

# An Exception Swallows a Rule: Police Authority To Search Incident to Arrest

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We must remember that the extent of any privilege of search and seizure without a warrant which we sustain, the officers interpret and apply themselves and will push to the limit. . . .

And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.<sup>1</sup>

## INTRODUCTION

Compared to Fourth Amendment jurisprudence more generally, with its well-earned reputation for complexity and variability,<sup>2</sup> the search incident to arrest exception to the Amendment's warrant requirement would appear an oasis of consistency.<sup>3</sup> The exception affords police an unqualified right to search anyone they arrest, without first obtaining a search warrant from a neutral judicial official.<sup>4</sup> This right extends to the bodies of all arrestees, their area of

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1. *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

2. *E.g.*, AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1 (1997) (referring to Fourth Amendment decisional law as "complex and contradictory," a "vast jumble"); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985) (describing law as "the Supreme Court's tarbaby: a mass of contradictions and obscurities that has ensnared the 'Brethren'"); William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 345 (1991) (noting that the "complexity of the rules of search and seizure" leads to inevitable violations of citizens' rights and exclusion of evidence).

3. The Fourth Amendment states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

4. *Coolidge v. New Hampshire*, 403 U.S. 443, 444-45 (1971) ("The most basic constitutional rule in this area is that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment . . ."); *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("When the right of privacy must reasonably yield to the right of search is, as a rule,

“immediate control,” and, if driving a car, the interior of the car and any containers located therein.<sup>5</sup>

The “magical moment of arrest”<sup>6</sup> is thus of considerable constitutional significance.<sup>7</sup> This significance, however, extends beyond the jurisprudential; indeed, for decades it has been recognized that warrantless arrests, and hence warrantless searches, are very much the norm—not the exception—in American policing.<sup>8</sup> As far back as 1965 Professor Wayne LaFave observed: “Although a search may be made with a search warrant . . . by far the commonest method of searching is incident to an arrest. An officer who has adequate grounds may arrest a suspect to make it possible to conduct a lawful search of his person.”<sup>9</sup>

Certainly, such a modern empirical reality would dumbfound the Framers, with their pronounced distaste for grants of broad discretionary authority to law enforcement.<sup>10</sup> It would also appear contrary to the precept that search in-

to be decided by a judicial officer, not by a policeman or Government enforcement agent.”).

5. *Infra* notes 89-97 and accompanying text.

6. H. RICHARD UVILLER, *VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA* 28 (1996).

7. *See generally* WAYNE R. LAFAVE, 3 *SEARCH AND SEIZURE* § 5.1(a), at 2 (3d ed. 1996 & Supp. 2000) (stating that “[i]t is often important to determine whether or not the police have made an arrest and, if they have, precisely when the arrest occurred”) [hereinafter LAFAVE]. “Inventory” searches of belongings of suspects, as well, are triggered only by a constitutionally valid arrest. *Jurdi v. State*, 908 S.W.2d 904, 906 (Tex. Crim. App. 1998) (observing that an “inventory search by definition is a search conducted after an arrest”).

Beyond the Fourth Amendment, the timing and occurrence of arrest is of critical importance for Sixth Amendment speedy trial purposes. *E.g.*, *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Thomas*, 55 F.3d 144 (4th Cir. 1995); *Williams v. State*, 757 So. 2d 597 (Fla. Dist. Ct. App. 2000).

8. LAWRENCE P. TIFFANY ET AL., *DETECTION OF CRIME: STOPPING AND QUESTIONING, SEARCH AND SEIZURE, ENCOURAGEMENT AND ENTRAPMENT* 105, 122 (Frank J. Remington ed. 1967); *MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE* 493-94 (1975); Leon R. Yankwich, *Lawless Enforcement of Law*, 9 S. CAL. L. REV. 14, 17 (1930); *see also* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1184 (1999) (noting that “the vast majority of arrests are made without a warrant”).

9. WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 186 (Frank J. Remington ed. 1965); *see also* LAFAVE, *supra* note 7, § 5.2(b), at 68-69 (stating that “[w]hile the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency”).

10. This reluctance, of course, derived from the extreme concern generated by the widespread use of “general warrants” and “writs of assistance,” which afforded executive officials sweeping authority to search and seize property in their unfettered discretion. *See generally* JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION* 19-48 (1966); NELSON B. LASSON, *THE HISTORY AND THE DEVELOPMENT OF THE FOURTH AMENDMENT TO THE CONSTITUTION* 79-105 (1937); Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 362-67, 396-400 (1974); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 361-62 (1921).

The Court itself has often noted the formative role this historical experience played in the genesis of the Fourth Amendment. *E.g.*, *Payton v. New York*, 445 U.S. 573, 583 (1980) (“It is familiar history that indiscriminate searches and seizures conducted under the authority of ‘general warrants’ were the immediate evils that motivated the framing and adoption of the Fourth Amendment.”); *Stone v. Powell*, 428 U.S. 465, 482 (1976) (“The Amendment was primarily a reaction to the evils associated with the use of the general warrant in England and the writs of assistance in the colonies . . . .”); *Stanford v. Texas*, 379 U.S. 476, 482 (1965) (noting that the Amendment resulted from “contemporary revulsion” for general warrants and writs of assistance); *Boyd v. United States*, 116 U.S. 616, 624-25 (1886) (observing that in interpreting the Amendment’s function it is “only necessary to recall” the use of general

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cident authority is both a “strictly limited right”<sup>11</sup> and numbers among the “jealously and carefully drawn”<sup>12</sup> exceptions to the warrant requirement.<sup>13</sup> Like other exceptions, however, the search incident exception has evolved to swallow the rule,<sup>14</sup> so much so that the parameters and rationales originating the exception are now only vaguely recognizable in many decisions of courts across the land.<sup>15</sup> As a consequence, the highly intrusive, widespread police practice of executing searches incident to arrest has become largely immune to

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warrants and writs of assistance).

11. *Chimel v. California*, 395 U.S. 752, 759 (1969) (citations omitted).

12. *Jones v. United States*, 357 U.S. 493, 499 (1958) (“The exceptions to the rule that a search must rest upon a search warrant have been jealously and carefully drawn, and search incident to a valid arrest is among them.”). The Court elaborated on this requirement in *Coolidge*:

[T]he most basic constitutional rule in this area is that “searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.” The exceptions are “jealously and carefully drawn,” and there must be “a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.”

403 U.S. at 454-55 (citations omitted).

13. *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (“A warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the warrant requirement . . . .”); *Katz v. United States*, 389 U.S. 347, 357 (1967) (stating “searches conducted outside the judicial process . . . are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions”) (emphasis added).

Several of the other identified exceptions are: inventory searches subsequent to lawful arrest, *Colorado v. Bertine*, 479 U.S. 367 (1987); “plain view” searches, *Arizona v. Hicks*, 480 U.S. 321 (1987); searches in “hot pursuit” of a fleeing felon, *United States v. Santana*, 427 U.S. 38 (1976); consent searches, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973); exigent circumstance searches, *Warden v. Hayden*, 387 U.S. 294 (1967); and automobile searches, *Carroll v. United States*, 267 U.S. 132 (1925). See generally Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 500-03 (1991) (enumerating other exceptions).

14. *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) (observing that the warrant requirement “has become so riddled with exceptions that it [has become] basically unrecognizable”).

15. Concern over the exception has been expressed by courts and commentators alike for some time. E.g., *New York v. Belton*, 453 U.S. 454, 458 (1981) (stating that “[a]lthough the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases”); *Worthy v. United States*, 409 F.2d 1105, 1112 (D.C. Cir. 1968) (Wright, J., dissenting) (stating that the exception has become a “virtual shibboleth, unthinkingly repeated by the courts”); *United States v. Hawkins*, No. 00-CR-53-BS, 2001 WL 103542, at \*7 (D. Me. 2001) (noting that there is “ample case law allowing courts to prevaricate on the search incident to arrest rule”); *Commonwealth v. Freeman*, 293 A.2d 84, 85 (Pa. Super. Ct. 1972) (noting the “inherent ambiguity of the phrase: Is a search incident to arrest because it is contemporaneous with the arrest or because it has some other relationship to the arrest?”).

Assessing the case law in 1972, the American Law Institute emphasized “the almost total lack of articulated conceptual underpinnings for the search incident to arrest [exception]—a lack surely due to its taken-for-granted character for centuries past.” A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 184 (Proposed Official Draft No. 1, 1972). For other instances of scholarly concern dating back many years, see, for example, David E. Aaronson & Rangeley Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 GEO. L.J. 53 (1975); H. Frank Way, Jr., *Increasing Scope of Search Incident to Arrest*, 1959 WASH. U. L.Q. 261; Note, *Scope Limitations for Searches Incident to Arrest*, 78 YALE L.J. 433 (1969); *Searches of the Person Incident to Traffic Arrests: State and Federal Approaches*, 26 HASTINGS L.J. 536 (1974); Note, *Searches of the Person Incident to Lawful Arrest*, 69 COLUM. L. REV. 866 (1969); and Note, *Search Incident to Arrest for Traffic Violation*, 1959 WIS. L. REV. 347.

constitutional scrutiny and control.<sup>16</sup>

The present Article seeks to remedy this situation and proceeds in four parts. At the outset, the Article provides an overview of the origins and evolution of the search incident exception, including its interpretation in the latter part of the twentieth century by the U.S. Supreme Court. The historical record makes clear that the exception affords contemporary police a degree of discretionary authority far in excess of that recognized in the late eighteenth and early nineteenth centuries. As will also be evident, while police authority to search incident to arrest represents perhaps the oldest of the several exceptions to the Fourth Amendment's warrant requirement,<sup>17</sup> the Court has treated the exception in a haphazard manner down the years.

Part II addresses several of the persistent uncertainties that plague search incident doctrine and practice, due mainly to the Court's curious failure, over the course of several decades, to address the threshold question of what constitutes an "arrest" sufficient to justify a search incident.<sup>18</sup> This failure has led lower courts to conceive of the exception in increasingly broad terms, ceding to police yet more discretionary power, and raising the specter of arbitrary application of the otherwise supposedly "strictly limited right." In particular, numerous courts are now eschewing the historic *sine qua non* of arrest altogether, allowing full searches merely if probable cause is present and police thus "could have" arrested the suspect. This judicial indulgence is troublesome both for its innate indeterminacy and because it signals the increasing divorce of search incident doctrine and practice from its exclusive historic justifications—to guard against physical harm to police and the possible destruction of evidence, triggered by the exigencies of an actual arrest.

Accordingly, in Parts III and IV the Article seeks to lend some clarity to this critically important area of search and seizure law. Part III provides a necessary foundation for the task, developing a taxonomy that permits arrests to be distinguished from other police-citizen encounters. This effort is crucial because only by carefully distinguishing arrests, and "custodial arrests" in par-

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16. *United States v. McLaughlin*, 170 F.3d 889, 895 (9th Cir. 1999) (Trott, J., concurring) (noting the "reality that the search incident to arrest exception has been completely severed from the historic rationales of officer safety and preservation of evidence").

17. *Harris v. United States*, 331 U.S. 145, 150-52 (1947) (footnotes omitted) (stating "[s]earch and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of law-enforcement procedures of the United States and of the individual states"), *rev'd on other grounds*, *Chimel v. California*, 395 U.S. 752 (1969); *United States v. Mills*, 185 F. 318, 319 (S.D.N.Y. 1911) (stating that search incident authority has existed since "time immemorial"); *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923) (Cardozo, J.) (stating that the authority "goes back beyond doubt to the days of the hue and cry, when there was short shrift for the thief who was caught . . . 'red-handed.'"); TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 28 (1969) (asserting that there "is little reason to doubt that search of an arrestee's person and premises is as old as the institution of arrest itself."); Louis B. Ewbank, *Extent of Right to Search and Bind Persons When Arrested*, 56 CENT. L.J. 303, 303 (1903) (footnotes omitted) (observing that right was "recognized as existing at common law, from time immemorial, and its existence is clearly necessary to the ends of justice."); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 401 (1995) (asserting that "[t]he power to search incident to arrest . . . was well-established in the mid-eighteenth century.").

18. *Infra* notes 51-87 and accompanying text.

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ticular, from other Fourth Amendment seizures, does it become possible to meaningfully discern when a search incident to arrest is constitutionally authorized. With this taxonomy in place, Part IV addresses the fundamental question of how custodial arrests, the constitutional precondition for searches, can be distinguished for purposes of search incident to arrest jurisprudence. The Article concludes by providing an analytic framework to answer this question, an approach anchored in the historic common law understandings of arrest and the practical justifications the search incident exception is thought to serve.

### I. THE ORIGINS AND EVOLUTION OF SEARCHES INCIDENT TO ARREST

#### A. Historical Origins

While today police authority to search incident to arrest is conceived as a categorical entitlement, the historical provenance and contours of the right are not so clear.<sup>19</sup> The image emerging from the fragmentary record suggests that, while such searches indisputably occurred and met with approval,<sup>20</sup> the right was decidedly more modest than that known today. The circumscribed extent of this authority derived from the quite limited powers enjoyed by eighteenth century authorities to execute arrests, especially without a warrant,<sup>21</sup> in keeping with the extreme reluctance of framing era authorities to extend discretionary authority to law enforcement officials.<sup>22</sup> Officials (and indeed private citizens) were authorized to execute warrantless arrests for felonies only if the arrestee

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19. As one treatise writer observed in 1872, “[t]here is but little to be found in the books relating” to police authority to search incident to arrest. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE § 210, at 126 (2d ed. 1872); see also *United States v. Robinson*, 414 U.S. 218, 232 (1973) (characterizing early discussions of search incident authority as “sketchy”).

20. According to Telford Taylor, “[t]hat there are very few traces of the matter in the early records is as true as it is natural, given a practice which was taken for granted, and under which suspected felons were the only victims. . . . That the practice had the full approval of bench and bar...when our Constitution was adopted seems entirely clear.” TAYLOR, *supra* note 17, at 28-29.

21. See Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1395 (1989) (noting that “[t]he few law enforcement officials that there were—sheriffs, constables, and customs inspectors—had very limited power to search or seize without a warrant”).

22. This section draws liberally from the seminal recent work on framing era search and seizure practices by Professor Thomas Davies. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999). For an earlier comprehensive treatment of the quite limited early right of law enforcement to arrest without warrants, see Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566 (1936).

This common law history makes clear that the basic distrust inspired by excesses of formal discretionary authority, principally writs of assistance and general warrants, was compounded by a basic contempt for law enforcement officers more generally. According to Professor Davies, the Framers “expressed outright disdain for the character and judgment of ordinary officers. Indeed, the Framers’ perception of the untrustworthiness of the ordinary officer was reinforced by class-consciousness and status concerns.” Davies, *supra*, at 577. “The common-law tradition viewed any form of discretionary authority with unease—but delegation of discretionary authority to ordinary, ‘petty,’ or ‘subordinate’ officers was anathema to framing-era lawyers.” *Id.* at 578; see also Donna J. Spindel & Stuart W. Thomas, Jr., *Crime and Society in North Carolina, 1663-1740*, 49 J.S. HIST. 223, 227 (1983) (describing local constables as being of “humble background”).

was ultimately convicted of the felony (“felony-in-fact”).<sup>23</sup> Authority to execute warrantless arrests of persons suspected of committing misdemeanors (constituting the vast majority of offenses, many of which are categorized as felonies today)<sup>24</sup> was even more limited: such arrests were proper only if the alleged offense was actually observed by the officer (“on view”)<sup>25</sup> and constituted a breach of the public peace.<sup>26</sup> If the foregoing requirements were not met, officers risked being sued in a private civil suit for trespass or false imprisonment, a seemingly quite effective disincentive for widespread warrantless arrests.<sup>27</sup>

Thus, as a practical matter, authorities had relatively little occasion to arrest persons in the absence of a warrant, and as a result had only limited recourse to conduct searches incident to arrest, typically relative to the quite restricted criminal class of suspected felons.<sup>28</sup> Even when invoked, the power to search was of limited utility. Beyond the acknowledged authority of officers to seize weapons from arrestees,<sup>29</sup> the primary form of evidence seized as a result of arrests was stolen property,<sup>30</sup> a function of the limited forensic capabilities of the time.<sup>31</sup>

23. Davies, *supra* note 22, at 631-33; *see also* Hall, *supra* note 22, at 568-71, 591-92 (noting same and discussing English authorities).

24. *United States v. Watson*, 423 U.S. 411, 441-42 (1976) (Marshall, J., dissenting) (noting same and observing that “the balance struck by the common law. . . decreed that only in the most serious of cases could the warrant be dispensed with”); *see also* Horace L. Wilgus, *Arrests Without a Warrant (Part I)*, 22 MICH. L. REV. 541, 572-73 (1924) (enumerating offenses).

25. Davies, *supra* note 22, at 630.

26. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 289 (1769); WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN 75, 77 (1721); JAMES FITZJAMES STEPHEN, 1 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883); FRANCIS WHARTON, 1 CRIMINAL PROCEDURE § 35 (10th ed. 1918).

27. Davies, *supra* note 22, at 630-32. As Professor Davies notes with respect to warrantless felony arrests: “The practical limitation was that the actual guilt justification involved a gamble—the officer had to predict *whether* a felony conviction would result (and the outcome at trial obviously could turn on factors other than the testimony provided by the arresting person).” *Id.* at 632. For a discussion of the remedies available at common law for unjustified arrests, *see* John Barker Waite, *The Law of Arrest*, 24 TEX. L. REV. 279, 280-85 (1945).

28. *See* 4 BLACKSTONE, *supra* note 26, at 292 (observing that warrantless arrests were allowed only in instances of a “felony actually committed, or a dangerous wounding, whereby felony is likely to ensue”); 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 582-83 (1898 ed.) (“We may strongly suspect . . . that in general the only persons whom it is safe to arrest are felons, and that a man leaves himself open to an action . . . if he takes as a felon one who has done no felony. . . . This may be one of the reasons why . . . arrests were rarely made except where there was hot pursuit after a “hand-having” thief.”).

29. A police instruction manual of the day, for instance, advised officers that “a thorough search of the [arrested] felon is of the utmost consequence to your own safety, and . . . by this means he will be deprived of instruments of mischief.” CONDUCTOR GENERALIS 109, 117 (James J. Parker ed., New York 1788).

30. *E.g.*, JOHN GARDNER HAWLEY, THE LAW OF ARREST ON CRIMINAL CHARGES 47 (1889) (acknowledging common law rule that an arresting officer is entitled to seize weapons and “has a right to search for the purpose of finding on [the arrestee] stolen money or other stolen property.”); SIR FREDERICK POLLOCK AND FREDERIC WILLIAM MAITLAND, 2 HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 579 (2d ed. 1898) (recognizing the common law authority to search one “still in seisin of his crime—if he was still holding the gory knife or driving away the stolen beasts.”).

31. *See* Davies, *supra* note 22, at 627 (“In the late eighteenth century, searches were still of limited utility to law enforcement. The principal possessory offense was possession of stolen property. In the

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This limited authority to arrest, and search, however, changed quite radically in the mid-nineteenth century. With emerging concerns over crime and urban disorder, and the development of professional police forces,<sup>32</sup> courts and legislatures eventually granted authority to arrest for felonies without a warrant on the basis of “probable cause,” a markedly less onerous standard.<sup>33</sup> This shift had two major, and interrelated, consequences: it significantly broadened police power to arrest for all crimes,<sup>34</sup> and, in due accord, hastened resort to incidental searches. As Professor Thomas Davies recently observed:

The expansion of the *ex officio* arrest authority of [officers] . . . constituted a revo-

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absence of forensic science, items other than stolen property would usually have been of limited evidentiary value.”); see also John Langbein, *Shaping the Eighteenth Century Criminal Trial: A View From the Ryder Sources*, 50 U. CHI. L. REV. 1, 36 (1983) (noting that “[g]rand larceny . . . was by far the most commonly prosecuted offense at the Old Bailey” in the mid-1700s); William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era*, 42 N.Y.U. L. REV. 450, 466 (1967) (noting that between 1790 and 1810 almost half of all prosecutions in Middlesex, Massachusetts were for thefts). The evidentiary presumption attaching to one “taken with the mainour,” i.e., in possession of stolen goods, dates back centuries. See JAMES BRADLEY THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 327 (1898) (identifying the presumption as “running through a dozen centuries”).

32. This development is very much a modern phenomenon. Constables in the framing era served on a part-time basis, had limited enforcement and investigative duties, and typically were persons of low social standing. Davies, *supra* note 22, at 620-22. Most often in the eighteenth century, Professor Davies notes, “the initiation of arrests and searches commenced when a crime victim either raised the ‘hue and cry’ or made a sworn complaint.” *Id.* at 622; WILLIAM BLACKSTONE, 4 *COMMENTARIES ON THE LAWS OF ENGLAND* 289 (1783) (stating “in general, an arrest may be made four ways: 1. By warrant: 2. By an officer without warrant: 3. By a private person also without a warrant: 4. By an hue and cry.”). As Roger Lane has observed, criminal law enforcement in colonial America was “largely a private matter.” ROGER LANE, *POLICING THE CITY: BOSTON 1822-1885* 7 (1967); see also CARL BRIDENBAUGH, *CITIES IN REVOLT: URBAN LIFE IN AMERICA, 1743-7996* 107-10, 297-305 (1955) (surveying sparse, and largely ineffectual, use of “peace officers”); ARTHUR P. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 51-55 (1930) (discussing the prominent role of private citizens in the identification and arrest of suspects). This modest role continued into the nineteenth century. According to Professor Kermit Hall, antebellum police forces played a small role in detecting crime, leaving that task to the thief catcher, an individual who was seldom a police officer and who, despite the title, did not actually catch thieves. Instead, the thief catcher recovered stolen goods. KERMIT L. HALL, *THE MAGIC MIRROR* 177-78 (1989).

For more general discussions of the historic evolution toward police professionalism, and the social, political and economic forces driving the transformation, see LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 27-30, 66-68 (1993); HALL, *supra* note 22, at 578-90; Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 830-38 (1994).

33. Professor Davies notes that the first references to the now-accepted probable cause standard for warrantless arrests appeared in an 1844 Pennsylvania case and an 1850 Massachusetts case. Davies, *supra* note 22, at 636-37 (citing and discussing *Rohan v. Sawin*, 59 Mass. (5 Cush.) 281, 284 (Mass. 1850); *Russell v. Shuster*, 8 Watts & Serg. 308, 309 (Pa. 1844)). Davies observes that twentieth century courts and commentators have succumbed to the “myth” that probable cause was the framing-era standard for warrantless arrests, accounting for a radical increase in police authority in relative historic terms. According to Davies, the slippage in the historical record is responsible for much of the confusion attending Fourth Amendment history:

We cannot appreciate the Framers’ understanding of the problem of search and seizure unless we remove the probable cause justification for arrests and related post-framing developments from the picture. The Framers understood that justifications for warrantless arrests and accompanying searches were quite limited. Thus, they did *not* perceive the peace officer as possessing an *ex officio* discretionary arrest or search authority.

*Id.* at 640 (emphasis in original).

34. Davies, *supra* note 22, at 638 (“As a result, an officer enjoyed a much broader latitude for erroneously arresting innocent persons or for making warrantless arrests of persons who were actually guilty of only a misdemeanor.”).

lution in criminal justice authority and resulted in warrantless felony arrests displacing the previous reliance on arrest warrants. Additionally, the expansion of *ex officio* felony arrest authority expanded the opportunities for officers to make warrantless searches incident to arrest, making that power far more significant than it had been at the framing.<sup>35</sup>

Not coincidentally, with the loosening of police authority to arrest and search, one finds increasing reference in the case law to search incident authority. Still, the right was by no means categorical or absolute.<sup>36</sup> Summarizing decisions, American treatise writer Joel Prentiss Bishop stated in 1895:

The officer should safely keep an arrested prisoner until lawfully discharged; and if from violent conduct or other reason he fears an attempt to escape, he may search the person and take away any implements helpful therein. But this right is limited; for example, it does not exist where the arrest is for mere disorderly drunkenness, and it is submitted to, and there is no ground to fear an attempt at escape. In the absence of any special reason, the officer should not take anything from the prisoner's custody . . . .<sup>37</sup>

Even when deemed a "duty" of police,<sup>38</sup> however, incidental searches were tied to the need to (1) ensure officers' safety<sup>39</sup> and diminish the related threat of escape;<sup>40</sup> and (2) secure evidence material to the prosecution of the particular crime justifying the arrest.<sup>41</sup> Property or money not relating to the crime

35. *Id.* at 638. For a discussion of the increasing resort to arrest for minor offenses by newly organized police forces in Philadelphia, during the era of 1850-1870, which prompted a local judge to warn police not to continue their "constant habit of arresting parties to search them," see ALLEN STEINBERG, *THE TRANSFORMATION OF CRIMINAL JUSTICE, PHILADELPHIA 1800-1880* 180-81 (1989).

36. See Bishop, *supra* note 19, § 211, at 127 (stating "it is not easy to lay down a general doctrine on this subject, with any great assurance of its being accepted everywhere as sound").

37. JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* § 210, at 118 (4th ed. 1895). This sentiment was echoed in a leading English case of the era:

[I]t is quite wrong to suppose any general rule can be applied . . . . Even when a man is confined for being drunk and disorderly, it is not correct to say that he must submit to the degradation of being drunk searched, as the searching of such person must depend on all the circumstances of the case.

*Leigh v. Cole*, 6 Cox Crim. Cas. 329, 332 (1853).

38. *E.g.*, *Getchell v. Page*, 69 A. 624, 629 (Me. 1908) (characterizing searches incident as a "common-law duty of officers").

39. As the Supreme Court of New Hampshire stated in 1867:

an officer would also be justified in taking from a person whom he had arrested for crime, any deadly weapon he might find upon him, such as a revolver, a dirk, a knife, a sword cane, a slung shot, or a club, though it had not been used or intended to be used in the commission of the offense for which the prisoner had been arrested, and even though no threats of violence towards the officer had been made.

*Closson v. Morrison*, 47 N.H. 482, 484 (1867).

40. *Spalding v. Preston*, 21 Vt. 9, 16 (1848) ("So we think it might be with money or other articles of value . . . if left in his possession, he might procure his escape, or obtain tools, implements, or weapons with which to effect his escape. We think the officer arresting a man for crime, not only may, but frequently should, make such searches and seizures."); 1 FRANCIS WHARTON, *WHARTON'S CRIMINAL PROCEDURE* § 97, at 136 (10th ed. 1918) ("The officer has an undoubted right to make a search . . . [and] take into his possession any articles which he may suppose will aid in securing the conviction of the prisoner, or will prevent his escape.")

41. *United States v. Wilson*, 163 F. 338, 340 (S.D.N.Y. 1908) ("the property must be material, or seem to be material, as evidence on the charge which is made against the defendant."); *Thatcher v. Weeks*, 11 A. 599 (Me. 1887) (officers are entitled to seize items "that may be of use as evidence upon

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justifying arrest was expressly beyond the permissible scope of seizure.<sup>42</sup> According to one authority:

A constable may search a prisoner, if he behaves with such violence of language or conduct that the constable may reasonably think it prudent to search him in order to ascertain whether he has any weapon, etc., with which he might do mischief.

A constable. . . may upon lawful arrest of a suspected offender take and detain property found in the offender's possession, if the property is likely to afford material evidence for the prosecution, in respect of the offense for which the offender has been arrested.<sup>43</sup>

As noted by then-Judge Benjamin Cardozo in 1923: "The peace officer em-

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the trial."); *Holker v. Hennesey*, 42 S.W. 1090, 1093 (Mo. 1897) ("[A]n officer has no right to take any property from the person of the prisoner except such as may afford evidence of the crime charged."); *Dillon v. O'Brien*, 16 Cox Crim. Cas. 245, 249 (Exchequer Div. 1887) ("constables . . . are entitled, upon a lawful arrest by one of them charged with treason or felony to take and detain property found in his possession, which will form material evidence in his prosecution for that crime."); JOSEPH H. BEALE, JR., *CRIMINAL PLEADING AND PRACTICE* § 29, 24-25 (1889) ("[a]ny article found upon the prisoner which is needed as evidence to prove the crime, or any property of another which he acquired by the crime, may be taken from him."); FRANCIS WHARTON, *TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES* § 2975, at 39 (7th ed. 1874) ("[t]hose arresting a defendant are bound to take from his person any articles which may be of use as proof in the trial of the offense with which the defendant is charged."). See generally Annotation, *Right of Search and Seizure Incident to Lawful Arrest, Without a Search Warrant*, 32 A.L.R. 680, 681-97 (1924) (noting same and citing cases).

Bishop, writing in 1872, urged that the arresting officer "consider the nature of the charge," and limit the seizure of items accordingly:

if he finds about the prisoner's person, or otherwise in his possession, either goods or moneys which there is reason to believe are connected with the supposed crime as its fruits, or as the instruments with which it was committed, or as directly furnishing evidence relating to the transaction, he may take the same, and hold them to be disposed of as the court may direct.

BISHOP, *supra* note 19, § 211, at 127. However, once again evidencing the uncertain lineage of the scope of search incident authority, Bishop hastened to add that:

[I]et the reader understand, that the author has before him no case in which the exact proposition is stated; but it seems rather to flow from the reason of the thing, from the general principles of the criminal law relating to such subjects, and from the few enunciations which we have in the books, than from what has been laid down in exact words.

*Id.*; see also JOEL PRENTISS BISHOP, *NEW CRIMINAL PROCEDURE* § 210, at 118 (4th ed. 1895) (emphasizing that "[t]he arresting officer ought to consider the nature of the accusation" and seize "goods or money which he reasonably believes to be connected with the supposed crime."); *Holker*, 42 S.W. at 1093 (stating an officer "has the undoubted right to make the search, and, considering the nature of the accusation . . . take into his possession any articles he may suppose will aid in securing the conviction of the prisoner, or will prevent escape").

42. See WILLIAM E. MIKELL, *CLARK'S CRIMINAL PROCEDURE* § 34, at 85 (2d ed. 1918) (stating other "[s]uch property cannot be seized, even though it affords evidence against the prisoner of the commission of a similar crime to that for which the arrest is made").

Authorities were at special pains to limit the seizure of money from arrestees. Any money seized from the arrestee must relate to the offense justifying the arrest. FRANCIS WHARTON, *CRIMINAL PLEADING AND PRACTICE* § 60, at 43 (9th ed. 1889). "Any wider license would not only be a violation of [the arrestee's] personal rights, but would impair his means for preparing his defense." *Id.* (footnote omitted).

43. LORD HALISHAM OF ST. MARYLEBONE, 10 *HALSBURY'S LAWS OF ENGLAND* 356 (3d ed. Simonds 1955); see also *Youman v. Commonwealth*, 224 S.W. 860, 863 (Ky. 1920) (stating an officer can seize "property connected with the offense for which [the suspect] is arrested that may be used as evidence against him, or any weapon or thing that might enable the prisoner to escape or do some act of violence"); *Elliott v. State*, 116 S.W.2d 1009, 1012 (Tenn. 1938) (stating search incident "authority is always limited to (1) offensive weapons and tools of escape and (2) evidence of guilt of the offense for which the lawful arrest has been made").

powered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds, if connected with the crime.<sup>44</sup>

The U.S. Supreme Court's first express acknowledgment of search incident authority came in *Weeks v. United States*,<sup>45</sup> in 1914, and *Carroll v. United States*,<sup>46</sup> in 1925, neither decision actually involving a search incident to arrest. Nonetheless, in *Weeks*, which involved a warrantless seizure of the defendant's private papers outside of his presence, the Court confidently stated:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to say what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime. The right has been uniformly maintained in many cases . . . .<sup>47</sup>

Similarly confident dictum can be found in *Carroll*<sup>48</sup> and other cases of the era.<sup>49</sup> The ensuing decades witnessed the Court articulating the availability and scope of search incident authority with varying degrees of certitude.<sup>50</sup>

44. *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923) (Cardozo, J.); see also *Ex parte Hurn*, 9 So. 515, 519 (Ala. 1891) (citing and discussing statute that codified common law in similar terms).

45. 232 U.S. 383 (1914).

46. 267 U.S. 132 (1925).

47. *Weeks*, 232 U.S. at 392.

48. *Carroll*, 267 U.S. at 158 ("When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be held as evidence in the prosecution.")

49. See, e.g., *Agnello v. United States*, 269 U.S. 20, 30 (1925) ("The right without a search warrant contemporaneously to search persons lawfully arrested . . . is not to be doubted.")

The historical context of *Carroll* and *Agnello* doubtless contributed to the confident tenor of the Court's articulation of doctrine. Both arose in the Prohibition era, a time when Fourth Amendment strictures more generally were under considerable strain, a situation not unlike that evidenced with modern America's "drug war." See generally KENNETH M. MURCHISON, *FEDERAL CRIMINAL LAW DOCTRINES: THE FORGOTTEN INFLUENCE OF NATIONAL PROHIBITION* (1994); Timothy E. Atkinson, *Prohibition and the Doctrine of the Weeks Case*, 23 MICH. L. REV. 748 (1925); Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389 (1993); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987). Indeed, it was during this time that one first sees evidence of the historically broader scope of search incident authority, universally reflected in today's search incident doctrine. See, e.g., *Dafoff v. State*, 153 N.E. 398 (Ind. 1926) (upholding admission of liquor found as a result of arrest for unspecified motor vehicle offense); *Commonwealth v. Vanderpool*, 84 Pa. Super. Ct. 552 (1925) (upholding admission of liquor found as a result of arrest for keeping a disorderly house); *State v. Deitz*, 239 P. 386 (Wash. 1925) (upholding admission of liquor found as a result of arrest for lacking proper lights and license plates on car); see also Annotation, *Right of Search and Seizure Incident to a Lawful Arrest, Without a Search Warrant*, 51 A.L.R. 424, 429-34 (1927) (surveying decisions allowing evidence without evidentiary nexus to offense justifying arrest).

50. Perhaps the greatest uncertainty over the categorical nature of search incident authority was evidenced in the Court's decision in *Trupiano v. United States*, 334 U.S. 699 (1948):

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant. Otherwise the exception swallows the general principle, making a search warrant completely unnecessary whenever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to re-

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### B. Chimel, Robinson and Their Progeny

It was not until the Court's 1969 decision in *California v. Chimel*<sup>51</sup> that search incident authority came into its own. In *Chimel*, police conducted an in-house arrest of a defendant allegedly involved in the burglary of a coin store.<sup>52</sup> Police searched the environs of defendant's house and garage for almost an hour, without his consent or a search warrant. The search revealed coins, medals, and other objects that resulted in defendant's burglary conviction.<sup>53</sup>

By a 7-2 margin, the *Chimel* Court invalidated the search as excessively broad in scope, yet squarely endorsed the authority of police to search incident to arrest<sup>54</sup> despite the Court's "far from consistent" decisions on the subject.<sup>55</sup> According to the majority, incident to arrest, police enjoy a "strictly limited right" to search the suspect's person and area of "immediate control" for weapons or destructible evidence, but cannot engage in a search of the general premises.<sup>56</sup> Noting that "'the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible,'"<sup>57</sup> the Court emphasized the exigent circumstances lending justification to the search incident exception:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule . . . . There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.<sup>58</sup>

Because police seized the contraband from other than Chimel's area of "imme-

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quire the arresting officer to equip himself with a search warrant.

*Id.* at 708 (citation omitted). *United States v. Rabinowitz*, 339 U.S. 56 (1950), decided only two years later, expressly overruled *Trupiano*, and downplayed the Court's emphasis on the warrant requirement, suggesting that a lawful arrest obviated the need for a search warrant. *See id.* at 64-66. In turn, *Rabinowitz*, which permitted incidental searches over the entire physical area in which an arrestee exercised possessory control, was overruled almost 20 years later by *Chimel v. California*, 395 U.S. 752, 760-63 (1969).

51. 395 U.S. 752 (1969).

52. The police did so after having first secured an arrest warrant, which was ultimately deemed infirm, due to a lack of an adequate supporting affidavit. The Court therefore addressed the case as if no warrant had been issued. *See id.* at 755 n.1.

53. *Chimel*, 395 U.S. at 753-54.

54. *Id.* at 759, 768.

55. *Id.* at 755; *see also id.* at 770 (White, J., dissenting) (noting that "[f]ew areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search 'incident to an arrest.' There has been a remarkable instability in this whole area . . . .") (citation omitted).

56. Searches of the latter require a search warrant. *Id.* at 763.

57. *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1968)).

58. *Id.* at 763.

diate control,” the Court concluded, the evidence should have been suppressed.<sup>59</sup>

While enlightening for its express endorsement of the search incident exception and articulation of the dual rationales justifying its application, *Chimel* nonetheless led to confusion. In particular, it failed to address an abiding uncertainty: Do police have a categorical right to search incident to arrest or must the factual circumstances suggest that material evidence will otherwise be destroyed and/or officer safety imperiled? Put another way, is it the “bare fact” of arrest that justifies an incidental search?<sup>60</sup>

In 1973, the Court addressed this crucial question in *United States v. Robinson*<sup>61</sup> and its companion case *Gustafson v. Florida*.<sup>62</sup> In *Robinson*, police observed a motorist they had reason to believe was driving with a revoked license, an offense that carried a mandatory minimum jail term, a fine, or both under District of Columbia law.<sup>63</sup> When stopped, the motorist produced a phony operator’s permit; the officer thereafter arrested Robinson, pursuant to department policy, and undertook a mandatory “full ‘field type search.’”<sup>64</sup> Police found a “crumpled-up” cigarette package in the left breast pocket of Robinson’s heavy coat containing fourteen gelatin capsules of heroin. Robinson was convicted of drug possession but his conviction was reversed on appeal.<sup>65</sup> A plurality of the D.C. Circuit concluded that when an arrest is made for a crime not requiring additional evidence for prosecution, such as the motor vehicle offense committed by Robinson, any incidental search must be limited to a “frisk” to discover weapons.<sup>66</sup>

59. *Id.* at 768.

60. *E.g.*, *United States v. Mills*, 472 F.2d 1231, 1234 (D.C. Cir. 1972) (en banc) (asserting “the bare fact that a person is validly arrested does not mean that he is subject to any and all searches that the arresting officer may wish to conduct.”); *Lemon v. State*, 514 P.2d 1151, 1158-59 n.17 (Ak. 1973) (asserting that “[t]he intensity of the search depends on the nature of the crime charged.”).

61. 414 U.S. 218 (1973).

62. 414 U.S. 260 (1973).

63. *Robinson*, 414 U.S. at 220 (citing D.C. Code § 40-302(d) (1967)).

64. *Id.* at 221-22 n.2. At an evidentiary hearing, a training instructor for the D.C. Police Department characterized such a search as follows:

Basically, it is a thorough search of the individual. We would expect in a field search that the officer completely search the individual and inspect areas such as behind the collar, underneath the collar, the waistband of the trousers, the cuffs, the socks and shoes. Those are the areas we would ask a complete and thorough search of.

*Id.* When asked what officers are instructed to do upon detecting a suspicious item on the inside of a suspect’s garment, as in *Robinson*, the instructor replied:

If it is a full custody arrest and [the officer] is conducting a field search, we expect him to remove anything and examine it to determine exactly what it is . . . . In conducting a field search, which is done any time there is a full custody arrest, we expect the officer to examine anything he might find on the subject.

*Id.* The instructor contrasted a “field search,” required with a custodial arrest, with a “pat-down” search, permitted in non-custodial situations; the latter permits further inquiry into a suspicious object only if the officer has a reasonable and “articulable suspicion” that the object is a weapon. *Id.* See generally *infra* notes 206-216 and accompanying text (discussing *Terry v. Ohio*, 392 U.S. 1 (1968) and “*Terry* frisks” for weapons, concerning “stops” based on reasonable suspicion).

65. *United States v. Robinson*, 471 F.2d 1082, 1109 (D.C. Cir. 1972) (en banc).

66. *Id.* at 1117.

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By a 6-3 vote, the *Robinson* Court reversed, based on the “unqualified authority” of police to search all persons arrested.<sup>67</sup> Despite what it acknowledged as ambiguous precedential support for such an unqualified right,<sup>68</sup> the Court proclaimed that officers are entitled to search incident to a “full custodial arrest,” regardless of the likelihood that the search will reveal a dangerous weapon or evidence material to the prosecution of the offense on which the arrest is predicated. According to the majority:

The authority to search . . . while based on the need to disarm and to discover evidence, does not depend on what a court might later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect . . . . It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a “reasonable” search under that Amendment.<sup>69</sup>

The Court emphasized that it is the “proximity, stress, and uncertainty, and not . . . the grounds for arrest” that justify a warrantless search.<sup>70</sup> It is the “fact of custodial arrest which gives rise to the authority to search,”<sup>71</sup> rather than the possible threat faced by an officer or the likely presence of “fruits or further evidence of the particular crime for which the arrest is made.”<sup>72</sup>

In *Gustafson*, the defendant was arrested for failure to be in possession of his operator’s license while driving.<sup>73</sup> A subsequent search revealed a cigarette box in Gustafson’s coat pocket containing marijuana cigarettes. The Court upheld the search on the basis of the categorical rule enunciated in *Robinson*:

Though the officer here was not required to take the petitioner into custody by police regulations as he was in *Robinson*, and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. It is sufficient that the officer had probable cause to arrest the petitioner and that he

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67. *Robinson*, 414 U.S. at 225.

68. The majority observed that “[v]irtually all of the statements of this Court affirming the existence of an unqualified authority to search incident to a lawful arrest are dicta.” *Id.* at 230; *see also id.* at 232-33 (stating that “[w]hile these earlier authorities are sketchy, they tend to support the broad statement of the authority to search incident to arrest found in the successive decisions of this Court, rather than the restrictive one which was applied by the Court of Appeals in this case.”). In fact, prior opinions of the Court often evinced concern that there be a nexus between the basis for arrest and the likelihood that material evidence would be present, as at common law. *See, e.g., Sibron v. New York*, 392 U.S. 40, 67 (1968) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964) (emphasis added) (stating that searches incident are justified “by the need to seize weapons and other things which might be used to assault the officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime”)); *see also Jack v. United States*, 387 F.2d 471, 473-74 (9th Cir. 1967) (“If a search for evidence of crime is justified as incident to an arrest, it must be because the evidence relates to the crime for which the arrest is made . . . and not to some other charge the police had hopes of being able to bring against the person arrested.”).

69. *Robinson*, 414 U.S. at 235.

70. *Id.* at 234 n.5. The exigency-based view of the majority was reflected in Judge Wilkey’s dissent in *Robinson* in the D.C. Circuit. *Robinson*, 471 F.2d at 1114 (Wilkey, J., dissenting) (“[T]he absence of a warrant is justified by the emergency created by the arrest itself.”).

71. *Robinson*, 414 U.S. at 236.

72. *Id.* at 234.

73. *Gustafson*, 414 U.S. at 261-62.

lawfully effectuated the arrest and placed the petitioner in custody . . . [I]t is the fact of custodial arrest which gives rise to the authority to search . . .<sup>74</sup>

Taken together, *Robinson* and *Gustafson* marked a significant advance in police authority to search incident to arrest. No longer did the law require an evidentiary nexus between the items seized and the basis for arrest; nor must there be a discernible threat to officer safety.<sup>75</sup> Police were freed to conduct full-body searches subsequent to any arrest, and permitted to seize any and all weapons or contraband they might find.<sup>76</sup> In sum, for the first time, the Court laid down a “bright-line rule” that tied search incident authority to the occurrence of a “lawful custodial arrest,”<sup>77</sup> without regard to the factual particularities of the police-citizen encounter.<sup>78</sup>

The Court confirmed its categorical approach eight years later in *New York v. Belton*.<sup>79</sup> In *Belton*, the Court revisited the issue examined in *Chimel* relating to the permissible scope of searches incident, with particular regard to traffic-

74. *Id.* at 265.

75. See *supra* notes 21-44 and accompanying text.

76. The Court’s invocation of a categorical rule was radical in itself, but also served to augment more general increases in the basic discretionary authority of police. With respect to many offenses, of course, the categorical right to search is not terribly significant because arrestees likely possess physically “the fruits, instrumentalities or other evidence of the crime for which the person was arrested.” *Robinson*, 461 F.2d at 1094. However, the extension in *Robinson* of search incident authority to violations where no further material evidence would likely be found (or be needed for successful prosecution) carried special significance: it allowed police to search pursuant to the myriad of low-level, nonevidentiary offenses for which arrest increasingly has been authorized (for example, automobile-related offenses, jaywalking, littering, loitering), and to seize absolutely anything incriminating they might find. See *infra* notes 124-126, 138-149, and accompanying text (discussing a broad array of petty and misdemeanor offenses for which arrest is now authorized); see also CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE 182 (4th ed. 2000) (arguing that had *Robinson* “forbade full searches absent probable cause in the limited context of arrests for minor traffic violations, it would have better implemented the rationale behind the search incident exception and still adopted a relatively precise rule”).

77. For other judicial statements of the era lending dispositive importance to the fact of arrest, see, for example, *United States v. Worthy*, 409 F.2d 1105, 1108 (D.C. Cir. 1968) (“[T]he lawfulness of the arrest clothes with validity the subsequent search and seizure of the contraband narcotics.”); *Charles v. United States*, 278 F.2d 386, 388 (9th Cir. 1960) (stating “[t]hat a search is incident to a valid arrest saves it from proscription”).

78. Another court at the time identified a more practical concern underlying the Court’s bright-line rule:

To make the nature of the offense the key to whether a full search may be undertaken as part of a valid arrest inevitably would be to create still another judicial morass, and would greatly complicate the day-to-day performance of the police officer’s vital duties. Perhaps even more importantly, it would unduly endanger the safety of the officer without conferring any benefit on the public at large.

*United States v. Simmons*, 302 A.2d 728, 733 (D.C. 1973). The *Simmons* court noted that at the time of his arrest Simmons was actually, unbeknownst to the officer, wanted on a more serious charge, a fact that “clearly . . . could have had a significant effect on Simmons’ response to being arrested.” *Id.* at 733 n.12. On this basis, the court deemed it “unjustifiabl[e]” to assume “a rational and peaceful response by anyone who is taken into custody pursuant to an arrest having its genesis in a traffic offense.” *Id.* *Contra* *People v. Watkins*, 166 N.E.2d 433, 437 (Ill. 1960) (“A uniform rule permitting a search in every case of a valid arrest, even for minor traffic violations, would greatly simplify our task and that of law enforcement officers. But such an approach would preclude consideration of the reasonableness of any particular search, and so would take away the protection that the constitution is designed to provide.”).

79. 453 U.S. 454 (1981).

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related encounters. Police in *Belton* observed a car speeding, and upon detaining the four occupants noted the aroma of burned marijuana and an envelope on the floor of the vehicle marked "Supergold." The suspects were then placed under arrest for marijuana possession, provided *Miranda* warnings, and searched after being separated from one another along the road outside the car.<sup>80</sup> Finding nothing incriminating on the bodies of the four, the officer turned his attention to the back seat of the car and found a black leather jacket belonging to Belton, which was found to contain cocaine in a zipped pocket.<sup>81</sup> The New York Court of Appeals held that a warrantless search "of the zippered pockets of an unaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article."<sup>82</sup>

The Supreme Court disagreed. Limiting its holding to the "meaning of *Chimel's* principles in this particular and problematic context,"<sup>83</sup> the Court held that incident to a lawful custodial arrest an officer can search the (1) "passenger compartment" of the automobile in which the arrestee is riding, as well as (2) "contents of any containers found within the passenger compartment."<sup>84</sup> Such a limit, the Court reasoned, was consistent with the area of "immediate control" logic adopted in *Chimel*, yet mindful that items in the "relatively narrow compass of the passenger compartment" can be reached by the arrestee and thus trigger search incident concerns.<sup>85</sup> As with the categorical authorization extended in *Robinson* and *Gustafson*, the *Belton* majority refused to limit the scope of the search in accord with the likelihood that a weapon or evidence germane to the arrest could be concealed in the compartment area or particular container actually searched.<sup>86</sup> Nor was it of any moment that Belton could not, because he was outside the car at the roadside, immediately reach any evidence or weapons that might be in the car.<sup>87</sup>

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80. *Id.* at 455-56.

81. *Id.* at 456.

82. *People v. Belton*, 407 N.E.2d 420, 421 (N.Y. 1980).

83. *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981). The *Belton* Court added that its decision "in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.*

84. *Id.* at 460. The Court defined a "container" to include: "closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." *Id.* at 460 n.4.

Prior to *Belton*, courts reached divergent results on the question of whether police enjoyed a categorical right to search based on motor vehicle violations, although most appeared to reject any such right. *E.g.*, *State v. Pierce*, 642 A.2d 947, 962 (N.J. 1994) (noting "the general rule in state courts prior to *Belton* was that a vehicular search could not be justified solely on the basis of a contemporaneous traffic arrest").

85. *Belton*, 453 U.S. at 460.

86. *Id.* at 461.

87. *Id.* at 466 (Brennan, J., dissenting) (arguing that the majority "adopt[ed] a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car"); *id.* at 472 (White, J., dissenting) (inferring that under the majority's rule "searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest").

Today, some thirty years after its full recognition in *Chimel*, the search incident to arrest exception provides law enforcement a powerful tool.<sup>88</sup> Incident to a lawful custodial arrest, police are authorized to conduct a full search of the bodies of arrestees<sup>89</sup> and the area within their “immediate control.”<sup>90</sup> Under the bright-line rule of *Robinson*, it is immaterial whether weapons or evidence pertaining to the alleged offense justifying arrest are likely present; police can seize anything incriminating they might find.<sup>91</sup> If the suspect is arrested while in an automobile, *Belton* allows police to search the passenger compartment of the vehicle and any containers found therein.<sup>92</sup> Search authority exists even when police have summoned the suspect to the roadside,<sup>93</sup> and after the suspect has been handcuffed and placed in a police car.<sup>94</sup> Moreover, the search can extend to the personal belongings of passengers not actually arrested,<sup>95</sup> and even to auto interiors when the suspect has exited the vehicle before the moment of arrest and hence is not technically an “occupant” (as in *Belton*).<sup>96</sup> Not surprisingly, *Belton* has been extended outside the auto context, with courts at times permitting searches of containers within the “immediate control” of suspects at the time of arrest, notwithstanding that the arrest did not occur in connection with a car.<sup>97</sup> Increasingly, the sole limits on search incident authority are that the search be more or less “contemporaneous” with the arrest,<sup>98</sup> and that the fruits of the search not be used retroactively to justify the arrest.<sup>99</sup> The

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88. It bears mention that a handful of states have adopted more restrictive approaches to search incident authority pursuant to their state constitutions. *E.g.*, *Joubert v. State*, 977 P.2d 753, 757 (Ak. Ct. App. 1999) (permitting searches incident to arrest only in regard to weapons, permitting “examination of articles that could hold a weapon of normal size” and of evidence of the crime for which the suspect was arrested); *Pierce*, 642 A.2d at 959-60 (precluding categorical right to search incident to arrest based on motor vehicle offenses); *State v. Johnson*, 909 P.2d 293, 303 (Wash. 1996) (holding that warrantless search of auto compartment does not permit search of any locked containers discovered).

89. *Robinson*, 414 U.S. at 235-36.

90. *Chimel v. California*, 395 U.S. 752, 763 (1969).

91. *Robinson*, 414 U.S. at 234-36.

92. *New York v. Belton*, 453 U.S. 454, 460 (1981).

93. *Id.*

94. *E.g.*, *State v. Ray*, 609 N.W.2d 390, 396 (Neb. Ct. App. 2000).

95. *E.g.*, *State v. Lopez*, 10 P.3d 1207, 1210 (Ariz. Ct. App. 2000); *State v. Steele*, 613 N.W.2d 825, 827 (S.D. 2000); *State v. Pallone*, 613 N.W.2d 568, 581 (Wis. 2000). *But see* *State v. Parker*, 987 P.2d 73, 80 (Wash. 1999) (reaching opposite result under Washington Constitution).

96. *E.g.*, *State v. Wanzek*, 598 N.W.2d 811, 814-15 (N.D. 1999) (holding same yet noting split in authority). On January 8, 2001, the U.S. Supreme Court agreed to hear an appeal from a decision of the Supreme Court of Florida holding that *Belton*'s bright-line authority to search does not apply when a suspect was arrested after having voluntarily left his vehicle. *State v. Thomas*, 761 So. 2d 1010 (Fla. 1999), *cert. granted*, 121 S. Ct. 755 (Jan. 8, 2001) (No. 00-391).

97. *E.g.*, *United States v. Abdul-Saboor*, 85 F.3d 664, 668 (D.C. Cir. 1996); *United States v. Johnson*, 846 F.2d 279, 281-82 (5th Cir. 1988); *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984).

In addition, the “relatively narrow compass of the passenger compartment,” envisaged in *Belton*, has been extended to hatchback and cargo areas in vehicles without a “trunk,” even when the area is covered by a built-in, retractable vinyl covering. *E.g.*, *United States v. Olguin-Rivera*, 168 F.3d 1203, 1206 (10th Cir. 1999).

98. *New York v. Belton*, 453 U.S. 454, 460 (1981); *Stoner v. California*, 376 U.S. 483, 486 (1964).

99. *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (citation omitted) (“[J]ustifying the arrest by the search and at the same time . . . the search by the arrest, just ‘will not do.’”).

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obvious appeal to law enforcement of the search incident exception,<sup>100</sup> and its potential for abuse, was evidenced in the Court's most recent pronouncement on the practice, *Knowles v. Iowa*,<sup>101</sup> discussed next.

### C. *Knowles v. Iowa* and "Searches Incident to Citation"

In keeping with "law reform" efforts first advanced by the American Bar Association and others beginning in the late 1960s,<sup>102</sup> the Iowa Legislature in 1983 enacted a law allowing local police to cite and release suspects, in lieu of formal arrest, for a broad range of offenses ranging from traffic offenses to many low-grade felonies.<sup>103</sup> Significantly, the law also expressly provided police blanket authority to execute incidental searches, even when electing to forego an arrest in favor of a citation.<sup>104</sup> Pursuant to this statutory authority, a Newton, Iowa police officer issued Patrick Knowles a ticket for traveling 43 m.p.h. in a 25 m.p.h. zone, and then searched Knowles' car.<sup>105</sup> The search uncovered a marijuana pipe and a small amount of marijuana under the front seat. Charged with separate counts of possessing marijuana and possessing marijuana in an automobile,<sup>106</sup> Knowles unsuccessfully moved to suppress the contraband, contending that the warrantless search of his vehicle pursuant to citation violated the Fourth Amendment.

In a 5-4 decision, the Iowa Supreme Court deemed the search permissible and affirmed Knowles' convictions.<sup>107</sup> Relying on several of its recent cases approving of the search incident to citation statute,<sup>108</sup> the Iowa court rejected Knowles' claim that "an actual arrest" was constitutionally required to validate a search, stating that any such assertion was "belied by those decisions that hold that the timing of the arrest need not precede the search."<sup>109</sup> Furthermore,

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100. *State v. Varnado*, 582 N.W.2d 886, 893 (Minn. 1998) ("A careful analysis of a search incident to arrest is prudent because, unlike a protective weapons search, a search incident to arrest is very broad in scope.").

101. 525 U.S. 113 (1998).

102. ABA STANDARDS FOR CRIMINAL JUSTICE §§ 10-2.1 to 10-2.3 (1968); MODEL CODE OF PRE-ARREST PROCEDURE § 120.2 (1975).

103. *E.g.*, IOWA CODE ANN. §§ 713.4 (West 1997) (second degree burglary), 714.2(1) (first degree theft), 714.1(2) (auto theft), 321.485(1)(a) (violation of traffic or motor vehicle equipment law).

104. IOWA CODE ANN. § 805.1(4) (West 1997) ("The issuance of a citation in lieu of arrest or in lieu of continued custody does not affect the officer's authority to conduct an otherwise lawful search."). This position was reflected in the original A.B.A. Standards. American Bar Association, STANDARDS RELATING TO PRETRIAL RELEASE § 1.4 (Approved Draft, 1968) ("Nothing in these standards should be construed to affect a law enforcement officer's authority to conduct an otherwise lawful search even though a citation is issued."). The Second Edition of the A.B.A.'s Standards, issued in the wake of *Chimel*, *Robinson*, and *Belton*, expressly renounced the search-incident-to-citation option. American Bar Association, STANDARDS RELATING TO PRETRIAL RELEASE § 10-2.4 (2d ed. rev. 1985) (stating that an officer "who decides *ab initio* to issue a citation cannot justify a search of the accused on the ground that the officer could have arrested the accused but did not").

105. *Knowles*, 525 U.S. at 114.

106. IOWA CODE ANN. §§ 124.401(3), 124.402(1)(e) (West 1995).

107. *State v. Knowles*, 569 N.W.2d 601, 603 (Iowa 1997).

108. *Id.* at 602 (citing *State v. Doran*, 563 N.W.2d 620 (Iowa 1997), *State v. Meyer*, 543 N.W.2d 876 (Iowa 1994), and *State v. Becker*, 458 N.W.2d 604 (Iowa 1990)).

109. *Id.* (citing *State v. Peterson*, 515 N.W.2d 23 (Iowa 1994) and *State v. Beatty*, 305 N.W.2d 496

the court reasoned, an officer's decision to forego a lawful arrest does not defeat authority to search when an "independent ground of an arrest on a more serious charge" develops as a result of the search.<sup>110</sup> In short, a full search is justified "when legal grounds for arrest are present," even if no actual arrest is undertaken; the existence of statutory authority to arrest, though unused, justified the search of Knowles' car.<sup>111</sup>

A unanimous U.S. Supreme Court reversed.<sup>112</sup> Writing for the Court, Chief Justice Rehnquist unequivocally stated that the "procedure" of searching an individual pursuant to a citation issued for a relatively minor traffic violation violated the Fourth Amendment.<sup>113</sup> The Chief Justice noted that the search was justified by neither of the historic rationales supporting the search incident exception. The first, concern for officer safety, did not apply because the prospect of danger associated with issuing a traffic ticket "is a good deal less than in the case of custodial arrest."<sup>114</sup> A "routine traffic stop" differs from a custodial arrest, which the Court characterized as involving "extended exposure," with "attendant proximity, stress, and uncertainty."<sup>115</sup> By comparison, the detention experienced by Knowles was a "relatively brief encounter . . . more analogous to a so-called 'Terry stop' than to a formal arrest."<sup>116</sup> Nor was the second rationale for the search incident exception—the need to discover and preserve evidence for later use at trial—served. This was because "[o]nce Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."<sup>117</sup> In short, the *Knowles* Court refused to extend the "bright-line" rule of *Robinson* "to a situation where the concern for officer safety is not present to the same extent and the concern for destruction or loss of evidence is not present at all."<sup>118</sup>

The unanimous result in *Knowles*, a refreshing departure from the

(Iowa 1981)).

110. *Id.* (citing *People v. Rossi*, 430 N.E.2d 233 (Ill. 1981)).

111. *Id.*

112. *Knowles v. Iowa*, 525 U.S. 113, 119 (1998).

113. *Id.* at 114.

114. *Id.* at 117.

115. *Id.* (quoting *Robinson*, 414 U.S. at 234 n.5).

116. *Id.* (quoting *Berkemer v. McCarty*, 468 U.S. 420, 437 (1984)). In so holding, the Court was at pains to emphasize that,

this is not to say that the concern for officer safety is absent in the case of a routine traffic stop. It plainly is not. But while the concern for officer safety in this context may justify the "minimal" additional intrusion of ordering a driver and passengers out of the car, it does not by itself justify the often considerably greater intrusion attending a full field-type search.

*Id.*

117. *Id.* at 118. The Court rejected Iowa's argument that a search was justified out of concern that a suspect might try to conceal or destroy evidence relating to his identity or evidence relating to another, undetected crime. As for the former, "if a police officer is not satisfied with the identification furnished by the driver, this may be a basis for arresting him rather than merely issuing a citation." *Id.* As for the latter, "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." *Id.*

118. *Id.* at 119.

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Rehnquist Court's tendency to reflexively endorse aggressive police behaviors, is significant for at least two reasons. First, the Court resolutely answered a question it left open a quarter century before in *Robinson*: whether the search of a person incident to a citation issued during a "routine traffic stop" passes constitutional muster.<sup>119</sup> Quite clearly, it does not, and in so concluding the *Knowles* Court reaffirmed its fealty to the *sine qua non* of arrest as a constitutional precondition to search incident authority.<sup>120</sup> Second, rather than summarily barring the practice of searches incident to citation, the *Knowles* Court unequivocally anchored its decision in the historic concerns justifying the search incident exception (officer safety and evidence destruction), emphasized in *Chimel*, and thus delivered a welcome measure of doctrinal clarity. The unambiguous signal of *Knowles* has already resulted in reversals of cases involving citation-based searches,<sup>121</sup> and rendered constitutionally suspect the

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119. *United States v. Robinson*, 414 U.S. 218, 235 n.6 (1973). *But cf.* *Douglas v. Buder*, 412 U.S. 430, 431-32 (1973) (holding that traffic citation did not constitute an arrest, for purposes of violating probation, because offender was not taken into "custody").

120. *Supra* notes 51-87 and accompanying text. As the South Dakota Supreme Court recently stated, in *Knowles* the "Supreme Court declined to extend the parameters of *Belton's* application where no arrest was made and therefore, the same concerns for officer safety and destruction of or concealment of evidence does not exist." *State v. Steele*, 613 N.W.2d 825, 827 n.2 (S.D. 2000); *see also State v. Pallone*, 613 N.W.2d 568, 577 (Wis. 2000) (citing *Knowles* and stating "[f]or the search incident to arrest exception to apply, there must be an arrest...The requirement of an arrest is a 'bright line rule.'").

It is worth noting that the case law provides hints of a somewhat broader interpretation of *Knowles*. Focusing on *Knowles'* fact-specific orientation, the view has been expressed that searches incident to types of seizures short of formal custodial arrests are permissible if either of the two historic search incident justifications are satisfied, when there exists a likelihood that evidence relating to the arrest will be uncovered by a search (unlike in *Knowles*). *See, e.g., United States v. McLaughlin*, 170 F.3d 889, 891 n.2 (9th Cir. 1999); *DeBroux v. Commonwealth*, 528 S.E.2d 151, 161-62 (Va. Ct. App. 2000) (Elder, J., dissenting). In his treatise Professor LaFave characterizes the question as a "hard one" that "remains open after *Knowles*." LaFave, *supra* note 7, § 5.2 at Supp. 14. However, any such interpretation runs contrary to the bright-line nature of the search incident to arrest exception, the certainty of which avoids any need for "case-by-case" determinations by police in their "quick ad hoc judgment[s]." *Robinson*, 414 U.S. at 235. Also, as *Robinson* held, it is an arrest, as such, and the exigencies it threatens, that justifies and makes "reasonable" the search incident. *See id.* at 235-36.

The novel interpretation also threatens considerable mischief, as evidenced in *State v. Evans*, 723 A.2d 423, 435 (Md. 1999), discussed at length *infra* at notes 250-272 and accompanying text. In *Evans*, the court approved of a procedure whereby the defendants were subjected to a full search notwithstanding that they were merely photographed, identified, and released at the scene. The court distinguished *Knowles* both because the detentions qualified as arrests under its idiosyncratic test and because it deemed the search incident rationales otherwise satisfied by the facts:

unlike the citation of *Knowles* for speeding, the arrests of [defendants] for drug trafficking incorporated both of the historical justifications for conducting a full search incident. . .

This Court and the Court of Special Appeals have often recognized the inherent danger of drug enforcement, such that an investigatory stop based upon a reasonable suspicion that a suspect is engaged in drug dealing 'can furnish the dangerousness justifying a frisk' for weapons. . . . While admittedly not transporting the arrestees to the station house, the officers were nonetheless engaged in more than a routine investigatory stop . . . [which] took some time and obviously placed the officers at significant risk.

*Evans*, 723 A.2d at 522 (citations omitted). The logical inference of the foregoing is to extend the bright-line authority of the search incident exception to numerous types of detentions, short of formal arrests, and to perhaps imbue *Terry* stops with the search authority afforded custodial arrests by *Chimel*, *Robinson* and *Belton*.

121. *E.g., Welch v. State*, 741 So. 2d 1268 (Fla. Dist. Ct. App. 1999) (invalidating search based on

groundswell of statutory provisions like Iowa's expressly allowing police to search when a citation is issued in lieu of arrest.<sup>122</sup>

Nevertheless, the unanimous outcome of *Knowles* and its seemingly self-evident teaching that an "arrest" is a necessary precondition to a search incident to arrest, belie significant confusion in search incident jurisprudence. Several of the key areas of this confusion are addressed next.

## II. WHAT *KNOWLES* DID NOT DECIDE: UNRESOLVED ISSUES RELATING TO SEARCH INCIDENT TO ARREST AUTHORITY

### A. Availability of Search Incident Authority for Minor Offenses

While at last the Court in *Knowles* addressed the propriety of searches incident to citation, it failed to address a related question that has bedeviled search and seizure law for decades: whether the Fourth Amendment allows police to execute warrantless arrests for non breach of the peace misdemeanor or petty offenses, such as the speeding offense committed by Patrick Knowles, and conduct a search incident as a result.<sup>123</sup> The propriety of such arrests has been the subject of ongoing critical commentary,<sup>124</sup> and judicial disagreement for years,<sup>125</sup> despite Justice Stewart's rumination in his *Gustafson* concurrence

citation issued for second degree misdemeanor of driving without a license); *State v. Gascoigne*, 594 N.W.2d 418 (Wis. Ct. App. 1999) (invalidating search based on citation for erratic driving).

122. *E.g.*, ARK. R. CRIM. P. 5.5 (1996); FLA. STAT. ANN. § 901.28 (West 1997); MINN. R. CRIM. PRO. 6.01(4) (West 1997).

123. Although the *Knowles* facts concerned a seizure for the minor offense of auto speeding, the outcome and rationale appear applicable in non-auto cases. This view was endorsed by counsel for the State of Iowa in the *Knowles* oral argument, and is evident in cases interpreting *Knowles*. Oral Argument Transcript, *Knowles*, available at 1998 WL 781827, at \*25 (acknowledging that holding would apply to jaywalker); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (applying *Knowles* to arrest for littering); *Caraballo v. State*, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000) (applying *Knowles* to arrest for being in possession of faulty identification—a suspended driver's license—while operating a bicycle); *State v. Evans*, 723 A.2d 423 (Md. 1999) (applying *Knowles* to felony drug arrest); *State v. Chearis*, 995 S.W.2d 641 (Tenn. Crim. App. 1999) (applying *Knowles* to drinking in public); *Commonwealth v. Lovelace*, 522 S.E.2d 856 (Va. 1999) (same). *But see* *United States v. Taylor*, No. 97-6146, 1999 WL 98576 \*3 n.2 (6th Cir. Jan. 27, 1999) (deeming *Knowles* inapposite in a trespassing case, both because *Knowles* involved a "routine traffic stop" and because an arrest was executed), cert. denied, 526 U.S. 1126 (1999).

124. *E.g.*, Thomas R. Folk, *The Case for Constitutional Constraints Upon the Power to Make Full Custody Arrests*, 48 CINN. L. REV. 321 (1979); Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMP. L. REV. 221 (1989); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771 (1993).

As noted, at common law warrantless arrests for non-felonies were limited to those involving breaches of the peace committed in the presence of police. *See supra* notes 26-27 and accompanying text. Over time, however, the controversy has come to be whether the use of arrest for minor misdemeanor and petty offenses committed in officers' presence more generally comports with the reasonableness requirement of the Fourth Amendment. *E.g.*, *United States v. Mota*, 982 F.2d 1384 (9th Cir. 1993); *State v. Lark*, 748 A.2d 1103 (N.J. 2000).

125. For instances of courts denying Fourth Amendment challenges to arrests for minor offenses see, for example, *United States v. Lugo*, 170 F.3d 996, 1003 (10th Cir. 1999) (speeding); *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (riding bicycle without a head lamp); *Fisher v. Washington Metro Area Transit Auth.*, 690 F.2d 1133, 1139 n.6 (4th Cir. 1982) (eating on subway); *State v. Kearse*,

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that a “persuasive claim” might be made against the practice.<sup>126</sup> The issue, which Professor Wayne LaFave refers to in his treatise as one “of overarching importance in current criminal justice administration,”<sup>127</sup> was ripe for potential resolution in *Knowles* because of Iowa’s grant of blanket legislative authority to police to arrest for minor violations, including traffic offenses. However, because *Knowles* failed to raise the facial challenge in proceedings below,<sup>128</sup> the Iowa statute was analyzed only as applied to him, raising the exclusive question of whether the officer’s decision to issue a ticket, in lieu of arrest, barred an incidental search.<sup>129</sup> The *Knowles* Court thus overtly neglected to revisit *Robinson*’s bright-line rule that permits searches as a result of any custodial arrest, without regard to the nature of the predicate offense.<sup>130</sup> As the Indi-

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986 S.W.2d 423, 425 (Ark. Ct. App. 1999) (speeding); *State v. Sparks*, 422 S.E.2d 293, 294-95 (Ga. App. 1992) (littering); *State v. Ranson*, 511 N.W.2d 97, 100 (Neb. 1994) (same); *State v. Harmon*, 910 P.2d 1196, 1203 (Utah 1995) (driving with suspended license); *State v. Hehman*, 544 P.2d 1257, 1260 (Wash. Ct. App. 1977) (driving with broken tail light). See generally *State v. Pallone*, 613 N.W.2d 568, 579 (Wis. 2000) (“[T]he Fourth Amendment does not preclude searches incident to arrests for non-criminal violations.”).

For instances of cases deeming such arrests constitutionally unreasonable see, for example, *State v. Bertella*, No. 23679-6-11, 2000 WL 128690 \*1 (Wash. Ct. App. Feb. 4, 2000) (violation of drug paraphernalia laws); *State v. Carver*, 577 N.W.2d 245, 250 (Minn. 1998) (speeding); *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993) (riding a bicycle without a bell); *Barnett v. United States*, 525 A.2d 197, 199 (D.C. App. 1987) (jaywalking); *State v. Hanson*, 364 N.W.2d 786, 789 (Minn. 1985) (petty misdemeanor of marijuana possession).

Courts have also invalidated arrests for minor offenses not because it is constitutionally unreasonable to do so, but rather because the factual circumstances fail to satisfy the statutory provision authorizing police to arrest (in lieu of issuing a citation), commonly called “cite-and-release” provisions. *E.g.*, *State v. Jones*, 727 N.E.2d 886, 895 (Ohio 2000) (invalidating warrantless arrest for jaywalking because the facts failed to satisfy the statutory conditions authorizing an arrest); *State v. Walker*, 12 S.W.3d 460, 468 (Tenn. 2000) (invalidating arrest for violation of noise ordinance on same basis). For examples of statutory formulations see, for example, MINN. R. CRIM. PRO. § 6.01, subd. 1(1)(a) (West 1999) (citations required unless “it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation.”); TENN. CODE ANN. § 40-7-118(b),(c) (1997) (citations required unless offense likely to resume or continue, suspect endangers himself or others, or suspect cannot produce satisfactory identification); VA. CODE ANN. § 19.2-74 (same).

Moreover, at times the courts have invalidated arrests for petty offenses when local law expressly prohibits such arrests. See, *e.g.*, *United States v. Mota*, 982 F.2d 1384, 1388-89 (9th Cir. 1993) (invalidating arrest when the state had “abjured the authority to execute arrest” for selling food without a license); *Barnett v. United States*, 525 A.2d 197, 199 (D.C. App. 1987) (same, regarding arrest for jaywalking); *Thomas v. State*, 614 So. 2d 468, 471 (Fla. 1993) (same, regarding violation of ordinance that prohibited riding bike without a bell); see also OHIO REV. CODE ANN. § 2935.36(A) (Anderson 1999) (stating that “[n]otwithstanding any other provision . . . when a law enforcement officer is otherwise authorized to arrest a person for the commission of a minor misdemeanor, the officer shall not arrest the person, but shall issue a citation.”).

126. *Gustafson v. Florida*, 414 U.S. 260, 266-67 (1973) (Stewart, J., concurring) (“[I]t seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made.”).

127. LAFAVE, *supra* note 7, §5.2(b), at 69.

128. *State v. Knowles*, 569 N.W.2d 601, 603 (Iowa 1997).

129. *Knowles*, 525 U.S. at 116 (“*Knowles* did not argue below, and does not argue here, that the statute could never be lawfully applied. The question we therefore address is whether the search at issue, authorized as it was by state law, nonetheless violates the Fourth Amendment.”).

130. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“It is the fact of the lawful arrest which establishes the authority to search . . .”). The *Robinson* Court refused “to qualify the breadth of the

ana Court of Appeals recently observed:

Nothing in *Knowles* purports to change the rule that there is no distinction for purposes of search justification based on the crime for which the person is arrested. Rather, the “bright-line rule” is simply that there must be a custodial arrest, as opposed to the mere issuance of a citation, before there may be a full field search incident to arrest.<sup>131</sup>

*Knowles*' failure to address the constitutionality of such arrests and searches, is complicated by the Court's 1996 decision in *United States v. Whren*.<sup>132</sup> In *Whren*, police stopped a sport utility vehicle occupied by two African-American males in a “high drug area.” Lacking an initial articulable suspicion of illegal behavior that would justify a stop, the officers observed the vehicle long enough to see its driver failing to signal a turn and driving at an “unreasonable” rate of speed. After detaining the vehicle, the officers observed in plain view two plastic bags containing crack cocaine in the hands of one of the occupants, resulting in defendants' arrest for drug possession.<sup>133</sup>

The *Whren* Court unanimously rejected the argument that the drugs should have been suppressed because the reason for the initial stop, the issuance of a traffic citation, was pretextual. In so holding, the Court adopted a “could have” test, i.e., that the officers' subjective motivation was constitutionally irrelevant so long as a legal basis existed for the stop.<sup>134</sup> That the officers waited for a minor violation to occur before acting, perhaps to follow up on their discriminatory suspicions of more serious criminal activity, was of no moment. According to the Court, although evidence of selective enforcement might implicate a Fourteenth Amendment Equal Protection claim, “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”<sup>135</sup>

Not surprisingly, the synergy of *Knowles* and *Whren*,<sup>136</sup> combined with ex-

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general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes.” *Id.* at 234. Likewise, *Gustafson* made clear that the concern for destruction of evidence does not turn on the nature of the predicate offense, but rather on the fact of arrest. *Gustafson*, 414 U.S. at 265 (stating “the arguable absence of ‘evidentiary’ purpose for a search incident to a lawful arrest is not controlling”).

131. *Leitch v. State*, 736 N.E.2d 1284, 1287 (Ind. Ct. App. 2000); see also *United States v. Herring*, 35 F. Supp. 2d 1253, 1256 (D. Or. 1999) (citing *Knowles* and stating that “the Court made it clear that it is the arrest itself, not the underlying grounds, that supports the search-incident doctrine”). It bears mention, however, that *Knowles* on occasion has been interpreted in a considerably broader sense to invalidate arrests, and hence searches incident, for non-serious offenses. *Kearse v. State*, 986 S.W.2d 423, 428 (Ark. Ct. App. 1999) (Griffin, J., concurring); *State v. Lark*, 726 A.2d 294, 298-99 (N.J. Ct. App. 1999), *aff'd*, 748 A.2d 1103 (N.J. 2000); *State v. Chearis*, 995 S.W.2d 641, 644 (Tenn. Crim. App. 1999).

132. 517 U.S. 806 (1996).

133. *Id.* at 808-09.

134. *Id.* at 809-10.

135. *Id.* at 813.

136. *Whren*, of course, addressed police power to “stop,” not arrest, motorists on the basis of a motor vehicle-related offense. Despite this important factual distinction, courts regularly apply the rationale of *Whren* to non-traffic offenses and arrests (rather than merely “stops”). *E.g.*, *United States v. Clarke*, 110 F.3d 612 (8th Cir. 1997); *United States v. Hudson*, 100 F.3d 1409 (9th Cir. 1996); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999).

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pansive police authority to arrest for minor offenses, is now manifesting itself on the nation's streets.<sup>137</sup> Police, when authorized by local law, are now arresting individuals for major and minor offenses alike, and courts are citing *Knowles* as precedent to admit evidence seized pursuant to such arrests. By way of example, courts have recently condoned searches incident to arrest for: littering;<sup>138</sup> civil contempt (based on a civil bench warrant);<sup>139</sup> riding a bicycle on a sidewalk;<sup>140</sup> a juvenile curfew violation;<sup>141</sup> truancy;<sup>142</sup> speeding;<sup>143</sup> driving with a suspended driver's license;<sup>144</sup> violation of an auto seat belt law;<sup>145</sup> underage possession of alcohol;<sup>146</sup> use of drug paraphernalia;<sup>147</sup> urinating in public;<sup>148</sup> and operating a bicycle while in possession of a suspended motor vehicle driver's license (on reasoning that the document permitted misidentification).<sup>149</sup>

In short, today, American police enjoy historically unprecedented powers to arrest—and hence search—individuals.<sup>150</sup> In the current era of “zero toler-

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137. *United States v. Hill*, 195 F.3d 258, 264 (6th Cir. 1999) (concluding that *Knowles* “does nothing” to undercut the rationale and outcome in *Whren*).

138. *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999); *People v. Whitted*, 718 N.Y.S.2d 162 (N.Y. City Ct. 2000). The *Herring* court was at pains to note “facts in the record” suggesting pretext, including that in 1998 90% of those persons detained because of littering in the City of Portland were not arrested, yet denied the claim on the basis of *Whren*. *Herring*, 35 F. Supp. 2d at 1257-58.

139. *People v. Allibalogun*, 727 N.E.2d 633 (Ill. 2000).

140. *United States v. McFadden*, 238 F.3d 198 (2d Cir. 2001) (applying New York law).

141. *In re Charles C.*, 90 Cal. Rptr.2d 430, 432 (Cal. Ct. App. 1999); *In re J.M.*, 995 S.W.2d 838 (Tex. App. 1999).

142. *In re Humberto O.*, 95 Cal. Rptr.2d 248 (Cal. Ct. App. 2000); *In re R.D.*, 749 So. 2d 802 (La. Ct. App. 1999).

143. *Kearse v. State*, 986 S.W.2d 423 (Ark. Ct. App. 1999).

144. *Polke v. State*, 528 S.E.2d 537 (Ga. Ct. App. 2000); *State v. Brassfield*, 615 N.W.2d 628 (S.D. 2000).

145. *United States v. Castro*, 166 F.3d 728 (5th Cir. 1999) (en banc); *State v. West*, 20 S.W.3d 867 (Tex. Ct. App. 1999).

146. *Comm. v. Moscat*, 731 N.E.2d 544 (Mass. App. Ct. 2000), *rev. denied*, 737 N.E. 2d 467 (Mass. 2000)

147. *State v. Thompson*, No. 23805-5-11, 2001 WL 30058 (Wash. Ct. App. Jan. 12, 2001).

148. *McConnell v. State*, No. 14-99-897-CR, 2001 WL 8344 (Tex. Ct. App. Jan. 4, 2001).

149. *Caraballo v. State*, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000); *see also* *People v. McKay*, 98 Cal. Rptr.2d 858 (Cal. Ct. App. 2000) (upholding search incident based on defendant's failure to have tangible identification in his possession after being stopped for driving a bicycle the wrong way down a one-way street), *rehearing granted*, 101 Cal. Rptr. 2d 652 (Cal. 2000).

150. This power was virtually unknown until modern times. According to Professor Barbara Salken:

Prior to the mid 1800s . . . the summons was the rule . . . Not until the advent of the professional police force did arrest rules begin to change. Legislatures then adopted statutes granting sweeping arrest powers. Without considering whether the taking of immediate custody was necessary, legislatures began to authorize custodial arrests for minor crimes. This change appears to have been aimed at making it easier to arrest without a warrant, but the effect was to authorize custodial arrests for many offenses, such as ordinance and regulatory violations, that had previously not been subject to arrest at all.

Salken, *supra* note 124, at 258-59 (citations and footnotes omitted). Writing in 1936, Professor Jerome Hall commented on the vastly enlarged rights of police to execute warrantless arrests in response to misdemeanors:

[Recent statutes] have brought within the area of legal arrest a vast number of misdemeanors which were not breaches of the peace at common law, and hence not subject to arrest without

ance” policing, characterized by aggressive street and motor patrol enforcement of “quality-of-life” offenses,<sup>151</sup> and the concurrent pressure on police executives to “show results” amid already decreasing crime rates,<sup>152</sup> the historic concern remains timely.<sup>153</sup> Surely, *Knowles* will not abate this empirical reality. If police wish to search, on the basis of major and minor offenses alike, they must “arrest” suspects, logically increasing the likelihood of arrests.<sup>154</sup> To

warrant even though committed in the presence of an officer. Without statutory provision, courts have occasionally held that an offense is a felony *in order to legalize arrest without a warrant*, despite the otherwise unvaried interpretation of the same offense as a misdemeanor.

Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 363 (1936) (emphasis in original) (footnotes omitted). This expanded power is especially noteworthy in historical terms because, as noted, many serious crimes that we today classify as felonies were misdemeanors at common law. *United States v. Watson*, 423 U.S. 411, 439-40 (1976) (Marshall, J., dissenting) (noting same and providing examples).

151. See generally Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998); Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551 (1997); Wayne A. Logan, *Policing in an Intolerant Society*, 35 CRIM. L. BULL. 334 (1999).

Among the consequences of zero tolerance policing in New York City is a marked increase in the number of arrests without prosecution, mainly for non-serious offenses. Ford Fessenden & David Rohde, *Dismissed Before Reaching Court, Flawed Arrests Rise in New York*, N.Y. TIMES, Aug. 23, 1999 at A1. In 1998 alone, New York City police executed a record 345,130 arrests, a volume that outpaced reported crimes. *Id.*; see also Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1 (2000) (discussing national prevalence of arrests for non-serious crimes without prosecution and arguing that the practice violates the reasonableness requirement of the Fourth Amendment). Cf. FLOYD FEENEY, ARRESTS WITHOUT CONVICTION: HOW OFTEN THEY OCCUR AND WHY (1983).

New York police have continued their aggressive resort to arrest, despite the controversy surrounding the high-profile police shootings of Amadou Diallo and Patrick Dorismond. Kevin Flynn, *Lower Morale, Yes. But Apathy? Police Say They Are as Diligent as Ever, and the Numbers Agree*, N.Y. TIMES, June 18, 2000, at 25 (noting that arrests increased by 12% in 2000 over 1999); David Rohde, *Police Arrest Smokers in Subways, and Lawyers Object*, N.Y. TIMES, June 11, 2000, at 48 (recounting recent arrests for selling tamales on the street without a license and smoking in the subway); see also David Rohde, *In Teeming Courts, Finding Strength in Family Ties*, N.Y. TIMES, July 7, 2000 at A1 (describing impact on middle-class families whose members have been ensnared by aggressive “quality-of-life” policing, when arrested for petty offenses). This heightened aggressiveness is especially evident in poorer areas of the City. David Barstow, *View From New York Streets: No Retreat by Police*, N.Y. TIMES, June 25, 2000, at A1 (chronicling marked increases in arrests despite decreases in reported crime). Recent data from Minneapolis reflect similar outcomes as a result of aggressive police use of arrest in response to quality-of-life offenses. James Walsh & Dan Browning, *Presumed Guilty Until Proved Innocent*, STAR-TRIBUNE (Minneapolis), July 23, 2000, at A1 (noting significantly higher arrest rates for African-Americans with regard to broad array of minor offenses).

152. Logan, *supra* note 151, at 345 (arguing that police administrators now have an “institutional, volume-oriented incentive to make ‘bigger’ cases on the basis of custodial arrests and searches premised on petty crimes”); Barry Loveday, *Managing Crime: Police Use of Crime Data as an Indicator of Effectiveness*, 28 INT’L J. SOC. L. 215, 216 (2000) (“Police forces . . . are now judged on performance criteria, which embraces their success in reducing crime.”).

153. This power is not newly discovered. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 437-82 (Frank J. Remington ed., 1965) (chronicling widespread use of arrest to control incipient social disorder) [hereinafter LAFAVE, ARREST]. Reflecting on the landmark studies of the American Bar Foundation of the 1950s and 1960s, of which Professor LaFave’s work was a part, Professor Herman Goldstein more recently observed: “The substantial police involvement in an activity like traffic control, through the arrests made and the searches conducted, was used in various ways to control serious crime.” HERMAN GOLDSTEIN, *Confronting the Complexity of the Policing Function, in DISCRETION IN CRIMINAL JUSTICE: THE TENSION BETWEEN INDIVIDUALIZATION AND UNIFORMITY* 32 (Lloyd E. Ohlin and Frank J. Remington eds. 1993).

154. *E.g.*, *United States v. Castro*, 166 F.3d 728 (5th Cir. 1999) (en banc) (search based on arrest

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complicate matters further still, there exists increasing uncertainty among the lower courts over the basic question of whether an arrest must actually occur, and more generally what constitutes an arrest sufficient to trigger search incident authority, issues taken up next.

### *B. The “Could Have” Approach to Search Incident Analysis*

When faced with a motion to suppress evidence obtained from a search incident to arrest, courts traditionally address two basic questions. First, the reviewing court assesses whether probable cause existed to support what the parties agree was an arrest,<sup>155</sup> and perhaps whether local law permitted the arrest.<sup>156</sup> Second, the court looks to the characteristics of the search undertaken: (1) its timing—was it sufficiently “contemporaneous” with the arrest,<sup>157</sup> and (2) its extent—did the search conform with the spatial limits imposed by *Chimel* and *Belton*.<sup>158</sup>

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for seat belt violation); *United States v. Herring*, 35 F. Supp. 2d 1253 (D. Or. 1999) (search based on arrest for “offensive littering”); *Carballo v. State*, 753 So. 2d 695 (Fla. Dist. Ct. App. 2000) (search based on arrest for possessing an invalid auto driver’s license, while driving a bicycle); *Polke v. State*, 528 S.E.2d 537 (Ga. Ct. App. 2000) (search based on arrest for driving with a suspended license); *People v. Allibalogun*, 727 N.E.2d 633 (Ill. App. Ct. 2000) (search based on arrest for failure to appear in unrelated civil matter); *State v. West*, 20 S.W.3d 867 (Tex. Ct. App. 2000) (search based on seat belt violation); *In re J.M.*, 995 S.W.2d 838 (Tex. App. 1999) (search based on arrest for violation of juvenile curfew ordinance); *State v. Pallone*, 613 N.W.2d 568 (Wis. 2000) (search based on arrest for possessing open container of alcoholic beverage in vehicle). *Cf. Smith v. City of Chicago*, No. 97-C-0763, 1999 WL 162811 (N.D. Ill. March 9, 1999) (distinguishing *Knowles* in 42 U.S.C. § 1983 action because petitioner arrested, not merely cited, for failing to have proof of auto insurance and reckless driving).

Professor LaFave noted this same concern some 15 years ago, with respect to *Robinson* and *Belton*:

They create an incentive for police to make custodial arrests for extremely minor crimes whenever, because of a whim or some suspicion, they would like to be able to make a full search of a person or the passenger compartment of the vehicle in which he was riding. . . . A need exists for limits upon the power of police to resort to the custodial arrest alternative.

Wayne R. LaFave, “Seizures” *Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J. L. REFORM 417, 441 (1984); *see also* *United States v. Robinson*, 471 F.2d 1082, 1108 (D.C. Cir. 1972) (“The rule that a full search without a warrant will be supported by any lawful arrest would give dangerously broad discretion to the police officers who would apply it.”), *rev’d*, 414 U.S. 218 (1973); LAFAVE, ARREST, *supra* note 153, at 187 (noting that an arrest for a traffic violation “is commonly made when a search is desired”). *Cf. United States v. Rabinowitz*, 339 U.S. 56, 82 (1950) (Frankfurter, J., dissenting) (“Arrest under a warrant for a minor or trumped-up charge has been a familiar practice in the past, is a commonplace in the police state of today, and too well-known in this country.”).

155. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (“[W]hether [an] arrest [is] constitutionally valid depends . . . upon whether, at the moment the arrest was made, the officers had probable cause to make it.”).

156. *E.g., United States v. Mota*, 982 F.2d 1384, 1388 (9th Cir. 1993) (invalidating arrest for violation of food vendor licensing ordinance because state law had “abjured the authority to execute custodial arrests for offenses so minor that they are designated as infractions”); *see also supra* note 125 (citing other examples).

157. As noted by the Supreme Court of Connecticut, the search and seizure must be “substantially contemporaneous and . . . integral parts of the same incident.” *State v. Trine*, 673 A.2d 1098, 1110 (Conn. 1996). For examples of judicial efforts to construe this flexible standard, *see United States v. Tank*, 200 F.3d 627 (10th Cir. 2000); *Commonwealth v. Wright*, 742 A.2d 661 (Pa. 2000); *State v. Bour-saw*, 976 P.2d 130 (Wash. Ct. App. 1999).

158. *Supra* notes 52-60, 81-99 and accompanying text. Also, incident to an arrest police are entitled to “look in closets and other spaces immediately adjoining the place of arrest from which an attack

Yet another inquiry, however, has now assumed paramount importance: whether in fact an arrest occurred. In striking contrast to the Court's rich jurisprudence on "custody" in the context of *Miranda*,<sup>159</sup> and whether a "de facto arrest" occurred for purposes of *Terry*,<sup>160</sup> the Court has never directly addressed the crucial question of what constitutes an arrest for purposes of search incident doctrine and practice. Worse yet, the Court's nomenclature is remarkably inconsistent, variously requiring an "arrest" (*Chimel*); a "custodial arrest" (*Knowles*; *Robinson*); a "formal arrest" (*Knowles*); a "full custody" arrest (*Robinson*); or a "lawful custodial arrest" (*Robinson*, *Belton*). This fundamental question is addressed at length later here.<sup>161</sup>

Less technical, but surely no less important, is a crucial doctrinal question now dividing the courts, which must first be addressed. This question turns on whether mere probable cause to arrest, as opposed to the execution of an actual arrest (however defined), suffices to justify a search. This question would appear to have been laid to rest by the Court's 1973 decision in *Cupp v. Murphy*,<sup>162</sup> and more recently in *Knowles*. In *Murphy*, the defendant voluntarily appeared at the police station in relation to his wife's murder. Observing a spot of blood on Murphy's fingernail, police asked to take a scraping, and did so despite Murphy's refusal and the lack of a search warrant. The scraping revealed incriminating evidence subsequently admitted at Murphy's murder trial. The *Murphy* Court deemed the evidence inadmissible on search incident grounds because Murphy was not "formally arrested," despite the existence of probable cause.<sup>163</sup> Similarly, in *Knowles*, even though the officer possessed le-

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could be immediately launched." *Maryland v. Buie*, 494 U.S. 325, 334 (1980). Such a search is "protective" in nature, and is dedicated to ferreting out third parties potentially in the location that might harm the arresting officer(s). *Id.* at 335-36. The search "may extend only to a cursory inspection of those spaces where a person may be found," and is "not automatic"; it can be "conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene." *Id.* at 336.

159. Anne B. Poulin, *The Fourth Amendment: Elusive Standards; Elusive Review*, 67 CHI.-KENT L. REV. 127, 138 n.76 (1991) (noting that *Miranda* cases "dwell on the definitions of custody and interrogation"). For extended discussions of judicial efforts in this vein more generally see JAMES B. HADDAD ET AL., *CRIMINAL PROCEDURE: CASES AND COMMENTS* 82-92 (5th ed. 1998); YALE KAMISAR ET AL., *MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS* 515-18 (8th ed. 1994); Jefferson V. Smith, *The Threshold Question in Applying Miranda: What Constitutes Custodial Interrogation*, 25 S.C. L. REV. 699, 707-10 (1974); Daniel Yeager, *Rethinking Custodial Interrogation*, 28 AM. CRIM. L. REV. 1, 15-19 (1990).

160. *Infra* notes 208-222 and accompanying text.

161. *Infra* notes 280-337 and accompanying text.

162. 412 U.S. 291 (1973).

163. *Id.* at 293-95. The Court elaborated:

Where there is no formal arrest, as in the case before us, a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might likely instead be concerned with diverting attention away from himself. Accordingly, we do not hold that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant.

*Id.* at 296. The Court did, however, permit the admission of the evidence pursuant to what it called a "very limited search," one "necessary to preserve the highly evanescent evidence [police] found under [Murphy's] fingernails." *Id.*

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gal authority to arrest Knowles for speeding under Iowa law, the fact that he did not do so—having only issued a citation—invalidated the search undertaken.<sup>164</sup>

Taken together, *Murphy* and *Knowles* (not to mention *Robinson*, *Gustafson*, *Chimel*, and *Belton*, cases where the occurrence of arrest was uncontroverted) dictate that if a warrantless search is to be justified, an actual arrest occur—not merely that probable cause be present.<sup>165</sup> This conclusion is buttressed by the basic assumption implicit in the Court's search incident case law: that the threshold privacy intrusion associated with an actual arrest in significant part justifies the additional incremental intrusion attending a search.<sup>166</sup>

The case law, however, is rife with instances suggesting that the issue is far from resolved.<sup>167</sup> Indeed, for some time courts have approved of searches when police "could have" but did not actually arrest a suspect,<sup>168</sup> on reasoning quite

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164. *Knowles*, 525 U.S. at 118-19. Notably, the Iowa Supreme Court in *Knowles* expressly relied on the "could have" approach, as articulated in its prior decision in *State v. Doran*, 563 N.W.2d 620 (Iowa 1997). *Knowles*, 569 N.W.2d at 602. According to the *Doran* court, search incident authority:

Is dependent on facts that provide a legal basis for making a custodial arrest rather than the act of arrest itself . . . . We have adopted an objective or "could" assessment of the arresting officer's conduct in making the arrest "so long as the officer is legally permitted and objectively authorized to do so, an arrest is constitutional." . . . If the officer is legally permitted and objectively authorized to make the arrest, he is, for that reason alone, also authorized to make the search.

*Doran*, 563 N.W.2d at 622-23 (citation omitted). Dissenting, Justice Neuman offered:

It is, indeed, expedient . . . to enhance the power of police officers . . . . But the sweep of today's opinion will also sacrifice the privacy of "soccer moms" driving a little too fast to the ball field, senior citizens motoring along without a taillight, and otherwise "good kids" who fail to dim their high beams swiftly enough. All will be subject to search at the whim of the officer, not because they will be taken into custody, but because they could have been.

*Id.* at 624 (Neuman, J., dissenting).

165. See *supra* notes 51-99 and accompanying text; see also *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (stating that when "the detention does not rise to the level of a full-blown arrest . . . there appears to be no clear support at common law for physically searching the suspect").

166. *Robinson*, 414 U.S. at 235 (stating an "arrest of a suspect . . . is a reasonable intrusion under the Fourth Amendment" and "that intrusion being lawful, a search incident to the arrest requires no additional justification"); *id.* at 237 (Powell, J., concurring) (stating "an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person"); see also *Belton*, 453 U.S. at 461 (stating that "a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have"); *United States v. Edwards*, 415 U.S. 800, 809 (1974) (stating that an arrest takes an arrestee's privacy "out of the realm of protection"); *State v. Parker*, 987 P.2d 73, 81 (Wash. App. 1999) (stating the "authority to search following an arrest stems directly from the fact of the arrest itself and the concomitant lessening of the arrestee's privacy interest").

167. According to the Minnesota Court of Appeals, for instance, the U.S. Supreme Court has yet to decide "whether police may subject a person to a search to the same degree permitted incident to arrest if there is in fact probable cause to arrest but the defendant is not subsequently arrested." *State v. Bauman*, 586 N.W.2d 416, 420 (Minn. Ct. App. 1998) (citations omitted). The *Bauman* court hastened to add that "although 'incident to arrest' identifies a category of constitutionally permitted searches, neither the word 'incident' nor 'arrest' should be used preclusively . . ." *Id.* at 422.

168. E.g., *United States v. Ricard*, 563 F.2d 45, 49 (2d Cir. 1977) ("[T]he fact that [the officer] had cause to arrest appellant for speeding, even if he initially determined not to do so, was a sufficient predicate for a full search."); *Busby v. United States*, 296 F.2d 328, 332 (9th Cir. 1961) ("Once there is probable cause for an arrest without a warrant it is immaterial that a search . . . precedes the arrest."); *Com-*

clearly at odds with *Murphy* and *Knowles*. The analytic cornerstone of this metonymic approach is found in *Rawlings v. Kentucky*,<sup>169</sup> where the Court upheld a search that immediately preceded Rawlings' "formal arrest," based on his admitted ownership of drugs. According to the *Rawlings* Court, "[w]here the formal arrest follow[s] quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa," so long as the fruits of the search are "not necessary to support probable cause to arrest."<sup>170</sup> Applying *Rawlings*, courts frequently now condone warrantless searches without initial arrests simply when (1) probable cause to arrest exists independent of the fruits of the search and (2) the arrest, conducted after the search, is deemed broadly contemporaneous.<sup>171</sup> In justifying their outcomes, such courts often draw support from the words of Justice John Marshall Harlan and California Justice Roger Traynor. Concurring in the Court's 1968 decision in *Sibron v. New York*, Justice Harlan offered that "[i]f the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is no case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.'"<sup>172</sup> Justice Traynor reasoned in 1955:

[I]f the officer is entitled to make an arrest on the basis of information available to

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monwealth v. Mantinez, 692 N.E.2d 92, 96 (Mass. Ct. App. 1998) ("Probable cause for an arrest, even if not acted upon by a formal arrest, brings with it the 'search incident to arrest' exception to the warrant requirement for a search."); *Bauman*, 586 N.W.2d at 421 ("The principle of reasonableness that has guided the development of Fourth Amendment jurisprudence is consistent with allowing a search incident to arrest when probable cause exists at the time of the search, even if a formal arrest does not follow."); *State v. Roach*, 452 N.W.2d 262, 266 (Neb. 1990) ("It is not necessary that a formal arrest occur before a search is undertaken, as long as probable cause for arrest does exist."); *State v. Greenslit*, 559 A.2d 672, 674 (Vt. 1989) ("[I]t is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking the individual into custody."); see also WILLIAM E. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 12.3(b) (2d ed. 1995) ("[I]f the statutory authority exists for a custodial arrest, it is not important whether the officer actually makes a decision to take the arrestee into custody before conducting the search. As long as the officer could have taken the arrestee into custody, the search is permissible.").

169. 448 U.S. 98 (1980).

170. *Id.* at 111, 111 n.6. Not coincidentally, this qualifying criterion first appears in the case law in the 1920s, a time of increased litigation relative to search incident authority, in the face of the emerging exclusionary rule, and in which one sees the first traces of the broadened search incident authority we know today. *E.g.*, *State v. Reynolds*, 125 A. 636 (Conn. 1924); *Ingle v. Commonwealth*, 264 S.W. 1088 (Ky. 1924); *State v. McDaniel*, 237 P. 373 (Or. 1925). Notably, however, courts in this earlier era required both that the arrest and search be "practically simultaneous and that the defendant in fact be proven guilty." See Sam B. Warner, *The Uniform Arrest Act*, 29 VA. L. REV. 315, 326 n.22 (1942).

171. See, e.g., *United States v. Landfair*, 207 F.3d 521 (8th Cir. 2000); *United States v. Lugo*, 170 F.3d 996 (10th Cir. 1999); *United States v. Anchondo*, 156 F.3d 1043 (10th Cir. 1998); *United States v. Morris*, 738 F. Supp. 20 (D.D.C. 1990); *Hopper v. City of Prattville*, 2000 WL 127221 (Ala. Crim. App. 2000); *Blockman v. State*, 11 S.W.3d 562 (Ark. Ct. App. 2000); *Commonwealth v. Moscat*, 731 N.E.2d 544 (Mass. App. 2000); *Commonwealth v. Mantinez*, 692 N.E.2d 92 (Mass. Ct. App. 1998); *People v. Barrientos*, 956 P.2d 634 (Colo. App. 1997); *State v. Robb*, 605 N.W.2d 96 (Minn. 2000); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998); *State v. Twohig*, 469 N.W.2d 344 (Neb. 1991); *State v. Overby*, 590 N.W.2d 703 (N.D. 1999); *State v. Ballard*, 987 S.W.2d 889 (Tex. Crim. App. 1999).

172. *Sibron v. New York*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring).

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him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested . . . there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. In fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person . . . suffers no more from a search preceding his arrest than it would from the same search following it.<sup>173</sup>

Despite having some superficial logical appeal, the “could have” approach is unjustified for several reasons.<sup>174</sup> First and foremost, it is wrong because it ignores the constitutional precondition of the occurrence of an “actual arrest,” laid down in *Robinson* and reiterated in *Knowles*. As the Wisconsin Supreme Court has noted:

[t]he *Robinson* Court made clear that it is the fact of the lawful arrest which establishes the authority to undertake an extensive search for weapons and evidence of a crime. The actual making of a formal arrest, as opposed to the mere existence of grounds for doing so, is considered to be a significant event. The lawful arrest is not a mere formality, and without an arrest there is no justification for a full search incident to an arrest.<sup>175</sup>

The “could have” approach thus conflates the significance of probable cause with that of actual arrest. The former permits an officer to forego a warrant and immediately arrest an individual;<sup>176</sup> the latter affords constitutional immunity for an incidental search. Pursuant to *Murphy*, probable cause standing alone might allow police to conduct a search less invasive in degree than the full field-type search permitted by *Chimel*, *Robinson*, and *Belton*,<sup>177</sup> but only to guard against destruction of “highly evanescent evidence.”<sup>178</sup> The existence of

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173. *People v. Simon*, 290 P.2d 531, 533 (Cal. 1955).

174. The views of Justices Harlan and Traynor, themselves, are of dubious precedential weight as both were expressed in the relative infancy of modern search and seizure law, and more importantly, prior to *Chimel* (1969) and *Robinson* (1973). Justice Harlan’s concurrence, in 1968, although a more timely expression than Justice Traynor’s, is weakened by the recognition that his concurring vote was of no practical significance, because only one justice was in the minority. In addition, Harlan’s language does not appear in any other decision of the Court, and amounted to dictum because defendant Peters, Harlan’s focus of concern in the combined case, was under arrest when the search was executed. See *Sibron*, 392 U.S. at 67 (“[I]t is clear that the arrest had, for purposes of constitutional justification, already taken place before the search commenced.”). Similarly, Justice Traynor’s statement in *Simon* was dictum because the court held, unanimously, that the officer lacked probable cause to arrest Simon, thus invalidating the search altogether. See *Simon*, 290 P.2d at 534.

175. *State v. Swanson*, 475 N.W.2d 148, 154 (Wis. 1991); see also *State v. Pallone*, 613 N.W.2d 568, 577 (Wis. 2000) (“For the search incident to arrest exception to apply, there must be an arrest . . . . The requirement of an arrest is a ‘bright line rule.’”) (citing *Knowles*, 525 U.S. at 117-18); *State v. Parker*, 987 P.2d 73, 79 (Wash. 1999) (“[A] lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. It is the fact of the arrest itself that provides the ‘authority of law’ to search”) (internal citations omitted); HARVEY CORTLAND VORHEES, *THE LAW OF ARREST IN CIVIL AND CRIMINAL ACTIONS* § 209, at 173 (2d ed. 1915) (stating “an officer has no right to search a person and seize anything upon him unless he has first arrested him”).

176. *United States v. Watson*, 423 U.S. 411 (1975); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

177. *Murphy*, 412 U.S. at 296; see also *United States v. Alexander*, 755 F. Supp. 448, 454 (D.D.C. 1991) (citing *Murphy* and noting that “the presence of probable cause to arrest, when the police have not effected an arrest, permits a more limited search than that permitted incident to arrest”).

178. *Murphy*, 412 U.S. at 296.

probable cause in itself, however, does not justify a full search absent an arrest.<sup>179</sup> Probable cause is a necessary but not sufficient precondition to an incidental search. As noted by the New York Court of Appeals over twenty years ago:

To adopt the proposition that the search was valid because there was probable cause to arrest puts the cart before the horse. An arrest is an essential prerequisite to a search incident. . . . Unless and until a person is arrested, a full body search without a warrant or exceptional circumstances is constitutionally unreasonable.<sup>180</sup>

Why such a bright-line rule of arrest exists can be understood by re-examining the rationales underlying the search incident exception itself: the exigencies created by an arrest and the recognized attendant concerns over officer safety and destruction of evidence.<sup>181</sup> It was on these bases that *Robinson*

179. *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (authorizing search incident when “the officer had probable cause to arrest the petitioner and . . . lawfully effectuated the arrest and placed the petitioner in custody”).

For examples over time of courts expressly disagreeing with the “could have” approach see *Bouldin v. State*, 350 A.2d 130, 132-33 (Md. 1976) (“It is axiomatic that when the State seeks to justify a warrantless search incident to arrest, it must show that the arrest was lawfully made prior to the search . . . . [T]he right to arrest is not equivalent to making an arrest; the record must satisfactorily demonstrate that an arrest was in fact consummated before a warrantless search incident thereto may be found to be lawful.”); *People v. Chiagles*, 142 N.E. 583, 584 (N.Y. 1923) (Cardozo, J.) (“Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.”); *State v. Crutcher*, 989 S.W.2d 295, 301 n.8 (Tenn. 1999) (“We decline to hold that a search may be upheld as a search incident to arrest merely because a lawful custodial arrest ‘could have’ been made.”); *id.* at 302 (“We are not prepared to hold that the police may conduct a warrantless search merely because they have probable cause to arrest the suspect.”); *Lovelace v. Commonwealth*, 522 S.E.2d 856, 859 (Va. 1999) (rejecting “position that the presence of probable cause to arrest, rather than an actual custodial arrest, determines the reasonableness of a search”); *State v. McKenna*, 958 P.2d 1017, 1023 (Wash. Ct. App. 1998) (“[T]he fact that an arrest could have been made, but was not made, is immaterial; what is material is the fact that the challenged search was not accompanied by a contemporaneous arrest.”); and *State v. Pallone*, 613 N.W.2d 568, 581 (Wis. 2000) (“For a search incident to arrest to be valid, there must be an actual arrest, not just a reasonable likelihood that a suspect will be arrested.”). See also *Timberlake v. Denton*, 786 F. Supp. 676, 689 (M.D. Tenn. 1992) (permitting section 1983 claim for wrongful search because suspect was not formally arrested, noting that search incident precedents “presume that the search was incident to an actual custodial arrest and not merely incident to probable cause to arrest. This follows from the history of the ‘search incident to arrest’ doctrine.”).

180. *People v. Evans*, 371 N.E.2d 528, 531 (N.Y. 1977); see also *State v. Fisher*, 539 S.E.2d 677, 683 (N.C. Ct. App. 2000) (interpreting *Knowles* as holding that a search is invalid, in absence of arrest, “even though officers may have had probable cause to arrest defendant”).

181. *Knowles*, 525 U.S. at 116-18; see also *Belton*, 453 U.S. at 457 (“[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.”); *Robinson*, 414 U.S. at 235-36 (“[I]t is the fact of custodial arrest which gives rise to the authority to search . . . .”); *United States v. Gaither*, 229 F.3d 1144, 1144 (4th Cir. 2000) (unpublished decision) (stating that is “the dangers inherent in arrests and not the particular offense [that] provide the justification for a search incident to a lawful arrest”); *Pallone*, 613 N.W.2d at 577 (“The fact that there is an arrest gives rise to two heightened concerns that justify a warrantless search: (1) the need to ensure officer safety, and (2) the need to discover and preserve evidence.”); see also *United States v. Royster*, 204 F. Supp. 760, 763 (N.D. Ohio 1961) (citations omitted):

[T]he right to search without a warrant as an incident to a lawful arrest is a narrow exception to the prohibition of the Fourth Amendment and has its roots in necessity. The necessity in such cases arises from the need to protect the arresting officer, to deprive the prisoner of potential means of escape and to prevent the destruction of evidence by the person arrested. . . . The necessity which justified a search incident to arrest does not and can not arise until an actual arrest is made. It is apparent, therefore, that a lawful arrest is an indispensable prerequi-

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deemed a search incident both “an exception to the warrant requirement of the Fourth Amendment,” and “also a ‘reasonable’ search under that Amendment.”<sup>182</sup> As the Supreme Court of Tennessee recently pointed out, “[t]he bottom line is this: when the police conduct a full search [incident], the seizure of the suspect must rise to the level of a custodial arrest.”<sup>183</sup> A similar sentiment was expressed by the Washington Supreme Court:

[i]t is the fact of arrest that provides the ‘authority of law’ to search . . . [I]n the absence of a lawful custodial arrest[,] a full blown search, regardless of the exigencies, may not validly be made. It states the obvious to observe that where a person is not under arrest there can be no search incident thereto.<sup>184</sup>

Furthermore, beyond obfuscating doctrine, abandonment of the actual arrest requirement threatens major practical concerns, deriving from the colossal indeterminacy associated. With respect to the courts, the arrest requirement, if nothing else, serves to anchor analysis in a tangible event. Because probable cause is neither a well-understood<sup>185</sup> nor a very demanding standard for law enforcement to meet,<sup>186</sup> judicial reliance on probable cause alone fosters a basic uncertainty that fundamentally undercuts Fourth Amendment protections.<sup>187</sup> This indeterminacy, in turn, is exacerbated by expansive judicial in-

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site to a valid search incident thereto.

182. *Robinson*, 414 U.S. at 235; see also Swanson, 475 N.W.2d at 154 (citing *Chimel*, *Robinson*, and *Rawlings* and stating that “[n]umerous cases establish the rule that a custodial arrest of a suspect based on probable cause is a reasonable intrusion under the fourth amendment and an extensive search incident to the valid arrest requires no additional justification”).

183. *State v. Crutcher*, 989 S.W.2d 295, 301 (Tenn. 1999).

184. *State v. Parker*, 987 P.2d 73, 79-80 (Wash. 1999) (en banc).

185. The Court has acknowledged the difficulty in articulating “precisely what [probable cause] means.” *Ornelas v. United States*, 517 U.S. 690, 695 (1996); see also *Illinois v. Gates*, 462 U.S. 213, 232 (1983) (noting that probable cause is a “fluid” concept “not readily . . . reduced to a neat set of legal rules”); *Brinegar v. United States*, 338 U.S. 160, 175 (1949) (“In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.”).

186. *United States v. Moore*, 215 F.3d 681, 685 (7th Cir. 2000) (noting that “[p]robable cause, contrary to its name, demands even less than ‘probability’”) (citation omitted); *Valdez v. McPherson*, 172 F.3d 1220, 1227 n.5 (10th Cir. 1999) (noting that “probable cause itself is a relatively low threshold of proof”); see also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 7 (1997) (“In a world where trivial crimes stay on the books, or one where routine traffic offenses count as crimes, the requirement of probable cause to arrest may mean almost nothing.”)

187. Worse yet, case law permits, if not encourages, creative judicial application of the standard. For instance, if police fail to identify a sustainable basis for probable cause at the time of a given seizure, courts enjoy broad authority to retroactively validate searches and admit evidence on the basis of facts in the record. *State v. Roach*, 452 N.W.2d 262, 267 (Neb. 1990) (stating that the “validity of an arrest and the permissibility of a search incident thereto are premised upon the existence of probable cause, not the officer’s knowledge that probable cause in fact does exist.”). Moreover, “[t]he probable cause justifying a lawful custodial arrest, and therefore a search incident to that arrest, need not be for the charge eventually prosecuted.” *United States v. Bizier*, 111 F.3d 214, 218 (1st Cir. 1997). Simply put, “[p]robable cause need only exist as to any offense that could be charged under the circumstances.” *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994); e.g., *United States v. Kalter*, 5 F.3d 1166 (8th Cir. 1993); *United States v. Saunders*, 476 F.2d 5 (5th Cir. 1973); *State v. Varnado*, 582 N.W.2d 886 (Minn. 1998); *Commonwealth v. Golden*, 519 S.E.2d 378 (Va. Ct. App. 1999); *State v. Huff*, 826 P.2d 698 (Wash. Ct. App. 1992). But see *Hernandez v. State*, 972 P.2d 730, 735 (Idaho Ct. App. 1999) (refusing to “engage in ex post facto extrapolations of all crimes that might have been

terpretation of the *Rawlings* contemporaneity standard. Although the defendant in *Rawlings* was subject to search in virtual unison with his arrest, and admitted to committing the predicate crime, courts now invoke *Rawlings* to justify searches under markedly different circumstances.<sup>188</sup> In short, *Rawlings* is now often employed to displace custodial arrest as a search incident precondition, in effect becoming a broad exception to an exception,<sup>189</sup> an especially ironic outcome given that search incident authority was plainly of secondary importance to the *Rawlings* Court, handled with a few summary sentences at the end of the opinion.<sup>190</sup>

With respect to everyday police activity, the “could have” approach plainly risks mischief, in several forms. The first scenario concerns that envisioned (and endorsed) by Justice Traynor in 1955: a situation where the warrantless search serves a sort of on-the-spot exculpatory function, constituting an admitted intrusion, but one that pales relative to the arrest that might have come to fruition had the officer so elected. Under this scenario, police “could” (but

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charged on a given set of facts at the moment of arrest to retroactively validate an otherwise unlawful arrest”).

188. Indeed, the Supreme Court of Iowa in *Knowles* relied on *Rawlings* to endorse the practice of “searches incident to citation.” *State v. Knowles*, 569 N.W.2d 601, 602 (Iowa 1997) (“The suggestion that the constitutional basis of the ‘search incident to an arrest’ exception is an actual arrest is belied by those decisions that hold that the timing of the arrest need not precede the search.”), *rev’d sub. nom.*, 525 U.S. 113 (1998); *see also* *United States v. Hernandez*, 825 F.2d 846, 852 (5th Cir. 1987) (“[Appellant] observes that the *Rawlings* Court employed the phrase formal arrest and contends that only a formal arrest may justify an immediately preceding incidental search. We doubt that the *Rawlings* principle is so limited. This particular statement of the principle undoubtedly reflects the fact that the arrest following the search in that case was a formal arrest.”) (citation omitted).

In a case decided before *Rawlings*, the New York Court of Appeals articulated a decidedly more sensible contemporaneity benchmark:

It may be said that the search and arrest must constitute a single *res gestae*. The fact that the search precedes the formal arrest is irrelevant as long as the search and arrest are nearly simultaneous so as to constitute one event . . . [Searches and arrests must] occur[] almost simultaneously so that they may be viewed as a single transaction . . . Where the arrest and search occur contemporaneously search incident to arrest reasoning will prevail.

*People v. Evans*, 371 N.E.2d 528, 531 (N.Y. 1977); *see also* *Anderson v. State*, 553 A.2d 1296, 130 (Md. App. 1989) (“It is enough, therefore, that the search closely anticipate, contemporaneously parallel, or follow shortly after the arrest of which it is an incident. In all three time frames, it is still an incident of the arrest. This is the purpose of the practical requirement that a lawful arrest and its search incident need only be essentially contemporaneous.”) (footnote omitted). *But see* *Hopper v. City of Prattville*, 2000 WL 127221 \*3 (Ala. Crim. App. 2000) (allowing evidence when “instead of immediately arresting” the suspect, police searched and then formally arrested him); *State v. Craig*, 739 So. 2d 410, 412 (Miss. Ct. App. 1999) (holding that “arrest had actually occurred because an arrest begins when an officer begins his pursuit to make the arrest,” making the search timely).

189. Although apparently not concerned about application of the “could have” approach, in his treatise Professor LaFave expresses worry over the application of *Rawlings*, stating: “The *Rawlings* principle is certainly not objectionable in the abstract, and in most fact situations produces a very sensible result. But if *Rawlings* is not to undo *Knowles*, it will be necessary for the Court to find some way to [limit its potentially broad application].” LAFAVE, *supra* note 7, §5.2, at Supp. 18.

Judicial liberty with *Rawlings* extends in the other direction as well—to condone searches well after the occurrence of arrest. *United States v. McLaughlin*, 170 F.3d 889, 892 (9th Cir. 1999) (noting “[t]here is no fixed outer limit for the number of minutes that may pass between an arrest and a valid, warrantless search that is a contemporaneous incident of the arrest”).

190. The central concern of the Court was *Rawlings*’ standing to contest the seizure of the illegal drugs he had stashed in his girlfriend’s purse. *Rawlings v. Kentucky*, 448 U.S. 98, 104-10 (1980).

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do not) arrest, conduct a full search, yet find nothing incriminating and free the suspect with a citation or warning. Regarding such a search as remedial, however, is antagonistic to the very premise of the Fourth Amendment, which is “designed to prevent, not simply to redress, unlawful police action.”<sup>191</sup> As one state appellate judge recently said in response to his colleagues’ acceptance of the Traynor view: “With due respect to Justice Traynor’s comments . . . I am not so convinced a search of a person who has not been arrested is to the person’s advantage. The insult remains.”<sup>192</sup>

Second, there is the situation where police have probable cause to arrest a suspect for a non-serious yet arrestable crime,<sup>193</sup> but do not arrest, and conduct a search upon unverified suspicion that the suspect is involved in greater wrongdoing. They then find evidence for a “good bust,” and on this basis indulge in a post-hoc inflation of an otherwise minor violation.<sup>194</sup> Alternatively, if nothing incriminating is found, the citizen is sent on her way, and the officer avoids the burdens associated with a formal arrest. Finally, police might seek to prevail upon the judiciary’s natural tendency to overlook what might be seen as the legal niceties of not just arrest, but also probable cause, when the search uncovers evidence of significant wrongdoing that the court is reluctant to suppress.<sup>195</sup> In short, without the requirement of an actual arrest, which typically entails significant administrative disincentives in the form of paperwork and

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191. *Chimel v. California*, 395 U.S. 752, 766 n.12 (1969).

192. *State v. Overby*, 590 N.W.2d 703, 708 (N.D. 1999) (Vande Walle, C.J., concurring). Dissenting in *Rawlings*, Justice Marshall voiced a similar concern over low-level police behaviors, which as a practical matter very often evade constitutional review:

Because we are called on to decide whether evidence should be excluded only when a search has been “successful,” it is easy to forget that the standards we announce determine what government conduct is reasonable in searches and seizures directed at persons who turn out to be innocent as well as those who are guilty. I continue to believe that ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society.

*Rawlings*, 448 U.S. at 121.

193. Which is easy because at present there exists no shortage of potential statutory bases to arrest. *Supra* notes 123-125, 138-149, and accompanying text.

194. This tendency is exacerbated by the rule permitting courts to discern probable cause on the basis of circumstances other than those initially identified by police. *Supra* note 184. Fortunately, to date, the courts have been reluctant to endorse searches premised exclusively on arrests of a questionable basis, such as resisting unlawful police behavior, when no other initial basis for probable cause exists. *E.g.*, *Jones v. State*, 745 A.2d 856, 872 (Del. 1999) (refusing to “bootstrap” admission of evidence seized pursuant to an illegal arrest, stating “the crime of resisting arrest does not necessarily carry with it the right to justify any search incident to an actual arrest for the crime of resisting arrest. Otherwise, there would be significant potential for official abuse”); *State v. Foldesi*, 963 P.2d 1215, 1217 n.1 (Idaho Ct. App. 1998) (refusing to uphold search ostensibly justified by a citizen’s lawful refusal to consent to the search of a vehicle); *State v. Westcott*, 2000 WL 1827222 \* 4 (Iowa Ct. App. 2000) (refusing to “cleanse” search incident triggered by a citizen’s resistance to prior illegal seizure by police). *But see United States v. Crump*, 62 F. Supp. 2d 560, 568 (D. Conn. 1999) (stating that suspect’s adverse response to illegal pat-down can serve as a “new distinct crime” justifying a search incident).

195. *See, e.g., Overby*, 590 N.W.2d at 708 (Vande Walle, C.J., concurring) (expressing concern that “with the expectation or hope that the search will produce such irrefutable evidence of the commission of a crime that a lack of probable cause to arrest prior to the search will be overlooked or such suspicion as did exist will be viewed more favorably in light of the evidence discovered in the search if, in fact, there is evidence discovered”); *see also* JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 221 (1975) (“The illegality of a search is likely to be tempered—even in the eyes of the judiciary—by the discovery of incriminating evidence on the suspect.”).

other logistical obligations, police remain free (so long as they do not issue a citation, as in *Knowles*) to search with constitutional impunity.<sup>196</sup>

Taken together, the aforementioned scenarios suggest a massive grant of unfettered discretionary authority anathema to the Framers,<sup>197</sup> and certainly in radical excess of the narrow historic confines of search incident authority.<sup>198</sup> In more practical terms, the indulgent approach is squarely at odds with the recognition that search incident authority is a “jealously guarded” exception, a “strictly limited right,” which in each instance must be justified by the government.<sup>199</sup> Finally, and perhaps most important, the approach is inconsistent with the dual rationales historically advanced in support of the search incident exception, themselves implicated only upon the occurrence of an actual arrest, and the exigencies associated with such a serious bodily intrusion.<sup>200</sup>

The next parts seek to lend some clarity and consistency to the crucial question passed on earlier here, namely, how courts should answer the constitutional question of what constitutes an arrest for purposes of the search incident to arrest exception.

### III. A TAXONOMY OF ARREST

As a general matter, distinguishing among the broad variety of police-citizen encounters is of critical importance because the Fourth Amendment regulates only “seizures.”<sup>201</sup> Officers are permitted, without constitutional constraint, to approach and question individuals up to an acknowledged demarcation point of “seizure,” drawn at the point citizen consent dissipates.<sup>202</sup> It is also critically important to distinguish recognized seizures from one another.

196. *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting):

[I]nvasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches . . . of innocent people which turn up nothing incriminating, in which no arrest is made, about which courts do nothing, and about which we courts can do nothing, and about which we never hear.

197. *Supra* notes 10-13, 22 and accompanying text.

198. *Supra* notes 21-44 and accompanying text.

199. *Chimel v. California*, 395 U.S. 752, 762 (1969) (citation omitted) (“Clearly, the general requirement that a search warrant be obtained is not lightly to be dispensed with, and ‘the burden is on those seeking [an] exemption [from the requirement] to show the need for it . . . .’”); *see also State v. Pallone*, 613 N.W.2d 568, 577 (Wis. 2000) (“The State bears the burden of proving that a warrantless search falls under one of the established exceptions.”).

200. *Supra* notes 52-80, 114-120 and accompanying text.

201. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (“If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.”); *see also Wayne R. LaFare, “Seizures” Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 461 (1984) (stating “[t]he Supreme Court’s developing seizures typology has proved to be exceedingly important in resolving critical Fourth Amendment issues”).

202. As the Supreme Court stated in *Florida v. Bostick*, 501 U.S. 429 (1991), “a seizure does not occur simply because a police officer approaches an individual and asks a few questions.” *Id.* at 434; *see also id.* at 439 (“The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.”); *Arrowsmith v. Le Mesuriur*, 2 Bos. and Pul. (N.R.) 210, 127 Eng. Rep. 605 (Com. Pl. 1806) (concluding that an officer can “request” another to go with him, and that compliance with such request does not constitute an illegal seizure).

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For instance, in the absence of probable cause, classifying an event as an “arrest” as opposed to a “stop” can result in dismissal.<sup>203</sup> Likewise, delineating precisely if (and when) an arrest occurs can be outcome-determinative when addressing whether to admit evidence seized incident thereto.<sup>204</sup>

Despite the importance of drawing such distinctions, the courts have not always spoken with one voice, employing a quixotic, case-by-case method lacking coherence and constitutional consistency.<sup>205</sup> Until the seminal *Terry v. Ohio*, in 1968,<sup>206</sup> the taxonomy was strikingly elemental: all seizures required probable cause, without qualification.<sup>207</sup> With *Terry*, the Court for the first time provided constitutional recognition to seizures short of full-blown arrests.<sup>208</sup> *Terry* allowed police to conduct “investigatory stops,” to question persons reasonably suspected of being involved in criminal activity, and to conduct “frisks” to recover any weapons they might possess.<sup>209</sup> In the wake of *Terry*,<sup>210</sup>

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203. *Infra* notes 213-222 and accompanying text.

204. See LAFAVE, *supra* note 7, § 5.1(a), at 12 (stating “a determination of the exact type of seizure which has occurred is most often of importance in assessing the propriety of the contemporaneous search of the person seized”).

205. This is despite Professor Wayne LaFave’s sage admonition almost twenty years ago that “it is essential that these classifications be drawn with the greatest of care.” LAFAVE, *supra* note 201 at 461-62.

206. *Terry v. Ohio*, 392 U.S. 1, 10-11 (1968).

207. Before *Terry*, as the Court noted several years later, “[t]he basic principles were relatively simple and straightforward: The term ‘arrest’ was synonymous with those seizures governed by the Fourth Amendment . . . . *Terry* for the first time recognized an exception to the requirement that Fourth Amendment seizures of persons must be based on probable cause.” *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979).

208. It bears mention that the *Terry* Court, in actuality, merely placed a judicial imprimatur on what was then a common police practice. As Professor LaFave noted around the time of *Terry*, police stops and frisks were a “time-honored police procedure,” gaining visibility only with the Court’s decision. Wayne R. LaFave, “Street Encounters” and the Constitution: *Terry*, *Sibron*, *Peters* and *Beyond*, 67 MICH. L. REV. 39, 40-46 (1968); see also Frank J. Remington, *The Law Relating to “On the Street: Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 386, 389-92 (1960); Herman Schwartz, *Stop and Frisk (A Case Study in Judicial Control of the Police)*, 58 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 433 (1967); Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1203 (1952).

209. *Terry*, 392 U.S. at 21. The *Terry* Court was at pains to emphasize that the scope of the search allowed was “as vital a part of the inquiry” as whether the seizure was authorized. *Id.* at 28. If an officer has reasonable basis to believe the suspect is armed and dangerous, a “frisk” or “pat-down” search (typically of external clothing) is authorized, “reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.” *Id.* at 29. During the course of such a search officers can seize what they discern to be a weapon, and palpable “nonthreatening contraband,” but may not manipulate an object to identify it as contraband, under what has come to be called the plain feel doctrine. *Minnesota v. Dickerson*, 508 U.S. 366, 377 (1993).

In the auto context, police can search locations in the passenger compartment where a weapon could be hidden, if they possess “a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.” *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (citation omitted).

210. *Terry* itself was just the first of numerous decisions from the Court relative to “stop and frisk” police behaviors. In *United States v. Hensley*, 469 U.S. 221 (1985), for instance, the Court held that based on the principles enunciated in *Terry* police are permitted to stop, question, and possibly frisk persons reasonably suspected of specific serious criminal activity on a prior, not present, occasion. For a comprehensive treatment of the Court’s numerous, and quite particularized, decisions interpreting *Terry*, see 4 WAYNE R. LAFAVE SEARCH AND SEIZURE §§ 9.0-9.5 (1996 ed. & Supp.) [hereinafter LAFAVE,

courts have come to recognize three varieties of Fourth Amendment seizures.<sup>211</sup> These include, conceived along a continuum of police intrusiveness: (1) *Terry* stops; (2) non-custodial arrests; and (3) custodial arrests.<sup>212</sup> This basic taxonomy can be used to answer two prevalent Fourth Amendment-related questions. The first might be called the "*Terry* question," which asks: whether, lacking probable cause to arrest, the particular police behaviors remained within the permissible scope of a *Terry* "stop and frisk," or strayed into the realm of an illegal *de facto* arrest. The second inquiry might be called the "arrest question," especially pertinent to search incident doctrine, inquiring: did the police execute an arrest, and, if so, what species (custodial or non-custodial)?

The "*Terry* question" has been the focus of enormous judicial<sup>213</sup> and scholarly<sup>214</sup> attention over the years. This predominance is understandable given that *Terry* stops since 1968, for better or worse, have become the common coin of street-level police behaviors.<sup>215</sup> Moreover, for suspects the exclusionary rule promises that a successful challenge will result in invalidation of the seizure as a threshold matter, along with any tainted evidence ("fruits") seized as a result.<sup>216</sup>

The parameters of a *Terry* stop are exceeded "when the officers' conduct is more intrusive than necessary for an investigatory stop."<sup>217</sup> Despite this ostensibly conservative standard, it is apparent that courts require a considerable amount of coercion and intrusion from police before a "*de facto*," and hence

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211. A seizure, the least invasive form of police-citizen encounter sufficient to trigger the Fourth Amendment, occurs when a reasonable person facing a show of authority believes she is not free to leave, combined with either (1) the application by police of physical force or (2) submission by the suspect to the assertion of lawful authority. *California v. Hodari D.*, 499 U.S. 621, 626 (1991).

212. The Court has also recognized "incarceration" as a type of arrest, which as a matter of course permits an extensive inventory of the arrestee's personal effects and perhaps automobile. *Illinois v. LaFayette*, 462 U.S. 640 (1983); *United States v. Edwards*, 415 U.S. 800 (1974).

213. *E.g.*, *Minnesota v. Dickerson*, 508 U.S. 366 (1993); *Florida v. Royer*, 460 U.S. 491 (1983); *Dunaway v. New York*, 442 U.S. 200 (1979); *Sibron v. New York*, 392 U.S. 40 (1968); *United States v. Gil*, 204 F.3d 1347 (11th Cir. 2000); *United States v. Campbell*, 178 F.3d 345 (5th Cir. 1999); *United States v. Taylor*, 162 F.3d 12 (1st Cir. 1998); *United States v. Zabala*, 52 F. Supp. 2d 377 (S.D.N.Y. 1999); *State v. Pfeleiderer*, 8 S.W.2d 249 (Mo. Ct. App. 1999); *Gordon v. State*, 4 S.W.3d 32 (Tex. Ct. App. 1999).

214. *E.g.*, LAFAYE, SEARCH AND SEIZURE, *supra* note 210, at §§ 9.0-9.5; Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person Within the Meaning of the Fourth Amendment*, 27 AM. CRIM. L. REV. 619 (1999); Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771 (1982).

215. Debra Livingston, *Gang Loitering, The Court, and Some Realism About Police Patrol*, 1999 SUP. CT. REV. 141, 177-78 (asserting *Terry* "may be the Court's single most important Fourth Amendment case in terms of its role in constituting a legal environment broadly supportive of street-level discretion of officers on patrol").

For an examination of the originating and continued controversy surrounding the Court's decision in *Terry*, thirty years after its rendition, see Symposium, *Terry v. Ohio 30 Years Later: A Symposium on the Fourth Amendment, Law Enforcement and Police-Citizen Encounters*, 72 ST. JOHN'S L. REV. 721-1382 (1998).

216. *Wong Sun v. United States*, 371 U.S. 471, 479-88 (1963).

217. *United States v. Hill*, 91 F.3d 1064, 1070 (8th Cir. 1996).

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illegal, arrest without probable cause is found. For instance, courts regularly hold that handcuffing suspects;<sup>218</sup> detaining handcuffed suspects for lengthy periods in police cars<sup>219</sup> or on the ground,<sup>220</sup> and drawing weapons on suspects who are handcuffed,<sup>221</sup> neither individually nor collectively necessarily exceed the permissible bounds of *Terry*.<sup>222</sup> Although on their face such outcomes strain credulity as being only “investigatory,” they are explained by two things. First, *Terry*’s analytic framework is highly deferential to the perceived exigencies and demands of police patrol.<sup>223</sup> Second, there are the consequences of the “socially costly” exclusionary rule, which is triggered upon finding an unjustified de facto arrest by police.<sup>224</sup> Taken together, these factors contribute to a climate increasingly deferential to police behaviors, resulting in judicial approval of aggressive “investigatory” practices far in excess of that expressly approved by the *Terry* Court.<sup>225</sup>

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218. *E.g.*, *United States v. Tilton*, 19 F.3d 1221, 1228 (7th Cir. 1994); *United States v. Crittendon*, 883 F.2d 326, 329 (4th Cir. 1989); *United States v. Purry*, 545 F.2d 217, 220 (D.C. 1976); *State v. Blackmore*, 925 P.2d 1347, 1351 (Ariz. 1996); *In re M.E.B.*, 638 A.2d 1123, 1127 (D.C. App. 1994); *Reynolds v. State*, 592 So. 2d 1082, 1084 (Fla. 1992).

219. *E.g.*, *United States v. Gil*, 204 F.3d 1347, 1350-51 (11th Cir. 2000) (75 minutes); *Courson v. McMillian*, 939 F.2d 1479, 1492 (11th Cir. 1991) (30 minutes); *United States v. Taylor*, 162 F.3d 12, 16 (1st Cir. 1998) (same).

220. *E.g.*, *United States v. Taylor*, 716 F.2d 701, 709 (9th Cir. 1983).

221. *E.g.*, *United States v. Campbell*, 178 F.3d 345, 349 (5th Cir. 1999); *United States v. Merkley*, 988 F.2d 1062, 1063-64 (10th Cir. 1993); *Blackmore*, 925 P.2d at 1351; *State v. Frank*, 986 P.2d 1030, 1034 (Idaho Ct. App. 1999).

222. *United States v. Sanders*, 994 F.2d 200, 206 (5th Cir. 1993) (“[U]sing some force on a suspect, pointing a weapon at a suspect, ordering a suspect to lie on the ground, and handcuffing a suspect—whether singly or in combination—do not automatically convert an investigatory detention into an arrest requiring probable cause.”).

223. *Terry v. Ohio*, 392 U.S. 1, 23 (1968) (“In addition [to the interest in investigating crime], there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him.”); *see also* *Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (“we decide whether the police action constitutes a *Terry* stop or an arrest by evaluating not only how intrusive the stop was, but also whether the methods used were reasonable given the specific circumstances.”); *Gordon v. State*, 4 S.W.3d 32, 37 (Tex. Ct. App. 1999) (employing a “totality of the circumstances” test, judged from the perspective of a reasonable officer, with “allowances . . . made for the fact that officers must often make quick decisions . . .”).

224. As Professor Sundby has noted, “given the magnitude of the type of societal problems that governmental intrusions will address—such as weapons possession, drunk driving, drug use, and gang activity—judicial review increasingly will defer to the government’s judgment that the intrusion was necessary.” Scott E. Sundby, “*Everyman*’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?”, 94 COLUM. L. REV. 1751, 1768-69 (1994); *see also* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 799 (1994) (“Judges do not like excluding bloody knives so they distort doctrine claiming the Fourth Amendment was not really violated....”); George C. Thomas III & Barry S. Pollack, *Saving Rights From a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 147-49 (1993) (“The possibility of . . . ‘erroneous acquittals’ may cause courts to twist the facts and doctrine to avoid finding Fourth Amendment violations.”).

225. As the Seventh Circuit has observed, “[i]n fact, handcuffing – once highly problematic – is becoming quite acceptable in the context of a *Terry* analysis. In addition, it is not necessarily improper to detain suspects in a police car during some kinds of investigatory stops.” *United States v. Tilton*, 19 F.3d 1221, 1228 (7th Cir. 1994); *see also* *United States v. Perdue*, 8 F.3d 1455, 1464 (10th Cir. 1993) (observing that courts have authorized greater police force in *Terry* stops); *United States v. Smith*, 3 F.3d 1088, 1094-95 (7th Cir. 1993) (same); *United States v. Chaidez*, 919 F.2d 1193, 1198 (7th Cir. 1990) (“Both the permissible reasons for a stop and search and the permissible scope of the intrusion

In comparison to *Terry*, the “arrest question” has been met with near silence by the Supreme Court. State and lower federal courts, however, faced with interpreting and adjudging the enormous variety of police-citizen encounters on a daily basis, of necessity have developed a more nuanced interpretative framework.<sup>226</sup> One outgrowth is the evolving jurisprudence associated with the second and third categories of seizure, custodial and non-custodial arrests.<sup>227</sup> The Supreme Court of Colorado characterized the two varieties of arrest as follows:

The word “arrest” may refer to either a “custodial arrest” or a “non-custodial arrest.” A distinction may be drawn between custodial arrests, which are made for the purpose of taking a person to the stationhouse for booking procedures and filing of criminal charges, and non-custodial arrests, which involve only temporary detention for the purposes of issuing a summons. The police may conduct a full search only when incident to a lawful custodial arrest.<sup>228</sup>

The types of encounters embodied in the category of non-custodial arrests include “field arrests,” whereby the suspect is detained but released at the scene, long a part of police patrol,<sup>230</sup> traffic “arrests”;<sup>231</sup> and “arrests” for non-

have expanded beyond their original contours, in order to permit reasonable police action when probable cause is arguably lacking.”).

226. The Seventh Circuit, responding to this perceived necessity in the area of stops, has recognized not merely *Terry* stops and de facto arrests, but also “[s]tops too intrusive to be justified by [reasonable] suspicion under *Terry*, but short of custodial arrest.” *Chaidez*, 919 F.2d at 1198. Such seizures are justified “when the degree of [police] suspicion is adequate in light of the degree and duration of restraint.” *Id.* at 1198. The court justified its embrace of “outer edge” investigatory stops by noting that “circumstances defy such simple categorization,” and because conceiving of the world of seizures in a dichotomous way “has put considerable pressure on the limits of the *Terry* doctrine.” *Id.* at 1197-98.

Professor Richard Uviller advanced a similar compromise, urging judicial adoption of a “sub-arrest.” RICHARD H. UVILLER, *TEMPERED ZEAL: A COLUMBIA LAW PROFESSOR’S YEAR ON THE STREETS WITH NEW YORK CITY POLICE* 84 (1988). Such a judicial order would be “a warrant of sorts that allows physical submission but not interrogation. Although the order requires the suspect to present his body without his consent, it is not deemed the functional equivalent of an arrest and hence probably need not be predicated on probable cause.” *Id.* Uviller suggests that this process would prove useful in obtaining on-site physical exemplars, such as hair samples and fingerprints. *Id.* Compare *Davis v. Mississippi*, 394 U.S. 721 726-28 (1969) (suggesting in dictum that on-site fingerprinting might be permissible if reasonable suspicion exists that suspect committed crime) with *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (holding that Fourth Amendment prohibits forcible removal and transport of suspect to police station without probable cause).

227. The late emergence, in historic terms, of non-custodial arrests can be explained by the recognition that at common law officers (and private citizens) were required to take the arrestee promptly before a judicial officer, or otherwise risk a civil action for false imprisonment. *Supra* notes 24-28 and accompanying text. There thus was no such thing as a “field-arrest.”

228. *People v. Bland*, 884 P.2d 312, 316 n.6 (Colo. 1994) (en banc). The court added: “[t]he seizure of a person, therefore, does not automatically constitute an arrest and all arrests do not necessarily rise to the level of a full custodial arrest.” *Id.* at 317 n.9; see also *Thomas v. State*, 614 So. 2d 468, 470-71 (Fla. 1993) (noting two types of arrests and associated respective rights to search); *Youhoing v. State*, 487 S.E.2d 86, 87-88 (Ga. Ct. App. 1997) (same); *State v. Brassfield*, 615 S.W.2d 628, 631 (S.D. 2000) (same); *State v. Walker*, 12 S.W.3d 460, 464 n.7 (Tenn. 2000) (same); *Linnett v. State*, 647 S.W.2d 672, 674-75 (Tex. Crim. App. 1983) (same); *State v. McKenna*, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998) (same).

230. WAYNE R. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 186-88, 484-85 (1965) (surveying widespread police “arrest and release” practices during the 1950s and 1960s); Jerome Hall, *The Law of Arrest in Relation to Contemporary Social Problems*, 3 U. CHI. L. REV. 345, 359-62 (1936) (surveying widespread police “arrest and release” practices during the first decades of the

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criminal infractions.<sup>232</sup> Because all such arrests, despite being based on probable cause, are noncustodial in nature, no right to a full search incident arises. Rather, police can conduct a *Terry* frisk for weapons, if warranted.<sup>233</sup>

What constitutes a custodial arrest has been, and remains, the subject of considerably more judicial disagreement. This confusion dates back at least to *Robinson*, which placed dispositive importance on the occurrence of a “custodial arrest,” but failed to elucidate its precise contours.<sup>234</sup> *Gustafson* also em-

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century).

231. Traffic seizures are very often classified as “arrests” because they are based on probable cause and the investigation is typically complete at the time of detention. As the Eighth Circuit recently noted, “[a] traffic stop is not investigative; it is a form of arrest, based upon probable cause that a penal law has been violated.” *United States v. \$404,905*, 182 F.3d 643, 648 (8th Cir. 1999); *cf. Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (noting in case addressing whether a suspect was in “custody” for purposes of *Miranda* that probable cause basis for traffic stop permits a seizure that may “exceed the bounds set by the Fourth Amendment on . . . a *Terry* stop”). Indeed, it is not uncommon for statutory law to expressly use the term “arrest” when referring to traffic-related offenses that result in issuance of a summons. *See, e.g., United States v. Gonzalez*, 763 F.2d 1127, 1130 n.1 (10th Cir. 1985) (citing and discussing N.M. Stat. Ann. § 66-8-117 to 123). The *Gonzalez* court elaborated as follows:

Despite the statute’s use of the words “arrest” and “custody,” when a New Mexico police officer stops a car merely to issue a traffic summons for a minor speeding infraction, we think that for Fourth Amendment purposes that stop is more in the nature of an investigative detention than a traditional arrest . . . . The distinction matters here because the label used for constitutional purposes defines the scope of reasonable police conduct incident to such a stop. If such a traffic stop were like a traditional custodial arrest, then as part of the search incident to arrest the apprehending officer could search the entire passenger compartment. . . . But if, as we conclude here, the traffic stop only amounts to an investigative detention, the officer’s freedom to search is more limited; his motivation for the search must be related to concern for protecting himself or others rather than any concern with preserving evidence.

*Id.* (internal citations omitted); *see also State v. Harmon*, 910 P.2d 1196, 1200 (Utah 1995) (concluding that the term “arrest,” as contained in Utah Motor Vehicle Act, refers to traffic seizure rather than custodial arrest).

Of course, the view that traffic seizures, in themselves, do not carry a power to search incident was central to the outcome in *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998). The Court’s analogy of a traffic seizure to a *Terry* stop, although inapt because probable cause is present in the former, was to some extent warranted because both seizures are (theoretically) brief in duration. *Id.* at 117; *see also Berkemer*, 468 U.S. at 439 (noting that the “usual traffic stop is more analogous to a so-called *Terry* stop . . . than to a formal arrest”).

232. *See, e.g., Thomas v. State*, 614 So. 2d 468, 470 (Fla. 1993) (“Arrest has been used loosely in our cases to apply not only to situations in which the person detained is suspected of committing a crime, but also to situations in which a person is ‘arrested’ for a noncriminal infraction.”). The *Thomas* court added: the term “arrest” . . . does not necessarily mean a full custodial arrest and incidental search.” *Id.* at 471; *see also State v. McKenna*, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998) (“Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful non custodial arrest.”).

233. *McKenna*, 958 P.2d at 1021:

The right to search incident to a lawful custodial arrest, once acquired, terminates no later than when the officer announces that the arrestee will be released rather than booked. Thereafter, the situation is the same as a noncustodial arrest, in that the arrestee will have little motivation to use a weapon or destroy evidence, and the officer will have little need to conduct a full search of the person. The officer may still pat for weapons if he or she reasonably suspects that the arrestee/releasee is armed.

234. In *Robinson*, the record established that local police were trained to conduct a “full field type search” subsequent to affecting a “full custody arrest.” The only definition of the latter contained in the Court’s opinion came in the form of testimony from a police instructor who testified that such a seizure occurs when an officer “arrest[s] a subject and subsequently transport[s] him to a police facility for booking’ . . . .” *Robinson*, 414 U.S. at 221 n.2. *See Zehrung v. State*, 569 P.2d 189, 197 (Ak. 1977) (la-

phasized that a search was permitted because the officer "lawfully effectuated the arrest, and placed [Gustafson] in custody," but did not elaborate.<sup>235</sup> Subsequent decisions by the Court have afforded no more guidance.<sup>236</sup> Faced with this definitional vacuum, lower courts have differed on search incident authority relative to the various permutations of arrest, for instance, juvenile detentions.<sup>237</sup> The categorization of de facto arrests represents another area of uncertainty. Most courts regard such seizures as custodial, reasoning that an "arrest is an arrest" for *Terry* and search incident purposes alike.<sup>238</sup> At the same time, the case law reflects the seemingly paradoxical position that police behaviors that would not likely qualify as de facto arrests under *Terry*, do constitute arrests for search incident purposes.<sup>239</sup>

There are several reasons for this incongruity. First, there is the institutional bias in favor of admitting inculpatory evidence, also observable in the *Terry* context,<sup>240</sup> which, with searches incident, conversely militates in favor of classifying particular seizures as arrests. Indeed, this predisposition is evidenced in the writings of the nation's foremost academic authority on the Fourth Amendment, Professor Wayne LaFare. In his treatise, Professor LaFare argues:

the question of when an arrest occurred cannot be answered in the abstract, that is, without consideration of why the question is being asked. Courts do (and, indeed,

menting Court's failure to define concept in *Robinson* and noting ambiguity); *People v. Brisendine*, 531 P.2d 1099, 1110 n.14 (Cal. 1975) (same).

235. *Gustafson v. Florida*, 414 U.S. 260, 262 (1973).

236. The deep confusion surrounding this most fundamental question was evidenced in oral arguments in *Knowles* itself. Counsel for Knowles, for instance, asserted at one point that suspects merely must be informed that they are "under arrest," yet at another point that suspects must be handcuffed and taken to the station for processing, for a search incident to be justified. Oral Argument Transcript, *Knowles*, available at 67 U.S.L.W. 3335, 1998 WL 781827, at \*8-11.

237. *Compare In re Paul T.*, 993 P.2d 74, 79 (N.M. 1999) (holding that detention for curfew violation is not "akin" to "formal arrest" justifying a search incident) and *In re Bernard G.*, 679 N.Y.S.2d 104, 106 (App. Div., 1998) (referring to such a seizure as a "non-criminal custodial arrest," not a "regular criminal arrest," which does not permit a search incident) with *In re Charles C.*, 90 Cal. Rptr.2d 430, 433 (App. Div. 1999) (permitting full search of juvenile taken into "temporary custody" for juvenile curfew violation, and noting that the statutory phrase "to take into temporary custody" is the "functional equivalent of an arrest") and *In re J.M.*, 995 S.W.2d 838, 842 (Tex. Ct. App. 1999) (permitting full search of juvenile taken into "custody" under Family Code for juvenile curfew violation). According to the California Court of Appeals, a truancy "arrest" is "very different" from a "typical criminal arrest." *In re Humberto O.*, 95 Cal. Rptr.2d 248, 251 (App. Div. 2000). The "circumscribed nature" of such an arrest, however, "does not preclude a search of the minor's body and of the area in the minor's control." *Id.* at 252.

238. *E.g.*, *United States v. Hernandez*, 825 F.2d 846, 851 (5th Cir. 1987); *United States v. Randle*, 67 F. Supp. 2d 734, 738 (E.D. Mich. 1999); *State v. Evans*, 723 A.2d 423, 432 (Md.), *cert. denied*, 120 S. Ct. 310 (1999); *In re R.D.*, 749 So. 2d 802, 805 (La. Ct. App. 1999); *State v. Fontenot*, No. CA 14809, 1993 WL 295901 \*6 (Ohio Ct. App. Aug. 3, 1993).

239. *E.g.*, *Stevens v. State*, 701 N.E.2d 277, 280-81 (Ind. Ct. App. 1998); *State v. Bauman*, 586 N.W.2d 416, 420-21 (Minn. Ct. App. 1998). *But see United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988) (expressing concern that deeming suspect arrested, for search incident purposes, would be "at odds with several of our prior [*Terry* question] decisions where far greater restraints were placed on suspects and we nevertheless held that no arrests occurred.").

240. *Supra* notes 223-225 and accompanying text; *see also* David A. Harris, *Frisking Every Suspect: The Withering of Terry*, 28 U.C. DAVIS L. REV. 1 (1994) (discussing increased judicial permissibility relative to intrusiveness of *Terry* detentions and frisks).

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should) take a somewhat different approach when it is the *prosecution* which is contending that an arrest was made at a particular time, so as to justify a search which presumably can be undertaken as a matter of constitutional or statutory law only subsequent to arrest. In this context, “the prosecution must be able to date the arrest as *early* as it chooses following the obtaining of probable cause.”<sup>241</sup>

Such a predisposition, however, is part and parcel of the constitutionally dubious “could have” approach, criticized above, which flouts the requirement that an “actual arrest” occur. An actual arrest is nothing less than a constitutional precondition<sup>242</sup> that must be alleged and legally established by the government if the search is to be approved.<sup>243</sup>

A second explanation derives from the analytic method employed by many such courts, which eschews the tripartite scheme of seizures outlined above, and instead regards the “arrest question” as only involving a basic distinction between stops and arrests, ignoring the unique features of custodial arrests. This approach uses an expansive, low-threshold definition of a “seizure,” evaluating whether a suspect reasonably felt “free to leave”,<sup>244</sup> if not, ipso facto, the requirements of an arrest for search incident purposes are satisfied.<sup>245</sup> However, the crude “tipping point” orientation of the approach utterly ignores the constitutional distinction between seizures and custodial arrests.<sup>246</sup> Equally important, by importing *Terry* analysis into the arrest question,<sup>247</sup> the approach

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241. LAFAVE, *supra* note 7, § 5.1(a), at 10-11 (citing *Peters v. Sibron*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring)); *see also* LAFAVE, *supra* note 7 § 5.4(b), at 155-63, Supp. at 2 n.8 (positing the “better view” that it is sufficient that “the search could have lawfully been made before rather than after the arrest”).

242. *Supra* notes 162-166, 179-184, and accompanying text.

243. *Supra* note 199 and accompanying text.

244. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

245. *E.g.*, *United States v. Taylor*, No. 97-6146, 1999 WL 98576 \*3 (6th Cir. Jan. 27, 1999); *Stevens v. State*, 701 N.E.2d 277, 281 (Ind. Ct. App. 1998). Employing such an approach, the *Stevens* court recognized what it called an “in effect” arrest. *Stevens*, 701 N.E.2d at 281.

In *State v. Crutcher*, 989 S.W.2d 295 (Tenn. 1999), the majority concluded that a custodial arrest for search incident purposes had not occurred, and derided the dissent for advocating a “free to leave” definition of arrest:

This definition, however, fails to recognize the distinction between “seizure” and “arrest” . . . .

A person may be seized without being placed under custodial arrest . . . . While we agree that the “reasonable person” standard is a factor in determining whether an arrest has occurred, just as it would be for any seizure, we believe more is required to establish a custodial arrest for purposes of a search incident to an arrest.

*Id.* at 302 n.10.

246. *E.g.*, *Cupp v. Murphy*, 412 U.S. 291, 296 (1973) (recognizing occurrence of a seizure but not a “formal arrest”); *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (distinguishing “seizures” from “arrests,” the latter “which eventuate in a trip to the station house and prosecution for crime”).

247. Such transference, it is worth noting, is not unprecedented in Fourth Amendment analysis more generally, especially with respect to *Miranda*’s “custody” requirement. *Miranda* is triggered only when a suspect is in “custody” and subject to police interrogation, the former an occurrence with obvious parallels to Fourth Amendment seizures. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (stating that custody requirement is satisfied when a suspect is “deprived of his freedom of action in any significant way”). Over the years the respective constitutional issues have been linked. Indeed, the Supreme Court has seen fit to analogize custody and arrest in evaluating a *Miranda* custody question. *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984) (equating custody with a “formal arrest” or “its functional equivalent,” and premising custody determination on whether a “reasonable person” would believe himself to

fails to recognize that a degree of police intrusiveness beyond *Terry* does not of necessity legally (or logically) satisfy the government's burden to establish the arrest precondition, justifying an incidental search. Turning Professor LaFave's analytic method on its head, "the question of when an arrest occurred cannot be answered in the abstract, that is, without consideration of why the question is being asked."<sup>248</sup> Accordingly, unlike *Terry* challenges, where the defendant must prove police excess in order to obtain redress (i.e., exclusion of "tainted" evidence), the government bears the burden of proving the occurrence of an arrest in order to justify the exceptional search it has undertaken,<sup>249</sup> suggesting the need for a less ambiguous and more stringent behavioral standard.

The Maryland Court of Appeals' recent decision in *State v. Evans*<sup>250</sup> provides a compelling example of the confusion now marking the arrest question, and the troubling constitutional ramifications associated. *Evans* involved the consolidated Fourth Amendment challenges of two Baltimore residents, separately ensnared by a police anti-drug task force. Evans allegedly sold drugs to an undercover officer who left the scene; five-to-ten minutes later, Evans was seized and subjected to a public search of his "rear area," revealing cocaine.<sup>251</sup> Although the officers confiscated the drugs, photographed Evans, and verified his identity,<sup>252</sup> they released him at the scene;<sup>253</sup> almost one month later, how-

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be "in custody"). Likewise, courts use *Miranda*-related conceptualizations of "custody" to inform Fourth Amendment seizure analysis. *E.g.*, *United States v. Taylor*, 162 F.3d 12, 22 (1st Cir. 1998) (citing *Berkemer* in analyzing a *Terry* question); *United States v. White*, 648 F.2d 29, 33-34 (D.C. Cir. 1981) ("Whether there has been an arrest turns on whether there has been an imposition of custody . . ."). The logical appeal of such a linkage has been increased because *Terry* stops have become increasingly aggressive, triggering the constitutional concern over coercion embodied in the Fifth Amendment, served by the *Miranda* safeguards. See Mark A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, 63 *FORDHAM L. REV.* 715, 728-33 (1994) (noting same and providing examples); Note, *Custodial Engineering: Cleaning Up the Scope of Miranda Custody During Coercive Terry Stops*, 108 *HARV. L. REV.* 665, 667-71 (1995) (noting same).

However, the mere fact that a suspect is in custody by no means compels that she has been arrested for search incident purposes. As one court recently observed, "[a] person need not be under arrest to be 'in custody' for *Miranda* purposes. Short of an actual arrest, 'the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest.'" *State v. Frank*, 986 P.2d 1030, 1036 (Idaho Ct. App. 1999) (quoting *Berkemer*, 468 U.S. at 441) (citations omitted); see also *In re Interest of J.W.*, 654 N.E.2d 517, 521 (Ill. App. Ct. 1995) (noting that "arrest" and "custody" have distinct constitutional meanings); cf. *Williams v. State*, 757 So. 2d 597, 599 (Fla. Dist. Ct. App. 2000) (holding that "[a] person may be 'in custody' for purposes of *Miranda* requirements," but not for purposes of Sixth Amendment speedy trial requirements). See generally Richard A. Williamson, *The Virtue (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody*, 1993 *U. ILL. L. REV.* 379 (arguing that Fourth Amendment values underlying the distinction between *Terry* stops and arrests are not coextensive with Fifth Amendment values underlying *Miranda* custody determinations).

248. LAFAVE, *supra* note 7, § 5.1(a), at 10.

249. *Supra* note 199 and accompanying text.

250. 723 A.2d 423 (Md.), *cert. denied*, 528 U.S. 833 (1999).

251. *Id.* at 425, 434 n.16.

252. Police held Evans for a "significant length of time," because he lacked personal identification, requiring that his father be summoned to the scene to identify him before release. *Id.* at 432.

253. Police completed an "Investigated and Released" document, which the court called "an alternative to taking a suspect to the police station and immediately processing formal charges." *Id.* at 426 n.2.

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ever, he was formally arrested and indicted on the basis of the cocaine possession.<sup>254</sup> Defendant Sykes-Bey came to the attention of police in a similar undercover operation. An officer sought to buy a small quantity of cocaine from Sykes-Bey, who responded that he only sold “weight cocaine.”<sup>255</sup> After another officer bought a “dime” bag of cocaine from a nearby seller, Sykes-Bey was stopped and bodily searched, revealing cash; another search behind a nearby billboard revealed powder cocaine allegedly owned by Sykes-Bey.<sup>256</sup> However, like Evans, Sykes-Bey was not formally arrested and charged until roughly one month later.<sup>257</sup> Both detentions were conducted pursuant to the modus operandi of the task force, which was designed to protect the “integrity of the ongoing undercover operation” and to result in a “mass sweep” of identified suspects at the conclusion of the operation.<sup>258</sup>

Sykes-Bey and Evans both filed unsuccessful motions to suppress, received substantial sentences, and appealed.<sup>259</sup> The Maryland Court of Special Appeals deemed the searches improper, and the Court of Appeals, the state’s highest court, agreed to address the following question: “What constitutes an ‘arrest’ for the purpose of applying the search incident to arrest exception to the warrant requirement?”<sup>260</sup>

The *Evans* court, in a unanimous decision, reversed. The court first negated what it called “gratuitous language” in several of its opinions over the preceding forty years suggesting that a contemporaneous “intent to prosecute is a prerequisite to a valid arrest.”<sup>261</sup> Whether an officer intends to formally arrest or otherwise initiate the booking and charging process “at or near the time of the initial detention,” the court reasoned, is irrelevant to the arrest question.<sup>262</sup> Rather, for an arrest to occur under Maryland law a police officer must have (1) probable cause that the suspect committed a crime and (2) either “physically restrain the suspect or otherwise subject the suspect to his custody or control.”<sup>263</sup>

Applying this test, the court both found that the requisite probable cause was present and that the detentions of Evans and Sykes-Bey “rose to the level

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254. *Id.* at 426.

255. *Id.* at 427.

256. *Id.*

257. *Id.* Both officers admitted on cross-examination that neither of the initial seizures amounted to formal arrests, and that they did not intend to formally arrest Evans or Sykes-Bey when the searches were undertaken. *Id.* at 429.

258. *Id.* at 425.

259. *Id.* at 426-27.

260. *Id.* at 429.

261. *Id.* at 431; *see also* Shorey v. Warden, Maryland State Penitentiary, 401 F.2d 474 (4th Cir. 1968) (stating that under Maryland law an arrest requires *inter alia* the detention of the suspect with an intent to prosecute). The court justified its result, in part, by noting that in Maryland (as elsewhere) police officers themselves do not enjoy prosecutorial powers. *Evans*, 723 A.2d at 431 n.14.

262. *Id.* at 432; *see also id.* (“This State’s law of arrest extends no talismanic significance to the act or intention of initiating the formal booking process. On the contrary, formally charging a suspect is not a *sine qua non* to a lawful arrest in Maryland.”).

263. *Id.*

of either a physical restraint or a subjugation to police custody and control,<sup>264</sup> justifying the street searches. It was thus of no moment that the two were not “formally arrested until much later.”<sup>265</sup> Indeed, the court reasoned, to require a timely “trip to the station house” and “formal criminal charging,”<sup>266</sup> would be at odds with the Fourth Amendment’s core interest in limiting governmental intrusiveness:

It would be ironic indeed were compliance with the guarantee of the Fourth Amendment . . . to mandate that police officers subject detainees to a greater intrusion, a “formal” arrest, in order to justify the lesser intrusion of a search. The force of the Court of Special Appeals’ decision . . . is that Respondents’ constitutional rights were violated only when the police decided not to “arrest” them, and let them go.<sup>267</sup>

An important lynchpin in the court’s reasoning was its disavowal of any need to distinguish arrest types from one another, for purposes of search incident analysis. While acknowledging that the Supreme Court has used qualifying terms like “formal” and “custodial,” the *Evans* court asserted that the “modifiers have been used by the Supreme Court and others simply to emphasize the distinction between arrests and non-arrests, not to delineate different types of arrest.”<sup>268</sup> According to the court: “the use of the adjectives ‘formal’ or ‘custodial’ does not further modify the constitutional contours of detention . . . . [T]here exists no constitutional distinction between an arrest and a ‘formal’ or ‘custodial’ arrest . . . . [T]he adjectives ‘formal’ and ‘custodial’ are redundant and unnecessary for the purpose of defining an arrest.”<sup>269</sup>

Thus, the *Evans* court approached the arrest question as a stark, bipolar inquiry,<sup>270</sup> and in so doing effectively combined the “could have” approach criticized above with the basic threshold question of whether the defendants were seized for Fourth Amendment purposes.<sup>271</sup> Plainly, *Evans* and *Sykes-Bey*

264. *Id.*

265. *Id.* (emphasis omitted).

266. In support, the court quoted dictum from *Illinois v. Lafayette*, where the Supreme Court addressed the permissibility of inventory searches (not the definition of arrest for search incident purposes): “‘An arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of the custody inherent in the arrest status.’” *Id.* at 438 (quoting *Illinois v. LaFayette*, 462 U.S. 640, 645 (1983)) (emphasis omitted).

267. *Id.* at 439.

268. *Id.* at 437.

269. *Id.*

270. The court suggested that *Robinson* and *Gustafson*, where the Justices used the phrases “custodial arrest” and “full custody arrest,” were decided shortly after *Terry* “with its introduction of a less stringent constitutional standard,” and that “the focus in these cases was to distinguish traditional arrests and searches incident thereto from the newfound *Terry* stop and frisk rather than to introduce yet another distinction in the reasonableness of searches and seizures.” *Id.* at 526. Whatever the merit of the *Evans* court’s historical analysis, the court failed to note the many more recent decisions where similar qualifying language has been used by the Court, especially *Rawlings* (1980), *Belton* (1981) and *Knowles* (1998). See also *Minnesota v. Dickerson*, 508 U.S. 366, 381 (1993) (Scalia, J., concurring) (referring to “full custodial arrest on probable cause” and attendant right to “a full physical search incident to the arrest”); *United States v. Parr*, 843 F.2d 1228, 1230-32 (9th Cir. 1988) (surveying conceptualization of “custodial arrest” by lower federal courts).

271. See also, e.g., *People v. Bland*, 884 P.2d 312, 325 (Colo. 1994) (Rovira, C.J., concurring)

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were “seized.” But whether they were arrested for search incident purposes should have been quite another matter.<sup>272</sup> By adopting its expansive notion of arrest, the court accorded Baltimore police enormous power to conduct invasive bodily searches (in *Evans*’ case, a rectal search conducted in public),<sup>273</sup> risking obvious concern over arbitrary enforcement. The police were permitted to search the defendants, continue with their undercover operation,<sup>274</sup> and then possibly search again upon execution of a massive, coordinated sweep one month later (delayed to preserve officers’ cover and to maximize public impact).<sup>275</sup>

Whatever practical appeal such a strategy might possess, however, should not justify judicial short shrift being given to Fourth Amendment requirements, no less one of its “jealously guarded” exceptions. As the New York Court of Appeals observed in suppressing search incident evidence when police similarly delayed formal arrest for a month after the initial seizure of a suspect, it is

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(concluding that suspect was “obviously” under arrest “because a reasonable person would not feel free to leave an officer’s presence when handcuffed in a motel room.”); *State v. Crutcher*, 989 S.W.2d 295, 304-05 (Tenn. 1999) (Drowota, J., dissenting) (rejecting majority’s effort to distinguish arrests from seizures and concluding that an arrest occurs for search incident purposes when (1) a suspect is seized (2) based upon probable cause).

272. Although perhaps easy to recognize, such a distinction is hard to put into effect. The Tennessee Supreme Court in a recent case emphasized that “seizure” and “arrest” differ constitutionally, and that accordingly different tests must be utilized. The court observed, “[a] person may be seized without being placed under custodial arrest.” *Crutcher*, 989 S.W.2d at 301 n.10. The *Crutcher* court could only add, unhelpfully, that “more is required to establish a custodial arrest for purposes of a search incident to arrest.” *Id.*

273. Although the majority opinion of the Maryland Court of Appeals did not describe the search in detail, the lower court did so:

The police officer made the search during daylight hours, in a public alleyway or street, in the presence of two female police officers who, the trial testimony showed, “turned their backs” during the time that the male police officer donned a rubber glove and extracted nine small vials from the appellant’s rectum “one by one.”

*Evans v. State*, 688 A.2d 28, 40 (Md. Ct. Spec. App. 1997) (Sonner, J., dissenting).

Whether the nature and extent of such an invasive search itself was permissible is very much open to question. *See, e.g.*, *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997) (holding that “*Robinson* did not hold that all possible searches of an arrestee’s body are automatically permissible as a search incident to arrest. To the contrary, any such search must still be reasonable.”); *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1446 (9th Cir. 1991) (stating that “*Robinson* simply did not authorize” a strip or body cavity search); *see also Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (stating that “the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street . . .”); *United States v. Edwards*, 415 U.S. 800, 808 n.9 (1974) (observing that an otherwise valid search might be improper due to its “manner of perpetration”); *United States v. McCauley*, 385 F. Supp. 193, 199 (E.D. Wis. 1974) (“In addition to being medically unsound, the forceful probing and examining of the vagina and anus by strangers attacks the very dignity, privacy, and integrity upon which our Constitution is founded.”).

274. One of the participating officers rationalized the strategy of the task force as follows:

The operation is designed to buy drugs, to buy as much drugs as we can within a specific period of time. Then once we’ve accomplished that, to get the paperwork together for these subjects and come back on a later date and try to arrest them all on one day or as many as we can on one day . . . to make an impact on the area . . . .

*Evans*, 723 A.2d at 425 n.1. After the police got “the[ir] paperwork together,” at the time of the formal arrest of the suspects almost one month later, they likely searched both suspects a second time, but found no contraband. *Id.* at 430 n.12.

275. *But cf. Petula Dvorak, After a Night of Raids Comes the Day*, WASH. POST, July 15, 2000, at B2 (describing “Operation Blockbuster,” in which District of Columbia police videotaped drug sales, and subsequently arrested suspects en masse pursuant to warrants).

a “dangerous non sequitur to conclude that constitutional rights should be diminished as a result” of a strategic choice by police to eschew custodial arrests at the time they desire to search.<sup>276</sup> “The State cannot have it both ways, [it] must choose. Here the police made a deliberate choice that the cover was more important than the immediate arrest of the defendant and they must be bound by that choice.”<sup>277</sup> Under the reasoning of *Evans*, police retain authority to search until such time as they elect to execute a formal custodial arrest, in effect using the initial probable cause determination (as yet untested by a judicial officer) as a “trump card to justify warrantless personal searches.”<sup>278</sup> To view the situation otherwise, i.e., to deem “contemporaneous” the initial detention/search and the “trip to the station,” almost one month later, is to stretch that requirement far, far beyond recognition.

Equally troubling, however, is the zero-sum orientation evidenced in *Evans*. To be sure, the state need not always be required to establish that an actual prosecution ultimately ensued to justify admission of evidence seized in an incidental search. As one judge has noted, “[t]he Fourth Amendment does not seek to regulate searches incident to prosecution, but those that are incident to arrest.”<sup>279</sup> However, the state surely must show something more than merely that a suspect was seized upon probable cause. The contours of that something are taken up next.

#### IV. IDENTIFYING THE CONSTITUTIONAL CONTOURS OF CUSTODIAL ARREST

Contrary to the insouciant view in *Evans* that an “arrest is an arrest,”<sup>280</sup> not all intrusive police practices qualify as custodial arrests, and hence justify incidental searches. This much is apparent not just from the recurrent use of such qualifiers as “custodial” and “formal” in search incident decisions by the U.S. Supreme Court and other tribunals, but also from decisional law extending back many decades. Despite the occasional reference to the arrest question as being factual in nature,<sup>281</sup> it is more properly conceived as a legal (indeed, constitutional) question that must be resolved on the basis of factual determinations made by the court.<sup>282</sup> As a result, the constitutional contours of arrest

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276. *People v. Evans*, 371 N.E.2d 528, 531 (N.Y. 1977).

277. *Id.*

278. *Id.*

279. *Evans*, 688 A.2d at 42 (Sonner, J., dissenting); cf. *United States v. Sayers*, 698 F.2d 1128 (11th Cir. 1983) (concluding that the Speedy Trial Act does not trigger until defendant is “charged,” and thus that there was no “arrest” despite fact that defendant was taken into custody, fingerprinted, photographed and released).

280. *Evans*, 723 A.2d at 432 n.15 (“[T]he act of arrest is not some Platonic ideal whose existence can be recognized only upon its perfection. Rather, it is a simple concept more readily perceivable.”).

281. See, e.g., *Sibron v. New York*, 392 U.S. 40, 67 (1968) (deeming it “a question of fact precisely when [an arrest occurs] in each case”); J. SHANE CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 49 (1968) (“Arrest, then, is a question of fact for the judge to decide on the basis of testimony at the hearing . . .”).

282. See *United States v. Hernandez*, 825 F.2d 846, 851 (5th 1987) (deeming it a legal question dependent upon factual findings); *State v. Evans*, 723 A.2d 423, 430 (Md. 1999) (same); *State v. Palone* 613 N.W.2d 568, 579 (Wis. 2000) (same); see also C.J.S., *ARREST* § 4, at 10 (1975 & Supp. 2000)

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should be recognizable.

To answer this crucial question in the abstract, as should be apparent from the foregoing discussion, risks intolerable indeterminacy. Fortunately, two resources are available to ground the inquiry: first, we can look for guidance to historic applications of the search incident exception, and the exception's triggering event—arrests; second, and perhaps more helpful, we can look to the justifying rationales of search incident doctrine and identify the situational characteristics and concerns that justify the exception.<sup>283</sup> With these benchmarks, an interpretative framework can be developed to answer the arrest question, one grounded in the justifying rationales of the constitutional exception, that both reflects and serves its articulated historic purposes.

As Justice Scalia is quick to remind us, framing era history has assumed threshold significance in Fourth Amendment interpretation. “In determining whether a particular government action violates [the Fourth Amendment],” he recently noted for the seven-member majority in *Wyoming v. Houghton*, “we inquire first whether the action was regarded as an unusual search or seizure under the common law when the Amendment was framed.”<sup>284</sup> As noted at the outset, framing era history affords surprisingly little express guidance on the

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(“The effect of facts as constituting an arrest is a question of law. Whether the particular circumstances have been established which constitute an arrest is ordinarily, however, a question of fact.”).

283. As the *Chimel* Court noted, in answering whether a warrantless search is reasonable, and hence justified, courts must be guided by “established Fourth Amendment principles” and the “exigencies of the situation” that make the warrantless search “imperative.” *Chimel v. California*, 395 U.S. 752, 761-64 (1969) (citations omitted).

284. 526 U.S. 295, 299 (1999); see also *Florida v. White*, 526 U.S. 559, 563 (1999) (“In deciding whether a challenged governmental action violates the Amendment, we have taken care to inquire whether the action was regarded as an unlawful search and seizure when the Amendment was framed.”); *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995) (“In evaluating the scope of [Fourth Amendment protections], we have looked to the traditional protections afforded by the common law at the time of the framing.”); *School District v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring) (stating that “the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers”); *Davis v. United States*, 328 U.S. 582, 605 (1946) (Frankfurter, J., dissenting) (“the meaning of the Fourth Amendment must be distilled from contemporaneous history”); *Carroll v. United States*, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted . . .”).

Of course, the Court's increasing emphasis on framing era history, what David Sklansky recently referred to as the Court's “new Fourth Amendment originalism,” has been and remains a matter of considerable controversy. David Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000). Among other concerns, Professor Sklansky emphasizes that framing era history is often quite thin and vague, rendering suspect the dispositive weight accorded history by the Court when it addresses particular actions of modern police. *Id.* at 1776-1813. Sklansky, however, refrains from unequivocal condemnation, stating, “not all appeals to common law are equally unconvincing, and as to a few matters—e.g., the legality of searching an arrestee—eighteenth-century practice may have been relatively uniform.” *Id.* at 1806. The risk of resorting to history, as Sklansky observes, is that it raises the prospect that the Court will eschew the need to “look[] to the background of the Fourth Amendment for the paradigmatic abuses that prompted its adoption, and . . . to the broader evils against which the Amendment offers protection.” *Id.* at 1813. The challenge, as Sklansky persuasively argues, is to use common law history as a critically important guide in assessing constitutional questions, yet not render the Amendment hidebound to ancient common law practices. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 71 (1991) (Scalia, J., dissenting) (stressing that Fourth Amendment protections “should not become less than” that afforded at common law during the framing era).

contours of police authority to search incident to arrest. We do know that such authority indisputably existed<sup>285</sup> and that the authority was quite limited in scope by virtue of the comparatively meager power of police to execute warrantless arrests.<sup>286</sup> Lacking extensive information on searches incident as such, it makes sense to examine the historic characteristics of the triggering event of searches incident—arrests.

Although only modestly better developed, the historical record does suggest that arrests shared several characteristics.<sup>287</sup> First, arrest presumed that the arresting official secured custody in order to effectuate prosecution. To Blackstone, for instance, an arrest involved the “apprehending or restraining of one’s person, in order to be forthcoming to answer an alleged or suspected crime.”<sup>288</sup> Upon surveying the common law authorities, Professor Horace Wilgus noted in 1924: “[n]ot every imprisonment is an arrest in the technical sense, although every arrest is an imprisonment. An arrest is the beginning of imprisonment . . . [I]t is the ‘apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime.’”<sup>289</sup> Writing in 1940, Professor Rollin Perkins summarized the common law of arrest as “the taking of another into custody for the actual or purported purpose of bringing the other before a court, body or official or otherwise securing the administration of the law.”<sup>290</sup> According to Perkins, “[i]f there is no intent to

285. *Supra* notes 19-50 and accompanying text.

286. *Supra* notes 21-44 and accompanying text.

287. Prior to the latter part of the sixteenth century, and the gradual emergence of formal constabularies, the law of arrest was “rough and rude,” as yet “unpolished by the friction of nice cases.” 2 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 582-83 (1898 ed.). *See generally* 3 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 598-604 (1908 ed.) (tracing arrest from the “primitive period” to the modern era with its greater reliance on “official action”); JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 184-200 (1883) (same); Horace L. Wilgus, *Arrest Without a Warrant* (Part I), 22 MICH. L. REV. 541, 545-49, 559-62 (1924) [hereinafter Wilgus Part I] (same).

288. 4 BLACKSTONE, *supra* note 26, at 289. Blackstone added that “[w]hen the defendant is regularly arrested, he must either go to prison, for safe custody: or put in special bail to the sheriff. For, the intent of the arrest being only to compel an appearance in court at the return of the writ, that purpose is equally answered . . .” *Id.* at 290. Nineteenth-century American treatise writer Joel Prentiss Bishop defined arrest as “the taking into custody of a person, or a person and his goods, in pursuance of some lawful command or authority, and for the purpose of further legal proceedings.” JOEL PRENTISS BISHOP, *BISHOP ON CRIMINAL PROCEDURE* § 156, at 92 (2d ed. 1872).

This singular purpose served to distinguish arrests from “imprisonments,” civil wrongs, a distinction quite plainly lost on the Maryland Court of Appeals in *Evans*, discussed in text accompanying *supra* noted 250-275. Indeed, at common law the seizure condoned in *Evans* would likely have rendered the Baltimore officers liable for a civil action. As Professor Wilgus observed in 1924: “A forcible seizure of a person without any pretense of taking him into legal custody is not an *arrest* although, if wrongful, it would be a false imprisonment: as in locking one in a bank after closing hours.” Wilgus Part I, *supra* notes 287, at 544 (emphasis in original). Wilgus cites by way of example an early Tennessee case where a claim for false imprisonment arose when an individual was detained and compelled to surrender papers, before being permitted to proceed, a situation with close parallel to *Evans*. *See id.* (citing and discussing *Bloomer v. State*, 3 Sneed (Tenn.) 66.)

289. Wilgus Part I, *supra* note 287, at 543 (citation and footnotes omitted); *see also, e.g.*, *Town of Hamden v. Collins*, 82 A. 636 (Conn. 1912) (noting same); *State v. Martin*, 131 P. 1190 (Kan. 1913) (same).

290. Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 201 (1940) [hereinafter Perkins]; *see also* WILLIAM L. CLARK, JR., *HAND-BOOK ON CRIMINAL PROCEDURE* § 14, at 19 (1895) (“When a

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take the other anywhere and his detention is a mere temporary incident to the proper exercise of some other privilege, it is not an arrest.”<sup>291</sup>

This requirement is evidenced in many more contemporary definitions of arrest. As the Ohio Supreme Court stated in 1980, “an arrest, in the technical, as well as the common sense, signifies the apprehension of an individual or the restraint of a person’s freedom in contemplation of the formal charging with a crime.”<sup>292</sup> Distilling modern law, one legal encyclopedia states an arrest “is intended to serve, and does serve, the end of bringing the person arrested personally within the custody and control of the law for the purpose specified in, or contemplated by, the process.”<sup>293</sup> The requirement was echoed by the Court in *Robinson*, when the majority distinguished arrests from *Terry* stops:

An arrest is a wholly different kind of intrusion upon individual freedom from a

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crime has been committed, the first thing to be done is to secure the body of the offender so that he may be forthcoming for his trial, or, in other words, to arrest him.”); 4 Am. Jur., *Arrest*, § 4, at 7 (1936) (stating “[a]n arrest . . . signifies the apprehension or detention of the person of another in order that he may be forthcoming to answer an alleged or supposed crime”); AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE § 18, at 27 (1930) (stating an “[a]rrest is the taking of a person into custody in order that he may be forthcoming to answer for the commission of an offense”); cf. INT’L ASS’N OF CHIEFS OF POLICE, COMMITTEE ON UNIFORM CRIME RECORDS, UNIFORM CRIME REPORTING: A COMPLETE MANUAL FOR POLICE 23 (1929) (defining arrest for data collection purposes as “the taking of a person into custody in order that he may be held to answer for a public offense. Arrest must be carefully distinguished from a court summons and a police notice or citation.”).

291. Perkins, *supra* note 290, at 206-07 (emphasis in original); see also, e.g., United States v. Bonanno, 180 F. Supp. 71, 77 (S.D.N.Y. 1960) (“It is clear that a technical arrest demands an intent on the part of the arresting officer to bring in a person so that he might be put through the steps preliminary to answering for a crime such as fingerprinting, booking, arraigning, etc.”); People v. Nunn, 70 Cal. Rptr. 869, 873 n.4 (Cal. App. 1968) (“As used in Fourth Amendment jurisprudence the term ‘arrest’ presupposes an intent on the part of the arresting officer to take the arrestee in so that he might be put through the steps preliminary to answering for a crime such as booking and arraigning.”); Smith v. State, 229 So. 2d 551, 556 (Miss. 1969) (arrest “is the taking into custody of another . . . for the purpose of holding him to answer an alleged or suspected crime”).

292. State v. Darrah, 412 N.E.2d 1328, 1331 (Ohio 1980); see also Morris v. United States, 728 A.2d 1210 (D.C. 1999) (stating that arrest occurs when police have made a determination to charge a suspect and custody is maintained to permit suspect to be formally charged and brought to justice); Melton v. State, 75 So. 2d 291 (Fla. 1954) (holding that arrest requires the taking of suspect into custody so that he may be brought into court to answer for a crime); Blue v. State, 674 So. 2d 1184 (Miss. 1996) (stating that arrest occurs when suspect taken into custody by officer with purpose to hold him to answer for alleged or suspected crime); State v. Mallett, 542 S.W.2d 584 (Mo. Ct. App. 1976) (stating that arrest continues so long as officer controls suspect’s movements for purpose of delivering person to authorities to be held to answer); State v. Long, 713 N.E.2d 1 (Ohio Ct. App. 1998) (holding that arrest signifies the detention of person in order that she may be forthcoming to answer for suspected crime); State v. Glick, 201 N.W.2d 867 (S.D. 1972) (arrest is the taking into custody of a person so that he may be held to answer for a suspected crime).

Statutory law reflects a similar orientation. E.g., MINN. STAT. ANN. § 629.30 (West 1983) (“Arrest means taking a person into custody that the person may be held to answer for a public offense.”); IND. CODE § 35-33-1-5 (1998) (“Arrest is the taking of a person into custody, that he may be held to answer for a crime.”); OR. REV. STAT. ANN. § 133.005(1) (1999) (defining arrest as “plac[ing] a person under actual or constructive restraint or [taking] into custody for the purpose of charging that person with an offense”); S.D. CODIFIED LAWS § 23A-3-1 (Michie 2000) (“An arrest is the taking of a person into custody so that he may be held to answer for the alleged commission of a public offense.”). BLACK’S defines arrest as the “[t]aking, under real or assumed authority, custody of another for the purpose of holding or detaining him to answer a criminal charge or civil demand.” BLACK’S LAW DICTIONARY 109-10 (6th ed. 1990).

293. C.J.S., *Arrest* § 2 at 8 (1975 & Supp. 2000).

limited search for weapons, and the interests each is designed to serve are likewise quite different. 'An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its law obeyed, and it is inevitably accompanied by further interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows.' The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.<sup>294</sup>

The authorities also make clear that it is critically important that police, in some way, manifest their purpose and intent, "by some unequivocal act, or by using words indicative of arrest."<sup>295</sup> Citing common law authorities, Professor Perkins observed that while neither "mere words" nor "actual physical touching" are essential, it is critical that there be "an assertion of authority and purpose to arrest followed by submission of the arrestee."<sup>296</sup> Writing in 1889, treatise author Francis Wharton stated that it is "essential that there should be notice of arrest either expressly or by implication, and without such notice no amount of physical restraint can constitute an arrest."<sup>297</sup> In 1954, the Florida Supreme Court stated:

an arrest involves the following elements: (1) A purpose or intention to effect an arrest under a real or pretended authority; (2) An actual or constructive seizure or detention of the person to be arrested by a person having present power to control the person arrested; (3) *A communication by the arresting officer to the person whose arrest is sought, of an intention or purpose then and there to effect an arrest;* and (4) An understanding by the person whose arrest is sought that it is the intention of the arresting officer then and there to arrest him.<sup>298</sup>

One sees this same emphasis on manifest intent in numerous more modern formulations.<sup>299</sup> In sum, historically arrests have required a detention by police intending to subject the detainee to forthcoming criminal processing, accompanied by an actual manifestation of such purpose.<sup>300</sup>

294. *Robinson v. United States*, 414 U.S. 218, 228 (1973) (quoting *Terry v. Ohio*, 392 U.S.1, 25-26 (1968)); see also *In re M.E.B.*, 638 A.2d 1123, 1126 (D.C. App. 1993):

generally, an arrest is effected when the police have made a determination to charge the suspect with a criminal offense and custody is maintained to permit the arrestee to be formally charged and brought before the court. A *Terry* seizure, on the other hand, involves a more temporary detention, designed to last only until a preliminary investigation either generates probable cause or results in the release of the suspect.

295. C.J.S., *supra* note 293, § 42, at 100; see also W.H.N. STEVENS, *THE LAW OF ARREST* § 45, at 38-39 (1930) ("There must be some act or restraint which is clearly indicative of arrest to make the arrest complete.").

296. Perkins, *supra* note 290, at 206.

297. FRANCIS WHARTON, *CRIMINAL PLEADING AND PRACTICE* § 4, at 4 (9th ed. 1889).

298. *Melton v. State*, 75 So. 2d 291, 294 (Fla. 1954) (emphasis added).

299. *E.g.*, *Kearse v. State*, 662 So. 2d 677, 682-83 (Fla. 1995); *State v. Fisher*, 720 So. 2d 1179, 1183 (La. 1998); *State v. Crutcher*, 989 S.W.2d 295, 301-02 (Tenn. 1999); *State v. McKenna*, 958 P.2d 1017, 1022 (Wash. Ct. App. 1998); *State v. Swanson*, 475 N.W.2d 148, 153-55 (Wis. 1991).

300. Unfortunately, modern statutory formulations of "arrest" often add little to the foregoing common law definitions, in fact exhibiting a frustrating circularity and breadth. Texas statutory law, for instance, provides that a person is under arrest "when he has been actually placed under restraint or taken into custody by an officer or person executing a warrant of arrest, or by an officer arresting without a warrant." TEX. CRIM. PROC. CODE §15.22 (Vernon 1977).

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Not surprisingly, the dual animating concerns justifying the search incident exception—concern for officer safety and destruction of evidence—are closely tied to the aforementioned conceptualizations of arrest. Fundamentally, both concerns derive from the exigent climate created by custodial arrests—triggered by police manifestations that the immediate detention threatens even greater prospective jeopardy for the criminal suspect. The threat of extended detention and eventual prosecution, logic and human experience suggest, engender the likelihood that suspects will harm officers (in order to flee) and/or destroy evidence (in order to hinder the signaled future prosecution).<sup>301</sup> As the Supreme Court recognized in *Cupp v. Murphy*:

The basis for the [search incident] exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence in his possession . . .

Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself.<sup>302</sup>

In seeking to formulate a framework to identify custodial arrests, it thus is sensible that analysis focus on the behavior of officers, who serve as street-level agents of the state, and who signal to suspects the nature and extent of their likely future involvement in the justice system.<sup>303</sup> The behavior of offi-

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301. *Washington v. Chrisman*, 455 U.S. 1, 7 (1982) (“There is no way for an officer to predict how a particular subject will react to arrest or the degree of the potential danger.”); *Robinson*, 414 U.S. at 234 n.5 (“The danger to the police officer flows from the fact of arrest, and its attendant proximity, stress, and uncertainty . . . .”); *United States v. Bennett*, 908 F.2d 189, 194 (7th Cir. 1990) (observing that persons under stress of arrest situation might act aggressively and irrationally, even attempting actions that are unlikely to succeed); *People v. Hufnagel*, 745 P.2d 242, 247 (Colo. 1987) (same).

302. *Cupp v. Murphy*, 412 U.S. 291, 295-96 (1973). The distinction was recently identified by the Washington Court of Appeals as follows:

Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful non custodial arrest. It is thought that the officer and arrestee will be in close proximity for only a few minutes, and the arrestee, who is about to be released anyway, will have little motivation to use a weapon or destroy evidence. The officer may pat the arrestee for weapons if he or she reasonably suspects the arrestee is armed.

*State v. McKenna*, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998); see also *United States v. Dimick*, 790 F. Supp. 1543, 1552 (D. Colo. 1992) (“The justifications for a warrantless search incident to arrest are premised on the exigencies created by a valid actual arrest.”); *State v. Carner*, 624 P.2d 204, 208 (Wash. Ct. App. 1981) (stating that justification for search incident terminates when decision to release is made and manifested).

303. The Court has repeatedly stressed that the actions of officers, objectively viewed, should inform Fourth Amendment analysis. *Bond v. United States*, 529 U.S. 334, 339 n.2 (2000) (stating “the subjective intent of the law enforcement officer is irrelevant in determining whether that officer’s actions violate the Fourth Amendment . . . . [T]he issue is not [the officer’s] state of mind, but the objective effect of his actions”); *United States v. Mendenhall*, 446 U.S. 544, 555 n.6 (1980) (holding that an officer’s subjective intent is irrelevant, unless conveyed to the suspect); *Robinson v. United States*, 414 U.S. 218, 236 (1973) (stating it “is the fact of the custodial arrest which gives rise to the authority to search,” and that it is irrelevant that the arresting officer’s testimony “did not indicate any subjective fear for the respondent or that he did not himself suspect that the suspect was armed”); see also J. SHANE CREAMER, *THE LAW OF ARREST, SEARCH AND SEIZURE* 49 (1968) (stating that in determining whether an arrest occurred, “the court looks to see what the officer’s purpose was, to see what he knew or observed, and to see what he did. . . . Of these determinants to an arrest, the most important from a practical point of view is what the officer did.”); cf. *Stansbury v. California*, 511 U.S. 318, 324 (1994)

cers is critically important, “whether or not trial or conviction ultimately follows,”<sup>304</sup> and indeed whether or not charges are ultimately actually filed.<sup>305</sup> Rather, as Professor Perkins has noted, it is the “manifestation of purpose and authority” in the encounter that deserves dispositive weight.<sup>306</sup> It is what officers signal at the time of the purported “moment of arrest,” by words or conduct, that should be of critical importance to the arrest question: objective manifestations of purpose that contribute to how a reasonable suspect would likely respond, in accord with the search incident justifications.

The actions of police, as opposed to any subjective views they might harbor that a custodial arrest was made, thus logically should serve as benchmarks of the custodial arrest analysis. *Knowles* itself implicitly rested on this intent-manifestation analytic approach: the officer there plainly was not “purporting” to arrest Knowles, as borne out in the ticket he issued, thus stripping the encounter of its exigent quality and invalidating the search undertaken.<sup>307</sup> Such an approach,<sup>308</sup> it might be added, has benefit because it avoids the risk of making dispositive the likely self-serving representations of police, who risk losing a “good bust” if the evidence seized as a result of the incidental search is barred.<sup>309</sup>

This recognition, however, fails to resolve which police signals warrant analytic attention. Case law suggests that the duration of constraint and trans-

(stating that, for *Miranda* “custody” purposes, an officer’s subjective views on whether an arrest occurred are not relevant, “[s]ave as they are communicated or otherwise manifested to the person being questioned”).

304. *Robinson*, 414 U.S. at 228 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)).

305. Whether to file charges, and what charges to file, are of course inherently prosecutorial functions, influenced by police input but ultimately consciously independent of police control. See generally James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (discussing largely unfettered executive power of prosecutors with regard to charging).

306. See Perkins, *supra* note 290, at 248.

307. *Knowles v. Iowa*, 525 U.S. 113, 118-19 (1998).

308. For other examples of this approach see, *State v. Keyes*, 657 P.2d 724, 726 (Or. Ct. App. 1983) (holding that detention of an inebriate for purposes of his transport to an alcohol treatment facility does not qualify as an arrest for search incident purposes); *State v. McKenna*, 958 P.2d 1017, 1022 (Wash. Ct. App. 1998) (concluding that officer knew the jail could not accommodate petitioner and thus “never formed an intent, much less manifested an intent, to arrest McKenna custodially”); *State v. Carver*, 624 P.2d 204, 208 (Wash. Ct. App. 1981) (deeming the search of a juvenile improper because before conducting “the challenged search, the officers had determined that the defendant would not be detained, but released to his mother. . . . [A]ny further intrusion on the privacy of his person . . . was unreasonable and not necessitated by any exigencies which further detention might have required”).

309. E.g., *State v. Fisher*, 539 S.E.2d 677, 681-82 (N.C. Ct. App. 2000) (rejecting officer’s assertion that the suspect was “actually arrested,” justifying search incident, based on factual contradictions in record). See generally JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 215 (1966) (observing that when an officer “sees the case law as a hindrance to his primary task of apprehending criminals, he usually attempts to construct the appearance of compliance, rather than allow the offender to escape apprehension”). Of course, concern also exists over the considerably less benign, well-documented occurrence of actual police perjury (“testifying”) in the context of motions to suppress. See, e.g., JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW* 45-49 (1993); Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive To Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998); Christopher Slobogin, *Testifying: Police Perjury and What To Do About It*, 67 U. COLO. L. REV. 1037 (1996).

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port of suspects are two factors deserving of particular attention.<sup>310</sup> Duration, in the words of one court, is “a principal distinction” in search incident analysis;<sup>311</sup> it stands to reason that, with the passage of time, not only will the suspect become more anxious, but also enjoy a corresponding greater opportunity to harm police and destroy evidence. This common sense inference was acknowledged even by the *Robinson* dissent:

A *Terry* stop involves a momentary encounter between officer and suspect, while an in-custody arrest places the two in proximity for a much longer period of time. If the individual happens to have a weapon on his person, he will certainly have much more opportunity to use it against the officer in the in-custody situation. The prolonged proximity also makes it more likely that the individual will be able to extricate any small hidden weapon which might go undetected in a weapons frisk . . . . In addition, a suspect taken into custody may feel more threatened by the serious restraint on his liberty than a person who is simply stopped by an officer for questioning, and may therefore be more likely to resort to force.<sup>312</sup>

The difficulty with using duration as an analytic criterion, however, is its indeterminacy; as with its inconsistent treatment in *Terry* jurisprudence, duration simply does not permit reliable analysis. When, precisely, does the passage of time suffice to result in a custodial arrest, and hence justify a search? In practical terms, duration is simply too indefinite and open-ended to qualify as a constitutional criterion.

Similarly, despite repeated reference by the Supreme Court<sup>313</sup> and lower courts<sup>314</sup> to the importance of transport in the custodial arrest analysis, the ini-

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310. *Robinson v. United States*, 414 U.S. 218, 235 (1973) (“It is scarcely open to doubt that the danger to an officer is far greater in the case of an extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop.”).

311. *People v. Bland*, 884 P.2d 312, 318 (Colo. 1994) (“A principal distinction [of custodial arrests] is the duration of the authorized detention . . . . If a defendant is to be released after a temporary detention, therefore, an arrest is non-custodial.”); cf. WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.8, at 225 (3d ed. 2000) (“[S]topping differs from an arrest not in the incompleteness of the seizure but in the brevity of it.”).

312. *Robinson*, 414 U.S. at 253-54 (Marshall, J., dissenting, joined by Douglas and Brennan, JJ.).

313. *Robinson*, 414 U.S. at 234-35; *Gustafson v. Florida*, 414 U.S. 260, 262 (1973); see also *Terry v. Ohio*, 392 U.S. 1, 16 (1968) (defining arrest as a detention that eventuates in a “trip to the station house and prosecution”).

314. E.g., *Bland*, 884 P.2d at 316 (“A distinction may be drawn between custodial arrests, which are made for the purpose of taking a person to the stationhouse for booking procedures and the filing of criminal charges, and non-custodial arrests, which involve only temporary detention for the purpose of issuing a summons.”); *People v. Bischofberger*, 724 P.2d 660, 662 n.4 (Col. 1986) (“seizure of person for the purpose of taking that person to the station house for booking procedures and the filing of criminal charges”); *State v. McKenna*, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998) (“[I]t is thought that while the officer transports the arrestee to jail, the arrestee will have both motive and opportunity to use any weapon that might be on his or her person, and also to destroy any evidence that might be on his or her person.”); see also LAFAVE, *supra* note 7, § 5.2(h), at 94 (defining a “full custody arrest” as one “where the officer ha[s] seized the person with the intention of thereafter having him transported to the police station or other place to be dealt with according to law”).

Professor LaFave urges in his treatise that transport be “essential” to the arrest question: “*Robinson* and *Belton* are not search incident to arrest cases, but searches incident to ‘custodial arrest’ cases, and if there was ever any doubt about that *Knowles* dramatically illustrates how essential the taking-to-the-station aspect of the arrest really is.” *Id.* Supp. § 5.2, at 15.

tial appeal of the criterion fades with scrutiny. Aside from being largely redundant of the duration criterion, insofar as transport of necessity extends the duration of detention, transport lacks real-world significance. In reality, police typically fully search a subject *before* the suspect is placed in the police vehicle for transport to a facility for processing. Accordingly, to the extent it has meaning, the transport criterion serves a figurative function, symbolizing the next phase in a continuum of custody,<sup>315</sup> conforming to the constitutional need to “promptly” confirm probable cause before a judicial officer,<sup>316</sup> consistent with the historic purpose of custodial arrest: to charge and prosecute.<sup>317</sup> The significance of transport thus lies not so much in it being a *per se* requirement, but rather a signal—an objective manifestation—of an officer’s intent to follow through with the prosecution. From this perspective, if transport occurs it can reasonably be interpreted as consistent with the government’s intent to place the suspect in greater jeopardy, which triggers the search incident justifications.

What should warrant more significance than either duration or transport in gauging the critical moment of arrest is evidence that the officer conveys by express words or action that the suspect is “under arrest,” a consideration too often given short shrift in the case law.<sup>318</sup> While police silence does not likely contribute in a measurable way to the “stress” of an encounter, an affirmative and unambiguous police representation that a person is under arrest logically does so, triggering search incident justification. Indeed, in *Robinson* the suspect was expressly told by the police that he was under arrest before the search ensued,<sup>319</sup> consistent with notice requirements of the common law of arrest<sup>320</sup>

315. *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983) (stating “[a]n arrested person is not invariably taken to a police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of custody inherent in the arrest status”).

316. *Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that individuals arrested without a warrant are entitled to a prompt post-arrest judicial assessment of probable cause).

317. 4 BLACKSTONE, *supra* note 26, at 289 (stating “no man is to be arrested, unless charged with such a crime, as will at least justify holding him to bail, when taken.”); *see also* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 50-51 (2000):

Within th[e] progressive scheme of criminal prosecution, an arrest serves as the manner in which an individual is “introduced” into the system . . . This scheme demonstrates that an arrest constitutes only one step toward the ultimate goal of presenting evidence against an individual for committing an offense within the constraints of the constitutional procedural requirements. The system and the constitutional scheme do not permit arrest for any other purpose.

Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 336 (1942) (stating “[w]ith few exceptions, an officer making an arrest must take his prisoner before a magistrate. The legal power to release resides in the magistracy, not the police”).

318. *E.g.*, *McDonald v. State*, 491 S.W.2d 36, 38 (Ark. 1973) (discounting the importance of officers’ failure to inform suspect that he was under “arrest” prior to search); *State v. Brown*, 586 So. 2d 473, 474 (Fla. Dist. Ct. App. 1991) (same); *In re G.L.C.*, 382 N.E.2d 705, 707-08 (Ill. App. Ct. 1978) (same); *Stevens v. State*, 701 N.E.2d 277, 280 (Ind. Ct. App. 1998) (same); *State v. Wooten*, 237 S.E.2d 301, 304-05 (N.C. Ct. App. 1977) (same). As the Texas Court of Criminal Appeals recently stated, “the time at which an officer announces arrest is not the critical issue; rather it is whether sufficient probable cause for arrest existed before the search.” *State v. Ballard*, 987 S.W.2d 889, 893 (Tex. Crim. App. 1999).

319. *Robinson*, 414 U.S. at 220; *see also, e.g.*, *United States v. Mota*, 982 F.2d 1384, 1388-89 (9th

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and many modern statutes.<sup>321</sup> Likewise, a statement that the suspect is free to go, after being seized, should be accorded importance, as such a statement would naturally allay the anxiety of a suspect and thus the motive to destroy evidence or harm the officer.<sup>322</sup> In short, in addressing the arrest question in search incident challenges, courts should attach particular weight to whether officers unequivocally communicate to suspects that they are under arrest prior to undertaking a search.<sup>323</sup>

A recent decision from the Tennessee Supreme Court nicely illustrates the aforementioned intent-manifestation approach. In *State v. Crutcher*,<sup>324</sup> police observed three motorcyclists violating the speed limit; two pulled over at the officers' command, while Crutcher sped away. After a high-speed chase,

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Cir. 1993) (attaching significance to the fact that suspects were told that they were under arrest).

320. Professor Wilgus, writing in 1924, referred to it as the "duty" of the officer "to make reasonable disclosure, adapted to the circumstances, of his purpose and authority, the cause of the arrest, and demand submission." Wilgus Part I, *supra* note 287, at 556-57. For discussions of common law examples see *id.* at 553-56 (citing cases); AMERICAN LAW INSTITUTE, CODE OF CRIMINAL PROCEDURE § 25, at 247-50 (Official Draft Commentary) (1930) (citing cases); WILLIAM L. CLARK, JR., HAND-BOOK ON CRIMINAL PROCEDURE § 16, at 20 (1895) (citing cases); HARVEY CORLTANDT VORHEES, THE LAW OF ARREST § 78, at 70-76 (2d ed. 1915) (citing cases). Professor Perkins, writing in 1940, emphasized the "common-law requirement that one about to be arrested is entitled to notice, if he does not already know, of (1) the intention to take him into the custody of the law, (2) the authority for the arrest, and (3) the reason therefor." *Supra* note 290, at 248-49. Perkins observed that with respect to warrantless arrests in particular, unless otherwise evident to the arrestee, there must be "a manifestation of intention to arrest and a statement of the offense for which the arrest is made . . ." *Id.* at 249. Professor William Clark, writing in 1895, noted that in the absence of such a communication, "physical restraint [itself] will not constitute an arrest." Clark, *supra* § 19, at 56; see also JOEL PRENTISS BISHOP, 1 BISHOP'S NEW CRIMINAL PROCEDURE § 158, at 112 (2d ed. 1913) ("[S]imply to restrain a man who is neither told nor suspects the reason is not to arrest him.").

Over time, the requirement that a suspect be apprized at time of arrest of the specific alleged offense has been notably loosened. *E.g.*, *Golden v. Commonwealth*, 519 S.E.2d 378, 380-81 (Va. Ct. App. 1999) (holding that an arrest supported by probable cause is not made unlawful because the officer erroneously informed the suspect of the arrest basis, when another justifying basis exists); *State v. Huff*, 826 P.2d 698, 701 (Wash. 1992) (same). This raises obvious concern in the context of arrests for low-level offenses, whereby police can evade legal or constitutional limits on their arrest powers by obfuscating purported bases for arrest. However, the lack of specificity is of no moment to the basic discussion here, which emphasizes the importance of unequivocally signaling an arrest *qua* arrest, based on probable cause, not its particular basis.

321. *E.g.*, MICH. COMP. LAWS § 764.19 (2000) ("When arresting a person without a warrant, the officer making the arrest shall inform the person arrested of his authority and the cause of the arrest . . ."); MISS. CODE § 99-3-7 (2000) ("the person making such arrest must inform the accused of the object and cause of the arrest . . ."). Such requirements, as at common law, do not apply under some circumstances, including when the arrestee resists, attempts to flee, or is otherwise aware of the authority and purpose of the officer such as occurs with service of an arrest warrant. CHARLES E. TORCIA, 1 WHARTON'S CRIMINAL PROCEDURE § 71, at 320-21 (13th ed. 1989 & Supp. 1995).

322. *State v. McKenna*, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998) (stating "[t]he right to search incident to a lawful custodial arrest, once acquired, terminates no later than when the officer announces that the arrestee will be released rather than booked"); see also *State v. Lewis*, 611 A.2d 69, 70 (Me. 1992) (holding same).

323. This communication, once again, need not accurately reflect charges ultimately filed, because probable cause determinations are invariably subject to subsequent review by superior officers and prosecutors. *Supra* note 74. However, requiring police to communicate the occurrence of an arrest on some specified basis, with its implicit public acknowledgment that they possess probable cause that the offense occurred, will serve as a check against arbitrary police behaviors such as discussed above. *Supra* notes 272-275 and accompanying text.

324. 989 S.W.2d 295 (Tenn. 1999).

Crutcher crashed and was thrown some twenty feet from his motorcycle. Upon finding Crutcher in the roadside brush, an officer placed one of his arms behind his back, intending to arrest him for reckless endangerment and evading arrest.<sup>325</sup> However, when Crutcher complained of injuries, the officer ceased his effort to handcuff him, and called for an ambulance. Crutcher was not told that he was under arrest and no *Miranda* warnings were provided; when he asked what was to happen to him, he was told that he would be transported to the hospital for medical treatment.<sup>326</sup> Without first securing a warrant, police then searched Crutcher's backpack and jacket, located on his motorcycle, resulting in the discovery of cocaine and a loaded gun. Crutcher was subsequently arrested upon his release from the hospital and charged on the basis of the contraband found in the search as well as reckless endangerment and evading arrest.<sup>327</sup> The trial court granted Crutcher's motion to suppress reasoning that the search incident exception did not authorize the warrantless search because Crutcher was not under arrest at the time of the search.<sup>328</sup>

On appeal, the Tennessee Supreme Court agreed. Acknowledging the question to be "close," the court held that despite there being probable cause to arrest Crutcher at the accident scene, the officers never communicated to Crutcher that he was under arrest, indicating only that he would receive medical treatment at a nearby hospital. "Without more," the court held, there was no showing that Crutcher "was being detained by police for any reason other than medical treatment."<sup>329</sup> The court proceeded to emphasize the important signaling role that police actions play in the arrest question:

If law enforcement officers intend to justify a search as incident to arrest, it is incumbent upon them to take some action that would indicate to a reasonable person that he or she is under arrest. Although formal words of arrest are not required, some words or actions should be used that make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer.<sup>330</sup>

The majority elaborated on what actions the police could have taken:

In this case, actions that would have accomplished this included, but were not limited to, accompanying the appellee to the hospital until the arrest warrant could be obtained and served, telling the appellee that he should consider himself in custody pending actual service of the arrest warrant, or any other words or actions that would have conveyed the same message.<sup>331</sup>

In short, the court was "not prepared to hold that the police may conduct a warrantless search merely because they have probable cause to arrest the subject. Having determined that appellee was not under arrest at the time of the search,

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325. *Id.* at 298.

326. *Id.*

327. *Id.* at 299.

328. *Id.* The court also concluded that an inventory search was not justified because a third party, one of Crutcher's friends at the accident scene, was willing to assume responsibility for the motorcycle and belongings and remove them from the scene. *Id.*

329. *Id.* at 302.

330. *Id.*

331. *Id.*

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we conclude that the search was not incident to a lawful arrest.”<sup>332</sup>

The result and rationale of *Crutcher* are in keeping with the intent-manifestation framework outlined above. The officers failed to signal to Crutcher their intent to subject him to custodial arrest, and, in the absence of such manifestation, the search they undertook was unjustified by the supporting rationales of the search incident exception. In deciding to suppress the evidence the *Crutcher* majority thus struck a blow for doctrinal clarity and fealty to the search incident justifications. Beyond its doctrinal appeal, the intent-manifestation framework embraced in *Crutcher* has considerable practical advantage, consistent with the concern for “workable rules” the U.S. Supreme Court itself has so often extolled in its Fourth Amendment decisions.

For police officers, requiring that their intent be manifested by express words or conduct (the former especially) will provide a valuable benchmark, allowing them “to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.”<sup>333</sup> As a result, instead of hindering police work due to its indeterminacy, search incident jurisprudence can actually lessen the likelihood that evidence will be suppressed.<sup>334</sup> For courts, the framework avoids the basic indeterminacy of the “could have” approach, criticized above,<sup>335</sup> by permitting analysis to be anchored in specific manifestations of police intent, not merely the patently ambiguous standards of probable cause. Finally, for citizens, requiring that police expressly manifest their intent to execute a custodial arrest—by words or the functional equivalent—will provide a welcome measure of clarity and intelligibility relative to police con-

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332. *Id.* The inventory issue was not before the court because the State abandoned the claim in the face of contrary Tennessee law. *Id.* at n.11.

For a more recent decision reaching the identical result under similar facts, see *United States v. Hawkins*, 2001 WL 103542 \*9 (D. Me. 2001) (invalidating the search on the grounds that police failed to custodially arrest a motorcyclist, rendered unconscious by a collision, rejecting the government’s suggested “ cursory dismissal of the necessity of an arrest”). The *Hawkins* court did, however, deem the contraband admissible on the alternate basis that it was discovered pursuant to a proper inventory search. *Id.* at \*10-11.

333. *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988); see also *Illinois v. Andreas*, 463 U.S. 765, 772 (1983) (identifying the “first principle” of Fourth Amendment analysis as requiring that the standard must be “workable for application by rank-and-file, trained police officers”); *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979) (stating “[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront”).

334. For instance, when police unequivocally signal that a custodial arrest is executed, not some lesser form of Fourth Amendment seizure, courts will have an enhanced basis to reject defense motions to suppress. *E.g.*, *State v. Westcott*, 2000 WL 1827222, \*4 (Iowa Ct. App. 2000) (emphasizing that officer’s testimony regarding time of arrest was “conflicting,” undermining search incident arguments); *State v. Fisher*, 539 S.E.2d 677, 681 (N.C. Ct. App. 2000) (suppressing evidence due to factual inconsistencies in the record regarding whether the suspect was “actually arrested,” or merely cited, prior to search). Unequivocal communication can also aid police work by lessening the likelihood of successful challenges based on the allegation that the arrest was impermissibly justified, post-hoc, by incriminating evidence derived from the search. See *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (citation omitted) (“[J]ustify[ing] the arrest by the search and at the same time . . . the search by the arrest,’ just ‘will not do.’ It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.”).

335. See *supra* notes 167-200 and accompanying text.

duct,<sup>336</sup> and lessen the prospect for police mischief.<sup>337</sup>

#### CONCLUSION

Virtually alone in the contradictory morass of modern Fourth Amendment jurisprudence are two precepts: that the power of police to conduct warrantless searches incident to lawful arrests exists but is “a strictly limited right,”<sup>338</sup> and that all exceptions to the Amendment’s warrant requirement should be “jealously and carefully guarded.”<sup>339</sup> The past three decades, however, have witnessed a significant de-emphasis of these constitutional certainties, and a marked distancing of the search incident exception from its comparatively modest common law origins.<sup>340</sup> Search incident authority has evolved to the point where “[c]reative or careful police officers have essentially unlimited powers to search people and places incident to a custodial arrest even for the most mundane crime.”<sup>341</sup> This evolution can be traced to *Robinson* and *Belton*, where the Court extended to police an unqualified right to search upon proof of a custodial arrest, regardless of the nature of the offense and whether the circumstances engender fear for officer safety or possible destruction of evidence material to the purported basis for arrest.<sup>342</sup> In *Knowles*, at last, the Court indicated its desire to limit this growth, refusing to extend the categorical right to search beyond instances of custodial arrest by police.<sup>343</sup>

Although *Knowles* did not make new law, the Court’s unanimous decision reinforced the critical importance of custodial arrest in search incident doctrine and practice, a constitutional *sine qua non* presumed (but never scrutinized) in the Court’s search incident jurisprudence. *Knowles*, in letter and spirit, thus comes at a critical time. Increasingly, courts (and hence police) justify searches incident merely because police “could have” arrested the suspect in question, given the presence of probable cause. This tendency, as discussed, is especially troublesome given the expanded authority of police to arrest for low-level offenses, raising the obvious threat of pretextual arrests (as permitted by *Whren*),

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336. *New York v. Belton*, 453 U.S. 454, 459-60 (1981) (“When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.”).

337. *See supra* notes 185-196 and accompanying text.

338. *Chimel v. California*, 395 U.S. 752, 759 (1969).

339. *Jones v. United States*, 357 U.S. 493, 499 (1958).

340. *Supra* notes 19-101 and accompanying text.

341. Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1156 (1998).

342. *Belton*, 453 U.S. at 460 (stating “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile”); *Robinson v. United States*, 414 U.S. 218, 235 (1973) (rejecting the “suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . It is the fact of the lawful arrest which establishes the authority to search”).

343. *State v. Steele*, 613 N.W.2d 825, 827 n.2 (S.D. 2000) (citing *Knowles* and stating that the “Court declined to extend the parameters of *Belton*’s application where no arrest was made and therefore, the same concerns for officer safety and prevention of loss or concealment of evidence did not exist”).

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and hence searches. If police wish to search an individual, they must merely wait for the suspect to commit an “arrestable” offense (which could be as petty as littering, depending on local law), and then conduct a full-body search. Nor are there meaningful protections against arbitrary street-level searches of persons suspected of more serious crimes, even felonies. If police have probable cause to arrest for any offense, they can detain but not arrest a subject, and execute a full search (possibly a body cavity search conducted in public, as in *Evans*). Depending on what they find, they can then subject the suspect to custodial arrest, or, let him go, in flagrant disregard of the acknowledged invasiveness of bodily searches.<sup>344</sup>

This expansive discretionary authority, as discussed, is exacerbated by the enduring confusion over the threshold question of what constitutes an “arrest” for search incident to arrest purposes. Despite the Court’s characterization of the search incident exception as a “straightforward rule, easily applied, and predictably enforced,”<sup>345</sup> it is readily apparent that courts differ significantly in how they conceptualize arrests. Lacking an accepted analytic framework, courts regularly reach conflicting results on this fundamental question, and as a consequence cast major doubt on the parameters of search incident authority, to the significant detriment of citizens’ civil liberties.

This Article has sought to develop an analytic framework to remedy the accumulated uncertainty associated with the definition of “arrest” for search incident to arrest purposes. The framework places premium importance on the objective manifestations of police, consistent with the historical understandings of custodial arrest and the exigency-based justifications of the search incident exception. The approach thus has two paramount benefits. First, it restores doctrinal consistency to search incident jurisprudence, tying analysis of the “arrest question” to the imperative of an “actual arrest,” and the exigency-based justifications such intrusive seizures are thought to trigger.<sup>346</sup> In doing so, moreover, Fourth Amendment “reasonableness” concerns are equally served.<sup>347</sup> For a warrantless search to be reasonable, it must be “‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”<sup>348</sup> *Chimel* reflected this grounding; *Robinson* and *Belton* distanced search

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344. The Court itself has frequently acknowledged the intrusive effects of bodily searches. *E.g.*, *Wyoming v. Houghton*, 526 U.S. 295, 303 (1999) (quoting *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968)) (noting that “[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience”); *Bell v. Wolfish*, 441 U.S. 520, 558 (1979) (observing that bodily searches “instinctively give[] us the most pause”).

345. *New York v. Belton*, 453 U.S. 454, 459 (1981) (citing the categorical rule enunciated in *Robinson*).

346. See *Chimel*, 395 U.S. at 761 (“We cannot be true [to the Fourth Amendment] and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation make that course imperative.”).

347. *Robinson*, 414 U.S. at 235-36 (holding that searches incident to arrest are both an exception to the warrant requirement and are “reasonable” under the Fourth Amendment).

348. *Terry v. Ohio*, 392 U.S. 1, 19 (1968) (citation omitted); see also *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (stating “the scope of a warrantless search must be commensurate with the rationale that excepts the search from the warrant requirement”).

incident doctrine from it,<sup>349</sup> and certainly from the narrow exception known at common law.<sup>350</sup> In line with *Knowles*, the framework advanced here hearkens back to *Chimel*'s effort to ground search incident jurisprudence in its supporting rationales.

Second, the framework promises several important practical benefits. Courts, for their part, will have a principled basis to evaluate legal challenges to searches incident, grounded in the objective manifestations of police, shoring up an area of search and seizure law in dire need of consistency and clarification. In turn, in keeping with the tenet that the government must establish that a custodial arrest occurred, law enforcement will be put on notice that not every seizure justifies a full-body search, and that their words and acts, as reasonably interpreted by suspects (and courts), will be instrumental in the state's effort to establish that the warrantless search was justified. For citizens, the daily subject of searches, such transparency will hopefully hasten improvements in the perceived legitimacy of police, and for the difficult work they are asked to perform,<sup>351</sup> a sensibility recognized as prerequisite to fostering voluntary compliance with the law.<sup>352</sup>

Of course, the approach advanced here does nothing to diminish the prospect of arbitrary police decisions to execute custodial arrests, a threat that doubtless will be enhanced by the Court's refusal in *Knowles* to extend search incident authority to seizures less than custodial arrests.<sup>353</sup> But this is perhaps

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349. See *Belton*, 453 U.S. at 471 (Brennan, J., dissenting):

Certainly there will be some close cases, but when in doubt the police can always turn to the rationale underlying *Chimel*—the need to prevent the arrestee from reaching weapons or contraband—before exercising their judgment. A rule based on that rationale should provide more guidance than the rule announced by the Court today. Moreover, unlike the Court's rule, it would be faithful to the Fourth Amendment.

350. *Supra* notes 19-44 and accompanying text (discussing the narrowness of exception at the time of the Fourth Amendment's origin and through much of the nineteenth century).

351. Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1163 (2000) ("Trust in government is . . . predicated on the perception of benevolent, principled justifications for official policy or conduct. An affirmative, genuine statement of intent is more likely to build trust than leaving citizens to guess at police motivations.").

352. See Tom R. Tyler, *Multiculturalism and the Willingness of Citizens To Defer to Law and Legal Authorities*, 25 LAW & SOC. INQUIRY 983, 989 (2000) (noting that "the key to the effectiveness of legal authorities lies in creating and maintaining the public view that authorities are functioning fairly"). See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

353. One possible means of decreasing the likelihood of arbitrary searches is to mandate, as many departments do already, record-keeping requirements by police describing the circumstances giving rise to the alleged probable cause to arrest. For a helpful discussion of how such a requirement can constrain arbitrary police behavior and promote accountability more generally, see Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 846-52 (1999).

Record-keeping efforts are now being undertaken with respect to traffic stops, prompted by concerns over police use of racial profiles in detentions of minority motorists. See, e.g., Associated Press, *N.J. Accepts Outside Monitor in U.S. Effort To End Police Racial Bias*, WASH. POST, Dec. 24, 1999, at A6 (describing tracking requirements in New Jersey imposed as a result of consent decree); David Shepardson, *Cops Will Log Race of Drivers*, DET. NEWS, Dec. 10, 1999, at A1 (noting data collection efforts in Connecticut, Michigan, North Carolina and Ohio). Similarly, New York City police, in response to allegedly discriminatory "stop and frisk" practices, were recently required to document citizen encounters on special forms designed to record *inter alia* the purported legal basis for the stop and the

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unavoidable given the well-established constitutional exception drawn for searches incident to arrest. What is avoidable is the current incoherence of search incident doctrine and analysis. It is hoped that the framework advanced here, with its emphasis on the objective formalities of custodial arrest and the core justifications of the search incident exception, can help clear up the accumulated confusion in this critically important area of Fourth Amendment jurisprudence.

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age, race, and gender of persons stopped. CIVIL RIGHTS BUREAU, OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT'S "STOP AND FRISK" PRACTICES: A REPORT TO THE PEOPLE OF NEW YORK (1999).

