# Probable Cause with Teeth

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## Abstract

*Recent incidents involving African Americans arrested by police for engaging in activities that would rarely lead to police intervention if engaged in by white individuals highlight the need for clarity regarding how much certainty of guilt is required before an officer can arrest an individual. The United States Supreme Court, however, has provided little guidance on exactly how much certainty of guilt is required to establish probable cause, stating only that probable cause is more than a mere suspicion, but less than the level of proof needed to convict. In 1983, Justice Rehnquist lowered the bar significantly when he opined in* Texas v. Brown *that probable cause "does not demand any showing that such a belief be correct or more likely true than false." Many lower courts have repeated Justice Rehnquist's comment on probable cause as if it were settled law. In doing so, very few seem to recognize that* Texas v. Brown *was a plurality opinion and the meaning of probable cause was not the main issue before the Court.*

*This Article argues that Justice Rehnquist's musings on the meaning of probable cause in* Texas v. Brown *should not be followed for several reasons. First, thirty-seven years ago, Justice Rehnquist was only able to get three other Justices to sign onto his opinion.* Texas v. Brown *was just a plurality opinion, and Justice Rehnquist's statement on the showing required for a finding of probable cause was not necessary to the judgment. More importantly, a majority of the Court has never repeated Justice Rehnquist's statement that probable cause means something less than the preponderance of the evidence standard required in civil cases. Second, Justice Rehnquist's view of probable cause is misguided as a matter of history, precedent, and logic. Third, Justice Rehnquist's view of probable cause allows for, and perhaps even fosters, racial disparity in arrests. A more robust showing should be required for a finding of probable cause.*

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## INTRODUCTION

The United States Supreme Court has provided very little clarity on how much evidence is enough to support a finding of probable cause. The Court has stated that probable cause is more than a mere suspicion, but less than proof necessary to convict, that is, proof beyond a reasonable doubt.[1] This, however, tells us little since "more than a mere suspicion" is any amount of suspicion over zero, which is not much evidence at all, and "proof beyond a reasonable doubt" is the highest evidentiary standard available—enough to convince a jury to convict a criminal defendant. In 1983, writing for a plurality in *Texas v. Brown*,[2] Justice Rehnquist moved the needle significantly when he stated that probable cause "does not demand any showing that such a belief be correct or more likely true than false."[3] According to Justice Rehnquist more than three decades ago, probable cause can be satisfied by less certainty than the preponderance of the evidence standard that governs in civil cases.

Since *Texas v. Brown*, lower courts and legal scholars alike have repeated Justice Rehnquist's statement on probable cause as if it were well-settled law. In repeating this language, few have acknowledged that *Texas v. Brown* was just a plurality opinion and that probable cause was not the main issue before the Court.[4] More importantly, a majority of the Court has never repeated Justice Rehnquist's statement that probable cause requires something less than a preponderance of the evidence.

This Article argues that Justice Rehnquist's musings on probable cause in *Texas v. Brown* should not be followed. Just how much evidence is necessary to support a finding of probable cause is an important question, especially since probable cause is all that is required to validate an arrest in a public place.[5] Once a law enforcement officer has lawfully arrested an individual and taken the arrestee into custody, that arrest gives the officer the authority to conduct a full search

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1 Brinegar v. United States, 338 U.S. 160, 174–75 (1949).

2 460 U.S. 730 (1983).

3 *Id.* at 742 (1983) (plurality opinion).

4 The main issue before the Supreme Court was whether the seizure of a balloon containing heroin fell within the plain view doctrine. *Id.* at 732–35. Nonetheless, hundreds of lower courts have repeated Justice Rehnquist's language as if it were settled law. *See infra* notes 190–213 and accompanying text.

5 United States v. Watson, 423 U.S. 411, 423–24 (1976) (holding that a warrantless arrest in public based on probable cause did not violate the Fourth Amendment). Probable cause is also needed for an arrest warrant, which gives an officer the authority to arrest an individual in his or her own home. *See* Payton v. New York, 445 U.S. 573, 603 (1980).

of the arrestee's person,[6] including a search of any containers found on the arrestee.[7] Incident to that lawful custodial arrest, the officer can also search anything within the arrestee's wingspan or grabbing distance.[8] If the arrestee is an occupant or recent occupant of a vehicle, the officer can search the passenger compartment of the vehicle as long as the arrestee is unsecured and within reaching distance of the passenger compartment or the officer has reason to believe there is evidence of the crime of arrest in the vehicle.[9] As part of the booking process, an arrestee can be strip searched prior to being introduced into the jail's general population, even if there is no particularized reason to suspect the arrestee of hiding contraband or evidence in his or her body cavities.[10] All of the above can be done even if the individual is arrested only for a minor offense, including a minor traffic offense punishable by a fine with no jail time.[11] And if the arrest is for a serious offense, an officer may collect the arrestee's DNA without a warrant.[12] That individual's DNA can then be checked against DNA collected in past, unsolved crimes—even though the individual has not yet been tried, let alone found guilty of any crime.[13] In short, probable

6 *See* United States v. Robinson, 414 U.S. 218, 236 (1973).

7 *See id.* at 224. This rule, however, does not apply to smartphones. If the officer finds a smartphone on the arrestee's person, the officer must get a search warrant before searching that smartphone. *See* Riley v. California, 573 U.S. 373, 403 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."). For excellent commentary on cell phone searches and the Fourth Amendment prior to the *Riley* decision, see generally Adam M. Gershowitz, *The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27 (2008).

8 *See* Chimel v. California, 395 U.S. 752, 756 (1969). Lower courts have interpreted the term "wingspan" very liberally. *See, e.g.*, United States v. Tejada, 524 F.3d 809, 811–12 (7th Cir. 2008) (finding that an entertainment center in the living room was within the defendant's grabbing distance, even though defendant was handcuffed, lying face down, and surrounded by police officers in the kitchen at the time of the search); United States v. Nascimento, 491 F.3d 25, 50–51 (1st Cir. 2007) (finding that a cabinet in a closet eight to ten feet away was within the defendant's immediate control); *see also* Watkins v. United States, 564 F.2d 201, 203–05 (6th Cir. 1977) (permitting officers to seize a gun under a mattress in a bedroom after officers escorted arrestee into that bedroom).

9 *See* Arizona v. Gant, 556 U.S. 332, 343 (2009).

10 *See* Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 338–39 (2012).

11 *See* Atwater v. City of Lago Vista, 532 U.S. 318, 324, 354–55 (2001); *see also* Wayne A. Logan, *Reasonableness as a Rule: A Paean to Justice O'Connor's Dissent in* Atwater v. City of Lago Vista, 79 MISS. L.J. 115 (2009) (examining Justice Sandra Day O'Connor's dissent in *Atwater*).

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

13 *See* Ian Duncan, *Police in Md. Holding DNA on People Not Convicted of Crimes*, BALT.

cause gives the officer the authority to do a whole lot more than just arrest and take an individual into custody. This is particularly concerning when one considers that, on average, law enforcement officers in the United States make 29,000 arrests each day.[14]

While this Article focuses on the probable cause standard for arrests, probable cause is also the level of justification required for many other criminal procedures. Consider all the ways probable cause matters for purposes of criminal investigation. Most obviously, the Fourth Amendment establishes probable cause as the standard for the issuance of a warrant to search or arrest.[15] The Fourth Amendment explicitly states, "no Warrants shall issue, but upon probable cause . . . ."[16]

As a general matter, probable cause is also required for warrantless searches. The Supreme Court has explained, "Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon 'probable cause' to believe that a violation of the law has occurred."[17] Many exceptions to the warrant requirement explicitly require probable cause even as they dispense with the need for a warrant in advance of the search or seizure. For example, probable cause is needed before an officer can conduct a warrantless search of a motor vehicle under the automobile exception to the warrant requirement.[18] Probable cause is needed before an officer can make a warrantless entry into a home under the exigent circumstances

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SUN (Feb. 28, 2013), https://www.baltimoresun.com/news/maryland/sun-investigates/bs-md-dna-databases-20130228-story.html [https://perma.cc/JAC5-B4C6]. To ease concerns raised by some legislators and public defender offices, proponents of Maryland's law allowing police to collect DNA samples from persons arrested for serious crimes "agreed to . . . a provision that requires that suspects' DNA be thrown out if they are acquitted or their cases are dropped." *Id.*; *see also* MD. CODE ANN., PUB. SAFETY § 2-504(d)(2)(i) (West 2018) ("If all qualifying criminal charges are determined to be unsupported by probable cause: [ ] the DNA sample shall be immediately destroyed . . . .").

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

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

16 U.S. CONST. amend. IV.

17 *See* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

18 *See* United States v. Ross, 456 U.S. 798, 800 (1982) (upholding a warrantless search of an automobile, including the compartments and containers within, because the officers had probable cause to believe contraband was concealed somewhere within); Carroll v. United States, 267 U.S. 132, 155–56, 162 (1925) (holding that a warrantless seizure of an automobile based upon probable cause to believe the vehicle contains contraband liquor does not contravene the Fourth Amendment).

exception to the warrant requirement.[19] Probable cause is needed for a plain view search or seizure.[20]

Probable cause also enables an officer to shoot a fleeing felon. As the Supreme Court held in *Tennessee v. Garner*,[21] if an officer has probable cause to believe a fleeing felon poses a threat of serious physical harm to the officer or others, and if feasible gives a warning, that officer can use deadly force to stop the suspect.[22]

If an officer has probable cause to believe a driver has committed a traffic offense, the officer may pull the driver over even if the real reason for the stop was because the officer had a mere hunch that the driver was engaged in criminal activity and even if the officer based this hunch on the driver's race.[23] Probable cause to arrest will also defeat most claims of retaliatory arrest.[24]

Beyond the Fourth Amendment search and seizure context, probable cause is all that is needed for a prosecutor to charge an individual with a crime.[25] Probable cause is all that is needed before a grand jury can issue an indictment.[26] Probable cause is also the standard applied

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

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

21 471 U.S. 1 (1985).

22 *See id.* at 11–12 ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force . . . if, where feasible, some warning has been given.").

23 Whren v. United States, 517 U.S. 806, 819 (1996) (finding vehicle stop reasonable under the Fourth Amendment because officers had probable cause to believe that petitioners had violated the traffic code).

24 Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019) (holding that probable cause will "generally defeat a retaliatory arrest claim"). If a case involves an arrest pursuant to an official policy of retaliation, probable cause to arrest will not categorically bar a defendant from claiming retaliatory arrest. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954–55 (2018). For an excellent critique of the *Nieves* decision, see Garrett Epps, *John Roberts Strikes a Blow Against Free Speech*, ATLANTIC (June 3, 2019), https://www.theatlantic.com/ideas/archive/2019/06/nieves-v-bartlett-john-roberts-protects-police/590881/ [https://perma.cc/R9ME-9H4T] (noting that the *Nieves* decision "will make it harder to hold officers to account when they—as we all know they sometimes do—arrest citizens in retaliation for speech they don't like," even though the First Amendment makes clear that "[a]n individual should not face official retaliation for engaging in 'protected speech' alone, even when that speech is unpleasant or hostile").

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

26 Federal grand jurors are informed that probable cause is "[t]he finding necessary in order to return an indictment against a person accused of a federal crime" and that "[a] finding

by a magistrate judge at a preliminary hearing deciding whether to bind over a defendant for trial.[27] When an individual has been arrested and taken into custody without a warrant, a judicial determination of probable cause is needed to continue holding the individual.[28] Clarifying and strengthening the meaning of probable cause is thus important, not only because it will help protect individuals from the harms of a custodial arrest, but also because it will help protect against unjust searches and prosecutions.

Recent arrests of African Americans for conduct that rarely would lead to police intervention when non–African Americans are involved in similar activity highlight the need for more attention to the question of what is required to constitute probable cause to arrest an individual. Such incidents include the April 2018 arrest of two African American men at a Philadelphia Starbucks store[29] and the arrests of 21 African American partygoers in a vacant house in Northeast Washington, D.C. that culminated in a 2018 Supreme Court decision on probable cause.[30] Accordingly, one of the goals of this Article is to

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of probable cause is proper only when the evidence presented to the grand jury, without any explanation being offered by the accused, persuades 12 or more grand jurors that a federal crime has probably been committed by the person accused." ADMIN. OFFICE OF THE U.S. COURTS, HANDBOOK FOR FEDERAL GRAND JURORS 2, 9 ("The grand jury . . . does not determine guilt or innocence, but only whether there is probable cause to believe that a crime was committed and that a specific person or persons committed it."). For an excellent discussion of probable cause as the standard to indict or bind over a defendant for trial, see also William Ortman, *Probable Cause Revisited*, 68 STAN. L. REV. 511, 513–16 (2016) (arguing that probable cause is problematic and should be abandoned as the standard used in grand jury indictments and preliminary hearings).

27 *See* Barber v. Page, 390 U.S. 719, 725 (1968) (holding that the function of a preliminary hearing is "determining whether probable cause exists to hold the accused for trial"). In *Morrissey v. Brewer*, the Court noted that probable cause in the parole revocation context is akin to probable cause in the preliminary hearing context, and defined probable cause as a "reasonable ground to believe." 408 U.S. 471, 485 (1972) (noting that a parole revocation hearing "should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions"). Although the Court has never suggested that probable cause in the preliminary hearing context is more stringent than probable cause in the arrest context, one lower court has suggested that the former requires a higher showing than the latter. *See* Williams v. Kobel, 789 F.2d 463, 469 (7th Cir. 1986) ("[I]t is clear to us that the probable cause determination at the preliminary hearing is far more stringent and far more concerned with legal technicalities than the probable cause determination made by an arresting officer . . . .").

28 *See* Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

29 *See infra* text accompanying notes 280–95.

30 District of Columbia v. Wesby, 138 S. Ct. 577 (2018); *see also* Brief for Respondents at 2, *Wesby*, 138 S. Ct. 577 (No. 15-1485) (referring to the neighborhood as "low-income, predominantly African-American"); *id.* at 51 ("African-Americans, like Respondents, are often distrustful of the police.").

shed light on the Supreme Court's very unclear probable cause jurisprudence. This Article's primary objective, however, is to persuade lower courts not to follow Justice Rehnquist's description of probable cause in *Texas v. Brown*.[31]

This Article proceeds in three parts. Part I provides an overview of the Supreme Court's modern jurisprudence on probable cause.[32] Two themes frame the analysis in this part: (1) the Court's lack of clarity regarding the meaning of probable cause,[33] and (2) the Court's tendency in its probable cause jurisprudence to favor the government instead of the individual who was searched or arrested.[34]

Part II focuses on Justice Rehnquist's statement in *Texas v. Brown* that probable cause does not demand a showing that the officer's belief that the arrestee was engaged in criminal activity be "more likely true than false,"[35] and analyzes the influence this statement has had on lower court jurisprudence and legal scholarship. Almost every single lower court that has considered the meaning of probable cause has repeated this language as if it were settled law.[36] Even prominent legal scholars have cited this language as if it were settled law.[37]

Part III argues that *Texas v. Brown* should not be viewed as settled law for several reasons. First, Justice Rehnquist was only able to get three other Justices to sign onto his opinion.[38] *Texas v. Brown* was just a plurality opinion, and his statement on the showing required for a finding of probable cause was not necessary to the judgment.[39]

Second, Justice Rehnquist's view of probable cause is wrong as a matter of history, precedent, and logic. It is wrong as a matter of history because it conflicts with the Framers' desire to constrain the government's arrest and search powers.[40] It is wrong as a matter of precedent because prior to *Texas v. Brown*, the Supreme Court had never suggested that the degree of belief associated with probable

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31 *See supra* notes 2–3 and accompanying text.

32 For a more complete history of the Court's probable cause jurisprudence, see Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 957 (2003) (noting that the Supreme Court's probable cause jurisprudence dates back to the Warren Court's decision in Terry v. Ohio, 392 U.S. 1 (1968)).

33 *See* discussion *infra* Section I.A.

34 *See* discussion *infra* Section I.B.

35 Texas v. Brown, 460 U.S. 730, 742 (1983).

36 *See* discussion *infra* Section II.A.

37 *See* discussion *infra* Section II.B.

38 *Texas v. Brown*, 460 U.S. at 732.

39 *See* discussion *infra* Section III.A.

40 *See* discussion *infra* Section III.B.1.

cause was something less than a preponderance of the evidence.[41] Moreover, since *Texas v. Brown*, a majority of the Court has never endorsed Justice Rehnquist's stunted characterization of probable cause. The Court has been quite steadfast in its view that judicial officers have broad discretion when assessing whether an officer had probable cause to arrest or search. Justice Rehnquist's view is also wrong as a matter of logic because the term "probable cause" itself suggests that it must be probable, that is, more likely than not, that the person being arrested has committed a crime.[42] When an officer says, "I have probable cause to believe that a crime has been committed and that Person A committed that crime," the officer is essentially claiming he has reasonable grounds for believing that Person A committed a crime.[43] Probable cause to arrest, as the Supreme Court has often stated, means that the officer thinks there is a fair probability that Person A committed a crime.[44] It simply does not make logical sense to say that the officer with probable cause thinks that there is a less than fifty percent chance that Person A has committed a crime.

Finally, Justice Rehnquist's view of probable cause allows, and perhaps even fosters, racial disparity in arrests. Lowering the threshold of certainty needed for probable cause makes it easier for officers to arrest individuals.[45] Police officers, however, cannot arrest every single person for whom they have probable cause to arrest and, necessarily, will exercise their discretion in choosing who they actually arrest. Although most officers probably do not intend to discriminate on the basis of race, racial stereotypes are likely to color their perceptions of who seems suspicious and therefore, is worthy of arrest.[46] An extremely low threshold of certainty for probable cause means the bulk of these arrests will be deemed justifiable. Racial disparity in arrests is something the law should seek to avoid.

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41 *See* discussion *infra* Section III.B.2.

42 *See* discussion *infra* Section III.B.3.

43 Brinegar v. United States, 338 U.S. 160, 175–76 (1949) ("'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881))); Carroll v. United States; 267 U.S. 132, 161 (1925) (same).

44 Florida v. Harris, 568 U.S. 237, 244 (2013) (stating that all probable cause "require[s] is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act'" (quoting Illinois v. Gates, 462 U.S. 213, 238, 231 (1983))); *Gates*, 462 U.S. at 238, 246 (noting that "probable cause does not demand . . . certainty" and that a "fair probability" is sufficient).

45 *See* discussion *infra* Section III.C.

46 L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2038–39 (2011) (explaining how the operation of implicit racial biases can cause the police to target, stop, and search Blacks more often than Whites).

When Justice Rehnquist suggested thirty-seven years ago in *Texas v. Brown* that probable cause need not be correct nor more likely true than false, he significantly lowered the bar for probable cause. Probable cause should be more robust for the protection of all civilians. Lower courts should reject Justice Rehnquist's definition of probable cause in *Texas v. Brown*. Rather than follow the view that probable cause does not require more than fifty percent certainty,[47] judicial officers deciding whether there is probable cause to arrest an individual should insist on a more robust showing of certainty from the arresting officer. At least in most cases,[48] before an officer can execute a custodial arrest, she should have more than a fifty percent certainty that the individual has committed the offense for which he is being arrested. If probable cause turns on probabilities, as the Supreme Court has often stated,[49] it ought to mean that it is at least probable that a crime has been committed and that the individual being arrested committed that crime.

## I. The Supreme Court's Modern Jurisprudence on Probable Cause

### *A. Incapable of Precise Definition*

Legal scholars agree that probable cause "has not been defined with sufficient precision."[50] The Supreme Court itself has acknowledged that "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible."[51] According to the Court, "[t]he probable-cause standard is incapable of precise definition or quantification into percentages because it deals with *probabilities* and depends on the totality of the circumstances."[52] On another occasion, the Court stated, "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."[53] Along these lines, the Court has opined that "probable cause is a flexible, common-sense standard."[54]

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47 *See* Texas v. Brown, 460 U.S. 730, 742 (1983).

48 Some scholars have argued that the amount of certainty required for probable cause should vary depending on the severity of the offense. *See infra* Section I.C.2.

49 *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003).

50 *E.g.*, Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 Lewis & Clark L. Rev. 789, 795 (2013).

51 Ornelas v. United States, 517 U.S. 690, 695 (1996).

52 *Pringle*, 540 U.S. at 371 (emphasis added) (citing Illinois v. Gates, 462 U.S. 213, 232 (1983)).

53 *Gates*, 462 U.S. at 232 (emphasis added).

54 Texas v. Brown, 460 U.S. 730, 742 (1983).

One problem with these pronouncements is that they offer very little guidance to courts and police officers in practice. As Ronald Bacigal notes, "[t]he inability to formulate clear rules or precise probability levels governing probable cause has [led] the Court to adopt one over-arching rule for the police—just use your common sense and act reasonably."[55] What constitutes acting reasonably, however, is subjective. What may seem reasonable to one person may seem completely unreasonable to another.[56]

Somewhat more definitively, the Court has explained that "[p]robable cause exists where 'the facts and circumstances within . . . [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[57] The Court has also said that "'[t]he substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'"[58] Moreover, "the belief of guilt must be particularized with respect to the person to be searched or seized."[59] In other words, probable cause to arrest an individual requires a reasonable ground for believing both that an offense has been, or is being, committed and that a particular person—the person being arrested—is responsible for committing that offense. Just how much certainty is sufficient to

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

56 As Justice Thurgood Marshall noted in his dissent in *Strickland v. Washington* objecting to the standard of reasonableness for establishing a claim of ineffective assistance of counsel adopted by the Court, "[t]o tell lawyers and the lower courts that counsel for a criminal defendant must behave 'reasonably' and must act like 'a reasonably competent attorney,' is to tell them almost nothing." 466 U.S. 668, 707–08 (1984) (Marshall, J., dissenting) (internal citation omitted); *see also* CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM (NYU Press 2003) (showing how the reasonableness requirement in provocation and self-defense law often leads to disparate results because of race, gender, sexual orientation and gender identity); Dan M. Kahan et al., *Whose Eyes Are You Going to Believe*? Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009) (finding that rather than being a clear cut case in which no reasonable juror could find that the police officer acted unreasonably, as Justice Scalia writing for the Court in *Scott v. Harris* suggested was the case, over a thousand individuals who viewed a dashboard camera videotape of a high-speed police chase that ended with the officer ramming his patrol car into the Respondent's car with enough force to render him a quadriplegic were deeply divided over whether the officer's use of force was reasonable); Cynthia Lee, *Reforming the Law on Police Use of Deadly Force: De-Escalation, Preseizure Conduct, and Imperfect Self-Defense*, 2018 U. ILL. L. REV. 629, 655 (noting that reasonableness in the context of assessing a police officer's use of force "is such an open-ended standard; alone, it provides little-to-no guidance to the jury").

57 Brinegar v. United States, 338 U.S. 160, 175–76 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

58 *Id.* at 175 (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (Pa. 1881)).

59 Maryland v. Pringle, 540 U.S. 366, 371 (2003).

constitute a "reasonable ground," however, is not so clear. It just needs to be somewhere between more than a mere suspicion and less than proof necessary to convict.[60]

### *B. Deference to the Government*

Not only has the Supreme Court provided a very mushy definition of probable cause that appears to require not much in the way of certainty, but also, on almost every single question involving probable cause, the Court has ruled in favor of the government and against the defendant. For example, the Court has held that probable cause to arrest or search can be based on evidence that would be inadmissible at trial.[61] Other relevant cases in which the Court has favored the government over the defendant include situations where the police officer did not have probable cause as to the crime of arrest, but where a court found *post hoc* probable cause for another offense; probable cause based on informant tips; probable cause established by dog sniffs; and probable cause based on a common enterprise theory when several individuals were found in a car with drugs.

#### *1. Wrong Crime or Wrong Person, No Problem*

If a police officer arrests an individual for a crime but lacks probable cause for the crime that triggered the arrest, the Supreme Court has held that the arrest is still valid if the officer would have had probable cause to arrest the individual for any other crime.[62] In *Devenpeck v. Alford*,[63] police officers arrested Jerome Alford for recording his conversations with them during a traffic stop.[64] Alford was taken to jail where he was charged with violating the State Privacy Act.[65] A state trial court dismissed the charge because Alford's recording of his conversation with the officers was not, in fact, a crime under the State Privacy Act, and the officers were wrong in thinking that Alford had violated this law.[66]

Alford sued the officers for unlawful arrest and false imprisonment, alleging that the officers arrested him without probable cause in

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60 *Brinegar*, 338 U.S. at 175.

61 *See id.* at 173 (finding that evidence excluded at trial was properly admitted at suppression hearing where issue was whether officer had probable cause to search).

62 *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004).

63 543 U.S. 146 (2004).

64 *Id.* at 149–50.

65 *Id.* at 150.

66 *Id.* at 151.

violation of the Fourth and Fourteenth Amendments.[67] Even though recording a conversation with a police officer was not a crime under the law of the state where Alford was arrested, which meant that the officers clearly could not have had probable cause as to this supposed "crime," the jury was instructed that for Alford to prevail, he had to demonstrate that the officers arrested him without probable cause and that probable cause exists "if the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person to conclude that the suspect has committed, is committing, or was about to commit a crime."[68] Understanding this instruction to mean that probable cause exists if the prudent person would conclude that Alford had committed, was committing, or was about to commit *any* crime, the jury found for the officers.[69]

The United States Court of Appeals for the Ninth Circuit reversed, finding that the officers could not have had probable cause to arrest Alford because "[t]ape recording officers conducting a traffic stop is not a crime in Washington."[70] The Ninth Circuit rejected the officers' claim that Alford's arrest was valid because they had probable cause to arrest him for other crimes, namely, impersonating and obstructing a law enforcement officer, because these other crimes were not closely related to the offense for which Alford was actually arrested.[71]

The Supreme Court reversed the Ninth Circuit, noting that a "warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe a criminal offense has been or is being committed."[72] The Court explained that the probable cause inquiry is an objective inquiry and that the "arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause."[73] In short, the Court agreed with the government's position that if a court or jury decides after the fact that there was probable cause to arrest the defendant for a crime other than the crime of arrest, the arrest will be valid even if the arresting officer did not realize at the time that there was probable cause to arrest for another offense.

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67 *Id.*

68 *See id.* (quoting the jury instructions).

69 *See id.*

70 Alford v. Haner, 333 F.3d 972, 976 (9th Cir. 2003), *rev'd sub nom.* Devenpeck v. Alford, 543 U.S. 146 (2004).

71 *Id.*

72 *Devenpeck*, 543 U.S. at 152.

73 *Id.* at 153.

Additionally, the Court has held that if the police have probable cause to arrest Person A for a crime and they arrest Person B, mistakenly but reasonably believing that Person B is Person A, their arrest of Person B is valid.[74] In *Hill v. California*,[75] police officers had probable cause to arrest Archie Hill for robbery, and arrested a man who matched Hill's age and physical description and who answered the door of Hill's apartment—but who turned out not to be Hill.[76] Regardless, the Court found that because the police officers had probable cause to arrest Hill and had a "reasonable, good faith belief that the arrestee" was Hill, the arrest of the wrong person was valid.[77]

### *2. Informant Tips*

Another example of the Supreme Court favoring the government over the defendant is reflected in its treatment of probable cause in the informant context. In the 1960s, the Court set forth a two–prong test for probable cause in cases where police rely in whole or in part on an informant's tip to establish probable cause. Under the two-prong *Aguilar–Spinelli* test,[78] the government had to affirmatively establish (1) the informant's basis of knowledge, meaning "the particular means by which [the informant] came by the information given in his report,"[79] and (2) the informant's veracity, meaning the credibility of the informant or the reliability of the information.[80] In other words, the government had to show both how the informant got his information and why the informant was credible or why the information the informant provided to the police was trustworthy or reliable.[81]

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74 Hill v. California, 401 U.S. 797, 802 (1971).

75 401 U.S. 797 (1971).

76 *Id.* at 799.

77 *Id.* at 802.

78 *See generally* Spinelli v. United States, 393 U.S. 410 (1969), *overruled by* Illinois v. Gates, 462 U.S. 213, 238 (1983); Aguilar v. Texas, 378 U.S. 108 (1964), *overruled by Gates*, 462 U.S. at 238.

79 *Gates*, 462 U.S. at 228 (describing the basis of knowledge prong in the two-pronged *Aguilar-Spinelli* test); *see also Aguilar*, 378 U.S. at 114 (noting that "the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were").

80 *Gates*, 462 U.S. at 230. The Court in *Gates* noted that an informant's "veracity" is an important factor in determining the weight of an informant's tip without defining the term. The term "veracity" generally refers to a person's truthfulness. *See, e.g.*, United States v. Abel, 469 U.S. 45, 55 (1984) (referring to veracity as "character for truthfulness or untruthfulness" (quoting FED. R. EVID. 608(b))); *Veracity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "veracity" as "[h]abitual regard for and observance of the truth; truthful nature" and "[c]onsistency with the truth; accuracy").

81 *See Spinelli*, 393 U.S. at 415.

In 1983, the Court in *Illinois v. Gates*[82] did a complete about-face, and abandoned the *Aguilar-Spinelli* test in favor of a "totality-of-the-circumstances" test for determining probable cause in informant cases.[83] Writing for the Court, Justice Rehnquist acknowledged that an informant's veracity, reliability, and basis of knowledge were "all highly relevant in determining the value of his report,"[84] but noted that these factors should not be "understood as entirely separate and independent requirements to be rigidly exacted in every case . . . ."[85] Instead, basis of knowledge and veracity "should be understood simply as closely intertwined issues" that bear on whether there is probable cause.[86]

In explaining the Court's decision to abandon the *Aguilar-Spinelli* test,[87] Justice Rehnquist described probable cause as "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."[88] While *Illinois v. Gates* was a case about probable cause specifically in the informant context, its language on probable cause has been repeated in many other cases involving probable cause.[89]

In *Illinois v. Gates*, Justice Rehnquist listed examples where the government could prevail in establishing probable cause under its new totality of the circumstances test where it would not have prevailed under the old *Aguilar-Spinelli* test:

> If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not

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82 462 U.S. 213 (1983).

83 *Id.* at 230. The *Spinelli* Court had expressly rejected a totality of the circumstances approach. *See Spinelli*, 393 U.S. at 415 ("We believe . . . the 'totality of circumstances' approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis."). For a defense of the *Gates* decision, see Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 J.L. REFORM 465, 518–19 (1984) (arguing that the Court in *Gates* correctly abandoned the *Aguilar-Spinelli* two-pronged test).

84 *Gates*, 462 U.S. at 230.

85 *Id.*

86 *Id.*

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

88 *Id.* at 232.

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

> serve as an absolute bar to a finding of probable cause based on his tip.[90]

Justice Rehnquist continued, "Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary."[91]

Accordingly, under the *Illinois v. Gates* test, a strong showing on one prong can make up for a weak showing on the other prong.[92] One problem with not requiring a showing of *both* basis of knowledge and veracity is that an "unquestionably honest citizen,"[93] strong on the veracity prong, but without any basis of knowledge, can be badly mistaken. For example, on September 12, 2002,[94] approximately one year after the attacks on the World Trade Center and Pentagon on September 11, 2001,[95] Eunice Stone, a woman who likely was considered "unquestionably honest"[96] by the police, reported a conversation she overheard and found very disturbing while eating at a Shoney's restaurant in Calhoun, Georgia.[97] According to Stone, three men who appeared to be of Middle Eastern descent were laughing and joking about what happened on September 11, 2001.[98] Stone told police that one of the men said, "If they [Americans] mourn Sept[ember] 11, what will they think about Sept[ember] 13?"[99] and another spoke

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90 *Gates*, 462 U.S. at 233.

91 *Id.* at 233–34.

92 *See id.* at 233.

93 *Id.*

94 *See* David M. Halbfinger, *Terror Scare in Florida: False Alarm, But Televised*, N.Y. TIMES (Sept. 14, 2002), https://www.nytimes.com/2002/09/14/us/terror-scare-in-florida-false-alarm-but-televised.html [https://perma.cc/G3XP-FXPM].

95 On September 11, 2001, terrorists flew planes into the World Trade Center in New York City and the Pentagon in Northern Virginia. James Barron, *Thousands Feared Dead as World Trade Center Is Toppled*, N.Y. TIMES (Sept. 11, 2001), https://www.nytimes.com/2001/09/11/national/thousands-feared-dead-as-world-trade-center-is-toppled.html [https://perma.cc/C8AG-Y8NT]. Another plane crashed in Pennsylvania. *Id.* More than 2,997 people died as a result of the 9/11 attacks. Aaron Katersky, *The 9/11 Toll Still Grows: More Than 16,000 Ground Zero Responders Who Got Sick Found Eligible for Awards*, ABC NEWS (Sept. 10, 2018), https://abcnews.go.com/beta-story-container/US/911-toll-growsl-16000-ground-responders-sick-found/story?id=57669657 [https://perma.cc/5CNW-7DVP].

96 *Gates*, 462 U.S. at 233; *see also* Vikram Amar, *The Golden Rule of Racial Profiling*, L.A. TIMES (Sept. 22, 2002), http://articles.latimes.com/2002/sep/22/opinion/op-amar22 [https://perma.cc/HX57-EQVG] ("Stone, by all accounts, had no incentive to victimize the men. More generally, she does not seem like the kind of person to purposefully lie to the police.").

97 *See* Halbfinger, *supra* note 94.

98 *See id.*

99 *Id.*

about "bringing down" something.[100] Stone also claimed the men were speaking in a language that sounded like Arabic.[101]

Stone followed the men when they left the restaurant, wrote down the license plate numbers of their cars, and then called the Georgia State Patrol to report what she heard.[102] Police caught up with the men in Florida.[103] The three men were arrested, handcuffed, then detained for more than seventeen hours while police searched their cars.[104] The searches revealed nothing indicating a plot to commit a terroristic act against the United States.[105]

The three men Stone thought were terrorists were actually medical students on their way to Larkin Community Hospital in Miami, where they were planning to begin a series of nine-week rotations.[106] Their entire conversation was in English, not Arabic, since only one of the men knew any Arabic.[107] While the three men were of Middle Eastern descent,[108] they were all legally in the country, and two were U.S. citizens.[109] According to the men, "bringing down" something referred to a car that one of the men wanted to bring down to Miami.[110] Even though the men were eventually released from police custody and never charged with a crime, the hospital revoked their internships because of the controversy over the conversation they allegedly had at the restaurant.[111]

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100 Amar, *supra* note 96.

101 *Terror Scare Men: 'We Want Our Dignity Back'*, CNN (Sept. 17, 2002) [hereinafter *Terror Scare Men*], http://edition.cnn.com/2002/US/09/17/fla.students.talk/index.html [https://perma.cc/6GSH-3GWS].

102 Halbfinger, *supra* note 94.

103 *Id.*

104 *Id.*

105 *See id.*; Press Release, Am.-Arab Anti-Discrimination Comm., ADC Calls for Thorough Investigation of Terror False Alarm in Florida (Sept. 17, 2002), http://www.adc.org/adc-calls-for-thorough-investigation-of-terror-false-alarm-in-florida/ [https://perma.cc/9YGU-TT7F] (expressing concern about the circumstances leading to the arrest and seventeen-hour detention of the three medical students and noting that the men believed Eunice Stone's concerns were prompted by their "Middle Eastern and Muslim appearance").

106 Halbfinger, *supra* note 94.

107 *See Terror Scare Men*, *supra* note 101 (noting that the medical students told CNN that only one of them understands and speaks Arabic).

108 Halbfinger, *supra* note 94.

109 *Id.*; *see also* Amar, *supra* note 96.

110 *See* Amar, *supra* note 96; *see also Terror Scare Men*, *supra* note 101 (noting that one of the medical students told CNN that he was the only one of the three that hadn't yet purchased a car, explaining, "So my plan was that once we get to Miami I would buy a car before classes started, and I said that in case I don't find one in Miami, I could have one shipped down from Kansas City").

111 *See Terror Scare Men supra* note 101; *see also* Halbfinger, *supra* note 94.

If a court in the Eunice Stone example had to assess whether probable cause existed to arrest the men, the government could make a strong showing on the veracity prong since they had a witness who appeared to be of unquestionable honesty with no apparent motive to lie about what she heard.[112] The problem here was that Eunice Stone had no basis for knowing what she claimed to know.[113] She was not a friend or colleague of the three men with intimate knowledge of their plans.[114] She had not observed the men engaging in any criminal activity.[115] She had simply overheard a conversation that she mistakenly thought was a plot to commit a terrorist act.[116] But according to *Illinois v. Gates*, the government's very weak showing of basis of knowledge could be overcome by its strong showing on the veracity front.[117] Under *Illinois v. Gates*, tips from people like Eunice Stone can establish valid probable cause for arrest.

In explaining how to apply the new totality of circumstances approach to probable cause, Justice Rehnquist also emphasized that it is unnecessary for judicial officers to find an informant's information trustworthy or the informant credible as long as the informant gives a lot of detail and claims the information is based on first-hand knowledge, stating, "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case."[118]

In his dissent, Justice Brennan provided a hypothetical illustrating how a tipster might give the police an abundance of detail and claim first-hand knowledge that a person is involved in criminal activity, but it would not be wise to find probable cause to believe there was evidence of a crime in the place in question:

> [Suppose] a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607. But what if he states that there are narcotics locked in a safe in Apartment 300, which is described in detail, and the

112 *See* Amar, *supra* note 96.

113 Halbfinger, *supra* note 94.

114 *Id.*

115 *Id.*

116 *Id.*

117 *See Gates*, 462 U.S. at 233.

118 *Id.* at 234.

> apartment manager verifies everything but the contents of the safe? I doubt that the report about the narcotics is made appreciably more believable by the verification. The informant could still have gotten his information concerning the safe from others about whom nothing is known or could have inferred the presence of narcotics from circumstances which a magistrate would find unacceptable.[119]

Hypotheticals aside, a person with an axe to grind or grudge can provide an abundance of false details to the police and claim first-hand knowledge of those details in order to harass another person. For example, in September 2012, a man named Kenny Smith called the police and told them that another man, Christopher Shell, was on a U.S. Airways flight from Philadelphia to Dallas with liquid explosives.[120] Based on this tip, the police asked the pilot to bring the plane down, and the flight was "turned around and forced to return to Philadelphia."[121] Shell was taken off the plane at gunpoint, detained, and interrogated while the plane and his luggage were searched.[122] No explosives were found on the plane, in Shell's luggage, or on Shell's person, and Shell was released.[123] Later, the police discovered that Smith had called in the tip because he was angry at Shell for posting photos of Smith's girlfriend, who was Shell's ex-girlfriend, on Facebook.[124] While the police certainly had sufficient justification to take Shell off

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119 *Id.* at 282 (Brennan, J., dissenting) (quoting Spinelli v. United States, 393 U.S. 410, 427 (1969) (White, J., concurring)). This hypothetical was originally posed by Justice White, concurring in *Spinelli*, 393 U.S. at 427 (White, J., concurring).

120 Christina Ng & Richard Esposito, *Plane Bomb Hoax to "Avenge" Compromising Photos, Cops Say*, ABC NEWS (Sept. 7, 2012), https://abcnews.go.com/US/plane-bomb-hoax-avenge-compromising-facebook-photos-cops/story?id=17182136#.UFtQbK45iko [https://perma.cc/8Z63-EF67]; *see also* Richard Esposito & Christina Ng, *Police: Angry Ex-Girlfriend Triggered US Airways Bomb Hoax*, ABC NEWS (Sept. 6, 2012), https://abcnews.go.com/US/police-angry-girlfriend-triggered-us-airways-bomb-hoax/story?id=17170280 [https://perma.cc/PS7H-BWZ2] (reporting that Shell had "been sped through security by a friend at the airport" and had posted to Facebook that "getting through security had been a breeze," which caught the FBI's attention and led to "bomb techs, cops, FBI agents and K-9 dogs descend[ing] on the flight and conduct[ing] a full search"); Tim Jimenez, et al., *Philadelphia Man Charged With Fake Report of Bomb Aboard Airliner*, CBS PHILA. (Sept. 7, 2012), https://philadelphia.cbslocal.com/2012/09/07/philadelphia-man-charged-with-fake-report-of-bomb-aboard-airliner/ [https://perma.cc/R73J-2PAH] (reporting that Smith called in the tip from a payphone using the name "George Michaels"); *Victim of Philadelphia Plane Explosives Hoax Later Arrested in Texas*, FOX NEWS (last updated Nov. 29, 2015), https://www.foxnews.com/us/victim-of-philadelphia-plane-explosives-hoax-later-arrested-in-texas [https://perma.cc/VS4B-M8LG].

121 Ng & Esposito, *supra* note 120; *see also* Esposito & Ng, *supra* note 120.

122 *See* Esposito & Ng, *supra* note 120; Ng & Esposito, *supra* note 120.

123 *See* Ng & Esposito, *supra* note 120.

124 *Id.* Smith was arrested and charged with conveying false and misleading information to police. *See id.*

the plane and temporarily detain him while they searched him and his luggage to confirm whether Smith's tip was correct,[125] arresting Shell—who was not carrying liquid explosives and was simply trying to travel to celebrate his birthday—would not have been appropriate.[126] Yet under the totality of the circumstances test announced in *Illinois v. Gates*, a court asked to decide whether there was probable cause to justify an arrest could conclude that the police had probable cause to arrest Shell since the tipster had provided police with a lot of details of alleged wrongdoing and claimed first-hand knowledge that Shell was carrying liquid explosives on the plane.

### *3. Dog Sniffs*

The Supreme Court's jurisprudence on probable cause in the context of a dog sniff is another example of the Court favoring the government over the defendant. In *Florida v. Harris*,[127] the Court considered whether an alert by a drug detection dog during a traffic stop established probable cause to search a vehicle.[128] In this case, the Florida Supreme Court found that the officer lacked probable cause to search the defendant's vehicle because the State failed to establish that the dog in question was reliable.[129] The Florida Supreme Court explained that a drug detection dog's alert establishes probable cause only if the State can produce certain evidence, including:

> the dog's training and certification records, an explanation of the meaning of the particular training and certification, field performance records (including any unverified alerts), and evidence concerning the experience and training of the of-

125 *See* Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring) (noting that, as a general matter, police must have reasonable suspicion of criminal activity to forcibly stop an individual and reasonable suspicion that the individual is armed and dangerous before they can frisk that individual, but that "the right to frisk [is] immediate and automatic if the reason for the stop is . . . an articulable suspicion of a crime of violence").

126 There is no bright-line test for distinguishing between a temporary detention, which only requires reasonable suspicion, and a de facto arrest, which is when the police do not formally place an individual under arrest but the detention counts as an arrest, which requires probable cause. *See* Florida v. Royer, 460 U.S. 491, 503, 495 (1983) (finding that a defendant was arrested before he was formally placed under arrest, even though only fifteen minutes had elapsed from the time officers initially approached respondent until contraband was discovered and the defendant arrested). Accordingly, even if Shell was not formally placed under arrest, being handcuffed and led off the plane at gunpoint, then detained, searched, and interrogated, while the plane and his luggage were also searched, may have constituted a de facto arrest.

127 568 U.S. 237 (2013).

128 *Id.* at 240.

129 *See* Harris v. State, 71 So. 3d 756, 774 (Fla. 2011).

> ficer handling the dog, as well as any other objective evidence known to the officer about the dog's reliability.[130]

The Supreme Court reversed, explaining that "[t]he test for probable cause is not reducible to 'precise definition or quantification.'"[131] The Court stated that all probable cause requires "is the kind of 'fair probability' on which 'reasonable and prudent [people,] not legal technicians, act.'"[132] The Court explained that in evaluating probable cause, "we have consistently looked to the totality of the circumstances" and "rejected rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."[133] In delineating the evidence the State was required to produce to establish probable cause in the dog sniff context, the Florida Supreme Court had, in the Court's view, imposed an overly rigid rule that made it too difficult for the State to establish probable cause. As in *Illinois v. Gates*, the Court in *Florida v. Harris* eschewed a bright line rule requiring the government to provide objective evidence of reliability in favor of a less precise standard that allows the trial court to find that the government has established probable cause whenever the court is inclined to do so.

#### *4. Cars as Places Where Occupants Engage in Common Criminal Enterprises*

Another example of the Supreme Court favoring the government over individual defendants is when a police officer pulls over a car with more than one occupant and finds contraband in the car. In *Maryland v. Pringle*,[134] the Court held that an officer who finds drugs and money in a car during a lawful traffic stop has probable cause to arrest all the occupants of the vehicle for possession of the drugs.[135]

In *Pringle*, an officer stopped a car for speeding around 3:00 AM.[136] There were three men in the car: the driver, a front-seat passenger, and a back-seat passenger.[137] The officer received consent from the driver to search the vehicle, and found over $700 in the glove compartment and five plastic baggies of cocaine hidden behind the

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130 *Florida v. Harris*, 568 U.S. at 242–43 (quoting *Harris v. State*, 71 So. 3d at 775).

131 *Id.* at 243.

132 *Id.* at 244.

133 *Id.*

134 540 U.S. 366, 371 (2003).

135 *Id.* at 372.

136 *Id.* at 368.

137 *Id.*

backseat armrest.[138] The officer asked the men who owned the drugs and money "and told them that if no one admitted to ownership of the drugs he was going to arrest them all."[139] No one admitted to owning the cash or drugs, so the officer arrested all three men and transported them to the police station.[140]

Later that morning, Joseph Pringle, the front-seat passenger, admitted that the cocaine was his and that he "intended to sell the cocaine or use it for sex."[141] Pringle told police that the two others in the car "did not know about the drugs," and they were released.[142] Before his trial for possession of cocaine with intent to distribute, Pringle moved to suppress his confession as the fruit of an illegal arrest.[143] The trial court denied Pringle's motion, finding that the officer had probable cause to arrest him.[144] Pringle was convicted and sentenced to ten years in prison.[145]

The Court of Appeals of Maryland reversed Pringle's conviction.[146] The Court of Appeals held that the mere finding of cocaine in the backseat armrest of a car was insufficient to establish probable cause to arrest Pringle for possession of cocaine given that there were two other people in the car at the time of the arrest and that the arresting officer did not have additional facts to establish that Pringle, specifically, had knowledge of or control over the cocaine.[147]

The Supreme Court reversed the Court of Appeals of Maryland.[148] Writing for a unanimous Court, Justice Rehnquist noted that it was uncontested that upon finding the five baggies, the officer had probable cause to believe a felony had been committed and, therefore the sole question before the Court was whether the officer had probable cause to believe Pringle had committed that crime.[149] To answer the probable cause question, Justice Rehnquist started by noting that

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138 *Id.*

139 *Id.*

140 *Id.* at 368–69.

141 *Id.* at 369 (internal citation omitted).

142 *Id.*

143 *Id.*

144 *Id.*

145 *Id.*

146 Pringle v. State, 805 A.2d 1016, 1033 (Md. 2002).

147 *Id.* at 1027 ("Without additional facts available to the officer at that time that would tend to establish petitioner's knowledge and dominion or control over the drugs, the mere finding of cocaine in the back armrest when petitioner was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession.").

148 *Pringle*, 540 U.S. at 369.

149 *Id.* at 370.

probable cause is "incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."[150] He also stated, as the Court did in *Illinois v. Gates*, that probable cause is "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules,"[151] though he did not repeat the "not . . . more likely true than false" language from his plurality opinion in *Texas v. Brown*.[152]

Justice Rehnquist then observed that the cash was "in the glove compartment directly in front of Pringle" and the cocaine was located "behind the back-seat armrest and accessible to all three men" in the car.[153] He pointed out that "[u]pon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money."[154] Justice Rehnquist opined, "[w]e think it an entirely reasonable inference from these facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine," and concluded, "[t]hus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly."[155]

Rejecting Pringle's argument that it was improper to suggest probable cause existed from the mere fact that he was found in a car with drugs, Justice Rehnquist opined that "a car passenger . . . will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or the evidence of their wrongdoing."[156] Expressing what could be called a "common enterprise theory" of probable cause, Justice Rehnquist explained that it would be "reasonable for the officer to infer a common enterprise among the three men," especially given the quantity of the drugs and cash in the car.[157] To Justice Rehnquist, the cash and drugs suggested the men were probably dealing drugs, "an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him."[158]

Though the Court could have easily concluded that it was more likely the drugs found in the backseat armrest belonged to the

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150 *Id.* at 371.

151 *Id.* at 370–71 (quoting *Gates*, 462 U.S. at 232).

152 *See supra* notes 2–3 and accompanying text.

153 *Id.* at 372.

154 *Id.*

155 *Id.*

156 *Id.* at 373 (citing Wyoming v. Houghton, 526 U.S. 295 (1999)).

157 *Id.*

158 *Id*.

driver—since it was his car and he could have hidden the drugs anywhere within the car, including in the backseat armrest—or the backseat passenger—since he was in closest proximity to the backseat armrest—it instead found there was probable cause to arrest all three men because occupants of a car found with drugs within are likely to be involved in a "common [criminal] enterprise."[159]

### *C. Open Questions*

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

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

One question that remains open is whether probable cause to arrest requires probable cause for each and every element of the offense.[160] The Court has, however, given us a hint as to how it would answer this question should the issue ever come squarely before the Court in the future. In *District of Columbia v. Wesby*,[161] a large group of people attending a party at a vacant house were arrested for unlawful entry.[162] Sixteen of the partygoers, Respondents, challenged their arrest, arguing that the arresting officers did not have reasonable grounds to believe Respondents knew or had reason to know that they were in the house without permission since Respondents had been invited to the party by someone who had been in negotiations with the owner of the house to rent the house.[163] Because the police lacked probable cause on the mens rea element of unlawful entry, Re-

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159 *Id.*

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

161 138 S. Ct. 577 (2018).

162 *See generally id.*

163 Brief for Respondents at i, 7–9, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (No. 15-1485).

spondents argued the police lacked probable cause to arrest the partygoers for the offense of unlawful entry.[164]

The Court did not explicitly take a position on whether the government must show probable cause on each and every element of the offense for which an individual is arrested. However, the Court spent the bulk of its opinion explaining why the officers had good reason to believe that the partygoers knew or had reason to know that they were in the house without the owner's permission, which suggests that the Court accepted Respondents' argument and would rule, if this issue came up in a future case, that probable cause is required on each and every element of the offense of arrest.[165]

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

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

The closest the Court has come to addressing this issue was in *Florida v. J.L.*,[166] in which the issue was whether the police had reasonable suspicion—the standard for police to conduct a brief, temporary detention of a person[167]—to stop and frisk an individual.[168] *Florida v. J.L.* was not a case about whether the police had probable cause to support an arrest. The Court has often stated that "reasonable suspicion" requires less certainty than "probable cause."[169]

In *Florida v. J.L.*, police received an anonymous tip that a young black male standing at a particular bus stop, wearing a plaid shirt, was carrying a handgun.[170] Based on the tip, the police went to the bus stop and saw three black males, one of whom was in a plaid shirt.[171]

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164 *Id.* at 7–9.

165 *See Wesby*, 138 S. Ct. at 586–88.

166 529 U.S. 266 (2000).

167 *See* Terry v. Ohio, 392 U.S. 1, 30 (1968).

168 *See J.L.*, 529 U.S. at 266.

169 *See, e.g.*, United States v. Sokolow, 490 U.S. 1, 7 (1989) (reasoning that "the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause"); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985) (stating that the reasonable suspicion standard applies "when law enforcement officials must make a limited intrusion on less than probable cause").

170 *J.L.*, 529 U.S. at 268.

171 *Id.*

An officer approached J.L., the young man in the plaid shirt, told him to put his hands up on the bus stop, frisked him, and found a gun in his pocket.[172]

J.L., who was fifteen-years-old at the time, was charged with carrying a concealed firearm without a license and possessing a firearm while under the age of eighteen.[173] He moved to suppress the gun as the product of an unlawful search.[174] The trial court granted his motion, and the Supreme Court ultimately affirmed, holding that the officers lacked a reasonable suspicion to justify the stop and frisk.[175] The Court felt it particularly significant that the anonymous tip in this case contained only identifying information but no predictive information about the future movement of the subject.[176]

Writing for the Court, Justice Ginsburg left open the possibility that the Court might allow a finding of reasonable suspicion on similar facts if the crime in question was more serious than illegal possession of a firearm, stating, "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk."[177] If the Court were to go one step further and formally recognize a fluctuating standard of reasonable suspicion, varying the level of proof needed to establish reasonable suspicion depending on the gravity of the offense at issue, it would be hard-pressed not to also do so in the probable cause context. At the very least, a lower court might rely on Justice Ginsburg's language in *Florida v. J.L.* to support a sliding scale standard of probable cause.

Aside from Justice Ginsburg's suggestion in *Florida v. J.L.* that the Court might be open to a fluctuating standard of reasonable suspicion—which might be interpreted by some as possible support for a fluctuating standard of probable cause—the only other time a Supreme Court Justice has expressed support for a fluctuating standard of probable cause was over seventy years ago.[178] In 1949, Justice Jackson, dissenting in *Brinegar v. United States*,[179] provided perhaps the strongest defense so far of the view that the amount of certainty nec-

172 *Id.*

173 *Id.* at 269.

174 *Id.*

175 *Id.* at 272.

176 *Id.* at 271.

177 *Id.* at 273–74.

178 *See* Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

179 338 U.S. 160 (1949).

essary for a finding of probable cause should differ depending on the seriousness of the crime at issue:

> [I]f we are to make judicial exceptions to the Fourth Amendment . . . it seems to me they should depend somewhat upon the 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 undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger.[180]

Writing over seventy years ago, Justice Jackson was alone in arguing that police should be given more leeway to search when the underlying offense is a vicious crime, and less leeway when the underlying crime is less serious.[181] Since then, the Court has never expressed support for Justice Jackson's view that the amount of certainty needed for probable cause should fluctuate based on the gravity of the offense at issue.

Despite Justice Jackson's failure to convince his colleagues on the Supreme Court to adopt a fluctuating standard of probable cause, in recent years, a growing number of prominent legal scholars have argued that the Fourth Amendment should pay attention to the underlying crime at issue. Indeed, the dominant view in legal scholarship today appears to be that the Fourth Amendment pays too little attention to the gravity of the underlying offense as reflected in the substantive criminal law, and that in ignoring distinctions among crimes, the Supreme Court problematically treats the Fourth Amendment as "transsubstantive."[182]

Although scholarship on this topic is sparse, most legal scholars who have addressed the issue have argued for a sliding scale ap-

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

181 *Id.*

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

proach, under which the courts would give the police more authority to search and seize and require less certainty in terms of whether evidence of a crime will be found in the place searched when dealing with more serious offenses than when dealing with less serious offenses.[183] A few scholars have made similar arguments in the specific context of probable cause, arguing that courts should employ a sliding scale approach to probable cause, wherein the amount of certainty required for a finding of probable cause would decrease as the seriousness of the crime increases.[184]

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183 *See, e.g.*, Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 6 (2011) (suggesting that crime severity should be incorporated into Fourth Amendment doctrine); Richard Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 419–21 (2002) (noting that few scholars have recognized the importance of considering offense severity in Fourth Amendment reasonableness analysis); Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1958 (2004) (arguing that "[c]onstitutional law shouldn't be forced into unitary rules that underprotect rights when the government interest in preventing a crime is minor, or underprotect government power when the interest is great"); *see also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness*,*"* 98 COLUM. L. REV. 1642, 1645 (1998) (suggesting that courts should find that an "'unreasonable' search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated"); John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1046 (1974) (suggesting that the exclusionary rule should not apply to certain very serious offenses unless the police action shocks the conscience); William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of* Welsh v. Wisconsin, 38 U. KAN. L. REV. 439, 557 (1990) (arguing that warrantless searches should be prohibited in investigations of nonserious crimes); Stuntz, *supra* note 182, at 848 (proposing that courts take "differences among crimes into account when making probable cause determinations"). Other scholars oppose sliding scale approaches to the Fourth Amendment based upon the gravity of the crime. *See, e.g.*, Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–94 (1974) (arguing that adopting a sliding scale approach would convert the Fourth Amendment "into one immense Rorschach blot" and would provide little or no guidance to police); Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 11–26 (1987) (providing numerous arguments against proposals for a serious crime exception to the exclusionary rule); Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Test or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 81 (2014) (noting that "the Court has steered clear of this amorphous, ad hoc [sliding scale] approach [to probable cause], which 'could only produce more slide than scale'" (quoting Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 394 (1974))); *see also* Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 51–52 (1991) ("Even assuming that the severity of past harm can be measured in a meaningful way, the seriousness of the crime . . . by itself, should be irrelevant to the degree of certainty police must have before they act.").

184 *See, e.g.*, Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276 (2020) (arguing that courts should embrace a pluralist view of probable cause that recognizes different analytic methods and standards of proof in different cases); *see also* Bacigal, *supra* note 55, at 323 (arguing that "the fiction of one uniform definition of probable cause must be replaced with a flexible sliding scale that takes account of the severity of the intrusion and the magnitude of

## II. How Probable is Probable Cause?

As discussed above, the Supreme Court has been terribly unclear about how much proof is necessary for a finding of probable cause. The only thing a majority of the Court has stated definitively in terms of quantifying the amount of certainty needed is that probable cause "'means less than evidence which would justify condemnation' or conviction," but "more than bare suspicion."[185] This statement, however, does not provide much guidance to lower courts or law enforcement because it merely suggests that probable cause is more than a hunch but less than proof beyond a reasonable doubt. As Craig Lerner notes, "[T]he Court's statement that probable cause is more than a suspicion and less than beyond a reasonable doubt places it somewhere between .01% and 90%, which, when all is said and done, is not all that helpful."[186]

In 1983, a plurality of the Court provided more information as to where probable cause lies on the spectrum of certainty of guilt. In *Texas v. Brown*, a case about whether an officer's seizure of contraband during a traffic stop fell within the plain view doctrine, Justice Rehnquist moved the needle significantly by stating that probable cause "does not demand any showing that such a belief be correct or more likely true than false."[187] Under this definition, probable cause does not have to rise to the level of more than fifty percent certainty, but may constitute something less than the preponderance of the evi-

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the threat"); *see also* Lerner, *supra* note 32, at 1014 (arguing that probable cause should be recast within a reasonableness framework and noting that "[t]he idea that probable cause—though famously touted as a single standard—may in fact fluctuate is not an altogether alien notion in the case law"). Judge Richard Posner has also expressed support for a fluctuating standard of probable cause. *See* Llaguno v. Mingey, 763 F.2d 1560, 1565 (7th Cir. 1985) ("Probable cause—the area between bare suspicion and virtual certainty—describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed."). Some scholars oppose a sliding scale approach to probable cause based upon the severity of the crime. *See* Goldberg, *supra* note 50, at 794, 836 (arguing that the amount of certainty needed for probable cause should not vary with the gravity of the offense and proposing instead that courts assign a minimum percentage of certainty needed for a finding of probable cause). *But see* Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, *in* The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz 131–32 (Michael Klarman et al. eds., 2012) (arguing that the Court should not specify exactly how much probability constitutes a "fair" probability sufficient for a finding of probable cause and should continue to let lower courts intuit whether probable cause exists).

185 *Brinegar*, 338 U.S. at 175 (quoting Locke v. United States, 11 U.S. (7 Cranch) 339, 348 (1813)).

186 Lerner, *supra* note 32, at 996.

187 Texas v. Brown, 460 U.S. 730, 742 (1983). *Texas v. Brown* concerned the scope and applicability of the plain view doctrine. *Id.* at 733 ("Because of apparent uncertainty concerning the scope and applicability of this [plain view] doctrine, we granted certiorari.").

dence necessary for a plaintiff to prevail in a civil lawsuit.[188] In short, according to Justice Rehnquist's description of probable cause in *Texas v. Brown*, the amount of certainty needed for probable cause is not much certainty at all.[189]

### *A. Lower Courts*

Since 1983, hundreds of lower courts have repeated Justice Rehnquist's statement in *Texas v. Brown* that probable cause does not demand a showing that the officer's belief is more likely true than false, as if this pronouncement were settled law, even though it is far from clear that it is either correct or settled.[190] Every federal Circuit Court of Appeals, except the Third Circuit, and numerous state courts of last resort have repeated this language.[191] For example, in *McReynolds v. State*,[192] in explaining the meaning of probable cause, the Supreme Court of Indiana wrote:

> The Supreme Court in *Texas v. Brown* attempted to provide some guidance as to when the evidentiary value is immedi-

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188 Perhaps Justice Rehnquist was simply quantifying the way probable cause was already understood in the federal courts. In a study conducted a few years before *Texas v. Brown* was decided, federal judges were asked to assign a percentage of certainty to probable cause. The responses indicated that the average federal judge thought that probable cause meant between forty and fifty percent certainty. C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982) (indicating that 52 of the 166 judges surveyed equated probable cause with a fifty percent certainty and 44 judges equated probable cause with a forty percent certainty).

189 Thomas Davies suggests another way in which Justice Rehnquist weakened the standard formulation of probable cause in *Texas v. Brown*. Just before suggesting that probable cause does not demand a showing that the officer's belief is more likely true than false, Justice Rehnquist wrote, "probable cause . . . merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' that certain items *may* be contraband or stolen property or useful as evidence of a crime." *Texas v. Brown*, 460 U.S. at 742 (emphasis added) (quoting Carroll v. United States, 267 U.S 132, 162 (1925)). Davies argues that in previous cases, including *Stacey v. Emery*, *Carroll*, and *Brinegar*, the Supreme Court did not use the term "may" to describe the showing required for probable cause, but instead spoke about a reasonable belief that a crime had in fact been committed or that an item was in fact evidence of a crime. Thomas Y. Davies, *How the Post-Framing Adoption of the Bare-Probable-Cause Standard Drastically Expanded Government Arrest and Search Power*, 73 LAW & CONTEMP. PROBS. 1, 51, 55, 56 (2010). For example, in *Stacey v. Emery*, applying the criminal definition of probable cause to a customs proceeding, the Court explained that the threshold for probable cause is met if "the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense *has been* committed." *Id.* at 51 (emphasis added) (quoting Stacey v. Emery, 97 U.S. 642, 645 (1878)). The Court repeated its statement from *Emery* in *Carroll*. *Carroll*, 267 U.S. at 161.

190 A search for lower court cases repeating this language turned up around 450 cases. Memorandum from Stephanie Hansen to Cynthia Lee (Nov. 19, 2018) (on file with author).

191 *See id.*

192 460 N.E.2d 960 (Ind. 1984).

> ately apparent, holding that the third requirement [of the plain view doctrine] is met if the officer has probable cause to associate the property with criminal activity. This standard merely require[s] "that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*."[193]

Similarly, in *Williams v. Commonwealth*,[194] the Supreme Court of Kentucky repeated this language from *Texas v. Brown* in describing the proof necessary for a finding of probable cause as if it were settled law:

> As the United States Supreme Court has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*.[195]

In *Luster v. Nevada*,[196] the Supreme Court of Nevada repeated this language from *Texas v. Brown* to explain probable cause:

> The Supreme Court of the United States has held that probable cause in the context of the plain view doctrine "merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*."[197]

Similar reliance on *Texas v. Brown* is found in a host of other state supreme court opinions[198] and also in the federal courts. For ex-

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193 *Id.* at 963 (emphasis added) (internal quotation marks omitted) (internal citation omitted) (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)).

194 147 S.W.3d 1 (Ky. 2004).

195 *Id.* at 7 (emphasis added) (quoting *Texas v. Brown*, 460 U.S. at 742).

196 991 P.2d 466 (Nev. 1999).

197 *Id.* at 468 n.3 (emphasis added) (internal quotations omitted) (quoting *Texas v. Brown*, 460 U.S. at 742).

198 *See Ex parte* State, 121 So. 3d 337, 357 (Ala. 2013); People v. Melgosa, 753 P.2d 221, 227 (Colo. 1988); Lynch v. State, 2 So. 3d 47 (Fla. 2008); People v. Jones, 830 N.E.2d 541, 553 (Ill. 2005); Wengert v. State, 771 A.2d 389, 397 (Md. 2001); People v. Custer, 630 N.W.2d 870, 879 (Mich. 2001); State v. Haselhorst, 353 N.W.2d 7, 10 (Neb. 1984); State v. Wellman, 513 A.2d 944, 948 (N.H. 1986); State v. Sinapi, 610 S.E.2d 362, 365 (N.C. 2005); State v. Flores, 996 A.2d 156, 161 (R.I. 2010); *In re* Care & Treatment of Chandler v. State, 676 S.E.2d 676, 680 (S.C. 2009); State v. Bridges, 963 S.W.2d 487, 494 (Tenn. 1997); Pier v. State, 421 P.3d 565, 571 (Wyo. 2018).

ample, in *United States v. Jones*,[199] the First Circuit Court of Appeals quoted the same language from *Texas v. Brown*, writing as if a majority of the Court had set forth this low threshold of certainty for probable cause:

> In *[Texas v.] Brown*, the Court expounded upon the requirements of probable cause: [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be contraband or stolen property or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*.[200]

The Second Circuit did the same in *United States v. Barrios-Moreira*,[201] quoting from *Texas v. Brown* to explain the meaning of probable cause:

> Probable cause is a flexible, common sense standard that "merely requires that the facts available to the officers would warrant a man of reasonable caution in the belief that certain items may be contraband . . . or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*."[202]

Similar reliance on *Texas v. Brown* is found in opinions from the Fourth Circuit,[203] the Fifth Circuit,[204] the Sixth Circuit,[205] the Seventh Circuit,[206] the Eighth Circuit,[207] the Ninth Circuit,[208] the Tenth Cir-

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199 187 F.3d 210 (1st Cir. 1999).

200 *Id.* at 220 (emphasis added) (citing *Texas v. Brown*, 460 U.S. at 742).

201 872 F.2d 12 (2d Cir. 1989).

202 *Id.* at 16–17 (emphasis added) (internal quotations omitted) (quoting *Texas v. Brown*, 460 U.S. at 742).

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

204 *See, e.g.*, Crowder v. Sinyard, 884 F.2d 804, 821 n.22 (5th Cir. 1989) ("In defining 'probable cause' in [the plain view doctrine] context, the Supreme Court has observed that . . . 'it does not demand any showing that such a belief be correct or more likely true than false.'" (quoting *Texas v. Brown*, 460 U.S. at 742)).

205 *See, e.g.*, United States v. Mathis, 738 F.3d 719, 732 (6th Cir. 2013) (noting that probable cause "does not demand any showing that such a belief be correct or more likely true than false" (quoting *Texas v. Brown*, 460 U.S. at 742)).

206 *See, e.g.*, United States v. McDonald, 723 F.2d 1288, 1295 (7th Cir. 1983).

207 *See, e.g.*, Yost v. Solano, 955 F.2d 541, 546 (8th Cir. 1992) ("Probable cause . . . 'does not

cuit,[209] the Eleventh Circuit,[210] and the D.C. Circuit.[211] Indeed, the Seventh Circuit has gone so far as to suggest that the Supreme Court has *often* said that probable cause does not demand a showing that the officer's belief was correct or more likely true than false:

> As the Court *frequently* has remarked, probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," that certain items may be contraband or stolen property or useful as evidence of a crime; *it does not demand any showing that such a belief be correct or more likely true than false*.[212]

While the Court has often said probable cause is a flexible common-sense standard, it has not frequently remarked that probable cause does not require a showing that the officer's belief be more likely true than false.[213] To the contrary, a majority of the Court has never treated this language from *Texas v. Brown* as controlling, yet the lower courts have treated Justice Rehnquist's "not . . . more likely true than false" definition of probable cause as settled law.

### *B. Legal Scholars*

Not only have the lower courts treated Justice Rehnquist's statement regarding probable cause in *Texas v. Brown* as settled law, a few

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demand any showing that such a belief be correct or more likely true than false.'" (quoting *Texas v. Brown*, 460 U.S. at 742)).

208 *See, e.g.*, Dawson v. City of Seattle, 435 F.3d 1054, 1062 (9th Cir. 2006) ("The probable cause standard . . . 'does not demand any showing that such a belief be correct or more likely true than false.'" (citing *Texas v. Brown*, 460 U.S. at 742)).

209 *See, e.g.*, United States v. Alderete, 753 F. App'x 617, 622 (10th Cir. 2018) ("While probable cause is difficult to quantify, the Supreme Court has held that probable cause 'does not demand any showing that such a belief be correct or more likely true than false.'" (quoting *Texas v. Brown*, 460 U.S. at 742)).

210 *See, e.g.*, United States v. Wright, 324 F. App'x 800, 804 (11th Cir. 2009) (noting that probable cause "does not demand any showing that such a belief be correct or more likely true than false" (quoting *Texas v. Brown*, 460 U.S. at 742)).

211 *See, e.g.*, Dukore v. District of Columbia, 799 F.3d 1137, 1142 (2015) ("The probable cause standard does 'not demand any showing that such a belief be correct or more likely true than false.'" (quoting *Texas v. Brown*, 460 U.S. at 742)).

212 United States v. McDonald, 723 F.2d 1288, 1295 (7th Cir. 1983) (emphasis added) (citing Brinegar v. United States, 338 U.S. 160, 176 (1949)). *Brinegar*, however, was decided in 1949, more than thirty years before *Texas v. Brown*, and the Court in *Brinegar* did not define probable cause as not more likely true than false.

213 Memorandum from Casey Matsumoto to Cynthia Lee, March 29, 2020 (describing research into whether the Supreme Court has repeated this language and noting that this language has been repeated only once by Justice Powell, dissenting in Arizona v. Hicks, 480 U.S. 321 (1987)) (on file with author).

prominent legal scholars have repeated this language as if it were settled law. For example, in explaining the probable cause standard for arrests, Kent Greenawalt has noted:

> The "probable cause" standard for arrests and seizures is not one of absolute certainty. In actual application by law enforcement officers and judges, the seriousness of the crime and concern about escape from the jurisdiction are likely to play a role in what probability is seen as necessary. However, in one standard formulation by the Supreme Court, probable cause for an arrest was present when officers had "knowledge" and "reasonably trustworthy information" of "facts and circumstances . . . sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." This imprecise language standard suggests a likelihood approximating "more probable than not," although *the Court has specifically stated that probable cause "does not demand any showing that such a belief be correct or more likely true than false.*"[214]

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

> *[T]he probable-cause standard "does not demand any showing that such a belief be correct or more likely true than false."* Though some of the cases are relatively old, the Court has not subsequently retreated from the position—however obliquely stated—that probable cause is something more than bare suspicion but something less than "more probable than not."[215]

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214 Kent Greenawalt, *Probabilities, Perceptions, Consequences and "Discrimination": One Puzzle About Controversial "Stop and Frisk,"* 12 OHIO ST. J. CRIM. L. 181, 185–86 (2014) (emphasis added) (internal citations omitted).

215 Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 LAW & CONTEMP. PROBS. 69, 72 (2010) (emphasis added) (citing *Texas v. Brown*, 460 U.S. at 742). Other legal scholars have recognized that *Texas v. Brown* was a plurality opinion. *See* Bacigal, *supra* note 55, at 289 (noting that *Texas v. Brown* was a plurality opinion and that "[a] majority of the Court has never explicitly held that probable cause is less than a preponderance of the evidence"); Goldberg, *supra* note 50, at 801 n.62 ("A plurality of the Supreme Court has stated that the probable cause standard 'does not demand any showing that such a belief [of criminal wrongdoing] be correct or more likely true than false.'"); Arnold H. Loewy, *Protecting Citizens From Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 340 n.66 (1984) (noting that *Texas v. Brown* was a plurality opinion).

## III. WHY LOWER COURTS SHOULD NOT FOLLOW JUSTICE REHNQUIST'S COMMENT ON THE MEANING OF PROBABLE CAUSE IN *TEXAS V. BROWN*

Lower courts should not follow Justice Rehnquist's statement on probable cause in *Texas v. Brown* for several reasons. First, *Texas v. Brown* was just a plurality opinion and Justice Rehnquist's definition of probable cause was not necessary or essential to the judgment in the case. Second, Justice Rehnquist's suggestion that probable cause can be satisfied by something less than a preponderance of the evidence is misguided as a matter of history, precedent, and logic. Third, setting the bar for probable cause so low exacerbates the racial disparity in arrest patterns that already exists today.

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

First, lower courts should not follow Justice Rehnquist's description of probable cause because *Texas v. Brown* was just a plurality opinion. In 1983, Justice Rehnquist was only able to get three other Justices to sign onto his opinion.[216] Not only was *Texas v. Brown* just a plurality opinion, Justice Rehnquist's statement on the showing necessary for a finding of probable cause was not necessary to the judgment. As James F. Spriggs II and David R. Stras explain, a plurality decision is one in which "a majority of Justices agree upon the result or judgment in a case but fail to agree upon a single rationale in support of the judgment."[217] Importantly, "an opinion concurring in the judgment is the functional equivalent of a dissent from the plurality's reasoning even if it represents agreement with the result reached in the case."[218]

It is widely agreed that a plurality opinion "carr[ies] less precedential weight"[219] than a majority opinion because a plurality opinion "represents nothing more than the views of the individual justices who

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216 *Texas v. Brown*, 460 U.S. at 732.

217 James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 517 (2011).

218 *Id.* at 520.

219 John F. Davis & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, 1974 DUKE L.J. 59, 62; *see also* Pamela C. Corley, *Uncertain Precedent: Circuit Court Responses to Supreme Court Plurality Opinions*, 37 AM. POL. RES. 30, 35 (2009) (finding that lower courts are less likely to treat a plurality decision positively and more likely to treat that decision negatively or neutrally).

join in the opinion."[220] Just how much less precedential weight, however, is a matter of disagreement.[221]

In *Marks v. United States*,[222] the Supreme Court sought to provide guidance to lower courts with respect to splintered Supreme Court decisions, setting forth the following rule of thumb:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . ."[223]

*Marks* was a short opinion and seemed to offer a simple resolution to the problem of deciding which opinion to follow when there is a plurality opinion and opinions concurring in the judgment of the plurality but offering different rationales for that judgment, but it has proven difficult to apply in practice.[224] For example, lower courts have not been able to agree on which opinion to follow in *Missouri v. Seibert*,[225] a Supreme Court case addressing the constitutionally of a two-stage police interrogation strategy known as "question first, warn later."[226] Under this strategy, police officers would deliberately neglect to give a suspect in custody the warnings required by *Miranda v. Arizona*[227] prior to an initial custodial interrogation, in the hopes of obtaining a confession.[228] After obtaining the desired confession, the police would give the *Miranda* warnings and interrogate the suspect again, getting the suspect to repeat the earlier confession.[229] At trial, the government would concede that the first unwarned confession was

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220 Davis & Reynolds, *supra* note 219, at 61.

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

222 430 U.S. 188 (1977).

223 *Id.* at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

224 Spriggs & Stras, *supra* note 217, at 568 (noting that the *Marks* rule is "notoriously difficult to apply"). Even the Supreme Court itself has acknowledged that the *Marks* rule has "baffled" lower courts trying to apply it. *See* Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

225 542 U.S. 600 (2004).

226 *Id.* at 605–06.

227 384 U.S. 436 (1965).

228 *See Seibert*, 542 U.S. at 605–06.

229 *See id.*

inadmissible, but argue that the second warned confession should be admitted into evidence because the police gave the suspect the required *Miranda* warnings prior to obtaining that second confession.[230]

Writing for a plurality of the Court in *Seibert*, Justice Souter ruled that the subsequent warned confession following an earlier unwarned confession had to be thrown out.[231] According to Justice Souter, in two-stage interrogation cases, the proper test to apply asks whether it would be reasonable to find that the *Miranda* warnings could function "effectively" under the circumstances.[232] That is, "Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier?"[233] Justice Souter expressly declined to apply a "fruit of the poisonous tree" analysis, noting that the Court had rejected this type of analysis in a previous case involving a two-stage interrogation.[234] Additionally, the officer's intent is irrelevant under Justice Souter's test.[235]

Justice Breyer joined Justice Souter's opinion, but wrote a separate concurring opinion in which he suggested the proper approach in a two-stage interrogation case was not to ask whether the *Miranda* warnings functioned effectively, but rather to treat the initial failure to warn—the *Miranda* violation—as a constitutional violation and apply a fruit of the poisonous tree analysis to that *Miranda* violation.[236] As Justice Breyer explained, "Courts should exclude the 'fruits' of the initial unwarned questioning unless the failure to warn was in good faith."[237] Under Justice Breyer's test, the subsequent warned confession would constitute tainted "fruit" of the initial *Miranda* violation and would thus be inadmissible unless the initial failure to warn was in good faith, that is, not deliberately done to get a confession.[238]

Justice Breyer noted that he believed the plurality's test "in practice [would] function as a 'fruits' test" because the only time a court would conclude that the *Miranda* warnings functioned effectively would be when "certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the question-

230 *See id.* at 614.

231 *Id.* at 617.

232 *Id.* at 611–12.

233 *Id.* at 612.

234 *Id.* at 612 n.4 (citing Oregon v. Elstad, 470 U.S. 298, 300 (1985)).

235 *Id.* at 616 n.6.

236 *Id.* at 617 (Breyer, J., concurring).

237 *Id.*

238 *Id.*

ing—intervene between the unwarned questioning and any postwarning statement."[239]

Justice Breyer's test, however, differed from the plurality's test in two significant ways. First, the intent of the officer would matter under Justice Breyer's test, but not under the plurality's test. Justice Breyer's test would exclude the subsequent confession unless the failure to warn was in good faith and not deliberate.[240] Justice Souter did not carve out such a good faith exception, noting that "the intent of the officer will rarely be as candidly admitted as it was here."[241] Second, Justice Breyer's test would apply the fruit of the poisonous tree doctrine and treat the initial failure to warn as a constitutional violation,[242] whereas Justice Souter's test explicitly rejected a fruits analysis and refused to treat a *Miranda* violation as a constitutional violation.[243]

Justice Kennedy did not join Justice Souter's plurality opinion but concurred in the plurality's judgment. Like Justice Breyer, Justice Kennedy wrote a separate concurring opinion in which he proposed a test that, unlike the plurality's test, turned on whether the initial failure to warn was deliberate.[244] Under Justice Kennedy's test, if the initial failure to warn was deliberate, then not only would the initial confession be inadmissible as a violation of the *Miranda* rule, but the subsequent warned confession would also be inadmissible unless the police took specific curative measures to rectify the initial failure to warn.[245] Justice Kennedy provided specific examples of measures that could be considered curative by the court, including "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning" and explaining to the suspect that her first

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239 *Id.*

240 *Id.*

241 *Id.* at 616 n.6 (majority opinion).

242 *Id.* at 618 (Breyer, J., concurring).

243 *Id.* at 612 n.4 (majority opinion).

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

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

confession likely could not be used against her in court.[246] Since no such curative steps were taken in this case, Justice Kennedy agreed with the plurality that Seibert's post-warning statements were inadmissible and her conviction could not stand.[247]

According to Charles Weisselberg, at least six federal circuits have chosen to follow Justice Kennedy's approach, asking first whether the violation of *Miranda* was deliberate, and if so, whether curative measures were taken.[248] Other circuits either combine aspects of the plurality's test and Justice Kennedy's test or have declined to decide which controls.[249]

Presumably the lower courts are following Justice Kennedy's curative measures test because they believe his test is the narrowest offered by the different opinions in *Seibert*, thus satisfying the *Marks* standard that "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."[250] At first glance, it may appear that Justice Kennedy's curative measures test is narrower than Justice Souter's test since it applies only to two-stage interrogations where the officer's failure to warn is a deliberate tactical choice,[251] whereas Justice Souter's test applies to all two-stage interrogations regardless of the officer's intent.[252]

The problem is that if we count up the votes, all of the Justices except Justice Kennedy and Justice Breyer opposed a test that turns on the officer's subjective intent. Justice Souter was careful to note in his plurality opinion that in two-stage interrogation cases, courts should focus on the facts of the case rather than on the intent of the officer.[253] While the four dissenting Justices—Justice O'Connor, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—did not sign onto Justice Souter's proposed test, they agreed with Justice Souter that the analysis should not focus on the subjective intent of the interrogating officer.[254] Following Justice Kennedy's approach would there-

246 *Id.* at 622.

247 *Id.*

248 Charles Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519, 1551 (2008).

249 *See id.*

250 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

251 *Seibert*, 542 U.S. at 621–22 (Kennedy, J., concurring).

252 *Id.* at 616 n.6 (majority opinion).

253 *See id.*

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

fore be following an approach that was rejected by seven of the nine Justices.[255]

As illustrated by the Court's *Seibert* decision, lower courts generally follow the *judgment* of a plurality opinion and treat it as precedent, though they do not always follow the *reasoning* of the plurality opinion or even tests proposed in the plurality opinion. Through *Marks*, the Supreme Court has given lower courts the green light to follow the reasoning of a concurring opinion rather than the plurality opinion.[256]

Turning back to *Texas v. Brown*, what all this means is that while lower courts may justifiably follow the judgment of Justice Rehnquist's plurality opinion in *Texas v. Brown*, which was a finding that the seizure at hand met the requirements of the plain view doctrine, they need not and should not follow Justice Rehnquist's characterization of probable cause as requiring less than a preponderance of the evidence because this comment was not agreed on by a majority of the Court.[257] Justice Powell, joined by Justice Blackmun, concurred only in

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255 *See* Wiesselberg, *supra* note 248, at 1551.

256 *See* Marks v. United States, 430 U.S. 188, 193 (1977).

257 Separate from the fact that *Texas v. Brown* was only a plurality opinion and therefore not entitled to the full precedential weight afforded to majority Court opinions, Justice Rehnquist's definition of probable cause was not necessary to the judgment in the case. One might even argue that Justice Rehnquist's comment defining probable cause was merely dicta and therefore is not controlling. It is well settled that dicta is "not controlling." Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935). While judges often suggest that distinguishing between holdings and dicta is a "routine, noncontroversial matter," Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2003 (1994), courts and legal scholars have struggled for years to distinguish dicta from holdings in a way that is easy to understand and apply. Most seem to follow the necessity model under which dicta or "obiter dictum" is defined as "[a] judicial comment made while delivering a judicial opinion, but one that is *unnecessary* to the decision in the case and therefore not precedential." *Obiter Dictum*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added); *see also* JOHN CHIPMAN GRAY, NATURE AND SOURCES OF THE LAW 161 (2d ed. 1921) (stating that for a holding to have precedential weight, "it must be, in the first place, an opinion given by a judge, and, in the second place, it must be an opinion the formation of which is *necessary* for the decision of a particular case; in other words, it must not be *obiter dictum*") (emphasis added); KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 203 (2013) (defining "mere dicta" as "comments within opinions that are peripheral to what the case is about"). Michael Abramowicz and Maxwell Stearns suggest an alternative way of distinguishing holdings from dicta. Under their approach, "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually decided, (2) are based upon the facts of the case, and (3) lead to the judgment. If not a holding, a proposition stated in a case counts as dicta." Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1065 (2005). Under either of these definitions, Justice Rehnquist's comment about probable cause not needing to be more likely true than false arguably qualifies as dicta. Under the Black's Law Dictionary definition of dicta, Justice Rehnquist's comment qualifies as dicta because it was a judicial comment made while delivering a judicial opinion, but was unnecessary to the decision in the case. Under the Abramowicz and Stearns definition of dicta,

the judgment, agreeing that the seizure in that case met the requirements for a plain view seizure, but refused to join Justice Rehnquist's opinion because he felt that Justice Rehnquist's critique of another Supreme Court decision, *Coolidge v. New Hampshire*,[258] went too far.[259] Justice Stevens, joined by Justice Brennan and Justice Marshall, also concurred only in the judgment and refused to join Justice Rehnquist's opinion because he felt that the plurality gave "inadequate consideration" to Supreme Court precedent on the container doctrine.[260] These five Justices expressly refused to join anything other than the plurality's judgment that the seizure in question satisfied the requirements of the plain view doctrine.[261]

Tellingly, Justice Rehnquist did not rest his probable cause finding on a conclusion that the officer's belief that there was contraband in the balloon was more likely true than false.[262] He did not ask whether the officer's belief that there was contraband in the balloon was more likely true than false. He simply concluded that "it is plain

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Justice Rehnquist's comment could also qualify as dicta because it did not lead to the judgment. Justice Rehnquist did not apply his not more likely true than false standard when evaluating whether the officer had probable cause to believe the balloon in question contained contraband. He simply concluded that "it is plain" that the officer had the probable cause. Texas v. Brown, 460 U.S. 730, 742 (1983). Moreover, the issue before the Court was whether the "immediately apparent" requirement of the plain view doctrine requires that the officer know he is viewing contraband or evidence of a crime, or whether probable cause is sufficient to satisfy the immediately apparent requirement, not how much certainty is required for a finding of probable cause. *Id.* at 741–42. The Court of Criminal Appeals had suggested that the officer "had to know that 'incriminatory evidence was before him when he seized the balloon.'" *Id.* at 735. Three judges below had dissented on the ground that the officer just needed probable cause. *Id.* Another reason to view Justice Rehnquist's not more likely true than false definition of probable cause as dicta is that under the facts of the case, a strong argument can be made that there was more than a fifty percent likelihood that the balloon contained drugs. The officer did not merely observe a green balloon. He also saw some "small plastic vials" and "loose white powder." *Id.* at 734. A minority of courts follow what Chaz (Charles) Tyler calls the "adjudicative model" rather than the "necessity model" to distinguish holdings from dicta. Under the adjudicative model, "the key question is whether an issue has been *ruled on* (adjudicated), not whether that ruling was necessary." Charles W. Tyler, *The Adjudicative Model of Precedent*, 87 U. CHI. L. REV. (forthcoming 2020) (draft at 5) (describing the "adjudicative model" of distinguishing holdings from dicta used by the Ninth Circuit and state courts in Arizona, Illinois, Maryland, and Minnesota, under which a holding is "any ruling expressly resolving an issue that was part of the earlier case"). Under the adjudicative model, Justice Rehnquist's not more likely true than false comment on probable cause could be called a holding, rather than mere dicta, even though it was not necessary to the judgment, as long as probable cause was an issue before the courts below.

258 403 U.S. 443 (1971).

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

260 *Id.* at 747 (Stevens, J., concurring).

261 *See id.* at 744 (Powell, J., concurring); *id.* at 747 (Stevens, J., concurring).

262 *See id.* at 742–43.

that Officer Maples possessed probable cause to believe that the balloon in Brown's hand contained an illicit substance," given the officer's experience as a narcotics detective.[263]

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

A second reason lower courts should reject Justice Rehnquist's statement that probable cause does not demand any showing that the officer's belief "be . . . more likely true than false"[264] is that this understanding of probable cause is misguided as a matter of history, precedent, and logic.

#### *1. History*

One of the Framers' main goals in including the Fourth Amendment in the Bill of Rights was ensuring that the police did not have unconstrained power to search and seize.[265] As Thomas Davies explains, the Fourth Amendment was primarily a response to the English monarchy's use of general warrants to conduct revenue searches of houses.[266] Accordingly, at the time of the framing, bare probable cause that a crime had likely been committed was not sufficient to justify an arrest, whether with or without a warrant.[267] According to

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263 *Id.* at 742.

264 *Id.*

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

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

267 *Id.* at 11.

Davies, an arrest was justified only if there was (1) "a sworn accusation" that a crime had *in fact* been committed, and (2) probable cause as to the identity of the culprit.[268]

This common law standard for probable cause was much more stringent than the standard that applies today and was a product of the arbitrary arrests that were "a salient historical abuse of criminal-justice power in English constitutional history."[269] Allowing the police to arrest persons based on less than a fifty percent certainty that the arrestee is involved in criminal activity gives the police virtually unconstrained arrest power similar to the power accorded law enforcement in England prior to the founding. This is a far cry from what the Framers of our Constitution wanted.

Although looking to history reveals clear justification to reject Justice Rehnquist's standard, it is important to recognize how difficult it is to accurately determine this history, and not depend solely on history to reject Justice Rehnquist's musings on probable cause in *Texas v. Brown*.[270] As David Sklansky notes, one problem with what

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268 *Id.*

269 *Id.*

270 Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 347 (2002) ("Even if one believes that adherence to the original meaning of the Fourth Amendment serves the important goals of limiting judicial discretion and making the law more predictable, can these benefits be achieved with any regularity, given the difficulty of accurately determining common-law rules and applying them in a modern context?"). An example of the difficulty of ascertaining applicable common law is illustrated by *Atwater v. City of Lago Vista*, in which the Court was asked to rule on the constitutionality of allowing an officer with probable cause to believe that a minor fine-only offense had taken place to effectuate a custodial arrest. 532 U.S. 318 (2001). Gail Atwater was pulled over by a police officer for driving without a seat belt and failing to secure her young children in their seatbelts. *Id.* at 323–24. Driving without a seatbelt was a minor traffic violation punishable by a maximum fine of fifty dollars. *Id.* at 323. Even though the seatbelt offense for which Atwater was pulled over was a fine-only offense and the officer could have simply issued her a traffic citation, he handcuffed Atwater with her hands behind her back—a tactic usually used when an officer fears that a suspect poses some physical threat—arrested her, and took her to the police station where she was booked and placed in a jail cell for approximately an hour before being taken before a magistrate. Atwater v. City of Lago Vista, 165 F.3d 380, 382–83 (5th Cir. 1999), *reh'g en banc granted*, 171 F.3d 258 (5th Cir. 1999). Atwater entered a plea of no contest to the seatbelt charges. *Id.* at 383. After this incident, Atwater and her husband brought a federal civil rights lawsuit against the city of Lago Vista, the Police Chief, and the arresting officer, alleging violations of the Fourth Amendment and the Due Process Clause. *Id.* Before the Supreme Court, Atwater argued that "'founding-era common-law rules' forbade peace officers to make warrantless misdemeanor arrests except in cases of 'breach of the peace,' a category she claim[ed] was then understood narrowly as covering only those nonfelony offenses 'involving or tending toward violence.'" *Atwater*, 532 U.S. at 327. The Court rejected Atwater's argument because it found that common law authorities were not consistent as to what was required for a lawful custodial arrest. *Id.* at 332. Justice Souter explained that on the issue of "officers' warrantless misdemeanor arrest power," the relevant "'founding-era common-law rules' were not nearly

he calls Justice Scalia's "new Fourth Amendment originalism"—the idea that courts should look at early common law precedents and ask whether the government action in question constituted a search at the time of the framing to determine whether such action constitutes a search today—is that it is often difficult to determine what was required at early common law either because there are no early common law decisions on point or the early common law precedents that do exist are inconsistent.[271] Inconsistent precedent allows judges to pick and choose the precedent that suits them.[272]

### *2. Precedent*

Another reason to reject the view that probable cause means something less than a preponderance of the evidence is precedent. While the Supreme Court's pronouncements on probable cause have not been a model of clarity, the idea that probable cause is something less than a preponderance of the evidence has never commanded a majority of the Court—neither before *Texas v. Brown* nor after. The Court instead has consistently declined to assign a specific percentage to the concept of probable cause, explaining:

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

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as clear as Atwater claims" and, in fact, "reached divergent conclusions." *Id.* at 327–28. Accordingly, the Court affirmed the judgment below, finding that the arresting officer had probable cause to believe Atwater had violated the seat belt laws and acted reasonably when he arrested her and took her into custody. *Id.* at 354. *But 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 (2002) (critiquing Justice Souter's historical analysis in *Atwater*). Richard Frase makes the further point that even if the common law rules had been clearer, "it would have been (and was) a mistake to give these ancient rules controlling weight in a case like *Atwater*" because so much has changed in American society since the Founding era. Frase, *supra* at 345.

271 *Id.* at 1794–96, 1806.

272 *Id.* at 1794. Sklansky points out that in *Wyoming v. Houghton*, the very first case in which the full Court embraced Justice Scalia's new Fourth Amendment originalism, "[s]trictly speaking, no '18th-century common law' was found applicable by the Court," which led the majority to rely, not on common law, but on federal legislation from that time period. *Id.* at 1760.

> probability, and not a prima facie showing, of criminal activity is the standard of probable cause.'[273]

It may be that in rejecting the view that probable cause requires a specific quantum of evidence—like a preponderance of the evidence or proof beyond a reasonable doubt—the Court has simply not wanted to lock itself into quantifying the meaning of probable cause, leaving the ultimate decision as to whether there is probable cause to the magistrate judge deciding whether to issue a warrant. Whatever its reasons, a majority of the Court has never repeated Justice Rehnquist's statement that probable cause means something less than a preponderance of the evidence. Instead, it has time and again suggested that probable cause simply means something beyond a mere suspicion and something less than proof beyond a reasonable doubt.[274]

### *3. Logic*

Yet another reason to reject the notion that probable cause means something less than a preponderance of the evidence is logic. It makes no sense to say that probable cause deals with probabilities, and then say that probable cause does not have to be more likely than not. If you ask someone, "Do you think it is going to rain tomorrow?" and they reply, "Yes, I think there is a fair probability that it will rain tomorrow" or "Yes, I have reasonable grounds to believe that it will rain tomorrow," in other words, "I think there is probable cause that it will rain tomorrow," it would not make sense for the person to then add, "and I think the likelihood of rain is less than fifty percent." Similarly, when a police officer says, "I have probable cause to arrest Joe," the officer is suggesting there is a fair probability or reasonable grounds to believe that a crime has been committed and that Joe committed it. It simply does not make sense for the officer to then say, "and I think there is less than a fifty percent chance that Joe committed that crime."

Moreover, if we look to other areas of the law where probable cause is the standard, such as in the grand jury context, we see that probable cause is generally understood to mean that "the person be-

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273 Illinois v. Gates, 462 U.S. 213, 235 (1983) (citing Spinelli v. United States, 393 U.S. 410, 419 (1969); Brinegar v. United States, 338 U.S. 160, 173 (1949)).

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

ing investigated is *probably* guilty."[275] A grand jury needs probable cause to issue an indictment,[276] but probable cause in the grand jury context has a more robust meaning than Justice Rehnquist's understanding of probable cause in *Texas v. Brown*. The Model Grand Jury Charge instructs grand jurors as follows:

> 25. To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury and your task is not to decide the guilt or innocence of the person charged. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is *probably guilty* of the offense charged.[277]

Many jurisdictions have adopted the same or similar instructions to those that appear in the Model Grand Jury Charge.[278] Some jurisdictions go even further and instruct their grand jurors that they

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275 *See* FED. JUDICIAL CTR., *Section 7.04: Grand Jury Selection and Instructions*, BENCHBOOK FOR U.S. DISTRICT COURT JUDGES (Mar. 2013), https://www.fjc.gov/sites/default/files/2014/Benchbook-US-District-Judges-6TH-FJC-MAR-2013.pdf [https://perma.cc/F7AV-U6SF] (emphasis added).

276 *See, e.g.*, Kaley v. United States, 134 S. Ct. 1090, 1097 (2014) (noting that the "Court has often recognized the grand jury's singular role in finding the probable cause necessary to initiate a prosecution for a serious crime" (citing Costello v. United States, 350 U.S. 359, 362 (1956))).

277 FEDERAL JUDICIAL CENTER, *supra* note 275. The Model Grand Jury Charge is approved by the Judicial Conference of the United States, *see* MODEL GRAND JURY CHARGE (JUD. CONF. OF U.S. 2005), to whom Congress has granted authority to "adopt rules and regulations governing [grand jury procedure]." 28 U.S.C. § 1863(a) (2018).

278 *Id.* at 1197 (noting that a "majority of the states have adopted instructions similar to the federal model instructions"). Alabama's model grand jury instructions differ from the Model Grand Jury Charge by instructing grand jurors that they *must* indict if they find probable cause to believe the target has committed a felony. *See General Jury Instructions*, ALA. JUDICIAL SYS., (adopted Nov. 13, 2014), http://judicial.alabama.gov/docs/library/docs/General_Jury_Instructions.pdf [https://perma.cc/SK2L-UYRB] (instructing that, "[a]s to felonies, whenever the legal evidence received by a Grand Jury establishes probable cause to believe that a felony has been committed and that a particular person has committed that offense, then the Grand Jury must return a true bill of indictment"). In contrast, some states tell their grand jurors that they *may* indict if they find probable cause. *See, e.g.*, *Grand Jury Impanelment Instruction*, N.Y. UNIFIED CT. SYS., (revised June 2019), https://www.nycourts.gov/judges/cji/5-SampleCharges/CJI2d.Grand-Jury_Rev.pdf [https://perma.cc/35X9-N92K] (instructing that a grand jury "may indict a person for an offense . . . when the evidence presented is legally sufficient" to establish that the person committed the offense, and "provides reasonable cause to believe that the person in fact committed the offense").

should not return an indictment "unless the government's evidence would lead them to convict the accused at trial."[279]

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

Finally, Justice Rehnquist's very low threshold of certainty for probable cause gives the police broad discretion to arrest individuals who may or may not be involved in criminal activity, exacerbating a pre-existing problem of racial disparity in arrests. Whether because of explicit or implicit racial bias in the persons who call the police or the arresting officers themselves, police officers often arrest black individuals in situations where they would not have arrested a white individual behaving the same way.

For example, one afternoon in April 2018, two African American men entered a Starbucks in Philadelphia, Pennsylvania to meet someone for a business meeting.[280] Immediately upon walking into the store, one of the men asked an employee, who happened to be the manager of that store, for the code to the bathroom.[281] The manager told him that the restrooms were only for paying customers and the two men proceeded to sit at a table.[282] A few seconds later, the manager approached the men and asked if she could get them any drinks.[283] The men declined since they had bottles of water with them, and told her they were waiting for another person.[284] The manager asked the men to leave the store, and when they refused, she called

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279 Peter Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 486 (1980). Other jurisdictions simply equate probable cause to indict with probable cause to arrest. *Id.* at 485–86 (citing *U.S. Department of Justice Materials Relating to Prosecutorial Discretion*, 24 CRIM. L. REP. 3001, 3002 (BNA 1978) (treating the probable cause standard for a grand jury indictment the same as the probable cause standard for an arrest)).

280 Rachel Siegel, *Men Arrested at Starbucks Describe Surprise, Fear*, WASH. POST, Apr. 20, 2018, at A14.

281 *Id.*; *see also* Ben Shapiro, *That Philly Starbucks Has Several Cameras. So Why Won't They Release Tape of a Racist Incident?*, DAILY WIRE (Apr. 19, 2018), https://www.dailywire.com/news/29642/philly-starbucks-has-several-cameras-so-why-wont-ben-shapiro [https://perma.cc/QB6J-3YQJ].

282 Siegel, *Men Arrested at Starbucks Describe Surprise, Fear*, *supra* note 280 (noting that the manager told Nelson that the restrooms were for paying customers only, and Nelson "just left it at that").

283 *Id.*

284 *Id.*

911 and told the police that two men were in the store and that they had declined to leave despite not making a purchase.[285]

At 4:41 PM, approximately six minutes after the men walked into the store, two police officers arrived and told the men they had to leave.[286] When the men did not get up, the officers handcuffed and arrested them and, without reading them any rights or telling them why they were being arrested, took them into custody for trespassing and causing a disturbance.[287] During the arrest, which was caught on cell phone video,[288] the man with whom the two African American men planned to meet arrived and asked the officers why the men were being arrested.[289] On the video, that man, who is white, can be heard telling the officers that the two men were there to meet him.[290] The officers, however, refused to release the men and took them to the police station for booking.[291]

The video of the arrest went viral, and amidst public outrage and charges of racial profiling, the Chief Executive Officer of Starbucks, Kevin Johnson, apologized to the two men.[292] Howard Schultz, Execu-

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285 *Id.* (noting that the manager called the police just two minutes after the two African American men arrived at the Starbucks store). According to news reports of this incident, the manager was acting pursuant to store guidelines that required managers to ask nonpaying customers to leave the store and call police if they refuse. Rachel Siegel, *Starbucks Chairman Says Manager Showed 'Unconscious Bias' in Calling 911*, WASH. POST, Apr. 19, 2018, at A14; *see also* Jenny Gathright & Emily Sullivan, *Starbucks, Police And Mayor Respond To Controversial Arrest of 2 Black Men In Philly*, NPR, https://www.npr.org/sections/thetwo-way/2018/04/14/602556973/starbucks-police-and-mayor-weigh-in-on-controversial-arrest-of-2-black-men-in-ph [https://perma.cc/4WQB-ZVEW].

286 Siegel, *Men Arrested at Starbucks Describe Surprise, Fear*, *supra* note 280.

287 *Id.*; *see also* Elizabeth Dias, John Eligon & Richard A. Oppel Jr., *Philadelphia Starbucks Arrests, Outrageous to Some, Are Everyday Life for Others*, N.Y. TIMES (Apr. 17, 2018), https://www.nytimes.com/2018/04/17/us/starbucks-arrest-philadelphia.html [https://perma.cc/B9Y9-HPHX].

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

289 *Outrage Grows Over Video Showing Two Black Men Arrested at Philadelphia Starbucks*, NBC 10 (Apr. 14, 2018, 2:01 PM), https://www.nbcphiladelphia.com/news/local/Outrage-Over-Video-Showing-Two-Black-Men-Arrested-at-Philadelphia-Starbucks-479771543.html [https://perma.cc/A7YS-9EZ7].

290 *Id.*

291 *See* Dias et al., *supra* note 287; *see also* Alex Horton, *Starbucks CEO apologizes after employee calls police on black men waiting at a table*, WASH. POST (Apr. 15, 2018), https://www.washingtonpost.com/news/business/wp/2018/04/14/starbucks-apologizes-after-employee-calls-police-on-black-men-waiting-at-a-table/?noredirect=on&utm_term=.708b6a0c96d2 [https://perma.cc/DRR9-BW4R] (reporting that, according to their attorney, an officer at the police station suggested to the men that they faced charges for "defiant trespassing").

292 Rachel Siegel, *Starbucks Chairman Says Manager Showed 'Unconscious Bias' in Calling 911*, WASH. POST, Apr. 19, 2018, at A14.

tive Chairman of Starbucks at the time, acknowledged that the Starbucks manager probably acted from unconscious bias when she decided to call the police.[293] In addition, Starbucks closed more than 8,000 of its stores the month after the incident so its employees could undergo racial bias training.[294] Within a few weeks, the two African American men who were arrested at the Philadelphia Starbucks store reached a settlement with the city of Philadelphia, which agreed to pay them $1 each, help them take courses to complete their bachelor's degrees, and fund a $200,000 program to help high school students aspiring to be entrepreneurs.[295]

Far from being an isolated incident, about the same time as the Starbucks incident, police in cities and states across the nation were called to investigate other African Americans who were doing things that ordinarily do not trigger 911 calls.[296] For example, on April 21,

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293 *See id.* When asked about the arrest of the two African American men at the Philadelphia Starbucks store, Schultz spoke about the decision to close all Starbucks stores in May 2018 so all Starbucks employees could undergo implicit bias training. *See* Gregory Krieg & Vanessa Yurkevich, *Schultz's Claim He Doesn't 'See Color' at Odds with Starbucks' 2018 Anti-bias Training Videos*, CNN (Feb. 14, 2019) https://www.cnn.com/2019/02/14/politics/howard-schultz-starbucks-racial-bias-training-videos/index.html [https://perma.cc/5ZDT-2YHP]. Interestingly, Howard Schultz revealed his own unconscious racial bias at a CNN Town Hall in February 2019 when he remarked that he doesn't "see color." *See id.* ("I didn't see color as a young boy, and I honestly don't see color now."). One who claims not to see race or color is simply denying the existence of implicit bias. All of us, including those of us who are egalitarian-minded and progressive, are influenced by racial and other stereotypes. *See* Anastasia M. Boles, *The Culturally Proficient Law Professor: Beginning the Journey*, 48 N.M. L. REV. 145, 168 (2018) ("When a microaggressor comments 'I don't see color,' the hidden message is 'I do not recognize your unique cultural experience and background,' not 'I am not racist.'" (quoting DERALD WING SUE, MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION 32 (2010)); Charles R. Lawrence III, *Passing and Trespassing in the Academy: On Whiteness as Property and Racial Performance as Political Speech*, 31 HARV. J. RACIAL & ETHNIC JUST. 7, 10, 30 (2015); *see also* Ellen Yaroshefsky, *Waiting for the Elevator: Talking About Race*, 27 GEO. J. LEGAL ETHICS 1203, 1212–13 (2014).

294 Tracy Jan & Rachel Siegel, *Race Training to Briefly Close Starbucks Shops*, WASH. POST, Apr. 18, 2018, at A22; *see also* Christine Emba, Opinion, *Starbucks's Small Step Still Sets an Example*, WASH. POST, Apr. 22, 2018, at A17 (noting that "Starbucks's decision to shut down its stores on May 29 for a day of 'racial-bias education' training may not be enough to contain the backlash building against it" but that in doing this, "Starbucks is setting an unusually good example of what should be done when racism becomes a public problem in a public space.").

295 Rachel Siegel, *Two Black Men Arrested at Starbucks Settle with Philadelphia for $1 Each*, WASH. POST (May 3, 2018), https://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/?utm_term=.a602a3b4a02f [https://perma.cc/BM5L-9A75].

296 *See* Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1717–19 (2019) (discussing numerous cases where white people called the police to report black people doing normal things, and arguing that these people were, in essence, "using the police to discipline Black people" found in spaces typically occupied by whites).

2018, five African American women were golfing at a golf course in a largely white suburban area in York County, Pennsylvania, when they were approached by a man claiming to be affiliated with the club, who told the women that they were not keeping a quick enough pace and needed to leave.[297] The man told the women, "You're going too slow. I'll give you a refund[.]"[298] One of the women replied, "Do you realize we're the only black women on this course, and you're only coming up to us? We paid, we want to play."[299] The man walked off in a huff.[300] Three of the women left before finishing the round because they were so shaken by the confrontation,[301] but two of the women stayed and were about to start a second round of golf when they were approached again, this time by one of the club's owners and other employees, who told them that they had five minutes to leave and that the police had been called.[302] The women were also offered checks to refund their memberships.[303] The police arrived, but decided that charges were not warranted and did not arrest the women.[304]

In another incident around the same time, Lolade Siyonbola, a black graduate student, was napping at around 1:30 AM in the common area of her dormitory at Yale University in New Haven, Connecticut, when a white student confronted her.[305] The white student turned on the lights and said, "Is there someone in here? Is there someone sleeping in here? You're not supposed to be here."[306] The white student then called campus police.[307] When campus police arrived, Siyonbola told them that she was a student at Yale and used her room key to open the door to her dorm room.[308] Campus police, how-

297 Christina Caron, *5 Black Women Were Told to Golf Faster. Then the Club Called the Police,* N.Y. TIMES (Apr. 25, 2018), https://www.nytimes.com/2018/04/25/us/black-women-golfers-york.html [https://perma.cc/R98G-NFL2]; Rachel Siegel, *Pa. Golf Club Calls Police after Telling 5 Black Women They Were Playing Too Slowly*, PROVIDENCE J. (Apr. 24, 2018, 1:42 PM), https://www.providencejournal.com/news/20180424/pa-golf-club-calls-police-after-telling-5-black-women-they-were-playing-too-slowly [https://perma.cc/T22D-UZXG].

298 Siegel, *supra* note 297.

299 *Id.*

300 *Id.*

301 *Id*.

302 *Id.*; *see* Caron, *supra* note 297.

303 Siegel, *supra* note 297.

304 *Id.*

305 Siyonbola had been working on a paper and fell asleep in the common area of her dormitory. Tariro Mzezewa, *Napping While Black (and Other Transgressions)*, N.Y. TIMES (May 10, 2018), https://www.nytimes.com/2018/05/10/opinion/yale-napping-racism-black.html [https://perma.cc/55H7-R4EV].

306 *Id.*

307 *Id.*

308 *Id.*

ever, were not convinced that she belonged there and asked her to show identification.[309] Siyonbola showed the officers her student ID, but was detained for nearly twenty minutes while campus police investigated whether she was in fact a Yale student.[310] A spokesperson for Yale explained that the encounter took this long because the name on Siyonbola's campus ID was her preferred name, which did not match her name in university records.[311]

In the end, the police left without formally arresting Siyonbola, who was earning her master's degree in African studies at Yale.[312] When asked whether she felt the police acted appropriately, Siyonbola responded, "[A]bsolutely not. I know with absolute certainty that if I was white 1) the police would not have been called . . . and that 2) if they were, I would not have been detained for nearly 20 (minutes) for absolutely no reason."[313]

In December 2018, Jermaine Massey, an African American man, was confronted by a white hotel security guard police while he was sitting in the lobby of a DoubleTree by Hilton hotel in Portland, Oregon, talking on his cellphone with his mother.[314] The security guard accused him of loitering, then called the police.[315] Massey, who was a registered guest at the hotel, was told by police to pack up his belongings and leave the hotel or face trespass charges,[316] even after Massey

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309 *Id.*

310 *See* Matthew Ormseth, *Yale Says Police "Followed Procedures" after White Student Reported Presence of Black Student on Campus*, L.A. TIMES (May 10, 2018), https://www.latimes.com/nation/nationnow/la-na-yale-sleeping-student-20180510-story.html [https://perma.cc/7FY5-G2K6] (last visited Oct. 4, 2019).

311 *Id.*

312 Christina Caron, *A Black Yale Student Was Napping, and a White Student Called the Police*, N.Y. TIMES (May 9, 2018), https://www.nytimes.com/2018/05/09/nyregion/yale-black-student-nap.html [https://perma.cc/8FDL-QS3Q]. Siyonbola founded the Yoruba Cultural Institute in Brooklyn and is the author of a book about African history and diaspora migration. *Id.*

313 Ormseth, *supra* note 310.

314 *See* Associated Press, *Portland, Oregon Hotel Fires Two After Police Eject Black Guest from Lobby*, GUARDIAN (Dec. 29, 2018 16:50 EST), https://www.theguardian.com/us-news/2018/dec/29/portland-oregon-hotel-fires-two-police-eject-black-guest-lobby [https://perma.cc/C8B2-76LR]; *Portland, Oregon, Hotel Calls Cops on Black Guest in Lobby*, CBS NEWS (Dec. 28, 2018, 9:08 AM), https://www.cbsnews.com/news/portland-oregon-hotel-calls-cops-on-black-guest-in-lobby/ [https://perma.cc/4C4Z-TSLS].

315 *Portland, Oregon, Hotel Calls Cops on Black Guest in Lobby*, *supra* note 314.

316 Cydney Henderson, *Guest Says Hilton 'Racially Profiled' Him by Calling Police over Lobby Phone Call*, USA TODAY (Dec. 26, 2018 6:52 PM), https://www.usatoday.com/story/travel/news/2018/12/26/guest-hilton-racially-profiled-him-called-police-over-phone-call/2417679002/ [https://perma.cc/H5DS-YDYX].

told them he was a guest of the hotel and showed them the room key sleeve that listed his room number.[317]

In each of the instances described above, racial bias—whether explicit or implicit—likely played a role in the decision to involve the police in the first place or in the way in which the responding officers handled the situation once on the scene. I—an Asian American woman—have sat at a table at many a Starbucks without ordering anything while my husband made a purchase, and I have never been asked by store employees to leave. My husband, who is also Asian American, has occupied a seat at Peet's, another coffee shop, without purchasing anything while waiting for me to make a purchase, and he has never been asked to purchase something or leave, let alone been arrested by police for such action. I am sure many non-black persons have been slow on the golf course without being asked to leave or having the police called on them. I am also sure many a non-black student has fallen asleep in the common area of their residence hall without having someone call the police to investigate if they belonged there.

Under Justice Rehnquist's definition of probable cause, an arrest in any of the above-described cases would likely be considered justifiable, as police could easily meet Justice Rehnquist's very low threshold for probable cause.[318] While several of the incidents did not result in an arrest, the fact remains that a different set of officers may have chosen to exercise their arrest discretion differently and, under Justice Rehnquist's definition of probable cause, would likely have had the law on their side had they decided to effectuate an arrest.[319]

I want to return to *District of Columbia v. Wesby*, the case discussed earlier where twenty-one African Americans were arrested, taken into custody, and charged with unlawful entry for attending a party in D.C.[320] Though *Wesby* may not be as widely recognized as the

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317 *See* Michael Brice-Saddler, *Oregon Hotel Fires Employees Seen on Video Evicting Black Guest*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/business/2018/12/29/portland-hotel-fires-employees-seen-evicting-black-guest-video/?noredirect=on&utm_term=.b0feeabfa8cd [https://perma.cc/9FZ5-UBH6]; Mihir Zaveri, *Doubletree in Portland Fires 2 Employees After Kicking out Black Man Who Made Call from Lobby*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/2018/12/28/us/black-man-kicked-out-hotel-portland.html [https://perma.cc/J9Q4-622D] ("Mr. Massey said that he left the hotel after collecting his things from his room so as 'not to make a bad situation worse.' He then drove himself to a nearby Sheraton.").

318 *See* Texas v. Brown, 460 U.S. 730, 731 (1983).

319 In many states, refusing to leave a business' premises after being asked to leave constitutes trespass. *See, e.g.*, State v. Marcoplos, 572 S.E.2d 820, 821 (N.C. Ct. App. 2002); Cleveland v. Dickerson, 60 N.E.3d 686, 688–89 (Ohio Ct. App. 2016) (en banc).

320 District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

Starbucks incident, in some ways it is much more significant from a legal perspective. The case made it all the way to the Supreme Court and demonstrates the Court's support for police officers' broad arrest power.[321]

According to the Court, D.C. police received a phone complaint around 1:00 AM about "loud music and illegal activities at a house in Northeast D.C."[322] The caller stated that the house had been vacant for several months, a fact that several other neighbors confirmed when police officers arrived at the house.[323] When the officers arrived, they "heard loud music playing inside."[324] The officers knocked on the front door, and one of the partygoers let the officers into the house.[325] Inside, the officers smelled marijuana and saw beer bottles and cups of liquor on the floor.[326] In the living room, the officers found several scantily dressed women with cash in their garter belts giving lap dances to men holding cash and cups of alcohol.[327] Several of the partygoers scattered when they saw the uniformed officers.[328] Upstairs, the officers found a naked woman with several men in a bedroom with a mattress, open condom wrappers, and lit candles on the floor.[329]

When asked by the officers, several partygoers said they were there for a bachelor party but, according to the police, could not identify the bachelor.[330] The officers learned that a woman named Peaches had organized the party.[331] When contacted by the police, Peaches said she had left the party to go to the store; she also stated that she was renting the house.[332] The police reached out to the homeowner, who explained that he had been negotiating a lease with Peaches, but that they had failed to reach an agreement.[333] The owner also stated that he had not given Peaches or anyone else permission to use his house for a party.[334] After speaking with the homeowner, the officers

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321 *Id.*

322 *Id.* at 583.

323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.*

327 *Id.*

328 *Id.*

329 *Id.*

330 *Id.*

331 *Id.*

332 *Id.*

333 *Id.* at 584.

334 *Id.* Peaches later admitted that she did not actually have permission to use the house. *Id.*

arrested the partygoers for unlawful entry and drove them to the police station where they were charged with disorderly conduct.[335]

The charges against the partygoers were eventually dropped,[336] which suggests the government realized either that it would be difficult to prove the elements of unlawful entry[337] or that prosecuting these young black men for such a minor offense would widely be viewed as an unwise use of scarce prosecutorial resources.

The partygoers, Respondents, sued the District of Columbia and five of its officers for false arrest, claiming that they were arrested without probable cause in violation of the Fourth Amendment and D.C. law.[338] They argued that, under D.C. case law, probable cause to arrest required that officers have evidence the partygoers "knew or should have known, upon entry, that such entry was against the will of the owner," and that the officers lacked such evidence.[339] The District Court granted the partygoers' motion for summary judgment, concluding that the officers lacked probable cause to arrest for unlawful entry.[340] A jury awarded them $680,000 in compensatory damages, and after attorney's fees, the total award came to almost $1 million.[341] The D.C. Circuit Court of Appeals affirmed the judgment.[342]

The Supreme Court reversed the District Court and the D.C. Circuit Court of Appeals, relying primarily on two factors to justify its conclusion that the officers had probable cause to arrest the partygoers: (1) the condition of the house, and (2) the partygoers' conduct.[343] Notably, the Court in *Wesby* failed (or refused) to recognize that if the officers had come across twenty-one white male partygoers doing the same sorts of activities in a more affluent neighborhood, it is unlikely that the officers would have arrested those partygoers. Dur-

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335 *Id.*

336 *Id.*

337 To obtain a conviction for unlawful entry, the government must prove five elements: (1) the defendants voluntarily or purposely (not by accident or mistake), (2) entered a private dwelling, (3) without lawful authority, (4) against the will of the person lawfully in charge, and (5) the defendants knew or should have known the entry was unlawful. *See* D.C. CODE § 22-3302. The first four elements would have been easy to prove, so the case would have turned on whether the defendants knew or should have known their entry into the house was unlawful. If Respondents thought Peaches was renting the house and, therefore, had the right to invite them to the party, they would not have had the requisite mens rea for the offense.

338 *Wesby*, 138 S. Ct. at 584.

339 *Id.*

340 *Id.*

341 *Id.* at 585.

342 *Id.* That all of the lower court judges found for Respondents suggests that the case was not as cut and dry as represented by the Supreme Court. *See id.* at 589–93.

343 *Id.* at 586–87.

ing oral argument, Justice Sotomayor was the only Justice who raised the issue of race, remarking, "I suspect that if police officers arrived at a wealthy home and it was white teenagers having a party," and one of the teenagers claimed they had permission to use the house and it was unclear who invited everyone, "those kids wouldn't be arrested."[344] To drive her point home, Justice Sotomayor added, "[S]houldn't we have a rule that if we're going to require mens rea at all, that police officers should be treating people equally?"[345]

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

> [P]recisely because [loitering, sleeping in a public place, panhandling, drinking in public, jaywalking, riding bicycles on the sidewalk, etc.] are non-serious or vague, police officers will have little difficulty establishing the requisite probable cause to justify arresting people from committing them. For example, if the law criminalizes jaywalking, and people regularly jaywalk, the question is not whether the police will have probable cause (they will because many people jaywalk). Rather, the question is whether the police will use that probable cause selectively to arrest members of particular groups (for example, African-Americans). The short of it is that the more law criminalizes activities in which many people engage, the wider the pool of people from which police officers may pull to make arrests. . . . [Mass criminalization] provides police officers with the kind of perpetual probable cause that they can use to justify arresting African-Americans for a wide range of non-serious activities.[346]

In line with Carbado's observations on the breadth of police officer discretion in choosing which individuals to arrest, a 2011 study found that, on average, a person of color has a 30 percent greater chance of being arrested than a white person.[347] Moreover, even

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344 Transcript of Oral Argument at 60, District of Columbia v. Wesby, 138 S. Ct. 577 (2018) (No. 15-1485).

345 Transcript of Oral Argument, *supra* note 344, at 61.

346 Devon Carbado, *Predatory Policing*, 83 UMKC L. REV. 545, 550–51 (2017).

347 Tammy Rinehart Kochel, David B. Wilson & Stephen D. Mastrofski, *Effect of Suspect Race on Officers' Arrest Decisions*, 49 CRIMINOLOGY 473, 498 (2011).

though blacks make up only approximately 13.4 percent of the total population in the United States,[348] in 2017, blacks constituted 27.2 percent of all state and federal arrestees, which is more than double the percentage of blacks in the total population.[349]

Given the statistics and cases discussed above, it appears that race plays a role both in the exercise of police officers' arrest discretion and in post-hoc judicial affirmation of this probable cause.[350] Implicit biases can influence whether a police officer "decides to stop an individual for questioning," whether the officer interrogates or frisks that individual, and whether the officer decides to arrest that individual or simply give her a warning.[351]

Contrast Justice Rehnquist's not more likely true than false definition of probable cause with the commentary surrounding the issuance of a warrant in April 2018 to search the home and office of Michael Cohen, President Donald Trump's former attorney.[352] When a judicial officer is asked to issue a search warrant, the judicial officer must find there is probable cause to believe evidence of a crime will be found at the place to be searched.[353] The amount of proof needed to establish probable cause to search is usually considered to be the same as the showing required for probable cause to arrest.[354]

After the Michael Cohen search warrant was issued, many commentators spoke as if the showing necessary for probable cause to issue a search warrant is very rigorous, a far cry from Justice

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348 U.S. Census Bureau, *QuickFacts United States*, U.S. DEP'T OF COM., https://www.census.gov/quickfacts/fact/table/US/PST045218 [https://perma.cc/EMU5-5XFB] (July 1, 2018).

349 U.S. Dep't of Justice, Fed. Bureau of Investigation, Uniform Crime Report: Crime in the United States (2017), at tbl.43A (2018), https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/tables/table-43/ [https://perma.cc/HFZ5-RMKG].

350 *See* Angela J. Davis, *Racial Fairness in the Criminal Justice System: The Role of the Prosecutor*, 39 COLUM. HUM. RTS. L. REV. 202, 209 (2007) (noting that race "may affect the existence of a prior criminal record even in the absence of recidivist tendencies on the part of the suspect because of racial profiling at the arrest stage of the process"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1135 (2012); Richardson, *supra* note 46, at 2038–39 (explaining how the operation of implicit racial biases can cause the police to target, stop, and search Blacks more often than Whites).

351 Kang, *supra* note 350, at 1135.

352 *See, e.g.*, Danny Cevallos, *For Trump and Cohen, Attorney-Client Privilege Goes Only So Far*, NBC NEWS (Apr. 10, 2018, 4:37 AM), https://www.nbcnews.com/politics/donald-trump/trump-cohen-attorney-client-privilege-goes-only-so-far-n864206 [https://perma.cc/YTG2-YKGU].

353 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.1(a) (5th ed. 2012).

354 *Id.* § 3.1(b) ("It is generally assumed by the Supreme Court and the lower courts that the same quantum of evidence is required whether one is concerned with probable cause to arrest or probable cause to search.").

Rehnquist's definition of probable cause as something less than a preponderance of the evidence.[355] For example, Danny Cevallos, a criminal defense attorney and legal analyst for NBC News and MSNBC commented, "'Probable cause' means the FBI would have to demonstrate to a magistrate that there was a *substantial chance* evidence of criminal activity would be found in Cohen's offices, or in a hotel where he was living, which was also searched."[356]

The fact that this was a search of an attorney's home and office, and not just any attorney—the President's personal attorney—meant the showing of probable cause had to be higher than for the ordinary case. As Frank Figliuzzi, former FBI assistant director and current MSNBC legal analyst, noted, "it's really tough to get enough probable cause and senior level DOJ approval to search an attorney's office, and so it goes all the way up to DOJ, and you have to show there's *a substantial, pertinent reason to believe* that evidence exists [of a crime]."[357]

If we are willing to apply a robust showing of probable cause when it comes to searching the home and office of an attorney suspected of very serious crimes, should we not insist on an equally or more robust showing of probable cause when police officers arrest an individual for a minor offense?[358] Arguably, being arrested and taken into custody is a far greater intrusion—a humiliating intrusion on an individual's liberty and dignity interests—than having one's property searched,[359] yet we require a higher showing and make it more diffi-

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355 *See, e.g.*, Cevallos, *supra* note 352; *Fmr. FBI Asst. Dir.: Michael Cohen Raid Required Substantial Probable Cause* (MSNBC television broadcast, Apr. 9, 2018), [hereinafter *Cohen Raid Required Substantial Probable Cause*] http://www.msnbc.com/deadline-white-house/watch/fmr-fbi-asst-dir-michael-cohen-raids-required-substantial-probable-cause-1206702147538 [https://perma.cc/D64Z-HDL3].

356 Cevallos, *supra* note 352 (emphasis added).

357 *Cohen Raid Required Substantial Probable Cause*, *supra* note 355 (emphasis added).

358 The fact that the overwhelming majority of individuals who are arrested and charged end up pleading guilty rather than fighting the charges at trial provides another reason to support a more robust showing for probable cause. *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) (observing that "97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas"). As William Ortman notes, "a strict charging standard will be attractive when an adjudicative system does not otherwise provide adequate certainty that the people it punishes are guilty." Ortman, *supra* note 26, at 540. If many of the individuals who plead guilty are doing so not because they are guilty, but because the incentives deter them from asserting their right to a trial by jury, it would be best to require a more robust showing of probable cause at the arrest stage than the one suggested by Justice Rehnquist in *Texas v. Brown*.

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

cult for police when they seek to search the property of a wealthy attorney suspected of serious white collar crimes than when police seek to arrest black and brown individuals for relatively minor offenses. Probable cause should involve a more robust showing.[360]

## CONCLUSION

When Justice Rehnquist suggested more than thirty-five years ago in his plurality opinion in *Texas v. Brown* that probable cause to arrest an individual or search one's property need not "be correct or more likely true than false," he significantly lowered the bar for probable cause.[361] Lower courts should reject Justice Rehnquist's comment on probable cause and insist upon a more robust showing for the protection of all civilians, and especially for black and brown individuals who are often the subjects of heightened police interest. Rather than a trivial showing that amounts to less than the preponderance of the evidence standard used in civil cases, probable cause to arrest a person, to intrude on their liberty and dignity, and to place them into the criminal justice system, should have more teeth.

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

423 U.S. 411, 428–29 (Powell, J., concurring).

360 Other legal scholars have suggested good ways to strengthen the showing necessary for a search or arrest. Josh Bowers, for example, suggests police should take into account qualitative considerations, such as the individual's dignity, rather than simply relying upon quantitative calculations when assessing the constitutional reasonableness or unreasonableness of a search or seizure. *See* Josh Bowers, *Probable Cause, Constitutional Reasonableness, and the Unrecognized Point of a "Pointless Indignity"*, 66 STAN. L. REV. 987, 989 (2014). Max Minzner proposes that police should have to present hit data—showing how often they have been right or wrong about having probable cause—when applying for a search warrant or when trying to justify a warrantless search after the fact. *See* Max Minzner, *Putting Probability Back into Probable Cause*, 87 TEX. L. REV. 913, 915 (2009).

361 Texas v. Brown, 460 U.S. 730, 742 (1983).