. State, 460 N.E.2d 960, 963 (Ind. 1984), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1543, 75 L.Ed.2d at 514.

> reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[143]

In *Luster v. Nevada*, the Supreme Court of Nevada repeated this language from *Texas v. Brown* to explain probable cause:

> The Supreme Court of the United States has held that probable cause in the context of the plain view doctrine "merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[144]

Similar reliance on *Texas v. Brown* can be found not only in other state Supreme Court opinions,[145] but also in the federal courts. In *United States v. Jones*, for example, the First Circuit Court of Appeals quoted the same language from *Texas v. Brown*, writing as if a majority of the Court had set forth this low threshold of certainty for probable cause:

> In *[Texas v.] Brown*, the Court expounded upon the requirements of probable cause: Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[146]

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[143] Williams v. Commonwealth, 147 S.W.3d 1, 7 (Ky. 2004).

[144] Luster v. Nevada, 115 Nev. 431, 435 n.3 (1999), *citing* Texas v. Brown, 460 U.S. at 742.

[145] Pier v. State, 421 P.3d 565, 571 (Wyo. 2018); Ex parte State, 121 So. 3d 337, 357 (Ala. 2013); State v. Flores, 996 A.2d 156, 161 (R.I. 2010); In re Care & Treatment of Chandler v. State, 382 S.C. 250, 257-58 (2009); Lynch v. State, 34 Fla. L. Weekly 179, 33 Fla. L. Weekly 880 (2008); People v. Jones, 215 Ill. 2d 261, 277 (2005); State v. Sinapi, 359 N.C. 394, 399 (2005); Wengert v. State, 364 Md. 76, 90 (2001); People v. Custer, 465 Mich. 319, 332 (2001); State v. Bridges, 963 S.W.2d 487, 494 (Tenn. 1997); People v. Melgosa, 753 P.2d 221, 227 (Colo. 1988); State v. Wellman, 128 N.H. 340, 346 (1986); State v. Haselhorst, 218 Neb. 233, 237 (1984).

[146] United States v. Jones, 187 F.3d 210, 220 (1st Cir. 1999), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533.

The Second Circuit did the same in *United States v. Barrios-Moreira*, quoting from *Texas v. Brown* to explain the meaning of probable cause:

> Probable cause is a flexible, common sense standard that "merely requires that the facts available to the officers would 'warrant a man of reasonable caution in the belief' that certain items may be contraband . . . or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.'"[147]

Similar reliance on *Texas v. Brown* can be found in opinions from the Fourth Circuit,[148] the Fifth Circuit,[149] the Sixth Circuit,[150] the Seventh Circuit,[151] the Eighth Circuit,[152] the Ninth Circuit,[153] the

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[147] United States v. Barrios-Moriera, 872 F.2d 12, 16-17 (2d Cir. 1989), *citing* Texas v. Brown, 460 U.S. at 742.

[148] United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004) ("[W]e have stated that the probable-cause standard does not require that the officer's belief be more likely true than false."), *citing* United States v. Jones, 31 F.3d 1304, 1313 (4th Cir. 1994); Jones, 31 F.3d 1304, 1313 (4th Cir. 1994) ("The probable cause standard does not demand any showing that such a belief be correct or more likely true than false."), *citing* Texas v. Brown, 460 U.S. at 742 and acknowledging that Texas v. Brown was a plurality opinion.

[149] Crowder v. Sinyard, 884 F.2d 804, 821 n.22 (5th Cir. 1989) ("In defining 'probable cause' in [the plain view doctrine] context, the Supreme Court has observed that… 'it does not demand any showing that such a belief be correct or more likely true than false.'"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[150] United States v. Mathis, 738 F.3d 719, 732 (6th Cir. 2013) (noting that "probable cause . . . does not demand any showing that such a belief be correct or more likely true than false."), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[151] United States v. McDonald, 723 F.2d 1288, 1295 (7th Cir. 1983).

[152] Yost v. Solano, 955 F.2d 541, 546 (8th Cir. 1992) ("Probable cause . . . does not demand any showing that such a belief be correct or more likely true than false"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[153] Dawson v. City of Seattle, 435 F.3d 1054, 1062 (9th Cir. 2006) ("The probable cause standard . . . does not demand any showing that such a belief be correct or more likely true than false.'"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

Tenth Circuit,[154] the Eleventh Circuit,[155] and the D.C. Circuit.[156] Indeed, the Seventh Circuit has gone so far as to suggest that the Supreme Court has *often* said that probable cause does not demand a showing of more likely than not, writing:

> As the Court *frequently* has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief, ' that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false.[157]

While the Court has often said probable cause is a flexible common-sense standard, it has not frequently remarked that probable cause does not require a showing that the officer's belief be more likely true than false.[158] To the contrary, a majority of the Court has never treated this language from *Texas v. Brown* as controlling.

B. Legal Scholars

Not only have the lower courts treated Justice Rehnquist's statement regarding probable cause in *Texas v. Brown* as settled law, a few prominent legal scholars have repeated this language as if it

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[154] United States v. Alderete, No. 18-1032, 2018 U.S. App. LEXIS 29831, at *13 (10th Cir. Oct. 23, 2018) ("While probable cause is difficult to quantify, the Supreme Court has held that probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[155] United States v. Wright, 324 F. App'x 800, 804 (11th Cir. 2009) (noting that probable cause "does not demand any showing that such a belief be correct or more likely true than false"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[156] Dukore v. District of Columbia, 419 U.S. 799 F.3d 1137, 1142 (2015) ("The probable cause standard does 'not demand any showing that such a belief be correct or more likely true than false'"), *citing* Texas v. Brown, 460 U.S. at 742, 103 S. Ct. at 1533, 75 L.Ed.2d 502 (1983).

[157] United States v. McDonald, 723 F.2d 1288, 1295 (7th Cir. 1983) (emphasis added), *citing* Brinegar v. United States, 338 U.S. 160 (1949). *Brinegar v. United States*, however, was decided in 1949, more than 30 years before *Texas v. Brown*, and the Court in *Brinegar* did not define probable cause as not more likely than not.

[158] Memorandum from Casey Matsumoto to Cynthia Lee dated January 17, 2019 (describing research into whether the Supreme Court has repeated this language and noting that this language has been repeated only once by Justice Powell, dissenting in Arizona v. Hicks).

were settled law. For example, in explaining the probable cause standard for arrests, Kent Greenawalt has noted:

> The "probable cause" standard for arrests and seizures is not one of absolute certainty. In actual application by law enforcement officers and judges, the seriousness of the crime and concern about escape from the jurisdiction are likely to play a role in what probability is seen as necessary. However, in one standard formulation by the Supreme Court, probable cause for an arrest was present when officers had "knowledge" and "reasonably trustworthy information" of "'facts and circumstances . . . sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. This imprecise language standard suggests a likelihood approximating "more probable than not," although *the Court has specifically stated that probable cause "does not demand any showing that such a belief be correct or more likely true than false."*[159]

Similarly, in examining the meaning of probable cause to arrest, Sherry Colb has explained:

> [T]he probable-cause standard "does not demand any showing that such a belief be correct or more likely true than false." Though some of the cases are relatively old, the Court has not subsequently retreated from the position—however obliquely stated—that probable cause is something more than bare suspicion but something less than "more probable than not."[160]

III

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[159] Kent Greenawalt, *Probabilities, Perceptions, Consequences and "Discrimination": One Puzzle About Controversial "Stop and Frisk,"* 12 OHIO ST. J. CRIM. L. 181, 186 (2014) (emphasis added).

[160] Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69, 72 (2010). Some legal scholars have recognized that *Texas v. Brown* was a plurality opinion. *See* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279, 289 (2004) (noting that Texas v. Brown was a plurality opinion and that "[a] majority of the Court has never explicitly held that probable cause is less than a preponderance of the evidence"); Arnold H. Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 340 n. 66 (1984); Erica Goldberg. *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 LEWIS & CLARK L. REV. 789, 801 n. 62 (2013) ("A plurality of the Supreme Court has stated that the probable cause standard 'does not demand any showing that such a belief [of criminal wrongdoing] be correct or more likely true than false'").

Why Lower Courts Should Not Follow Justice Rehnquist's Comment on the Meaning of Probable Cause in *Texas v. Brown*

Lower courts should not follow Justice Rehnquist's statement in *Texas v. Brown* about probable cause not needing to rise to the level of more likely than not for several reasons. First, Justice Rehnquist's definition of probable cause should not be followed because *Texas v. Brown* was just a plurality opinion and Justice Rehnquist's definition of probable cause was not necessary or essential to the judgment in *Texas v. Brown*. Second, Justice Rehnquist's suggestion that probable cause should mean something less than "more likely than not" is misguided as a matter of history, precedent, and logic. Third, setting the bar for probable cause so low exacerbates the racial disparity in arrest patterns that already exists today.

A. *Texas v. Brown* was Just a Plurality Opinion and Justice Rehnquist's Description of Probable Cause Was Not Necessary to the Judgment

First, lower courts need not follow Justice Rehnquist's description of probable cause in *Texas v. Brown* because *Texas v. Brown* was just a plurality opinion. In 1983, Justice Rehnquist was only able to get three other Justices to sign onto his opinion. Not only was *Texas v. Brown* just a plurality opinion, Justice Rehnquist's statement on the showing necessary for a finding of probable cause was not necessary to the judgment.

As James F. Spriggs II and David R. Stras explain, a plurality decision is one in which "a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment."[161] Importantly, "an opinion concurring in the judgment is the functional equivalent of a dissent from the plurality's reasoning even if it represents agreement with the result reached in the case."[162]

It is widely agreed that a plurality opinion "carr[ies] less precedential weight"[163] than a majority opinion because a plurality opinion "represents nothing more than the views of the individual

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[161] James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 517 (2011).
[162] *Id.* at 520.
[163] John F. Davis & William L. Reynolds, *Juridicial Cripples: Plurality Opinions in the Supreme Court,* 1974 DUKE L.J. 59, 62. *See also* Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 35 (2009) (finding that lower courts are less likely to treat a plurality decision positively and more likely to treat that decision negatively or neutrally).

justices who join in the opinion."[164] Just how much less precedential weight, however, is a matter of disagreement.[165]

In 1977, the Supreme Court sought to provide guidance to lower courts with respect to splintered Supreme Court decisions. In *Marks v. United States*, the Court set forth the following rule of thumb: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'"[166]

Marks was a short opinion and seemed to offer a simple resolution to the problem of deciding which opinion to follow when there is a plurality opinion and opinions concurring in the judgment of the plurality but offering different rationales for that judgment, but has proven difficult to apply in practice.[167] For example, lower courts have not been able to agree on which opinion to follow in *Missouri v. Seibert*, a 2004 Supreme Court case addressing the constitutionally of a two-stage police interrogation strategy known as "question first, warn later" under which police officers would deliberately fail to give a suspect in custody the *Miranda* warnings prior to an initial custodial interrogation even though required by *Miranda v. Arizona*, in the hopes of obtaining a confession. After obtaining the desired confession, the police would give the *Miranda* warnings and interrogate the suspect again, getting the suspect to repeat the earlier confession.[168] The government then would concede that the first unwarned confession was inadmissible, but argue that the second warned confession should be admitted into evidence since police gave the suspect the required *Miranda* warnings prior to obtaining that second confession.

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[164] Davis & Reynolds, *supra* note 163, at 61.

[165] Some have argued that only the result of the plurality decision (and not the legal reasoning on which the decision was based) should be treated as binding. Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 Stan. L. Rev. 795, 823 (2017) ("Some distinguished commentators on the common law have urged that *only* the result of the precedent-setting case should be treated as binding"). Others have suggested that lower courts should "give precedential effect to at least some aspects of the reasoning through which the precedent-setting court arrived at its decision." *Id.* at 824. Yet others have suggested that lower courts should follow both the specific result in a plurality opinion and the "broader rule or rationale that the precedent court articulated in explaining that result." *Id.* at 824–25.

[166] Marks v. United States, 430 U.S. 188, 193 (1977), *citing* Gregg v. Georgia, 428 U.S. 153 (1976).

[167] Spriggs & Stras, *supra* note 161, at 568 (noting that the *Marks* rule is "notoriously difficult to apply"). Even the Supreme Court itself has acknowledged that the *Marks* rule has "baffled" lower courts trying to apply it. Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[168] Missouri v. Seibert, 542 U.S. 600, 605–06 (2004).

Writing for a plurality of the Court in *Missouri v. Seibert*, Justice Souter ruled that the subsequent warned confession following an earlier unwarned confession had to be thrown out.[169] According to Justice Souter, in two-stage interrogation cases, the proper test to apply is to ask whether it would be reasonable to find that under the circumstances the *Miranda* warnings could function "effectively" as *Miranda* requires.[170] As Justice Souter explained:

> The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?[171]

Justice Souter expressly declined to apply fruit of the poisonous tree analysis, noting that the Court had in a previous case involving a two-stage interrogation rejected fruit of the poisonous tree analysis.[172] In light of that prior case, Justice Souter felt that "[i]n a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective."[173]

Justice Breyer, who joined Justice Souter's opinion, wrote a separate concurring opinion in which he suggested the proper approach was not to ask whether the *Miranda* warnings functioned effectively (the plurality's test), but instead to treat the initial failure to warn—the *Miranda* violation—as a constitutional violation and apply fruit of the poisonous tree analysis to that *Miranda* violation.[174] As Justice Breyer explained, "In my view, the following simple rule should apply to the two-stage interrogation technique: Courts should exclude the "fruits" of the initial unwarned questioning unless the failure to warn was in good faith."[175] Under Justice Breyer's test, the subsequent warned confession would constitute tainted fruit of the initial Miranda violation and would thus be inadmissible unless the initial failure to warn was in good faith, i.e. not deliberately done in the hopes of getting a confession.

Justice Breyer noted that he believed the plurality's test "in practice will function as a 'fruits' test" because the only time a court

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[169] *Id.* at 617.
[170] *Id.* at 611–12.
[171] *Id.* at 611–12.
[172] *Id.* at 612 n.4 (referencing Oregon v. Elstad, 470 U.S. at 300).
[173] *Id.* at 612 n.4.
[174] Missouri v. Seibert, 542 U.S. 600, 617 (2004) (Breyer, J., concurring).
[175] *Id.* at 617 (Breyer, J., concurring).

would conclude that the *Miranda* warnings functioned effectively would be only when "certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning—intervene between the unwarned questioning and any postwarning statement."[176] Justice Breyer's proposed test differed from the plurality's test in two significant ways. First, the intent of the officer would matter under Justice Breyer's test, but not under the plurality test. Justice Breyer would exclude the subsequent confession unless the failure to warn was in good faith, i.e. not deliberate while Justice Souter explicitly noted in a footnote that his test focused on the facts of the case, not the intent of the officer.[177] Second, Justice Breyer's test would apply fruit of the poisonous doctrine and treat the initial failure to warn as a constitutional violation whereas Justice Souter's plurality opinion explicitly rejected fruits analysis in line with other Supreme Court decisions refusing to treat a *Miranda* violation as a constitutional violation.

Justice Kennedy did not join the plurality opinion, and merely concurred in the plurality's judgment. Like Justice Breyer, Justice Kennedy wrote a separate concurring opinion in which he proposed a test that, unlike the plurality's test, turned on whether the initial failure to warn was deliberate.[178] Under Justice Kennedy's approach, if the initial failure to warn was deliberate, then not only would the initial confession be inadmissible as a violation of the *Miranda* rule, but the subsequent warned confession would also be inadmissible unless the police took specific curative measures, i.e. measures to cure the initial failure to warn.[179] Justice Kennedy then provided examples of specific curative measures that could be considered by the court deciding whether to admit the second warned confession, including "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" and an additional warning explaining to the suspect that

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[176] *Id.* at 618 (Breyer, J., concurring).

[177] *Id.* at 616 n.6.

[178] Missouri v. Seibert, 542 U.S. 600, 618 (2004) (Kennedy, J., concurring) ("Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement"). Justice Kennedy took pains to distinguish Ms. Seibert's case from *Oregon v. Elstad*, a case in which the police officer's initial failure to warn was inadvertent. *Id.* at 620. According to Justice Kennedy, "This case presents different considerations. The police [in this case] used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given." *Id.* at 620.

[179] *Id.* at 621(Kennedy, J., concurring) ("When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps").

her first confession most likely could not be used against her in court.[180] Since no such curative steps were taken in this case, Justice Kennedy agreed with the plurality that Seibert's postwarning statements were inadmissible and her conviction could not stand.[181]

According to Charles Weisselberg, at least six federal circuits have chosen to follow Justice Kennedy's approach, asking first whether the violation of *Miranda* was deliberate and if it was deliberate, then asking whether curative measures were taken.[182] Other circuits either combine aspects of the plurality's test and Justice Kennedy's test or have declined to decide which controls.[183]

Presumably the lower courts are following concurring Justice Kennedy's curative measures test because they believe his test is the narrowest of the tests offered by the different opinions in *Seibert*, thus satisfying the *Marks* standard that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[184] At first glance, it may appear that Justice Kennedy's curative measures test is narrower than Justice Souter's test since Justice Kennedy's test only applies to two-stage interrogations where the officer's use of the question first-warn later strategy is a deliberate or intentional tactical choice, whereas Justice Souter's test applies to all two-stage interrogations regardless of the officer's intent.[185]

The problem is that if we count up the votes, all of the Justices, except Justice Kennedy and Justice Breyer, opposed a test that turned on the officer's subjective intent, so following Justice Kennedy's approach would be following an approach that was rejected by seven of the nine Justices. Justice Souter was careful to note in his plurality opinion that in cases involving the admissibility of a subsequent warned confession following an unwarned confession, the court should focus on the facts of the case rather than on the intent of the officer, explaining that "[b]ecause the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on the facts apart from intent that show the question-first tactic at work."[186] While the four dissenting Justices—Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—did not like Justice Souter's proposed solution to the problem of two stage interrogations, they agreed with the plurality that the analysis

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[180] *Id.* at 622 (Kennedy, J., concurring).
[181] *Id.* at 622.
[182] Charles Weisselberg, *Mourning Miranda*, 96 CAL. L. REV. 1519, 1551 (2008).
[183] *Id.*
[184] Marks v. United States, 430 U.S. 188, 193 (1977).
[185] Missouri v. Seibert, 542 U.S. 600, 622 (Kennedy, J., concurring).
[186] *Id.* at 616 n.6.

should not focus on the subjective intent of the interrogating officer.[187]

As seen from the discussion above, lower courts generally follow the judgment of a plurality opinion, treating it as precedent, but they do not always follow the reasoning of the plurality opinion or even tests proposed in the plurality opinion. Through its *Marks* decision, the Supreme Court has given lower courts the green light to follow the reasoning of a concurring opinion rather than the plurality opinion.

Bringing the discussion back to *Texas v. Brown*, what all of this means is that while lower courts may justifiably follow the judgment of Justice Rehnquist's plurality opinion in *Texas v. Brown*, which was a finding that the seizure met the requirements of the plain view doctrine, they need not and should not follow Justice Rehnquist's characterization of probable cause as requiring less than a preponderance of the evidence since this comment was not agreed on by a majority of the Court. Justice Powell, joined by Justice Blackmun, concurred only in the judgment and not the reasoning of the plurality opinion, agreeing that the seizure in that case met the requirements for a plain view seizure, but refusing to join Justice Rehnquist's opinion because he felt Justice Rehnquist's critique of *Coolidge v. New Hampshire* went too far.[188] Justice Stevens, with whom Justice Brennan and Justice Marshall joined, also concurred only in the judgment, but refused to join Justice Rehnquist's plurality opinion because he felt the plurality gave "inadequate consideration to [Supreme Court] cases holding that a closed container may not be opened without a warrant."[189] These Justices expressly refused to join anything other than the plurality's judgment that the seizure of the heroin in question satisfied the requirements of the plain view doctrine.

Tellingly, Justice Rehnquist himself did not rest the finding that there was probable cause to believe the balloon seized by the officer contained heroin on his not more likely true than false comment, simply concluding that given the officer's experience as a narcotics detective, there was probable cause to support the seizure.[190] Justice Rehnquist did not ask whether the officer's belief that there was contraband in the balloon was more likely true than false. He simply concluded that "it is plain that Officer Maples had probable cause to believe that the balloon in Brown's hand contained an illicit

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[187] *Id.* at 623 (O'Connor, J., dissenting) ("the plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer").

[188] Texas v. Brown, 460 U.S. at 744 (Powell, J., concurring) ("I do not join the plurality's opinion because it goes well beyond the application of the [plain view] exception").

[189] *Id.* at 747 (Stevens, J., concurring).

[190] *Id.* at 742–43.

substance," given his "participation in previous narcotics arrests and from discussions with other officers."[191]

B. Justice Rehnquist's View of Probable Cause is Misguided as a Matter of History, Precedent and Logic

A second reason lower courts should reject Justice Rehnquist's statement in *Texas v. Brown* that probable cause does not demand any showing that the officer's belief "be correct or more likely true than false"[192] is that this understanding of probable cause is misguided as a matter of history, precedent, and logic.

1. History

[191] *Id*. One might even argue that Justice Rehnquist's comment defining probable cause as not more likely true than false was merely dicta and therefore is not controlling. It is well settled that dicta is not controlling. *See* Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935) (noting that dicta is "not controlling"). Judges often suggest that distinguishing between holdings and dicta is a "routine, noncontroversial matter," Michael C. Dorf, *Dicta and Article III,* 142 U. PA. L. REV. 1997, 2003 (1994). Legal scholars, however, have struggled to define and distinguish between holdings and dicta. Black's Law Dictionary defines "obiter dictum" as "a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." BLACK'S LAW DICTIONARY (10th ed. 2014). Michael Abramowicz and Maxwell Stearns have suggested a perhaps clearer way of distinguishing holdings from dicta. According to Abramowicz and Stearns, "A holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005). Under either of these definitions, Justice Rehnquist's comment about probable cause not needing to be more likely true than false seems to qualify as dicta. Under the Black's Law Dictionary definition of dicta, Justice Rehnquist's comment on probable cause is dicta because it was a judicial comment made while delivering a judicial opinion, but was unnecessary to the decision in the case. Under the Abramowicz and Stearns definition of dicta, Justice Rehnquist's comment also qualifies as dicta because it did not lead to the judgment. Justice Rehnquist did not apply his not more likely true than false standard when evaluating whether the officer had probable cause to believe the balloon in question contained contraband. He simply concluded that "it is plain" that the officer had the probable cause. Texas v. Brown, 460 U.S. at 742. Moreover, the issue before the Court was whether the "immediately apparent" requirement of the plain view doctrine requires that the officer know he is viewing contraband or evidence of a crime or whether probable cause is sufficient, not how much certainty is required for a finding of probable cause. *Id.* at 741–42. The Court of Criminal Appeals had suggested that the officer "had to know that 'incriminating evidence was before him, when he seized the balloon.'" *Id.* at 735. Three judges below had dissented on the ground that the officer just needed probable cause. *Id.*

[192] Texas v. Brown, 460 U.S. at 742.

If we think about why the founding fathers included the Fourth Amendment in the Bill of Rights, it is clear that the Framers wanted to make sure the police did not have unconstrained power to search and seize.[193] As Thomas Davies explains, the Fourth Amendment was primarily a response to the Crown's use of general warrants to conduct revenue searches of houses.[194] Accordingly, at the time of the framing, bare probable cause that a crime had likely been committed was not sufficient to justify an arrest, whether with or without a warrant.[195] According to Davies, an arrest was justified only if there was (1) a sworn accusation that a crime had *in fact* been committed, and (2) probable cause as to the identity of the culprit.[196] This more stringent common law standard for probable cause than the standard that applies today was a response to the fact that arbitrary arrests upon order of the Crown were "a salient historical abuse of criminal-justice power in English constitutional history."[197]

Allowing police to arrest persons based on less than a fifty-fifty certainty that the arrestee is involved in criminal activity gives police virtually unconstrained power to arrest similar to the power

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[193] *See, e.g.*, Camara v. Mun. Court of S.F., 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."); *see also* WILLIAM J. CUDDIHY, THE FOURTH AMENDMENT: ORIGINS AND ORIGINAL MEANING 602–1791 767 (2009) ("By requiring that all warrants be specific and by abrogating multiple categories of search and seizure, the framers of the amendment hoped to shield the people, not just their houses, from all unreasonable searches and seizures by the federal government.") [full text available online at http://www.oxfordscholarship.com.gwlaw.idm.oclc.org/view/10.1093/acprof:oso/9780195367195.001.0001/acprof-9780195367195]; David E. Steinberg, *An Original Misunderstanding: Akhil Amar and Fourth Amendment History*, 42 SAN DIEGO L. REV. 227, 230 (2005) ("Historical sources indicate that the framers were focused on a single, narrow problem—physical invasion of houses by government agents. The Fourth Amendment was enacted to address this problem with a precise, bright-line rule. Before entering a house, law enforcement officers typically would need to obtain a specific warrant."); David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1053 (2004) ("A review of history demonstrates that the Fourth Amendment was intended to proscribe only a single discrete activity—physical searches of houses pursuant to a general warrant, or no warrant at all."); Thomas K. Clancy, *The Purpose of the Fourth Amendment and Crafting Rules to Implement That Purpose*, 48 U. RICH. L. REV. 479, 522 (2014) ("The Fourth Amendment was designed by the framers to protect individuals from the government").

[194] Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS 1, 4 (2010).

[195] *Id.* at 11.

[196] *Id.*

[197] *Id.*

accorded law enforcement in pre-founding England. This could not have been something that the framers of our Constitution wanted.

It would be a mistake, however, to rely entirely on history as the reason to reject the more likely than not standard. As Richard Frase points out, "much has changed in American society, law, and criminal justice since the Founding era."[198] Indeed, such change was a big reason why the Supreme Court in *Tennessee v. Garner* rejected the common law rule that allowed police to shoot a fleeing felon if necessary to prevent the felon's escape even if the felon did not pose a threat of death or serious bodily injury to the officer or others.[199] As Frase explains:

> In *Garner*, the changes had to do with the common-law's authorization of the death penalty for almost all felonies, the dramatically different mix of offenses defined as a felony under modern criminal law, and major changes in police weaponry that made it much easier for modern police to kill fleeing suspects who pose no imminent danger to the officer.[200]

At the time of the founding, we did not have "large professional police departments with officers constantly on patrol looking for minor violations."[201] Moreover, "custodial arrest for minor crimes was relatively rare in the Founding era."[202]

It would be a mistake to rely entirely on history to guide what should be done today not only because so much has changed in American society since the founding, but also because of the difficulty in determining that history. As David Sklansky notes, one problem with what he calls Justice Scalia's new Fourth Amendment originalism—the idea that courts should look at early common law precedents and ask whether the government action in question constituted a search at the time of the framing to determine whether such action constitutes a search today—is that it is often difficult to figure out what was required at early common law either because there are no early common law decisions on point or the early common law precedents that do exist are inconsistent.[203]

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[198] Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 345 (2002).
[199] Tennessee v. Garner, 471 U.S. 1, 11 (1985).
[200] Frase, *supra* note 198, at 345.
[201] *Id.* at 346.
[202] *Id.* at 346 n.72.
[203] David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1794–96, 1806 (2000).

Inconsistent precedent allows judges to pick and choose the precedent that suits them.[204]

Sklansky points out that in *Wyoming v. Houghton*, the very first case in which the full Court embraced Justice Scalia's new Fourth Amendment originalism, "[s]trictly speaking, no '18th-century common law' was found applicable by the Court," and "[i]nstead the majority relied on federal legislation in the late-eighteenth century authorizing warrantless inspections of ships by customs officers with probable cause to suspect the presence of contraband."[205] Sklansky concludes that "the majority in *Houghton* inferred from the Founding-era legislation that 'the Framers' would have thought the challenged search 'reasonable.'"[206]

Another example of the difficulty of ascertaining the law applicable at common law can been seen in *Atwater v. City of Lago Vista*, a case in which the Court was asked to rule on the constitutionality of allowing an officer with probable cause to believe that a minor fine-only traffic violation had taken place to effectuate a custodial arrest.[207] Gail Atwater was pulled over by a police officer for driving without a seat belt and failing to secure her 3-year-old son and 5-year-old daughter in seatbelts.[208] Driving without a seatbelt in the City of Lago Vista, Texas at the time was a traffic violation with a maximum fine of $50.[209] Even though Atwater did not pose a physical threat to the officer and the seat belt offense which the officer believed her to be violating was a fine-only offense, the officer handcuffed Atwater with her hands behind her back, arrested her, and hauled her off to jail.

The Fifth Circuit Court of Appeals, which heard Atwater's case below ruled in her favor, finding that the officer's actions were unreasonable and in violation of the Fourth Amendment. That court described the facts of the case as follows:

> Gail Atwater and her family are long-term residents of Lago Vista, Texas, a suburb of Austin. She is a full-time mother and her husband is an emergency room physician at a local hospital. On the pleasant spring afternoon of March 26, 1997, as Gail Atwater was driving her children home after their soccer practice at 15 miles per hour through her residential neighborhood, she violated Section 545-413 of the Texas Transportation Code. Neither Gail Atwater, her four-year-old son nor her six-year-old daughter were wearing their seat belts.

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[204] *Id.* at 1794.
[205] *Id.* at 1760.
[206] *Id.* at 1760.
[207] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).
[208] *Id.* at 323–24.
[209] *Id.* at 323.

> Detecting this breach of the peace and dignity of the state, Lago Vista police officer, Bart Turek, set about to protect the community from the perpetration of such a crime. In doing so, he brought to bear the full panoply of means available to accomplish his goal—verbal abuse, handcuffs, placing Gail Atwater under custodial arrest, and hauling her to the local police station. It was not a proud moment for the City of Lago Vista.[210]

Officer Turek could have simply issued Atwater a traffic citation and released her upon a promise to appear, but instead chose to handcuff Atwater with her hands behind her back, a tactic usually used when an officer fears that a suspect will try to harm the officer, and took Atwater to the police station where she was booked and placed in a jail cell for approximately an hour before being taken before a magistrate.[211] Ultimately, Atwater entered a plea of no contest to not wearing a seat belt and allowing her children to not wear seat belts.[212] After this incident, Atwater's youngest child required counseling and Atwater was prescribed medication for nightmares, insomnia, and depression arising from the incident.[213]

Atwater and her husband sued the City of Lago Vista, the Police Chief, and Officer Turek under 18 U.S.C. §1983, alleging violations of the Fourth Amendment and the Due Process Clause.[214] After the Fifth Circuit Court of Appeals found that Officer Turek's actions were constitutionally unreasonable and denied his claim of qualified immunity,[215] the government appealed and the Supreme Court agreed to hear the case.

Before the Supreme Court, Atwater argued that "'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace,' a category she claimed was then understood narrowly as covering only those nonfelony offenses 'involving or tending toward violence.'"[216] The Supreme Court, however, rejected this argument because it found the common law authorities were not consistent with respect to what was required for a lawful custodial arrest.[217] As Justice Souter explained, "We begin with the state of pre-founding English common law and find that, even after making some allowance for variations in the common-law usage of the term

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[210] Atwater v. City of Lago Vista, 165 F.3d 380 (5th Cir. 1999).
[211] *Id.* at 383.
[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.* at 389.
[216] Atwater v. City of Lago Vista, 532 U.S. 318, 327 (2001).
[217] *Id.* at 332.

'breach of the peace,' the 'founding-era common-law rules' were not nearly as clear as Atwater claims; on the contrary, the common-law commentators (as well as the sparsely reported cases) reached divergent conclusions with respect to officers' warrantless misdemeanor arrest power.[218] Accordingly, the Supreme Court reversed the judgment below, finding that because Officer Turek had probable cause to believe Mrs. Atwater had violated the seat belt laws, he acted reasonably when he arrested her and took her into custody.

2. Precedent

An even more compelling reason to reject the view that probable cause means something less than "more likely than not" is precedent. While the Supreme Court's pronouncements on probable cause have not been a model of clarity, the idea that probable cause is something less than "more likely than not" has never commanded a majority of the Court—neither before *Texas v. Brown* nor after. The Court instead has consistently resisted assigning any specific percentage to the concept of probable cause, explaining:

> More recently, we said that "the *quanta* . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."[219]

It may be that in rejecting the view that probable cause requires a specific quantum of evidence, like a preponderance of the evidence or proof beyond a reasonable doubt, the Court has simply not wanted to lock itself into quantifying the meaning of probable cause, leaving the ultimate decision as to whether there was probable cause to the magistrate-judge deciding before the fact whether to issue an arrest warrant or deciding after the fact whether police were justified in a warrantless arrest. Whatever its reasons, a majority of the Court has never repeated Justice Rehnquist's statement that probable cause means something less than a preponderance of the evidence. Instead, it has time and again

[218] *Id.* at 327–28.
[219] Illinois v. Gates, 462 U.S. 233, 238 (1983).

suggested that probable cause simply means something beyond a mere suspicion and something less than proof beyond a reasonable doubt.[220]

3. Logic

Perhaps the most compelling reason to reject the notion that probable cause means something less than "more likely than not," however, is logic. It simply does not make sense to say that probable cause deals with probabilities, and then say that probable cause does not have to rise to the level of a preponderance of the evidence standard. If you ask someone, "Do you think it is going to rain tomorrow?" and the person says, "Yes, I think there is a fair probability that it will rain tomorrow" or "Yes, I have reasonable grounds to believe that it will rain tomorrow," in other words, "I think there is probable cause that it will rain tomorrow," it would not make sense for the person to then add, "and I think the likelihood of rain is less than 50%." Similarly, when a police officer says, "I have probable cause to arrest Joe," the officer is suggesting there is a fair probability or reasonable grounds to believe that a crime has been committed and that Joe committed it. It simply does not make sense to for the officer to then say, "and I think there is less than a fifty-fifty chance that Joe committed that crime."

If we look to other areas of the law where probable cause is the standard, we see that probable cause is understood to mean *probably* true. For example, a grand jury needs probable cause to issue an indictment, but probable cause in the grand jury context has a more robust meaning than Justice Rehnquist's understanding of probable cause in *Texas v. Brown*. For example, the Model Grand Jury Charge instructs grand jurors as follows:

> 25. To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury and your task is not to decide the guilt of innocence of the person charged. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged. To put it another way, you should vote to indict where the evidence presented to you is

[220] Brinegar v. United States, 338 U.S. 160, 175 (1949). *See also* Illinois v. Gates, 462 U.S. 213, 235 (1983) (repeating this language from Brinegar); Henry v. United States, 361 U.S. 98, 102 (1959) ("Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough. Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.").

> sufficiently strong to warrant a reasonable person's belief that the person being investigated is *probably* guilty of the offense charged.[221]

The Model Grand Jury Charge is not without its faults,[222] but many jurisdictions have adopted it and give their grand jurors the same instructions that appear in the Model Grand Jury Charge.[223] Some jurisdictions go even further than the Model Grand Jury Charge and instruct their grand jurors that they should not return an indictment "unless the government's evidence would lead them to convict the accused at trial."[224]

C. Lowering the Threshold of Certainty for Probable Cause Allows for More Arbitrary Arrests and Exacerbates a Pre-existing Problem of Racial Disparity in Arrests

Finally, Justice Rehnquist's very low threshold of certainty for probable cause gives police broad discretion to arrest individuals who may or may not be involved in criminal activity, exacerbating

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[221] MODEL GRAND JURY CHARGE (JUD. CONF. OF U.S. 2005) (emphasis added). Congress has granted authority to the Judicial Conference of the United States to "adopt rules and regulations governing [grand jury procedure]." 28 U.S.C. §1863(a).

[222] United States v. Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005).

[223] *Id.* at 1197 (noting that "a majority of the states have adopted instructions similar to the federal model instructions"). Alabama's model grand jury instructions go even further than the Model Grand Jury Charge and instructs grand jurors that if they find probable cause to believe the target has committed a crime, they must indict. ALABAMA JUDICIAL SYSTEM, GENERAL JURY INSTRUCTION (Adopted Nov.13, 2014), http://judicial.alabama.gov/docs/library/docs/General_Jury_Instructions.pdf (instructing that, as to felonies, whenever the legal evidence received by a Grand Jury establishes probable cause to believe that a felony has been committed and that a particular person has committed that offense, then the Grand Jury must return a true bill of indictment). In contrast, some states tell their grand jurors that they *may* indict if they find probable cause. *See, e.g.,* NEW YORK STATE OFFICE OF COURT ADMINISTRATION, GRAND JURY IMPANELMENT INSTRUCTION NEW YORK (Rev. Jan. 2018), https://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Grand-Jury_Rev.pdf. Ainstructing grand jury that they may indict a person for an offense when the testimony and any other evidence presented is, one, "legally sufficient" to establish that the person committed the offense, and two, provides "reasonable cause to believe that the person, in fact, committed the offense.").

[224] Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 486 (1980). Other jurisdictions simply equate probable cause to indict with probable cause to arrest. *Id.* at 485-86, *citing U.S. Dep't of Justice Materials Relating to Prosecutorial Discretion*, 24 CRIM. L. REP. 3001, 3002 (BNA 1978) (treating the probable cause standard for a grand jury indictment the same as the probable cause standard for an arrest).

a pre-existing problem of racial disparity in arrests. Whether because of explicit or implicit racial biases of police officers themselves or of the persons who call the police, police officers often arrest black individuals in situations where they would not have arrested a white individual doing the same thing. For example, at approximately 4:35 PM on one April afternoon in 2018, two African American men entered the Center City Starbucks in Philadelphia, Pennsylvania to meet someone for a 4:45 p.m. business meeting.[225] Immediately upon walking into the store, one of the men asked an employee who happened to be the manager of that Starbucks store for the code to the bathroom.[226] After the manager told him that the restrooms were only for paying customers, the two men proceeded to sit at a table.[227] A few seconds later, the manager approached the men and asked if she could get them any drinks.[228] The men told the manager that they didn't need anything since they had bottles of water with them and they were waiting for another person.[229] The manager asked the men to leave the store, and when they refused to leave, she called 911 and told the police that two men were in the store and were refusing to make a purchase or leave.[230]

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[225] Rachel Siegel, *Men Arrested at Starbucks Describe Surprise, Fear*, WASH. POST, April 20, 2018, at A14.

[226] *Id.* ("Immediately upon walking in, Nelson asked the manager if he could use the restroom."). *See also* Ben Shapiro, *That Philly Starbucks Has Several Cameras. So Why Won't They Release Tape of a Racist Incident?*, DAILY WIRE (Apr. 19, 2018), https://www.dailywire.com/news/29642/philly-starbucks-has-several-cameras-so-why-wont-ben-shapiro (noting that in an interview on ABC News' *Good Morning America*, two African American men who were arrested at a Starbucks while waiting for a business meeting said "they asked a barista for the code to the bathroom and were told they could hot have it because they had not yet purchased anything").

[227] Siegel, *Men Arrested at Starbucks Describe Surprise, Fear, supra* note 225 (noting that the manager told Nelson that the restrooms were for paying customers only, and Nelson "just left it at that"). **[Editor – please note that I have included the article title since Rachel Siegel wrote more than one article on the Starbucks arrest that I cite to in this Article, and this way the reader will know which article by Rachel Siegel the footnote is referencing.]**

[228] *Id.* (noting that "the manager came over to their table to ask if she could help with any drinks or water")

[229] *Id.* (noting that the men told the manager that they had their own bottles of water and didn't need anything).

[230] *Id.* (noting that the manager called the police at 4:37 p.m., just two minutes after the two African American men arrived at the Starbucks store). According to news reports of this incident, the manager was acting pursuant to store guidelines that required managers to ask nonpaying customers to leave the store and called police if they refused. Rachel Siegel, *Starbucks Chairman Says Manager Showed 'Unconscious Bias' in Calling 911*, WASH. POST, Apr. 19, 2018, at A14 (reporting that according to a Starbucks spokesperson, "In this particular store, the guidelines were that partners must ask unpaying customers to leave the store, and police were to be called if they refused"). *See also* **J**enny Gathright & Emily Sullivan,

At 4:41 PM, two officers from the Philadelphia Police Department arrived and told the men they had to leave.[231] When they did not get up to leave, the officers handcuffed and arrested the men and, without reading them any rights or telling them why they were being arrested, took them into custody for trespassing and causing a disturbance.[232] During the arrest, which was caught on cell phone video,[233] the man with whom the two African American men were planning to meet arrived and asked the officers why the men were being arrested.[234] On the video, that man, who is white, can be heard telling the officers that the two African American men were there to meet with him.[235] The officers, however, refused to release the men and proceeded to take them down to the police station for booking.[236]

The video of this arrest when viral, and amidst public outrage and charges of racial profiling, the CEO of Starbucks, Kevin

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Starbucks, Police And Mayor Respond To Controversial Arrest Of 2 Black Men In Philly, NPR (Apr. 14, 2018, updated at 1:56 PM), https://www.npr.org/sections/thetwo-way/2018/04/14/602556973/starbucks-police-and-mayor-weigh-in-on-controversial-arrest-of-2-black-men-in-ph (reporting that the men were asked to leave by the manager before she called 911 and again by police officers when they arrived on the scene and they refused to leave both times).

[231] Siegel, *Men Arrested at Starbucks Describe Surprise, Fear, supra* note 225 ("Officers arrived at 4:41, according to tapes released by the Philadelphia police this week").

[232] *Id.* (noting that the men were arrested for trespassing and creating a disturbance); *see also* Elizabeth Dias, John Eligon & Richard A. Oppel Jr., *Philadelphia Starbucks Arrests, Outrageous to Some, Are Everyday Life for Others*, N.Y. TIMES (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/us/starbucks-arrest-philadelphia.html (reporting that the men were handcuffed and taken to police station to be booked).

[233] Rachel Siegl & Alex Horton, *Starbucks CEO Calls for Bias Training*, WASH. POST, April 17, 2018, at A2 (noting that "[a]t least two videos captured the tense moment when six Philadelphia police officers stood over two seated black men, asking them to leave").

[234] *See Outrage Grows Over Video Showing Two Black Men Arrested at Philadelphia Starbucks*, NBC 10 (Apr. 14, 2018, 2:01 PM), https://www.nbcphiladelphia.com/news/local/Outrage-Over-Video-Showing-Two-Black-Men-Arrested-at-Philadelphia-Starbucks-479771543.html.

[235] *Id.*

[236] *See* Dias, *Philadelphia Starbucks Arrests, Outrageous to Some, Are Everyday Life for Others*, *supra* note 232; Alex Horton, *Starbucks CEO apologizes after employee calls police on black men waiting at a table*, WASH. POST (Apr. 15, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/14/starbucks-apologizes-after-employee-calls-police-on-black-men-waiting-at-a-table/?noredirect=on&utm_term=.708b6a0c96d2 (reporting that, according to their attorney, the men were taken to a police station, fingerprinted, and photographed, and that an officer suggested to the men that they faced charges for "defiant trespassing").

Johnson, apologized to the two African American men.[237] Howard Schultz, former CEO of Starbucks and possible 2020 Presidential hopeful, acknowledged that the Starbucks manager, who was white, probably acted from unconscious bias when she decided to call the police.[238] Starbucks also decided to close more than 8,000 of its stores on May 29, 2018, so its employees could undergo racial bias training.[239] Within a few weeks, the men reached a settlement with the City of Philadelphia, which agreed to pay $1 to each man, fund a $200,000 program to help high school students aspiring to be

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[237] Rachel Siegel, *Starbucks Chairman Says Manager Showed 'Unconscious Bias' in Calling 911*, WASH. POST, Apr. 19, 2018, at A14 (reporting that Starbucks Chief Executive Office Kevin Johnson appeared on Fox Business Network's "Mornings with Marta" and said he apologized to the two gentlemen for what happened to them).

[238] *Id.* Interestingly, Howard Schultz revealed his own unconscious racial bias at a CNN Town Hall in February 2019. When asked about the arrest of the two African American men at the Philadelphia Starbucks store, Schultz spoke about the decision to close all Starbucks stores in May 2018 so all Starbucks employees could undergo implicit bias training. Rachel Siegel, *Starbucks's bias training finally happened. Here's what it looked like*., WASH. POST (May 29, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/29/starbucks-training-finally-happened-heres-what-it-looked-like/?utm_term=.2e4584cee54f. He then added that he doesn't see color. Gregory Krieg & Vanessa Yurkevich, *Schultz's claim he doesn't 'see color' at odds with Starbucks' 2018 anti-bias training videos*, CNN (Feb. 14, 2019) https://www.cnn.com/2019/02/14/politics/howard-schultz-starbucks-racial-bias-training-videos/index.html ("I didn't see color as a young boy, and I honestly don't see color now," Schultz said during the CNN town hall, describing his formative years "as a young boy in the projects. Of course, one who claims not to see race or color is simply denying the existence of implicit bias. All of us, including those of us who are egalitarian-minded and progressive, are influenced by racial and other stereotypes. Ellen Yaroshefsky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203, 1212–13 (2014); Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness As Property and Racial Performance As Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 30 (2015); Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 168 (2018)("When a microaggressor comments 'I don't see color,' the hidden message is 'I do not recognize your unique cultural experience and background,' not 'I am not racist.'").

[239] Tracy Jan & Rachel Siegel, *Race Training to Briefly Close Starbucks Shops*, WASH. POST, April 18, 2018, at A22 (noting that "[p]ublic outrage over the arrest of two African-American men at a downtown Starbucks store sparked a corporate crisis that led the company to take the unprecedented step of announcing it would close more than 8,000 stores for an afternoon in May to train baristas on how to recognize their racial biases"). *See also* Christine Emba, Opinion, *Starbucks' Small Step Still Sets an Example*, WASH. POST, Apr. 22, 2018, at A17 (noting that "Starbucks' decision to shut down its stores on May 29 for a day of 'racial-bias education' training may not be enough to contain the backlash building against it" but that in doing this, "Starbucks is setting an unusually good example of what should be done when racism becomes a public problem in a public space").

entrepreneurs, and help the men take courses to complete their Bachelor's degrees.[240]

Far from being an isolated incident, the April 2018 arrest at the Center City Starbucks simply happened to be caught on cell phone video. About the same time as the Starbucks incident, police in other cities and states were called to investigate several other African Americans who were doing things that ordinarily do not trigger calls for the police. For example, on April 21, five African American women were golfing at a golf course in a largely white suburban area when they were approached by someone claiming to be was the owner of the club (it turns out this man was not the owner of the club, but served in an advisory role for the gold course) who told the women that they were not keeping a quick enough pace and needed to leave.[241] The man told the women, "You're going too slow. I'll give you a refund."[242] One of the women told the man, "Do you realize we're the only black women on this course, and you're only coming up to us? We paid, we want to play."[243] The man walked off in a huff.[244] Three of the women left when the group reached the ninth hole because they were so shaken by the confrontation,[245] but two of the women stayed and were about to start a second round when they were approached again, this time by one of the club's owners and other employees, who told them that they had five minutes to leave and that the police had been called.[246] The women were also offered checks to refund their memberships.[247] The police

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[240] Rachel Siegel, *Two Black Men Arrested at Starbucks Settle with Philadelphia for $1 Each*, WASH. POST, May 2, 2018, https://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/?utm_term=.a602a3b4a02f (also available at https://perma.cc/BM5L-9A75**).**

[241] Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police,* N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html; Rachel Siegel, *Police Called on Black Golfers After Complaints of Slow Play*, WASH. POST, Apr. 25, 2018, at A13, https://www.providencejournal.com/news/20180424/pa-golf-club-calls-police-after-telling-5-black-women-they-were-playing-too-slowly (last visited Feb. 17, 2019).

[242] Siegel, *Police Called on Black Golfers After Complaints of Slow Play*, *supra* note 241.

[243] *Id.*

[244] *Id.*

[245] *Id*.

[246] Caron, *supra* note 241.

[247] Siegel, *Police Called on Black Golfers After Complaints of Slow Play*, *supra* note 241.

arrived, but left without arresting the women after deciding charges were not warranted.[248]

In another incident around the same time, a young black female was napping in the common area of her dormitory at Yale University where she had been working on a paper when a white student confronted her around 1:30 a.m.[249] The white student turned on the lights and said, "Is there someone in here? Is there someone sleeping in here? You're not supposed to be here."[250] The white student then called campus police.[251]

Lolade Siyonbola, the black woman who had fallen asleep on the couch, was a student at Yale University and lived in the same dormitory where she was found napping.[252]When campus police arrived, Sivonbola told them that she was a student at Yale and used her room key to open the door to her dorm room.[253] The police, however, were not convinced that she belonged there and asked her to show identification.[254] Siyonbola showed officers her student ID, but was detained by police for nearly twenty minutes while they investigated whether she was in fact a Yale University student.[255] A spokesperson for Yale University explained that the encounter was drawn out because the name on Siyonbola's campus ID was her preferred name, which did not match her name in university's records.[256]

In the end, the police left without formally arresting Siyonbola, who was earning a master's degree in African studies at Yale.[257] Asked whether she felt the police acted appropriately, Siyonbola responded, "[A]bsolutely not. I know with absolute certainty that if I was white 1) the police would not have been called . . . and that 2)

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[248] *Id.*

[249] Tariro Mzezewa, *Napping While Black (and other Transgressions)*, N.Y. TIMES (May 10, 2018), https://www.nytimes.com/2018/05/10/opinion/yale-napping-racism-black.html.

[250] *Id.*

[251] *Id.*

[252] Matthew Ormseth, *Yale Says Protocol Followed on Report of Black Woman*, L.A. TIMES, May 11, 2018, at A8, https://www.latimes.com/nation/nationnow/la-na-yale-sleeping-student-20180510-story.html (last visited Feb. 17, 2019).

[253] Mzezewa, *supra* note 249.

[254] *Id.*

[255] *Ormseth,* supra note 252.

[256] *id.*

[257] Christina Caron, *A Black Yale Student was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html. Siyonbola founded the Yoruba Cultural Institute in Brooklyn and is the author of a book about African history and diaspora migration. Caron, *supra* note ∗257.

if they were, I would not have been detained for nearly 20 (minutes)."[258]

More recently, on December 22, 2018, an African American man sitting in the lobby of the DoubleTree by Hilton hotel in Portland, where he was a registered guest, talking on his cellphone with his mother, was confronted by a white hotel security guard police who accused him of loitering, and then called the police.[259] Jermaine Massey was told by police to pack up his belongings and leave the hotel or face trespass charges,[260] even after he told them he was a guest of the hotel and showed them his room key.[261]

I have sat at a table at Starbucks without ordering anything (while my husband went to go purchase a coffee mug), and was not asked by store employees to leave. My husband, who is also an Asian American, has occupied a seat at a rival coffee shop without purchasing anything while waiting for me while I was making a purchase, and he has never been asked to purchase something or leave, let alone arrested by police for such action. I'm sure many non-black persons have been slow on the golf course without being

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[258] Matthew Ormseth, *Yale President Defends Black Student In Racial Incident Where Police Were Called, Hartford Courant*, May 11, 2018, https://www.courant.com/news/connecticut/hc-news-yale-police-response-20180510-story.html.

[259] Associated Press, *Portland, Oregon hotel fires two after police eject black guest from lobby*, GUARDIAN, Dec. 29, 2019 16:50 EST, https://www.theguardian.com/us-news/2018/dec/29/portland-oregon-hotel-fires-two-police-eject-black-guest-lobby; *Portland, Oregon, hotel calls cops on black guest in lobby*, CBS NEWS (Dec. 28, 2018, 9:08 AM), https://www.cbsnews.com/news/portland-oregon-hotel-calls-cops-on-black-guest-in-lobby/.

[260] Cydney Henderson, *Guest says Hilton 'racially profiled' him by calling police over lobby phone call*, USA TODAY (Dec. 26, 2018 6:52 PM), https://www.usatoday.com/story/travel/news/2018/12/26/guest-hilton-racially-profiled-him-called-police-over-phone-call/2417679002/.

[261] *See* Michael Brice-Saddler, *Oregon hotel fires employees seen on video evicting black guest*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/business/2018/12/29/portland-hotel-fires-employees-seen-evicting-black-guest-video/?noredirect=on&utm_term=.b0feeabfa8cd (noting that Massey told the security guard that he was a guest and showed the guard and the hotel manager a ticket he received after he had checked in with his room number); Nina Golgowski, *Black Hotel Guest Making A Call In Lobby Accused Of Loitering, Loses His Room*, HUFFINGTON POST, (Dec. 27, 2018), https://www.huffingtonpost.com/entry/hotel-calls-police-on-black-guest-making-call-in-lobby-guest_us_5c24e157e4b08aaf7a8e2bad; Mihir Zaveri, *Doubletree in Portland Fires 2 Employees After Kicking Out Black Man Who Made Call From Lobby*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/2018/12/28/us/black-man-kicked-out-hotel-portland.html ("Mr. Massey said that he left the hotel after collecting his things from his room so as "not to make a bad situation worse," then drove himself to a nearby Sheraton.").

asked to leave or having the police called on them. I'm also sure many a non-black student has fallen asleep in the common area of their residence hall without having someone call the police to investigate if they belonged there.

In each of the above instances, racial bias—whether explicit or implicit—likely played a role in bringing about police involvement in the first place and how the responding officers handled the situation once on the scene. Under Justice Rehnquist's definition of probable cause, an arrest in any of these cases would likely be considered justifiable, as police could easily meet Justice Rehnquist's very low threshold of suspicion to justify almost any arrest. While several of these incidents did not result in an arrest, the fact remains that another set of officers may have chosen to exercise their arrest discretion differently and under Justice Rehnquist's definition of probable cause, would likely have had the law on their side had they decided to effectuate an arrest.[262]

In another case that may not be as widely recognized as the Starbucks incident, but is in some ways much more significant from a legal perspective because it was the subject of a 2018 U.S. Supreme Court decision on probable cause, twenty-one African Americans attending a party in Northeast D.C. were arrested and taken into custody and charged with unlawful entry. In *District of Columbia v. Wesby*, the Supreme Court reversed an almost $1 million damages award in favor of sixteen of the twenty-one partygoers who sued the District of Columbia and five police officers for false arrest under the Fourth Amendment.[263]

According to the Court, at "[a]round 1 a.m. on March 16, 2008, the District's Metropolitan Police Department received a complaint about loud music and illegal activities at a house in Northeast D.C."[264] According to the caller, the house had been vacant for several months, a fact that several other neighbors confirmed with police when they arrived at the house.[265] The officers "approached the house and . . . heard loud music playing inside."[266] Upon entering the house, the officers smelled marijuana and saw beer bottles and cups of liquor on the dirty floor.[267] In the living room, the officers found several scantily dressed women with cash in their garter belts giving lap dances to men holding cash and cups of alcohol.[268] When

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[262] In many states, refusing to leave a business' premises after being asked to leave constitutes trespass. [add citation]

[263] District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (slip opinion at 4–5).

[264] Wesby, slip op. at 1.

[265] *Id.*

[266] *Id.*

[267] *Id.* at 2. The officers knocked on the front door, and one of the partygoers answered and let the officers into the house. *Id.*

[268] *Id.*

they saw the uniformed officers, several partygoers scattered.[269] Upstairs, the officers found a naked woman and several men in a bedroom with a mattress on the floor.[270] Several open condom wrappers and lit candles were on the floor of the bedroom.[271]

When asked by police, several partygoers said they were there for a bachelor party but, according to the police, could not identify the bachelor.[272] Eventually, the officers learned that a woman named Peaches had organized the party.[273] When contacted by police, Peaches said she had left the party to go to the store; she also told police she was renting the house.[274]

The police then reached out to the owner of the house who confirmed that he had been trying to negotiate a lease with Peaches, but they had failed to reach an agreement.[275] The owner also told officers that he had not given Peaches or anyone else permission to use his house for a party.[276] After speaking with the owner of the house, the officers arrested the partygoers for unlawful entry and transported them to the police station where they were charged with disorderly conduct.[277]

The partygoers were later released and the charges were eventually dropped.[278] That the charges were ultimately dropped suggests prosecutors realized either that it would be difficult to prove the elements of unlawful entry[279] or that prosecuting these young black men for such a minor offense would widely be viewed as an unwise use of scarce prosecutorial resources.

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[269] *Id.*
[270] *Id.*
[271] *Id.*
[272] *Id.*
[273] *Id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* Peaches later admitted that she did not actually have permission to use the house. *Id.*
[277] *Id.*
[278] *Id.*
[279] To obtain a conviction for unlawful entry, the government would have had to prove five elements beyond a reasonable doubt: (1) the defendants voluntarily or purposely (not by accident or mistake), (2) entered a private dwelling, (3) without lawful authority, (4) against the will of the person lawfully in charge, and (5) the defendants knew or should have known the entry was unlawful. D.C. Code § 22-3302. The first four elements would have been easy to prove, so the case would have turned on whether the defendants knew or should have known their entry into the house was unlawful. If the partygoers thought Peaches was renting the house and therefore had the right to invite them to the party, they would not have had the requisite mens rea for the offense. Likewise, if they had no reason to think that someone without authority had invited them to the house, they would not have had the required mens rea to be found guilty of unlawful entry.

The partygoers sued the District of Columbia and five of its officers for false arrest, claiming they were arrested without probable cause in violation of the Fourth Amendment and D.C. law.[280] The partygoers argued that, under D.C. case law, probable cause to arrest required that officers have evidence the partygoers "knew or should have known, upon entry, that such entry was against the will of the owner," and that the officers lacked such evidence.[281] On cross-motions for summary judgment, the District Court ruled in the partygoers' favor, concluding that the officers lacked probable cause to arrest the partygoers for unlawful entry.[282] A jury awarded the partygoers $680,000 in compensatory damages.[283] After the District Court awarded attorney's fees, the total award in favor of the partygoers came to almost $1 million.[284] The D.C. Circuit Court of Appeals affirmed.[285]

In reversing the District Court and the D.C. Circuit Court of Appeals' judgment, the Supreme Court relied primarily on two factors: (1) the condition of the house, and (2) the partygoers' conduct to justify its conclusion that the officers had probable cause to arrest the partygoers.[286] Notably, the Court in *Wesby* failed to recognize that if the officers had come across twenty-one white male partygoers doing the same sorts of activities in a more affluent part of town, it is unlikely that the officers would have arrested those partygoers. During oral argument, Justice Sotomayor was the only Justice who suggested this possibility:

> JUSTICE SOTOMAYOR: Mr. Kim, I don't know if I agree completely with your opposing counsel that the wealth of the neighborhood should make a difference, but I suspect that if police officers arrived at a wealthy home and it was white teenagers having a party, and one of them says, "my dad just bought this house," that it would be very – and I told the kids they could have a party, and it became, Joe told me to come, and Larry King told me to come, and X King told me to come, that those kids wouldn't be arrested. Maybe the kid who lied might be, but I doubt very much those kids would be arrested. . . .
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> [S]houldn't we have a rule that if we're going to require mens rea at all, that police officers should be treating people equally?

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[280] Wesby, slip op. at 4.
[281] *Id.* at 5. *See also supra* note 279 and accompanying text.
[282] *Id.* at 4.
[283] *Id.* at 5.
[284] *Id.*
[285] *Id.* That all of the lower court judges found for the partygoers suggests that the case was not as cut and dry as represented by the Supreme Court.
[286] *Id.* at 8.

District of Columbia v. Wesby, like the Starbucks incident discussed earlier, illustrates that police officers have broad arrest power. Since officers have limited resources, they cannot and will not use this power to arrest everyone who is eligible to be arrested. The lower the showing required for probable cause, the more discretion police officers have to arrest whomever they choose. As Devon Carbado observes:

> [P]recisely because [loitering, sleeping in a public place, panhandling, drinking in public, jaywalking, riding bicycles on the sidewalk, etc.] are non-serious or vague, police officers will have little difficulty establishing the requisite probable cause to justify arresting people from committing them. For example, if the law criminalizes jaywalking, and people regularly jaywalk, the question is not whether the police will have probable cause (they will because many people jaywalk). Rather, the question is whether the police will use that probable cause selectively to arrest members of particular groups (for example, African-Americans). The short of it is that the more law criminalizes activities in which many people engage, the wider the pool of people from which police officers may pull to make arrests. . . [Mass criminalization] provides police officers with the kind of perpetual probable cause that they can use to justify arresting African-Americans for a wide range of non-serious activities.[287]

Along these lines, a 2011 study found that, on average, the chance of a nonwhite person being arrested is thirty percent greater than the chance of a white person being arrested.[288] Moreover, even though blacks make up only approximately 13.4 percent of the total population in the United States,[289] in 2017, blacks constituted 27.2 percent of all federal arrestees, more than double the percentage of blacks in the total population.[290]

Given the statistics and cases discussed above, it is clear that race plays a role both in the exercise of police officers' arrest discretion and in post-hoc judicial affirmation of this probable

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[287] Devon Carbado, *Predatory Policing*, 83 UMKC L. REV. 545, 550-51 (2017).
[288] Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers Arrest Decisions*, 49 CRIMINOLOGY 473, 498 (2011).
[289] U.S. CENSUS BUREAU, QUICKFACTS (July 2018), https://www.census.gov/quickfacts/fact/table/US/PST045218.
[290] U.S. DEP'T OF JUSTICE, FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2017, https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-43/.

cause.[291] Contrast the arrests of the African American men at Starbucks and the African American partygoers in *Wesby*, where there seemed to be no disagreement that police had the requisite probable cause to make those arrests, with the commentary surrounding the issuance of a search warrant to search the home and office of Michael Cohen, President Donald Trump's former attorney in April 2018. When a judicial officer is asked to issue a search warrant, the judicial officer must find there is probable cause to believe evidence of a crime will be found at the place to be searched. The amount of proof needed to establish probable cause to search is usually considered to be the same as the showing required for probable cause to arrest.[292]

When attorney Michael Cohen's home and office were searched pursuant to a search warrant issued by a judicial officer, many commentators spoke as if the showing necessary for probable cause is a very rigorous standard, a far cry from Justice Rehnquist's definition of probable cause as something less than a preponderance of the evidence. For example, Danny Cevallos, a criminal defense attorney and legal analyst for NBC News/MSNBC commented, "'Probable cause' means the FBI would have to demonstrate to a magistrate that there was a *substantial chance* evidence of criminal activity would be found in Cohen's offices, or in a hotel where he was living, which was also searched."[293]

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[291] *See* Jerry Kang, et al., *Implicit Bias in the Courtroom*, 59 UCLA L. Rev. 1124 (2012) (noting that implicit biases can influence whether a police officer decides to stop an individual for questioning, whether the officer interrogates or frisks that individual, and whether the officer decides to arrest that individual or simply give her a warning); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011) (explaining how the operation of implicit racial biases can cause the police to target, stop, and search Blacks more often than Whites); Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202 (2007) (noting that race "may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect because of racial profiling in at the arrest stage of the process").

[292] 2 Wayne R. LaFave, *Search and Seizure* § 3.1(b) (5th ed. 2012) ("It is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search").

[293] Danny Cevallos, *For Trump and Cohen, attorney-client privilege goes only so far*, NBC NEWS (Apr. 10, 2018, 4:37 AM) (emphasis added), https://www.nbcnews.com/politics/donald-trump/trump-cohen-attorney-client-privilege-goes-only-so-far-n864206.

The fact that this was a search of an attorney's home and office, and not just any attorney—the President's personal attorney—meant the showing of probable cause had to be higher than for the ordinary case. As Frank Figliuzzi, former FBI assistant director and current MSNBC legal analyst, noted, ". . . it's really tough to get enough probable cause and senior level DOJ approval to search an attorney's office, and so it goes all the way up to DOJ, and you have to show there's *a substantial, pertinent reason to believe* that evidence exists [of a crime]."[294]

If we are willing to apply a robust showing of probable cause when it comes to searching the home and office of an attorney suspected of very serious crimes, shouldn't we insist on an equally or more robust showing of probable cause when police officers arrest an individual for a minor offense? Arguably, being arrested and taken into custody is a far greater intrusion—a humiliating intrusion on an individual's liberty and dignity interests—than having one's property searched,[295] yet we require a higher showing and make it more difficult for police when they seek to search the property of a wealthy attorney suspected of serious white collar crimes than when police seek to arrest black individuals for relatively minor offenses. Probable cause should require a showing of more than just a preponderance of the evidence.[296]

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[294] *Deadline: White House* (MSNBC television broadcast, Apr. 9, 2018) (emphasis added), http://www.msnbc.com/deadline-white-house/watch/fmr-fbi-asst-dir-michael-cohen-raids-required-substantial-probable-cause-1206702147538.

[295] In *United States v. Watson*, Justice Powell noted the anomaly created by a rule that allows police officers with probable cause to arrest individuals in public without a warrant when the general rule in the search context is that officers must obtain a warrant prior to searching an individual's property:

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater. A search my 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. . . . Logic therefore would seem to dictate that arrests be subject to the warrant requirement at least to the same extent as searches.

423 U.S. 411, ____ (Powell, J., concurring). **[need to add pincite]**

[296] Other legal scholars have suggested good ways to strengthen the showing necessary for a search or arrest. Josh Bowers, for example, suggests police should take into account qualitative considerations, such as the individual's dignity, rather than simply relying upon quantitative calculations when assessing the constitutional reasonableness or unreasonableness of a search or seizure. Josh

Conclusion

When Justice Rehnquist suggested more than thirty-five years ago in his plurality opinion in *Texas v. Brown* that probable cause to arrest an individual or search one's property need not be correct or even more likely than not, he significantly lowered the bar for probable cause. Lower courts should reject Justice Rehnquist's comment on probable cause from *Texas v. Brown* and insist upon a more robust showing for the protection of all civilians, and especially for black and brown individuals who are often the subjects of police interest. Rather than a trivial showing that amounts to less than the preponderance of the evidence standard used in civil cases, probable cause to arrest and place someone into the criminal justice system should have more teeth.

Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity,"* 66 STAN. L. REV. 987 (2014). Max Minzner proposes that police should have to present hit data—showing how often they have been right or wrong about having probable cause—when applying for a search warrant or when trying to justify a warrantless search after the fact. Max Minzner, *Putting Probability Back Into Probable Cause*, 87 TEX. L. REV. 913 (20