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Making the Right Gamble: The Odds On Probable Cause

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MAKING THE RIGHT GAMBLE: THE ODDS ON PROBABLE CAUSE

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More so than any other provision of the Bill of Rights, the Fourth Amendment has always been a deadly serious gamble. How much of our collective security are we willing to risk in order to promote individual freedom?[1]

The framers of the amendment have given us one answer to this question[2]—intrusions upon liberty and privacy may take place when the government has probable cause that the search will uncover the sought-after goods or that the seized person committed a crime. Yet the Supreme Court has said very little about computing the odds—the degree of certainty—that determines when probable cause exists. The

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[1] In construing probable cause for seizure of a person, *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975) stated that this standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *See also* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 13 (The Johns Hopkins Univ. Studies in Historical and Political Sci., Series No. 84, 1966) (the issues raised under the Fourth Amendment "bring into sharp focus the classic dilemma of order versus liberty in the democratic state").

[2] In addressing the conflict between enforcing the law in protection of the community, and protecting the community from unreasonable interferences with privacy, the Court has labeled probable cause as "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." Brinegar v. United States, 338 U.S. 160, 176 (1949).

Probable cause, however, is but one form of justification for constitutional searches. *See infra* note 179 and accompanying text (discussing the Court's recognition of various forms of justification involving balancing and special needs).

case law on probable cause harbors a central ambiguity because the Court has told us that probable cause lies between bare suspicion and proof beyond a reasonable doubt.[3] Within this sizable range, "[t]he emphasis is on calculating likelihoods. Whether this excludes all other factors and whether the likelihood must be 'more likely than not' are questions arguably unsettled."[4]

Just how unsettled these questions are can be demonstrated by considering two hypotheticals:[5]

> 1. A small commuter plane takes off with two pilots, a flight attendant and ten passengers. When the attendant slips into the bathroom, a would-be hijacker locks her in and attempts to take over the plane. The attendant can discern the voices of five hijackers as they coordinate their attack on the cockpit. She then hears the voices of five passengers who rally to thwart the attempted hijacking. The stalemate ends when the pilot makes an emergency landing and the police take control of the plane. Predictably, the passengers split into two groups of five, each group claiming to be the heroic passengers while identifying the other group as the terrorists. The police thus face a situation where there is a 50/50 chance that each passenger is a terrorist.

Do these facts constitute probable cause to detain, arrest or search each passenger? Is there probable cause to search each passenger's luggage, their autos parked at the airport and their residences?

If the answers to the first hypothetical seem preordained

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[3] *Brinegar*, 338 U.S. at 175. "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction . . . [but] more than bare suspicion." *Id.* (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881); Locke v. United States, 7 Cranch 339, 348 (1813)) (citations and footnote omitted).

[4] Valente v. Wallace, 332 F.3d 30, 32 (1st Cir. 2003) (citations omitted).

[5] These hypotheticals were inspired by Professor Nesson's famous "prisoner" hypothetical where only one of twenty-five identically dressed prisoners refuses to participate in the killing of a guard. Because Professor Nesson gives us no way to distinguish among the prisoners, the odds as to any one prisoner are a 96% likelihood of guilt, and a 4% likelihood of innocence. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192-93 (1979).

in a post-September 11 world, are the answers altered in any way when the facts of the hypothetical are modified as follows:

> 2. This time, when the attendant enters the bathroom, a defective latch temporarily locks her in. A nicotine deprived passenger seizes the opportunity to light a cigarette. The attendant can hear the voices of four other passengers who agree to share the cigarette. She also hears the protests of five passengers who object to the second-hand smoke. When the attendant frees herself and confronts the passengers, she is faced with two five person groups, each group claiming to be the non-smokers while identifying the others as the smokers.

Again, is there probable cause to detain, arrest or search each passenger? Is there probable cause to search each passenger's luggage, their autos parked at the airport and their residences?

This article seeks the answer to the hypotheticals in sources ranging from the judiciary's own pronouncements on probable cause to linguistics, history mathematics and cognitive psychology.

A LINGUISTIC VIEW OF PROBABLE CAUSE

If we begin at the beginning, we must give some attention to the common usage of the term "probable." "At first blush, the phrase [probable cause] seems to connote a standard akin to more than fifty percent,"[6] i.e., more likely than not that the search will turn up sought-after items or that the seized person is guilty of a crime. After all, if the weatherman says it's probably going to rain today, I assume he's talking about more than a 50% chance. But that assumption may not be universally shared. *Webster's* defines "probable" as meaning "supported by evidence strong enough to establish presumption but not proof."[7] Putting a legal spin on the words "presumption" and "proof," provides some support for the "more likely than not

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[6] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 784 (1994).

[7] WEBSTER'S NEW COLLEGIATE DICTIONARY 916 (1973).

standard." Juries in civil cases are instructed that the party with the burden of proof must convince them by a preponderance of evidence, i.e., more likely than not.[8] Judges apply presumptions to establish a *prima facia* case, a degree of likelihood sufficient to decide the issue until rebutted.

This slight linguistic support for equating "probable" with "more likely" is undercut, however, by the very same dictionary's alternative definition of "probable" as "likely to be or become true or real."[9] The word "likely" is not modified by the term "more likely," or by mathematical likelihoods such as 50%, 30%, and so on. About the only thing clear is that "likely to be or become true or real" sounds more certain than the dictionary's characterization of "possible," as "something that may or may not occur."[10] Like the Supreme Court, semantic interpretation of the term "probable" seems comfortable only with placing the term somewhere between the range of a 1% to 100% likelihood. The lower end of this range is identified as "mere possibility" in the dictionary, and as "mere conjecture" in the Court's lexicon. The upper end of the range is referred to in the dictionaries as "presumption but not proof," while the Court prefers the terminology of "less than proof beyond a reasonable doubt." In short, the Court has its own preferred language, but has neither improved upon nor worsened the linguistic uncertainty surrounding the term probable.

Still lurking somewhere in that semantic tangle between 1% and 100% likelihood is the dividing line between probable and improbable. When the Court speaks of "fair probability,"[11] it implicitly recognizes that there must be a contrasting "unfair probability," often labeled mere speculation or conjecture. Spec-

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[8] A typical jury instruction in a civil action is:

> [I]t is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

2 HON. EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.13 (3d ed. 1977).

[9] WEBSTER'S, *supra* note 7, at 917.

[10] *Id.*

[11] Illinois v. Gates, 462 U.S. 213, 238 (1983).

ifying a standard of certainty for probable cause necessarily entails drawing a dividing line on the spectrum of uncertainty. As is so often the case in life and the law, we are faced with drawing a dividing line. To recognize this task is not to abandon hope because Justice Holmes assured us that the question of where to draw the line is "pretty much everything worth arguing in the law."[12]

If linguists and Supreme Court Justices haven't pinned down this elusive creature called probable cause, perhaps our forefathers did the heavy lifting for us and settled upon a more precise definition of the term. At this point we can turn from the dictionaries to the history books in search of an answer.

A HISTORICAL VIEW OF PROBABLE CAUSE

"A natural starting point for those trying to solve the various puzzles of the Fourth Amendment, including the meaning of probable cause, is in the English and American colonial past."[13] Unfortunately, a number of recent scholarly examinations of the Fourth Amendment in general, and probable cause in particular, have despaired of finding a definitive answer. Craig S. Lerner, in *The Reasonableness of Probable Cause*, concludes that "the precise phrase [probable cause] appears to have been relatively uncommon in colonial practice,"[14] and that when the phrase was used, "far from being a single standard, [probable cause] seems to have been a variable one, both across time and within a given time period."[15] For example, within the seventeenth century Coke "argued that a warrant could issue only after an indictment and not upon what he termed 'bare surmise[,]' [but] [t]his view was forcefully and repeatedly criticized in the mid-seventeenth century by Matthew Hale."[16]

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[12] Irwin v. Gavit, 268 U.S. 161, 168 (1925).

[13] Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 TEX. L. REV. 951, 972 (2003).

[14] *Id.* at 979.

[15] *Id.* at 978.

[16] *Id.* at 974 (footnote omitted).

In *The Birth of Probable Cause,*[17] Jack K. Weber traces the earliest first-hand discussion of probable cause to Bracton's writings in the late thirteenth century, but concludes that "Bracton's concepts are bundled together in an imprecise way. There are no supporting cases and we cannot pin down from his generalizations the precise level of information needed in each instance."[18] Rather than provide a precise definition of probable or adequate cause, Weber leaves us with a rather amorphous standard that he says represents the "horse sense of the ages," a theme that reappears in one of the current approaches to probable cause as a matter of "common sense."[19]

From its origins until the enactment of the Fourth Amendment, probable cause seems to have remained in a state of flux.[20] The historian William Cuddihy has contrasted various enactments of the First Congress of the United States which embraced differing thresholds for the issuance of search warrants.[21] The Collection Act of 1789 created a low evidentiary standard for the issuance of a warrant, removed altogether a magistrate's discretion to refuse a warrant, and largely insulated the officer from suit if the search failed to uncover evidence of crime.[22] By contrast, The Excise Act of 1791 created a higher evidentiary burden, invested magistrates with the discretion to refuse warrants and was far more liberal in affording those searched with civil remedies.[23]

In *The Fourth Amendment and Common Law,*[24] David A.

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[17] Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155 (1982).

[18] *Id.* at 161.

[19] *See infra* text accompanying notes 168-69.

[20] In 1766, George Mason protested against a British statute's use of the term "probable Cause of Complaint," because the word probable was "a word before an unknown in the Language and Style of Laws!" Lerner, *supra* note 13, at 979 (quoting Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in 1 PAPERS OF GEORGE MASON 65, 67 (Robert A. Rutland ed., 1970)).

[21] William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1550 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

[22] Cuddihy, *supra* note 21, at 1527.

[23] *Id.* at 1528, 1543.

[24] David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

Sklansky issues a broad challenge to the Court's new found emphasis on common law history and its failure to recognize that common law rules of search and seizure were both hazier and less comprehensive than the Court has suggested. Professor Sklansky is particularly critical of

> how Justice Scalia and Justice Thomas speak in their recent Fourth Amendment opinions. To find the rule 'at common law' they look sometimes to cases, sometimes to statutes, sometimes to commentaries. They refer interchangeably to authorities from the 1600s and 1700s—and sometimes also from the 1800s and early 1900s. They mix together English and American materials.[25]

Professor Sklansky maintains that even if there were an accepted common law definition of probable cause, and it appears there was not, most of those who ratified the Constitution and adopted the Bill of Rights were not lawyers, and they would have been unlikely to view probable cause as a term of art. In fact there is little evidence that most of them had mastered the common-law rules of search and seizure, let alone endorsed them.

> [D]uring the debates . . . over ratification of the proposed Constitution, those concerned about the search-and-seizure powers of the federal government consistently called for an amendment restraining those powers "within proper bounds," or forbidding "all unreasonable searches and seizures." No one proposed a constitutional ban on searches and seizures "contrary to common law," or "currently illegal under state law."[26]

These recent historical inquiries suggest that the first failing of Fourth Amendment history is its inability to provide a clear meaning for the term probable cause. But an even more serious shortcoming of this type of historical inquiry is the realization that even if we could learn with certainty what the common law meant, there remains the fundamental ques-

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[25] *Id.* at 1795.

[26] *Id.* at 1792 (footnote omitted).

tion—"So what?" Prior to Justice Scalia's "originalist" approach to the Fourth Amendment, the Court had informed us that

> [t]he common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.[27]

A reluctance to adopt common law history as the *sine qua non* of Fourth Amendment interpretation appears frequently in Supreme Court cases decided in the 1980s. For example, in *Tennessee v. Garner*,[28] the Court acknowledged that it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[29] The *Garner* Court found the use of deadly force to stop all fleeing felons "unreasonable" under the Fourth Amendment, despite common-law approval of the practice.[30] The old rule, the Court concluded, no longer made sense. In the past decade or so, however, Justice Scalia has replaced the Court's hesitance to follow common law precedent with a strict "originalist" approach to constitutional interpretation. His approach maintains that "the principal criterion for assessing whether searches and seizures are 'unreasonable' within the meaning of the Constitution is whether they were allowed by eighteenth-century common law."[31] "This new form of Fourth

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[27] Steagald v. United States, 451 U.S. 204, 217 n.10 (1981). "The Bureau of Justice note[d] that as of 1996, there were more than 700,000 police officers in the United States, which is roughly one police officer for every 400 citizens." Lerner, *supra* note 13, at 1019 n.452 (citing Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies 1996 (1998)). In contrast, in 1811 there was one constable in England for every 18,187 persons. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant*, 49 HARV. L. REV. 566, 582 (1936).

[28] 471 U.S. 1 (1985).

[29] *Garner*, 471 U.S. at 13 (quoting Payton v. New York, 445 U.S. 573, 591 n.33 (1980)).

[30] *Id.* at 14.

[31] Sklansky, *supra* note 24, at 1739.

Amendment originalism breaks dramatically . . . with the ahistoric approach of the Warren and Burger Courts . . . [and] with an older tradition of using the background of the Fourth Amendment to illuminate not its precise demands but its general aims."[32]

Judge Richard Posner has been particularly critical of this "originalist" approach, suggesting that it is a sham, with a "judge . . . do[ing] the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them."[33] Whether or not one agrees with Judge Posner's criticism, the Court has demonstrated an uncanny ability to simultaneously select and ignore relevant common law precedent. For example, in *California v. Hodari D.*,[34] the majority adopted the common law definition of a seizure of a person as requiring either an actual touching or a submission to a show of authority.[35] Thus, an escaping suspect is not seized so long as he continues to flee. The dissent, however, urged the Court to look "not to the common law of arrest, but to the common law of attempted arrest."[36] Although a common law arrest required either touching or submission, the common law also recognized that "an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other."[37] The majority countered, however, that "neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions."[38]

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[32] *Id.*

[33] RICHARD A. POSNER, OVERCOMING LAW 251 (1995). Professor Tribe also cautioned against using the passive voice which "makes it look as though someone out there, unspecified, is doing it to us. Admit that it's we who are doing it." Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-scientific Sieve*, 36 HASTINGS L.J. 155, 170 (1984).

[34] 499 U.S. 621 (1991).

[35] *Hodari D.*, 499 U.S. at 628.

[36] *Id.* at 632 (Stevens, J., dissenting).

[37] Rollins M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201 (1990) (citing *Gold v. Bissell*, 1 Wend. 210 (N.Y. Sup. Ct. 1828).

[38] *Hodari D.*, 499 U.S. at 626 n.2.

The *Hodari D.* majority did not explain why it had selectively incorporated common law arrests into Fourth Amendment jurisprudence, while refusing to assimilate common law concepts of attempted arrests.[39] Recognition of a common law arrest as "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"[40] does not mean that the Court must banish common law prohibitions of attempted arrests to the trash bin of peculiar historical practices that cannot be "elevated to constitutional proscriptions."[41] After all, intrusion into residential dwellings is the prototypical search specified in the Constitution,[42] but the Court has extended Fourth Amendment coverage to commercial premises,[43] automobiles,[44] and quasi-public areas like telephone booths.[45]

In the final analysis Fourth Amendment history appears to fail us on two counts. First, it does not provide a clear, precise or even commonly accepted definition of probable cause.[46] Second, the common law's judgments about search and seizure are necessarily time-bound by the era in which they arose. They may provide limited guidance, but they are not dispositive of modern day search and seizure issues.

[W]e make a serious mistake to accept the belief that the past

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> The Court has adopted an abridged version of the Amendment's history . . . . This truncated view of history simply does not reflect the Framer's thoughts about the Fourth Amendment's constitutional meaning. In sum, the Court has ignored the complexity of the Fourth Amendment's origins, and as a result has denied itself and the nation the potential benefits of a comprehensive historical inquiry.

Tracy Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 973 (2002).

[40] *Hodari D.*, 499 U.S. at 624.

[41] *Id.* at 626 n.2.

[42] *See* Payton v. New York, 445 U.S. 573, 585-90 (1980).

[43] See v. City of Seattle, 387 U.S. 541, 546 (1967).

[44] California v. Carney, 471 U.S. 386, 390 (1985).

[45] Katz v. United States, 389 U.S. 347 (1967).

[46] Even Justices Scalia and Thomas may be abandoning their focus on history and common law. *See* Groh v. Ramirez, 124 S. Ct. 1284, 1298 (2004) (Thomas, J., dissenting) (stating "it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance" in discussing the relationship between the Amendment's two clauses).

> has done its work for the present, and that our liberty, which is the cornerstone of democracy, is guaranteed. The truth is that one generation can never protect the rights of another, and although all of our great documents: the Declaration of Independence, the Constitution, and the Bill of Rights, are ideal reflections of our finest aspirations, they are not self-fulfilling chariots of justice. For all their beauty, they are only words, dependent on each generation to give them a meaning and content for its own time and place.[47]

JUDICIAL ANALYSIS OF PROBABLE CAUSE—PIGEONHOLING WITHOUT CROSS-REFERENCING

"'The substance of all the definitions' of probable cause 'is a reasonable ground for *belief* of guilt.'"[48] In *Texas v. Brown*,[49] a four person plurality declared that this reasonable belief need not be "correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required."[50] A majority of the Court has never explicitly held that probable cause is less than a preponderance of the evidence, and the Court has been inconsistent in the few decisions where it has addressed the burdens of proof that apply to various Fourth Amendment issues. The prime example of this troubling approach is *Maryland v. Buie*,[51] where the Court managed to be both opaque and inconsistent.

When discussing the Fourth Amendment standard of proof that applies to a protective sweep of the defendant's premises, the only clear aspect of *Buie* was the Court's rejection of "an unnecessarily strict Fourth Amendment standard" requiring "a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed . . . ."[52] It is difficult, however, to decipher the following pas-

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[47] Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 387 (1987).

[48] Brinegar v. United States, 338 U.S. 160, 175 (1949) (emphasis added) (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)).

[49] 460 U.S. 730 (1983).

[50] *Brown*, 460 U.S. at 742.

[51] 494 U.S. 325 (1990)

[52] *Buie*, 494 U.S. at 336-37.

sage in which the Court formulates the correct standard to be applied:

> The type of search we authorize today . . . may 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. . . .
>
> . . . The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a *reasonable belief* based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.[53]

Within a couple of sentences, the Court referred to the standard of proof as both reasonable suspicion and reasonable belief. One of the few areas of clarity involving probable cause is the Court's recognition of a hierarchy of certainty, i.e., probable cause requires a greater degree of likelihood than does suspicion. The clarity arises primarily from logic and linguistics, not from the Court's sometimes cavalier use of the terms belief and suspicion. As a logical matter, any distinction between reasonable suspicion and reasonable belief must rest on the meaning of the words suspicion and belief, not on the meaning of the identical modifier—reasonable. Common usage of the terms belief and suspicion also accords with the Court's placement of these terms within a scale of certainty. For example, *Webster's* defines "believe" as having "a firm conviction" or "to consider to be true,"[54] while suspicion involves merely "slight evidence" or "uncertainty."[55] When the Court uses the terms suspicion and belief in a consistent manner, we have the tools for distinguishing two constitutional levels of certainty.[56] In contrast, when the Court states that searches, seizures and

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[53] *Id.* at 337 (emphasis added).

[54] WEBSTER'S, *supra* note 7, at 101.

[55] *Id.* at 1174.

[56] In most contexts, the court uses the term probable cause "to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.'" Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987).

temporary detention must all be based on "reasonable grounds," any distinction between degrees of likelihood is lost in a muddled consideration of the "totality of the circumstances."

The useful distinction between belief and suspicion was emphasized in *Richards v. Wisconsin*,[57] in the discussion of the justification required for "no-knock" entry.[58] The Court held in *Richards* that the police must have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.[59] The Court explained that its choice of the standard of reasonable suspicion "—*as opposed to a probable-cause requirement*—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries."[60] *Richards* is one of the few cases in which the Court effectively cross-referenced and contrasted the levels of certainty required by suspicion and belief (probable cause). *Buie*, on the other hand, blurred the distinction by interchanging the terms reasonable suspicion and reasonable belief. Whether that blurring rests upon a slip of the pen, or the Court's failure to adhere to its prior distinction between suspicion and belief, we can register our legitimate concern over the Court's lack of precision when discussing the level of certainty required by the Fourth Amendment.

The Court's tendency to pigeonhole, but not cross-reference, degrees of certainties is also reflected in its discussion of the inevitable discovery doctrine. The question of whether illegally seized evidence likely *would* (inevitably) have been discovered by lawful means is akin to the nature of probable cause, i.e. whether evidence to be seized likely *will* be discovered by a lawful search. Despite the ambiguity surrounding the

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[57] 520 U.S. 385, 394 (1997).
[58] *Richards*, 520 U.S. at 394.
[59] *Id.*
[60] *Id.* (emphasis added).

forward looking nature of probable cause,[61] *Nix v. Williams*[62] was clear with respect to the backward-looking nature of the inevitable discovery doctrine.[63] *Nix* required the government to meet the more-likely-than-not standard in order to avail itself of the inevitable discovery doctrine.[64] In fact the only debate in *Nix* was whether to adopt the preponderance standard or the higher standard of "clear and convincing evidence." The *Nix* dissent argued for the clear and convincing evidence standard because "[i]ncreasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted."[65]

If the risk that unjustified searches and seizures will occur is substituted for the risk of admitting illegally obtained evidence, the *Nix* dissent's argument for a high standard of proof could be transposed to the probable cause requirement. After all, a higher standard of certainty would seem most needed when authorizing future searches that may well impact on innocent people.[66] In contrast, *Nix* involved a situation where the past search produced clear evidence of the defendant's guilt.[67] The higher standard adopted in *Nix* is particularly sur-

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[61] The Court has stated:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142).

[62] 467 U.S. 431 (1984).

[63] *Nix*, 467 U.S. at 431 (addressing a violation of the Sixth Amendment).

[64] *Id.* at 444. Evidence will not be excluded "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . ." *Id.*

[65] *Id.* at 459-60 (Brennan, J., dissenting).

[66] *See generally*, Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

[67] *Nix*, 467 U.S. at 434-35. Protection of the innocent against unreasonable searches and seizures would be largely a prospective matter, because, as a practical matter, the trial court will be determining probable cause in a suppression hearing where the seized evidence is likely to be damning. The higher standard

prising in light of the Court's expressed hostility to the truth defeating nature of the exclusionary rule.[68] Had the Court thought to compare the levels of certainty required for probable cause and for "inevitable discovery," it might have been surprised at what it had wrought. If, however, the Court sees a symmetry in the standards of certainty it requires from the government, we would all benefit from an articulation of that symmetry. To date, the Court has not only failed to define the level of certainty that constitutes probable cause, the Court has failed to explain the underlying principle governing its choice among standards such as suspicion, belief, preponderance, and clear and convincing.[69]

A MATHEMATICAL APPROACH TO PROBABLE CAUSE

In *Trial by Mathematics: Precision and Ritual in the Legal Process*, Professor Laurence H. Tribe gave us one view of the evolutionary role mathematics has played in the legal system:

> The system of legal proof that replaced trial by battle in Continental Europe during the Middle Ages reflected a starkly numerical jurisprudence. The law typically specified how many uncontradicted witnesses were required to establish

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in *Nix* is aimed, in part, to protect against the attractiveness of 20-20 hindsight (e.g., "of course our police department is competent and would have found the evidence"). A court's determination of probable cause is likely to be influenced by hindsight in a similar way, and thus requires similar protection by a similar standard of proof.

[68] As Professor Akil Amar suggested:

> [S]hould not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns—or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.

Amar, *supra* note 6, at 794.

[69] The Court has also used the phrase "reasonable probability" when determining violations of constitutional discovery rights. In that context, the Court has stated that a material violation "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted unlimitedly in the defendant's acquittal . . . . A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citations omitted).

> various categories of propositions, and defined precisely how many witnesses of a particular class or gender were needed to cancel the testimony of a single witness of a more elevated order. So it was that medieval law, nurtured by the abstractions of scholasticism, sought in mathematical precision an escape from the perils of irrational and subjective judgment.
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> In a more pragmatic era, it should come as no surprise that the search for objectivity in adjudication has taken another tack. Yesterday's practice of numerology has given way to today's theory of probability, currently the sine qua non of rational analysis.[70]

The continuing development of modern science has fostered a desire to quantify legal doctrines such as probable cause. Soft facts and "mushy" legal concepts increasingly are seen as inferior to hard facts and objective analysis, and concrete statistical inference is to be preferred to intuitive judgment. Thus, some urge that law in general and probable cause in particular should be made amenable to mathematical formulation.[71]

The judiciary, however, has cautioned against being seduced by the allure of objectivity and precision in mathematics. "Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him."[72] In its most comprehensive discussion of probable cause, the Supreme Court stated that "an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful . . . ."[73] Instead, probable cause remains "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."[74]

If we seek to find the appropriate middle ground between being the master or slave of mathematical precision, we must

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[70] Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1329 (1971) (footnote omitted)

[71] "[T]he question inevitably arises in any discussion of probable cause: just how probable? There is the vague impression that, if law were truly a serious enterprise, the answer would be amenable to mathematical form." Lerner, *supra* note 13, at 995.

[72] People v. Collins, 438 P.2d 33, 33 (Cal. 1968).

[73] Illinois v. Gates, 462 U.S. 213, 235 (1983).

[74] *Gates*, 462 U.S. at 232.

consider three questions: (1) Should mathematical probabilities be used as evidence to meet the standard of probable cause, at whatever level of certainty the standard is set? (2) To what extent should mathematical probabilities replace or compliment intuitive appraisals? (3) Should probable cause be expressed as a mathematical likelihood?

USE OF STATISTICAL EVIDENCE

All proof is ultimately "probabilistic" in the sense that no conclusion can ever be drawn from empirical data without some step of inductive inference. The question is whether to bring this probabilistic element of inference to explicit attention in a quantified way, i.e., in overtly probabilistic evidence.

> Perhaps the most common type of overtly probabilistic evidence involves base rates which are defined as the relative frequency with which an event occurs or an attribute is present in a population. The base rate for an event or attribute equals the probability that it will be present in any randomly selected member of the reference class prior to the introduction of case-specific or individuating information.[75]

For example, in the airplane hypotheticals at the start of this article, the base rate is a 50% probability that any particular passenger is guilty. The question of probable cause might be resolved at this point purely on the basis of probability theory—a legal determination that a 50% likelihood constitutes adequate probable cause to arrest and search. Yet the law seems uncomfortable with relying wholly on base rates and making the leap from aggregate likelihood to a conclusion of probable cause in a specific case.[76] "Background evidence is

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[75] Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 252 (1990).

[76] In *United States v. Leon*, 468 U.S. 897, 943 (1984), Justice Brennan cautioned that "personal liberties are not rooted in the law of averages." *See also* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2164 (2002) ("Current Fourth Amendment law discourages group seizures. . . . Aggregate justifications—no one person is reasonably suspected, but the odds are high that some members of the group are criminals—do not suffice.").

considered somehow inferior to evidence that is individuating and specific to the case at hand."[77]

In our hijacking hypothetical, non-mathematically based probable cause might be satisfied by case-specific evidence like the flight attendant's claim that she could recognize all ten voices she heard on the plane. After some minimal assurances that she was reasonably confident of her ability, the police might utilize her voice identifications to sort the ten suspects into the likely guilty and the likely innocent. Suppose, however, that the police disdained case-specific facts and used additional statistics to sort the suspects according to who most closely matched a profile of hijackers. In a crude example, the police cite a study establishing that people from Middle-Eastern countries are ten percent more likely than the general population to hijack a plane. Should the law of probable cause distinguish between the overtly probabilistic hijacker profile and the case-specific voice identifications made by the flight attendant? Why should there even be a question of discounting the starkly numerical likelihood reflected in the profile, when no one questions establishing probable cause based upon circumstantial evidence or statements from witnesses or informants of doubtful credibility?[78]

One objection to relying on statistical likelihoods is that arresting or searching based solely on a bare probability (i.e., favorable "betting odds") wrongfully "gambles" with a citizen's liberty or privacy. Thus, the argument goes, law enforcement authorities should be barred from searching or seizing on the basis of bare statistics.[79] This claim ignores the reality that a similar gamble exists whenever there is any doubt about the defendant's guilt, regardless of whether the doubt arises from statistics or case-specific evidence. After all, how sure is the

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[77] Koehler & Shaviro, *supra* note 75, at 262.

[78] *See* Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 378 U.S. 410 (1969).

[79] The "[a]uthority of police officers to spy on occupants of toilet booths—whether in an amusement park or a private home—will not be sustained on the theory that if they watch enough people long enough some malum prohibitum acts will eventually be discovered." State v. Bryant, 177 N.W.2d 800, 801 (Minn. 1970)

flight attendant that she can distinguish ten voices, and how sure are we of her professed ability to make such distinctions?[80] All evidence is probabilistic, requires inferences to support an ultimate conclusion, and thus involves a risk of error. Statistical evidence is different only in that it makes these uncertainties explicit. Society cannot avoid "gambling" with citizens' liberties unless one hundred percent certainty becomes the prerequisite to arrests and searches. Any aversion to gambling with a defendant's liberty and privacy suggests raising the burden of proof for all cases. "It does not support a special rule for statistical-probability cases."[81]

A second objection to relying on statistical likelihoods is that arresting or searching based wholly on a bare statistical probability violates the principle that citizens should be treated as unique individuals.[82] The profiling evidence in the hijacking hypothetical focuses not on a suspect's own attributes, but on background information that describes the statistical attributes of a broader class of individuals, i.e., residents of Middle-Eastern countries. An unavoidable feature of probabilistic thinking is that it treats people as members of a group rather than as individuals. Some commentators suggest that this focus violates an ethical command to treat citizens as unique individuals and to judge them only on evidence about their own conduct or matters within their own control.[83] We should, the argu-

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[80] The flight attendant may have first-order uncertainty, e.g., she may be 60% sure of her identification of any voice. The police, however, may have a second-order uncertainty if they are only 50% confident of her ability to distinguish among the voices. Empirical studies suggest that people making judgments and decisions generally take both first-order and second-order uncertainty into account. Koehler & Shaviro, *supra* note 75, at 251.

[81] Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 538 (1989).

[82] Some fear that using numerical terms leads to "the dehumanization of the legal process." Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1147 (1987).

[83] One commentator has stated that

> the Fourth Amendment is the commitment to treating persons who come before the law on the basis of their individual, particular, uncommon, and odd property and attributes. Juristic procedures which help show the unique characteristics of individuals and actions to the decision-maker provide the factual evidentiary base for legal judgments which avoid ab-

ment goes, apply to the search and seizure phase the instinctive reluctance to convict and punish a person based on statistical evidence that the defendant is one among many, or even a few, who could have committed the crime.[84]

Of course we all know that innocent people are sometimes convicted by an imperfect criminal justice system. But deliberately sacrificing an innocent person, by say, convicting all ten passengers on our hypothetical airplane, seems worse than simply acknowledging a long-run statistical chance of unjust convictions. As an analogy, consider the difference between a suicide bomber and a volunteer for a suicide mission where death is highly likely, but not certain. Western society views the latter as an act of heroism, while generally condemning the former. Yet, however much society seeks to prevent the ultimate conviction and punishment of the innocent, the concept of probable cause accepts that some innocent people will be required to surrender their liberty or privacy at the early investigative stages of search and seizure.[85]

Once we acknowledge that innocents may be searched and seized, any differentiation between "individualized" case-specific evidence and "statistical" evidence is largely illusionary. For example, what was suspicious about the conduct observed in

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stract moral structures and remain useful as explanations of external phenomena.

Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality Is Lost?*, 11 CREIGHTON L. REV. 1077, 1082 (1977) (footnote omitted).

The law's respect for autonomy counsels focusing on factors that can be controlled by the suspect whose liberty and privacy are to be set aside. "The citizen who has given no good cause for believing he is engaged in [transportation of contraband] is entitled to proceed on his way without interference." Brinegar v. United States, 338 U.S. 160, 177 (1949).

[84] This instinctive reluctance was the focus of Professor Nesson's prisoner hypothetical. *See supra* note 5. "Group guilt can be both immensely powerful and deeply troubling when used to punish people *or focus suspicion on them* merely for their associations . . . ." David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 451 (2003) (emphasis added).

[85] *Terry v. Ohio*, 392 U.S. 1 (1968), "accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." Illinois v. Wardlow, 528 U.S. 119, 126 (2000).

Terry v. Ohio, where Officer McFadden observed two men take turns walking down the street to stare into a window twenty-four times, conferring with each other after each trip.[86] Presumably Officer McFadden's past experience provided him with a generalized view of how innocent shoppers act. The suspects observed by Officer McFadden did not fit this unscientific profile of an innocent shopper. The point was well illustrated in the following hypothetical:

> Assume that the Cleveland Police Chief asked Officer McFadden and other similarly experienced officers to address a class of new recruits at the police academy on the topic, "What to Look for in Preventing Burglaries." Could a recruit take notes at this lecture and then rely on the experience of Officer McFadden and Officer McFadden's colleagues to justify the recruit's own reasonable suspicion in making future stops?[87]

If the answer to the question is yes, it is difficult to conclude that hijacker profiles cannot be used because they are not *individualized*. "[T]he suspicion underlying the detention of a person believed to be a potential criminal is often based on police experience with previous crimes under similar circumstances . . . ."[88] Thus, like other decision-makers, police inevitably act on stereotypes derived from their experience.

The explicit use of profiles or other statistical compilations in searches and seizures mirrors the type of probabilistic thinking that increasingly appears in many areas of the law. For example, sentencing guidelines and "three strikes and you're out" laws treat offenders as members of a group rather than as unique individuals. Thus, all offenders with three requisite convictions who are sentenced on a new offense are considered to pose a similar risk of recidivism and to warrant similar sentences. Such an assessment ignores, or gives little weight to, a particular offender's individuality. Instead, the

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[86] *Terry*, 392 U.S. at 5.

[87] JOHN MONAHAN & LAURENS WALKER, SOCIETY SCIENCE IN LAW: CASES AND MATERIALS 225 (1985).

[88] Christopher Slobogin, *The World Without a Fourth Amendment*, 39 U.C.L.A. L. REV. 1, 83 (1991).

three-time offender is judged, as would be a person matching a profile, on the behavior of others in his group.[89] Although "three strikes" laws are relatively recent developments, Professor Morgan Cloud has examined some largely ignored historical practices that led him to conclude that "the Founders of our constitutional scheme accepted some seizures based upon group identity as necessary responses to national crises."[90]

Those who criticize sentencing guidelines, profiles and other stereotyping, seem to take as a given that stereotyping always works to the detriment of the individual, whereas treating people as individuals always works to the benefit of the individual.[91] Yet, one might wonder whether persons who lost their liberty or privacy because of the exclusion of statistical evidence would derive much solace from being "treated as a unique human being." In our hijacking hypothetical, suppose the same profile that attributed a ten percent likelihood of guilt to suspects from Arab countries, indicated that there was a ninety-nine percent likelihood that citizens of Iceland would not hijack a plane. If the police treat Arabs and Icelanders alike, will the Icelander applaud such equality, or claim reverse discrimination favoring Arabs in spite of the Icelander's empirically superior score on the hijacker profile?

When statistical studies uncover disproportionate offending rates among a distinct group, simple efficiency [not racial or ethnic prejudice] points toward devoting greater law enforcement resources to this disproportionate group.[92] Efficiency

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[89] *See generally* Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, LAW & CONTEMP. PROBS. 99 (2003).

[90] Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 418 (2003).

[91] *But see* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2169 (2002) ("Some marginal substitution of group searches for individual ones is very likely to raise the quality of police treatment of suspects even as it raises the ability of the political process (instead of the courts) to regulate policing. These are real social gains.").

[92] "All nineteen of the suicide hijackers of September 11 were from one narrow demographic group: they were young Muslim men from the Arab world. How could it *not* make sense to target our enforcement efforts at these same people?" Harris, *supra* note 84, at 426-27 (2003). Professor Harris ultimately concluded that racial profiling "is a legal, moral and practical dead end." *Id.* at 428.

considerations become particularly relevant if hijacker profiles and other screening measures are seen as promoting deterrence,[93] not just apprehension of the guilty. In particular, viewing the war on terrorism as a preemptive rather than reactionary endeavor suggests that profiles and screening measures may be the best way of insuring that terrorism never succeeds. The specter of hijacker profiles and airport screening is more likely to deter would-be-terrorists than is the fear that they will be betrayed by case-specific facts such as someone spotting a bomb fuse protruding from their tennis shoes.[94]

There are of course many valid objections to profiling,[95] but these objections involve policy considerations independent of the empirical validity of the profiles.[96] Although the law generally seeks to maximize factual accuracy, criteria other than error minimization also must be considered. The rules of evidence governing logical and legal relevance are particularly instructive in this regard. At trial, a fact-finder motivated solely by the interest in factual accuracy considers all logically probative evidence.[97] Similarly, if the only function of probable cause is to ensure an accurate factual determination, then

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[93] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 552, 557 (1976) (stating an individualized suspicion requirement at roadblocks "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly").

[94] When the goal is deterrence, insistence on case-specific facts becomes problematic because the goal is to prevent such facts from developing, i.e., to prevent potential threats at an early stage before they become mass disasters. If the government must wait until sufficient case-specific facts develop, its goal of deterrence has been frustrated.

[95] *See generally* Symposium, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure*, 73 MISS. L.J. 365 (2003).

[96] Racial profiling is a repugnant practice "not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an *individual* using the statistics of a racial or ethnic *group*. The argument against bigotry, . . . [is] a rule of ethics, that tells us when to turn our statistical categorizers off." STEVEN PINKER, HOW THE MIND WORKS 313 (1997).

[97] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

scientifically valid profiles cannot be discounted.[98] Legal relevance, however, introduces the type of extraneous policy considerations that may counterbalance the interest in logical validity,[99] and Courts are often called upon to exclude probative evidence in order to serve important social goals. Within the context of the Fourth Amendment, we need look no further than its exclusionary rule, which excludes probative evidence and thus, presumably reduces factual accuracy. Application of the exclusionary rule recognizes that, at times, the quest for factual accuracy must be subordinated to the policy interest in deterring violations of the right to be free of unreasonable searches and seizure. Similarly, when assessing the use of profiles, it is valid to ask whether their logical relevance is outweighed by the social costs of permitting police to target people based on factors such as race or ethnic origin.[100] However, any reluctance to permit police to engage in profiling should not be based on a blanket rejection of the factual reliability or social costs of all profiles. Surely, with all the various profiles that abound,[101] some are scientifically valid while others are

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[98] J.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817 (1961) (stating the proper standard of proof is the one that causes the smallest number of mistakes); David Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34, 35-36 (1979) (noting the only question in deciding whether to apply probability theory to legal fact-finding is "whether the technique would reduce the number of errors in the fact finding").

[99] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

[100] Courts have differed as to whether race or ethnicity can be considered as at least one piece of evidence establishing probable cause. *Compare* United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992) ("As it is, . . . facts are not to be ignored simply because they are unpleasant—and the unpleasant fact in this case is that [the police officer] had knowledge . . . that young . . . black Los Angeles gangs were flooding the Kansas City area with cocaine."), *with* United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2002) ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.").

[101] Just a few of the currently used profiles include: airline highjackers, drug-couriers, alien smugglers, battering parents, serial killers, and those who make school-shooting threats.

not;[102] some create social costs that outweigh their benefits, while others do not.[103]

In summary, when the police in our hijacking hypothetical seek to supplement their information by consulting a hijacker profile, two separate objections may be raised. First, is the profile empirically valid, and second, do the efficiency gains from profiling outweigh the impact that this type of post-September policing imposes on people of Middle-Eastern origin? As to the first consideration, statistical probability evidence, "while neither a panacea nor devoid of problems, is relevant to the truth of asserted facts, and indeed is no less relevant in principle than case-specific evidence."[104] A fifty percent probability of guilt based entirely on statistical information carries with it the same chance of inaccuracy as a fifty percent probability of guilt based on, say, the ability of a flight attendant to recognize and distinguish ten voices. All evidence contains a risk of error; overtly probabilistic evidence simply makes the risk more visible. Thus, a decision to rely on the flight attendant's ability to distinguish voices is no more or less speculative than deciding whether to rely on statistics. The difference between unacceptable speculation and reasonable inference is not a logical distinction, but a legal judgment. Speculation describes a category of doubts that fail to establish probable cause, while reasonable inference describes a category of doubts acceptable within the concept of probable cause.[105]

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[102] For instance, according to one study conducted by the Drug Enforcement Administration, between forty and fifty percent of those identified as drug couriers pursuant to a profile turned out to be carrying either illegal drugs or other evidence connecting them with the illegal drug trade. *See* MONAHAN & WALKER, *supra* note 87, at 226-27 (citing ZEDLEWSKI, THE DEA AIRPORT SURVEILLANCE PROGRAM: AN ANALYSIS OF AGENT ACTIVITIES (1984)). Compare Justice Marshall's criticism of the drug courier profile used in United States v. Sokolow, 490 U.S. 1, 13(1989) (Marshall J., dissenting).

[103] "Reasonable people can differ about the balance, but one could plausibly conclude that the efficiency gains from profiling outweigh the harm" of race-conscious policing. *See* Stuntz, *supra* note 91, at 2179.

[104] Koehler & Shaviro, *supra* note 75, at 278.

[105] "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States,

As to the second consideration regarding the social costs of profiling, the law has never permitted the quest for factual accuracy to trump all other values; thus, both case-specific and statistical evidence may be excluded for policy reasons. For example, in *Winston v. Lee*,[106] the Court observed that "[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' *even if likely* to produce evidence of a crime."[107] All other policy values being equal, however, there is no reason to favor case-specific facts over statistical evidence such as profiles. Correctly applied, mathematical expressions of probabilities can assist, if not exclusively control, probable cause determinations.

ACCOMMODATING MATHEMATICAL PROBABILITIES AND INTUITIVE APPRAISALS

We live in an uncertain world of probabilities ranging from the possible/probable actions of subatomic quarks to the possible/probable physics taking place below the event horizon of black holes. Our task is to develop strategies for management of uncertainty—in the small universe of the Fourth Amendment—to manage the level of uncertainty surrounding probable cause.

In *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*,[108] Professor Barbara D. Underwood explained that prediction can be made in a variety of ways, such as by use of individualized judgment based on case-specific facts, or by use of formulas that assign fixed weights to predetermined characteristics of the person matching a profile. Arguments abound for the superiority of either method, and for the extent to which the choice of one method precludes use of the alternative method.

Those who favor individualized assessment would ignore

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338 U.S. 160, 176 (1949).

[106] 470 U.S. 753 (1989).

[107] *Winston*, 470 U.S. at 759 (emphasis added).

[108] Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1978-79).

available statistical evidence because they prefer to trust the subjective judgment of experienced decision makers who evaluate each individual situation in light of accumulated experience. Such experienced observers may rely on perceptions that they cannot articulate as explicit rules or mathematical probabilities, what Professor Underwood refers to as "the gap between intuitive individualized judgment and statistical inference."[109]

Professor Joseph Grano once offered an explanation of why the law of probable cause should insist on case-specific facts and discount statistical evidence. He posed a hypothetical in which the police could establish, based on case-specific facts, that one of ten people must be guilty of a specific crime. Thus, "for any suspect selected at random from the group, the odds are only ten percent that he is guilty but a whopping ninety percent that he is innocent."[110] Conceding that at first blush ten percent certainty might seem too low for probable cause, Professor Grano suggested that

> [s]uch a probability analysis, however, distorts our perspective. It causes us to overlook the success of the police in narrowing their investigation from the universe of all possible suspects, which may include much of the population, to ten individuals. In a modern, mobile society, this should be seen as a rather significant accomplishment.[111]

He concluded that there is probable cause to arrest each suspect because "[h]aving narrowed the universe of possible suspects to ten, the community would not be unreasonable in requiring all ten, nine of whom are presumably innocent, to sacrifice some liberty or privacy to solve the crime."[112]

Professor Grano then distinguished the arrest of another group of ten based solely on a statistical showing that random searches of people on city streets would show one of ten pos-

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[109] *Id.* at 1429.

[110] Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REFORM 465, 496 (1984).

[111] *Id.* at 497.

[112] *Id.*

sesses a concealed weapon or narcotics.[113] Professor Grano maintained that this random search is unacceptable because, "under the [F]ourth [A]mendment, it is one thing to demand some sacrifice of liberty or privacy when suspicion has focused on an individual; it is another to demand such sacrifice when no cause whatsoever exists to believe that the individual, as opposed to anyone else, is involved with crime."[114] I confess that Professor Grano's distinct treatment of these two hypotheticals escapes me, as does his characterization of a ten percent statistical likelihood as "no cause whatsoever." Why is this statistical probability of ten percent any less valid probable cause than the same ten percent likelihood established by case-specific facts?[115] There are other reasons for objecting to random searches, but in assessing likelihoods, one ten percent probability is as good as another.

The strongest argument against random searches is that they resemble the general warrants and writs of assistance that the framers of the Fourth Amendment sought to prohibit.[116] English custom inspectors relied upon general warrants to search whomever and wherever they pleased, but today's government officials might achieve the same result by replacing general warrants with statistical likelihoods that are readily available or easily created. Thus, searches based wholly on statistics could infringe upon the rights of large numbers of innocent people. However, the very nature of probable cause assumes that some innocents must lose their privacy or liberty in order to further law enforcement needs. The proper question is *how many* must surrender their rights, not what type of

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[113] *Id.* at 498.

[114] *Id.*

[115] *Id.* If one of Professor Grano's rationales for upholding the case-specific arrests was to reward police for narrowing "much of the population" to ten suspects, why not reward police for researching statistics and narrowing suspects to those who are on city streets as opposed to those who are on suburban streets or home in bed?

[116] "The drafting process of the Fourth Amendment reinforces the conclusion that suspicionless searches and seizures pursuant to general warrants were the initial and primary evils sought to be prevented." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizure*, 25 U. MEM. L. REV. 483, 527 (1995).

factual inference or statistical likelihood leads us to demand that surrender, i.e., does it matter whether innocent people lose their liberty because of case-specific facts like driving the same model and color car as the bank robber,[117] or whether they lose liberty because they are walking on public streets that statistics point to as likely to involve certain crimes? The upsetting aspect of arresting on a ten percent likelihood of guilt is that nine innocents are being sacrificed to apprehend one guilty party. These "odds" are equally unacceptable whether the odds are computed on the basis of statistics or case-specific facts. This is best illustrated by retaining Professor Grano's distinct *methods* of determining the odds of guilt in his hypotheticals, but changing the odds themselves. For example, suppose police investigation of specific facts points to one of the ten people as possessing drugs, while random searches of people on city streets would show seven of ten possess narcotics. My choice between these two hypotheticals would be the exact opposite of Professor Grano's choice. I would prefer sacrificing three innocents on the basis of statistics, to sacrificing nine innocents based on the "success of the police in narrowing their investigation . . . to ten individuals."

Whatever the resolution of hypotheticals like Professor Grano's or my hijacking hypothetical, practical considerations are also said to point toward preferring intuitive individualized judgment over statistical inferences. Because few police officers, magistrates, and judges are accustomed to statistical ways of thinking and reasoning, they are likely to experience difficulty in translating relevant evidence (statistical or otherwise) into numerical probabilities. There is always a danger that one's opinions and judgments may be altered when they are restated numerically. Some commentators thus favor what they term

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[117] Insisting on case-specific facts is no guarantee against intrusions on the rights of a great number of innocent people. In *Davis v. Mississippi*, 394 U.S. 721, 722 (1969), the case-specific facts were the rape victim's "description of her assailant . . . [as] a Negro youth." These facts led to the police taking at least twenty-four African-American youths to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. *Davis*, 394 U.S. at 722. The police also interrogated forty or fifty other African-American youths either at police headquarters, at school, or on the street. *Id.*

"intuitive"' decision making strategies that reflect how statistically untrained people actually make decisions. They argue that "intuition"' is internally coherent and preferable to probabilistic logic in the event of conflict.[118]

Recognizing that most police officers cannot express their intuitive judgements in terms of explicit probabilities, however, does not dictate that all logic be abandoned in favor of police consulting entrails and witch doctors when determining probable cause.[119] Even when fact-finders do not make explicit or precise probability estimates about issues, their decisions are often grounded in implicit estimates. For example, in *Delaware v. Prouse*,[120] Justice White relied upon his intuitive appreciation of the likely statistical impact of random automobile stops. He explained that, "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."[121] Similarly, both common sense and statistics tell police that young men commit a hugely disproportionate number of crimes. Police factor this into their assessment of probable cause even if they cannot quote precise percentages.

The crudeness of the intuitive probabilistic determinations currently used to determine probable cause can be improved through use of tools like probability assessment procedures and other mathematical techniques.[122] Police can be expected to improve their assessment of probabilities if they are formally trained in probabilistic appraisal techniques. One frequently

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[118] Koehler & Shaviro, *supra* note 75, at 266.

[119] "The difficulty of practicing an art is no excuse for practicing it stupidly, carelessly." JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 222 (2d prtg. 1950) (1949).

[120] 440 U.S. 648 (1979).

[121] *Prouse*, 440 U.S. 648, 659-60 (1979).

[122] Properly done statistical analyses are hardly less reliable than the intuitions, unfounded assumptions and guesswork on which the courts and police often rely. *See generally* Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 146 (1980-81) ("[T]he decision maker whose only tool is intuition will often err . . . . It has been well established for some time now that when the same information is available to intuitive humans or a good mathematical model, the human's decisions are consistently less accurate.").

cited justification for not using statistical evidence at trial is that unsophisticated juries can be misled by pseudo-scientific probability analysis.[123] But unlike juries who come and go with little or no training, police can be familiarized with the proper methods of assessing probabilities. When searches and seizures are based on objectively scored factors such as statistics, whatever may be lost in terms of regard for individual autonomy could be compensated for by an increase in terms of uniformity and neutrality.

If mathematical precision is not always to be preferred over unstructured intuition, at a minimum, mathematical probabilities can supplement traditional methods of assessing probable cause. The practical question that remains is to how often will such statistics be available in the real world of search and seizure. This question surfaced last year in the oral arguments on *Maryland v. Pringle*.[124] More so than any other case, *Pringle* provided the Supreme Court with an opportunity to relate probable cause to mathematical probabilities.

The facts of *Pringle* were fairly straight-forward:

> In the early morning hours a passenger car occupied by three men was stopped for speeding by a police officer. The officer, upon searching the car, seized $763 of rolled-up cash from the glove compartment and five glassine baggies of cocaine from between the back-seat armrest and the back seat. After all three men denied ownership of the cocaine and money, the officer arrested each of them.[125]

The Court of Appeals of Maryland held that "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession."[126] The U.S. Supreme Court ultimately upheld the arrest because

> it was reasonable for the officer to infer a common enterprise

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[123] *See* People v. Collins, 438 P.2d 33, 33 (Cal. 1968).

[124] 124 S. Ct. 795 (2003).

[125] *Pringle*, 124 U.S. at 798

[126] Pringle v. State, 805 A.2d 1016, 1027 (Md. 2002), *rev'd* Maryland v. Pringle, 124 S. Ct. 795 (2003).

> among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.[127]

Although *Pringle* was ultimately decided on the "common enterprise" theory, most of the oral arguments[128] had proceeded on the assumption that only one of the three occupants of the car was guilty. Thus, the arguments explored the question of whether a one in three chance of guilt constituted probable cause. Government counsel argued that probable cause could not be expressed in mathematical terms, while defense counsel's opening argument suggested "this is a unique case with highly unusual facts" which starkly presented probable cause in a numerical fashion. The Court, however, saw it differently: "You make an interesting opening statement that this is highly unusual-we've-a lot of us read a lot of these cases. It seems to me this happens all the time, that drugs in the car, the person says, it's not mine. It seems to me that that's common place."[129]

Not only was the particular factual situation in *Pringle* commonplace, but the availability of statistical probabilities is also much more common than is often realized. Automobile search cases in particular seem to abound with readily available and relevant statistical information. In *Pennsylvania v. Mimms*,[130] the Court was asked to discount case-specific facts and the concept of personal autonomy when ruling on a police practice of ordering all motorists out of their vehicles "as a matter of course whenever they had been stopped for a traffic violation."[131] The Court addressed this uniform practice without inquiring whether the individual police officer had any case-specific information that a particular motorist was likely

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[127] *Pringle*, 124 S. Ct. at 801.

[128] *See infra* text accompanying notes 155-56.

[129] Oral arguments at 32-33, Maryland v. Pringle, 124 S. Ct. 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

[130] 434 U.S. 106 (1977).

[131] *Mimms*, 434 U.S. at 110; *see also* Maryland v. Wilson, 519 U.S. 408 (1997) (permitting police to order all passengers out of the vehicle)

to be armed and dangerous.[132] The Court ultimately concluded that uniform treatment of motorists as a class was justified by statistical evidence "that a significant percentage of murders of police officers occur[] when the officers are making traffic stops."[133] The Court's holding was influenced by one study concluding that approximately thirty percent of police shootings occurred when a police officer approached a suspect seated in an automobile.[134]

In *Michigan Department of State Police v. Sitz*,[135] the Court upheld sobriety roadblocks when informed that approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment.[136] In addition, an expert witness testified at the trial that experience in other states demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around one percent of all motorists stopped.[137] When the Court subsequently distinguished *Sitz* in *Indianapolis v. Edmond*,[138] the Court noted that the overall "hit rate" of the program in *Edmond* was reported as approximately nine percent—about five percent of stopped cars in drug checkpoints led to drug arrests and another four percent led to arrests for other offenses.[139]

In *Delaware v. Prouse*[140] a majority of the Court accepted the government's contention that random stops furthered a

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[132] *Mimms*, 434 U.S. at 109. The state conceded that "the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.*

[133] *Id.* at 110. (citing United States v. Robinson, 414 U.S. 218, 234 n.5 (1973)).

[134] *Id.* at 110.

[135] 496 U.S. 444 (1990)

[136] *Sitz*, 496 U.S. at 455.

[137] *Id.*

[138] 531 U.S. 32 (2000).

[139] *Edmond*, 531 U.S. at 34-35; *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 557 (1985) (Brennan, J., dissenting) (noting one physician's estimate "that he had found contraband in only 15 to 20 percent of the persons he had examined"); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (noting the ratio of illegal aliens detected to vehicles stopped was approximately 0.5 percent, and data established that .12% of those initially stopped and 20% of those referred to a secondary checkpoint were illegal immigrants).

[140] 440 U.S. 648 (1979).

"vital" state interest in promoting highway safety[141] and indicated its willingness to uphold the searches if "in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail."[142] The state, however, was unable to offer any statistics to prove its claim that random stops are more efficient than the less intrusive checkpoint stops formerly used by the authorities.[143] *Prouse* thus found the state's practice unconstitutional on the basis of the state's inability to demonstrate that the method was "sufficiently productive" in relation to less intrusive but more efficient means of serving the government's purpose.[144]

In addition to automobile cases, statistical evidence is often used to establish the effectiveness of airport screening programs,[145] as well as the reliability of human informants[146] and drug sniffing dogs. For example, *United States v. Limares*[147] held that probable cause was clearly established when the record revealed that the drug sniffing dog had been right sixty-two percent of the time.[148] Even when such precise statistics are unknown or forgotten, there often remains a vague awareness of their general thrust. In one of the most famous cases of our era—the O. J. Simpson case—Professor

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[141] *Prouse*, 440 U.S. at 658-60.

[142] *Id.* at 659.

[143] *Id.* at 658.

[144] *Id.* at 659.

[145] For example,

> [i]n the 15 years the [Government's airport screening] program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage have been inspected. By far the overwhelming majority of those persons who have been searched . . . have proved entirely innocent—only 42,000 firearms have been detected during the same period.

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

[146] The reliability of informants is often established by citing specific numbers establishing their "track record" of past accuracy. *See, e.g.*, United States v. Shepard, 714 F.2d 316, 317 (4th Cir. 1983) ("[O]n approximately thirty earlier occasions the informant had provided information that had led to over twenty-five convictions.").

[147] 269 F.3d 794 (7th Cir. 2001).

[148] *Limares*, 269 F.3d at 798.

William J. Stuntz suggested that the "officers undoubtedly knew what Justice Department statistics indicate: that half of the women murdered in the United States are killed by their husbands or boyfriends. Simple probabilities made Mr. Simpson a suspect."[149]

In summary, statistical evidence is readily available in many cases and should be utilized whenever it exists. When it is not available, there would be a powerful incentive to discover or create such statistics if the Court announced its preference for statistical evidence over unstructured intuition.[150] As suggested earlier, police could be trained in probability assessment techniques, and this training could include not only how to "think like a statistician," but how to gleam percentages from arrest files and other police records.[151] Creating data banks showing where past efforts have been most and least productive could help establish the probability of guilt in particular types of recurring situations.[152]

If the courts were to accept that mathematical probabilities have a role to play in determining probable cause, the remaining area for consideration is the extent to which the probable cause standard itself should be expressed in mathematical terms.

THE LEVEL OF CERTAINTY—PLAYING BY THE NUMBERS?

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[149] William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 846 (2001) (quoting Scott Turow, *Policing the Police: The D.A.'s Job*, *in* POSTMORTEM: THE O.J. SIMPSON CASE: JUSTICE CONFRONTS RACE, DOMESTIC VIOLENCE, LAWYERS, MONEY, AND THE MEDIA 189, 189-90 (Jeffrey Adamson ed., 1996).

[150] Illinois v. Wardlow, 528 U.S. 119, 131 n.6 (2000) (Stevens, J., dissenting) ("Statistical studies of bystander victimization are rare. One study attributes this to incomplete recordkeeping and a lack of officially compiled data.").

[151] *Wardlow*, 528 U.S. at 135 n.10 (Stevens, J., dissenting) (noting the United States Department of Justice announced that it would appoint an outside monitor to ensure that New Jersey State Police keep records on racial statistics and traffic stops).

[152] "When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." United States v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

> The law's principal task is decisionmaking, and decisionmaking takes place in a world of uncertainty. A central and critical task . . . is to specify the degree of certainty or likelihood required to support a particular decision.[153]

Although they turned out to be a mere tease, the oral arguments in *Maryland v. Pringle* dramatically framed the question of expressing probable cause in mathematical terms. When government counsel asserted that a one in three chance of guilt satisfied the probable cause standard, the following exchange occurred:

> Court: Why do we call it probable cause?
> Counsel: I think there's a bit of a misnomer there, but clearly from the case law of this Court, it means a fair probability . . .
> Court: But if you had to reduce it to a percentage figure, what would you call the percentage required for probable cause?[154]
> Counsel: I don't know that I could, Your Honor. I really don't know that it's useful to -
> Court: But it's less than 50, though, I gather?
> Counsel: Yes. Your-the cases of this Court has said -
> Court: So that takes care of the two people in the room, but when you get down to 33-1/3 with three people?
> Counsel: I think-I think three people clearly would be -
> Court: And with four people it would be 25 percent. Is that enough?
> Counsel: Probably, probably. . . .
> Court: . . . [Y]ou agree that at some point the probability is-when the numbers of people present keep increasing, at some point the probability is going to be too slim?[155]

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[153] Clermont, *supra* note 82, at 1117 (footnotes omitted).

[154] When asked to quantify the degree of certainty represented by the phrase "probable cause," 166 federal judges gave, as an average response, 45.78%. C.M.A McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982). They also equated reasonable suspicion with a 31.34% level of certainty. *Id.* at 1327-28.

[155] Oral arguments at 14-15, Maryland v. Pringle, 124 S. Ct. 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

At another point the Court stated, "you know, it gets worse and worse," what if there are ten people in a mini-van or bus "so the chance that any individual one did it is ten percent. That's still enough [probable cause]?"[156]

Pushed down that slippery slope by the Court, counsel's only lifeline was the Court's own statements that probable cause could not be quantified.[157] But when the Court states that probable cause resists definition, the Court is not saying that it is logically impossible to attach a probability value to probable cause. The question is not whether the law of probable cause can be precise, but whether it ought to be precise. "Although nothing in probability theory determines the choice of a probability value for probable cause, nothing in the notion of probability prevents the assignment of a specific probability value to the legal requirement of probable cause."[158]

The previous sections of this article focused on the methodology for determining probable cause, (i.e., whether police should utilize statistical studies), and the extent to which police should be encouraged to compile statistical records and to analyze situations in an overtly probabilistic way. At this point, however, the concern is no longer about which methodology, as an empirical matter, will generate the highest degree of certainty. The focus now shifts to the degree of certainty required by the Constitution. As a substantive legal standard, probable cause is independent of the methodology used to assess factual likelihoods.

Unfortunately, the Supreme Court has often confused the method of determining factual likelihoods with the constitutionally required degree of certainty. Consider the definition of probable cause in *Carroll v. United States*:[159] "If the facts and

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[156] *Id.* at 13. Professor Grano once asserted that ten percent was enough to establish probable cause. *See supra* note 112 and accompanying text.

[157] Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

[158] Peter Tillers, *Intellectual History, Probability, and the Law of Evidence*, 91 MICH. L. REV. 1465, 1484 (1993).

[159] 267 U.S. 132 (1925).

circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."[160] This definition specifies a methodology for arriving at probable cause—use prudence and caution—but merely describes the ultimate arrival point as a "belief" that the offense has been committed. The question that remains is how strong must that belief be in order to satisfy the constitution?

Meeting that question head-on would require the Court to provide a reasonably precise [perhaps mathematically precise] answer, and at times the Court has acknowledged that the first principle of Fourth Amendment interpretation is that the constitutional standard must be "workable for application by rank and file, trained police officers."[161] As Professor LaFave put it, Fourth Amendment doctrine

> is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[162]

Formulating rules that are clear in application, however, says little about the substance of those rules. "Don't search on Thursdays" is a clear rule furthering privacy interests; "search all teenagers who are in public after 11 p.m." is a clear rule diminishing privacy. Does the Fourth Amendment have noth-

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[160] *Carroll*, 267 U.S. at 161.

[161] Illinois v. Andreas, 463 U.S. 765, 772 (1983). *Dunaway v. New York*, 422 U.S. 200, 213-14 (1979), held that "[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." Departures from such a standard should be adopted, the Court added, reluctantly, and only in "narrowly defined" circumstances. *Dunaway*, 422 U.S. at 213-14.

[162] LaFave, *supra* note 61, at 141 (footnotes omitted).

ing to say about the desirability of these equally clear rules? Once the Court settles on the conditions under which a search or seizure may occur, we would all hope that the Court will be as lucid as possible in defining the contours of such reasonable searches. This is mom and apple pie stuff, and the police do not have a unique perspective in preferring clarity over ambiguity.[163] But if clarity is all that the police want,[164] one very clear rule would be—"when in doubt, don't search"—or at least don't search when the level of doubt drops below an acceptable risk of error.

The problem with quests for clear rules defining probable cause is that

> any attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles. The process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines.[165]

Thus, the Court has acknowledged that because so many variables exist in the probable cause equation, "one determination will seldom be a useful 'precedent' for another."[166] In the end, even seemingly "bright-line" rules usually become blurred as the police and the adversarial process test their outer limits, and "[t]he grail of 'rule-oriented' jurisprudence is as mythical as

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[163] "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Oliver W. Holmes, *The Path of Law*, *in* COLLECTED LEGAL PAPERS 167, 186 (1920).

[164] Professor LaFave did not advocate clarity as the sole or dominant consideration, but instead argued that clarity plays a role in the calculus of balancing government and individual interests. He suggested that a rule theoretically correct only 95% of the time, but understandable in virtually all cases is preferable to a rule that is 100% theoretically correct, but which police could correctly apply only 75% of the time. Wayne R. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9, 30 n.76 (1972).

[165] Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2.

[166] Illinois v. Gates, 462 U.S. 213, 238 n.11 (1983).

King Arthur's."[167]

The inability to formulate clear rules or precise probability levels governing probable cause has lead the Court to adopt one over-arching rule for the police—just use your common sense and act reasonably. In an imperfect world where correct answers are uncertain, a "pragmatic" Court recognizes that it must muddle through to the best of its ability, and that it can hardly ask more from the police. Thus, the Court often determines the constitutionality of police conduct "by resorting to a malleable 'objective' test of reasonableness viewed from the police officer's perspective,"[168] and "any police conduct that is 'understandable' in the circumstances according to common sense [will] be judged 'reasonable' for purposes of assessing the constitutionality of police intrusions."[169]

As formulated in *Terry v. Ohio*,[170] the legal standard becomes whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."[171] The *Terry* Court was misguided, however, in its suggestion that

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[167] Slobogin, *supra* note 88, at 71.

[168] Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 U.C.L.A. L. REV. 199, 265 (1993); *see also* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV 473, 477 (1991).

> Although the [F]ourth [A]mendment conveys to "the People [the right] to be secure in their persons, houses, papers, and effects" the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person's rights were violated. This approach endorses retrospective evaluations of police behavior rather than prospective protections.

Id. (footnote omitted).

[169] Thomas Y. Davis, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 52-53 (1991); *see also Gates*, 462 U.S. at 232 (stating probable cause "does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

[170] 392 U.S. 1 (1968).

[171] *Terry*, 392 U.S. at 21-22.

a police officer could choose the constitutionally appropriate action by employing a common sense, seat-of-the pants assessment.[172] The crucial mistake in *Terry* was using the word "reasonable" as a term of art synonymous with constitutionality, and at the same time, a description of the searching officer's rational analysis of the situation. By equating reasonableness as a process of logical thought with reasonableness as a standard of constitutionally permissible behavior, the protections of the Fourth Amendment are reduced to a prohibition against irrational police actions. As Justice Stevens charged, the Court acts "on the assumption that the constitutional protection against 'unreasonable' seizures requires nothing more than a hypothetically rational basis for intrusions on individual liberty."[173]

If taken seriously, deference to the reasonably prudent police officer's common sense is "an invitation to reviewing courts to treat a police intrusion as 'reasonable' if any explanation for the police conduct can be given."[174] Admittedly, this approach requires something more than whimsy or caprice by police officers,[175] but even a five percent likelihood that

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[172] Terry's statement regarding a belief "that the action taken was appropriate" is a meaningless generality to the police officer on the street. Wayne R. LaFave, *Street Encounters and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 39, 64 (1968). *But see* Stuntz, *supra* note 91, at 2175. However, Stuntz states that

> [n]o one knows how to craft a legal formula that will tell officers how to behave in advance. That problem, however, need not be solved; vagueness in legal definitions is a more tolerable vice than law professors tend to think. The problem that needs addressing is not definition but application—the question is not whether we can come up with the right legal terminology, but whether police officers can know roughly where the boundaries are in practice. Maybe they can. "I know it when I see it" has a bad reputation in legal circles, but the reputation is undeserved. Sometimes, consider-all-the-circumstances standards work tolerably well in spite of their linguistic muddiness—for all the muddiness, bottom lines may be reasonably predictable.

Id. at 2175.

[173] Maryland v. Wilson, 519 U.S. 408, 422 (1997) (Stevens, J., dissenting).

[174] Davis, *supra* note 169, at 57.

[175] United States v. Montoya de Hernandez, 473 U.S. 531, 543 (1985) (noting customs inspectors had more than an "inchoate and unparticularized suspicion or hunch"). "The clear incentive that operated in the past to establish probable cause

seizable items are present in the place to be searched establishes that the basis for the search is rational and not wholly arbitrary. Allowing police to act on such minimal odds, however, would lead to an unacceptable number of unnecessarily invasive and harassing searches and seizures.[176] The cost to the victims of such unnecessary intrusions is obvious, but the state also has an "economic" interest because "[t]he lower the level of certainty required for a search and seizure, the more state resources will be wasted in conducting it, since more mistakes will occur."[177]

Trusting probable cause determinations to a police officer's common sense also runs contra to the intent of the framers of the Fourth Amendment. Is it plausible they drafted the Warrant Clause and the probable cause requirement merely to insure that the police had some minimally rational basis for exercising their power?

> It seems unlikely the Framers would have accepted that the government can bestow generalized discretionary authority on a police officer through the credential of a metal police badge . . . when they clearly would not have allowed the same officer to be given the same generalized discretionary authority in the form of a paper general warrant.[178]

Most importantly, deferring to the officer's exercise of common sense conflicts with the Court's view of the Fourth Amendment as requiring a delicate balance between the governmental interest and the individual interest in privacy or liberty. Despite the Court's protestations that it balances interests only in

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has now been so completely vitiated that the police need only show that it was not 'entirely unreasonable' under the circumstances of a particular case for them to believe that the warrant they were issued was valid." United States v. Leon, 468 U.S. 897, 957 (1984) (Brennan, J., dissenting) (citations omitted).

[176] Illinois v. Wardlow, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., dissenting) (noting in a two-year period, the "New York City Police Department Street Crimes Unit made 45,000 stops, only 9,500, or 20%, of which resulted in arrest;" "in 1997, New York City's Street Crimes Unit conducted 27,061 stop-and-frisks, only 4,647 of which, 17%, resulted in arrest").

[177] Slobogin, *supra* note 88, at 61 n.196.

[178] Davis, *supra* note 169, at 53 n.203.

"special need" cases,[179] or only where the probable cause standard does not apply,[180] the Court has never explained why it sometimes uses balancing and sometimes uses rigid rules.[181] The Court's vacillation between a rigid definition of probable cause and the ultimate flexibility of balancing has replaced its bipolar approach to the relationship between the amendment's warrant clause and the reasonableness clause.[182] Justice Thomas' recent comment on that legendary schizophrenia can be paraphrased to apply equally to the Court's vacillation on probable cause: "Our cases stand for the illuminating proposition that [probable cause is a uniform standard], except, of course, when [it is] not."[183]

Stripped of qualifiers, modifiers, and outright obfuscation, the true essence of the Court's overall approach is that "'the balancing of competing interests' [is] 'the key principle of the Fourth Amendment.'"[184] Probable cause is but one of many forms or levels of justification for reasonable searches and seizures, and it would be a strange jurisprudence that utilized the balancing of government and individual interests for all constitutional intrusions except those based on probable cause. The very idea of balancing implies that each side has some merit; that some privacy interests outweigh some government interests; and that all forms of privacy cannot be set aside merely because the government offers a modicum of rational justification for the intrusion. Determining which justifications are sufficient for which types of intrusions requires something

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[179] Slobogin, *supra* note 88, at 25.

[180] Dunaway v. New York, 442 U.S. 200, 210 (1979) (stating that because the balancing test of *Terry v. Ohio* "involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope").

[181] Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 22 (1988) (noting the Court's failure to explain when it balances and when it uses rigid rules).

[182] *See generally* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989).

[183] The original statement was: "Our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." Groh v. Ramirez, 124 S. Ct. 1284, 1299 (2004) (Thomas, J., dissenting).

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

other than ostensibly value-free objective rationality on the part of police officers. For example, the police officer in *Tennessee v. Garner* acted rationally, but unreasonably in the constitutional sense, by using deadly force against a non-dangerous fleeing felon.[185] The use of such force was rational because it had been approved by common law and adhered to by a majority of modern police departments.[186] Nonetheless, its use became constitutionally unreasonable in cases involving non-dangerous felons,[187] because the balance was now to be struck in favor of an individual's right to life, which outweighed society's interest in effective law enforcement.

Judicial balancing of the conflicting considerations in *Garner, Terry*, and other Fourth Amendment cases furthers one of the images of how justice is done, i.e., one case at a time, taking into account all the circumstances, and identifying within that context the right outcome—reasonableness under the circumstances.[188] But the reasonable or fair result in a particular case is but one of a number of competing values. Often contradicting the quest for individual justice is the need for equal treatment of similarly situated individuals, the need for comprehensible and stable laws to guide law enforcement officials, and the larger concerns of general society.[189] It is impossible for the Supreme Court to maintain its institutional concern for general principles and to remain totally responsive to the pecu-

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[185] *Garner*, 471 U.S. at 11.

[186] *Id.* at 12.

[187] *Id.* at 11 (stating deadly force may be used only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force").

[188] The genius of the common law, so the theory goes, was that by sticking close to the facts of the case, the law would grow and develop, not through the pronouncement of general principles, but case-by-case, incrementally, one step at a time. The meaning of the rule emerges, develops and changes in the course of applying it to specific facts.

[189] "[T]he law does undoubtedly treat the individual as a means to an end . . . ." OLIVER WENDELL HOLMES, THE COMMON LAW 35 (Mark DeWolfe Howe ed., The Belknap Press of Harvard Univ. Press 1963) (1881). "[J]ustice to the individual is rightly outweighed by the larger interests on the other side of the scales." *Id.* at 41.

liarities of each case.[190]

Although the Court cannot avoid the dichotomy between uniform application of law and responsiveness to individual situations, between universe and context, between sameness and difference, the Court can achieve an accommodation. The accommodation I suggest is twofold: 1) the fiction of one uniform definition of probable cause must be replaced with a flexible sliding scale that takes account of the severity of the intrusion and the magnitude of the threat; and 2) the amorphous approach of balancing the totality of the circumstances must be replaced with a fixed number of structured categories reflecting multiple layers of probable cause. The goal of this suggested approach is to achieve an appropriate or at least workable blending of flexibility and calibration.

FLEXIBILITY

"Decision theorists insist that the problem of choice always involves *two* questions: (a) What are the odds?, and (b) What's at stake?"[191] We cannot settle on an appropriate level of probable cause [the odds] until we can assess the importance of the interests at stake. On any scale of importance, the interests in the two airplane hypotheticals at the start of this article must be seen as poles apart. Terrorists and illegal smokers are both criminals, but hardly constitute the same threat to society. When computing the odds for probable cause, it seems obvious that a low level of probability should suffice when the stakes involve a terrorist threat. Conversely, we would expect that a high level of probability must be satisfied when the stakes are limited to the possible escape of an illegal smoker.

Despite this obvious truism, the Court often clings to the

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[190] The Court's prime institutional task is to deal with issues of significant public interest, not merely to do justice to the particular parties of the relatively rare case in which certiorari has been granted.

[191] Barbara J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence*, 91 MICH. L. REV. 1465, 1486 (1983).

fiction that probable cause is a "single, familiar standard,"[192] and that distinctions among crimes are irrelevant when it comes to regulating criminal investigations.[193] This rigid view of probable cause requires the police to pinpoint their level of certainty to some fixed, but undefined, percentage that applies equally to illegal smokers and terrorists. In contrast to the rigidness of probable cause, the reasonable suspicion standard of *Terry* has evolved into a variable standard, calibrated to the degree of both the privacy intrusion and the state interest. Thus, reasonable suspicion is "not simply a lower standard than probable cause, but a different kind of standard."[194] The flexibility exemplified in the balancing approach of *Terry* is an appropriate model for an expanded definition of probable cause that would take account of the severity of the suspected crime. In Judge Posner's words, "probable cause—the area between bare suspicion and virtual certainty—describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed."[195]

One objection to calibrating the level of probable cause according to the severity of the suspected crime is the difficult timing considerations facing courts and police. At the time most searches and arrests take place, the police do not know

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[192] *Dunaway v. New York*, 422 U.S. 200, 213 (1979), rejected "a multifactor balancing test" of reasonable police conduct under the circumstances, because 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."

[193] In *Brinegar v. United States*, 338 U.S. 160 (1949), Justice Jackson stated that

> 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.

Id. at 182 (Jackson, J., dissenting).

[194] Lerner, *supra* note 13, at 1002.

[195] Llaguno v. Mingey, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc); *see* Amar, *supra* note 6, at 784 ("To begin with, probable cause cannot be a *fixed* standard. It would make little sense to insist on the same amount of probability regardless of the imminence of the harm, the intrusiveness of the search, the reason for the search, and so on.").

precisely what crime occurred. In contrast, by the time a court rules on the constitutionality of a search, the litigants typically have established the nature of the alleged crime with precision. The contrast between the initially suspected crime and the offense subsequently discovered can be drastic. By way of illustration, consider the following two situations. First, upon hearing loud screams from an apartment, a police officer concludes that someone's life is in immediate danger. He breaks down the door, follows the screams, and finds an uninhibited couple making love. Second, a police officer outside an apartment building detects an odor he believes is the smell of burning marijuana. He rushes into the apartment and finds that the odor comes from a decomposing body. In both situations, the court faces almost unbearable pressure to evaluate the government's justification for initiating the search in light of the facts known at trial.[196] In the latter situation, the court might wish to deter overzealous and faulty investigations of marijuana smoking, but it requires a truly Herculean effort to suppress evidence of a dead body. Conversely, the court might prefer to encourage the first officer's concern for saving lives, but it is difficult to overlook this intrusion into the marital bedroom. Thus, the criticism goes, factoring the severity of crimes into Fourth Amendment jurisprudence would only compound the dangers of hindsight judgment which inhere in the remedy of exclusion of evidence at trial.

Although this criticism is valid, it is not impossible to overcome. Courts routinely struggle with excluding reliable evidence because of legal rules holding such evidence to be inadmissible. For example, evidence that a defendant committed crimes similar to the crime currently charged at trial must be excluded unless some exception applies, such as showing that the previous crimes establish the *modus operandi* used in the current charge. It may be distasteful for a trial judge to exclude

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[196] "[A]fter-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964).

a defendant's lengthy rap sheet,[197] but no more or less so than requiring the judge to focus exclusively on what police suspected pre-search, regardless of what we now know. As to the difficulty of police making pre-search evaluations—i.e., asking them to classify cases by the severity of the underlying crime before the details of the crime are known—rough estimates or classifications of suspected crimes are everyday occurrences when police and prosecutors decide where to put their investigative resources. "All police forces and all prosecutors' offices make up-front judgments about the seriousness of alleged crimes."[198] A concept of probable cause that recognizes four or five classes of crimes ranging from the most serious to the least, would not require police or courts to make unmanageably complex judgments.[199]

A more theoretical objection to weighing the severity of the suspected crime is that the Fourth Amendment would become unique in lowering constitutional rights when society's interest is strong.

> For example, the state's admittedly great interest in solving a murder does not permit a relaxation of the right to remain silent, the right to jury trial, the right to counsel, or— most analogous to the subject of the present discussion—the burden of proof; if anything, given the greater consequences that flow from a murder conviction, we are more protective of these rights in homicide cases.[200]

One way to avoid this objection, or at least diminish its impact, is to return to the original concerns that led the *Terry* Court to create a new form of justification and a lower level of certainty

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[197] The exclusion of probative evidence in order to serve some other policy is by no means unique to the Fourth Amendment. Dean Wigmore devoted an entire volume to such exclusionary rules of evidence. *See* 8 J. WIGMORE, EVIDENCE (J. McNaughton rev., 1961) (discussing, inter alia, marital privilege, attorney-client privilege, communications among jurors, state secrets privilege, physician-patient privilege, priest-penitent privilege).

[198] Stuntz, *supra* note 149, at 870.

[199] For example, courts and police would find the following categories fairly easy to distinguish: violent crime; nonviolent, nondrug crime; serious drug crime; and less serious drug crime. *Id.*

[200] Slobogin, *supra* note 88, at 52.

for a seizure. *Terry* focused not on solving past crimes, but on preventing an impending crime and protecting against future harm to a police officer. "[T]he very point of *Terry* was to permit officers to take preventive action and conduct investigative stops *before* crimes are committed . . . . [W]hereas probable cause looks for past or present illegalities, an underlying purpose of *Terry* is to grant officers the ability to prevent future wrongdoing."[201] When future danger is significant, the government's interests expand to include protection of the community as well as solving past crimes.[202]

> The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and *especially the danger of its imminent repetition*. If a multiple murderer is at large, the police must compress their investigation and make the decision to search or arrest on less information than if they could investigate at their leisure.[203]

Perhaps the best example of the benefits and pitfalls of distinguishing between past and future harm is the *Sirhan*[204] case in 1968, where society faced a possible terrorist threat, before the word terrorist became a familiar part of our collective consciousness. At approximately midnight on June 4, 1968, Senator Robert Kennedy, a candidate for the Democratic Presi-

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[201] United States v. Perkins, 363 F.3d 317, 326-27 (4th Cir. 2004), *cert. denied*, No. 04-5795, 2005 U.S. LEXIS 544 (2005).

[202] Consider this "thought experiment" posed by Professor George Thomas:

> Suppose the authorities on the evening of September 10 had a choice between foiling the plot and causing the terrorists to flee or arresting all nineteen hijackers after the planes had done their destruction. (I have no idea how this would be possible, but it is only a thought experiment).

George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 536 (2003). Professor Thomas concluded that the dominant purpose should be to protect the public safety even if it meant that no one would be arrested or convicted. *Id.*

[203] Llaguno v. Mingey, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc) (emphasis added).

[204] People v. Sirhan, 497 P.2d 1121 (Cal. 1972), *overruled by* Hawans v. Superior Court, 586 P.2d 916 (Cal. 1978).

dential nomination, was shot and killed by Sirhan Sirhan.[205] At 10:30 a.m. the next day, police entered Sirhan's house, without a warrant,[206] and "began 'a general search' . . . to determine both 'whether or not there was anyone else involved in [the crime]' and 'whether or not there were any other things that would be relative to the crime.'"[207] In the defendant's bedroom, the police found a diary that was introduced at the trial.[208]

The warrantless "general search"[209] of a private dwelling and the seizure of a personal diary intruded upon the most sacrosanct aspects of privacy. Balanced against these interests were 1) the severity of the crime, and 2) the threat of a nationwide panic that could follow a political assassination. The Supreme Court of California upheld the search because

> [t]he crime was one of enormous gravity, and the "gravity of the offense" is an appropriate factor to take into consideration. The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, we believe that *the mere possibility* that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy. Today when assassinations of persons of prominence have

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[205] *Sirhan*, 497 P.2d at 1126.

[206] *Id.* at 1138.

[207] *Id.* at 1141.

[208] *Id.* at 1138.

[209] The court noted that:

> The scope of the search must, of course, be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. . . . Even if the exigent circumstances in this case made lawful a warrantless search only for evidence of a possible conspiracy to assassinate prominent political leaders, it is clear from the record that the officers were searching for such evidence. Only a thorough search in the house could insure that there was no evidence therein of such a conspiracy.

Id. at 1141 (citations omitted).

> repeatedly been committed in this country, it is essential that law enforcement officers be allowed to take fast action in their endeavors to combat such crimes.[210]

No one can dispute the court's appraisal of the crime as one of enormous gravity. But solving such a horrendous crime does not necessitate dispensing with a warrant and lowering the level of probable cause to a "mere possibility." The defendant had been caught in the act, gun in hand, in front of a considerable number of eye witnesses. With or without the seized diary, there was little possibility that the defendant would be acquitted. The true justification for the search lies in the Court's recognition of the danger of continuing assassinations of political leaders and the possible ensuing public panic. The *Sirhan* Court took judicial notice that "only two months [before the assassination of Senator Kennedy] Reverend Martin Luther King, Jr., had been assassinated, and less than five years previously the victim's brother, President John F. Kennedy."[211] The court could have also added that the race riots in the Watts section of Los Angeles had occurred within the past three years, and that the summer of 1968 saw increased challenges (violent and peaceful) to the Vietnam War.

Whether one agrees or disagrees with the particular result in *Sirhan*, the court's concern for future harm provides some guidance for resolving our hijacking hypothetical. The thwarted hijacking in our hypothetical did not result in anyone's death, and to that extent the past harm is distinct from the tragic assassination of Senator Robert Kennedy. But the major concern in the hypothetical (as in the *Sirhan* case) is whether these would-be hijackers were an isolated group, or part of a wide-scale attack that might still be unfolding. When imminent damage to society is anticipated, the state may legitimately point to a need for loosening investigative restrictions.

Of course we must guard against overreacting and seeing terrorists plots behind every serious crime. Under current law, because the threatened harm is not an element of the probable

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[210] *Id.* at 1140 (emphasis added).
[211] *Id.* at 1140 n.18.

cause analysis, the government never has to produce any hard proof of alleged threats. Instead, the government often uses veiled suggestions of serious harm, implicitly seeking a generous judicial approach to the government's search and seizure powers. A humorous, but not atypical, example occurred during the oral arguments for *Maryland v. Pringle* when the Court asked whether it would be significant if the seized drugs had been in a locked trunk rather than in the back seat of the car.[212] Counsel responded: "[I]f there had been a large quantity of drugs in the trunk or if there had been a dead body in the trunk . . . ."[213] At least on this occasion, the Court instructed counsel not to speculate in this manner—"Well, let's stick to the five—these five bags that were stuck in a Ziploc bag. The Ziploc bag is in the trunk, not a dead body."[214] Although this was a fairly innocuous illustration, history has multiple examples (ranging from the "communist menace" during the McCarthy era; to the threat of weapons of mass destruction in the post-9/11 era) of the government's tendency to exaggerate and manipulate perceived "threats" as justifications for expanding government power and limiting individual liberty. What we gain from placing threats of future harm within the calculus of probable cause is the opportunity to force the government to produce hard evidence of any perceived threat.

In addition to showing—not merely speculating—that a specific, significant danger exists, the government should have to demonstrate that the danger cannot be averted unless the usual level of certainty is lowered. For example, when the Department of Home Land Defense obtained information of terrorists threats during the 2003 holiday travel season, the country was placed on heightened alert and several flights from London to the United States were cancelled until further investigation could occur. This seems like an eminently sensible and fair way to proceed, and preferable to sacrificing additional

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[212] Oral Arguments at 8, Maryland v. Pringle, 124 S. Ct 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

[213] *Id.* at 9.

[214] *Id.*

passengers' rights as the only response to a possible threat. Lowering the level of certainty required for searches and seizures should be reserved for the most serious and immediate threats when the government has few, if any, alternatives.[215] If the threat is not immediate, then "[a]n alternative to all modes of search is more police work: more interviewing of witnesses, more surveillance, more poring over documents, more informer recruitment, more of whatever police do, other than searching, to solve or create cases."[216] For example, when the only threat of future harm is that a smoker might again smoke in an airplane or other prohibited area, the police can act at their leisure when investigating the case against the suspected smokers.

Focusing on future versus past harm also helps avoid a paradox that has sometimes arisen in the Court's analysis of probable cause. In *Winston v. Lee*, the government sought a court order to remove a bullet from the defendant's body so that a ballistics test of the bullet could tie the defendant to a thwarted burglary.[217] The Court recognized that such an extreme invasion of privacy should not be justified by the relatively low level of certainty required to satisfy ordinary probable cause. Instead, the Court examined whether there was a "compelling need" for the removal of the bullet or whether the prosecution had access to sufficient alternative methods of proving guilt at trial.[218] In effect, the Court created another form and level of probable cause which managed to hook the government on the horns of a dilemma: if the facts were sufficient to establish a high degree of likelihood that the bullet was present in the defendant's body, then these same facts, when presented at trial, could circumstantially establish the location of the bullet. Thus, there was no compelling need to actually remove the bullet. The Court gave full effect to this paradox by

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[215] "[I]ntuitively we agree that less antecedent cause should be required as the need for the police conduct becomes more urgent." Grano, *supra* note 110, at 504.

[216] Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1418 (1986).

[217] Winston v. Lee, 470 U.S. 753, 756 (1985).

[218] *Winston*, 470 U.S. at 765-66. The Court considered whether prohibiting the intrusion would affect "the community's interest in fairly and accurately determining guilt or innocence." *Id.* at 762.

holding that the government's strong circumstantial case without the bullet demonstrated that there was inadequate justification for such an extreme intrusion into the privacy of the defendant's body.[219] The Court turned out to be correct because the defendant was ultimately convicted based on circumstantial evidence.[220] This type of analysis of the likelihood of finding the evidence and the need for the evidence to prove a past crime has only marginal relevance to the separate concern for preventing future harm. For example, the paradox would not exist if the government had compelling circumstantial evidence that a suspect had swallowed a capsule with the names of terrorists planning a future attack, and the government now sought court approval to forcibly extract the capsule.

To return to our hypotheticals once again, if the government has strong circumstantial evidence that a particular passenger is a smoker (e.g., tobacco smell on clothing, cigarette lighter in briefcase, etc.), that evidence can be presented to a jury, and the past crime of smoking on an airplane can be proved without the need to search the passenger's house for additional evidence that he is a smoker. In contrast, no matter how strong the evidence is that a hypothetical terrorist is guilty of attempted hijacking, even a slight indication of a wider terrorist plot might be adequate justification to search his house in order to prevent future terrorists attacks.

In summary, the concept of adequate justification for searches and seizures must be made flexible enough to take account of the severity of the underlying crime, and even more importantly, the severity of the threat of future harm. At some point, the future danger may be so great that lessening constitutional protections might be necessary. As Justice Jackson cautioned in another context, "[t]he choice is not between order and liberty. It is between liberty with order and anarchy with-

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[219] *Id.* at 765. "[A]lthough the bullet may turn out to be useful to the Commonwealth in prosecuting [Lee], the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be 'reasonable' . . . to search for evidence of this crime by means of the contemplated surgery." *Id.* at 766.

[220] *See* Clyde Burrows, *10 Years Given Man with Bullet in Shoulder*, RICHMOND TIMES-DISPATCH, Apr. 24, 1985, at A1.

out either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[221]

CATEGORIES

It is relatively easy to distinguish the severity of the past crime and the future threat in the two airplane hypotheticals at the start of this article. The difficult task that remains is to draw the line or lines distinguishing and categorizing situations somewhere between these polar extremes. The difficulty of the task inheres in its very formulation because to suggest categories instantly gives rise to the question—how many categories? Two, three, forty?[222] As Professor Amsterdam put it thirty years ago:

> [A]ny number of categories, however shaped, is too few to encompass life and too many to organize it manageably. The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves."[223]

We can seek guidance on categorization from the experts on the psychology of decision making and from that ultimate legal decision maker-the Supreme Court.

Cognitive psychology examines "how we detect, transform, store, retrieve, and use information from our environment."[224] In *Procedure's Magical Number Three: Psychological Bases for Standards of Decision,* Professor Kevin M. Clermont reflects on experimental investigations which indicate that humans have built-in cognitive limitations, and that most of us can only identify around seven distinguishable categories or a seven

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[221] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[222] "Using a larger number of categories might reap larger gains, as there are always potential gains from fine-tuning legal rules. . . . It is true that too much fine-tuning can be costly: consistency may suffer, and police may ignore or evade the law if it becomes too complex." Stuntz, *supra* note 149, at 870-71 n.93.

[223] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974).

[224] Clermont, *supra* note 82, at 1134.

point rating scale.[225] In an effort to make sound probability assessments better fit humans, not the impracticable reverse, Professor Clermont has suggested that "the law usually does, realistically can, and optimally should recognize only seven categories of uncertainty in its standards of decision: (1) slightest possibility, (2) reasonable possibility, (3) substantial possibility, (4) equipoise, (5) probability, (6) high probability and (7) almost certainty."[226] With some slight tinkering, those seven categories can be edited down to accord with what I believe are five categories of certainty currently recognized by the Supreme Court.

The initial editing involves discarding two levels of certainty on practical grounds. The first to go is "equipoise" because the police need a standard of decision, not a standard of inaction where they are paralyzed by doubt. Also, as a practical matter, situations where the facts on either side are in exact equilibrium rarely appear in the real world of search and seizure where the police usually deal with vague estimates of probabilities, not mathematical precision. About the only time perfect equilibrium might arise is when and if statistical likelihoods are exactly balanced. But even in such cases there would almost always be case-specific facts that would tip the balance one way or the other. For example, our hijacking hypothetical poses exact equilibrium—a 50/50 likelihood of guilt as to each passenger—but adding facts such as the airline attendant's voice recognition or even something as minor as police observation of which passengers seem nervous, would take the decision-maker off of dead center. In short, the law of probable cause need not concern itself with the largely theoretical concern of how to deal with "equipoise."

The second level of certainty to be discarded is the "almost certain" level. Whether this level is equated with beyond a reasonable doubt or some even higher standard, it really has no place at the preliminary investigation stage. Certainly the framers of the Fourth Amendment never contemplated such a restrictive standard, and the Court has never indicated that it

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[225] *Id.* at 1134-35.
[226] *Id.* at 1156.

might raise the bar to require this level of certainty.

With the elimination of the "almost certain" and "equipoise" levels of certainty, the five remaining categories of uncertainty match up with the Supreme Court's approach, although two of these categories are not acknowledged as such by the Court. At present the Court admits to recognizing three categories of justification for a search or seizure: (1) traditional probable cause; (2) reasonable suspicion; and (3) a balancing of individual and government interests under the general rubric of reasonableness. Although the Court resists the label, there are two other levels of justification for search and seizure: (4) "non-searches" which require no justification;[227] and (5) extreme intrusions into personal liberty such as the use of deadly force[228] or surgical intrusion into the suspect's body,[229] which require the highest level of justification.

SEARCHES FORMERLY KNOWN AS "NON-SEARCHES"

A government practice of placing skymarshals on airplanes intrudes on personal privacy to the extent that "big brother is watching" and the passengers have a diminished " right to be let alone, the right most valued by civilized men."[230] The Court, however, deals with such diminimus intrusions by placing them beyond the coverage of the Fourth Amendment, and thus relieves the government of any need to justify its actions. An expansive view of "non-searches" may have been necessary when probable cause was seen as the sole and relatively high standard for all searches and seizures. Under such a monolithic Fourth Amendment, the Court was faced with many cases in which it could either impose a probable cause standard that the government could not meet, or place certain intrusions beyond

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[227] For example, undercover activity, searches of "open fields" and voluntary police-citizen encounters fall into this category.

[228] Tennessee v. Garner, 471 U.S. 1, 3 (1985)

[229] Winston v. Lee, 470 U.S. 753 (1985).

[230] Olmstead v. United States, 277 U.S. 438, 478 (1929) (Brandeis, J., dissenting).

the scope of the Fourth Amendment.[231] However, with a flexible approach to probable cause and with a suggested standard of certainty as low as "slight possibility," these intrusions can be brought within the amendment's scope, where they properly belong.[232]

The question arises as to whether this suggested approach amounts to anything but word play. What do we gain by bringing most "non-searches" within the amendment's coverage if that coverage merely requires a level of justification as low as a slight possibility? In the case of the skymarshals, "search" versus "non-search" may be a distinction without a difference. The potential harm of a skyjacking is so great that lowering the required level of certainty to a "slight possibility" can always be justified.[233] But when the threat is less serious or less immediate, the level of justification can rise accordingly. For example, a one percent chance of skyjacking might justify the use of skymarshals, but when the government wishes to inspect a citizen's garbage for marijuana residue, a ten percent possibility of success might be required. Ten percent likelihood is still quite low, but it exceeds the Court's current approach which holds that government intrusion into garbage is a non-search and thus requires absolutely no justification.[234] Bringing former "non-searches" within the scope of the amendment insures that the police have some rational basis for their actions, and the sufficiency of that rationale (the odds of suc-

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[231] "The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." Terry v. Ohio, 392 U.S. 1, 11 (1968).

[232] *See* Amsterdam, *supra* note 223, at 393 ("A sliding scale approach would considerably ease the strains that the present monolithic model of the fourth amendment almost everywhere imposes on the process of defining the amendment's outer boundaries.").

[233] "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as" the procedures involved are reasonable. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (quoting United States v. Edwards, 498 F.2d 496, 500 (2nd Cir. 1974)).

[234] *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

cess) can vary according to the nature of the threat and the degree of intrusion upon privacy or liberty.

EXTREMELY INTRUSIVE GOVERNMENT ACTION

In addition to bringing former "non-searches" within the amendment's coverage (albeit at the lowest level of required certainty), I also propose open acknowledgment of the highest level of certainty required in extraordinary cases,[235] i.e., recognition that the normal level of probable cause is not sufficient to justify abnormal intrusions. The Court has recognized this principle in connection with police use of deadly force against a suspect[236] and the surgical probing for evidence,[237] situations that "are unusual because of the degree of violence involved in the search or seizure."[238]

Like all other levels of required justification, this highest level should be flexible enough to accommodate extreme threats and extreme measures of protection against such threats. This category might be utilized to help resolve a classic, but again current,[239] quandary for a free society—can torture ever be used to uncover and prevent a threatened mass disaster, for example, the location of a pirated atomic bomb smuggled into the United States by terrorists. The fundamental question of whether torture is ever permissible is not a Fourth Amendment question. Any absolute limitations on balancing individual rights against the collective good are better addressed by due

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[235] *See* Whren v. United States, 517 U.S. 806, 818 (1996) ("Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner."). Justice Marshall, however, disdained the "extraordinary manner" language, and espoused a much broader view of the flexible nature of probable cause—"[i]t is by now established Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches." Gooding v. United States, 416 U.S. 430, 464 (1974) (Marshall, J., dissenting).

[236] Tennessee v. Garner, 471 U.S. 1 (1985).

[237] Winston v. Lee, 470 U.S. 753 (1985).

[238] Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment Reasonableness*, 98 COLUM. L. REV. 1642, 1650 (1998).

[239] *See* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2004); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2004).

process considerations.[240] But assuming that torture is ever acceptable, we certainly would not permit torturing a suspect based on a slight possibility of some terrorist act. We might, however, act differently when faced with a ninety percent certainty that detonation of the pirated bomb is imminent.

Recognizing this highest level of required certainty is the mirror image of recognizing the lowest level of certainty that should be made applicable to former "non-searches." With these newly recognized bookends in place, we can sandwich in three currently existing standards and create a five tiered model of the levels of certainty required for searches and seizures.

TIERED MODEL OF THE LEVELS OF CERTAINTY REQUIRED FOR SEARCHES AND SEIZURES

The parenthetical numbers following each category are largely arbitrary and necessarily vague, but they help give some level of concreteness to what might otherwise be an overly theoretical model. At a minimum, such numbers place the hierarchy of these categories beyond dispute.[241]

1) Slight possibility (1% to 10%)
2) Reasonable suspicion (20% to 40%)
3) Fair probability (40% to 49%)

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[240] *See* Chavez v. Martinez, 538 U.S. 760, 773 (2003) ("The Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases" involving "police torture or other abuse that results in a confession."); Rochin v. California, 342 U.S. 165, 172-74 (1952) (noting evidence obtained by methods that are "so brutal and so offensive to human dignity" that they "shock the conscience" violate the Due Process Clause).

[241] For example, when watching an Olympic diving event, I might disagree with the judges whether a particular dive merited an eight rather than a nine, but at least there is no uncertainty that eight is lower than nine. The Court, however, sometimes confuses the hierarchical relationship between belief and suspicion. *See supra* text accompanying note 53. In general, the Court has shown a disturbing tendency to coin a new phrase (e.g., non-whimsical suspicion, clear indication, etc.) to resolve each new or difficult factual situation. "[C]ourts should clear up their domains where the decision makers cannot tell which standard prevails or what the prevailing standard means." Clermont, *supra* note 82, at 1151.

4) More likely than not (51%)[242]
5) High probability (80% to 100%)

CONCLUSION

My examination of mathematical definitions of probable cause has been less of a tease than the oral arguments in *Pringle*, although I do stop short of endorsing precise mathematical expressions of probable cause. Too much precision diminishes the resources of ambiguity, and as Aristotle cautioned, "[w]e must not look for the same degree of accuracy in all subjects; we must be content in each class of subjects with accuracy of such a kind as the subject matter allows."[243]

In some settings, the required level of certainty can be expressed with a fair amount of mathematical precision. For example, the law could specify whether a drug sniffing dog must have an established track record of reliability in the 30%, 40%, 50% range, and so on. But in the absence of a precisely measured track record, "in the ordinary task of unaided categorization of amorphous probability . . . we can at best make little more than an imprecise stab at judgment."[244] In recognition of human cognitive limitations, these stabs at judgment should be limited and structured into manageable categories of probabilities. Five such categories may or may not be the magic number, but they are preferable to the unacceptable complexity of balancing the totality of the circumstances,[245] or the other

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[242] Professor LaFave grudgingly conceded that some arrests could be made on less than a fifty-one percent probability, i.e., the classic hypothetical where police encounter a dead man and two bystanders who each accuse the other of murdering the victim. He insisted, however, that if the police were permitted to arrest "upon a less than 50% probability that a crime has even occurred, then this would open up the possibility that police would generally arrest persons engaged in activity which was only equivocal," a practice that would result in many intrusions into the freedom and privacy of innocent persons. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 3.2(e) (3d ed. 1996).

[243] FRANK, *supra* note 119, at 194 (quoting Aristotelian lines).

[244] Clermont, *supra* note 82, at 1146.

[245] "The factors in the balancing test have become mere shells, manipulated to justify unguided conclusions as to what the majority in any given case concludes is reasonable." Clancy, *supra* note 116, at 585.

extreme of a "one size fits all" approach to probable cause.[246] "While the Court has never embraced a case-by-case sliding scale of probable cause, it has implicitly adopted a category-by-category sliding scale."[247]

In summary, my view of the flexible nature of probable cause rests on a string of theoretical and pragmatic acknowledgments: probable cause must be seen as but one form of justification for searches and seizures; all justifications reflect compromises that resolve conflicting government and individual interests; the same compromise is not mandated in all cases; thus, the required degree of certainty becomes a flexible standard that is part of the balance or compromise itself.

Given the countervailing needs for both clarity and calibration, for rules and standards, a categorical proportionality approach to probable cause will not arrive at many "bright line" rules. My five-tiered approach to the levels of certainty required for searches and seizures draws a line that is obviously subject to attack[248] (or further refinement). But by adjusting the odds to reflect the varying interests at stake, perhaps we can make the best possible gamble—one in which both sides win.

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[246] "Still, whatever the best possible regime is, it seems hard to believe that the current approach—one category for all crimes—makes sense." Stuntz, *supra* note 149, at 870 n.93.

[247] Thomas, *supra* note 202, at 531.

[248] "[I]t is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." United States v. Banks, 540 U.S. 31, 36 (2003).