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# Factoring the Seriousness of the Offense Into Fourth Amendment Equations: Strip Searches in Detention Facilities - Atwater Strikes Again

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**FACTORING THE SERIOUSNESS OF THE OFFENSE INTO  
FOURTH AMENDMENT EQUATIONS: STRIP SEARCHES IN  
DETENTION FACILITIES—*ATWATER* STRIKES AGAIN**

*William A. Schroeder\**

I.	Introduction .....	332
II.	<i>Atwater v. City of Lago Vista</i> .....	335
III.	<i>Atwater</i> and Searches Incident to Arrest .....	337
	A. The Extent of the Authority to Search Incident to Arrest.....	337
	B. The Requirement of a Custodial Arrest .....	340
	C. The Effect of <i>Atwater</i> on Search Incident to Arrest Law .....	342
IV.	Limiting the Impact of <i>Atwater</i> .....	347
	A. Limiting the Power to Make Custodial Arrests Through Legislation.....	347
	B. Limiting Custodial Arrests by a Constitutional Requirement That Police Follow Standardized Procedures in Deciding When to Make Custodial Arrests for Minor Offenses .....	348
	C. Limiting <i>Atwater</i> by Factoring the Seriousness of the Offense into Probable Cause Equations.....	350
V.	Revisiting <i>Atwater</i> .....	373
	A. Fourth Amendment Reasonableness: The Balancing of Interests.....	373
	B. The Consequences of a Custodial Arrest .....	376

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C. The Governmental Interests That Justify the Intrusion of a Custodial Arrest.....	382
D. The Bottom Line .....	397
VI. Reasonableness, Proportionality, and Common Sense.....	401
VII. Determining the Purpose of Fourth Amendment Activities.....	405
VIII. Conclusion .....	407

## I. INTRODUCTION

In many detention facilities, officials seek to improve security by requiring everyone who is detained to submit to some kind of strip search.<sup>1</sup> In *Florence v. Board of Chosen Freeholders*,<sup>2</sup> the Supreme Court ruled that the Constitution should not be read as imposing “special restrictions on the searches of offenders suspected of committing minor offenses once they are taken to jail” and admitted into the general population.<sup>3</sup>

The *Florence* Court gave several reasons for its conclusion. First, it said “the seriousness of an offense is a poor predictor of who has contraband.”<sup>4</sup> Second, “[e]ven if people arrested for a minor offense do not themselves wish to introduce contraband into a jail, they may be coerced into doing so by others.”<sup>5</sup> Third, it would be “difficult, as a practical matter, to classify inmates by their current and prior offenses before the intake search.”<sup>6</sup>

Justice Kennedy’s majority opinion observed that the Court addressed an analogous problem in *Atwater v. City of Lago Vista*,<sup>7</sup> where the petitioner had “argued the Fourth Amendment prohibited a warrantless arrest when . . . [conviction] of the suspected crime ‘could not ultimately carry any jail time’ and there was ‘no compelling need for

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1. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012). The Court characterized the actual search at issue as “a close visual inspection while undressed.” *Id.* at 1513.

2. *Id.*

3. *Id.* at 1518, 1522 (observing that this question was not addressed in *Atwater v. Lago Vista*, 532 U.S. 318 (2001), and noting that “[t]his case [Florence] does not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee will be held without assignment to the general jail population and without substantial contact with other detainees.”).

4. *Id.* at 1520.

5. *Id.* at 1521.

6. *Id.*

7. 532 U.S. 318.

immediate detention.”<sup>8</sup> Such a rule, said the *Atwater* Court, “promise[d] very little in the way of administrability.”<sup>9</sup> The *Florence* Court expressed similar concerns and emphasized that officers who interact with those suspected of violating the law have an “essential interest in readily administrable rules,” and cannot be expected to draw the proposed lines on a moment’s notice.<sup>10</sup> For all these reasons, the *Florence* Court ruled that the suspicionless search procedures at issue “struck a reasonable balance between inmate privacy and the needs of the institutions.”<sup>11</sup>

In terms of security at detention centers, the Court’s reasoning in *Florence* is persuasive. The difficulty lies not with the *Florence* Court’s balancing of interests once minor offenders arrive at a detention center, but rather with the Court’s earlier decision in *Atwater*, that gave police officers constitutionally “unfettered discretion” to either issue a citation or to make a custodial arrest for any offense, however minor.<sup>12</sup> *Atwater* made it likely that “[p]ersons arrested for minor offenses may be among the detainees processed at these facilities.”<sup>13</sup>

*Florence* is only one of the consequences of *Atwater*. Because the authority to search incident to arrest is premised on the fact of a custodial arrest,<sup>14</sup> *Atwater* also greatly enlarged the impact of the Court’s search incident to arrest rules. At the time *Atwater* was decided, the law governing searches incident to vehicle stops, laid down in 1981 in *New York v. Belton*,<sup>15</sup> allowed a policeman who made “a lawful custodial arrest of an occupant of an automobile” to make a contemporary search of the passenger compartment of that automobile incident to that arrest.<sup>16</sup> In addition, the officer could impound the vehicle and conduct a thorough inventory search of the vehicle.<sup>17</sup> In 1996, in *Whren v. United States*,<sup>18</sup> the Supreme Court held that a traffic stop “is reasonable where the police have probable cause to believe that a traffic violation has occurred,” even if the traffic stop is a pretext to stop the vehicle for some

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8. *Florence*, 132 S. Ct. at 1522.

9. *Atwater*, 532 U.S. at 350.

10. *Florence*, 132 S. Ct. at 1522.

11. *Id.* at 1523.

12. *See Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting) (characterizing the majority’s ruling).

13. *Florence*, 132 S. Ct. at 1517.

14. *See, e.g., United States v. Robinson*, 414 U.S. 218, 224-26, 235-36 (1973).

15. 453 U.S. 454 (1981).

16. *Id.* at 460.

17. *Colorado v. Bertine*, 479 U.S. 367, 374 (1987).

18. 517 U.S. 806 (1996).

other reason.<sup>19</sup>

The result of *Atwater*, *Belton*, and *Whren*, taken together, was draconian. It is almost impossible for any motorist to drive any significant distance without violating one or more traffic laws. Thus, after *Atwater*, an officer determined to search a particular motorist needed only to monitor that person's driving until, and inevitably, he committed a violation. The driver could then be taken into custody, booked, and searched again.<sup>20</sup> His vehicle could be searched incident to the arrest, impounded, and subjected to an inventory search.<sup>21</sup>

Perhaps recognizing the monster it had created, the Court, in *Arizona v. Gant*,<sup>22</sup> attempted to scale back the power of law enforcement officers to search vehicles incident to the custodial arrest of an occupant.<sup>23</sup> The Court's efforts, however, made the law of search and seizure more confusing and are unlikely to have much effect on the frequency or intensity of searches. After *Florence*, meaningful limits on the power to search persons brought into correctional facilities also require limits on the power to make custodial arrests. Such limitations could take the form of legislation or regulations, or of a requirement that police departments adopt rules to guide the discretion of police officers faced with the decision to issue a citation or make a custodial arrest. A better approach would be for the Court to overrule *Atwater*.

Reasonableness and the balancing of interests are the key principles of the Fourth Amendment.<sup>24</sup> In *Atwater*, the Court failed to recognize the profound consequences of a custodial arrest and failed to properly balance those consequences against the interests served by such an arrest. *Florence* allows the police to add another major consequence—a strip search—to the arrestee's experience.<sup>25</sup> *Atwater* also allows the police officer, in effect, to circumvent the courts and impose the draconian consequences of a custodial arrest and all that can follow, thereby imposing a "penalty" that far exceeds the penalty a court could, or would, impose. These consequences are totally disproportionate to,

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19. *Id.* at 810.

20. *See, e.g.*, *Illinois v. LaFayette*, 462 U.S. 640, 647-48 (1983).

21. *See Atwater v. Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (citing *Bertine*, 479 U.S. at 374).

22. 556 U.S. 332 (2009).

23. *Id.* at 351 (holding that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

24. *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see also United States v. Knights*, 534 U.S. 112, 118-19 (2001).

25. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1521-23 (2012).

and bear no reasonable relation to, the harm the offender and his offense might have caused. The *Atwater* Court rejected compelling arguments for a different result and, instead, reached a result that was contrary to the intentions of the Framers,<sup>26</sup> and which, in a very real sense, totally nullified the Fourth Amendment in most settings outside the home.<sup>27</sup>

This article suggests, *inter alia*, that *Atwater* can and should be limited, or better yet, overruled, by the adoption of reasonableness and probable cause standards that take into account the seriousness of the offense and make custodial arrests of minor offenders, and searches directed at minor offenders, much more difficult to justify than comparable activities directed at serious offenders.

## II. *ATWATER V. CITY OF LAGO VISTA*

*Atwater v. City of Lago Vista* arose out of the actions of a police officer who exercised “extremely poor judgment.”<sup>28</sup> Gail Atwater and her two children, three and five years old, were riding in the front seat of her pickup truck without seatbelts.<sup>29</sup> Under Texas law, a front seat passenger must wear a seat belt and the driver of the vehicle must secure any small child riding in front. Violation of either provision is a misdemeanor punishable by a fine of not more than fifty dollars. The officer observed the violations and pulled Atwater over. After some conversation, he called for backup and handcuffed Atwater.<sup>30</sup> The officer transported Atwater to the local police station where she was subsequently booked, photographed and placed “alone, in a jail cell for about one hour, after which she was . . . released on \$310 bond. . . . She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a \$50 fine.”<sup>31</sup>

The Court first concluded that the Fourth Amendment, as originally understood, did not forbid “peace officers to arrest without a warrant for misdemeanors not amounting to or involving [a] breach of the peace.”<sup>32</sup> The Court then turned to the argument that the custodial arrest of Atwater was constitutionally unreasonable because the crime for which

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26. See David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1813-14 (2000).

27. See Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239, 246-47 (2002).

28. 532 U.S. 318, 346-47 (2001).

29. *Id.* at 323-24.

30. *Id.* at 324.

31. *Id.*

32. *Id.* at 340.

she was arrested was “minor,”<sup>33</sup> and held that “[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”<sup>34</sup>

In *Atwater*, the Court refused to hold that “the Fourth Amendment prohibited a warrantless arrest when . . . [conviction] of the suspected crime ‘could not ultimately carry any jail time’ and there was ‘no compelling need for immediate detention.’”<sup>35</sup> Such a rule, said the *Atwater* Court, “promise[d] very little in the way of administrability.”<sup>36</sup> The Court went on to explain:

An officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect’s risk of flight would not arrest, even though it could perfectly well turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial.<sup>37</sup>

According to the Court, an officer who erred could face “legal action challenging the discretionary judgment . . . and the prospect of evidentiary exclusion.”<sup>38</sup>

The Court rejected the idea of resolving this problem with “a simple tiebreaker for the police to follow in the field: if in doubt do not arrest.”<sup>39</sup> That approach, said Justice Souter, “would boil down to something akin to a least-restrictive-alternative limitation . . . generally thought inappropriate in working out Fourth Amendment protection,” and would provide a “systematic disincentive”<sup>40</sup> for officers to arrest suspects in circumstances where an arrest would serve important societal interests. “Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked.”<sup>41</sup>

Justice O’Connor’s dissent observed that “[j]ustifying a full arrest by the same quantum of evidence that justifies a traffic stop—even though the offender cannot ultimately be imprisoned for her conduct—

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33. The Court said its reasoning applied to any major-minor crime distinction whether a “‘minor crime’ [is] . . . defined as a fine-only traffic offense, a fine-only offense more generally, or a misdemeanor.” *Id.* at 348.

34. *Id.* at 354.

35. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1522 (2012).

36. *Atwater*, 532 U.S. at 350.

37. *Id.* at 351.

38. *Id.* at 350.

39. *Id.*

40. *Id.* at 350-51.

41. *Id.* at 351.

defies any sense of proportionality and is in serious tension with the Fourth Amendment's proscription of unreasonable seizures."<sup>42</sup> Instead, said O'Connor,

[W]hen there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion of a full custodial arrest."<sup>43</sup>

The dissent dismissed the majority's concerns about lawsuits by saying that qualified immunity should afford sufficient protection in most cases.<sup>44</sup> Finally, it observed that the rule the Court created has potentially serious consequences for the everyday lives of Americans who are now at the mercy of police officers who have essentially "unfettered discretion" to stop every motorist whenever they want for whatever reason they want.<sup>45</sup>

### III. *ATWATER* AND SEARCHES INCIDENT TO ARREST

#### A. *The Extent of the Authority to Search Incident to Arrest*

It has long been clear that a police officer who makes a lawful custodial arrest may, incident to that arrest, conduct a warrantless search of a person arrested in order to: "remove any weapons that the latter might seek to use . . . to resist arrest or effect his escape" and "to search for and seize any evidence . . . to prevent its concealment or destruction."<sup>46</sup> In addition, and for the same reasons, a search may be

42. *Id.* at 364.

43. *Id.* at 366; *see also id.* at 365 ("A citation should be used when [arresting for a minor offense] . . . except when by issuing a citation and releasing the violator, the safety of the public and/or the violator might be imperiled as in the case of D.W.I.") (quoting TEXAS DEP'T OF PUB. SAFETY, STUDENT HANDBOOK, TRAFFIC LAW ENFORCEMENT I (1999)).

Prior to *Atwater* several state courts had held unconstitutional custodial arrests for minor offenses. *See, e.g., State v. Hehman*, 578 P.2d 527, 528 (Wash. 1978) (en banc) ("We hold as a matter of public policy that custodial arrest for minor traffic violations is unjustified, unwarranted, and impermissible if the defendant signs the promise to appear . . ."); *see also People v. Clyne*, 541 P.2d 71, 72-73 (Colo. 1975) (en banc) (holding that custodial arrest of defendant for hitchhiking violated statute and search incident thereto was thus improper, but declining to consider its constitutionality).

44. *Atwater*, 523 U.S. at 367-68 (O'Connor, J., dissenting).

45. *Id.* at 372 (O'Connor, J., dissenting).

46. *Chimel v. California*, 395 U.S. 752, 763 (1969); *Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("The interests justifying search are present whenever an officer makes an arrest. A search enables officers to safeguard evidence, and, most critically, to ensure their safety during the 'extended exposure which follows the taking of a suspect into custody and transporting him to the



conducted of the area within the arrestee's "immediate control."<sup>47</sup> Until recently, if the arrestee was "the occupant of a car, the entire passenger compartment of the car, including any purse or package inside, [was] . . . subject to search as well."<sup>48</sup> If a person is arrested in a room, most of that room is subject to search.<sup>49</sup> That search might be followed by a protective sweep of other parts of the building.<sup>50</sup> Moreover, the Court has said that it is not unreasonable under the Fourth Amendment for police officers to routinely monitor the movement of a person following his arrest in a public place even when the arrest is for a minor offense and even when the monitoring entails accompanying the suspect into his home.<sup>51</sup>

The authority to search a person incident to his arrest, like the authority to search residents of a detention center, is not altered or diminished by the fact that the offense for which an arrest is made is benign or trivial in nature.<sup>52</sup> Moreover, for many years, the right to search incident to arrest was said not to be expanded or diminished by the fact that in a particular case the nature of the offense or the nature of the suspect suggested a greater or lesser likelihood that weapons or evidence will in fact be found.<sup>53</sup>

In rejecting a case-by-case approach to searches incident to arrest in *United States v. Robinson*,<sup>54</sup> the Supreme Court emphasized that traditionally the fact of a lawful custodial arrest necessarily gave rise to an authority to search incident to that arrest.<sup>55</sup> The *Robinson* Court also

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police station") (quoting *United States v. Robinson*, 414 U.S. 218, 234-235 (1973)); see also *Robinson*, 414 U.S. at 234 (the search incident to arrest exception "rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence.").

47. *Chimel*, 395 U.S. at 763.

48. *Atwater*, 532 U.S. at 364 (O'Connor, J., dissenting) (citing cases).

49. *Chimel*, 395 U.S. at 763.

50. See *Maryland v. Buie*, 494 U.S. 325 (1990).

51. *Washington v. Chrisman*, 455 U.S. 1, 6-7 (1982) (no constitutional violation where suspect, a university student, was arrested for carrying a bottle of gin after which officer accompanied him to his dormitory room to get his identification and, while there, observed marijuana seeds and a small pipe).

52. See *id.* at 7; see also *Gustafson v. Florida*, 414 U.S. 260, 266 (1973). In *Schmerber v. California*, 384 U.S. 757 (1966), the Court imposed a special limitation on searches incident to arrest that result in bodily intrusions. Though the offense under investigation in *Schmerber* was relatively minor, this factor does not seem to have played any role in the Court's decision.

53. See *United States v. Robinson*, 414 U.S. 218, 235 (1973); cf. *Arizona v. Gant*, 556 U.S. 332 (2009).

54. 414 U.S. 218.

55. *Id.* at 224-26, 235-36. In at least five places the *Robinson* Court observed that a full-custodial or custodial arrest was at issue. In a footnote, the Court observed that the court below had distinguished this from a full traffic stop and described a custodial arrest as an arrest where an

recognized that “the danger to an officer [that flows from] . . . the extended exposure which follows the taking of a suspect into custody and transporting him to the police station,”<sup>56</sup> does not directly correlate with the seriousness of the crime for which a person is being arrested.<sup>57</sup> Though some offenses are such that by their very nature no evidence of their commission is likely to be found, there is no easy way to infer whether a particular arrestee is in fact armed and/or dangerous.<sup>58</sup> Like the Court in *Florence*, the *Robinson* Court realized that even if one could safely assume that persons arrested for certain offenses are more or less likely to be armed than other offenders, this says little about a particular offender.<sup>59</sup> Given the difficulties inherent in case-by-case adjudication and “the relatively minor intrusion”<sup>60</sup> that the search constitutes “on a person who, by hypothesis, has already been subjected to the more serious step of arrest,”<sup>61</sup> officer safety “is an adequate basis for treating all custodial arrests alike for purposes of search justification.”<sup>62</sup>

The Court has also used a uniform, one-size-fits-all approach in dealing with most post-arrest station house searches of arrestees and

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officer “arrest[s] a subject and subsequently transport[s] him to a police facility for booking.” *Id.* at 221 n.2. See also *Gustafson*, 414 U.S. at 263-66 (emphasizing that a custodial arrest was the necessary predicate for a search incident to arrest).

56. *Robinson*, 414 U.S. at 234-35.

57. See e.g., *Id.* at 234-35; *Gustafson*, 414 U.S. at 265-67. See also 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT, § 5.2 at 105 (West Publ’g Co. 4th ed. 2004) [hereinafter LAFAVE, SEARCH AND SEIZURE].

58. See generally 3 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 5.2 at 111-112.

59. *Robinson*, 414 U.S. at 234 n.5 (noting that thirty percent of “shootings of police officers occur when an officer stops a person in an automobile”).

60. *Chimel v. California*, 395 U.S. 752, 776 (1969).

61. WAYNE R. LAFAVE & JEROLD ISRAEL, CRIMINAL PROCEDURE § 3.5(b) at 145 (2d ed. 1992) [hereinafter LAFAVE & ISRAEL, CRIMINAL PROCEDURE]; see also *Robinson*, 414 U.S. at 235-37.

62. *Robinson*, 414 U.S. at 235 (“[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement . . . [i]t is also a ‘reasonable’ search under that Amendment.”).

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that blood could not be involuntarily withdrawn from a motorist in order to test it for alcohol content, on the theory that this was a search of the motorist’s body incident to his arrest. *Id.* at 769-70. The Court observed that the considerations that ordinarily justify a search incident to arrest “have little applicability with respect to searches involving intrusions beyond the body’s surface.” *Id.* at 769. “The interests in human dignity and privacy which the Fourth Amendment protects” require “a clear indication” that the intrusion will turn up evidence of intoxication. *Id.* at 767-68.

In *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985), the Court referred to *Schmerber*’s “clear indication” language as the equivalent of a particularized suspicion and specifically rejected the idea that it referred to a third level of certainty between reasonable suspicion and probable cause. Interestingly, the *Florence* Court did not cite *Hernandez*.

their belongings.<sup>63</sup> The Court has stated that “[i]t is immaterial whether the police actually fear any particular package or container; the need to protect against [the risks of theft, false claims of theft, and weapons] arises independent of a particular officer’s subjective concerns [about a particular item].”<sup>64</sup> However, prior to *Florence*, some lower court cases had suggested strip searches and body cavity searches were unreasonable when directed at persons in custody for minor offenses.<sup>65</sup>

### B. *The Requirement of a Custodial Arrest*

The Supreme Court has premised the authority to search incident to arrest on the fact of a custodial arrest. In *United States v. Robinson*, the Court observed in at least five places in the text of its opinion that a full custody or custodial arrest was at issue.<sup>66</sup> In a footnote, the Supreme Court observed that the court below had distinguished this from a full traffic stop and described a custodial arrest as one where an officer “arrest[s] a subject and subsequently transport[s] him to a police facility for booking.”<sup>67</sup> Similarly, in *Gustafson v. Florida*,<sup>68</sup> the Court emphasized that a custodial arrest was the necessary predicate for a search incident to arrest.<sup>69</sup>

The same emphasis on custodial arrests appears in most of the

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63. See, e.g., *Illinois v. LaFayette*, 462 U.S. 640, 648 (1983) (holding that “it is not ‘unreasonable’ for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures.”); *United States v. Edwards*, 415 U.S. 800, 807 (1974) (holding that a search which would have been proper if made incident to an arrest is also proper if made at the station house).

64. *LaFayette*, 462 U.S. at 646.

65. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1530 (2012) (Breyer, J., dissenting) (citing cases); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (“[T]he strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees’ privacy interests, the searches cannot be considered ‘reasonable’”); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985) (“[S]ecurity cannot justify the blanket deprivation of rights of the kind incurred here.”); *Logan v. Shealy*, 660 F.2d 1007, 1013 (4th Cir. 1981) (strip search of jailed DWI suspect was unreasonable and unconstitutional because it “bore no such discernible relationship to security needs at the Detention Center . . . when balanced against the ultimate invasion of personal rights involved”), *cert. denied*, 465 U.S. 90 (1982); see also *Hill v. Bogans*, 735 F.2d 391, 393-95 (10th Cir. 1984) (following *Logan* and holding unreasonable a strip search of a driver who was arrested on an outstanding bench warrant—which had apparently been withdrawn—relating to a speeding ticket).

66. 414 U.S. at 234-236.

67. *Id.* at 221 n.2. The Court of Appeals, 471 F.2d 1082, 1095 (D.C. Cir. 1972), had held that “the permissible scope of searches incident to routine traffic arrests . . . where the officer intends simply to issue a notice of violation and to allow the offender to proceed, must be governed by the teaching of the Supreme Court as set forth in *Terry*.”

68. 414 U.S. 260 (1973).

69. *Id.* at 263-66.

Court's opinions involving the extent of the area that may be searched incident to his arrest.<sup>70</sup> Although these references suggest an attempt to establish a meaningful line between custodial arrests and situations where an offender is merely given a ticket, summons, or notice to appear,<sup>71</sup> it is not clear beyond doubt that the Court intended the use of the word "custodial" to operate as a limitation on searches incident to arrest.<sup>72</sup> However, there are sound reasons for limiting searches incident to arrest to custodial arrests. First, if an arrest is not custodial, a search incident to that arrest is not a "relatively minor intrusion . . . on a person who by hypothesis has already been subjected to the more serious step of arrest;"<sup>73</sup> it is a major intrusion added to a relatively minor annoyance. Second, most offenses for which citations are issued are of such a nature that no evidence of their commission exists to be found.<sup>74</sup> Third, non-custodial arrests pose less danger to the arresting officer because the officer is only briefly in contact with a suspect who knows he will soon be free to go and who thus has a diminished incentive to destroy evidence or resort to force.<sup>75</sup> Fourth, even though many police officers have been injured in the course of traffic stops,<sup>76</sup> those injuries often take place as the officer approaches the vehicle and before any search could occur. Fifth, when a suspect is not being taken into custody there is no need to search his person in order to ensure that weapons or

70. See, e.g., *Washington v. Chrisman*, 455 U.S. 1, 6-8 & n.3 (1982) (referring to the arresting officer's need to "maintain custody over the arrested person" and the "arresting officer's custodial authority"); *New York v. Belton*, 453 U.S. 454, 460 (1981) (referring to the right of a policeman who makes "a lawful custodial arrest of an occupant of an automobile" to make a contemporary search of the passenger compartment of that automobile incident to that arrest).

71. See Wayne R. LaFave, "Seizure" Typology, *Classifying Detentions of the Person To Resolve Warrant, Grounds, and Search Issues*, 17 MICH. J. L. REF. 417, 440 (1984).

72. Courts have, for some time, recognized a difference between custodial arrests and arrests made by means of a ticket or a summons. See, e.g., *People v. Dandrea*, 736 P.2d 1211, 1215 n.7 (Colo. 1987) (en banc) (distinguishing between protective custody and custodial arrests and stating that "[a]n arrest of a person upon probable cause of having committed a crime for the purpose of taking the person to police facilities for booking is considered a 'custodial arrest.'"); *Pittman v. State*, 541 So. 2d 583, 585 (Ala. Crim. App. 1989) (a traffic stop and "requiring a motorist to sit in a patrol car while the officer completes [a ticket] does not constitute a custodial arrest."). See also *Gustafson*, 414 U.S. at 266 (noting several times that defendant was searched incident to his "custodial arrest"); *Robinson*, 414 U.S. at 236 n.6 (emphasizing that search was incident to a full custody arrest as opposed to the simple issuance of a notice of violation); cf. *Robbins v. California*, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) ("I am not familiar with any difference between custodial arrests and any other kind of arrests.").

73. LAFAVE & ISRAEL, CRIMINAL PROCEDURE, *supra* note 61, § 3.5(b) at 145; cf. *Robinson*, 414 U.S. at 256-57 (Marshall, J., dissenting) (arguing that even in the context of a custodial arrest, the additional intrusion of a search incident thereto is significant).

74. See, e.g., *Knowles v. Iowa*, 525 U.S. 113, 115, 118 (1998) (speeding).

75. See *Robinson*, 414 U.S. at 234-35; see also *Knowles*, 525 U.S. at 117.

76. See *Robinson*, 414 U.S. at 234 n.5.

contraband are not brought into the officer's squad car or into a custodial facility.<sup>77</sup>

Recognizing the force of many of these arguments, the Court held in *Knowles v. Iowa*<sup>78</sup> that there is no right to search incident to arrest if an officer stops a vehicle and only issues a ticket or citation summons.<sup>79</sup> As an alternative, officers may:

order out of a vehicle both the driver, and any passengers, perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous; conduct a "*Terry* patdown" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon.<sup>80</sup>

It is likely that the Court would reach the same result if faced with a case where an individual, not in a vehicle, were stopped and given a citation or ticket.<sup>81</sup> Here again, a *Terry*-type frisk for weapons<sup>82</sup> should be all that is necessary.<sup>83</sup>

### C. *The Effect of Atwater on Search Incident to Arrest Law*

When *Atwater* was decided, the law governing searches incident to vehicle stops, laid down in 1981 in *New York v. Belton*, allowed a policeman who made "a lawful custodial arrest of the occupant of an automobile" to make a contemporary search of the passenger compartment of that automobile incident to that arrest.<sup>84</sup> In addition, the

77. *Virginia v. Moore*, 553 U.S. 164, 177 (2008) ("Officers issuing citations do not face the same danger and we therefore held in *Knowles* . . . that they do not have the same authority to search . . .").

78. 525 U.S. 113 (1998).

79. *See id.* at 118-119.

80. *See id.* at 117 (citations omitted) (citing *Terry v. Ohio*, 392 U.S. 1 (1967)).

81. *Cf. Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (noting that a person not under formal arrest "might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person.").

82. *See Terry*, 392 U.S. at 30 ("[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.").

83. *See, e.g., People v. Clyne*, 541 P.2d 71, 72-74 (Colo. 1975) (where defendant was charged with hitchhiking, the court reaffirmed, in light of *Robinson* and *Gustafson*, a Colorado rule that searches incident to arrests for minor traffic or municipal offenses must be limited to protective pat downs for weapons when the officer reasonably believes the suspect is armed and dangerous).

84. 453 U.S. 454, 460 (1981).

officer could impound the vehicle and inventory all of its contents.<sup>85</sup>

In *Delaware v. Prouse*,<sup>86</sup> the Court held that absent reasonable suspicion, police officers may not stop motorists to check their driver's licenses or registration or use other methods that involve the exercise of "standardless and unconstrained" discretion.<sup>87</sup> However, in *Michigan Department of State Police v. Sitz*,<sup>88</sup> the court held that sobriety checkpoints where every vehicle is stopped are constitutionally permissible.<sup>89</sup> In *City of Indianapolis v. Edmond*,<sup>90</sup> the Court declared unconstitutional the use of vehicle checkpoints to interdict drugs or to obtain evidence of ordinary criminality unrelated to the use of the highways.<sup>91</sup> Despite these restrictions, on average, approximately 18 million drivers are stopped by the police each year throughout the United States.<sup>92</sup> That number would be higher if the police did not choose to ignore the vast majority of minor violations.

There is no way to know how many of these stops were truly made only because of a traffic violation.<sup>93</sup> However, in 1996, in *Whren v. United States*,<sup>94</sup> the Supreme Court held that a traffic stop "is reasonable where the police have probable cause to believe that a traffic violation has occurred" even if the traffic stop is a pretext to stop the vehicle for

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85. *Atwater v. Lago Vista*, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting) (citing *Colorado v. Bertine*, 479 U.S. 367, 374 (1987)).

86. 440 U.S. 648 (1979).

87. *Id.* at 663 (suggesting that it would be permissible to stop all on-coming drivers at a roadblock in order to check their licenses and registrations).

88. 496 U.S. 444, 451 (1990).

89. *Id.* 454-55 (looking at the serious consequences of drunk driving and the number of violators apprehended as a percentage of the cars stopped, and balancing the state's interest in preventing drunken driving and the system's efficacy in advancing that interest against "the degree of intrusion upon individual motorists who are briefly stopped.").

90. 531 U.S. 32 (2000).

91. *Id.* at 41-48 (noting that "the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route"); *cf.* *MacWade v. Kelly*, 460 F.3d 260, 267-74 (2d Cir. 2006) (upholding, under the special needs doctrine, the constitutionality of New York City's program of random, suspicionless, subway baggage searches).

92. In 1999, it is estimated that 19.3 million drivers were stopped by police. ERICA L. SCHMIDT, PATRICK A. LANGAN, PH.D. & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 1999 (Mar. 2002). In 2002, that number fell to about 17 million. ERICA L. SCHMIDT & MATTHEW R. DUROSE, U.S. DEP'T OF JUSTICE: OFFICE OF JUSTICE PROGRAMS, CHARACTERISTICS OF DRIVERS STOPPED BY THE POLICE, 2002 (June 2006) [hereinafter CHARACTERISTICS OF DRIVERS STOPPED BY THE POLICE, 2002].

93. In 2002, eighty-three percent of drivers who were stopped felt they were pulled over for a legitimate reason. CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002, *supra* note 92.

94. 517 U.S. 806 (1996).

some other reason.<sup>95</sup>

The result of *Atwater*, *Belton*, and *Whren*, taken together, was draconian. Because it is almost impossible for any motorist to drive any significant distance without running afoul of one or more traffic laws,<sup>96</sup> *Whren* rendered largely meaningless *Prouse's* limitations on suspicionless, random, stops.<sup>97</sup> In practice, any motorist can be stopped at almost any time. By giving police officers constitutionally unfettered discretion to either issue a citation or to make a custodial arrest after a stop based on probable cause, *Atwater* also rendered largely meaningless *Knowles'* bar on searches incident to a citation-only stop.

Before *Atwater*, an officer who wanted to make a custodial arrest to gain access to a stopped vehicle was constrained by the uncertainty of whether his or her actions were constitutional. In some states, the officer was also constrained by state law.<sup>98</sup> After *Atwater* and *Whren*, it was clear that there are no constitutional constraints on vehicle stops except probable cause. Now, there is always the “possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search.”<sup>99</sup>

An officer determined to investigate a particular individual need only monitor that individual's driving until he inevitably commits a violation.<sup>100</sup> If the officer has constitutionally unfettered discretion to either issue a citation or make a custodial arrest, the requirement of a custodial arrest as a predicate to a search incident to arrest does not limit the arresting officer's authority—it increases the scope of his or her

95. *Id.* at 810, 815.

96. *Id.* at 818 (1996); *State v. Robinson*, 447 S.W.2d 71, 74 (Mo. 1969) (Seiler, P. J., concurring in the result) (“Few drivers . . . can drive any considerable distance without violating some traffic law or ordinance.”).

97. Despite the difficulties in determining whether a stop was pretextual, prior to *Whren* some courts made the effort. *See, e.g., Taglavore v. United States*, 291 F.2d 262, 265 (9th Cir. 1961) (“Where the arrest is only a sham or a front being used as an excuse for making a search, the arrest itself and the ensuing search are illegal.”); *Blazak v. Eyman*, 339 F. Supp. 40, 41-43 (D. Ariz. 1971) (following *Taglavore* and finding Fourth Amendment violation where officers did not stop defendant whose driver's license they knew was suspended until they suspected he had narcotics in his possession and then arrested him for that offense but did not arrest him for the traffic offense).

98. *See Atwater v. Lago Vista*, 532 U.S. 318, 352 (2001) (citing statutes).

99. *United States v. Robinson*, 414 U.S. 218, 248 (1973) (Marshall, J., dissenting).

100. *See Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsberg J., concurring) (quoting opinion of the Arkansas Supreme Court, 16 S.W.3d 551, 552 (Ark. 2000), where that court expressed its “unwillingness ‘to sanction conduct where a police officer can trail a targeted vehicle with a driver merely suspected of criminal activity, wait for the driver to exceed the speed limit by one mile per hour, arrest the driver for speeding, and conduct a full-blown inventory search of the vehicle with impunity.’”).

discretion.<sup>101</sup> The officer can stop the driver and proceed essentially as he or she chooses. If the officer only wants to search the car, but does not necessarily want to take the driver into custody, the officer can seek consent to search the vehicle. If that fails, “[a]ll the officer has to do is announce his intention to arrest and . . . conduct a full search of the person and his belongings and vehicle, . . . [if nothing is] found, the officer can then ‘change his mind’ and issue a citation.”<sup>102</sup> The officer who proceeds in this manner may also search any other person’s belongings that happen to be in the vehicle.<sup>103</sup> Alternatively, the officer can search the vehicle, impound it, conduct another (inventory) search, and transport the driver to a detention center where he and his belongings can be searched and he can be held up to forty-eight hours without seeing a judge.<sup>104</sup> Eventually, if he is released into the general jail or prison population, the driver can be strip-searched.<sup>105</sup>

More questions are raised by cases such as *Berkemer v. McCarty*,<sup>106</sup> where the Court said that the usual traffic stop is more analogous to a so-called *Terry* stop, than to a formal arrest.<sup>107</sup> If this is true, a search incident to that stop/arrest would not be permitted. However, in a footnote the *Berkemer* Court said, “We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a *Terry* stop.”<sup>108</sup> Just what this means is not clear. However, if a custodial arrest, and all that follows, is, after *Atwater*, permissible after a traffic stop on probable cause, anything less should be permissible as well on the theory that the greater necessarily includes the lesser. Subsequent cases have, for the most part, finessed this question.<sup>109</sup>

101. Cf. *People v. Corral*, 498 N.E.2d 287, 291 (Ill. App. Ct. 1986) (absent evidence of “a more serious crime . . . a mere traffic stop cannot justify a full search of a defendant’s vehicle.”).

102. Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. Lago Vista*, 71 *FORDHAM L. REV.* 329, 334 (2002). A search incident to arrest may occur before the arrest. See, e.g., *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (“Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.”); *People v. Avila*, 58 Cal. App. 4th 1069, 1076 (1997) (“[I]t is unimportant whether a search incident to an arrest precedes the arrest or vice versa”).

103. See *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (“Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars.”).

104. *Atwater v. Lago Vista*, 532 U.S. 364, 371 (2001) (O’Connor, J. dissenting); see also *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-59 (1991).

105. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1517 (2012).

106. 468 U.S. 420 (1984).

107. *Id.* at 439.

108. *Id.* at 439 n.29.

109. See, e.g., *Illinois v. Caballes*, 543 U.S. 405 (2005); see also *Arizona v. United States*, 132



Perhaps recognizing the monster it had created, the Court tried in *Arizona v. Gant* to scale back the power of law enforcement officers to search vehicles incident to the custodial arrest of an occupant.<sup>110</sup> In doing so, the Court rejected a rule that was clear and had been widely taught in police academies for twenty-eight years. Under the new rule, “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”<sup>111</sup>

*Gant* raised many more questions than it answered,<sup>112</sup> and made the law of search and seizure more confusing. It will lead to endless litigation and occasional lost evidence until its contours and effects are clarified. Yet, when all is said and done, it is unlikely to have much effect in preserving privacy, in part because it can be easily circumvented by impounding the stopped vehicle and conducting an inventory search of its contents.

Meaningful limits on the power to search incident to arrest require limitations on the power to make custodial arrests.<sup>113</sup> After *Florence*, meaningful limits on the power to search persons brought into correctional facilities also require limits on the power to make custodial arrests.

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S. Ct. 2492, 2529 (2012) (“An investigative stop, if prolonged, can become an arrest and thus require probable cause”); *see also* State v. Tucker, 595 P.2d 1364, 1370-71 (1979) (holding that temporary two-hour detention at police station of defendant who was stopped for riding his bicycle through a stop sign was reasonable—under statute which authorized citation or full custody arrest—to determine offender’s identity); *cf.* United States v. Everett, 601 F.3d 484, 491-93 (6th Cir. 2010) (rejecting a no prolongation rule in traffic stop cases but observing that such a rule is arguably necessary to prevent abuse of the wide discretion to stop errant motorists that police officers already enjoy under *Whren*); Layton City v. Oliver, 139 P.3d 281, 285-86 (Utah 2006) (the reasonableness of a detention depends, in part, on the seriousness of the offense being investigated, but three and a half hours was too long where motorist was stopped for non-functioning brake light).

110. *Arizona v. Gant*, 556 U.S. 332 (2009).

111. *Id.* at 351.

112. *See* YALE KAMISAR, ET AL, MODERN CRIMINAL PROCEDURE 405-407 & nn.1-5 (asking rhetorically some of questions raised by *Gant*) (13th ed. 2012) [hereinafter KAMISAR ET AL, MODERN CRIMINAL PROCEDURE].

113. *See* State v. Dangerfield, 795 A.2d 250, 260 (N.J. 2002) (“[T]he Rule modification authorized by this opinion will diminish the frequency of custodial arrests for [certain] . . . offense[s] and therefore reduce . . . the frequency of searches related to such arrests”); *see also* Thomas R. Folk, *The Case for Constitutional Constraints Upon The Power to Make Full Custody Arrests*, 48 U. CINN. L. REV. 321 (1979); Arthur Mendelson, *Arrests for Minor Traffic Violations*, 19 CRIM. L. BULL. 501, 503 (1983).

IV. LIMITING THE IMPACT OF *ATWATER*<sup>114</sup>

Limits on the power of the police to make custodial arrests and to conduct strip searches could be imposed through legislation, or by rules limiting police departments in the exercise of their discretion. Limits could also take the form of a variable probable cause standard which makes actions directed at minor offenders more difficult, but makes actions directed against extremely serious offenders easier. Finally, *Atwater* could be limited, or overruled, by a new assessment of constitutional reasonableness.

A. *Limiting the Power to Make Custodial Arrests Through Legislation*

In *Atwater*, the Court observed that some states had statutes limiting warrantless arrests for some minor offenses,<sup>115</sup> and said it is easier to impose a minor offense limitation on custodial arrests by statute than to derive it from the constitution. Moreover, said the Court, it is in the interest of the police to limit such arrests because they are time consuming and costly and divert officers from other tasks.<sup>116</sup> Legislation, however, has proven difficult to enact. “For example, in Texas, following the *Atwater* decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.”<sup>117</sup> In any event, any legislation will have less force after *Virginia v. Moore*,<sup>118</sup> where the Court made it clear that a state law constraint was not the equivalent of a constitutional constraint.<sup>119</sup> Limits on the power to make custodial arrests could also be achieved through state court rules<sup>120</sup> and through state court judicial interpretations of state constitutional

114. Because *Atwater* dealt with a misdemeanor, it could be argued that ordinance violations, infractions, civil offenses, and the like are exempt from its reach.

115. *Atwater v. Lago Vista*, 532 U.S. 318, 352 (2001) (citing statutes); see also OHIO REV. CODE § 2935.26 (West 2013).

116. *Atwater*, 532 U.S. at 352.

117. Frase, *supra* note 102, at 415 (citing Michelle Deitich, *Veto Risks Texans’ Civil Rights*, DALLAS MORNING NEWS, July 1, 2001, at 5J).

118. 553 U.S. 164 (2008).

119. *Id.* at 172-78 (where custodial arrest was made in violation of state law that allowed only a summons (VA. CODE ANN. § 19.2-74 (West 2013)) evidence found in the course of a search incident to that illegal arrest was not rendered inadmissible by the Fourth Amendment).

120. See, e.g., *State v. Dangerfield*, 795 A.2d 250, 260 (N.J. 2002) (“the Rule modification authorized by this opinion will diminish the frequency of custodial arrests for [certain] . . . offense[s] and therefore reduce . . . the frequency of searches related to such arrests”); Frase, *supra* note 102, at 413 (citing MINN. R. CRIM. P. 6.01(1) and MINN. R. CRIM. P. 3.01).

provisions.<sup>121</sup>

Prior to *Florence*, some courts had held strip searches of persons detained for minor offenders unconstitutional.<sup>122</sup> Some states had banned them by statute.<sup>123</sup> Now they seem likely to become the norm, at least where a detainee is placed in a facility's general population.<sup>124</sup>

*B. Limiting Custodial Arrests by a Constitutional Requirement That Police Follow Standardized Procedures in Deciding When to Make Custodial Arrests for Minor Offenses*

The *Atwater* Court rejected the idea of “a simple tiebreaker for the police to follow . . . : if in doubt do not arrest,” because, *inter alia*, it “would boil down to something akin to a least-restrictive-alternative limitation . . . generally thought inappropriate in working out Fourth Amendment protection.”<sup>125</sup> Often, when the Court has rejected a least intrusive alternative requirement, it has instead required that officers follow standardized procedures.<sup>126</sup> The *Atwater* Court, however, gave

121. Frase, *supra* note 102, at 414 (citing *State v. Bauer*, 36 P.2d 892 (Mont. 2001) and *State v. Brown*, 792 N.E.2d 175, 179 (Ohio 2003)).

122. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1530 (2012) (Breyer, J., dissenting) (citing cases).

123. *Id.* (Breyer, J., dissenting) (citing statutes); see, e.g., 725 ILL. COMP. STAT. 5/103-1(c) (West 2013) (“No person arrested for a traffic, regulatory, or misdemeanor offense, except in cases involving weapons or a controlled substance, shall be strip searched . . .”).

124. The *Florence* Court noted that the case before it did “not require the Court to rule on the types of searches that would be reasonable in instances where, for example, a detainee [whose detention has not yet been reviewed by a magistrate or other judicial officer] will be held without assignment to the general jail population and without substantial contact with other detainees.” *Florence*, 132 S. Ct. at 1522-23 (observing that “[t]his describes the circumstances in *Atwater* . . . where [o]fficers took *Atwater*’s ‘mug shot’ and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on \$310 bond.”).

125. *Atwater v. Lago Vista*, 532 U.S. 318, 350 (2001).

126. See, e.g., *Illinois v. LaFayette*, 462 U.S. 640, 647-48 (1983) (holding that it was “not ‘unreasonable’ for police as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures” and stating that it was unnecessary to consider whether less intrusive procedures could be used to achieve the state’s goals because “standardized inventory procedures are appropriate to serve the legitimate governmental interest at stake here.”); *Colorado v. Bertine*, 479 U.S. 367, 374 (1987) (holding that an inventory of a van after the driver was arrested for driving while under the influence and before the van was taken to an impoundment lot was proper and stating that “[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means. . . . [Instead,] reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment.”) (quoting *LaFayette*, 462 U.S. at 647); *Florida v. Wells*, 495 U.S. 1, 4-5 (1990) (invalidating an inventory of a locked suitcase found in an impounded vehicle because “the Florida Highway patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search,” and suggesting that it did not matter what the policy was; it only mattered that there be a policy.).

the police unbridled discretion to choose between custodial and non-custodial responses when making arrests.<sup>127</sup>

Any time an officer has probable cause he or she must make choices. These include whether to ignore or stop the offender and whether to warn him or arrest him. The decision whether to give the offender a citation or make a custodial arrest is one more discretionary call “along the continuum from arrest to incarceration.”<sup>128</sup> Not all of these choices can be governed by rules; the officer must have some discretion to make decisions on the street.

The Supreme Court has been unenthusiastic about giving officers unfettered discretion in making choices.<sup>129</sup> However, the Court has distinguished independent legal concepts that directly relate to the suppression of crime (such as the decision to arrest) from incidental procedures (such as inventory searches) following a lawful arrest,<sup>130</sup> and has allowed the police to exercise more discretion where their choices involve independent legal concepts but less discretion where their choices involve incidental procedures. The decision to turn an arrest into a custodial arrest is somewhere along the continuum from a purely law enforcement related decision such as the decision to arrest and an administrative choice such as the decision about what things to inventory.

Whether the decision to make a custodial arrest can fairly be characterized as incidental or not, it “carries with it grave potential for

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127. *Cf. Atwater*, 532 U.S. at 366 (O’Connor, J., dissenting) (proposing a rule that “when there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is ‘able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion’ of a full custodial arrest.”).

128. *Lafayette*, 462 U.S. at 644.

129. *See, e.g., Steagald v. United States*, 451 U.S. 204, 221 (1981) (“An arrest warrant, [if] . . . invoked as authority to enter the homes of third parties, . . . [is] like a writ of assistance. . . . [It] specifies only the object of a search— . . . and leaves to the unfettered discretion of the police the decision as to which particular homes should be searched. We do not believe that the Framers of the Fourth Amendment would have condoned such a result.”); *Texas v. Brown*, 443 U.S. 47, 51 (1979) (stating that the Court’s “central concern in balancing . . . competing considerations [relating to the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty] in a variety of [Fourth Amendment] settings has been to assure that an individual’s reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field.”); *Delaware v. Prouse*, 440 U.S. 648, 661 (1979) (the decision to stop a vehicle may not depend solely on “standardless and unconstrained discretion”).

130. *See, e.g., Lafayette*, 462 U.S. at 644 (“A so-called inventory search is not an independent legal concept but rather an incidental administrative step following arrest and preceding incarceration.”).

abuse.”<sup>131</sup> An officer’s decision to exercise his discretion to make a custodial arrest should be guided by standardized procedures to ensure that the discretion does not turn into an occasion for harassment, pre-textual, or discriminatory activities.<sup>132</sup>

C. *Limiting Atwater by Factoring the Seriousness of the Offense into Probable Cause Equations*

In *Devenpeck v. Alford*,<sup>133</sup> decided after *Atwater*, the Supreme Court said, “a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed.”<sup>134</sup> In effect, this is the approach the Court took in *Atwater*. Probable cause, however, is not a self-defining term. Like many legal concepts, it is a far easier term to articulate than to define. On several occasions, the Supreme Court has said that probable cause is “a single familiar standard.”<sup>135</sup> However, it is, at most, a single familiar phrase; its meaning is neither single nor familiar.<sup>136</sup>

131. *Atwater*, 532 U.S. at 372 (O’Connor, J., dissenting) (“as the recent debate over racial profiling demonstrates . . . a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual”).

132. *See Brown*, 443 U.S. at 51 (“[T]he Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society’s legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.”); *Colorado v. Bertine*, 479 U.S. 367, 376-77 (1987) (Marshall J., dissenting) (“[W]e have consistently emphasized the need for . . . set procedures: ‘standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.’”).

133. 543 U.S. 146 (2004).

134. *Id.* at 153.

135. *See Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (“A single familiar standard [of probable cause] is essential to guide police officers.”).

136. *See Craig S. Lerner, The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 976-78 (2003) (discussing the realities surrounding these terms).

Confusion surrounding the meaning of probable cause is increased by the use of that phrase in many non-Fourth Amendment settings. For example, probable cause is sometimes said to be necessary before a defendant will be bound over at a preliminary hearing. *See, e.g., People v. Riddle*, 489 N.E.2d 1176, 1179 (Ill. App. Ct. 1986) (stating that “[t]he purpose of a preliminary hearing is to ensure that a criminal defendant is not held without a prompt showing of probable cause” and adding that a “judicial determination of probable cause as a prerequisite to an extended restraint of liberty following an arrest is required by the Fourth Amendment”) (citing *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975)).

Some courts have defined preliminary hearing probable cause as essentially identical to Fourth Amendment probable cause. *See, e.g., People v. Nygren*, 696 P.2d 270, 272 (Colo. 1985) (“The . . . preliminary hearing . . . probable cause standard requires only that the prosecution present evidence sufficient to persuade a person of ordinary prudence and

By its terms, the Fourth Amendment commands that “no warrants shall issue, but upon probable cause . . . .”<sup>137</sup> In addition, the Supreme Court has held that probable cause is a prerequisite to certain warrantless searches and seizures.<sup>138</sup>

Courts and commentators have occasionally expressed the view that the seriousness of the offense under investigation should be relevant in determining the existence of probable cause.<sup>139</sup> Whether this should be so is a complex and difficult question whose answer turns, in the first instance, on the nature of probable cause.

### 1. The Nature of Probable Cause

In the late 1960s and early 1970s, several individual Supreme Court Justices suggested,<sup>140</sup> and the Court sometimes held, that probable cause

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caution to a reasonable belief that the defendant committed the crimes charged.”). However, Fourth Amendment probable cause does not require the same “evidence of each element of the offense as would be needed to support a conviction.” *Adams v. Williams*, 407 U.S. 143, 149 (1972). It also “does not involve speculation about the outcome of a trial on the merits.” *United States v. Atkinson*, 450 F.2d 835, 838 (5th Cir. 1971) (en banc). Thus, the preliminary hearing standard for probable cause is necessarily different from that applicable in search and seizure settings. *See, e.g., Williams v. Kobel*, 789 F.2d 463, 467-69 (7th Cir. 1986) (interpreting Illinois law and observing that “[a] finding of no probable cause at a preliminary hearing, therefore, may very well be made, and often is made, even though there *was* probable cause to arrest the defendant.”); *State v. Berby*, 260 N.W.2d 798, 801 (Wisc. 1978) (“The probable cause that is required for a bindover is greater than that required for the issuance of an arrest warrant, but guilt beyond a reasonable doubt need not be proven”).

Because the preliminary hearing is directed in part toward screening out cases where prosecution is not warranted, the court’s determination there is roughly analogous to a trial judge’s ruling on a motion for a directed verdict. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *see also Myers v. Commonwealth*, 298 N.E.2d 819, 823-24 (Mass. 1973); *Commonwealth v. Lacey*, 496 A.2d 1256, 1260 (Pa. Super. Ct. 1985). Consequently, it is more accurate to say that a prima facie case, sufficient if un rebutted to warrant conviction, is required. *See, e.g., Lacey*, 496 A.2d at 1260.

The term probable cause has also been used in the grand jury setting. *See, e.g., 725 ILL. COMP. STAT. ANN. 5/112-4 (d)* (West 2012) (indictment should be returned if evidence before grand jury establishes “probable cause that a person has committed an offense”). However, generally, a prima facie case, not probable cause, is required before a grand jury can return an indictment. *See CAL. PENAL CODE § 939.8* (West 2013).

137. U.S. CONST. amend. IV.

138. *See, e.g., United States v. Watson*, 423 U.S. 411, 417 (1976) (probable cause is required for a warrantless arrest in a public place).

139. *See, e.g., Edward L. Barrett Jr., Personal Rights, Property Rights and the Fourth Amendment*, 1960 SUP. CT. REV. 46 (1960); *Llaguno v. Mingey*, 763 F.2d 1560, 1565-66 (7th Cir. 1985).

140. *See, e.g., Gooding v. United States*, 416 U.S. 430, 464 (1974) (Marshall, J., dissenting) (suggesting that “searches conducted in the middle of the night involve a greater intrusion than ordinary searches and therefore [the constitution may] require a greater justification”); *Berger v. New York*, 388 U.S. 41, 69 (1967) (Stewart, J., concurring) (“The standard of reasonableness

is a concept which could vary with the magnitude of the intrusion and with the interests at issue.<sup>141</sup> By 1987, though, the Court had moved away from the variable probable cause concept. Instead, it separated out “probable cause” for “administrative warrants,” where “we use [the term probable cause] as referring not to a quantum of evidence, but merely to a requirement of reasonableness,”<sup>142</sup> and contrasted this use with the more usual use of “probable cause” in criminal cases to “refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as ‘reasonable suspicion.’”<sup>143</sup> Having separated out the administrative search cases, the Court tried to move toward a uniform and fixed view of probable cause in criminal cases.<sup>144</sup> Despite these efforts, however, probable cause remains “an exceedingly difficult concept to objectify.”<sup>145</sup>

Traditional probable cause in criminal cases—the kind of probable cause necessary to obtain what the Court has termed a judicial

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embodied in the Fourth Amendment demands that the showing of justification match the degree of intrusion. By its very nature electronic eavesdropping for a 60-day period, even of a specified office, involves a broad invasion of a constitutionally protected area. Only the most precise and rigorous standard of probable cause should justify an intrusion of this sort.”)

141. *Michigan v. Tyler*, 436 U.S. 499, 506 (1978) (“The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search.”); *see also* *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 320-21 (1978) (probable cause for an administrative search may be based on evidence of specific violations or on a showing that the proposed search comports with a legislative scheme); *Camara v. Municipal Court*, 387 U.S. 523, 530, 538 (1967) (holding that because a building inspection is “a less hostile intrusion than the typical policeman’s search . . . probable cause to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied.”).

142. *See Camara*, 387 U.S. at 538-39 (holding that certain kinds of administrative searches could be conducted on the basis of a type of probable cause which was different from the probable cause ordinarily required to conduct a search or seizure). The *Camara* Court’s use of the phrase “probable cause” may have stemmed from an underlying desire to require a warrant. Once committed to requiring the warrant the Court saw no escape, given the Fourth Amendment’s language, from holding that the warrant could only issue upon a showing of probable cause.

143. *See Griffin v. Wisconsin*, 483 U.S. 868, 878 n.4 (1987) (distinguishing *Camara* and *Barlow’s Inc.*). Although *Terry v. Ohio*, 392 U.S. 1 (1967), relied heavily on *Camara*, *Terry* did not adopt a lesser standard of probable cause, but instead held that some Fourth Amendment activities, particularly those not subjected to the warrant requirement, are not subject to the probable cause requirement. *Terry*, 392 U.S. at 20; *see also* *Ybarra v. Illinois*, 444 U.S. 85, 93 (1979) (“The *Terry* case created an exception to the requirement of probable cause”).

144. *See, e.g., New York v. P.J. Video*, 475 U.S. 868, 875 & n.6 (1986) (holding that “an application for a warrant authorizing the seizure of materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally” and rejecting the argument that a “‘higher’ standard of probable cause” should apply to warrants directed at the seizure of books and films).

145. 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.2 at 24 (quoting Cook, *Probable Cause To Arrest*, 24 VAND. L. REV. 317 (1971)).

warrant<sup>146</sup>—has been defined from four perspectives. First, probable cause has often been defined in terms of the mental state of the police officer about to engage in, or the judicial officer deciding whether to authorize, a Fourth Amendment activity. Second, probable cause has frequently been defined in terms of probabilities. Third, probable cause has often been said to be “the best compromise that has been found for accommodating [the] often opposing interests’ in ‘safeguard[ing] citizens from rash and unreasonable interferences with privacy’ and ‘in seek[ing] to give fair leeway for enforcing the law.’”<sup>147</sup> More than one of these definitions has appeared in the same case<sup>148</sup> and all of them seem to be encompassed within a fourth definition, the totality of the circumstances, that is the overarching standard. Looking at each of these as a separate test reveals that the seriousness of the offense impacts differently on each.

## 2. Definitions of Probable Cause

### a. Probable Cause as a Mental State

Probable cause has often been defined in terms of the state of mind that should be possessed by a police officer about to engage in, or a judicial officer about to authorize, a Fourth Amendment activity. Frequently, it has been said that “[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”<sup>149</sup> That belief

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146. See, e.g., *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2081 (2011) (referring to “a properly issued judicial warrant”); *Griffin*, 483 U.S. at 877-78 (referring to “constitutionally mandated judicial warrants” and distinguishing them from administrative warrants).

147. *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

148. Occasional decisions acknowledge that there is more than one test for probable cause. See, e.g., *United States v. Watson*, 423 U.S. 411, 435 n.1 (1976) (Marshall, J., dissenting) (referring to objective and subjective standards of probable cause). Whatever the precise standard, it is clear that the probable cause determination is significantly different from trial type fact-finding efforts. Perhaps most fundamentally, the probable cause determination is *ex parte*. In addition, Fourth Amendment probable cause does not require the same “evidence of each element of the offense as would be needed to support a conviction.” *Adams v. Williams*, 407 U.S. 143, 149 (1972). Finally, “a finding of ‘probable cause’ may rest upon evidence which is not legally competent in a criminal trial.” *United States v. Ventresca*, 380 U.S. 102, 107-08 (1969) (citing cases); *Brinegar*, 338 U.S. at 174, n.12 (“the ordinary rules of evidence are generally not applied in *ex parte* proceedings”); *Gray v. State*, 507 So. 2d 1026, 1027 (Ala. Crim. App. 1987) (“[I]nformation which would be inadmissible at trial on hearsay grounds may be used to show probable cause”), *cert. denied*, 507 So. 2d 1026 (Ala. 1987) (quoting 1 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, at 469).

149. See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Brinegar*, 338 U.S. at 175).



must be objectively reasonable.<sup>150</sup>

Probable cause to arrest has been said to be present when there is substantial evidence that a crime has been committed and that the person to be arrested committed it<sup>151</sup> or, when “the facts and circumstances within [the arresting officer’s] knowledge and of which he had reasonably trustworthy information are sufficient to warrant a man of reasonable caution in the belief that” the person to be arrested had committed or was committing an offense.<sup>152</sup> Probable cause to search has been said to be present when “the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found” in the place to be searched.<sup>153</sup>

Efforts to define probable cause in terms of the intensity of someone’s belief in another’s guilt necessarily result in vague definitions. Moreover, the difficulties inherent in communicating intelligently a sound method of analyzing the intensity of one’s belief<sup>154</sup> make it difficult to apply any definitions to specific factual situations.<sup>155</sup>

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150. *Devenbeck v. Alford*, 543 U.S. 146, 152-53 (2004); *Pringle*, 540 U.S. at 371; *see also* *Whren v. United States*, 517 U.S. 806, 813 (1996) (reasonableness cannot depend on the subjective motivation of the police officer).

151. *Pringle*, 540 U.S. at 370 (noting that there was no question that a felony had been committed and observing that the only question was whether the arresting “officer had probable cause to believe that Pringle committed that crime.”); *see also* FED. R. CRIM. P. 4(a) (“If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant.”).

152. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 369 (2009) (quoting *Brinegar*, 338 U.S. at 175); *Adams*, 407 U.S. at 148 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *see also* *Wong Sun v. United States*, 371 U.S. 471, 479 (1963) (referring to the quantum of evidence which would constitute probable cause as the amount which would generate this belief).

153. *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *see also* *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n.6 (1978) (“Two conclusions necessary to the issuance of the warrant must be supported by substantial evidence: that the items sought are in fact seizable by virtue of being connected with criminal activity, and that the items will be found in the place to be searched.”) (citing authorities).

154. *See In re Winship*, 397 U.S. 358, 369 (1970) (Harlan J. concurring) (quoting 9 J. WIGMORE, EVIDENCE 325 (3d. ed. 1940)).

155. Courts have often observed that attempts to explain the term “reasonable doubt” are usually unhelpful for this same reason. *See, e.g.,* *Holland v. United States*, 348 U.S. 121, 140 (1954); *United States v. Hanson*, 994 F.2d 403, 408 (7th Cir. 1993) (“The trial court should not attempt to define reasonable doubt because “[a]n attempt to define reasonable doubt presents a risk without any real benefit.”) (quoting *United States v. Hall*, 854 F.2d 1036, 1039 (7th Cir. 1988)); *see also* *United States v. Moss*, 756 F.2d 329, 333 (4th Cir. 1985) (recognizing that “little can be gained from attempts to define reasonable doubt” and admonishing district courts not to do so, but holding that “doing so does not require reversal”); *cf. Victor v. Nebraska*, 511 U.S. 1, 18 (1994) (allowing definition of reasonable doubt as “such a doubt as would cause a reasonable and prudent person, in one of the graver and more important transactions of life, to pause and hesitate before . . .

If probable cause is a single standard defined solely in terms of the mental state of an objectively reasonable person who is attempting to determine whether it is present, the seriousness of the offense under investigation will ordinarily be of little relevance to the probable cause determination. Occasionally, the nature of the offense could affect the way an observer perceives and interprets available information. More often, the seriousness of a suspected offense may be relevant to the intensity of an official's desire to act. These factors, however, impact differently on different people and should be of little relevance in determining how an objectively reasonable person would feel or act.

#### b. Probable Cause as a Probability

The Supreme Court has often said that “[t]he probable-cause standard . . . deals with probabilities.”<sup>156</sup> Probable cause has been said to “require . . . only a probability or substantial chance of criminal activity, not an actual showing of such activity.”<sup>157</sup> It does not mean a *prima facie* case,<sup>158</sup> it “means less than evidence which would justify . . . conviction, [but] more than bare suspicion,”<sup>159</sup> or reasonable

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acting”); *United States v. Wallace*, 461 F.3d 15, 30 (1st Cir. 2006) (approving trial judge’s statement that reasonable doubt “does not mean . . . beyond all doubt or beyond any conceivable shadow of a doubt.”); Federal Judicial Center Committee to Study Criminal Jury Instructions, *Pattern Juror Instructions*, Instr. 21 (Federal Judicial Center 2008); Henry A. Diamond, *Reasonable Doubt: To Define to Not to Define*, 90 COLUM. L. REV. 1716, 1723 (1990) (the words “reasonable doubt” confuse jurors).

156. See, e.g., *Pringle*, 540 U.S. at 371; see also *Brinegar*, 338 U.S. at 175 (“in dealing with probable cause . . . we deal with probabilities.”). On the use of mathematics and probability theory in criminal trials, see generally Laurence H. Tribe, *Trial By Mathematics, Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

157. *Illinois v. Gates*, 462 U.S. 213, 245 n.13 (1983); see also *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 371 (“fair probability” or “substantial chance”).

158. *Gates*, 462 U.S. at 235 (“only the probability, and not a *prima facie* showing, of criminal activity is the standard of probable cause.”) (quoting *Spinelli v. United States*, 393 U.S. 410, 419 (1969)); *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813) (expressly rejecting the argument that probable cause means *prima facie* evidence); *United States v. Travisano*, 724 F.2d 341, 346 (2d Cir. 1983) (probable cause requires “only a probability and not a *prima facie* showing of criminal activity”); *Commonwealth v. Jones*, 484 A.2d 1383, 1387 (Pa. 1984) (“probable cause [to issue a search warrant] is based on a finding of the probability, not a *prima facie* showing of criminal activity”); *State v. Bates*, 495 A.2d 422, 425 (N.J. Super. Ct. App. Div. 1985) (“probable cause need not equal the *prima facie* case required to sustain a conviction.”).

159. *Brinegar*, 338 U.S. at 175; see also *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (“Probable cause means . . . more than bare suspicion, but less than virtual certainty [and] . . . describes not a point but a zone within which the graver the crime the more latitude the police must be allowed.”); cf. *Locke*, 11 U.S. (7 Cranch) at 348 (probable cause “means less than evidence which would justify condemnation” and “imports a seizure made under circumstances which warrant suspicion”); Joseph D. Grano, *Probable Cause and Common Sense: A Reply To The Critics of Illinois v. Gates*, 17 U. MICH. J. L. REFORM 465, 478-95 (1984) (tracing the history of probable

suspicion.<sup>160</sup> However, probable cause does not appear to refer to any particular level of probability.

Despite occasional suggestions that probable cause is synonymous with a more likely than not level of certainty,<sup>161</sup> the vast majority of authorities describe probable cause<sup>162</sup> in general terms. Thus, in *Texas v.*

cause and suggesting that the early English common law equated probable cause with little more than suspicion, while the First Congress, which proposed the Bill of Rights, viewed probable cause as the equivalent of a “focused suspicion”).

160. See *Griffin v. Wisconsin*, 483 U.S. 868, 877 n.4 (1987) (outside the administrative law context, “probable cause” refers to “a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as ‘reasonable suspicion’”). In *Dumbra v. United States*, 268 U.S. 435, 441 (1925), the Court held that issuance of a search warrant requires “reasonable grounds . . . for the belief that the law was being violated on the premises to be searched” and quoted with approval from *Stacey v. Emory*, 97 U.S. 642, 645 (1878), where the Court characterized probable cause as “a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged.” This definition is still in use in some settings in some states. See, e.g., *Redican v. K Mart Corp.*, 734 S.W. 2d 864, 869 (Mo. Ct. App. 1987) (suit for malicious prosecution) (quoting *Palermo v. Cottom*, 525 S.W.2d 758, 764 (Mo. Ct. App. 1975)). The *Stacey* Court also said probable cause is “such a state of facts as would lead a man of ordinary caution to believe, or to entertain an honest and strong suspicion, that the person is guilty.” *Stacey*, 97 U.S. at 645.

161. See, e.g., *State v. Brown*, 562 A.2d 1057, 1059 n.2 (Vt. 1999) (“more likely than not” is the test, “where the pertinent inquiry is whether evidence of a crime will be found in particular place”); *State v. Johnson*, 422 So. 2d 1125, 1127 (La. 1982) (Probable cause for an arrest exists when it is “more probable than not that the defendant’s activity consisted of criminal behavior” and holding that an officer who saw defendant leave a narcotics outlet, remove a gun from his waist band, and throw it on front seat of car had “reasonable cause to believe that it was more probable than not” the defendant “had been carrying the weapon concealed on his person”); *People v. Triggs*, 506 P.2d 232 (Cal. 1973) (en banc) (events equally consistent with innocence or with criminal activity “cannot afford the police probable cause to search.”); *People v. Rosales*, 237 Cal. Rptr. 558, 561 (Cal. Ct. App. 1987) (“more evidence for than against”); Steven Duke, *Making Leon Worse*, 95 YALE L. J. 1405, 1418 n.100 (1986); William Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L. J. 365, 390-94 (1981) (suggesting an economic efficiency theory that defines probable cause as more likely than not); Kathryn A. Buckner, Note, *School Drug Tests: A Fourth Amendment Perspective*, 1987 U. ILL. L. REV. 275, 284 (1987) (stating, without citing any decisions, that “[m]ost of the Court’s early opinions have adopted a ‘more probable than not’ test.”).

The more likely than not formula has also been invoked in probable cause determinations made in preliminary hearings. See, e.g., *State v. Sheppard*, 581 P.2d 549, 551 (Or. Ct. App. 1978). Without analyzing the question, the Supreme Court has said that “preponderance of the evidence” is synonymous with “more likely than not.” *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

The Supreme Court has said that the kind of reasonable suspicion that will justify a Terry stop “is considerably less than proof of wrongdoing by a preponderance of the evidence . . . [and] is obviously less demanding than that [required] for probable cause.” *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

162. Occasionally, it is claimed that the use of the word “probable” is evidence that “more likely than not” is the proper level of certainty. See, e.g., Duke, *supra* note 161, at 1418 n.100; *State v. Jones*, 417 So. 2d 788, 793 (Fla. Dist. Ct. App. 1982) (Coward, J., concurring) (probable means “more likely than not”). However, standard dictionary definitions of “probable” usually

*Brown*,<sup>163</sup> a plurality of the Supreme Court expressly stated that probable cause does not mean more likely than not.<sup>164</sup> Rather, said the *Brown* plurality, a “practical, non-technical” probability . . . is all that is required.”<sup>165</sup> That same year, in *Illinois v. Gates*,<sup>166</sup> the Supreme Court said that probable cause to search exists when a magistrate finds, based on “the totality-of-the-circumstances,” that “there is a fair probability that contraband or evidence of a crime will be found in a particular place.”<sup>167</sup>

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.”<sup>168</sup> Thus, “[f]inely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence . . . have no place in the [probable cause] decision [and] . . . an effort to fix some general, numerically precise degree of certainty

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make no reference to “more likely than not” and define “probable” as “likely” or based on adequate or fairly convincing, but not conclusive, evidence. *See, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY (2002). Even before *Gates*, some courts had expressly held that the Fourth Amendment’s use of the word “probable” in the phrase “probable cause” does not indicate that probable cause means “more likely than not” or “by a preponderance of the evidence.” *See, e.g.*, *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979).

In formulating its Model Code of Pre-Arrest Procedure, the American Law Institute rejected the use of the term “probable cause” because it suggests that an arrest or search can only be made if guilt appears more probable than not. *See AMERICAN LAW INSTITUTE A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE*, 292-296, § 120 commentary (1975).

163. 460 U.S. 730 (1983).

164. *Id.* at 742. Other courts have also rejected the more likely than not test. *See, e.g.*, *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir. 1985) (The probable cause requirement does “not demand any showing that such a belief [that a crime is occurring] be correct or more likely true than false.”) (quoting *Brown*, 460 U.S. at 742); *United States v. Hendershot*, 614 F.2d 648, 654 (2d Cir. 1980) (stating that the “the more likely than not” standard is “improper”); *People v. Hearty*, 644 P.2d 302, 310 (Colo. 1982) (expressly rejecting the more probable than not standard); *Darden v. State*, 571 So.2d 1272, 1279 (Ala. Crim. App. 1990) (“[N]either certainty nor a 50% plus probability is demanded by the concept of probable cause”) (quoting *Mewbourn v. State*, 570 So.2d 805 (Ala. Crim. App. 1990)); *see also Gramenos v. Jewel Cos.*, 797 F.2d 432, 438 (7th Cir. 1986) (stating, in the context of a civil suit based on a lack of probable cause to arrest, that probable cause “is less than a rule of more-likely-than-not, but how much less depends on the circumstances.”); *cf.* 2 LAFAYETTE, SEARCH AND SEIZURE, *supra* note 57, § 3.2(e), at 69 (suggesting that “the question of whether probable cause to arrest means more-probable-than not . . . is still open.”).

165. *Brown*, 460 U.S. at 742 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

166. 462 U.S. 213 (1983).

167. *Id.* at 238; *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 371 (2009) (“fair probability” or “substantial chance”).

168. *Maryland v. Pringle*, 540 U.S. 366, 370-71 (2003) (quoting *Gates*, 462 U.S. at 232); *see also Massachusetts v. Upton*, 466 U.S. 727, 732 (1984) (observing that in *Gates* “[w]e did not merely refine or qualify the ‘two-pronged test.’ We rejected it as hypertechnical and divorced from” reality and substituted the totality of the circumstances approach.).

corresponding to ‘probable cause’ may not be helpful.”<sup>169</sup> In *Maryland v. Pringle*,<sup>170</sup> the Court made this point again, saying that probable cause is “incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.”<sup>171</sup>

*Brown, Gates, and Pringle* should have sounded the death knell of the more likely than not test. Nonetheless, that standard will, in some cases, be a useful starting point for analysis. By itself, however, it is unlikely to lead to the resolution of individual cases. Even in the context of probable cause to arrest, which entails merely determining the likelihood that a particular individual committed an offense,<sup>172</sup> few cases can be easily reduced to the level of simplicity required by a more likely than not test.<sup>173</sup> For example, if a police officer saw an individual carrying a cup and the only question was whether that individual was in violation of some ordinance barring the carrying of open container of alcohol, a more likely than not test might be a useful aid in analyzing the

169. *Gates*, 462 U.S. at 235; see also *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 379.

170. 540 U.S. 366 (1970).

171. *Id.* at 371. See also *People v. Rosales*, 237 Cal. Rptr. 558, 561 (Cal. Ct. App. 1987) (the probable cause standard “cannot be applied with mathematical precision, or according to a set formula”). Most commentators seem to agree that properly interpreted the case law does not fix a precise, inflexible, standard of probable cause. See, e.g., Donald Dripps, *More on Search Warrants, Good Faith, and Probable Cause*, 95 YALE L. J. 1424, 1429 (1986) (“Current law describes the substantive standard as ‘more probable than not’ under some circumstances and as ‘somewhat less than more probable than not’ under other circumstances.”).

172. Professor LaFave has said that the Supreme Court’s decisions suggest that probable cause to arrest does not exist “unless the information at hand singles out one individual.” 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.2(e) at 68; see also Grano, *supra* note 159, at 499 (observing that the common law of arrest did not require much suspicion, but did require that some degree of suspicion be focused on a specific individual); cf. *People v. Masters*, 508 N.E.2d 1163, 1169 (Ill. App. Ct. 1987) (warrantless entry into room upheld where probable cause existed that some occupant was committing an offense because there was LSD in the apartment). Neil Ackerman, Comment, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U. L. REV. 85, 107-09 (1981).

173. A more likely than not test would render unconstitutional those arrests for investigation that are made on the basis of less than probable cause. 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.2 at 71-76 (noting investigative function of arrests and saying that such arrests can be made on the basis of less evidence than ordinary arrests); *People v. Lee*, 502 N.E.2d 399, 404 (Ill. App. Ct. 1986) (“since arrests may serve an investigative purpose, they are not limited to situations where the facts indicate that it is more probable than not that the suspect has committed the crime”); see also *State v. Gant*, 490 S.W.2d 46, 47-48 (Mo. 1973) (suggesting that it was proper to pick up robbery suspect for further investigation in order to put him in lineup and to determine if the only living victim of robbery-murder could identify him even though probable cause was lacking). However, many cases have said that even arrests for investigation or questioning must be based on probable cause. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 216 (1979); *People v. McBride*, 510 N.E.2d 1087, 1089 (Ill. App. Ct. 1987) (holding that the arrest of the defendant “for investigation” was illegal because it was without probable cause).

known facts.<sup>174</sup> Even under those circumstances, however, it is difficult to quantify one's suspicions with any meaningful degree of precision.

Most cases are far more complex.<sup>175</sup> For example, in *Pringle*, the defendant was one of three occupants in a vehicle. The police searched it and found \$763 and five plastic glassine baggies containing cocaine. They arrested all three men, and Pringle challenged his arrest as being without probable cause.

When Pringle was arrested there were three possibilities. The first was that the cocaine was the sole property of one of the three occupants. If this were the case there was, in the abstract, only a 33.3% chance that the sole possessor was Pringle. Other facts, of course, could have raised

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174. Most courts faced with the question have held that arresting officers need only have probable cause to believe that the person to be arrested has committed some crime and need not know, or be able to articulate, in advance the precise crime for which the arrest will be or is being made. See *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004); see also *Hatcher v. State*, 410 N.E.2d 1187, 1189 (Ind. 1980) (search incident to arrest valid where police officer had probable cause to arrest defendant for armed robbery but instead arrested him for disorderly conduct—for which she had no probable cause); AMERICAN LAW INSTITUTE, *supra* note 162, at 13, § 120.1(2) (“An arrest shall not be deemed to have been made on insufficient cause hereunder solely on the ground that the officer is unable to determine the particular crime which may have been committed.”).

There is no requirement that the offense establishing probable cause be “closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest.” *Devenpeck*, 543 U.S. at 153; cf. *Walker v. City of Mobile*, 508 So. 2d 1209, 1214 (Ala. Crim. App. 1987) (“A statement of the cause of the arrest is always mandatory except when the person is arrested in the commission of the act.”), *cert. denied*, 508 So. 2d 1209 (Ala. 1987).

175. See, e.g., *State v. Thomas*, 421 S.E.2d 227 (W.Va. 1992) (where murder was committed by one person but evidence pointed to two men and it was highly probable that one or the other had committed the crime, there was probable cause to search as to each one separately). The difficulty of applying the more likely than not test in arrest cases is increased by the fact that in most such cases there is not one probability but at least two. First, a court must determine the likelihood that an offense was committed, and second, it must determine the likelihood that a particular offender committed it. See, e.g., FED. R. CRIM. P. 4(a) (an arrest warrant shall issue if “there is probable cause to believe that an offense has been committed and that the defendant has committed it”); *State v. Bates*, 495 A.2d 422, 425 (N.J. Super. Ct. App. Div. 1985) (observing that probable cause to arrest demands “a well-grounded suspicion or belief that (1) an offense is taking place or has taken place and (2) that the suspected individual is or was a party to it.”). Even a seventy percent probability for each of these two primary factors—a relatively high level of certainty—translates into only a forty-nine percent overall probability. Of course, greater certainty as to one prong might offset or compensate for lesser certainty as to the other prong. Cf. *People v. Wright*, 490 N.E.2d 640, 646 (Ill. 1985) (stating that “where there is uncertainty as to whether a crime has been committed, the privacy rights may be given more consideration” and observing that in the case before it there was “no doubt that a crime had been committed”).

Each of the two primary probabilities in arrest cases is often itself a function of various underlying probabilities. On occasion the various probabilities will be wholly independent of one another; more often, they will be, to a greater or lesser extent, interdependent. See *State v. Jones*, 417 So. 2d 788, 792-93 (Fla. Dist. Ct. App. 1982) (Coward J., dissenting).

or lowered this probability.<sup>176</sup> There were two other possibilities: either the cocaine was the joint property of two of the occupants, or it was the joint property of all three occupants. Without deciding whether a 33.3% chance standing alone was sufficient to establish probable cause, the Court held, in effect, that all three possibilities taken together were sufficient to establish “probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.”<sup>177</sup>

Probable cause to search is an inquiry different from and, more complex than, probable cause to arrest.<sup>178</sup> Determining the existence of probable cause to search entails weighing and evaluating considerations of time, place, the objects sought, the crime being investigated, and other factors, in order to decide whether there is a sufficient likelihood that specific permissible objects of a search can presently be found in a given place.<sup>179</sup> Given the number of variables involved, quantifying the

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176. Courts often solve probability problems by *per se* rules. Thus, reports are generally assumed to be reliable if they come from witnesses, victims of crime, law enforcement officials, or citizen informants, not part of the criminal milieu. See *e.g.*, *United States v. LaFond*, 482 F. Supp. 1379, 1384 (E.D. Wisc. 1980) (citing cases); *Bush v. State*, 523 So. 2d 538, 544-45 (Ala. Crim. App.), *cert denied*, 523 So. 2d 538 (Ala. 1988) (“[A]ny person purporting to be a crime victim or witness may be presumed reliable”); *Hooks v. State*, 416 A.2d 189, 202 (Del. 1986). It is only professional or anonymous informers or persons involved in or connected with crime whose reports require corroboration. See, *e.g.*, *LaFond*, 482 F. Supp. at 1384 (citing cases); *Bush*, 523 So. 2d at 544-45.

177. *Maryland v. Pringle*, 540 U.S. 366, 372 (2003).

178. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 & n.6 (1978) (“It does not follow, however, that probable cause for arrest would justify the issuance of a search warrant, or, on the other hand, that probable cause for a search warrant would necessarily justify an arrest. Each requires probabilities as to somewhat different facts and circumstances—a point which is seldom made explicit in the appellate cases.”) (citations omitted); *State v. Heinz*, 480 A.2d 452, 460 (Conn. 1984) (“The probable cause determination in the context of arrest warrants requires inquiries that are less complex constitutionally than those that pertain to search warrants.”); see also 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.2. at 71 (probable cause to search, in contrast to probable cause to arrest, requires a probability determination with respect to certain specified items being in a particular place).

179. 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, §3.2(e) at 81, 5 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 10.1(b) at 9 (probable cause to search exists when there is substantial evidence that the items sought are, in fact, seizable by virtue of being connected with criminal activity and there is a fair probability that the items will be found in the place to be searched); *U.S. v. Grubbs*, 547 U.S. 90, 95 (2006) (in the typical search case, the “determination that there is probable cause for the search amounts to a prediction that the item will still be there when the warrant is executed”); *Zurcher*, 436 U.S. at 556 & n.6 (1978) (“Search warrants may be issued only . . . upon a showing of probable cause—that is, reasonable grounds to believe—that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted.”); *People v. Lyons*, 872 N.E.2d 393, 396 (Ill. App. Ct. 2007) (“To determine probable cause, a sufficient nexus between a criminal offense, the items to be seized, and the place to be searched must be established. . . . When there is no direct information to establish a nexus, reasonable inferences may be entertained to create the nexus” (citing *People v. Beck*, 713 N.E.2d 596, 601 (1999))).

likelihood that a given search will be successful is usually an all but impossible task.<sup>180</sup> Perhaps as a reflection of this fact, references to a more likely than not test are less frequent in the search context<sup>181</sup> than in the arrest context.<sup>182</sup>

In *Dunaway v. New York*,<sup>183</sup> the Court rejected the use of “a multifactor balancing test” that might cause the existing bright-line test of probable cause to disappear as courts consider and balance “the multifarious circumstances presented by different cases.”<sup>184</sup> *Dunaway*

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The length of time that has passed from when evidence of a crime was observed to when the complaint is issued is highly relevant to whether probable cause exists. *United States v. Wagner*, 989 F.2d 69, 75 (2d Cir. 1993). Probable cause ceases to exist when the information relied on to prove its existence has grown stale. *See, e.g., People v. Rehkopf*, 506 N.E.2d 435, 437-38 (Ill. App. Ct. 1987) (thirteen months was too long, but the evidence was admissible because it was obtained in good faith reliance on a warrant).

The Constitution requires specificity in warrants. *See Grubbs*, 547 U.S. at 97 (observing that only two things must be particularly described; “the place to be searched” and “the persons or things to be seized”).

180. It has been observed that even in the absence of any particular reason to suspect anything, there is probably a substantial probability that evidence of some crime can be found if any particular place is thoroughly searched at any particular time. *See Albert W. Alschuler, Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 255-56 (1984). However, it has also been pointed out that law enforcement activities directed against persons to whom no specific suspicions have attached run afoul of “the fourth amendment’s concern.” *Grano, supra* note 159, at 498.

181. *See, e.g., United States v. Travisano*, 724 F.2d 341, 346 (2d Cir. 1983) (“Plainly, the standard of probable cause cannot imply ‘more probable than not’ under circumstances such as those here where many locations were available to the guilty parties to secrete the stolen goods.”); *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979) (rejecting claim that probable cause to search means “more likely than not,” or “by a preponderance of the evidence” and suggesting that probable cause is synonymous with reasonable grounds to believe) (*Zurcher*, 436 U.S. at 556 n.6 (1978)).

In practice, the percentage of searches pursuant to warrants that are successful (in the sense that the searching officers find incriminating items of the kind named in the warrant) appears to be much higher than fifty percent. *See, e.g., Edward Ray, Statistical Analysis of Search Warrants and Their Evidentiary Basis* (May 26, 1997) (studying warrants issued in three Southern Illinois counties (Bond, Jackson, and Madison), in 1989, 1990, 1991, 1995, and 1996 and finding a success rate of a little over 90%) (unpublished student seminar paper) (on file with the author); *Robert Barker, Statistical Analysis of Search Warrants* (Oct. 19, 2003) (studying warrants issued in two Southeast Missouri Counties (Mississippi and Cape Girardeau in 2000 and 2001) and finding a success rate of about 96%) (unpublished student seminar paper) (on file with the author); *Bill Vandersand, Research on Search Warrants* (Oct. 28, 2003) (studying 119 search warrants issued from 1994-2003 by six federal magistrates in the Western District of Kentucky, Eastern District of Missouri, and Southern District of Illinois, and finding that 112 were actually executed and ninety (80.4% of those executed) yielded positive results) (unpublished student paper) (on file with the author).

182. *See, e.g., People v. Carrasquillo*, 429 N.E.2d 775, 778 (N.Y. 1981) (probable cause to arrest requires that it “appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator”).

183. 442 U.S. 200 (1979).

184. *Id.* at 213-214.



did not hold that only one standard should govern all Fourth Amendment activities. In fact, the *Dunaway* Court reaffirmed the propriety of the reasonable-suspicion standard in certain settings.<sup>185</sup>

Defining probable cause in terms of a single constant level of probability has the superficial appeal of appearing to simplify the probable cause determination.<sup>186</sup> However, there is no inherent reason that the degree of certainty required before a particular Fourth Amendment activity may be undertaken could not vary depending on the seriousness of the offense toward which the activity is directed.<sup>187</sup> In theory, searches and seizures directed toward or precipitated by extremely serious offenses (apocalyptic offenses)<sup>188</sup> could be permitted on the basis of lesser degrees of certainty than searches and seizures directed at or precipitated by ordinary offenses.<sup>189</sup> Conversely, searches and seizures directed at very minor offenses, especially those that

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185. *Id.* at 209-211.

186. Professor Alschuler illustrates the problems with a constant level of probability with the example of a reliable informant who has provided information that a bomb is set to explode in a rented locker in a New York airport. However, the informant does not know in which of 150 lockers the bomb is located. Given the magnitude of the danger and the relatively impersonal intrusions, it can reasonably be argued that the police should have the right to search all the lockers despite the fact that there is less than a one percent chance the bomb will be in any particular locker. Alschuler, *supra* note 180, at 246-47. *See also* Dripps, *supra* note 171, at 1430 (citing an example where the police can prove with certainty that a particular individual is dealing drugs from a particular location, but are not certain which drugs and arguing that in these circumstances a search would pose no threat to legitimate privacy rights, but would advance law enforcement interests). Of course, even in the case of lockers, where the expectation of privacy is less, there could presumably be some stopping point where, for example, hundreds of lockers in several airports were involved.

187. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 784 (1994) (It makes “little sense to insist on the same amount of probability regardless of the imminence of the harm, the intrusiveness of the search, the reason for the search, and so on”); Alschuler, *supra* note 180, at 245-49 (arguing that “[t]he concept of probable cause can be interpreted sensibly only as an embodiment of the ‘multifactor balancing test that the Court rejected in *Dunaway*’ and observing that “[a] unitary view of the probable cause requirement leads . . . to incongruous results.”); Barrett, *supra* note 139, at 63.

188. *See* Schroeder, *The Legacy of Welsh v. Wisconsin*, 38 U. KAN. L. REV. 439, 546-52 (1990) [hereinafter Schroeder, *The Legacy of Welsh v. Wisconsin*].

189. *See, e.g.*, *Llaguno v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (Even where a “multiple murderer is on the loose . . . there must be reasonable grounds for believing that the search of *this* house would prove fruitful”; the existence of an emergency “great but not apocalyptic in its menace . . . does not give the police a license to search and seize without a reasonable basis . . .”); *United States v. Adams*, 484 F.2d 357, 359 (7th Cir. 1973) (“The threshold of probable cause was lowered by” the fact that the search in question “took place at the time of and within a few blocks of a racial disturbance.”); *cf. Ybarra v. Illinois*, 444 U.S. 85, 94-95 (1979) (rejecting argument that the *Terry* reasonable belief standard should be applied to searches of persons who appear to be involved in narcotics trafficking); *Camera v. Municipal Court*, 387 U.S. 523, 535 (1967) (noting that the “public interest would hardly justify a sweeping search of an entire city conducted in the hope that [stolen] . . . goods might be found.”).

involve invading the home, could be barred altogether<sup>190</sup> or permitted only where there is a high probability that the search will be successful. Similarly, arrests of persons suspected of apocalyptic offenses could be permitted on the basis of reasonable suspicion while arrests of minor offenders could be barred altogether or permitted only where there is a high probability that the arrestee is guilty.<sup>191</sup>

### c. Probable Cause as the Accommodation of Competing Interests

The Court has often said that the balancing of competing interests is the key principle of the Fourth Amendment.<sup>192</sup> Probable cause has been said to be “the best compromise that has been found for accommodating [the] often opposing interests’ in ‘safeguard[ing] citizens from rash and unreasonable interferences with privacy’ and ‘in seek[ing] to give fair leeway for enforcing the law.’”<sup>193</sup>

Many public and private interests are accommodated within the compromise represented by the Fourth Amendment. At any given time and place, the privacy interest—as defined by the character of the place to be searched,<sup>194</sup> by reasonable expectations of privacy and by

190. See William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842 (2001) (house searches, even with probable cause and a warrant, should perhaps be barred for anything associated with marijuana); cf. *State v. Weist*, 730 P.2d 26, 28-29 (Or. 1986) (rejecting argument that legislature “could not constitutionally authorize the use of search warrants in the investigation of violations, infractions, or other non-criminal offenses”).

191. See, e.g., *BeVier v. Hucal*, 806 F.2d 123, 127-28 (7th Cir. 1986) (no probable cause where the crime, child neglect, was serious but there was no danger of its imminent repetition); see also *Moore v. The Marketplace Rest.*, 754 F.2d 1336, 1345 (7th Cir. 1985) (jury question whether there was probable cause to arrest restaurant patrons who had not paid their bill but had not fled, were not dangerous, and whose crime was not serious); *Hill v. Bogans*, 735 F.2d 391, 393-95 (10th Cir. 1984) (holding unreasonable strip search of person detained for traffic offense); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983) (holding unreasonable strip searches of persons briefly detained after their arrests for nondangerous misdemeanors).

192. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700, n.12 (1981)).

193. See *Dunaway v. New York*, 442 U.S. 200, 208 (1979) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)); see also *Beck v. Ohio*, 379 U.S. 89, 91 (1964); Gerald G. Ashdown, *The Fourth Amendment and the Legitimate Expectation of Privacy*, 34 VAND. L. REV. 1289 (1981).

194. See, e.g., *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (noting that “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); *Cardwell v. Lewis*, 417 U.S. 583, 590 (1974) (searches of automobiles are “far less intrusive on the rights protected by the Fourth Amendment than the search of one’s person or a building”); *See v. City of Seattle*, 387 U.S. 541, 545-46 (1967) (“We do not in any way imply that business premises may not reasonably be inspected in many more situations than private homes”). See also *California v.*

constitutionally protected areas—remains relatively constant. The impact of the government’s activities, however, varies widely. A search will often be less intrusive than a custodial arrest.<sup>195</sup> A search undertaken through the use of high technology will obviously be more invasive than a traditional search. The nature of the things sought,<sup>196</sup> the magnitude of the intrusion,<sup>197</sup> whether a warrant was obtained,<sup>198</sup> the

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Carney, 471 U.S. 386, 395 (Stevens, J., dissenting) (“The character of ‘the place to be searched’ plays an important role in Fourth Amendment analysis”) (quoting U.S. Const., Amend. IV). Compare *Payton v. New York*, 445 U.S. 573, 583-90 (1980) (holding that ordinarily warrantless felony arrests in the home are prohibited by the Fourth Amendment) with *United States v. Watson*, 423 U.S. 411, 418 (1976) (permitting warrantless felony arrests in a public place).

195. *Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (“A search may cause only annoyance and temporary inconvenience to the law-abiding citizen. . . . An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent.”); cf. *State v. Heinz*, 480 A.2d 452, 460 (Conn. 1984) (“As we have noted previously, because arrests are inherently less apt to be intrusive than are searches, there is a difference in the constitutional standards by which probable cause to arrest and probable cause to search are measured.”).

Because a search is often less intrusive than a custodial arrest, it could be argued that an entry to search should be permissible in some situations where an entry to arrest would not be permissible. See *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting). In his dissent, Justice White stated:

[I]f circumstances can justify the warrantless arrest, it would be strange to say that the Fourth Amendment bars the warrantless search, regardless of the circumstances, since the invasion and disruption of a man’s life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.

196. See *United States v. United States Dist. Court*, 407 U.S. 297, 309, 321-22 (1972) (implicitly acknowledging that the nature of some kinds of crime renders those crimes subject to different kinds of treatment for Fourth Amendment purposes); cf. *New York v. P.J. Video Inc.*, 475 U.S. 868, 873-75 & n.6 (1986) (reaffirming earlier cases holding that “special conditions” must be met before books and films may be seized but holding that “an application for a warrant to search for materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally,” and rejecting the argument that a “‘higher’ standard of probable cause” should apply to warrants directed at such materials) (citing *Roaden v. Kentucky*, 413 U.S. 496, 502-04 (1973), and *Stanford v. Texas*, 379 U.S. 476, 485-86 (1965)).

At one time, no search was permitted for items of “evidential value only.” See *Gouled v. United States*, 255 U.S. 298, 310-11 (1921). This rule was rejected in *Warden v. Hayden*, 387 U.S. 294, 309-10 (1967), although the argument is occasionally made that certain types of evidence—in particular private papers—are beyond the reach of a constitutionally reasonable search or seizure. See *Warden*, 387 U.S. at 323-25 (Douglas, J., dissenting). See generally Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869 (1985) and cases cited therein; Craig M. Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L.L. REV. 461 (1981).

197. See, e.g., *United States v. Torres*, 751 F.2d 875, 882-83 (7th Cir. 1984) (suggesting that a highly intrusive technique such as television surveillance of a home could properly be barred in connection with minor crimes); see also Wayne R. LaFave, “*Street Encounters*” and the Constitution: *Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 39, 55 n.82 (1968) [hereinafter “*Street Encounters*”] (“a higher standard of probable cause than ordinarily required would be called for when the intrusion is particularly severe.”); Comment, *Search and Seizure in the Supreme Court*,

reliability of the information on which probable cause is based,<sup>199</sup> and other factors may also be relevant.<sup>200</sup> Finally, while most Fourth Amendment activities are motivated by the goal of “effective crime prevention and detection,”<sup>201</sup> all are not motivated by a single objective of constant weight. “There is one . . . variable—the seriousness of the offense—which cannot be ignored by police and courts.”<sup>202</sup> The simple, undeniable fact is that society has a greater interest in apprehending a multiple murderer than in apprehending a person with a single ounce of marijuana in her possession or a teenager drinking a beer.<sup>203</sup>

Some cases suggest that a single standard of probable cause applies to all situations without the need to “balance the interests and circumstances involved in particular situations.”<sup>204</sup> However, the government’s interest in enforcing the law and in apprehending

28 U. CHI. L. REV. 664, 687 (1961) (same).

198. It has been sometimes said that the preference to be accorded warrants is an important consideration in determining the existence of probable cause in doubtful or marginal cases. *See Watson*, 423 U.S. at 423 (“judgments about probable cause may be more readily accepted where backed by a warrant issued by a magistrate”).

199. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 379 (2009) (looking to the degree to which the information implies prohibited conduct, its specificity, and its reliability); *see also United States v. Maestas*, 546 F.2d 1177, 1180 (5th Cir. 1977) (observing that first-hand evidence that seizable materials are on the premises sought to be searched is not necessary and stating that evidence that a defendant has stolen material which would “normally” be hidden at his residence is sufficient to support a search of that residence) (citing *United States v. Lucarz*, 430 F.2d 1051 (9th Cir. 1970)).

200. *See United States v. Savoca*, 761 F.2d 292, 298 (6th Cir.), *cert denied*, 474 U.S. 852 (1985) (other factors include the extent of any opportunity to conceal evidence and the normal inferences that can be drawn about likely hiding places); *see also Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (quoting *Texas v. Brown*, 443 U.S. 47, 51 (1979) in which the Court stated in that in judging the reasonableness of a seizure: “we look to the ‘gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with the individual liberty’”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 556 (1978) (“[A] less stringent standard of probable cause is acceptable where the entry is not to secure evidence of crime against the possessor.”).

201. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). Some Fourth Amendment activities are motivated by the need to aid persons, or to protect property. *See, e.g., Brigham City, Utah v. Stuart*, 547 U.S. 398 (2006) (officers observed ongoing physical altercation between occupants from outside home); *see also Michigan v. Fisher*, 558 U.S. 45 (2009) (*per curiam*) (officers arrived at house in response to a complain and “noticed blood on the hood of the pickup [in the driveway] and on clothes inside of it, as well as on one of the doors to the house. . . . Through a window, the officers could see . . . Fisher, inside the house, screaming and throwing things.”)

202. “*Street Encounters*,” *supra* note 197, at 57.

203. *See, e.g., Llaguno v. Minge*, 763 F.2d 1560, 1565-66 (7th Cir. 1985) (“The shooting of seven persons (four fatally) by a team of criminals in the space of two hours is about as grave a crisis as a local police department will encounter. The police must be allowed more leeway in resolving it than when they are investigating the theft of a bicycle.”).

204. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 208 (1979); *see also Ybarra v. Illinois*, 444 U.S. 85, 95-96 (1979) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

offenders is greater if the offense is more serious or if the offender is a greater threat to the public<sup>205</sup> and less if the offense is not serious or if the offender is not a threat. If probable cause represents an accommodation of competing interests, it follows that it should be, to some extent, a function of the seriousness of the offense to which that cause relates.<sup>206</sup>

Some offenses are so minor that the state's interest in making arrests for those offenses should not justify warrantless home entries, even with a warrant, in order to do so.<sup>207</sup> Similarly, the balance of interests that underlies the probable cause determination could warrant the conclusion that there can never be probable cause, no matter how great the likelihood of success, to justify the use of high technology or an entry into a home to search for evidence of minor crimes.<sup>208</sup>

At the other end of the scale, it could be argued that some offenses are so serious (or even apocalyptic) that the balance of interests justifies home entries directed at locating evidence of such crimes even when there is a relatively low likelihood of success. Certainly, it is not unreasonable to suggest that the great public interest in taking action to prevent (and sometimes to apprehend the perpetrators of) these kinds of offenses should affect the way courts assess the balance of interests in such cases.<sup>209</sup>

#### d. Probable Cause and the Totality of the Circumstances

The Supreme Court has repeatedly emphasized the common sense nature of probable cause and has said that the existence of probable cause turns on the "totality-of-the-circumstances."<sup>210</sup> This approach, it

205. See 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, § 3.2 at 31-36.

206. See *Llaguno*, 763 F.2d at 1566 ("[T]he amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition."); *cf.* 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, § 3.2 at 33 (stating that perhaps this "is the correct conclusion").

207. See *Stuntz*, *supra* note 190 (house searches, even with probable cause and a warrant, should perhaps be barred for anything associated with marijuana); *cf.* *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (barring most home entries to arrest for non-jailable offenses but implicitly allowing such entries with a warrant).

208. See, e.g., *United States v. Torres*, 751 F.2d 875, 882-86 (7th Cir. 1984) (suggesting that the use of highly intrusive techniques such as television surveillance should be barred where minor offenses are concerned); *Stuntz*, *supra* note 190.

209. See, e.g., *Llaguno*, 763 F.2d at 1565-66 ("An emergency, . . . great but not apocalyptic in its menace, . . . would not allow the police to search every house in Chicago or even every house on the Llagunos' block," but "the fact that a multiple murderer is on the loose . . . may affect the judgment of what is reasonable").

210. See, e.g., *Illinois v. Gates*, 462 U.S. 213, 230-32, 238, 241 (1983) ("The task of the

was said in *Illinois v. Gates*, best “achieve[s] the accommodation of public and private interests that the fourth amendment requires.”<sup>211</sup> In *Tennessee v. Garner*,<sup>212</sup> the Court cited a number of cases, in both search and seizure contexts, which it viewed as reflecting the totality of the circumstances approach to determining the reasonableness of a given search or seizure.<sup>213</sup>

Relevant circumstances have been said to include, *inter alia*, the intensity of the actor’s belief in the likely success of his actions, the probability of success, and the competing interests of the individual and the government.<sup>214</sup> There is no inherent reason that the seriousness of the offense under investigation could not also be added to the equation.<sup>215</sup> In fact, the common sense nature of the totality of the circumstances approach almost compels courts to look at the seriousness of the offense.<sup>216</sup>

Occasional decisions have specifically said that the fact that a person being arrested was believed to have committed a felony or other serious or violent offense is a relevant factor in determining whether the officers acted properly.<sup>217</sup> Others have specifically considered the seriousness of the offense and “the danger of its imminent repetition” as relevant factors in the probable cause equation.<sup>218</sup> Thus, in *Llaguno v.*

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issuing magistrate is simply to make a practical, common-sense decision whether, given [the totality of] all the circumstances . . . there is a fair probability that contraband or evidence of crime will be found in a particular place.”); *see also* *Texas v. Brown*, 460 U.S. 730, 742 (1983) (“probable cause is a flexible, common- sense standard”); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) (“probable cause is a practical, non-technical conception”).

211. 462 U.S. at 230, 238-39.

212. 471 U.S. 1 (1985).

213. *Id.* at 8-9.

214. *See supra* notes 196-203 (citing authorities). When *Atwater* was decided by the Fifth Circuit, Judge Weiner, writing in dissent, criticized the majority’s analysis because it “focuses solely on the quantum of certainty involved in the case, to the exclusion of the other two relevant variables: the importance of the government’s interest and the extent of the intrusion on the individual’s liberty and privacy interests.” *Atwater v. Lago Vista*, 195 F.3d 242, 249 (5th Cir. 1999) (en banc) (Weiner J., dissenting).

215. *See* 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, § 3.2(a) at 33 (“It is tempting to conclude that the seriousness of the offense should be a factor in the probable cause equation.”).

216. *See* Jeffrey Bellin, *Crime Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 9 (2011) (noting “the close relationship between reasonableness, the public interest, and crime severity . . . in the common-sense judgments of ‘our daily lives,’ popular-opinion surveys, pronouncements of political actors, . . . scholarly commentary, and even judicial opinions.”).

217. *See e.g.*, *Llaguno v. Mingey*, 763 F.2d 1560, 1566 (7th Cir. 1985) (citing cases); *People v. Sirhan*, 497 P.2d 1121, 1140 (1972) (“The crime was one of enormous gravity, and ‘the gravity of the offense’ is an appropriate factor to take into consideration.”); *see also* THE AMERICAN LAW INSTITUTE, *supra* note 162, at 294-96.

218. *Llaguno*, 763 F.2d at 1566.

*Mingey*,<sup>219</sup> the Seventh Circuit dealt with a suit brought under 42 U.S.C. § 1983 which alleged that members of the Chicago Police Department, who were searching for two murderers who had shot seven people (four fatally), acted illegally when they entered and searched the plaintiff's (Llaguno's) home without a search warrant and on the basis of "limited" information and weak inferences.<sup>220</sup> The court held that the phrase probable cause "describes not a point, but a zone, within which the graver the crime the more latitude the police must be allowed"<sup>221</sup> and said that the gravity of the crime and the danger of its imminent repetition will affect the amount of information the police collect and hence the amount of probable cause they will have.<sup>222</sup> Subsequent cases have said that "[u]nder Seventh Circuit precedent . . . probable cause is a function of information and exigency,"<sup>223</sup> and added that "officers need a greater quantum of evidence when making arrests for less serious crimes."<sup>224</sup>

### 3. The Desirability of Factoring the Seriousness of the Offense into the Probable Cause Equation

Incorporating the seriousness of the offense into probable cause equations is a very difficult task. For one thing, courts frequently refer to probable cause as if it were a single standard applicable interchangeably to both search and arrest<sup>225</sup> cases. In fact, however, the probable cause determination in search cases is different from, and more complex than, that in arrest cases.<sup>226</sup>

There is much to be said for factoring the seriousness of the offense into Fourth Amendment equations where this factor simply tells law

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219. *Id.*

220. *Id.* at 1564-66.

221. *Id.* at 1565.

222. *Id.* at 1566 ("The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and especially the danger of its imminent repetition.").

223. *BeVier v. Hucal*, 806 F.2d 123, 127 (7th Cir. 1986).

224. *Pasiewicz v. Lake County Forest Preserve Dist.*, 270 F.3d 520, 525 (7th Cir. 2001) (observing that "[w]alking naked in the woods may be only a bit unsettling, but it is considerably more threatening when coupled with evidence, as in this case, that the walker was watching children play in a nearby clearing"); *see also Moore v. The Marketplace Rest.*, 754 F.2d 1336 (7th Cir. 1985) (jury question whether there was probable cause to arrest a patron who had not paid his check because the crime was minor, the patrons had not fled, and they were not dangerous).

225. 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.1(b) at 8.

226. *State v. Heinz*, 480 A.2d 452, 460 (Conn. 1984) ("The probable cause determination in the context of arrest warrants requires inquiries that are less complex constitutionally than those that pertain to search warrants.").

enforcement officers that they can act, or, must not act, in a particular way in a particular setting. A reasonably clear and administrable bright line between offenses<sup>227</sup> can tell officers when they cannot: (1) make warrantless arrests for misdemeanors not committed in the arresting officer's presence,<sup>228</sup> (2) make warrantless home entries to arrest for minor offenses,<sup>229</sup> (3) make warrantless home entries to search for evidence of minor offenses, (4) make *Terry* stops for past misdemeanors,<sup>230</sup> (5) make custodial arrests for minor offenses, (6) make surgical searches or other physical intrusions into the human body, (7) use deadly force to seize a suspect,<sup>231</sup> or (8) set up roadblocks to find evidence of, or suspects in, crimes not related to the use of the roads.<sup>232</sup>

Because probable cause is a complex, multifactor concept, it does not lend itself to a rule that makes a single factor—even one as important as the seriousness of the offense—decisive in determining its existence. In theory, however, a rule could be formulated that there can never be probable cause for certain actions directed against those suspected of minor offenses.<sup>233</sup> For example, a rule could be formulated that the police can never have probable cause to enter a home to arrest for, or to seek evidence of, a minor offense. Another possible approach would be varying standards of probable cause where more intrusive actions were permitted on the basis of less evidence if the offense was serious but allowed only upon a heightened standard if the offense was minor. This approach is not totally inconsistent with Supreme Court precedent. Although the Supreme Court has never demanded an unusually high level of probable cause for some particular activity,<sup>234</sup> it has held that lower, or different, levels of probable cause are appropriate

227. See generally Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

228. See generally William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993) [hereinafter Schroeder, *Warrantless Misdemeanor Arrests*].

229. See generally Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188.

230. See generally Rachel S. Weiss, *Defining the Contours of United States v. Hensley: Limiting the Use of Terry Stops for Completed Misdemeanors*, 94 CORNELL L. REV. 1321 (2009).

231. See *Tennessee v. Garner*, 471 U.S. 1 (1985).

232. See *City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000).

233. Cf. *State v. Weist*, 730 P.2d 26, 28-29 (Or. 1986) (rejecting argument that legislature “could not constitutionally authorize the use of search warrants in the investigation of violations, infractions, or other non-criminal offenses.”).

234. Cf. *New York v. P. J. Video, Inc.*, 475 U.S. 868, 875 (1986) (rejecting the idea of a “higher” standard of probable cause for warrants seeking to search books and films and holding that an application for a warrant authorizing the seizure of “materials presumptively protected by the First Amendment should be evaluated under the same standard of probable cause used to review warrant applications generally.”).



in some administrative search settings.<sup>235</sup> That lower standard, or a similar one that requires some level of particularized suspicion,<sup>236</sup> could be used for “grave” or “apocalyptic”<sup>237</sup> crimes, and a higher one developed for minor crimes.<sup>238</sup> Such an approach, however, quickly becomes very complex.

In most Fourth Amendment settings, “the law, . . . including the definition of probable cause, is more in need of greater clarity than greater sophistication.”<sup>239</sup> The use of multiple standards is likely to cause any differences among them to disappear in a sea of ever finer distinctions.<sup>240</sup> As Professor Amsterdam put it, “[t]he varieties of police behavior and of the occasions that call it forth are so innumerable that their reflection in a general sliding scale approach could only produce more slide than scale . . . [and thereby] convert . . . the fourth amendment into one immense Rorschach blot.”<sup>241</sup> Some search and seizure situations recur with sufficient frequency that particular rules may be useful in their resolution.<sup>242</sup> Moreover, an occasional case might present facts similar to those presented in a prior case. Generally, however, “[t]here are so many variables in the probable cause equation that one determination will seldom be a useful ‘precedent’ for another.”<sup>243</sup> The more factors that are relevant to the probable cause

235. See 5 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 10.1(b) at 14-16 (discussing *Camara v. Municipal Court*, 387 U.S. 523 (1967)).

236. Cf. *Terry v. Ohio*, 392 U.S. 1, 27 (1967); cf. “*Street Encounters*,” *supra* note 197 at 56 & n.86 (“If the balancing technique is used, it would seem to make no difference in terms of outcome whether the balancing is done merely to determine what is reasonable or to determine what level of probable cause is required. . . . [U]nfortunat[ely] . . . the Court did not say . . . this,” but rather stated that because the situation in *Terry* did not lend itself to requiring the police to obtain a warrant, “probable cause is irrelevant.”)

237. See Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 546-552.

238. See Bellin, *supra* note 216, at 29-33 (proposing three standards, grave, serious, and minor).

239. 2 W. LAFAVE, SEARCH AND SEIZURE, *supra* note 57, § 3.2(a), at 27; see also *New York v. Belton*, 453 U.S. 454, 458 (1981); Wayne R. LaFave, “*Case-by-Case Adjudication*” *Versus* “*Standardized Procedure*” *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141-42; Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing “Bright Lines” and “Good Faith*,” 43 U. PITT. L. REV. 307, 321 (1982); Wayne R. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures Into the “Quagmire*,” 8 CRIM. L. BULL. 9, 30 (1972).

240. *Welsh v. Wisconsin*, 466 U.S. 740, 761 (1984) (White, J., dissenting).

241. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 392-93 (1974).

242. See *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (observing that the “‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information” are relevant considerations); see also *supra* note 176 and cases cited therein).

243. *Id.* at 239 n.11; *United States v. Preston*, 468 F.2d 1007, 1009 (6th Cir. 1972) (“As is frequently true in Fourth Amendment cases, we find no directly controlling precedent to guide this court on this appeal.”); Dripps, *supra* note 171, at 1430 (stating that the approach proposed by the

determination, the more fluid the concept of probable cause becomes and the more difficult it is to apply a given definition of probable cause to a given situation.

The inclusion of the seriousness of the offense in probable cause analysis would further complicate an already complex Fourth Amendment picture without providing meaningful guidance to police and courts. There is simply no practical way to intelligently assess and articulate the weight to be assigned to each relevant factor in the probable cause equation and to quantify the result.<sup>244</sup> In most cases, therefore, the injection of an additional factor into the equation would have few practical consequences. In a few cases, however, the seriousness of the offense will be a factor that most observers would say, as a matter of common sense, should make a difference. In many of these cases, judges, faced with excluding probative evidence of a serious offense, are likely, consciously or unconsciously, to distort doctrine to avoid doing so.<sup>245</sup> As a result, the seriousness of the crime influences “the probable cause determination even when there is no explicit acknowledgement of this fact.”<sup>246</sup>

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author “acknowledges that the variables are so numerous that the cases will not be consistently decided”).

244. See *United States v. Robinson*, 414 U.S. 218, 254 (1973) (Marshall, J., dissenting) (“We are dealing with factors not easily quantified and, therefore, not easily weighed one against the other.”); 2 LAFAVE, *SEARCH AND SEIZURE*, *supra* note 57, § 3.2(a) at 24 (noting that probable cause “remains ‘an exceedingly difficult concept to objectify.’”) (quoting Joseph G. Cook, *Probable Cause to Arrest*, 24 VAND. L. REV. 317 (1971)).

245. See 2 LAFAVE, *SEARCH AND SEIZURE*, *supra* note 57, § 3.2(a) at 33 (referring to “the sub rosa practice of taking the offense into account”); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1998) (“Judges do not like excluding bloody knives, so they distort doctrine, claiming the Fourth Amendment was not really violated”); see also *United States v. Leon*, 468 U.S. 897, 925 & n.26 (1984) (“[T]he recognition of a ‘penumbral zone’ within which an inadvertent mistake would not call for exclusion, . . . will make it less tempting for judges to bend fourth amendment standards to avoid releasing a possibly dangerous criminal because of a minor and unintentional miscalculation by the police”) (quoting William A. Schroeder, *Detering Fourth Amendment Violations: Alternatives To The Exclusionary Rule*, 69 GEO. L. J. 1361, 1420-21 (1981)); Bellin, *supra* note 216, at 6 (“[E]xplicit consideration of crime severity would minimize doctrinal distortions that inevitably arise . . . when courts must judge all searches and seizures by the same standard.”).

246. See 2 LAFAVE, *SEARCH AND SEIZURE*, *supra* note 57, § 3.2(a) at 32; see also *Brinegar v. United States*, 338 U.S. 160, 183 (1949) in which Justice Jackson, in his dissent, stated:

But if we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, . . . 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 such an 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

For all these reasons, the seriousness of the offense should not be completely irrelevant to the probable cause determination. Instead, the realities of the real world of law enforcement “should be recognized and [the use of this factor] legitimated.”<sup>247</sup> Probable cause is not a precise concept.<sup>248</sup> Consequently, consideration of the seriousness of the offense does not require, and would not really benefit from, “the use of some fine-spun theory whereby each offense in the criminal code has its own probable-cause standard.”<sup>249</sup> Rather, all that is necessary is to recognize the common-sense notion “that murder rape, armed robbery, and the like, call for a somewhat different police response than, say, gambling, prostitution, or possession of narcotics.”<sup>250</sup> Apocalyptic crimes should be put into a special category.<sup>251</sup> Recognizing and legitimating a factor which everyone knows to be influential makes it easier for the courts, in close cases, to avoid bending Fourth Amendment standards to avoid results that seem disproportionate and at odds with common sense. *Llagano* and the notion of probable cause as a zone, not a point, illustrate how this approach could work.

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search to salvage a few bottles of bourbon and catch a bootlegger.

247. See 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, § 3.2(a) at 33 (suggesting that “[p]erhaps this is the correct conclusion”).

248. *Atwater v. Lago Vista*, 532 U.S. 318, 366 (2001) (O’Connor, J., dissenting) (“Probable cause . . . is not a model of precision”); *BeVier v. Hucal*, 806 F.2d 123, 126 (7th Cir. 1986) (“Probable cause is a fluctuating concept”); *Llagano v. Mingey*, 763 F.2d 1560, 1565 (7th Cir. 1985) (“probable cause . . . describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed”); *People v. Hearty*, 644 P.2d 302, 309 (Colo. 1982) (“Probable cause is measured by ‘reasonableness’ not by pure mathematical probability.”).

249. “*Street Encounters*,” *supra* note 197, at 57. See also 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, 3.2(a) at 33 (“Certainly it would be undesirable if each offense . . . had its own probable cause standard”); Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 499 (“[L]inedrawing [and categorization are] . . . necessary substitute[s] for case-by-case adjudication.”); Bellin, *supra* note 216, at 25-26.

250. 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, §3.2(a) at 33; see also *Llagano*, 763 F.2d at 1565-66 (“The shooting of seven persons (four fatally) by a team of criminals in the space of two hours is about as grave a crisis as a local police department will encounter. The police must be allowed more leeway in resolving it than when they are investigating the theft of a bicycle.”); *People v. Sirhan*, 497 P.2d 1121, 1140 (Cal. 1972), *cert. denied*, 410 U.S. 947 (1973) (“the ‘gravity of the offense’ is an appropriate factor to take into consideration” in determining whether an emergency existed that justified the searching officers’ decision to forego obtaining a warrant); *State v. Clark*, 544 P.2d 1372, 1379 (Kan. 1976) (the seriousness and nature of the offense is a factor in determining whether a warrantless arrest is reasonable); see also 2 LAFAYE, SEARCH AND SEIZURE, *supra* note 57, §3.2(a) at 35 (suggesting that a massive civil disorder or other explosive situation might justify a lowering of the probable cause standard).

251. Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 546-552; see also *Llagano*, 763 F.2d at 1565-66 (referring to crimes that are serious, but not “apocalyptic”).

V. REVISITING *ATWATER*

The Court's decision in *Atwater* was based in part on its analysis of history and, in part on its assessment of reasonableness and a proper balance of interests. Powerful arguments have been made that that the Court's interpretation of history is not supported by "the constitutional text, nor [by] . . . what we know of the intentions of the 'Framers.'"<sup>252</sup> One author has said that the Court's historical analysis "bear[s] little resemblance to authentic framing-era arrest doctrine" and "consist[s] . . . almost entirely of rhetorical ploys and distortions of the historical sources."<sup>253</sup> The historical issue will not be revisited here. Instead, this article will focus on the Court's efforts to achieve what it called "a responsible [or reasonable] Fourth Amendment balance."<sup>254</sup>

A. *Fourth Amendment Reasonableness: The Balancing of Interests*

The Supreme Court has had great difficulty settling on a single theory as to the precise relationship between the probable cause clause and the reasonableness clause.<sup>255</sup> From time to time the Supreme Court has appeared to take the position that all searches and seizures must be reasonable<sup>256</sup> and that the requirements of probable cause and a warrant bear on the reasonableness of a search or seizure.<sup>257</sup> More often, the

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252. See Sklansky, *supra* note 26, at 1813-14.

253. See Davies, *supra* note 27, at 246.

254. *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001).

255. Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 48, 70 (1974) (noting the constantly shifting relationship between the two clauses and observing that "[t]he Courts have said little of lasting significance about the relationship between the two clauses"); see also Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing The Mischief of Camara and Terry*, 72 MINN. L. REV. 383, 398 (1988) ("The Court's basic inability to agree on when to use a reasonableness standard instead of traditional probable cause evidences its failure in defining the relationship between the warrant and reasonableness clauses."); Schnapper, *supra* note 196, at 871-73 (noting two lines of decisions); James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55 81-82 (1977).

256. See, e.g., *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009) ("[T]he ultimate touchstone of the Fourth Amendment . . . is 'reasonableness.'") (quoting *Brigham City v. Stuart*, 547 U.S. 398 (2006)); *Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("We have long held that the touchstone of the Fourth Amendment is reasonableness.") (internal quotation marks omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (stating that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable").

257. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978) (stating that "[t]he Fourth Amendment has itself struck the balance between privacy and public need," but adding that "'reasonableness' is the overriding test of compliance with the Fourth Amendment"); *Camara v. Municipal Court*, 387 U.S. 523, 539 (1967) ("The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard.").

Court has suggested that the reasonableness analysis is a distinct approach to Fourth Amendment problems that is appropriate only in certain settings.<sup>258</sup>

Whatever the exact relationship between the clauses, “‘the balancing of competing interests’ . . . [is] ‘the key principle of the Fourth Amendment.’”<sup>259</sup> The Supreme Court has often said that “[t]he touchstone of . . . analysis under the Fourth Amendment is always ‘the reasonableness in all the circumstances of the particular governmental invasion of a citizen’s personal security.’”<sup>260</sup> A determination of reasonableness requires a court to “consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted” and balance this against the importance of the governmental interests alleged to justify the intrusion.<sup>261</sup>

Rather than determining reasonableness by case-by-case balancing in each individual case, the Court has generally resorted to a process of categorization in which specific rules are applied to specific situations on the basis of a perception that the nature of a particular intrusion or the interests which justify an intrusion of a particular kind are sufficiently distinct from those that justify other kinds of intrusions to warrant a

258. See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968) (determining the reasonableness of government actions initiated on the basis of a lesser justification than traditional probable cause, requires “balancing the need to search (or seize) against the invasion [of personal rights] which the search (or seizure) entails”); see also *City of Ontario v. Quon*, 130 S.Ct. 2619, 2632-33 (2010).

259. *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981)).

260. *Atwater v. Lago Vista*, 532 U.S. 318, 360 (2001) (O’Connor J., dissenting) (quoting *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977) (*per curiam*); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (“What is reasonable depends upon all of the circumstances surrounding the search or seizure.”).

261. *Bell v. Wolfish*, 441 U.S. 520, 559 (1979); see also *United States v. Knights*, 534 U.S. 112, 118-19 (2001) (“The touchstone of the Fourth Amendment is reasonableness and the reasonableness of a search is determined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)); *T.L.O.*, 469 U.S. at 337 (“The determination of the standard of reasonableness governing any specific class of searches requires ‘balancing the need to search against the invasion which the search entails.’”) (quoting *Camara*, 387 U.S. at 536-37); *United States v. Hensley*, 469 U.S. 221, 228 (1985) (the test of reasonableness involves balancing “the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion”) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

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

distinct approach.<sup>262</sup> The *Atwater* Court said that “the preference for categorical treatment of Fourth Amendment claims gives way to individualized review when a defendant makes a colorable argument that an arrest” was made in an extraordinary way, or, with excessive force.<sup>263</sup> Having said this, the Court added another factor to the reasonableness calculation—the government’s essential interest in readily administrable rules<sup>264</sup> and balancing the benefits of a rule barring custodial arrests for minor crimes against the impact of such a rule on law enforcement.<sup>265</sup> The *Atwater* Court rejected compelling arguments for a bar on most custodial arrests for minor crimes<sup>266</sup> (however “minor” is defined),<sup>267</sup> because it saw unnecessary custodial arrests for minor offenses as few in number,<sup>268</sup> and therefore the resultant “costs to society of under-enforcement [if police were deterred from custodial arrests for more serious offenses] could easily outweigh the costs to defendants of being needlessly arrested and booked.”<sup>269</sup>

The *Atwater* Court was wrong on at least five levels. First, the number of unnecessary custodial arrests is probably not as few in number as the Court believed.<sup>270</sup> Second, even if they are as infrequent

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262. In large measure, the Supreme Court has analyzed Fourth Amendment problems by first placing them in particular categories. See “*Seizure*” *Typology*, *supra* note 71, at 461. Even though attempts at categorization are necessarily somewhat arbitrary, and inevitably lead to some analytical overlapping, this article will follow a similar approach.

263. *Atwater*, 532 U.S. at 352-53 (citing *Graham v. Conner*, 490 U.S. 386, 395-96 (1989)).

264. *Id.* at 347-350.

265. *Id.* See also Note, *Use of Deadly Force on Fleeing Felony Suspects*, 99 HARV. L. REV. 244, 245 (1985) (*Garner* suggests that the reasonableness of seizures should be determined by weighing “the infringement of the individual’s interests caused by the police conduct against the governmental interests served by such conduct.”).

266. See *Atwater*, 532 U.S. at 360-73 (O’Connor, J., dissenting). Subsequent to *Gustafson v. Florida*, 414 U.S. 260 (1973), several courts held unconstitutional custodial arrests for minor offenses. See, e.g., *State v. Hehman*, 578 P.2d 527, 528 (Wash. 1978) (en banc); see also *People v. Clyne*, 541 P.2d 71, 72-73 (1975) (en banc) (holding that custodial arrest of defendant for hitchhiking violated statute and search incident thereto was thus improper).

267. *Atwater*, 532 U.S. at 348 & n.17 (stating that the Court’s reasoning applied to any major-minor crime distinction “whether ‘minor crime’ be defined as a fine-only traffic offense, a fine-only offense more generally, or a misdemeanor”); see also Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 503-34, 549-52 (discussing different approaches to distinguishing crimes for Fourth Amendment purposes).

268. *Atwater*, 532 U.S. at 353 (“[W]e are sure . . . the country is not confronting anything like an epidemic of unnecessary misdemeanor arrests.”).

269. *Id.* at 351.

270. See STUART TAYLOR, JR & KC JOHNSON, *UNTIL PROVEN INNOCENT* 52-55 (2007) (stating that a certain detective Gottlieb regularly made custodial arrests of Duke students charged with minor offenses while giving summons to townspeople arrested for more serious offenses); Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L. J. 419, 429-49 (2002) (stating that custodial arrests for traffic violations are not uncommon).

as the Court says, this fact does not make the ones that occur more reasonable.<sup>271</sup> If anything, that infrequency makes the few instances where this “penalty” is imposed seem all the more arbitrary. Moreover, the Court’s ruling is likely to embolden police officers and lead to more such arrests. Third, the Court simply is not realistic about the impact of a custodial arrest on the arrestee.<sup>272</sup> Fourth, the Court’s concerns about the costs of under-enforcement are speculative and exaggerated. Fifth, the Court failed to take into account the impact its ruling would have on other areas of search and seizure law.

### B. *The Consequences of a Custodial Arrest*

Much of what is wrong with the Court’s decision in *Atwater* stems from its failure to recognize the profound consequences of custodial arrest. If a person charged with a minor crime is subjected to a custodial arrest, that arrest will, in most cases, be the most significant consequence of the violation.<sup>273</sup> A custodial arrest is an awesome and frightening experience<sup>274</sup> that will have a profound and far reaching effect on the arrestee.<sup>275</sup> The arrestee is abruptly constrained<sup>276</sup> and ordinarily

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271. See, e.g., *Lee v. Ferraro*, 284 F.3d 1188, 1195-97 (11th Cir. 2002) (upholding custodial arrest under statute that banned “[t]he sounding of any horn or signaling device on any automobile, motorcycle, bus or other vehicle on any street or public place of the County, except as a danger warning” but allowing excessive force claim to go forward); Kristal Roberts, *Man Arrested for Hocking Spit on Daytona Sidewalk*, ABC ACTION NEWS (Jan. 20, 2012), [http://www.abcactionnews.com/dpp/news/local\\_news/water\\_colloer/ma-arrested-forhocking-spit-on-daytona-sidewalk](http://www.abcactionnews.com/dpp/news/local_news/water_colloer/ma-arrested-forhocking-spit-on-daytona-sidewalk); cf. *Arkansas v. Sullivan*, 531 U.S. 769, 776 (2001) (Ginsburg, J., concurring) (expressing hope that the Court “will reconsider its decision if experience demonstrates anything like an epidemic of unnecessary minor offense arrests”).

272. Even before *Atwater*, it was suggested that the Court was simply not realistic about the impact of an arrest on the arrestee. See Tracy Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77 CORNELL L. REV. 732, 768 (1992).

273. See Brief for Petitioner at 27-28, *Atwater v. Lago Vista*, 532 U.S. 318 (No. 99-1408), 2000 WL 1299527 (quoting William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 779 (1993)).

274. See THE AMERICAN LAW INSTITUTE, *supra* note 162, at 290-91 (1975) (“Being arrested and held by the police, even if for a few hours, is, for most persons, awesome and frightening.”).

275. See *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (“An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained”); *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (“A search may cause only annoyance and temporary inconvenience to the law-abiding citizen . . . An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent.”); *Chimel v. California*, 395 U.S. 752, 776 (1969) (White, J., dissenting) (“[T]he invasion and disruption of a man’s life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.”); Barrett, *supra* note 139, at 46-47 n.2.

276. See THE AMERICAN LAW INSTITUTE, *supra* note 162, commentary at 291 (observing that an arrest is ordered “on the spot” by a policeman who “stands ready then and there to back [it] up with force”).

searched incident to the arrest.<sup>277</sup> He or she is then handcuffed; forcibly taken to an unfamiliar place; booked;<sup>278</sup> probably fingerprinted;<sup>279</sup> photographed;<sup>280</sup> stripped of personal belongings<sup>281</sup> (which will themselves be searched);<sup>282</sup> searched more extensively;<sup>283</sup> and held, often in a “crowded, unsanitary, and dangerous place,”<sup>284</sup> and sometimes in the company of dangerous felons,<sup>285</sup> until, and unless, he can obtain

277. See, e.g., *Chimel*, 395 U.S. at 762-68 (recognizing the right to search incident to arrest and defining permissible scope of such searches); cf. *United States v. Robinson*, 414 U.S. 218, 256-57 (1973) (Marshall, J., dissenting) (arguing that even in the context of a custodial arrest, the additional intrusion of a search incident thereto is significant).

278. See *Wainwright v. City of New Orleans*, 392 U.S. 598, 605 (1968) (Warren, C.J., dissenting) (observing that “booking” is required in most jurisdictions and describing “booking” as “an administrative record of an arrest . . . made on the police ‘arrest book’ indicating, generally, the name of the person arrested, the date and time of the arrest or booking, the offense for which he was arrested, and other information”); WAYNE R. LAFAYE, *ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 304, 379-82 (Frank J. Remington ed., 1965) (discussing booking procedures) [hereinafter LAFAYE, *ARREST*].

279. See LAFAYE, *ARREST*, *supra* note 278, at 379-80. See, e.g., N.Y. CRIM. PROC. LAW § 160.10 (McKinney’s 2012).

280. See, e.g., *Atwater v. Lago Vista*, 532 U.S. 318, 355 (2001) (Officers took Atwater’s “photograph and placed her in a cell, alone, for about one hour, after which she was taken before a magistrate, and released on \$310 bond.”); see also *State v. Klinker*, 537 P.2d 268, 275 (Wash. 1975); 20 ILL. COMP. STAT. ANN. 2630/2 (Smith-Hurd 1993) (“The Department [of State Police] shall procure and file for record . . . photographs . . . measurements, descriptions and information of all persons who have been arrested [in this state].”); Lawrence G. Newman, Note, *Retention and Dissemination of Arrest Records: Judicial Response*, 38 U. CHI. L. REV. 850, 850-51 (1971) (“The practice of taking fingerprints, photographs, and other identification data of every person arrested by local, state, and federal law enforcement officers . . . is well established.”).

281. *Atwater*, 532 U.S. at 354-55; *Id.* at 364 (O’Connor, J., dissenting) (“The arrestee is subject to a full search of her person and confiscation of her possessions.”).

282. See *United States v. Edwards*, 415 U.S. 800 (1974).

283. See, e.g., *Illinois v. LaFayette*, 462 U.S. 640, 648 (1983) (upholding station house search of person arrested for disorderly conduct); see also *State v. McCabe*, 708 S.W.2d 288, 291 (Mo. App. 1986) (holding that a person who has been arrested may be searched at the police station incident to a lawful arrest and as an inventory procedure); cf. *State v. Jetty*, 579 P.2d 1228, 1229-30 (Mont. 1978) (where “a local resident, [was] arrested at 3 a.m. for failure to pay an overdue one dollar parking ticket,” but was never booked, it was unconstitutional to search him for weapons and contraband prior to placing him in a holding cell).

284. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520 (2012); see also Mireya Navarro, *As Suspects Wait, the Fear of Tuberculosis Rises*, N.Y. TIMES, Jan. 30, 1992, at B1 (observing that persons held in New York City jails are at risk of contracting tuberculosis); William Glaberson, *Trapped in the Terror of New York’s Holding Pens*, N.Y. TIMES, Mar. 23, 1990, at A1.

285. *Florence*, 132 S. Ct. at 1518-19 (observing that Florence was held in a facility that admits more than 25,000 inmates each year and houses about 1,000 gang members at any given time and noting the “grave threats posed by the increasing number of gang members who go through the intake process,” and who, once admitted, “orchestrate thefts, commit assaults, and approach inmates in packs to take contraband from the weak” putting everyone, “including detainees being held for a minor offense,” at risk); see also *Atwater*, 532 U.S. at 364 (O’Connor, J., dissenting) (observing that “[b]ecause people arrested for all types of violent offenses may be housed together, . . . this detention period is potentially dangerous”).



his release.<sup>286</sup> If the arrest was made while the arrestee was in a vehicle the vehicle will probably be impounded and an inventory search conducted.<sup>287</sup> The arrestee may lose time from work,<sup>288</sup> or school, and may lose contact with family and friends.<sup>289</sup> He may suffer emotional distress<sup>290</sup> and public humiliation,<sup>291</sup> and will probably be required to retain an attorney and spend money on bail.<sup>292</sup> His “release may be accompanied by burdensome conditions that impose a significant restraint on his liberty.”<sup>293</sup> If the detention is at all prolonged, he may lose his job or suffer other adverse consequences.<sup>294</sup>

In addition to its direct consequences, any arrest, even a non-custodial arrest for a minor offense,<sup>295</sup> carries with it serious, long-term,

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One author has expressed the view that the in-the-presence requirement for misdemeanor arrests grew out of an early nineteenth century recognition of “[t]he deplorable conditions of jails and the resulting need to protect individuals from mistaken or arbitrary arrest.” J. Terry Roach, Comment, *The Presence Requirement and the Police-Team Rule in Arrest for Misdemeanors*, 26 WASH. & LEE L. REV. 119, 120 n.8 (1969) (citing David Kauffman, *The Law of Arrest in Maryland*, 5 MD. L. REV. 125 (1941)).

286. See, e.g., *Atwater*, 532 U.S. at 354 (Atwater was held for about one hour, “after which she was taken before a magistrate and released on \$310 bond”). See also *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-59 (1991) (a probable cause hearing should be held within forty-eight hours).

287. See *Colorado v. Bertine*, 479 U.S. 367 (1986).

288. See *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (“The consequences of prolonged detention may be more serious than the interference occasioned by arrest.”).

289. See, e.g., *Duran v. Elrod*, 542 F.2d 998, 1000 (7th Cir. 1976). The inconvenience, of course, is all the greater if the arrest or search takes place during the nighttime. Cf. *Jones v. United States*, 357 U.S. 493, 498 (1958); *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970).

290. See, e.g., *Atwater*, 532 U.S. at 370 (O’Conner, J., dissenting) (Atwater’s son was traumatized and subsequently had to be treated by a psychologist); *Thomas v. E.J. Korvette, Inc.*, 329 F. Supp. 1163, 1169 (E.D.Pa 1971), *rev’d*, 478 F.2d 421 (3d Cir. 1973) (noting that wrongfully arrested plaintiff suffered injury to his feelings, humiliation, and embarrassment); see also Barbara C. Salken, *The General Warrant of the Twentieth Century: A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. Q. 221, 257 (1989) (noting the “indignity, powerlessness, and inconvenience occasioned by a custodial arrest”).

291. See, e.g., *Atwater*, 532 U.S. at 354 (“Atwater’s arrest was surely humiliating”); *Lykken v. Vavreck*, 366 F. Supp. 585, 596 (D. Minn. 1973); *Thomas*, 329 F. Supp. at 1169; see also *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 440 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987) (noting the “sheer embarrassment” of an arrest).

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

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

293. *Gerstein*, 420 U.S. at 114.

294. “Pretrial confinement may imperil the suspect’s job, interrupt his source of income, and imperil his family relationships.” *Id.*

295. See *Foley v. Connelie*, 435 U.S. 291, 298 (1978) (“Even the routine traffic arrests made

collateral consequences for the arrestee.<sup>296</sup> Even if charges against the arrestee are ultimately dropped, or if he or she is found not guilty,<sup>297</sup> the records of the arrest will often be retained and disseminated among police agencies,<sup>298</sup> and on the internet.<sup>299</sup> Moreover, widespread public feeling that “where there’s smoke, there’s fire” will often leave even the acquitted defendant forever under a cloud of suspicion.<sup>300</sup> The result will often be lost employment opportunities,<sup>301</sup> lost educational

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by [a] state trooper . . . can intrude on the privacy of the individual. In stopping cars, they may, within limits, require a driver or passengers to disembark and even search them for weapons, depending on time, place and circumstances.”).

296. See Jeremiah Rygus, *Collateral Damage: Saddling Youth with a Lifetime of Consequences*, 26 CRIM. JUST. 37 (Winter 2012); Hon. Cynthia Diane Stephens, *Keeping an Arrest from Resulting in a Life Sentence in an Age of Full Disclosure of Criminal Records*, 87-NOV MICH. BAR J. 29 (2008); Margaret Colgate Love, *The Debt That Can Never Be Paid: A Report Card on the Collateral Consequences of Criminal Convictions*, 21 CRIM. JUST. 16 (Fall 2006).

297. See *Foley*, 435 U.S. at 298 (“An arrest . . . is a serious matter for any person even when no prosecution follows or when an acquittal is obtained.”).

298. See, e.g., 20 ILL. COMP. STAT. 2630/3(A) (West 2013) (requiring retention of arrest information and its dissemination “to peace officers of the United States, of other states or territories, of the Insular possessions of the United States, of foreign countries duly authorized to receive the same, [and] to all peace officers of the State of Illinois”); Barrett, *supra* note 139, at 47 n.2; Donald L. Doernberg & Donald H. Zeigler, *Due Process Versus Data Processing: An Analysis of Computerized Criminal History Information Systems*, 55 N.Y.U. L. REV. 1110, 1114 (1980) (observing that arrest records are generally maintained even when the arrestee is acquitted or the charges against him are dismissed); *Retention and Dissemination of Arrest Records*, *supra* note 280, at 852-53; cf. N.Y. CRIM. PRO. LAW § 160.50 (McKinney 1992) (specifying procedures for the return of fingerprints and photographs and providing that if a criminal action terminates in favor of an accused the record shall be sealed).

299. See, e.g., INSTANT CHECKMATE, <http://www.instantcheckmate.com>; INTELIUS, <http://www.intelius.com/>; U.S. CRIMINAL CHECKS, INC., <https://www.criminalchecks.com/>; CRIMINAL BACKGROUND CHECK, <http://backgroundchecks.org/>; see also JUDICI!, <http://www.judici.com> (many Illinois counties). Records are also available through county clerks’ online sites. See, e.g., [www.circuitclerk.co.jackson.il.us](http://www.circuitclerk.co.jackson.il.us).

300. See *In re Fried*, 161 F.2d 453, 458-59 (2d Cir. 1947), *cert. denied*, 331 U.S. 858 (1947) (“The stigma [of a wrongful arrest] cannot be easily erased . . . [and] is seldom wiped out by a subsequent judgment of not guilty. Frequently, the public remembers the accusation, and still suspects guilt, even after an acquittal.”); see also *Retention and Dissemination of Arrest Records*, *supra* note 280, at 864-65 (discussing uses of arrest records outside the criminal justice system). Expungement is unlikely to provide a full and complete remedy. See Amy Shlosberg, Evan Mandery, & Valerie West, *The Expungement Myth*, 75 ALB. L. REV. 1229 (2011-12); Clay Calvert & Jerry Bruno, *When Cleansing Criminal History Clashes With the First Amendment and Online Journalism: Are Expungement Statutes Irrelevant in the Digital Age?*, 19 COMMLAW CONSPICUOUS 123, 135 (2010).

301. It is very difficult to move beyond the stigmatizing effects of a criminal record. See *Criminal Background Checks Upend Job Search for Some Unemployed*, HUFFINGTONPOST (May 25, 2011), [http://www.huffingtonpost.com/2011/03/24/criminal-background-check\\_n\\_840195.html](http://www.huffingtonpost.com/2011/03/24/criminal-background-check_n_840195.html). In 1996, approximately fifty percent of employers ran background checks. By 2004, ninety-six percent did so. See Chad Terhune, *The Trouble with Background Checks*, BUSINESS WEEK (May 28, 2009), <http://www.businessweek.com/stories/2008-05-28/the-trouble-with-background-checks>. Some employers are barred by statute and regulation from hiring or continuing to employ anyone

opportunities,<sup>302</sup> and future law enforcement scrutiny.<sup>303</sup> Convictions, of course, can lead to even more severe consequences.<sup>304</sup>

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with a criminal record. See 12 U.S.C. § 5104(b)(2)(A) (West 2013) (applicants in “any State for licensing and registration as a State-licensed loan originator”) and 75 Fed. Reg. 44656, 44674 (West 2013) (must have “not been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign, or military court—(A) during the seven-year period preceding the date of the application for licensing and registration; or (B) at any time preceding such date of application, if such felony involved an act of fraud, dishonesty, or a breach of trust, or money laundering). There is no *de minimis* exception to the statute’s bar on hiring or continuing to employ anyone with a criminal record for dishonesty or breach of trust. See Victor Epstein, *Low-level workers fired because of new banking standards*, USA TODAY (Aug. 26, 2012, 6:01 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-08-26/banks-fire-low-level-workers/57334450/1> (employee fired for forty-nine year old conviction for stealing ten cents). Other employers, as a matter of policy, will not hire applicants who have a record of arrests for anything other than minor traffic violations. See, e.g., *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (D.C. Cal. 1970) (holding that company “policy of excluding from employment persons who have suffered a number of arrests without any convictions . . . is unlawful under Title VII”). Applicants for most professional licenses, including bar applicants, must ordinarily acknowledge all arrests without regard to their final disposition. See generally, Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 520-21 (1985).

Recently, the EEOC has limited employers’ ability to consider criminal histories. See EQUAL EMP’T OPPORTUNITY COMM’N, CONSIDERATIONS OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Apr. 25, 2012), available at 2012 WL 1499883; Am. Bar. Assoc. Section of Labor & Emp’t Law, *EEOC Issues Comprehensive Guidance Regarding Employers’ Use of Criminal Background Information*, HOT TOPIC: LABOR AND EMP’T LAW NEWS (Apr. 25, 2012), available at [http://www.americanbar.org/content/newsletter/groups/labor\\_law/ll\\_hottopics/2012\\_aball\\_hottopics/5-2012hot\\_guidance.html](http://www.americanbar.org/content/newsletter/groups/labor_law/ll_hottopics/2012_aball_hottopics/5-2012hot_guidance.html).

302. See, e.g., 20 U.S.C. § 1091 (2012) (rendering ineligible for federal education aid (for varying time periods) any “student who is convicted of *any* offense under Federal or State law involving the possession or sale of a controlled substance [while a student]”) (emphasis added); 12 U.S.C. § 1829 (West 2013) (rendering certain offenders ineligible for employment in a FDIC insured banking institution).

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

304. See *Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (“The practical effects of conviction of even petty offenses of the kind involved here are not to be minimized. . . . The collateral consequences of conviction may be even more serious, as when (as was apparently a possibility in this case) the impecunious medical student finds himself barred from the practice of medicine because of a conviction he is unable to appeal for lack of funds.”); Bruce R. Jacob, *Memories of and Reflections About Gideon v. Wainwright*, 33 STETSON L. REV. 280, 284 (2003) (“The stigma of any criminal conviction, including a misdemeanor conviction that results in a fine, is significant. Any misdemeanor conviction in a person’s past, except for a minor traffic offense, makes it difficult for that person to gain entry into medical school or law school, to obtain certain jobs, or to enter the

The consequences of an erroneous arrest are sufficiently severe that substantial civil damages have been awarded to persons improperly arrested for minor offenses.<sup>305</sup> The severity of these consequences, however, did not deter the *Atwater* court from holding that custodial arrests for minor crimes were constitutionally reasonable. *Florence* allows the police to add another major consequence—a strip search—to the arrestee’s experience.

The facts in *Florence* are especially egregious. For that reason, they are worth reproducing as the Supreme Court recited them. In 1998, according to the Supreme Court, Albert Florence pleaded guilty to two relatively minor offenses and was sentenced to two days in jail, two years probation, and ordered to pay a fine in monthly installments.<sup>306</sup> When he fell behind on his payments and failed to appear at an enforcement hearing, a bench warrant was issued for his arrest. He paid the outstanding balance less than a week later; but for some unexplained reason, the warrant remained in a statewide computer database.

Two years later, in Burlington County, New Jersey, Florence and his wife were stopped in their automobile by a state trooper. Based on the outstanding warrant in the computer system, the officer arrested petitioner and took him to the Burlington County Detention Center. He

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military service”); ABA COMM’N ON EFFECTIVE CRIMINAL SANCTIONS AND THE PUB. DEFENDER SERV. FOR THE DIST. OF COLUMBIA, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (Jan. 2009), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf>.

305. See, e.g., *McClellan v. Smith*, No. 1:0-cv-1141, 2009 WL 3587431 (N.D.N.Y. Oct. 23, 2009) (\$150,000 in compensatory damages and \$20,000 in punitive damages); *Zellner v. Summerlin*, 494 F.3d 344 (2d Cir. 2007); *Thomas*, 329 F.Supp. at 1169-71 (\$750,000 jury verdict, including \$250,000 actual damages, reduced on appeal to compensatory damages of \$100,000 and \$50,000 in punitive damages); *Gaszak v. Zayre of Illinois, Inc.*, 305 N.E.2d 704, 711-12 (Ill. App. Ct. 1973) (\$10,500 verdict); *Schmidt v. Richman Gordman, Inc.*, 215 N.W.2d 105, 111 (Neb. 1974) (\$10,500 reduced on appeal to \$10,000); see also Schroeder, *Warrantless Misdemeanor Arrests*, *supra* note 228 (containing an earlier discussion of the information contained in footnotes 273-303 and accompanying text) (cited in Brief of Amicus Curiae Texas Criminal Defense Lawyers Ass’n in Support of Petitioners, *Atwater v. Lago Vista*, 532 U.S. 318 (2001) (No. 99-1408), 2000 WL 1341293; Brief of Respondents at 38, *Atwater*, 532 U.S. 318, (No. 99-1408), 2000 WL 1659099; Brief Amicus Curiae of the American Civil Liberties Union, the ACLU of Texas, the Mexican-American Legal Defense and Educational Fund, and the National Police Accountability Project of the National Lawyer’s Guild in Support of Petitioners at 20, *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1341276; Brief of Amicus Curiae for Americans for Effective Law Enforcement, Inc. in Support of Neither Party at 7, *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1280456; Brief for the United States as Amicus Curiae Supporting Respondents at 12, *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1673201).

306. The original charges were obstruction of justice and use of a deadly weapon after fleeing police officers in an automobile. Florence pleaded guilty to hindering prosecution and obstructing the administration of law. Brief for Respondents at 6, *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012) (No. 10-945), 2011 WL 3739474.

was held there for six days and then was transferred to the Essex County Correctional Facility. . . .

Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. Petitioner shared a cell with at least one other person and interacted with other inmates following his admission to the jail. . . .

The Essex County Correctional Facility . . . admits more than 25,000 inmates each year and houses about 1,000 gang members at any given time. . . . [A]ll arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Apparently without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. This policy applied regardless of the circumstances of the arrest, the suspected offense, or the detainee's behavior, demeanor, or criminal history. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position as part of the process. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility.<sup>307</sup>

Florence was released the next day, when the charges against him were dismissed because, as finally became known, he had long ago complied fully with the law.

### C. *The Governmental Interests That Justify the Intrusion of a Custodial Arrest*

In the broadest sense, the government's primary interest in arresting any lawbreaker is to make the arrestee available for prosecution.<sup>308</sup> That goal is advanced, at least potentially, by any arrest, custodial or non-custodial. The *Atwater* Court pointed to two reasons this goal would be compromised if the police were not allowed to make custodial arrests for "minor" offenses: (1) There would be administrative difficulties because police officers would be required to make on-the-spot judgments about

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307. *Florence*, 132 S. Ct. at 1514.

308. *Virginia v. Moore*, 553 U.S. 164, 173 (2003); cf. LAFAYE, ARREST, *supra* note 278, at 437-89 (1965) (observing that many arrests for minor offenses are made for purposes other than prosecution).

the seriousness of offenses; (2) There would be a “systematic disincentive” to make custodial arrests in close cases where such an “arrest . . . would serve . . . important societal interest[s],”<sup>309</sup> because police officers would face the prospect of evidentiary exclusion and personal liability if their judgments were wrong.<sup>310</sup> In the absence of custodial arrest, said the Court, evidence could be lost, some offenders could flee and avoid prosecution, and some convictions could be lost. All these concerns are illusory.

### 1. The Government’s Interest in Avoiding Administrative Barriers to Law Enforcement

#### a. The Seriousness of the Offense and the Government’s Interest in Easily Administered Rules

The *Atwater* Court premised its decision, in significant part, on its belief that a rule requiring arresting officers to distinguish between “minor” crimes and other crimes “on a moment’s notice,” would be unmanageable.<sup>311</sup> The Court did not claim, however, (and could not have credibly claimed), that the government’s interest in arresting and convicting lawbreakers is the same in every case. Clearly, for example, its interest in apprehending and convicting serial killers is greater than its interest in convicting litterers.<sup>312</sup> Long before *Atwater*, the Court recognized that variations in the government’s interest could translate into different Fourth Amendment rules for different kinds of offenses.

In *Welsh v. Wisconsin*,<sup>313</sup> the Court observed that the penalty that attaches to a crime is the best indicator of the government’s interest in convicting people of that offense and explicitly held that the gravity of the underlying offense for which the arrest is made is “an important factor to be considered when determining whether any exigency exists” that would justify a warrantless entry into a person’s home to make that arrest.<sup>314</sup> The Court concluded that a warrantless entry into a person’s home to effectuate that person’s arrest could not ordinarily be justified where only “a minor offense, such as that at issue in this case” is involved.<sup>315</sup>

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309. *Atwater*, 532 U.S. at 351.

310. *Id.* at 350.

311. *Atwater*, 532 U.S. at 347.

312. See Stuntz, *supra* note 190.

313. 466 U.S. 740 (1984).

314. *Id.* at 753.

315. *Id.*

The *Welsh* majority did not elaborate further on which offenses were “minor” for purposes of warrantless home entries but observed that by classifying driving while intoxicated as a “non-jailable traffic offense”<sup>316</sup> and as a “noncriminal civil forfeiture offense” which carried no possibility of imprisonment, the state of Wisconsin had differentiated it from all other offenses.<sup>317</sup> However, in *McArthur v. Illinois*,<sup>318</sup> decided shortly after *Atwater*, the Court distinguished *Welsh* on the basis that the crime in *Welsh* was non-jailable, whereas “[t]he evidence at issue [in *McArthur* is] . . . of crimes that were jailable.”<sup>319</sup> *McArthur* arose out of the actions of police officers who barred McArthur from his home while they went to get a warrant to search the home for drugs. McArthur argued that the offense that the drugs could prove was too minor to justify his exclusion from his home. The *McArthur* Court rejected this argument and also noted that temporarily barring a person from his home “is considerably less intrusive” than entering his home and is permissible where the offense at issue was “jailable.”<sup>320</sup>

The *Atwater* Court could have taken a similar approach and said that a custodial arrest for a non-jailable offense is at least as intrusive as the warrantless home entry that was at issue in *Welsh*, and is therefore unconstitutional absent exigent circumstances akin to those recognized in *Welsh*.<sup>321</sup> The *Atwater* Court did not do this. Instead, it ignored *Welsh* and took the position that a rule requiring arresting officers to distinguish between “minor” offenders and other offenders “promise[d] little in the way of administrability,”<sup>322</sup> because officers often would not know in advance which offenses qualified as minor (however that term was defined).<sup>323</sup> In the Court’s view such a rule was unnecessary, would

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316. *Id.* at 742.

317. *Id.* at 754.

318. 531 U.S. 326 (2001).

319. *Id.* at 335-36.

320. *See id.* at 336 (declining to decide if the same restrictions on entry would have been permissible “were only a ‘non-jailable’ offense at issue.”).

321. *See Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (a “persuasive claim might [be] made . . . that [a] custodial arrest . . . for a minor traffic violation violate[s] the Fourth and Fourteenth Amendments . . .”); *New Jersey v. T.L.O.*, 469 U.S. 325, 379 (1985) (Stevens, J., dissenting) (observing that the “[c]riminal law has traditionally recognized a distinction between essentially regulatory offenses and serious violations of the peace, and [has] graduated the response of the criminal justice system” accordingly).

322. *Atwater v. Lago Vista*, 532 U.S. 318, 350 (2001).

323. *Id.* at 347-48. *See also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 392 (2009) (Thomas, J., concurring in part and dissenting in part) (complaining that if “the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. . . . Such a test is unworkable and unsound. School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is

require “sensitive, case-by-case determinations of government need,”<sup>324</sup> and could expose officers to the risk of a lawsuit or to the exclusion of evidence if they erred on the side of custodial arrest.<sup>325</sup>

*Welsh* was not the only pre-*Atwater* Fourth Amendment case to consider the seriousness of the offense. A year after *Welsh*, in *United States v. Hensley*,<sup>326</sup> the Court unanimously held that a police officer may stop a person whom he or she reasonably suspects “was involved in or is wanted in connection with a completed felony.”<sup>327</sup> The *Hensley* Court did not limit such stops to felonies. Rather, it merely declined to decide whether warrantless “*Terry* stops to investigate all past crimes, however serious, are permitted.”<sup>328</sup>

One week after *Hensley*, in *New Jersey v. T.L.O.*,<sup>329</sup> the Court held that a student in a public school may be subjected to a search of his or her person or belongings if “there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.”<sup>330</sup> The Court said the intrusiveness of a search must be limited, “in light of the age and sex of the student and the nature of the infraction.”<sup>331</sup> However, in response to Justice Stevens’ concerns, expressed in a separate opinion, that this standard would permit searches for evidence of even the most trivial violations of school rules,<sup>332</sup> the *T.L.O.* majority expressly stated that it was “unwilling to adopt a standard under which the legality of a search is dependent upon a judge’s evaluation of the relative importance of various school rules.”<sup>333</sup>

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not severe enough to warrant an intrusive investigation.”).

324. *Atwater*, 532 U.S. at 347.

325. *Id.* at 350.

326. 469 U.S. 221 (1985).

327. *Id.* at 229. The idea of limiting particular types of Fourth Amendment activities to situations where a felony was involved was also raised in *Payton v. New York*, 445 U.S. 573 (1980), where the dissenters argued that historically warrantless arrests in the home could only be made for felonies. *Id.* at 616-17 (White, J., dissenting).

328. *Hensley*, 469 U.S. at 229. See also *United States v. Sharpe*, 470 U.S. 675, 689 n.1 (1985) (Marshall, J., concurring) (“We have never suggested that all law enforcement objectives, such as the investigation of possessory offenses, outweigh the individual interests infringed upon [by investigatory stops].”).

329. 469 U.S. 325 (1985).

330. *Id.* at 342; see also *id.* at 350 n.3 (Powell, J., concurring) (recapitulating the Court’s holding in this language).

331. *Id.* at 342.

332. *Id.* at 377 (Stevens, J., concurring in part and dissenting in part). See also *Robbins v. California*, 453 U.S. 420, 450-52 (1981) (Stevens, J., dissenting) (expressing similar concerns in the context of minor traffic stops).

333. *T.L.O.*, 469 U.S. at 342 n.9; cf. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 392 (2009) (Thomas, J., concurring in part and dissenting in part) (complaining that “[t]he



A few months after *T.L.O.*, the Court added a new wrinkle when it focused on the nature of the harm that would be averted by the Fourth Amendment action in question. In *Tennessee v. Garner*,<sup>334</sup> the Court characterized the felony-misdemeanor distinction as “highly technical,” “minor,” and “arbitrary” and held that deadly force cannot be used to seize a suspect simply because there is probable cause to believe that he has committed a felony.<sup>335</sup> Instead, the Court, relying on the balancing of interests that it said is at the core of the Fourth Amendment, held that the use of such force to prevent the escape of a suspect, is “constitutionally unreasonable” unless the officer also has “probable cause to believe that the suspect poses a threat of serious physical harm, whether to the officer or to others.”<sup>336</sup>

In *Graham v. Connor*,<sup>337</sup> the Court held all claims that a law enforcement officer used excessive force in effecting a “seizure” should be analyzed under the Fourth Amendment’s reasonableness standard in light of the facts and circumstances of each case.<sup>338</sup> Reasonableness, said the Court, must be determined from all the facts and circumstances, “including the severity of the crime at issue.”<sup>339</sup>

Numerous pre-*Atwater* cases in state courts<sup>340</sup> and in lower federal

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majority has placed school officials in this ‘impossible spot’ by questioning whether possession of Ibuprofen and Naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. . . . In effect, then, the majority has replaced a school rule that draws no distinction among drugs with a new one that does. As a result, a full search of a student’s person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous.”)

334. 471 U.S. 1 (1985).

335. *Id.* at 14, 20.

336. *Id.* at 11. In *Skinner v. Railway Labor Exec.’s Ass’n*, 489 U.S. 602 (1989), the Court suggested that the magnitude of the harm that a Fourth Amendment activity is intended to avert is relevant to Fourth Amendment analysis. The Court ruled that railroad employees could be tested for drug use without a warrant and without individualized suspicion, because the evil against which such efforts were directed was not simply the violation of criminal laws against the possession of drugs, but the “far more dangerous wrong” of performing “certain sensitive tasks while under the influence of those substances.” *Id.* at 633.

Skinner’s emphasis on the harm the seizure was intended to avert is similar to Professor LaFave’s suggestion that “a much more promising approach” than looking to the seriousness of the offense is to take “into account the utility of the police action for purposes other than securing a conviction.” 2 LAFAVE, SEARCH AND SEIZURE, *supra* note 57, §3.2(a) at 33 (quoting *United States v. Soyka*, 394 F.2d 443, 452 (2d Cir. 1968) (Friendly, J., dissenting)).

337. 490 U.S. 386 (1989).

338. *Id.* at 395.

339. *Id.* at 396.

340. See, e.g., *State v. Weist*, 730 P.2d 26, 29 (Or. 1986) (“A warrant to rip apart a vehicle or tear up the inside of a home in search of less than an ounce of marijuana (possession of which is a violation. . . ) may well be unreasonable. . . . So might a warrant to rip apart a vehicle to see whether it was registered in a manner constituting . . . a traffic infraction.”); *State v. Niblock*, 631 P.2d 661, 666

courts<sup>341</sup> also recognized, in various Fourth Amendment contexts, that the seriousness of the offense under investigation bears on whether a particular Fourth Amendment activity is reasonable. Some post *Atwater* cases contain similar suggestions.

*Welsh*, *Garner*, and *Hensley* suggest that the less serious the offense under investigation, the greater the limits the Constitution imposes on the kind of actions the government can take to investigate the offense and to seize the offender.<sup>342</sup> At the other end of the scale, some post-*Atwater* cases suggest that a “grave” crime might justify greater interference with individual liberty. In *City of Indianapolis v. Edmond*,<sup>343</sup> the Court held that roadblocks could not be directed at ordinary criminality not connected in some way with the use of the highways.<sup>344</sup> That Court observed, however, that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”<sup>345</sup>

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(Kan. 1981) (“the seriousness of the alleged offense” is a relevant factor “in evaluating police conduct in making a warrantless arrest”); *People v. Scott*, 578 P.2d 123, 127 (Cal. 1978) (where probable cause exists to believe that a bodily intrusion will yield relevant evidence, the court should only issue a warrant if the balance of other factors, including “the seriousness of the underlying criminal offense,” so suggests); *People v. Sirhan*, 497 P.2d 1121, 1140 (Cal. 1972) (“[T]he ‘gravity of the offense’ is an appropriate factor to take into consideration” in determining whether an emergency existed that justified the searching officers’ decision to forego obtaining a warrant.); *see also* *People v. Stachelek*, 495 N.E. 2d 984, 989 (Ill. App. 1986) (the seriousness and violent nature of a gang related murder was “[a]nother relevant factor in determining whether the officers acted properly” in determining that they had probable cause to arrest defendant); *People v. Sanders*, 374 N.E.2d 1315, 1317-18 (Ill. App. Ct. 1978) (applying factors from *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), including the seriousness of the crime, to invalidate warrantless entry to arrest person suspected of burglary which is not “a grave offense of violence”); *People v. Johnson*, 93 Cal. Rptr. 534, 537 (Ct. App. 1971) (“[T]he seriousness of the offense allegedly committed” is relevant to whether police officers had probable cause to arrest kidnapper described by child’s mother.).

341. *See, e.g.*, *Llaguno v. Minge*, 763 F.2d 1560, 1565 (7th Cir. 1985) (“[T]he fact that a multiple murderer is on the loose . . . may affect the judgment of what is reasonable. . . . Probable cause . . . describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed.”); *United States v. Holland*, 510 F.2d 453, 455 (9th Cir. 1975), *cert. denied*, 422 U.S. 1010 (1975) (quoting *Arnold v. United States*, 382 F.2d 4, 7 (9th Cir. 1967)) (“The reasonableness of . . . [an] on-the-scene detention is determined by all the circumstances [including] . . . [t]he seriousness of the offense.”); *Dorman v. United States*, 435 F.2d 385, 392-93 (D.C. Cir. 1970) (holding that in determining whether exigent circumstances justify a warrantless entry into a home to make an arrest, one factor to be considered is whether a grave offense, particularly a crime of violence, is involved); *see also* *United States v. Jarvis*, 560 F.2d 494, 498 (2d Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (following *Dorman*).

342. *Cf. Search and Seizure in the Supreme Court*, *supra* note 197, at 677 (“[T]he detection of minor crimes might legitimize only minor invasions of privacy.”).

343. 531 U.S. 32 (2001).

344. *Id.* at 39-44.

345. *Id.* at 44.

In *Illinois v. Lidster*,<sup>346</sup> the Court held that highway checkpoints to obtain information from possible witnesses to a fatal hit and run accident were reasonable under the Fourth Amendment.<sup>347</sup> The Court relied on the three part test used in *Brown v. Texas*<sup>348</sup> and observed “[p]olice were investigating a crime that had resulted in a human death. . . . The stop advanced this grave public concern to a significant degree.”<sup>349</sup>

The Supreme Court’s focus on the seriousness of the offense in Fourth Amendment settings has been tentative and without direction. It has not, however, been non-existent. Taken together, *Welsh*, *Hensley*, *Garner*, and *Graham*, suggest: (1) a willingness on the part of the Supreme Court to consider the seriousness of the offense in a wide range of Fourth Amendment contexts, (2) uncertainty and ambivalence about where the line or lines should be drawn between or among various kinds of offenses, and (3) an assumption that if offenses are to be ranked for Fourth Amendment purposes, they should be categorized and not ranked individually on a case-by-case basis.

In his *Welsh* dissent, Justice White expressed fears that focusing on the seriousness of the offense would “hamper law enforcement . . . burden courts with pointless litigation concerning the nature and gradation of crimes,” and “necessitate a case-by-case evaluation of the seriousness of particular offenses.”<sup>350</sup> Those concerns are similar to the “administrability” concerns expressed by the *Atwater* Court. However, the *Welsh* Court’s use of generic terms such as “minor” and “jailable” strongly suggests that the *Welsh* majority contemplated some process of categorization and not case-by case adjudication of the seriousness of each offense.

*Hensley*, *Garner*, *McCarthy*, and *Lidster* also used generic terms in their efforts to distinguish some crimes from others. No one has seriously argued that a case-by-case approach to the seriousness of the crime should be used in Fourth Amendment settings. In fact, when the idea has reared its head, it has been firmly rejected.<sup>351</sup>

If a process of categorization is used, possible methodologies for ranking crimes abound.<sup>352</sup> It is only necessary is to articulate clear

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346. 540 U.S. 419 (2004).

347. *Id.* at 426-27.

348. 443 U.S. 47, 51 (1979).

349. *Id.* at 427.

350. *Welsh v. Wisconsin*, 466 U.S. 740, 760-62 (1984) (White J., dissenting).

351. *See, e.g., Dunaway v. New York*, 442 U.S. 200, 213-14(1979) (extolling the virtues of “[a] single, familiar standard . . . to guide police officers . . .”).

352. *See Schroeder, The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 503-34 (setting out different possible classification schemes).

distinctions that can easily be applied. Once a scheme is agreed upon for distinguishing offenses for which custodial arrests are permissible from those for which they are not permissible, a “no-custodial-arrest” rule for minor offenses could be easily administered through the use of what the *Atwater* Court referred to as “a simple tiebreaker . . . : if in doubt do not arrest.”<sup>353</sup> The Court rejected this approach, however, on the ground it “would boil down to something akin to a least restrictive alternative limitation . . . generally thought inappropriate in working out Fourth Amendment protection,” and would provide “a systematic disincentive to arrest.”<sup>354</sup> On examination, the Court’s arguments do not hold water.

b. Evidentiary Exclusion, Personal Liability, and the Government’s Interest in Avoiding a Systematic Disincentive to Make Custodial Arrests

According to the *Atwater* Court, a rule barring custodial arrests for minor offenders would address a largely non-existent problem because very few custodial arrests are made for minor offenses<sup>355</sup> and would therefore yield few benefits. However, “the prospect of evidentiary exclusion or . . . personal § 1983 liability for the misapplication of a constitutional standard”<sup>356</sup> would cause many officers to issue only citations where a custodial arrest might have been appropriate. The result would be a “systematic disincentive to arrest in situations where . . . arresting would serve an important societal interest.”<sup>357</sup> The *Atwater* Court was especially troubled by the possibility that an officer might refrain from making a custodial arrest because he was “not quite sure that the drugs weighed enough to warrant jail time,” or was not sure whether the offense was a second offense.<sup>358</sup> “Multiplied many times over, the costs to society of such under-enforcement could easily outweigh the costs to defendants of being needlessly arrested and

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353. 532 U.S. 318, 350 (2001).

354. *Id.* at 350-51.

355. *Id.* at 353 (observing that “when *Atwater*’s counsel was asked at oral argument for any indications of comparably foolish, warrantless misdemeanor arrests, he could offer only one”). In 2002, 448,000 drivers were arrested during traffic stops. CHARACTERISTICS OF DRIVERS STOPPED BY POLICE, 2002, *supra* note 92, at 5. Seventy-three percent of these drivers experienced a vehicle or personal search. Police searched about 838,000 drivers in 2002. Of the drivers who were searched, 39.3% were also arrested; about half of the drivers who were both searched and arrested, were searched after police arrested them. *Id.* at 6.

356. *Atwater*, 532 U.S. at 350.

357. *Id.* at 351.

358. *Id.*

booked.”<sup>359</sup>

The Court’s concerns seem exaggerated. There is no reason to believe there would be large numbers of cases where, out of an excess of caution, an officer would issue a citation for a minor offense when probable cause exists to justify a custodial arrest for a more serious offense.<sup>360</sup> In many cases, an officer could resolve any doubts about the seriousness of the offense by detaining and questioning the suspect briefly in a *Terry*-type stop. Even if the officer was unable to resolve his or her doubts, the chances are minimal that a mistake could result in “legal action,” or “evidentiary exclusion,” because of a violation of the constitution.<sup>361</sup> For one thing, probable cause does not require certainty—it requires only a fair probability of criminal activity.<sup>362</sup> Probable cause “means less evidence than would justify . . . conviction, [but] more than bare suspicion”<sup>363</sup> or reasonable suspicion.<sup>364</sup> Second, an arrest generally is valid if the police had probable cause to arrest the suspect for any offense.<sup>365</sup> An officer not quite certain about the weight of the drugs, or about some other fact that would justify a custodial arrest, would almost always have probable cause to make a non-custodial arrest for *some* offense. A decision not to take a suspect into custody would therefore ordinarily not preclude an arrest; it would only mean the loss of immediate custodial control over the suspect. Third, the fact that an individual is arrested without probable cause does not entitle him to terminate the prosecution.<sup>366</sup> Fourth, as Justice O’Connor pointed out in her *Atwater* dissent, officers would be protected from liability by qualified immunity<sup>367</sup> “if they arrest a suspect under the mistaken belief that they have probable cause to do so, provided that the

359. *Id.* at 351.

360. *Atwater* seems to allow a custodial arrest for a minor offense even when that arrest is motivated primarily by the officer’s suspicion of a more serious offense. *Cf.* *Whren v. United States*, 517 U.S. 806 (1996).

361. *Atwater*, 532 U.S. at 350.

362. *See* *Illinois v. Gates*, 462 U.S. 213, 245, n.13 (1983).

363. *Brinegar v. United States*, 338 U.S. 160, 175 (1949); *see also* *Llaguno v. Mingey* 763 F.2d 1560, 1565 (7th Cir. 1985) (“Probable cause means . . . ‘more than bare suspicion, but less than virtual certainty’ . . . [it] describes not a point but a zone, within which the graver the crime the more altitude the police must be allowed.”).

364. *See* *Griffin v. Wisconsin*, 483 U.S. 868, 878 n.4 (1987).

365. *Devenpeck v. Alford*, 543 U.S. 146, 153-54 (2004); *cf.* *McClellan v. Smith*, No. 1:02-cv-1141, 2009 WL 3587431 (N.D.N.Y. Oct. 26, 2009) (suggesting that the *Devenpeck* doctrine would not apply where there is probable cause to arrest a person for opening a car door in traffic and he is instead, arrested for murder).

366. *See* *United States v. Crews*, 445 U.S. 463, 474 (1980); *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Frisbie v. Collins*, 342 U.S. 519, 522 (1952).

367. *Atwater v. Lago Vista*, 532 U.S. 318, 367 (2001) (O’Connor, J., dissenting).

mistake is objectively reasonable.”<sup>368</sup> Indeed, shortly after its decision in *Atwater*, the Court expanded the protections afforded by the qualified immunity doctrine.<sup>369</sup> It is therefore unlikely that fear of suit alone would cause large numbers of officers to issue a citation for a minor offense when there was probable cause to make a custodial arrest for a more serious offense. For all these reasons, even if some officers occasionally erred on the side of caution and refrained from making some legal custodial arrests, the direct costs of this “underenforcement” would be low.

## 2. The Government’s Interest in Preventing Flight, Loss of Evidence, and Lost Convictions

### a. Flight

The *Atwater* Court expressed concern that a rule limiting custodial arrests to minor crimes would, among other things, mean that “[a]n officer not quite sure that the drugs weighed enough to warrant jail time or not quite certain about a suspect’s risk of flight would not arrest, even though it could . . . turn out that, in fact, the offense called for incarceration and the defendant was long gone on the day of trial.”<sup>370</sup> This concern is inconsequential.

First, if a custodial arrest is possible but instead a citation is issued, the offender still has an obligation to appear in Court. If he does not appear, a bench warrant will issue for his arrest and he can be arrested at a later date.

Second, in most cases where a citation is given for a minor offense and it turns out a custodial arrest could have been made for a more

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368. See, e.g., *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478 (8th Cir. 2010) (quoting *Ameren v. Brooks*, 522 F.3d 823, 832 (8th Cir. 2008) (finding doctrine inapplicable)); *Lee v. Ferraro*, 284 F.3d 1188, 1195 (11th Cir. 2002) (“[A]ll that is required for qualified immunity to be applicable to an arresting officer” is that a “reasonable officer . . . in the same circumstances and possessing the same knowledge as the Defendant[] could have believed that probable cause existed to arrest.”) (quoting *Scarborough v. Miles*, 245 F.3d 1299, 1302 (11th Cir. 2001)).

369. See *Saucier v. Katz*, 533 U.S. 194, 201, 205 (2001), stating that the immunity inquiry: must be undertaken in light of the specific context of the case, not as a broad general proposition; . . . The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding . . . [of the law]. If the officer’s mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.

370. *Atwater*, 532 U.S. at 351.

serious offense, the latter will still be a relatively minor offense. “The seriousness of the offense with which a suspect may be charged . . . bears on the likelihood that he will flee and escape apprehension if not arrested immediately.”<sup>371</sup> Minor offenders have less to fear from prosecution than serious offenders and therefore have less incentive to flee, to resist arrest by force, or to engage in other activities that endanger police officers or others.<sup>372</sup> In fact, for most minor offenders, the costs and risks of serious efforts to flee or otherwise evade arrest are prohibitive given the minor consequences of conviction.<sup>373</sup>

Third, in many misdemeanor cases, particularly those that occur in the officer’s presence, the identity of the suspect is known or strongly suspected.<sup>374</sup> In traffic cases, the officer has access to the offender’s driver’s license and registration. There is little prospect of successful flight and finding the suspect should be relatively easy.

Fourth, even if a custodial arrest were made for the more serious offense, the defendant will ordinarily be able, in some legal way, to secure his release before trial. If he is determined to flee, he will probably eventually be able to do so despite a custodial arrest.

Fifth, if a person who has committed a more serious offense is released with a summons, he may develop a misplaced confidence that the police have no serious interest in him. Some such persons may not even know they have committed, or are suspected of, another offense.<sup>375</sup>

For all these reasons, it is unlikely that significant numbers of persons given summonses will flee or escape apprehension if the police

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

372. *See* EDWARD C. FISHER, *THE LAWS OF ARREST* 189 (1987) (observing that at common law persons accused of breaches of the peace were “not considered likely to resort to desperate measures to escape punishment, as was quite likely to be the case of one who had committed a felony”).

373. *See* LAFAYETTE & ISRAEL, *CRIMINAL PROCEDURE*, *supra* note 61, § 1.2, at 10. The overwhelming majority of minor offenders are charged in state court. Many of their offenses are traffic-related and result only in small fines. “[T]he vast majority” of defendants whose cases started as misdemeanors “will be sentenced to a fine and/or some form of community service. *Id.* § 1.4 at 28. “[F]ew are sentenced to incarceration.” *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1524 (2012) (Alioto, J., concurring). Even in the federal system, where more serious offenses are usually involved, less than half of all non-drug, non-violent offenders convicted in federal court from 1980 through 1986 received prison sentences. UNITED STATES DEP’T OF JUSTICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1989*, at 5.26 (1989).

374. *See, e.g., Welsh*, 466 U.S. at 342-43; *State v. Koziol*, 338 N.W.2d 47, 47-48 (Minn. 1983); *see also Mendelson*, *supra* note 113, at 504 (“[I]t makes no sense to arrest someone for a noisy muffler where there is reliable identification and reasonable assurance that the ticket will be obeyed.”).

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

must wait before arresting them.<sup>376</sup>

#### b. Loss of Evidence

A bar on custodial arrests for certain offenses would translate into a bar on searches incident to arrests for those offenses. Because a search for evidence ordinarily is not permitted on the basis of mere suspicion,<sup>377</sup> an officer making a non-custodial arrest will be unable, incident to that arrest, to search for evidence that he or she reasonably suspects is in the arrestee's possession. In many misdemeanor cases, however, there is no evidence to be found.<sup>378</sup> In others, all the evidence has long since been gathered. In those few cases in which evidence remains to be gathered, minor offenders are probably less likely than serious offenders to be alert to the need to destroy evidence and are less likely to actually do so.<sup>379</sup> Finally, the issuance of a citation is not necessarily the end of the matter. While writing the citation the officer can seek consent to search. Because the stop is not, by definition, custodial,<sup>380</sup> the officer can also question the suspect unhindered by *Miranda*.

#### c. Lost Convictions

Occasionally, a rule barring custodial arrests for minor offenses could mean some crime that could otherwise have been prosecuted will go unpunished. As Justice Scalia said, however, in *Arizona v. Hicks*,<sup>381</sup> “[T]here is nothing new in the realization that the Constitution

376. See KAMISAR, ET AL, MODERN CRIMINAL PROCEDURE, *supra* note 112, at 336 (speaking in terms of offenders generally and observing that “the risk is negligible that the defendant will suddenly flee between the time the police solve the case and the time which would be required to obtain and serve an arrest warrant.”); 3 LAFAYETTE, SEARCH AND SEIZURE, *supra* note 57, § 6.1(b) at 573 & n.50 (same, noting that it is unlikely that “prospective arrestees, as a class, pose the same risk of disappearance as objects believed to be in a moving vehicle”); *cf.* United States v. Hensley, 469 U.S. 221, 229 (1985) (stating that “[r]estraining police action until after probable cause is obtained . . . might . . . enable the suspect to flee in the interim and to remain at large”).

377. See *Arizona v. Hicks*, 480 U.S. 321, 326-28 (1987).

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

379. See *State v. Lloyd*, 606 P.2d 913, 919 (Haw. 1980) (“[N]ot every suspect . . . will attempt to escape or destroy valuable, albeit illicit, merchandise.”). In some cases, the police could take steps to prevent the destruction or loss of evidence. See, e.g., *McArthur v. Illinois*, 531 U.S. 326, 335-36 (2001) (temporarily keeping defendant from entering his home while police obtained a search warrant).

380. See *Berkemer v. McCarty*, 468 U.S. 420, 439-40 (1984) (“[T]he usual traffic stop is more analogous to a so-called ‘Terry stop’” and a driver stopped for a routine traffic violation is therefore “not ‘in custody’ for the purposes of *Miranda*.”).

381. 480 U.S. 321 (1987).



sometimes insulates the criminality of a few in order to protect the privacy of us all.”<sup>382</sup> Countless crimes go unreported and unprosecuted; the addition of a few more to the list is not consequential.

Most of the crimes that might go unprosecuted as a consequence of a rule barring some custodial arrests would be relatively minor. In almost all of the “under-enforcement” situations with which the Court was concerned, the more serious offense is similar in kind but different in degree from the less serious offense. In the vast majority of cases the uncertainty lies not in whether the arrestee who appears guilty of underage drinking may actually be guilty of murder;<sup>383</sup> the uncertainty lies in whether the arrestee had a larger quantity of drugs instead of a smaller quantity of drugs or, in whether an apparent larceny exceeded some arbitrary dollar amount or was a second such offense. The penalties may be more severe for greater amounts of drugs or property but the offenses are not morally different and the costs to society of a lost prosecution are not significantly greater. Extreme examples, such as that given by the Court in *Atwater* where a failure to restrain a child could turn into felony child endangerment,<sup>384</sup> demonstrate, not the possibility of a serious crime going unpunished, but the growing tendency of the law to over-criminalize and over-punish relatively innocuous behaviors.

Minor regulatory crimes, and minor thefts and drug cases, and their slightly bigger brothers, are not the kind of crimes that cry out for punishment or retribution. In many instances, the pursuit of minor offenders is motivated more by a desire to raise revenue than to control a social problem.<sup>385</sup> In fact, most minor offenders are never

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382. *Id.* at 329.

383. At least one well-known criminal, Tim McVeigh, was apprehended when stopped for a minor offense. However, McVeigh was not taken into custody for that offense. *See, e.g.*, Richard Serrano, *Trooper Testifies About McVeigh's Arrest*, L.A. TIMES, Apr. 29, 1997, available at [http://articles.latimes.com/1997-04-29/news/mn-53622\\_1\\_mcveigh-trooper-testifies](http://articles.latimes.com/1997-04-29/news/mn-53622_1_mcveigh-trooper-testifies) (stating that McVeigh was pulled over for not having a license plate but taken into custody because he had a gun).

384. *Atwater v. Lago Vista*, 532 U.S. 318, 349 n.20 (2001).

385. It has been argued that the pursuit of minor offenders can reduce the number of major crimes:

First articulated in a 1982 essay for the *Atlantic Monthly*, the broken windows theory suggests that the slippery slope to lawlessness begins when a community starts tolerating relatively minor violations of public order—vandalism of abandoned structures, minor traffic violations, loitering and the like—and that cracking down on such nuisances discourages more serious crimes such as robbery, burglary and assault.

Brian Dickerson, *Broken Windows theory of Community Policing will get major Test in Detroit*, DETROIT FREE PRESS (May 24, 2012),

<http://www.freep.com/article/20120524/COL04/205240458/Brian-Dickerson-Broken-windows->

apprehended.<sup>386</sup> Many of those who are arrested are not prosecuted,<sup>387</sup> or are acquitted.<sup>388</sup> Even when the offense is one for which incarceration is a possible penalty, few minor offenders who are convicted actually serve jail time.<sup>389</sup>

Although “[t]he purpose of the Fourth Amendment is not the defeat of certain criminal laws,”<sup>390</sup> in most cases involving minor offenses there is no real loss if the offender goes unpunished. If the offender continues to reoffend, he will ultimately be caught and prosecuted. If he is scared straight by his close brush with the law or, for some other reason does not reoffend and goes on to lead a good life, then most of society’s legitimate goals have been accomplished.

In truth, in many cases of minor criminality, the offender and society might both be better off if the crime had never been detected and the offender never prosecuted.<sup>391</sup> Often the damage done to the offender by prosecution far outweighs the harm done to society by his or her offense.<sup>392</sup> The damage done by the arrest is only part of that cost. In her *Atwater* dissent, Justice O’ Connor explained that “[a]rresting Atwater, . . . taught the children . . . that ‘the bad person could just as easily be the policeman as it could be the most horrible person they could imagine.’”<sup>393</sup> Killing a fly with a hand grenade is not the way to teach people to respect the law and the judicial system. Exposing

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theory-of-community-policing-will-get-major-test-in-Detroit. “Although some critics suggest its impact has been overstated, broken windows policing is generally credited with contributing to dramatic reductions of crime in New York and Los Angeles.” *Id.*

386. Often, the police make a conscious decision not to arrest minor offenders. See LAFAVE, *ARREST*, *supra* note 278, at 161-64.

387. See LAFAVE & ISRAEL, *CRIMINAL PROCEDURE*, *supra* note 61, §1.2, at 10 n.3; ¶1.4 at 21-22 & n.4 (noting that thirty to sixty percent of felony arrests are dropped as a result of pretrial screening, and stating that a high percentage of misdemeanor cases are also rejected, but observing that “available statistics . . . are quite sparse”).

388. See, e.g., *Gramenos v. Jewel Cos.*, 797 F.2d 432, 434 (7th Cir. 1986), *cert denied*, 481 U.S. 1028 (1987) (defendant acquitted of shoplifting).

389. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1524 (2012) (Alito, J., concurring) (“In some cases, the charges are dropped. . . . In the end, few [individuals arrested for minor offenses] are sentenced to incarceration.”).

390. Donald Dripps, *Driving with Leon*, 95 *YALE L. J.* 906, 920 (1986).

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

392. For a first offender, the impact of the collateral consequences of minor convictions often far outweighs the impact of the small fine or other minor sanction that is the direct consequence. Indeed, “[a]t times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty.” Robert M. A. Johnson, *Message from the President: Collateral Consequences*, *THE PROSECUTOR*, May 2001.

393. *Atwater v. Lago Vista*, 532 U.S. 318, 370 (2001) (O’Connor, J., dissenting).

ordinary citizens to the inside of a jail cell, to other inmates, and to the workings of the lower echelons of the criminal justice system,<sup>394</sup> is not likely to instill respect for the law and the judicial system.

### 3. Other “Important Societal Interests” that Could be Compromised by Limits on the Power to Make Custodial Arrests

The *Atwater* Court referred to other “important societal interest[s]” that might be served by custodial arrests,<sup>395</sup> but which could be compromised if custodial arrests were barred for some offenses.

#### a. Continuing Offenders

The *Atwater* Court referred to “[t]he chronic speeder [who] will speed again despite a citation in his pocket,”<sup>396</sup> to illustrate its concern about the minor offender who will continue to offend unless taken into custody. In fact, if the chronic speeder speeds immediately, he will be given another ticket immediately. If he gets enough tickets, he will lose his license—the penalty the law provides. A custodial arrest only postpones for a few days—until the offender’s release on bail—the new offenses.

Restraint may be important where driving while intoxicated is concerned, or in other cases where there is some temporary impairment or motive to misbehave, but in most cases there is neither. In reality, most minor offenders will simply continue to go about their lawful business until their court dates. Those who are inclined to commit more offenses are unlikely to do significant damage.

A few days in jail may, perhaps, have some long-term deterrent effect. That fact, however, should not justify a custodial arrest if an offense is not punishable by jail time. The penalties provided by the relevant law tell us how much deterrence society wants. A police officer should not be able to unilaterally impose a greater penalty in the hope of achieving greater deterrence.

#### b. Officer Safety

Most searches incident to custodial arrests, like suspicion-less strip searches in detention centers, are motivated, at least in part, by concerns

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394. See generally STEPHEN R. BING & S. STEPHEN ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER COURTS OF METROPOLITAN BOSTON* (1970).

395. 532 U.S. at 351.

396. *Id.* at 349.

about officer safety. In both detention centers and on the street, a mistake—for example, the failure to locate a concealed weapon—could be fatal. That is a risk worth avoiding even at high cost to personal dignity.

A rule barring custodial arrests for minor offenses should have no negative consequences for officer safety. In fact, such a rule may actually enhance officer safety because the suspect who is not being taken into custody has less reason to resist arrest and fewer opportunities to do so.

#### D. *The Bottom Line*

Often, where balancing tests are used, there is no easy answer to the question of what is the proper balance. Once the relevant factors are identified, the weight to be assigned to each factor depends on the value system and preferences of the person doing the weighing. In this instance, though, the balance is clear; the Court simply reached the wrong result.

In *Tennessee v. Garner*,<sup>397</sup> the Court held that deadly force may not be used to arrest a suspect simply because there is probable cause to believe that she committed a felony.<sup>398</sup> The state had argued that if the probable cause requirement “is satisfied the Fourth Amendment has nothing to say about *how* that seizure is made.”<sup>399</sup> This argument, said the Court:

ignores the many cases in which this Court, by balancing the extent of the intrusion against the need for it, has examined the reasonableness of the manner in which a search or seizure is conducted. To determine the constitutionality of a seizure “[w]e must balance the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.” . . . We have described “the balancing of competing interests” as “the key principle of the Fourth Amendment.” . . . Because one of the factors is the extent of the intrusion, it is plain that reasonableness depends on not only when a seizure is made, but also

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397. 471 U.S. 1 (1985).

398. *Id.* at 11-12. At issue in *Garner* was a Tennessee statute which, as interpreted, permitted a police officer to “use all . . . necessary means to effect the arrest” of a felon. Operating pursuant to this statute, and in accordance with the slightly more restrictive policy of the Memphis police department, a Memphis police officer shot and killed a fleeing burglary suspect in order to prevent the suspect’s escape. Subsequent investigation revealed that the suspect was unarmed. *Id.* at 4-5.

399. *Id.* at 7 (internal citations omitted).

how it is carried out.<sup>400</sup>

In holding that the suspect's father had a cause of action against the City of Memphis under 42 U.S.C. § 1983, the Court concluded:

[T]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.<sup>401</sup>

In a similar vein, it is not better that all minor offenders go to jail than that they escape. Where the offense is minor and the suspect poses no immediate threat, the harm resulting from failing to take him into custody does not justify the impact of a custodial arrest. Jails are not nice places; they can be dangerous places, as *Florence* acknowledges. The *Atwater* court failed to recognize, or at least failed to give sufficient weight to, the profound consequences of a custodial arrest and its sequels.<sup>402</sup> Dire consequences to the arrestee may be a reasonable, acceptable risk where the crime is serious and the public interest in apprehending and incarcerating the offender is great. However, where the crime is minor, and, in particular, where it is a non-jailable offense, it is unreasonable to subject presumptively innocent people to such consequences.<sup>403</sup>

The *Atwater* Court erred because it failed to take into account the seriousness of the offense at issue. The seriousness of the crime is relevant in virtually every area of criminal procedure.<sup>404</sup> Every

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400. *Id.* at 7-8.

401. *Id.* at 11.

402. See *infra* notes 273 to 303 and accompanying text.

403. See Mendelson, *supra* note 113, at 502, 505 (citing cases where individuals were "arrested, handcuffed, searched, and jailed" for minor traffic violations and noting the "unreasonableness of arresting someone for a trivial traffic offense since it is not a crime [and], the penalty is only a fine").

404. Courts have looked to the seriousness of the offense in a wide range of settings outside the obvious areas of bail, sentencing, and parole. See *e.g.*, *Nichols v. United States*, 511 U.S. 738, 740 n.3 (1994) (sentencing); *United States v. Loud Hawk*, 474 U.S. 302, 315-16 (1986) ("In assessing the . . . reasonableness of [the government's interlocutory appeal] courts may consider several factors [including] . . . —in some cases—the seriousness of the crime. . . . Moreover, the charged offense usually must be sufficiently serious to justify restraints that may be imposed on the defendant pending the outcome of the appeal."); *Duncan v. Louisiana*, 391 U.S. 145, 158-62 (1968) (the right to jury trial in state court only applies where a defendant is charged with a serious offense); *People v. Edelbacher*, 766 P.2d 1, 9 (Cal. 1989) (the seriousness of the offense is relevant to whether a motion for change of venue should be granted); *State v. Mouser*, 714 S.W.2d 851, 857 (Mo. App. 1986) (the seriousness of the offense is a factor in whether a juvenile should be tried as

jurisdiction distinguishes among crimes by assigning different penalties for various offenses. “[T]he penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State’s interest in arresting individuals suspected of committing that offense.”<sup>405</sup> In most of cases of minor regulatory criminality, the maximum penalty that can be imposed by a judicial officer, if the arrestee is found or pleads guilty, will be a small fine.<sup>406</sup> The *Atwater* Court failed to recognize that the minor penalties the law imposes for minor crimes reflects the relative unimportance society attaches to the apprehension and conviction of persons suspected of such crimes.

In *Garner*, the Court acknowledged the government’s “interests in effective law enforcement,” but said:

[W]e are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of nonviolent suspects . . . . The use of deadly force is a self-defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion. If successful, it guarantees that that mechanism will not be set in motion.<sup>407</sup>

Custodial arrest of “minor” offenders is often similarly unproductive. In her dissent in *Atwater*, Justice O’Connor said that the majority “recognizes that the [custodial] arrest of Gail Atwater was a ‘pointless indignity’ that served no discernible state interest.”<sup>408</sup> In fact, taking minor offenders into custody is often counterproductive in terms of other law enforcement needs. Booking suspects is an expensive<sup>409</sup> and time consuming-process that takes police officers off the streets. Moreover, as the Supreme Court has observed, “[t]he processing of misdemeanors, in particular, and the early stages of prosecution generally, [are] . . . marked by delays that can seriously affect the quality of justice.”<sup>410</sup> Loading the system with more cases will not help solve that problem.<sup>411</sup> “[T]here . . . are public interests in not incarcerating

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an adult); see also *Argersinger v. Hamlin*, 407 U.S. 25, 36-40 (1972) (the right to appointed counsel only attaches if the defendant is to be sentenced to incarceration).

405. *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984)).

406. *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 441 (7th Cir. 1986).

407. *Tennessee v. Garner*, 471 U.S. 1, 9-10 (1985).

408. *Atwater v. Lago Vista*, 532 U.S. 318, 361 (2001).

409. *Virginia v. Moore*, 553 U.S. 164, 173 (2008) (quoting Dep’t of Justice, NIJ, Issues and Practices, Citation release (Mar. 1984) (describing costs savings as a principal benefit of citation release)).

410. *Gerstein v. Pugh*, 420 U.S. 103, 122 n.23 (1975).

411. In some counties, jailors will not book minor traffic offenders if they are brought into the

persons accused of minor regulatory offenses [who cannot make bail] solely on account of their indigency and in not exacerbating existing problems of prison overcrowding.”<sup>412</sup> Finally, if fewer resources were devoted to the pursuit of minor criminality, more resources would be available to pursue serious offenders.<sup>413</sup>

In *Florence*, if a custodial arrest had not been made, the consequences would have been simple. The error that led to Florence’s arrest would eventually have been discovered and corrected, and he could have gone on with his life unmolested by law enforcement. The government would have saved the time and money required to process and hold Florence (not to mention the time and money required to defend his law suit). No law enforcement interest would have been compromised in any way.

At bottom, custodial arrests for offenses that carry no possibility of imprisonment are unreasonable for one simple reason: the costs imposed on the offender by the arrest and its sequels greatly exceed the penalties the legislature has authorized judges to impose on persons convicted of the offense after their guilt has been proved in a court beyond a reasonable doubt. *Atwater* allows police officers to circumvent the expressed will of the legislature, and the protections available in court, and, on the basis of probable cause, unilaterally impose as a penalty the draconian consequences of a custodial arrest and its consequences. In most instances, this “penalty” is totally disproportionate to the harm the offender and his offense might have caused. For these reasons, a custodial arrest for a non-jailable offense is an unreasonable means of advancing a relatively minor societal interest if an alternative, such as the issuance of a citation or notice to appear, is available.<sup>414</sup>

Finally, the *Atwater* Court erred because it failed to take into

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jail after a custodial arrest. Interview with Assistant State’s Attorney (formerly Deputy Sheriff) Marty Beltz, Perry County, Illinois (Jan. 14, 2013).

412. See *State v. Hurtado*, 529 A.2d 1000, 1008 (N.J. Super. Ct. App. Div. 1987) (Skillman, J., dissenting), *rev’d*, 549 A.2d 428 (N.J. 1998).

413. See *Atwater*, 532 U.S. at 352 (“[T]he use of custodial arrests for minor offenses ‘[a]ctually contradicts [l]aw [e]nforcement interests.’”) (quoting Brief of the Inst. on Criminal Justice at the Univ. of Minn. Law Sch. and Eleven Leading Experts on Law Enforcement and Corr. Admin. and Pol’y as Amici Curiae in Support of Petitioners at 11 *Atwater*, 532 U.S. 318 (No. 99-1408), 2000 WL 1341293).

414. Whether custodial arrests are also unreasonable for offenses punishable by a short jail term is a more difficult question. Cf. *Illinois v. McArthur*, 531 U.S. 326, 336 (2001) (distinguishing the offense at issue in *McArthur* from the offense at issue in *Welsh* by noting that the offense in *McArthur*, unlike that in *Welsh*, was punishable by up to thirty days in jail). It may be significant, though, that very few minor offenders are sentenced to jail time upon conviction. *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1524 (2012) (Alito, J., concurring).

account the pervasive regulation of vehicles<sup>415</sup> (which renders nearly impossible compliance with all traffic laws),<sup>416</sup> and the resultant consequences of its ruling on search and seizure law. It is no exaggeration to say that after *Atwater* the police have the power to stop every motorist almost at will, search him or her, take him or her into custody, impound the vehicle, and search it. Arbitrary stops of vehicles were rejected by the Court in *Delaware v. Prouse*.<sup>417</sup> Now those stops are back. This result is contrary to the intentions of the Framers.<sup>418</sup> “The suspicionless search is the very evil the Fourth Amendment was intended to stamp out. The pre-revolutionary ‘writs of assistance’ . . . were reviled precisely because they placed the liberty of every man in the hands of every petty officer.”<sup>419</sup>

In a very real sense, *Atwater* and *Whren* together amount to an almost total nullification of the Fourth Amendment in most settings outside the home.<sup>420</sup> This result should be intolerable in any society that claims to respect individual freedom and to be governed by the rule of law.

## VI. REASONABLENESS, PROPORTIONALITY, AND COMMON SENSE

The criminal justice system as a whole is a continuum where the more compelling the government’s interest, and the greater the quantity and quality of evidence in the government’s possession, the greater the consequences it can impose on the individual.<sup>421</sup> In addition, as the

415. The Supreme Court has often referred to the pervasive regulation of vehicles as a reason for recognizing a reduced expectation of privacy in vehicles. *See, e.g., California v. Carney*, 471 U.S. 386, 392 (1985) (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976)).

416. *Whren v. United States*, 517 U.S. 806, 818 (1996) (observing that it was argued that “the ‘multitude of applicable traffic and equipment regulations’ is so large and so difficult to obey perfectly that virtually everyone is guilty of violation, permitting the police to single out almost whomever they wish for a stop”).

417. 440 U.S. 648, 663 (1979) (absent reasonable suspicion, police officers may not stop motorists to check their driver’s licenses or registration and may not use other methods that involve the unrestrained exercise of discretion). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 41-42 (2000) (vehicle checkpoints directed at ordinary crime, rather than crimes that specifically implicate the lawful use of the roadways, are unconstitutional).

418. Sklansky, *supra* note 26, at 1813-14.

419. *Samson v. California*, 547 U.S. 843, 858 (2006) (Stevens, J., dissenting) (internal quotations omitted).

420. *See Davies, supra* note 27, at 246, 247.

421. *See Samson*, 547 U.S. at 850 (referring to “the ‘continuum’ of state imposed punishments”); *New Jersey v. T.L.O.*, 469 U.S. 325, 379 (1985) (Stevens, J., concurring in part and dissenting in part) (“Criminal law has traditionally recognized a distinction between essentially regulatory offenses and serious violations of the peace, and [has] graduated the response of the criminal justice system [accordingly].”).



consequences of the government's actions impact more severely on the individual, more and more protections are available to that person. Fourth Amendment law follows this pattern.<sup>422</sup> Some seizures have been said to be so minimal in their impact, and the interests advanced by them so important, that no evidence at all is necessary.<sup>423</sup> A small amount of evidence—reasonable suspicion<sup>424</sup>—justifies a brief detention,<sup>425</sup> or a limited protective intrusion.<sup>426</sup> A greater amount of evidence<sup>427</sup>—probable cause (and sometimes a warrant)—justifies an arrest or a full scale search.<sup>428</sup> A still greater quantity of evidence—clear and convincing—can, after a hearing, justify preventive

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422. See *Tennessee v. Garner*, 471 U.S. 1, 8-11 (1985) (relying on the balancing of interests that is “the key principle of the Fourth Amendment” to hold that the use of deadly force is “constitutionally unreasonable” unless the officer also has “probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others”).

423. See, e.g., *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (*per curiam*) (requiring a driver to step out of the car after a traffic stop did not require reasonable suspicion because “this additional intrusion . . . [was] *de minimus*” and justified by the state interest in officer safety); *Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (ordering passenger out of the car was a “minimal” additional intrusion and did not require reasonable suspicion).

424. *United States v. McHugh*, 639 F.3d 1250, 1256 (10th Cir. 2011) (“[R]easonable suspicion may exist ‘even if it is more likely than not that the individual is not involved in any illegality.’”) (quoting *United States v. Albert*, 579 F.3d 1188, 1197 (10th Cir. 2009)).

425. See, e.g., *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002); see also *Brown v. Texas*, 443 U.S. 47, 50 (1979) (in determining the reasonableness of seizures that are less intrusive than traditional arrests, courts should consider “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty”).

In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that a brief seizure of a homeowner while his home was searched for narcotics was justified by the need to prevent the homeowner’s flight if incriminating evidence was found, and by the necessity of protecting the police, other persons and the property from harm. *Id.* at 702-03. The *Summers* Court said that *Terry v. Ohio*, 392 U.S. 1 (1967), *Adams v. Williams*, 407 U.S. 143 (1971), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), “recognize that some seizures admittedly covered by the Fourth Amendment constitute such limited intrusions on the personal security of those detained, and are justified by such substantial law enforcement interests that they may be made on less evidence than probable cause, so long as the police have an articulable basis for suspecting criminal activity.” *Summers*, 452 U.S. at 699.

426. See, e.g., *Terry*, 392 U.S. at 27 (holding that “the proper balance” requires “that there be a narrowly drawn authority to permit a reasonable search for weapons” where an officer has stopped an individual whom “he has reason to believe” on the basis of “specific reasonable inferences” is “armed and dangerous . . . regardless of whether he has probable cause to arrest the individual for a crime,” to conduct a search for weapons “limited in scope to this protective purpose”).

427. Though somewhat misleading, the phrase “greater” evidence is consistent with the phrase “lesser” quantum of evidence which the Court recently used in *Griffin v. Wisconsin*, 483 U.S. 868, 878 n.4 (1987), in distinguishing the nature of the belief which would justify a search based on reasonable suspicion from the nature of the belief which would justify a search based on probable cause.

428. See *supra* notes 146 to 224 and accompanying text.

detention.<sup>429</sup> Still more evidence—proof beyond a reasonable doubt—can, after a trial, justify life imprisonment or even death.

A similar continuum seemed to be developing with respect to seizures and examinations of things. The Court upheld some police actions by viewing them as so minor they did not infringe on any constitutionally protected interest,<sup>430</sup> or by viewing them as “very limited” searches necessary under the circumstances<sup>431</sup> or “to preserve highly evanescent evidence.”<sup>432</sup> Then, in *Arizona v. Hicks*,<sup>433</sup> the Court refused to recognize a category of minimally intrusive searches or cursory inspections, which could be justified on the basis of reasonable suspicion.<sup>434</sup>

*Hicks* arose out of the action of police officers who legally entered

429. See, e.g., *United States v. Salerno*, 481 U.S. 739, 751 (1987) (upholding the constitutionality of preventive detention under a statute which permits the detention of an arrestee where the government proves by clear and convincing evidence that the arrestee “presents an identified and articulable threat to an individual or [to] the community . . .”).

430. See, e.g., *Cardwell v. Lewis*, 417 U.S. 583 (1974) (“[N]o expectation of privacy was violated” when police officers, acting without a warrant, took a paint scraping from the exterior of defendant’s car (which had been left in a public parking lot) and examined a tire on a wheel on that same car for the purpose of comparing it with tire tracks left on the ground at a crime scene.).

431. See, e.g., *United States v. Van Leeuwen*, 397 U.S. 249, 252-53 (1970) (unanimously ruling that it was reasonable for authorities to seize from the mail two suspicious packages (which had been sent registered mail), and without opening them, detain them for twenty-nine hours until a search warrant could be obtained was permissible because the detention was relatively brief and was no longer than was necessary for the authorities to confirm their suspicions and obtain a warrant). It is difficult to determine whether the *Van Leeuwen* Court viewed the detention of the package as so inconsequential that it simply did not rise to the level of a Fourth Amendment activity, or whether the Court felt that the Fourth Amendment was implicated, but viewed the seizure as reasonable. Language in the Court’s opinion lends support to both conclusions. In two different places, Justice Douglas specifically stated that the detention of the packages resulted in no invasion of any interest protected by the Fourth Amendment. In another place, he stated that “detention of mail could at some point become an unreasonable seizure.” *Id.* at 252. At the conclusion of its opinion, the Court stated that given the suspicious nature of the packages, and the unavoidable delay in obtaining a warrant, the detention was not “unreasonable within the meaning of the Fourth Amendment.” *Id.* at 253.

432. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (while Murphy was briefly detained, though not arrested, on the basis of probable cause to believe he had murdered his wife, it was constitutionally permissible for the police to take a sample of scrapings from his fingernail against his wishes and without a warrant).

433. 480 U.S. 321 (1987). The *Hicks* Court characterized *United States v. Place*, 462 U.S. 696 (1983) (as well as *United States v. Cortez*, 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)), as all involving the seizure of objects (vehicles in *Cortez* and *Brignoni-Ponce* and luggage in *Place*) and cited them as examples of situations where “minimally intrusive” seizures “on less than probable cause” were upheld because “operational necessities” rendered them “the only practicable means of detecting certain types of crime.” *Hicks*, 480 U.S. at 327.

434. *Hicks*, 480 U.S. at 327-38; cf. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (allowing warrantless searches of school children on the basis of reasonable suspicion).

a squalid apartment from which shots had been fired.<sup>435</sup> Once inside, one of the officers noticed two sets of expensive stereo components.<sup>436</sup> Suspecting they were stolen, the officer moved some of the equipment to examine the serial numbers.<sup>437</sup> Eventually, it was learned that the equipment was stolen and Hicks was charged with armed robbery.<sup>438</sup>

In an opinion by Justice Scalia, the Supreme Court held that the mere recording of the numbers was not a search but it also held that the movement of the equipment was an unreasonable search or seizure because it was not based on probable cause and was not justified as part of the initial entry.<sup>439</sup> The Court concluded that an item in plain view could not be seized except on the basis of probable cause unless “the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime.”<sup>440</sup>

Despite its insistence that “[n]othing in the prior opinions of . . . [the Supreme] Court supports a distinction” between full blown and cursory searches,<sup>441</sup> the *Hicks* majority ignored both Fourth Amendment theory and “a substantial body”<sup>442</sup> of Fourth Amendment jurisprudence<sup>443</sup> in order to establish a wholly unnecessary bright line test which, whatever its abstract appeal, makes very little sense as a real world proposition. Many officers, faced with what some will see as a highly technical rule with little to commend it, may find it difficult to resist the temptation to move items to obtain needed information and then recall later that the information was in plain view and that obtaining it required no movement. Unlike a wrongfully seized or wrongfully searched person, who can counter an officer’s testimony with his or her own testimony, an inanimate object has no such ability.

This invitation to perjury is wholly unnecessary.<sup>444</sup> In other

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435. *Hicks*, 480 U.S. at 323.

436. *Id.*

437. *Id.*

438. *Id.* at 323-24.

439. *Id.* at 324-25.

440. *Id.* at 327. The majority claimed it was adhering “to the textual and traditional standard of probable cause.” *Id.* at 329. Cf. Silas Wasserstrom & Louis Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L. J. 19, 24-25 (1988) (arguing that the *Hicks* Court, despite implicitly conceding that the officer’s conduct was reasonable, “slavishly adhere[d] to a series of rules relating to warrants and probable cause that have no basis in constitutional text”).

441. *Hicks*, 480 U.S. at 329.

442. *Id.* at 339 (O’Connor, J., dissenting).

443. None of the opinions in *Hicks* cited *Van Leeuwen* or *Murphy*.

444. The Court should not assume officers will perjure themselves. See *People v. Berrios*, 270 N.E.2d 709, 713 (N.Y. 1971). However, police officers are human beings, who often see themselves engaged in a “war” on crime. The Court should be realistic about how they will behave just as legislatures, when passing laws like the national fifty-five mile per hour speed limit, should

situations, the Court has responded to real world needs and realities and recognized the necessity of distinguishing between stops and arrests and between frisks and searches. The practical difficulties in drawing a line between “full-blown” and cursory searches are minimal by comparison. A principled and relatively clear distinction can easily be made between a surface inspection of an object, even one that requires moving it a few inches, and the opening of a container or the rummaging through or among multiple objects.<sup>445</sup> By failing to make this distinction, and treating minimally intrusive activities as if they were full-scale searches or seizures, the majority “trivializes the Fourth Amendment,” and “handicap[s] law enforcement without enhancing privacy.”<sup>446</sup>

The result in *Hicks*, like that in *Atwater*, is utterly “contrary to the idea of proportionality that is essential to the concept of justice.”<sup>447</sup> Taken together, *Hicks*, *Atwater*, and *Florence*, suggest that the Court, in its quest to formulate bright line rules, has lost all sense of proportionality and balance. In effect, any person can be stopped at any time for a minor traffic violation, taken into custody and subjected to all that can follow; but an inanimate, unfeeling object cannot be moved a few inches without probable cause and without a warrant.<sup>448</sup> Putting the matter in a different setting, the police can come to a person’s home and wait there for nineteen hours while they obtain a search warrant,<sup>449</sup> but they cannot move the stereo nineteen millimeters while they wait.

## VII. DETERMINING THE PURPOSE OF FOURTH AMENDMENT ACTIVITIES

If the seriousness of the offense under investigation is to be relevant to the propriety of Fourth Amendment activities, it will frequently be necessary for police officers to know, and courts to determine, that purpose. In practice, police and prosecutors often “make up front judgments about the seriousness of alleged crimes.”<sup>450</sup> In many cases, however, an officer on the street might not have a clear idea what crime he is investigating.

Determinations of purpose will usually be easier in arrest cases than

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be realistic about how people will behave.

445. *Hicks*, 480 U.S. at 336-37 (O’Connor, J., dissenting).

446. *Id.* at 333 (Powell, J., dissenting).

447. *Stone v. Powell*, 428 U.S. 465, 490 (1976) (referring to the impact of the Fourth Amendment exclusionary rule in some instances).

448. See *Wasserstrom & Seidman*, *supra* note 440, at 49 (observing that “it is far from clear that the need for a proper educational environment which moved the Court in *T.L.O.* is greater than the need to catch burglars which left it unmoved in *Hicks*”).

449. *Segura v. United States*, 468 U.S. 796 (1984).

450. *Stuntz*, *supra* note 190, at 870.

in search cases. Arrests must be made for a specific offense. Even if the offense for which a suspect is arrested is not the offense with which the arresting officer was most concerned, the offense for which the arrest is made provides some indication of the arresting officer's motives. Where an arrest warrant is obtained prior to an arrest, advance notice of the offense for which the arrest will be made will have been given in the course of obtaining the warrant.

In search cases it will often be impossible to state in advance the offense toward which the search is directed. "[M]ost searches occur at an early stage of the prosecutorial process, long before the severity of the crime is known with certainty."<sup>451</sup> If there is probable cause to associate particular items with criminal activity, but uncertainty as to the precise crime to which they relate, a search is justified.<sup>452</sup> As a result, in search cases it will often not be possible to factor the seriousness of the offense into the probable cause equation.

Whatever the actual goal of a particular search, the experience in the stop and frisk area suggests that after the fact the police will say they were looking for whatever would be permissible or for whatever would justify the most intrusive search.<sup>453</sup> Some control over this reality may be possible where a search warrant is used, because the necessity of applying for a warrant at least ensures that a record is made of some of the information on which the determination to search is based. Moreover, a warrant will sometimes specify the offense to which the items sought relate.<sup>454</sup> Often, however, "search warrants are employed

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451. Ronald J. Bacigal, *The Fourth Amendment in Flux, The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763, 795-96.

452. See, e.g., *People v. Casillo*, 425 N.E.2d 1379, 1382 (Ill. App. 1981)

In the instant case, too, there was probable cause to believe that one of two particular offenses, i.e. murder or failure to report an accident involving death, had occurred. Assuming arguendo, that the complaint for the search warrant did not state probable cause to believe that the offense which the officers were investigating[,] murder[,] had occurred, the complaint nevertheless clearly revealed probable cause to believe that the particular offense of failure to report an accident involving death had been committed.

*Id.*

453. John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1047 (1974) ("[R]egardless of what they find, policemen almost always claim to be looking for weapons."); cf. *Warden v. Hayden*, 387 U.S. 294, 299-300 (1967) (refusing to accept police officer's statements that he was searching for the suspect or for stolen money, and concluding that he must have been searching for weapons).

454. See, e.g., *United States v. Washington*, 797 F.2d 1461, 1473 (9th Cir. 1986) ("[A] federal search warrant must be based upon a showing of probable cause that a federal crime has been committed and that evidence of that crime is present on the premises to be searched."); cf. *United States v. Melvin*, 596 F.2d 492, 495 (1st Cir. 1979) ("[I]t is our collective opinion that there probable cause to believe that James F. Melvin was responsible for the explosion at Rooney's Tavern and respectfully request that the Court issue search warrant for Melvin's white Cadillac,

early in a investigation . . . perhaps before the identity of any likely criminal [or the exact crime suspected] . . . could be known.”<sup>455</sup>

Where no warrant is obtained, it will often be difficult to determine the purpose of a search except on the basis of law enforcement’s after the fact statements and the results obtained.<sup>456</sup> The offense for which the suspect is ultimately prosecuted, though not irrelevant, will rarely provide a clear indication of the purpose of the search because prosecutors have wide discretion,<sup>457</sup> and because, in many cases, the offense that law enforcement believed was occurring will not turn out to be the offense that was actually occurring.<sup>458</sup> Finally, in some cases, a search will yield nothing incriminating. In these, and perhaps in some other cases, “the court would simply have to take the policeman’s word as to what crime he was investigating.”<sup>459</sup>

### VIII. CONCLUSION

The seriousness of the crime is relevant in virtually every area of criminal procedure.<sup>460</sup> However, in its quest for bright line rules, the Court has chosen to ignore the seriousness of the offense in Fourth Amendment equations. Where officer safety is at issue, this is the correct result.

The overriding goal of any police officer or correctional officer is to make it home safely at the end of his or her shift. Rules that advance officer safety enable officers to do their duty with less fear and legitimize activities that some officers might feel were necessary even if they were not legal.<sup>461</sup> It is therefore not surprising that the Court has consistently recognized and ruled that the seriousness of the offense is

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Mass. Reg. D66-105” and “for James Melvin’s residence at 38 Ells Avenue, Weymouth, Massachusetts.”); *Casillo*, 425 N.E.2d at 1382 (“[T]here is no constitutional requirement that the crime under investigation be named in the complaint or affidavit for search warrant.”).

455. *Zurcher v. Stanford Daily*, 436 U.S. 547, 561 (1978).

456. *Beck v. Ohio*, 379 U.S. 89, 96 (1964) (“[A]n after-the-event justification for the . . . search . . . [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.”).

457. See *Dripps*, *supra* note 171, at 1426 & n.19.

458. See *Bacigal*, *supra* note 451, at 796 (citing examples).

459. *Kaplan*, *supra* note 453, at 1047.

460. See *supra* note 404 (citing cases).

461. See, e.g., *Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997) (officer who makes a traffic stop may order a passenger out of the vehicle); *Terry v. Ohio*, 392 U.S. 1 (1967); cf. *United States v. Soyka*, 394 F.2d 443, 454 (2d Cir. 1968) (Friendly, J., dissenting) (suggesting that it might be appropriate, in some Fourth Amendment settings, to focus on the gravity of the offense as well as the utility of the police action for purposes other than securing a conviction), *cert denied*, 393 U.S. 1095 (1969).

not relevant in assessing, for Fourth Amendment purposes, the threat to officer safety posed by a person in custody.<sup>462</sup>

The picture is different where officer safety is not an issue and the purpose of a Fourth Amendment activity is simply law enforcement.<sup>463</sup> Here, the seriousness of the offense under investigation is highly relevant to the propriety of many actions. The balancing of interests inherent in the Fourth Amendment is, itself, a sufficient, if not a compelling, argument for distinguishing between or among various Fourth Amendment activities on the basis of the seriousness of the offense. The Court's unwillingness to recognize this fact has put great strain on the Fourth Amendment and has led to decisions such as *Atwater* and *Hicks* whose artificiality offends common sense, "complicates the police officer's task,"<sup>464</sup> and is "contrary to the idea of proportionality that is essential to the concept of justice."<sup>465</sup>

In a broad sense, consideration of the seriousness of the offense would mean that a wide range of Fourth Amendment activities directed toward minor offenses would, in general, be viewed less sympathetically because of the government's reduced interest in convicting people of those offenses.<sup>466</sup> Conversely, Fourth Amendment activities directed toward more serious offenses, or motivated by more serious concerns, would, in general, be viewed more sympathetically.<sup>467</sup> Factoring the

462. See, e.g., *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012); *Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981); *Arizona v. Gant*, 556 U.S. 332 (2009).

463. Compare *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (barring strip search of school girl for contraband pills) with *Florence*, 132 S. Ct. 1510 (allowing strip search of detainees).

464. *Bellin*, *supra* note 216, at 38.

465. *Stone v. Powell*, 428 U.S. 465, 490 (1976).

466. Silas J. Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 138 (1989) [hereinafter *The Court's Turn Toward a General Reasonableness Interpretation*]; see also *Folk*, *supra* note 113, at 331 ("The state's interest in solving a crime should be a function of the seriousness of the crime; so the state's interest in investigating crimes should decrease as the seriousness of the crime diminishes.").

It could also be argued that where minor offenses are concerned, the reduced consequences to the individual render the intrusion less hostile and hence more readily justified. Cf. LAFAVE, *SEARCH AND SEIZURE*, *supra* note 57, at 342 (stating, in the context of stop and frisk theory, that "it may be postulated that less evidence is needed to meet the probable cause test when the consequences for the individual are less serious"); see also *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

467. See, e.g., *Gumz v. Morrissette*, 772 F.2d 1395, 1406 (7th Cir. 1985) (Easterbrook, J., concurring) (noting the notorious difficulties in defining reasonableness and observing that "[r]easonableness is an open-ended approach . . . [which] calls for an objective balancing of the harms from the arrest or search against the potential harms to effective law enforcement of delaying the action or not acting at all. The graver the crime and the more exigent the circumstances, the more the police can do—whether that means searching on a lesser probability of finding something, entering a dwelling at night, or tearing a house apart in search of evidence."), *cert. denied*, 475 U.S.

seriousness of the offense into Fourth Amendment equations does not require case-by-case analysis. It can, and should, be done categorically.<sup>468</sup> The exact categories of offenses and the exact places where lines might be drawn is something on which reasonable people can differ.<sup>469</sup> One author suggests five categories.<sup>470</sup> Another author suggests three categories.<sup>471</sup> In *Welsh v. Wisconsin*,<sup>472</sup> the Court seemed to suggest four categories.<sup>473</sup> The important thing is that the rules be easily understood<sup>474</sup> and their application be limited primarily to situations where they give the officer a simple choice between “yes” and “no.”<sup>475</sup>

Eventually, the Court will have to change course. The catalyst for that change could take several forms. First, change could come when the Court is faced with an exceptionally intrusive search or seizure such as the one at issue in *Winston v. Lee*,<sup>476</sup> where the Court considered whether, consistent with the Fourth Amendment, an individual suspected of armed robbery could be compelled to undergo surgery under general anesthetic in order to retrieve a bullet lodged in his shoulder which there was probable cause to believe would be useful evidence against him.<sup>477</sup>

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1123 (1986), *overruled on other grounds by* *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987) (holding “Fourth Amendment standards govern all excessive force in arrest claims”); *see also* *Llaguno v. Minge*, 763 F.2d 1560, 1565 (7th Cir. 1985) (holding that the seriousness of the crime under investigation “may affect the judgment of what is reasonable [police behavior]”); *State v. Flowers*, 441 So. 2d 707, 713 n.1 (La. 1983), *cert. denied*, 466 U.S. 945 (1984) (“[H]eightedened public interest in the case of serious or violent crimes can tip the scales in favor of the reasonableness of the police conduct.”); *see also* *Wasserstrom & Seidman*, *supra* note 440, at 47 (observing that a fully rational approach to search and seizure problems “would allow consideration of degrees of probability and incorporate other considerations as well such as . . . the seriousness of the crime under investigation”).

468. Schroeder, *The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 488-498; *see also* *Bellin*, *supra* note 216, at 37.

469. *See* *Atwater v. Lago Vista*, 532 U.S. 318, 352 (2001) (observing that at least three categories were proposed there); *see also* *Schroeder, The Legacy of Welsh v. Wisconsin*, *supra* note 188 (discussing different ways to categorize crimes).

470. *Stuntz*, *supra* note 190, at 870.

471. *Bellin*, *supra* note 216, at 30-31 (suggesting three categories of crimes, grave, serious, and minor).

472. *Welsh v. Wisconsin*, 466 U.S. 740 (1984).

473. *See* *Schroeder, The Legacy of Welsh v. Wisconsin*, *supra* note 188, at 500.

474. *See id.* at 505, 508 (jailable and non-jailable is “clear and obvious” while the felony-misdemeanor distinction “has the apparent virtue of being obvious and well known”).

475. *See e.g.*, *Schroeder, Warrantless Misdemeanor Arrests*, *supra* note 228.

476. 470 U.S. 753 (1985).

477. *Id.* at 766. The *Lee* Court observed that the police “plainly had probable cause to conduct the search” and observed that a judge had in fact authorized it after an adversary hearing. *Id.* at 763 & n.6.



In an opinion which relied heavily on *Schmerber v. California*,<sup>478</sup> the *Winston* Court weighed the nature and risks of the operation, noted that the state had other substantial evidence of Winston's guilt and had not demonstrated "a compelling need" for the bullet, and found that the proposed surgery would be unreasonable under the Fourth Amendment.<sup>479</sup>

Justice Brennan's opinion for the majority observed that the reasonableness of such intrusions depends on a case-by-case approach, in which the individual's interests in privacy and security are weighed against society's interests in conducting the procedure.<sup>480</sup> The Court did not expressly state that the seriousness of the offense was a relevant factor in determining reasonableness,<sup>481</sup> but his test certainly suggests that the operation might have been allowed if there had been little other

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478. 384 U.S. 757 (1966). Although *Schmerber* suggests that minor intrusions are permissible even where relatively minor offenses are concerned, the *Schmerber* Court gave no indication of whether such invasive searches would be permitted if extremely minor offenses such as underage drinking were involved. Cf. *Hoyle v. State*, 268 S.W.3d 313, 320 (Ark. 2007) (under ARK RULE CRIM P. 12.3, which provides that searches of an accused's blood stream, body cavities, and subcutaneous tissue, are permitted if they are reasonable "under the circumstances of the case, including the seriousness of the offense and the nature of the intrusion," it was constitutionally reasonable for the police to take of blood and urine samples from motorist involved in accident that caused two fatalities).

At the other end of scale, *Schmerber* did not say whether a "clear indication" of the searches likely success that the Court required would still be required if an extremely serious offense were involved.

In *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), the Court relied on *Schmerber* to uphold the use of blood tests to detect drug use without even requiring individualized suspicion. In addition, the *Skinner* Court upheld, under the same criteria, breath tests and urine tests. *Id.* at 625.

479. 470 U.S. at 766-67. Prior to *Lee* most courts generally distinguished between surgical searches under general anesthesia (which were generally barred) and those under local anesthesia (which were generally permitted if reasonable. See Leonard Mandell & L. Anita Richardson, *Surgical Search: Removing a Scar on the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 525, 527, 546-52 (1984) (citing cases and proposing a per se bar on searches under general anesthesia and strict limits on those under local anesthesia).

480. Justice Brennan also wrote the opinion in *Schmerber*.

481. Cf. *The Court's Turn Toward a General Reasonableness Interpretation*, *supra* note 466, at 138 (suggesting that *Lee* implicitly recognized that the seriousness of the offense is relevant to reasonableness analysis.).

Prior to *Lee*, almost all surgical search cases involved very serious offenses. See e.g., *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976) (murder and robbery), *cert. denied*, 429 U.S. 1062 (1977); *Hughes v. United States*, 429 A.2d 1339, 1339 (D.C. App. 1981) (murder and armed robbery) (upholding surgery); *Doe v. State*, 409 So. 2d 25, 27-28 (Fla. App. 1982) (on rehearing) (per curiam) (murder and armed robbery) (upholding surgery); *State v. Martin*, 404 So. 2d 960, 961 (La. 1981) (second degree murder); *State v. Richards*, 585 S.W.2d 505 (Mo. App. 1979) (first degree murder) (upholding surgery to remove bullet lodged in hip); cf. *People v. Adams*, 299 N.E.2d 834, 835 (Ind. 1973) (murder) (disallowing surgery and adopting per se rule barring such surgery), *cert. denied*, 415 U.S. 935 (1974).

evidence and a compelling need for the bullet. It would seem absurd, however, to allow such a surgical search to extract a bullet to prove that someone was guilty of unlawful discharge of a firearm within the city limits.<sup>482</sup>

Second, the Court may be forced to confront the seriousness of the offense problem in a roadblock type case. As previously noted, in these cases, the Court has relied on “a balancing test to determine Fourth Amendment reasonableness.”<sup>483</sup> In *City of Indianapolis v. Edmond*, the Court held that roadblocks could not be directed at ordinary criminality not connected in some way with the use of the highways.<sup>484</sup> The Court observed, however, that “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”<sup>485</sup> In *Illinois v. Lidster*, the Court held that highway checkpoints to obtain information from possible witnesses to a fatal hit and run accident were reasonable under the Fourth Amendment<sup>486</sup> because the “[p]olice were investigating a crime that had resulted in a human death. . . . The stop advanced this grave public concern to a significant degree.”<sup>487</sup>

Reasonable people can dispute where the line should be drawn but a line must be drawn somewhere. As Justice Jackson observed years ago in his dissenting opinion in *Brinegar v. United States*:<sup>488</sup>

[I]f we are to make judicial exceptions to the Fourth Amendment . . . , it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnaped [sic] and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and indiscriminating use of the search. . . . 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.<sup>489</sup>

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482. Because most, if not all, surgical searches are made with a warrant, and the crime is known, the administrability objections that were raised in *Atwater* should not be relevant.

483. See *Ferguson v. City of Charleston*, 532 U.S. 67, 84 (2001) (citing cases).

484. 531 U.S. 32, 39-44 (2001).

485. *Id.* at 44.

486. 540 U.S. 419, 426-27 (2004).

487. *Id.* at 427.

488. 338 U.S. 160 (1949).

489. *Id.* at 183 (Jackson, J. dissenting).

Third, the Court may also be forced to confront the seriousness of the offense issue because “new technology allows the government to replace traditional surveillance techniques with far more comprehensive means of gathering information.”<sup>490</sup> In either event, the balancing of interests which underlies the notion of reasonableness suggests that the Fourth Amendment requires special constraints on the power to search or seize when the State seeks to engage in exceptionally intrusive activities<sup>491</sup> or activities which impact on an area in which our society recognizes significantly heightened privacy or other interests.

Finally, the Court may be forced to confront the seriousness of the offense issue because the results and unintended consequences of *Atwater* are so draconian that the decision cannot be allowed to stand.<sup>492</sup> Their impact on the law of search and seizure is such that the Court in a very real sense totally nullified the Fourth Amendment in most settings outside the home.<sup>493</sup>

Reasonableness is the core concern of the Fourth Amendment. Custodial arrests for offenses that carry no possibility of imprisonment are unreasonable for one very simple reason; the costs imposed by the arrest are often greater than those authorized by the legislature for persons convicted of these offenses. Proper emphasis on the seriousness of the offense, and on the fact that the “balancing of conflicting values” is “the key principle of the [F]ourth [A]mendment,”<sup>494</sup> would enhance individual privacy interests<sup>495</sup> and provides the flexibility necessary to respond to such modern problems as terrorism and ever advancing technology.

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490. Bellin, *supra* note 216, at 41.

491. See, e.g., Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985).

492. See *Arkansas v. Sullivan*, 532 U.S. 769, 773 (2001) (Ginsburg, J., concurring) (expressing hope that the Court will reconsider its decision in *Atwater* “if experience demonstrates ‘anything like an epidemic of unnecessary minor- offense arrests’”) (quoting *Atwater v. Lago Vista*, 532 U.S. 318, 353 (2001)).

493. See Davies, *supra* note 27, at 246-47.

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

495. It has been observed that most Fourth Amendment violations occur in the victimless crime area. See authorities cited in Kathleen Bach, Note, *The Exclusionary Rule in The Public School Administrative Disciplinary Proceeding: Answering The Question After New Jersey v. T.L.O.*, 37 HAST. L.J. 1133, 1152 n.119 (1986).