Maryland Law Review

Volume 69 | Issue 2 Article 4

10-26-2012

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POLICING FROM THE GUT: ANTI-INTELLECTUALISM IN AMERICAN CRIMINAL PROCEDURE

BRIAN J. FOLEY*

ABSTRACT

Over the last thirty years, the Supreme Court of the United States has given police increased power to search and seize practically anyone they wish. In many of the Supreme Court decisions that have helped create this sweeping power, the Court built its reasoning on premises and rhetoric that can be described as anti-intellectual, revealing an antipathy to thinking—where, it turns out, the thinking is about how to protect civil liberties. The Court has concluded that, in some investigatory contexts, police need not think about a suspect's civil liberties but instead may go ahead and search, seize, or interrogate. Thinking about civil liberties, the Court has said, could lead to inaction by police that could possibly result in a failure to discover evidence or to detain a person who might be dangerous. But when police are not required to think, courts are not required to do so either; indeed, under the rulings in these cases, courts are barred from ever considering claims by some people who are searched or arrested unnecessarily or even based on improper police motives. The Court does not address this danger to civil liberties directly but disparages thinking in general, using anti-intellectual language.

This Article identifies some of these cases—including Illinois v. Gates, *which lowered the probable cause standard;* Atwater v. City of Lago Vista, *which gave police discretion to arrest people who commit minor traffic offenses; and the 2008 case* Virginia v. Moore, *which extended this broad arrest power to cases in which state law prohibits arrest—and examines the Court's reasoning and rhetoric.*

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Anti-intellectualism pervades American culture, as was examined famously almost five decades ago by Richard Hofstadter in his Pulitzer Prize-winning book Anti-intellectualism in American Life. *If anything, this antipathy toward reflection has actually increased in recent years. It is no surprise, then, that anti-intellectualism would affect our criminal procedure jurisprudence. What is surprising is that this effect has gone largely unnoticed. This Article will show that the reasoning in these Supreme Court opinions is inapt and tendentious, and that in the situations where the Court asserts it would be too difficult for police to think about civil liberties, it actually is not. The tendency of the Court of not requiring police to think about civil liberties has allowed the police to decide based on gut feeling—which sometimes involves racial or other animus—who ultimately will receive criminal sanctions. Indeed, in the past thirty years, the criminal justice system has disproportionately ensnared the poor and minorities. The cases rooted in anti-intellectualism have undermined the rule of law and respect for citizens, and they have promoted inaccuracy in criminal investigations by permitting police to indulge racial and cultural animus at the expense of meaningful investigation of crime. This Article will argue that these cases should be reexamined and that police and courts should be required to consider civil liberties.*

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I. INTRODUCTION

While television and movies portray police as shrewd, even cerebral, detectives who conduct complicated investigations driven by cutting-edge science and technology, a great deal of policing in the United States is the result of hunches and dumb luck. Sherlock Holmes has been replaced by the muscular officer from the television show *COPS*. This officer, with his military-style buzz cut, shotgun, body armor, rubber gloves, Taser, and Glock semiautomatic pistol,

pulls over shirtless poor people for minor offenses and, after getting consent for a search of their cars—or after chasing and tackling them—discovers illegal drugs. The reality is that of the more than two million people warehoused in U.S. jails, about one quarter are there for drug crimes.[1] In many cases, these people were not arrested because of investigations; rather, they were swept off the street by a modern police force that has at its disposal a multiplicity of minor offenses, a low standard of probable cause, and broad search and arrest powers.[2] In fact, anybody driving a car is subject to arrest and at least a limited search, either by committing a minor offense or by being accused by the police of committing a minor offense.[3] Broad vagrancy laws may be unconstitutional,[4] but they are not needed as an initial matter; undesirables may nonetheless be swept off the streets.[5] The restriction of broad search and seizure powers that British colonial officials exercised under general warrants animated the adoption of the Fourth Amendment, but two centuries later American police in

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1. Eric Blumenson & Eva S. Nilsen, *How to Construct an Underclass,* or *How the War on Drugs Became a War on Education*, 6 J. GENDER RACE & JUST. 61, 71–72 (2002). There has been an explosive increase in the overall prison population and in those sentenced for drug offenses since 1980. *Id.*; *see also* N.C. Aizenman, *New High in U.S. Prison Numbers; Growth Attributed to More Stringent Sentencing Laws*, WASH. POST, Feb. 29, 2008, at A1 (noting that recent growth in the prison population due to tougher sentencing laws has resulted in over 2.3 million incarcerated individuals in the United States, making it the country with the largest number and percentage of residents in prison).

2. *See infra* Part III. *See generally* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001) (discussing the broad powers of the police to sweep citizens off the street).

3. *See* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules,* 74 MISS. L.J. 341, 420–21 (2004) ("Current Fourth Amendment law conditions the use of the primary mode of personal transportation in this country on liability to arbitrary arrest and search . . . . *That can't be right.*"). This Article will discuss searches incident to arrest and inventory searches of automobiles impounded by the police after arrest. *See* Arizona v. Gant, 129 S. Ct. 1710, 1722–23 (2009) (limiting the breadth of *New York v. Belton*, 453 U.S. 454 (1981), by more narrowly defining the possible justifications for searching a vehicle incident to arrest); *infra* Part III.A; *see also* Colorado v. Bertine, 479 U.S. 367, 374–76 (1987) (concluding that police officers' broad discretion about which cars to impound and their subsequent ability to conduct inventory searches of those cars according to reasonable standardized procedures do not violate the Fourth Amendment if administered in good faith). For a discussion on when police merely say that someone committed an offense, see ANDREW E. TASLITZ ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 239 (3d ed. 2007) ("Police lying, after all, is a phenomenon sufficiently common to have been given its own name: 'testilying.'").

4. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 171 (1972) (holding a Jacksonville, Florida, ordinance prohibiting vagrancy to be unconstitutional because it failed to provide fair notice to persons of ordinary intelligence about what conduct was prohibited by the statute and because it encouraged "arbitrary and erratic arrests and convictions").

5. *See* Dubber, *supra* note 2, at 835, 908 (explaining that police now use possession offenses to fulfill the "sweeping function" previously fulfilled by vagrancy offenses).

many instances have wide discretion to search and seize and otherwise investigate crime.[6]

In many of the United States Supreme Court decisions shifting this power to the government, the Court has built its reasoning on premises that can be described as anti-intellectual, revealing an antipathy to thinking—in which the thinking is about how to protect civil liberties.[7] The Court has concluded that in some situations in which police must decide whether to search or seize or to continue interrogating, police should not have to think about civil liberties: They should simply go ahead and search or seize or interrogate.[8] If a police officer thinks about protecting a suspect's rights, it could lead to inaction—*not* arresting, *not* searching, *not* interrogating—which could result in a failure to uncover evidence or to detain a person who might be dangerous.[9] The reality, however, is that the police *are* thinking. They are just doing it badly. They are relying on hunches, which may be based on racism or other animus.[10] And they are permitted to do so: What police think, as a subjective matter, has been deemed irrelevant to the constitutionality of a search under the Fourth Amendment.[11] Only the objective facts of the circumstances matter.[12]

The upshot of anti-intellectualism in Supreme Court cases is watered-down objective standards, which are achieved by preferences for "bright-line rules" and "administrability"—preferences that are relied on more prominently in the cases that allow the sweeping up of

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6. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 556 (1999) (observing "the larger purpose for which the Framers adopted the text [of the Fourth Amendment]; namely to curb the exercise of discretionary authority by officers," and explaining that "we now accord officers far more discretionary authority than the Framers ever intended or expected").

7. In using the term anti-intellectualism, this Article is referring to an attitude and not about actual oppression of intellectuals. *See* RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 6–7 (Vintage Books 1966) (1962) (explaining difficulties with defining the term anti-intellectualism). This attitude is revealed in the Court's language and rhetoric. *See infra* Part III.

8. *See infra* Part III.

9. *See infra* Part III.

10. *See infra* Parts III, V.

11. Whren v. United States, 517 U.S. 806, 813 (1996). Proving racism under the Equal Protection Clause—as *Whren* says is the appropriate method—is almost impossible. *See* Tracey Maclin, United States v. Whren*: The Fourth Amendment Problem with Pretextual Traffic Stops*, *in* WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS 90, 116–18 (Michael Avery ed., 2009) (discussing the difficulty of bringing an equal protection claim for a pretextual stop under *United States v. Armstrong*, 517 U.S. 456 (1996), and *McCleskey v. Kemp*, 481 U.S. 279 (1987)); *see also Whren*, 517 U.S. at 813.

12. *Whren*, 517 U.S. at 813.

citizens than in other sorts of cases.[13] This anti-intellectualism can be found in opinions by a number of Justices and in cases as recent as the Court's 9-0 decision in *Virginia v. Moore*[14] in 2008.

This Article will closely examine the reasoning in some of the key cases that have helped usher in this era of policing from the gut.[15] In addition, this Article will argue that this reasoning is based on anti-intellectualism, that is, the Court's antipathy toward reflection by police officers about citizens' rights. This approach—political rhetoric masquerading as legal reasoning—denies the importance of rigorous thinking by individual police officers in their work. It also denies the role of the judiciary to protect citizens from government intrusion and oppressive police behavior[16]: If police officers do not have to think rigorously, or at all, about civil liberties in certain types of searches and seizures, then *courts* do not have to consider these civil liberties either. The result is a law enforcement machine that engages in overly broad searches and seizures. The motivations of police officers may ultimately determine who receives criminal sanctions—sanctions that have become harsher over the years.[17] As a result, the current system disproportionately ensnares poor individuals[18] and minorities[19] and leaves them without recourse. The Court's refusal to require police to think rigorously about whether there is actually a need to search or seize a particular suspect also affects accuracy and public safety by permitting police to focus on racial and cultural stereotypes at the expense of meaningful crime investigation.[20] This system undermines the rule of law and the relationship between citizens and their government. The Court's anti-intellectual approach in

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13. *See infra* Part III.A.2 (discussing "bright-line rules"); *infra* Part III.D.4 (discussing "administrability").

14. 128 S. Ct. 1598 (2008). Justice Ginsburg penned a concurring opinion.

15. *See infra* Part III.

16. *See* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1282–83 (1990) (noting that the Court in *United States v. Sokolow*, 490 U.S. 1 (1989), agreed that the judiciary should defer to law enforcement officers' common sense when deciding who should be arrested for suspected drug trafficking).

17. *See, e.g.*, JAMES Q. WHITMAN, HARSH JUSTICE (2003).

18. JEFFREY REIMAN, THE RICH GET RICHER AND THE POOR GET PRISON 109–10 (6th ed. 2001) (1979).

19. *See* Solomon Moore, *Justice Dept. Data Show Prison Increases*, N.Y. TIMES, Dec. 6, 2007, at A26 (explaining that recent prison population data "reflect deep racial disparities in the nation's correctional institutions," with the incarceration rates of blacks in some states being more than ten times the rate for whites); *Sentencing-Guideline Study Finds Continuing Disparities*, N.Y. TIMES, Nov. 27, 2004, at A11 (discussing the "striking growth" in the Hispanic prison population since 1984).

20. *See infra* Part V.B.

these cases is, effectively, a refusal by the Court to think about any of these problems.[21]

Anti-intellectualism pervades American culture, as pointed out almost five decades ago by Richard Hofstadter, the Pulitzer Prize-winning author of *Anti-intellectualism in American Life*,[22] and recently by *New York Times* columnist Nicholas Kristof.[23] Given this pervasiveness, it is no surprise that anti-intellectualism affects our criminal procedure jurisprudence. What may be surprising is that this effect appears to have gone unnoticed: It has not been addressed in legal scholarship. This Article will show that in situations when the Court asserts that it is too hard for police to think, it actually is *not* too hard, and that more rigorous thinking by police would protect civil liberties without leading to the dangers feared by the Court.[24] The following analysis will show that the Court, out of an excessive fear of crime, simply has preferred to create an over-inclusive crime-control machine rather than to foster more precise and more focused policing. The Court sees the rights in issue, such as searches incident to arrest and arrests for minor offenses, as minor and as literally not worth the thoughts of either the police or the Court.[25] Yet such contempt for rights is at odds with the United States Constitution. Identifying that this contempt is rooted in anti-intellectualism—an antagonism to rigorous thinking and inquiry—and not in jurisprudence or in reasoned deference to police tactics and expertise is an important step toward change.

Part II will briefly explain the concept of anti-intellectualism.[26] Part III will discuss the following Supreme Court cases: *New York v.*

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21. See *infra* Part V for a discussion of the negative effects of the Court's anti-intellectualism.

22. HOFSTADTER, *supra* note 7.

23. *See* Nicholas D. Kristof, *Obama and the War on Brains*, N.Y. TIMES, Nov. 9, 2008, at WK10 (discussing "the anti-intellectualism that has long been a strain in American life"); *see also* SUSAN JACOBY, THE AGE OF AMERICAN UNREASON xi–xii (updated ed., Vintage Books 2009) (2008) ("During the past four decades, America's endemic anti-intellectual tendencies have been grievously exacerbated . . . . This new form of anti-rationalism . . . has propelled a surge of anti-intellectualism capable of inflicting vastly greater damage than its historical predecessors inflicted on American culture and politics.").

24. *See infra* Part IV.

25. *See generally* Maclin, *supra* note 16, at 1259–60, 1264–65, 1268–69 (discussing the Court's lack of concern for citizens who have experienced police infringement of their "right to locomotion" during investigatory stops and searches based on either the reasonable suspicion standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), or something even less). This Article will address similar concerns, but the primary focus is on cases in which anti-intellectual rhetoric is prominently featured.

26. *See infra* Part II.

Belton,[27] *Illinois v. Gates*,[28] *Davis v. United States*,[29] *Atwater v. City of Lago Vista*,[30] *Devenpeck v. Alford*,[31] and *Virginia v. Moore*.[32] This Article does not purport to have identified all of the Court's anti-intellectual cases. Rather, the cases discussed are exemplary and can help jurists begin to identify this strain of rhetoric in other cases—a rhetoric that has not been addressed until now.[33] Part IV will briefly contrast these cases with those in which the Court concluded that rigorous thinking by police is not only possible, but also desired and required[34]: *Tennessee v. Garner*[35] and *Berkemer v. McCarty*.[36] These cases can be distinguished from the cases that promote the inhumane, unthinking machine that sweeps up citizens who commit minor violations.[37] Part V will show the harms that flow from this anti-intellectualism.[38] Part VI will conclude that the reasoning in these cases should be reexamined.[39]

II. ANTI-INTELLECTUALISM IN AMERICAN LIFE

This Article uses the term "anti-intellectualism" broadly to describe antipathy toward thinking—the sort of reflection that can

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27. 453 U.S. 454 (1981). After this Article was accepted for publication, the Supreme Court further explained *Belton*; how to characterize the case differs according to the majority and dissenting opinions in *Arizona v. Gant*, 129 S. Ct. 1710 (2009). *Compare id.* at 1719 (stating that the *Belton* Court held that police may "search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search"), *with id.* at 1726–27 (Alito, J., dissenting) (arguing that, as per *Belton*, the police's search of the passenger compartment is justified in every case). This treatment of *Belton* adds strength to this Article's argument about the dangers of anti-intellectualism in Supreme Court opinions. See *infra* Part III.A.3 for a discussion of *Gant*.

28. 462 U.S. 213 (1983).

29. 512 U.S. 452 (1994).

30. 532 U.S. 318 (2001).

31. 543 U.S. 146 (2004).

32. 128 S. Ct. 1598 (2008).

33. More subtle forms of anti-intellectualism appear in other cases and will be more easily observable by readers of this Article. For example, there is anti-intellectualism in some of the Court's investigative seizure cases. The same motivations—the Court's fear of crime and its desire to join the war on crime—animate the Court's decision to grant police broad discretion in that context. *See infra* Part III. In these cases, the anti-intellectual rhetoric is not as prominent, although there is a discussion of "common sense" rules. *See* Maclin, *supra* note 16, at 1264. In the investigatory seizure cases, police instinct is honored: Police officers are seen as having reasonable suspicion based on limited facts. *Id.* at 1278.

34. *See infra* Part IV.

35. 471 U.S. 1 (1985).

36. 468 U.S. 420 (1984).

37. *See infra* Part III.

38. *See infra* Part V.

39. *See infra* Part VI.

sometimes get in the way of action, especially government action. Anti-intellectualism is an antipathy toward pausing, pondering, and contemplation.[40] Anti-intellectualism is not opposed to what one could call animal intelligence or shrewdness. In fact, such qualities in the police are supposedly facilitated by the Supreme Court opinions discussed in this Article. In politics, this anti-intellectual sentiment is apparent in the rhetorical disdain for those who would oppose governmental policies and action that would appear to promote the common good or general welfare. The opposite of intellectualism is often expressed as "common sense."[41]

A. *Defining Anti-intellectualism*

Anti-intellectualism is often discussed without being precisely defined. In *Anti-intellectualism in American Life*,[42] the best-known work discussing this concept,[43] Richard Hofstadter eschewed "a rigorous or narrow definition"[44]:

> [Anti-intellectualism] does not yield very readily to definition. As an idea, it is not a single proposition but a complex of related propositions. As an attitude, it is not usually found in a pure form but in ambivalence—a pure and unalloyed dislike of intellect or intellectuals is uncommon. . . . The common strain that binds together the attitudes and ideas which I call anti-intellectual is a resentment and suspicion of the life of the mind and of those who are considered to represent it; and a disposition constantly to minimize the value of that life.[45]

Hofstadter wrote, "Dealing as I do with the milieu, the atmosphere, in which American thinking has taken place, I have had to use

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40. The assumption that thought is always antithetical to action is itself an expression of anti-intellectualism; for example, some behavior may be deemed suspicious only after reflection.

41. *See infra* Part III.B.3. This type of common sense can be distinguished from what has recently been termed "emotional common sense." *See* Terry A. Maroney, *Emotional Common Sense as Constitutional Law*, 62 VAND. L. REV. 851, 852 (2009) (defining common sense as, *inter alia*, "sound practical judgment"). Maroney analyzes the Supreme Court's application of "emotional common sense" as part of its reasoning in a variety of cases, which is "what one thinks she simply knows about emotions, based on personal experience, socialization, and other forms of casual empiricism." *Id.* at 854.

42. HOFSTADTER, *supra* note 7.

43. JACOBY, *supra* note 23, at xi–xii.

44. HOFSTADTER, *supra* note 7, at 7.

45. *Id.*; *see also* JACOBY, *supra* note 23, at 9 ("It is impossible to define anti-intellectualism as a historical force, or a continuing American reality, in a manner as precise or useful as the kind of definition that might be supplied for, say, abolitionism or feminism.").

those impressionistic devices with which one attempts to reproduce a milieu or capture an atmosphere."[46] Hofstadter gave several examples, such as the use of "egghead," which he described by relying on the playful definition set forth by a writer he called "a popular novelist of right-wing political persuasion"[47]:

> A person of spurious intellectual pretensions . . . . Over-emotional and feminine . . . . Supercilious and surfeited with conceit and contempt for the experiences of more sound and able men . . . . A self-conscious prig, so given to examining all sides of a question that he becomes thoroughly addled while remaining always in the same spot. An anemic bleeding heart.[48]

Hofstadter characterized the egghead as marked by "'extreme remoteness . . . from the thought and feeling of the whole of the people.'"[49]

Hofstadter also gave examples of anti-intellectualism: quotations from President Dwight Eisenhower about intellectuals ("'a man who takes more words than are necessary to tell more than he knows'")[50] and about people whom we might describe today as "quick studies";[51] a Cabinet member's comments dismissive of scientific research;[52] "the hostility to intellectuals expressed on the far-right wing [in the 1950s], a categorical folkish dislike of the educated classes and of anything respectable, established, pedigreed, or cultivated";[53] right-wing attacks on universities as breeding grounds for Communism and its dangerous idealism;[54] a right-wing "Jacksonian dislike of specialists and experts";[55] a Congressman's railing against "'isms . . . of foreign origin

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46. HOFSTADTER, *supra* note 7, at 7.

47. *Id.* at 9.

48. *Id.* at 9–10 (quoting Louis Bromfield, *The Triumph of the Egghead*, FREEMAN, Dec. 1, 1952, at 155, 158).

49. *Id.* at 10 (quoting Bromfield, *supra* note 48, at 158).

50. *Id.* (quoting Dwight D. Eisenhower, President of the United States, Remarks of the President at the Breakfast in Los Angeles Given by Republican Groups of Southern California, 1954 PUB. PAPERS 875, 879 (Sept. 24, 1954)).

51. *Id.* at 10–11. Hofstadter did not use the term "quick study."

52. *Id.* at 11–12 (quoting *Study of Airpower: Hearing Before the Subcomm. on the Air Force of the S. Comm. on Armed Services*, 84th Cong. 1742, 1744 (1956) (statement of Charles E. Wilson, Secretary of Defense)).

53. *Id.* at 12.

54. *Id.* at 13–14 ("'Our universities are the training grounds for the barbarians of the future, those who, in the guise of learning, shall come forth loaded with pitchforks of ignorance and cynicism, and stab and destroy the remnants of human civilization.'" (quoting Jack Schwartzman, *Natural Law and the Campus*, FREEMAN, Dec. 3, 1951, at 149, 152)).

55. *Id.* at 14.

[that] truly should have no place in American art'";[56] anti-intellectual comments by evangelist Billy Graham ("'[In place of the Bible] we substituted reason, rationalism, mind culture, science worship, the working power of government, Freudianism, naturalism, humanism, behaviorism, positivism, materialism, and idealism. [This is the work of] so-called intellectuals.'");[57] attacks on high school education for being "'highly rigid'"[58] and for focusing on "'absorption of accumulated knowledge for its own sake[, which] tend[s] to produce decadence,'"[59] at the expense of "'other goals of education, such as preparation for citizenship, occupational competence, successful family life, self-realization in ethical, moral, aesthetic and spiritual dimensions, and the enjoyment of physical health'";[60] attacks on public education teachers as inhumanly categorizing students according to mathematical ability and ignoring "'a whole life, a whole personality'";[61] and attacks on public education at teaching reading, writing, and arithmetic to children who are unable to learn these things and who would be better off learning other skills.[62] Hofstadter summed up these examples, which portray "the ideal assumptions of anti-intellectualism,"[63] by stating the following:

> Intellectuals, it may be held, are pretentious, conceited, effeminate, and snobbish; and very likely immoral, dangerous, and subversive. The plain sense of the common man, especially if tested by success in some demanding line of practical work, is an altogether adequate substitute for, if not actually much superior to, formal knowledge and expertise acquired in the schools.[64]

How many times in the 2008 presidential elections was Barack Obama attacked for lacking experience in the business world, and

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56. *Id.* at 14–15 (quoting 95 CONG. REC. 11584 (1949) (statement of Rep. Dondero)).

57. *Id.* at 15 (alteration in original) (quoting WILLIAM G. MCLOUGHLIN, JR., BILLY GRAHAM: REVIVALIST IN A SECULAR AGE 213 (1960)).

58. *Id.* at 16 (quoting CALIFORNIA TEACHERS ASSOCIATION COMMISSION ON EDUCATIONAL POLICY ET AL., JUDGING AND IMPROVING THE SCHOOLS 8 (1960) [hereinafter CALIFORNIA TEACHERS ASSOCIATION]).

59. *Id.* (quoting CALIFORNIA TEACHERS ASSOCIATION, *supra* note 58, at 8).

60. *Id.* (quoting CALIFORNIA TEACHERS ASSOCIATION, *supra* note 58, at 7–8).

61. *Id.* at 16–17 (quoting Robert E. Brownlee, *A Parent Speaks Out*, 17 PROGRESSIVE EDUC. 419, 420–21 (1940)).

62. *Id.* at 17–18 ("'One junior high [school] . . . has . . . accepted the fact that some twenty percent of their students will not be up to standard in reading . . . and they are doing other things for these boys and girls. That's straight thinking.'" (quoting A.H. Lauchner, *How Can the Junior High School Curriculum Be Improved?*, BULL. OF THE NAT'L ASS'N OF SECONDARY-SCH. PRINCIPALS, Mar. 1951, at 296, 299–301)).

63. *Id.* at 18.

64. *Id.* at 18–19.

how often was his experience as a community organizer and law professor said to be inadequate preparation for the presidency?[65]

But anti-intellectualism is not *anti-intelligence*. Hofstadter distinguished the two and pointed out that intelligence is always praised, whereas intellect is not.[66] The distinction is frequently made in American culture.[67] Hofstadter distinguished the two concepts as follows:

> [I]ntelligence is an excellence of mind that is employed within a fairly narrow, immediate, and predictable range; it is a manipulative, adjustive, unfailingly practical quality—one of the most eminent and endearing of the animal virtues. Intelligence works within the framework of limited but clearly stated goals, and may be quick to shear away questions of thought that do not seem to help in reaching them. . . .
>
> . . . Whereas intelligence seeks to grasp, manipulate, reorder, adjust, intellect examines, ponders, wonders, theorizes, criticizes, imagines. Intelligence will seize the immediate meaning in a situation and evaluate it. Intellect evaluates evaluations, and looks for the meanings of situations as a whole.[68]

This is a critical distinction that this Article examines when analyzing the cases below.

B. *Anti-intellectualism as Political Cover*

Many of the quotations and descriptions above seem straight out of today's "culture wars." Many of these assertions are described by Hofstadter as "right-wing,"[69] and many of these assertions seem like the shibboleths of right-wing radio and television commentary, speeches at various "institutes" and "foundations," and op-eds today. Although Hofstadter did not discuss American law to any extent in his book, these ideas animate some of the "law and order" conservative jurisprudence of the post-Warren Court.[70]

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65. Indeed, anti-intellectualism was on display in myriad ways during the 2008 presidential campaign. JACOBY, *supra* note 23, at xvi–xvii.

66. HOFSTADTER, *supra* note 7, at 24.

67. *Id.* at 25.

68. *Id.* at 124 n.4.

69. *See, e.g.*, *id.* at 124 n.4, 134–35, 356; *see also* JACOBY, *supra* note 23, at xviii–xix (discussing the popular equation of intellectuals with liberals).

70. *See* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE 124–30 (2003) (discussing the Burger and Rehnquist Courts' treatment of the Warren Court's criminal procedural decisions).

Hofstadter also qualified his project by saying he was being careful not to overstate his case and stated, "I do not suffer from the delusion that the complexities of American history can be satisfactorily reduced to a running battle between the eggheads and the fatheads."[71] He explained the following:

> Although I am convinced that anti-intellectualism is pervasive in our culture, I believe that it can rarely be called dominant. Again and again I have noticed, as I hope readers will, that the more mild and benign forms of anti-intellectualism prove to be the most widespread, whereas the most malign forms are found mainly among small if vociferous minority groups.[72]

Nor are anti-intellectuals against all ideas or all thinking—"the leading anti-intellectuals are usually men deeply engaged with ideas, often obsessively engaged with this or that outworn or rejected idea. Few intellectuals are without moments of anti-intellectualism; few anti-intellectuals [are] without single-minded intellectual passions."[73] Instead, "anti-intellectualism is usually the incidental consequence of some other intention, often some justifiable intention."[74]

Similarly, this Article intends to point out the anti-intellectualism prevalent in key Supreme Court opinions addressing constitutional criminal procedure.[75] Anti-intellectualism has served a law and order conservatism that ultimately has branded many Americans as criminals (for minor, non-violent crimes) and decreased the civil liberties of the rest of us. It has aggrandized the power of state police. Anti-intellectualism has served often, this Article argues, as a rhetorical device—a somewhat subliminal way of painting a concern for civil liberties as intellectual in the sense of superfluous, subversive, dangerous, pusillanimous, and decadent. Moreover, when examined in particular cases, it is revealed as a cover for the diminution of individual liberties, or a tendentious argument that police are unable to think in particular situations lest they and "the people" be endangered. This reasoning is often directly contradicted not only by the facts of the actual case,[76] but is also contradicted by other Supreme Court cases that actually *impose* the requirement to think on police who *are* in

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71. HOFSTADTER, *supra* note 7, at 19.

72. *Id.* at 19–20.

73. *Id.* at 21.

74. *Id.* at 22.

75. *See infra* Part III.

76. For example, the police are not in danger or in a hurry in the cases addressed below, but the Court creates the rule as if the police were so pressured.

stressful situations, such as when deciding whether to shoot a fleeing suspect.[77] This Article seeks to point out this anti-intellectualism to blow its cover so that jurists may recognize it and realize that it often does not end the debate in a particular case, but instead reveals that the debate must continue and delve into topics such as racism and the proper relationship between government and citizens.[78] Jurists should question assertions and assumptions by the Court that reflection by police (and judges) is impossible, unnecessary, or even downright bad in certain situations.

This Article will illustrate that anti-intellectualism pervades key Supreme Court cases in the form of outright hostility toward reflective thinking; as fear-mongering that such thinking will lead to loss of evidence and escape by dangerous criminals; as a preference for police to be "men and women of action" rather than dithering intellectuals; as a preference for rules that are "bright-line"[79] and "administrable"[80] over rules that can be described as situational and "it depends" rules that ultimately allow for argument, deliberation, and delay by police. Sometimes, the anti-intellectualism comes across loud and clear. Other times, it is but a faint echo. The effect, however, is that what is honored is not the anti-intellectual police officer, but the police officer as a common man who is full of common sense, street smarts that cannot be articulated, and animal intelligence that is necessary to save us from a Criminal Other who has infiltrated our society and cannot be ferreted out by usual, intellectual means—what Justice Rehnquist called the undetectable "perfect crime[ ]" in *Illinois v. Gates*,[81] when, writing for the majority, he lowered the standard of probable cause.[82] To catch this subversive, embedded Criminal Other and to detect these "perfect crimes," the Court has conferred on police the ability to sweep up citizens in order to rummage through their persons and their belongings for contraband and evidence of crime—to sort out the criminals, otherwise unidentifiable, from the populace at large.[83] This broad discretion violates the norms undergirding the Fourth

77. *See* Tennessee v. Garner, 471 U.S. 1, 11–12 (1985) (requiring that an officer must have probable cause to believe that a fleeing suspect poses a threat of serious physical harm before the officer may use deadly force).

78. *See infra* Part V.

79. *See infra* Part III.A.2.

80. *See infra* Part III.D.4.

81. 462 U.S. 213, 238 (1983) (internal quotation marks omitted).

82. *Id.* at 237–38 (rejecting a more rigorous "two-pronged test" for determining probable cause in favor of a "totality-of-the-circumstances analysis" (citations and internal quotation marks omitted)).

83. *See infra* Part III.

Amendment.[84] Anti-intellectualism has served as the "incidental consequence of some other intention, often some justifiable intention,"[85] at least in the eyes of a majority of Justices in some cases; a rhetorical tool to achieve a pro-police, pro-government result. Let us turn to those cases now.

III. POLICING FROM THE GUT: SIMPLIFYING RULES AND ERADICATING THINKING

The Supreme Court's rhetoric in several cases has evinced an attitude that police need not *think rigorously* when carrying out their duties—that in many instances, it is just too hard and too costly (in terms of lost evidence) for these men and women of action, as well as for judges, to analyze police conduct.[86] This Article shows that it is mostly in low-level police search and seizure cases that this anti-intellectualism appears[87]—cases in which the Justices did not see the infringements by the government as particularly troubling. These cases have green-lighted "policing from the gut"; police can follow their unarticulated instincts to ferret out the more serious offenders from among the multitude of people stopped every day for minor offenses. That is, a search of an automobile after arresting the driver for speeding or violating a mandatory seatbelt law may yield illegal drugs.[88] This caught-dead-to-rights (or lack of rights) defendant will, when faced with the awesome mandatory minimum sentences developed in some jurisdictions, offer to plead guilty and give up as much information as possible about where he got the drugs, or even about other criminality, in exchange for a bargain in sentencing. Police then may work their way up the proverbial chain. But it is the mundane traffic stop, combined with police instinct (or plain dumb luck), that sets this grander investigation in motion. Removing any requirement that police consider a suspect's rights after he has been ensnared for a minor crime removes the requirement for a *court* to consider the suspect's rights later on, too.

This Article will not attempt to trace the development of this anti-intellectualism, but instead it will show its prevalence and its influence on the Court's reasoning in several cases.

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84. *See infra* Part V.

85. HOFSTADTER, *supra* note 7, at 22.

86. *See infra* Part III.A–F.

87. This Article, however, discusses *Davis v. United States*, 512 U.S. 452 (1994), which is a *Miranda* case.

88. Or, arguably more often, a "consent" search will yield drugs.

A. New York v. Belton*: No "ifs, ands, and buts"*

The facts of *New York v. Belton*[89] are a time-worn plot: Police stopped a car for speeding.[90] None of the occupants owned the car or was related to the owner.[91] Police smelled "burnt marihuana" and also saw an envelope marked "Supergold" that the police believed was "associated with marihuana."[92] Police ordered the men out of the car and arrested them for drug possession.[93] As part of the search, police found Belton's jacket in the back seat, which contained cocaine in the pocket.[94] At trial, Belton moved to suppress the cocaine, arguing that police violated the rule from *Chimel v. California*,[95] which allowed a search incident to arrest of "'the area from within which [an arrestee] might gain possession of a weapon or destructible evidence.'"[96] The area that was permissible to search under *Chimel* was limited. For example, if an arrest took place in the home, police could not search other rooms or "'all the desk drawers or other closed or concealed areas in that room itself.'"[97] The police could search any drawers "within an arrestee's reach . . . because of the danger their contents might pose to the police."[98]

In reviewing the search of Belton's jacket pocket, the Court, per Justice Stewart, said it sought a "straightforward rule"[99] and held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[100] This search included "the contents of any containers found within the pas-

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89. 453 U.S. 454 (1981). A recent Supreme Court case narrowed the holding of *Belton*. *Compare* Arizona v. Gant, 129 S. Ct. 1710, 1717–19 (2009) (rejecting a reading of *Belton* that authorizes a vehicle to be searched incident to every arrest), *with id.* at 1726–27 (Alito, J., dissenting) (arguing the majority's narrowing of *Belton*'s explicit holding overruled its "bright-line rule").

90. *Belton*, 453 U.S. at 455.

91. *Id.*

92. *Id.* at 455–56.

93. *Id.* at 456.

94. *Id.*

95. 395 U.S. 752 (1969).

96. *Belton*, 453 U.S. at 457–58 (alteration in original) (quoting *Chimel*, 395 U.S. at 763).

97. *Id.* at 458 (quoting *Chimel*, 395 U.S. at 763). *But see* Maryland v. Buie, 494 U.S. 325, 337 (1990) (permitting police to conduct "a properly limited protective sweep . . . 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").

98. *Belton*, 453 U.S. at 461 (citing *Chimel*, 395 U.S. at 763).

99. *Id.* at 459.

100. *Id.* at 460 (footnote call number omitted).

senger compartment."[101] The Court reasoned that "if the passenger compartment is within reach of the arrestee, so also will the containers in it be within his reach."[102]

Although this all may sound reasonable, it should be remembered that at the time of arrest, most occupants of cars are outside of the car and may be in handcuffs in the back of the police patrol car. Nevertheless, the search was ruled permissible, notwithstanding that, as Justice Brennan noted in dissent, it is "a fiction . . . that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car."[103] Indeed, it is a fiction of comic-book superhero proportions: Can the handcuffed occupant break out of the chains, race toward his stopped car, grab a weapon, and use that weapon against police before the police can tackle, Taser, or shoot him?

1. The Court Adopts an Unfortunate Passage from LaFave

The Court based its reasoning in *Belton* on the need for a straightforward rule and couched its reasoning in the language of anti-intellectualism. Adopting the language of an unfortunate passage from an article by the Nation's foremost Fourth Amendment scholar, Wayne R. LaFave, the Court stating the following:

> Yet, as one commentator has pointed out, the 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." This is because "Fourth Amendment doctrine, given force and effect by the exclusionary rule, 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."[104]

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101. *Id.*
102. *Id.*
103. *Id.* at 466 (Brennan, J., dissenting).
104. *Id.* at 458 (majority opinion) (citation omitted) (quoting Wayne R. LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT.

The Court continued, quoting language from Justice Brennan in *Dunaway v. New York*[105]: "In short, '[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.'"[106] *Dunaway*, however, was a very different case: The Court held that the police violated the Fourth and Fourteenth Amendments when, without probable cause, they arrested and seized people in order to interrogate them.[107]

Anti-intellectualism pervades the quoted passage from LaFave. The intellectual is pitted against the police officer as a man of duty and action. The police are described as "'*necessarily* engaged'" in "'law enforcement *activities*,'" while the intellectuals—judges and lawyers—are "'eagerly feed[ing]'" on qualifications and on "'subtle nuances and hairline distinctions.'"[108] The implication is that they are engaged in this "heady stuff" *un*necessarily, unlike the police, who are "necessarily engaged" in their work. The anti-intellectual theme of practical knowledge being preferable to abstract, intellectual thought is evident.[109] The police, who are protecting us, do not have time for

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REV. 127, 141 [hereinafter *Case-by-Case Adjudication*]). The Court did not adequately consider where, later in the article, LaFave proposed some limits and qualifications to a broad rule. *See Case-by-Case Adjudication*, *supra*, at 158–61. LaFave disagreed with the Court's holding in *Belton* as going too far. *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 324–33 (1982) (arguing that *Belton* impedes the development of sound Fourth Amendment doctrine). But he wryly said that he would not ask the Court to "give back" his quoted language; instead, LaFave said he remained a proponent of bright-line rules in what he deemed appropriate situations, such as in *United States v. Robinson*, 414 U.S. 218 (1973). LaFave, *supra*, at 323, 329–30, 333 (internal quotation marks omitted). The quotation shows up again in another anti-intellectual case: *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001) (quoting *Belton*, 453 U.S. at 458). *See infra* Part III.D. One can fairly question whether LaFave was being anti-intellectual or elitist. That said, his statement drew the oft-seen distinction between practical men and intellectuals, and that is how the Court used his quote. *See supra* Part II.A.

105. 442 U.S. 200 (1979).

106. *Belton*, 453 U.S. at 458 (quoting *Dunaway*, 442 U.S. at 213–14). Also drawing from *Dunaway*, *Atwater* used similar language. *See Atwater*, 532 U.S. at 354 ("[T]he standard of probable cause 'applie[s] to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations.'" (second alteration in original) (quoting *Dunaway*, 442 U.S. at 208)); *infra* Part III.D.

107. *Dunaway*, 442 U.S. at 216.

108. *Belton*, 453 U.S. at 458 (emphasis added) (quoting *Case-by-Case Adjudication*, *supra* note 104, at 141).

109. *See* HOFSTADTER, *supra* note 7, at 18–19 (arguing ideal assumptions of anti-intellectualism include superiority of "plain sense of the common man" to "formal knowledge").

such triviality.[110] Moreover, as a result of this ruling, *neither does the Court.* When the police are given free rein to search without complication, courts are also given free rein to disregard complaints about such searches. After *Belton*, there is no way for a court to even discuss whether an automobile search incident to arrest was constitutional under the Fourth Amendment. All such discourse was dismissed as trivial or as quaint. Such thinking has been erased from judicial language in a manner that calls to mind the state-created language "Newspeak" in George Orwell's *Nineteen Eighty-Four.*[111]

Dissenting, Justice Brennan, joined by Justice Marshall, did not attack this premise and did not note the anti-intellectualism of the reasoning.[112] Instead, Justice Brennan argued that the Court's "'bright-line' rule"[113] was arbitrary and that the *Chimel* rule would, in fact, be easier for officers to apply: "The standard announced in *Chimel* is not nearly as difficult to apply as the Court suggests. . . . A rule based on that rationale should provide more guidance than the rule announced by the Court today. Moreover, unlike the Court's rule, it would be faithful to the Fourth Amendment."[114]

Justice Brennan spun out a number of questions that could still arise under the rule, thus belying that the Court's newly announced rule had done anything to simplify police practice,[115] and stated, "The Court does not give the police any 'bright-line' answers to these questions. More important, because the Court's new rule abandons the justifications underlying *Chimel, it offers no guidance to the police officer seeking to work out these answers for himself.*"[116] Indeed, Justice Brennan in *Belton* was envisioning a world where police actually think and work out answers for themselves—a world where the Court and police can serve and protect the citizen from inappropriate government intrusion. Justice Brennan conceded that "there will be some close cases"[117] under his standard, "but when in doubt the police can always turn to the rationale underlying *Chimel*—the need to prevent the ar-

110. *See Dunaway*, 442 U.S. at 213–14 (noting that the police have limited time and expertise to reflect on a suspect's individual rights).

111. GEORGE ORWELL, NINETEEN EIGHTY-FOUR (1949).

112. *Belton*, 453 U.S. at 463–66 (Brennan, J., dissenting). This may be because Justice Stewart, in a sort of *jiu jitsu*, used Justice Brennan's own language from *Dunaway.*

113. *Id.* at 463.

114. *Id.* at 471–72.

115. *Id.* at 470.

116. *Id.*

117. *Id.* at 471.

restee from reaching weapons or contraband—before exercising their judgment."[118]

2. *The Problem with Bright-Line Rules*

Although a thorough discussion of straightforward/bright-line rules and the Court's occasional preference for them under the Fourth Amendment is beyond the scope of this Article,[119] it is worth briefly pointing out that there is a serious problem with such rules: They *guarantee* that constitutional rights will be violated. Look once more at language the *Belton* Court quoted from LaFave:

> [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."[120]

This means that in "most" instances, a person's rights will not be violated. But "most" does not encompass *all* instances. What about those individuals who are searched when the search is wholly unreasonable—say, when the suspect is handcuffed in the back of the police car, or when the suspect is unconscious and as a matter of medical certainty unable to resist, or when the suspect is physically disabled and is in a wheelchair or on a gurney? The answer is that *they have no recourse*. Under a bright-line rule, the Court cannot vindicate the rights of everybody who has been violated.[121] These people are a sort of collateral damage from the bright-line rule. The aggrieved person cannot maintain a Section 1983 lawsuit in a federal court because it will be rejected under Federal Rule of Civil Procedure 12(b)(6). Nor,

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118. *Id.* at 471–72.

119. For a detailed critique of bright-line rules, see, for example, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 227–31 (1984) (arguing that using bright-line rules to interpret the Fourth Amendment is problematic and unworkable); Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 957–58 (2006) (arguing that bright-line rules make Fourth Amendment doctrine confusing and arbitrary).

120. *Belton*, 453 U.S. at 458 (majority opinion) (emphasis added) (quoting *Case-by-Case Adjudication*, *supra* note 104, at 142).

121. *See, e.g.*, Alschuler, *supra* note 119, at 231 ("[C]ategorical fourth amendment rules often lead to substantial injustice . . . ."); Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2257 (1998) ("Although bright-line rules may offer comparative advantages in reducing risks of error or bias by other decisionmakers . . . they do so only at the inevitable cost of being either overinclusive or underinclusive in serving their substantive purposes.").

if contraband or other incriminating evidence was produced, could the person have the evidence excluded.[122]

Why is it that the Court eliminates the possibility of individually considering some cases under the Fourth Amendment? The answer, of course, is "effective law enforcement."[123] But that explanation is cold comfort. Consider other contexts in which a similar rationale of "effectiveness" might be posed. Why not, for example, make bright-line rules under the First Amendment that might allow viewpoint discrimination against some citizens' political speech in the name of "effective government" or even an "effective marketplace of ideas"? Why not let some defendants' Confrontation Clause rights be violated by introducing against him at trial un-cross-examined, hearsay, testimonial evidence in the name of "effective criminal justice"?[124] The Fourth Amendment has achieved second-class status.[125] The explanation for this occurrence is beyond the scope of this Article, but one answer may be that the fear of crime has led to a mindset in which the Court sees limiting the government's ability to sweep up individuals from the streets as a bad idea, or as too costly in terms of lost evidence and lost arrests in the permanent War on Crime. There is language in opinions such as *Gates* and *Atwater* to support this fear.[126] To let intellectualizing stand in the way of this street sweeping—this *action*—is just so much dickering and dithering of the sort that facile minds feed on.

Last, it should be noted that the specific purpose of the broad rule in *Belton* is officer safety and preservation of evidence.[127] Like the other simplified rules discussed in this Article, this rule is based on fear. It also groups anybody arrested—for even minor crimes—as *presumptively* a dangerous criminal bent on harming the officer and destroying evidence. This is a broad assumption and one that seems

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122. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) (rejecting the contention that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest").

123. *See Belton*, 453 U.S. at 457–58 (explaining that the need to apprehend criminals and discover evidence justifies exempting the police from the Fourth Amendment's warrant requirement under some circumstances).

124. *See* Crawford v. Washington, 541 U.S. 36, 68–69 (2004) (strictly prohibiting introduction against a criminal defendant any un-cross-examined testimonial hearsay).

125. This second-class status has developed despite the protestations of Justice Jackson. *See* Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting).

126. *See infra* Part III.B, D.

127. *Belton*, 453 U.S. at 457–58, 461.

destructive of the trust between government and the governed.[128] The brunt of this over-inclusiveness is borne by citizens at the discretion of police.

It is unfortunate that Justice Brennan did not confront the twisting of his words from *Dunaway* head-on.[129] In *Dunaway*, Justice Brennan was not simplifying a rule to allow for more police discretion, but was holding the line on probable cause. He appears to have had in mind the trope of the *competitive cop*—an intelligent, aggressive officer who might be tempted to use a balancing test aggressively to violate a citizen's rights.

3. Arizona v. Gant *Reveals the Danger of the Court's Anti-intellectual Rhetoric*

Belton was recently limited by the Supreme Court in *Arizona v. Gant*.[130] What is clear is that the bright-line rule set forth in *Belton* has been erased as a result of the majority's "narrow reading" of the case, which resulted in the following holding:

> *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. . . . [W]e also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.[131]

In his opinion for the majority, Justice Stevens stated that under the broad reading of *Belton*, courts have allowed police to conduct searches of arrestees' vehicles that were wholly unnecessary for officer

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128. *See* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1784–88 (1994) (describing government-citizen trust as a central aspect of the Fourth Amendment).

129. *See supra* notes 112–14 and accompanying text.

130. 129 S. Ct. 1710 (2009). The majority, led by Justice Stevens, appears to have challenged the accusation that it overruled *Belton*, but the denial is ambiguous:

> [The dissent] accuses us of "overrul[ing]" *Belton* . . . "even though respondent Gant has not asked us to do so." Contrary to that claim, the narrow reading of *Belton* we adopt today is precisely the result Gant has urged. That Justice Alito [in dissent] has chosen to describe this decision as overruling our earlier cases does not change the fact that the resulting rule of law is the one advocated by respondent.

Id. at 1722 n.9 (second alteration in original) (citations omitted). Is Justice Stevens countering the entire claim or only the claim that Gant had not urged such a result? He appears agnostic on the claim that *Gant* overrules any precedents by depicting the dissent as having "chosen to describe this decision as overruling our earlier cases." *Id.*

131. *Id.* at 1714; *see also id.* at 1727 (Alito, J., dissenting) ("This 'bright-line rule' has now been interred.").

safety and otherwise lacked probable cause, which "implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."[132] He pointed out that such searches would be merely a police "entitlement."[133] Justice Stevens opined that the misreading "may be attributable to Justice Brennan's dissent in *Belton*,"[134] in which Justice Brennan described the holding as giving unnecessarily broad powers to police, as discussed above.[135]

Even if *Belton* had merely been misread for twenty-eight years, the misreading probably resulted from the strong anti-intellectual rhetoric in that case instead of Justice Brennan's characterization of the holding.[136] Police were said to not need to think at all (no "'ifs, ands, and buts'"[137]) and could search regardless of need. It is difficult to reconcile that language with a requirement that police consider whether a suspect can actually gain access to weapons or evidence in the passenger compartment. The quotation the Court adopted from LaFave reflects an antipathy to thinking. If the *Belton* Court did not mean to suggest such antipathy, then the Justices should not have agreed to adopt that quotation. One might be tempted to believe that the Court was seduced by the colorfulness of that quotation, but instead it appears more likely that the Justices agreed with that language and used it to further their goal of creating a bright-line rule that would increase the police's power to search. Justice Brennan's dissent made clear that the Court was giving police this broad power;[138] the *Belton* Court could have responded to Justice Brennan as well by stating that he mischaracterized the holding, but it did not.[139] In 2004,

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132. *Id.* at 1720 (majority opinion).

133. *Id.* at 1721; *see also* Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part) ("[L]ower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* . . . .").

134. *Gant*, 129 S. Ct. at 1718.

135. See *supra* text accompanying notes 115–16.

136. In his dissent, Justice Alito disagreed with Justice Stevens's statement and explained that "[c]ontrary to the Court's suggestion . . . Justice Brennan's *Belton* dissent did not mischaracterize the Court's holding in that case or cause that holding to be misinterpreted." *Gant*, 129 S. Ct. at 1727 (Alito, J., dissenting).

137. New York v. Belton, 453 U.S. 454, 458 (1981) (citation omitted).

138. *Id.* at 466 (Brennan, J., dissenting) (asserting that the majority "substantially expand[ed] the permissible scope of searches incident to arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest").

139. *See id.* at 455–63 (majority opinion) (failing to respond to Justice Brennan's dissent).

the Court also "reaffirmed" the *Belton* holding in *Thornton v. United States*.[140]

The narrower reading of *Belton* does not, of course, solve the problem of anti-intellectualism. It solves the problem of *Belton*, and it is therefore a welcome move by the Court that will uphold Fourth Amendment protections.[141] Unfortunately, the *Gant* Court did not take the opportunity to confront the anti-intellectual rhetoric that *Belton* relied on; indeed, the quotation from LaFave is not repeated or even mentioned in any of the opinions in *Gant*. Furthermore, it is not even clear whether any of the Justices recognized the role that this powerful rhetoric most likely played in creating a nearly three decade putative misreading of *Belton*. This Article identifies this sort of rhetoric and shows how it can shape the Court's discourse; the fact that the Court did not similarly do so in *Gant* makes the need for this identification even stronger. Indeed, as stated below, identifying this rhetoric can help jurists identify cases that merit reexamination.

B. Illinois v. Gates*: A "Complex Superstructure of Evidentiary and Analytical Rules"*

Led by Justice Rehnquist, the Supreme Court in *Illinois v. Gates*[142] weakened the probable cause standard in an opinion grounded in anti-intellectualism.[143] This move was significant: The probable cause standard is the turnkey to the criminal justice system.[144] It is the stan-

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140. 541 U.S. 615, 617 (2004) (holding that the *Belton* rule applies even when a police officer does not make contact with the arrestee until after he has left his vehicle).

141. Canny police officers know that they may still conduct a broad search of a driver and his car if they arrest him for a minor traffic offense and then impound his car. *See* Colorado v. Bertine, 479 U.S. 367, 375–76 (1987) (concluding that police have broad discretion about which cars to impound and search according to standardized procedure); *see also infra* Part III.D.

142. 462 U.S. 213 (1983).

143. For a detailed account of how Justice Rehnquist accomplished this in *Gates*, see Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 326–41 (1984).

144. *Gates* now seems like standard fare in criminal procedure casebooks, but the decision has spurred much controversy. *See, e.g.*, Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 379–81 (2002) (explaining that the *Gates* Court "drastically relaxed" and "drastically weakened the meaning of 'probable cause'"); Yale Kamisar, Gates, *"Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 588–89 (1984) (discussing the lack of necessity for a good faith exception to the exclusionary rule because the *Gates* Court essentially adopted a "good faith" or "reasonable belief" test in "dilut[ing]" the probable cause standard (internal quotation marks omitted)); Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1186–99 (1983) (criticizing *Gates*'s abandonment of the two-pronged test for determining probable cause);

dard for searches and seizures—and often seizures lead to searches incident to arrest—both with and without a warrant.[145] *Gates* is also significant because the Court reduced the strength of the probable cause standard when it was unnecessary to do so.[146] The Court treated a test used in one aspect of the probable cause determination—determining the reliability of informants—as a proxy for the overall probable cause standard. The Court then concluded that because this test of informant reliability was just too difficult, too time-consuming, and too impractical, the probable cause standard itself had to be made simpler. This simpler test enabled police and even judges to apply the standard without fear of having a reviewing court conclude that they had applied it incorrectly and then exclude the evidence that the police had seized. Justice Rehnquist's opinion has been attacked for, among other things, misusing precedent to simplify the informant reliability test.[147] The discussion here will focus on the anti-intellectual rhetoric and reasoning he used and will focus on prior cases only for the anti-intellectual language Justice Rehnquist cherry-picked from them.

In *Gates*, an anonymous letter was sent to the Bloomingdale, Illinois, Police Department alleging that Lance and Susan Gates were drug dealers.[148] The letter claimed that the Gateses would soon travel to Florida to pick up a load of drugs.[149] The police corroborated

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Arnold H. Loewy, *Protecting Citizens from Cops and Crooks: An Assessment of the Supreme Court's Interpretation of the Fourth Amendment During the 1982 Term*, 62 N.C. L. REV. 329, 345 (1984) (noting that *Gates* created an "insufficiently protective" standard); Edward G. Mascolo, *Probable Cause Revisited: Some Disturbing Implications Emanating from* Illinois v. Gates, 6 W. NEW ENG. L. REV. 331, 331 (1983) (explaining that *Gates* constitutes a "wholesale assault" on the Fourth Amendment's vitality); Wasserstrom, *supra* note 143, at 326–40 (criticizing *Gates* for replacing the probable cause requirement with a general reasonableness test). For a defense of the *Gates* Court's opinion, see Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REFORM 465, 468–78, 497–501, 512–19 (1984). Grano suggested that the diminution of rights was appropriate in the interest of the wider community. *Id.* at 497 (suggesting a "community" model of criminal procedure in addition to the "due process," "crime control," and "family" models).

145. The definition applies to all contexts where probable cause is required. *See* Ornelas v. United States, 517 U.S. 690, 695–97 (1996) (applying the *Gates* test to warrantless searches); Kamisar, *supra* note 144, at 584 (asserting that *Gates* should be limited to the search warrant context, "[b]ut it will be a great feat" to convince the Court to adopt this limitation).

146. *See Gates*, 462 U.S. at 273–74 (White, J., concurring) (declining to join the majority's opinion rejecting the two-pronged test for probable cause); Wasserstrom, *supra* note 143, at 337–39 (criticizing *Gates* for replacing the "probable cause" standard with a weaker "fair probability" standard).

147. Wasserstrom, *supra* note 143, at 329.

148. *Gates*, 462 U.S. at 225 (majority opinion).

149. *Id.*

some of the facts in the letter and conducted surveillance on Lance and Susan while the couple was in Florida.[150] The police obtained a search warrant to search the Gateses' home and car when the Gateses returned to Bloomingdale.[151] The police officers who searched the Gateses' home found significant quantities of marijuana, weapons, and other contraband.[152] In affirming a suppression of the evidence, the Illinois Supreme Court held that the application for the search warrant failed to meet the probable cause standard because it did not meet the two-pronged *Aguilar-Spinelli* test establishing "veracity" (alternatively, "reliability") and "basis of knowledge" of the informant's report.[153]

1. *The Probable Cause Standard Is Weakened*

In reversing the Illinois high court, the Supreme Court of the United States held that the standard for probable cause itself needed to be refashioned to be less "rigid": The Court substituted a general, fluid, "totality-of-the-circumstances" test[154] for the "rigid" *Aguilar-Spinelli* test applied to informant tips.[155]

Much of the language from Hofstadter's book quoted earlier in this Article is echoed in Justice Rehnquist's opinion.[156] First, Justice Rehnquist characterized the *Aguilar-Spinelli* test as "rigid" and too diffi-

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150. *Id.* at 225–26. There were discrepancies as to which facts police corroborated, but they are irrelevant to this argument.

151. *Id.* at 226.

152. *Id.* at 227.

153. *Id.* at 216–17 (citing Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108 (1964)); *id.* at 229–30. This case was decided a year before the Supreme Court recognized a "good faith" exception to the exclusionary rule. *See* United States v. Leon, 468 U.S. 897, 923–24 (1984) (adopting a "good-faith exception for searches conducted pursuant to warrants").

154. *Gates*, 462 U.S. at 236–38. Justice Rehnquist defined probable cause as the following:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does the approach that has developed from *Aguilar* and *Spinelli*.

Id. at 238–39 (alteration in original) (citations omitted); *see also id.* at 246.

155. *Id.* at 230–31.

156. Justice Rehnquist echoes Hofstadter both in his own language and in the language he used from other opinions—though none of the other opinions was nearly as antagonistic to reflection by police and judges as *Gates*.

cult for police and many magistrates to apply.[157] He then denounced the standard as a "complex superstructure of evidentiary and analytical rules."[158] Justice Rehnquist further stated the following:

> [This] rigorous inquiry . . . cannot be reconciled with the fact that many warrants are—quite properly—issued on the basis of nontechnical, common-sense judgments of laymen applying a standard less demanding than those used in more formal legal proceedings. Likewise, given the informal, often hurried context in which it must be applied, the "built-in subtleties" of the "two-pronged test" are particularly unlikely to assist magistrates in determining probable cause.[159]

The Court also lowered the probable cause standard so that nonlawyer magistrates would be able to apply the test when deciding whether to grant police officers' applications for a search warrant:

> We also have recognized that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once enacted under common law pleadings have no proper place in this area." Likewise, search and arrest warrants long have been issued by persons who are neither lawyers nor judges, and who certainly do not remain abreast of each judicial refinement of the nature of "probable cause."[160]

Thus, according to the Court, it is acceptable for police *and judges* not to know the law. The Court seems to think that this is not a problem; this solution simplifies the law so that police officers and judges need not learn the law. *Law itself* seems equated with intellectualizing. Police and judges are, according to Justice Rehnquist, in a hurry; they are not trained. Notably, as Justice White pointed out in his concurring opinion, *Shadwick v. City of Tampa*,[161] a case relied upon by the majority to support its contention that persons who issue warrants need not be trained,[162] did not stand for the general proposition that judges need not be, or often are not, legally trained.[163]

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157. *Id.* at 230–31.

158. *Id.* at 235.

159. *Id.* at 235–36 (citations omitted).

160. *Id.* at 235 (citations omitted).

161. 407 U.S. 345, 352 (1972) (holding that a magistrate need not be a judge or lawyer).

162. *Gates*, 462 U.S. at 235 (citing *Shadwick*, 407 U.S. at 348–50).

163. *Id.* at 263 n.17 (White, J., concurring) ("I reject the Court's insinuation that it is too much to expect that persons who issue warrants remain abreast of judicial refinements of probable cause."); *see also* Wasserstrom, *supra* note 143, at 326 ("Some commentators had

The Court's attempt to "dumb down"[164] the law was evident in other language in the opinion that reflected anti-intellectualism and favored men and women of action over men and women of reflection—on the (false) assumption that the two groups are always opposed. For example, Justice Rehnquist contrasted a common man with "legal technicians": He wrote that probable cause "'deal[s] with probabilities [that are] practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[165]

Here, Justice Rehnquist, like many anti-intellectuals, seems to be fighting modernity[166]: It turns out that probability *is* technical, and that people untrained in probabilistic reasoning often make errors in such reasoning.[167] Hofstadter explained that much of the anti-intellectualism of his time (which coincided with Justice Rehnquist's early professional years) was expressed in the denunciation of "experts," often seen as having come inappropriately to dominate public life to the detriment of the proverbial common man.[168]

The Court also contrasted the "'common-sense'" analysis carried out by "'practical people'"—jurors and police—with "'library analysis by scholars.'"[169] The probable cause test should not have "requirements to be rigidly exacted"[170] or be expressed in "[r]igid legal rules,"[171] which is language that echoes the uses of "rigid" that Hofstadter quoted in *Anti-intellectualism in American Life*.[172] Instead, according to Justice Rehnquist, the "nontechnical, common-sense

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suggested that the Court would not uphold search warrants or felony arrest warrants issued by such untrained clerks.").

164. *See* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 458 (2002) (using this term in describing the Court's holding in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)); *see also infra* Part III.D.

165. *Gates*, 462 U.S. at 231 (majority opinion) (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

166. *See* HOFSTADTER, *supra* note 7, at 43 (describing the intellectual as an "ideologist [who has] frequently hastened the country into the acceptance of change").

167. *See* REID HASTIE & ROBYN M. DAWES, RATIONAL CHOICE IN AN UNCERTAIN WORLD 167–99 (2001).

168. HOFSTADTER, *supra* note 7, at 130–31, 151.

169. *Gates*, 462 U.S. at 231–32 (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)) (discussing the meaning of "particularized suspicion" (citation and internal quotation marks omitted)). *Cortez* was also anti-intellectual. Chief Justice Burger upheld an officer's reasonable suspicion that was based on training, which the Court sneeringly contrasted with "library analysis by scholars." *Cortez*, 449 U.S. at 418.

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

171. *Id.* at 232.

172. *See* HOFSTADTER, *supra* note 7, at 16 (discussing anti-intellectual praise of "'the attempt to avoid a *highly rigid* system of education'" (emphasis added) (quoting CALIFORNIA TEACHERS ASSOCIATION, *supra* note 58, at 8)); *see also supra* Part II. Justice Rehnquist used the word "rigid" several times in his opinion for the Court. *See Gates*, 462 U.S. at 216–46.

judgments of laymen applying a standard less demanding than those used in more formal legal proceedings"[173] is preferable.

Justice Rehnquist went on to cast the standard he was overthrowing as the following:

> [A]n elaborate body of case law dealing with the "veracity" prong of the *Spinelli* test, which in turn is broken down into two "spurs"—the informant's "credibility" and the "reliability" of his information, together with the "basis of knowledge" prong of the *Spinelli* test. That such a labyrinthine body of judicial refinement bears any relationship to familiar definitions of probable cause is hard to imagine.[174]

This casting makes the law sound overly complex and unfamiliar. The standard is "elaborate." There are "prongs" and "spurs." Things are "broken down," which has the ring of dissection.[175] There are "refinements." It is "labyrinthine," mysterious. The common man could get lost. And with his hands tied behind his back by intellectuals, the common man and the citizenry could be taken advantage of by the Criminal Other.

2. *A Disdain for Judicial Review*

Justice Rehnquist stated that a reviewing court must give deference to the magistrate's decision to grant an application for a warrant, thus requiring substantial deference to the magistrate's determination of probable cause:

> [T]he traditional standard of review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. We think reaffirmation of this standard better serves the purpose of encouraging recourse to the warrant procedure and is more consistent with our traditional deference to the probable-cause determinations of magistrates than is the "two-pronged test."[176]

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173. *Gates*, 462 U.S. at 235–36.

174. *Id.* at 240–41 (citation omitted).

175. *Cf.* William Wordsworth, *The Tables Turned*, *in* 3 THE OXFORD TREASURY OF ENGLISH LITERATURE 240, 241 (G.E. Hadow & W.H. Hadow eds., 1908) ("Sweet is the lore which Nature brings; / Our meddling intellect / Mis-shapes the beauteous forms of things:—/ We murder to dissect.").

176. *Gates*, 462 U.S. at 236–37 (alteration in original) (citations omitted).

This deference seems inappropriate when the probable cause standard is lowered to assist a magistrate who is not legally trained and who cannot be expected to "remain abreast of each judicial refinement of the nature of 'probable cause.'"[177]

Moreover, Justice Rehnquist expressed what seemed like disdain for any review at all. For example, he stated that "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review" and that reviewing courts should treat a magistrate's determination of probable cause with "great deference."[178] Referring to judicial review as "after-the-fact scrutiny"[179] contains negative connotations akin to "Monday Morning Quarterback" or "Backseat Driver"—the critic, the intellectual. Furthermore, the Court emphasized its point by explaining that courts should refrain from invalidating a warrant by interpreting the affidavit in a "'hypertechnical, rather than a commonsense, manner.'"[180] "Hypertechnical" is contrasted with "commonsense." It is as if the Court sought to honor the men and women of action who protect us from the "'horrors of drug trafficking.'"[181] Is Justice Rehnquist painting his opponents on the Court, such as Justice Brennan, as pointy-headed intellectuals who side with subversive drug dealers, fussing and finessing while the Nation is in danger?[182]

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177. *Id.* at 235. As Silas Wasserstrom remarked, "If untrained court clerks who cannot possibly 'remain abreast' of the nature of probable cause have constitutionally unlimited power to issue search and arrest warrants, then a constitutionally based warrant requirement is difficult to defend." Wasserstrom, *supra* note 143, at 326.

178. *Gates*, 462 U.S. at 236.

179. *Id.*

180. *Id.* (quoting United States v. Ventresca, 380 U.S. 102, 109 (1965)).

181. *Id.* at 241 (quoting *id.* at 290 (Brennan, J., dissenting)).

182. In 1957, Justice Rehnquist wrote an article in which he argued that the bias of law clerks could influence the Court's granting of certiorari—though probably not its actual decisions in cases it heard. In this article, Justice Rehnquist's language seems to express concern about the "left"—described as pro-criminal, pro-Communist, and anti-business:

> The bias of the clerks, in my opinion, is not a random or hit-and-miss bias. From my observations of two sets of Court clerks during the 1951 and 1952 terms, the political and legal prejudices of the clerks were by no means representative of the country as a whole nor of the Court which they served.
>
> After conceding a wide diversity of opinion among the clerks themselves, and further conceding the difficulties and possible inaccuracies inherent in political cataloguing of people, it is nonetheless fair to say that the political cast of the clerks as a group was to the "left" of either the nation or the Court.
>
> Some of the tenets of the "liberal" point of view which commanded the sympathy of a majority of the clerks I knew were: extreme solicitude for the claims of Communists and other criminal defendants, expansion of federal power at the expense of State power, and great sympathy toward any government regulation of business . . . .

3. *Further Critique of the Anti-intellectualism in* Gates

There are many problems with the anti-intellectual line of reasoning in *Gates*. Even if one were to assert that there is nothing wrong with anti-intellectualism if it serves the justifiable end of effective law enforcement, there was no need to dumb down the probable cause standard in this case. For one, the *Aguilar-Spinelli* test, which ostensibly applied only when police and magistrates dealt with informants, may not have been as complicated as the *Gates* Court believed.[183] The real problem was that lower courts had made it more complicated than necessary.[184] The Court could have taken the opportunity to clarify or simplify the *Aguilar-Spinelli* test itself, which Justice White pointed out in his concurring opinion.[185] The Court could have explained that the test merely asked, when assessing a tip from an informant, about the "veracity, reliability, and basis of knowledge" of the informant's information.[186] The Court could have pointed out that, surely, a "common man" would ask such questions of most anybody purporting to give him important information. What questions, for example, would the common man ask someone who, in trying to sell him a car, says it is an "excellent car"? Wouldn't the common man want to find out the seller's reputation for honesty and his knowledge of cars in general as well as of the car for sale? Such an inquiry into the speaker's basis for his opinion is not "labyrinthine";[187] it is pre-

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> There is the possibility of the bias of the clerks affecting the Court's certiorari work because of the volume factor described above. I cannot speak for any clerk other than myself in stating as a fact that unconscious bias *did* creep into his work. Looking back, I must admit that I was not guiltless on this score, and I greatly doubt if many of my fellow clerks were much less guiltless than I. And where such bias did have any effect, because of the political outlook of the group of clerks that I knew, its direction would be to the political "left."

William H. Rehnquist, *Who Writes Decisions of the Supreme Court?*, U.S. NEWS & WORLD REP., Dec. 13, 1957, *available at* http://www.usnews.com/articles/opinion/2008/12/09/william-rehnquist-writes-in-1957-on-supreme-court-law-clerks-influence.html. The article was revived in December 2008 as a sidebar to a separate article about a study concluding that Supreme Court clerks lean to the left in the political spectrum. *See* Andrew Burt, *Rehnquist 1957 Assertion That Clerks Influenced Supreme Court Borne Out by New Study*, U.S. NEWS & WORLD REP., Dec. 9, 2008, *available at* http://www.usnews.com/articles/news/national/2008/12/09/rehnquist-1957-assertion-that-clerks-influenced-supreme-court-borne-out-by-new-study.html (discussing Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008)).

183. *But see* Wasserstrom, *supra* note 143, at 332–33 ("I do not fault the Court for abandoning the two-pronged test. That test had, unquestionably, bred much confusion.").

184. *See Gates*, 462 U.S. at 273–74 (White, J., concurring) (explaining that some lower courts were applying the *Aguilar-Spinelli* test in an "unduly rigid" manner).

185. *Id.*

186. *Id.* at 230 (majority opinion) (internal quotation marks omitted).

187. *Id.* at 240.

cisely an expression of the "common sense" that anti-intellectualism purports to celebrate.

Justice Rehnquist sought to make the test for probable cause more police-friendly. The reason for this is fear; indeed, fear bubbles up from the Court's rhetoric. Justice Rehnquist reiterated, with approval, Justice Brennan's statement that "the Fourth Amendment may be employed by government to cure [the horrors of drug trafficking]."[188] Justice Rehnquist also warned of the dire need to lower the standard:

> [A]nonymous tips seldom could survive a rigorous application of either of the *Spinelli* prongs. Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes."' While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.[189]

According to Justice Rehnquist, there are some crimes that could not be solved without lowering the standard.[190] They are undetectable, "perfect crimes,"[191] in which criminals have been able to take advantage of laws that show them "extreme solicitude."[192] The only way to get at these criminals, many think, is to lower the standard of proof and other protections and to let police act on hunches or go with their guts.[193]

But this fear seems overstated. For one, the *Gates* defendants could have been caught had police followed the regular standard. Police could have furthered their investigation. They could have conducted surveillance on the Gateses or carried out controlled buys.

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188. *Id.* at 241 (alteration in original) (quoting *id.* at 290 (Brennan, J., dissenting)).

189. *Id.* at 237–38.

190. *Id.*

191. *Id.* at 238.

192. Rehnquist, *supra* note 182.

193. This is the same dynamic that arose after 9/11 and instigated the creation of a new American justice system designed to convict terrorists by using diluted standards. *See* Brian J. Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1009–10 (2007) (explaining that the Combatant Status Review Tribunal, the vehicle for indefinitely-imprisoned enemy combatants to challenge their status, "applies a broad definition of 'enemy combatant' that inevitably ensnares innocent people; applies a presumption of guilt; has no juries; disables prisoners from gathering exculpatory evidence; prohibits prisoners from having lawyers; and relies on hearsay, coerced confessions, and secret evidence"). Of course, an anonymous tip could lead the police to investigate further to test the accuracy of the tip and to develop probable cause. Kamisar, *supra* note 144, at 576.

There was no need to arrest Lance and Susan Gates immediately upon their return from Florida: The drugs in their possession did not pose an imminent danger. Even if there are criminal enterprises where the criminals are almost too clever to be caught, it is not impossible to catch them. The criminal activity, especially the transfer of contraband from one person to another, can be interdicted at some point. But even if there were such perfect crimes, the fact is that the Bill of Rights inherently envisions a loss of evidence.[194] To lower the standard because some crimes purportedly cannot be detected is incommensurate with the Constitution.

In addition, Justice Rehnquist's reliance on language from *Brinegar v. United States*[195] was tendentious. True, the Court in *Brinegar* stated the following: "In dealing with probable cause . . . we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved."[196] This language, however, was taken out of context in *Gates*.[197] The "technical" point to which the *Brinegar* Court was referring was whether what could be deemed character evidence—evidence that in most cases would be inadmissible at trial—could be used by police to determine probable cause.[198] The *Brinegar* Court indicated that it could be.[199] Here, the evidence in question was the fact that, before the search, the police knew from personal experience that Brinegar had a reputation for being a liquor smuggler—one of the officers had even arrested him before.[200] This fact of a prior arrest most likely would be inadmissible character evi-

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194. *See infra* text accompanying notes 307–09.

195. 338 U.S. 160 (1949).

196. *Id.* at 175.

197. *See* Illinois v. Gates, 462 U.S. 213, 231 (1983) (quoting *Brinegar*, 338 U.S. at 175). This is not to say that *Brinegar* was correctly decided:

> The facts justifying a stop of Brinegar were at best, slim. In essence, Brinegar was seized because he had a reputation for running liquor. Justice Burton, however, contended that the agents' aggressive conduct was appropriate because it interrupted a criminal act, and that nothing occurred to lessen the original suspicion of the agents. This reasoning begs the question. Justice Burton simply assumed that it is constitutionally reasonable to seize citizens with unsavory reputations.

Maclin, *supra* note 16, at 1292.

198. *See Brinegar*, 338 U.S. at 169–70 (explaining that investigators knew that defendant had a reputation for smuggling liquor).

199. *See id.* at 170 ("The evidence here is undisputed, is admissible on the issue of probable cause, and clearly establishes that the agent had good ground for believing that [defendant] was engaged . . . in illicit liquor running and dealing.").

200. *Id.*

dence at trial, as the *Brinegar* Court noted.[201] Although character evidence can be probative and reliable, such evidence tends to be unfairly prejudicial when offered at trial because a jury might decide to punish a defendant for his past crimes by convicting him for the charged crime, regardless of guilt.[202] Alternatively, jurors might make the prohibited propensity argument: Since the defendant committed such crimes before, he probably committed the crimes in this case.[203] Character evidence does not necessarily pose this same danger, however, when trained police or magistrates are weighing whether there is probable cause to search a suspect. In contrast, the "complex superstructure of evidentiary and analytical rules"[204] in *Gates* was the *Aguilar-Spinelli* test, which was designed to help test the reliability of the hearsay accusations from informants,[205] hearsay that is being used in determining probable cause. Hearsay is generally inadmissible at trial because, without cross-examination, it is seen as of dubious reliability.

Thus Justice Rehnquist, in a juridical sleight of hand—or simply as a result of sloppy thinking[206]—made the two tests appear equivalent. Yes, the *Gates* Court and the *Brinegar* Court were both applying evidentiary standards, but in *Brinegar*, the standard was geared toward keeping arguably reliable evidence away from jurors because of the unfair prejudice that might result to the defendant,[207] whereas in *Gates*, the standard concerned determining reliability as an initial matter.[208] The language in *Brinegar* was arguably not even anti-intellectual because police officers are not trial lawyers—"legal technicians"[209]—and cannot be expected to understand stylized trial rules. In this sense, the police are "common men." The *Aguilar-Spinelli* test, however, was not a stylized test for *jury trials*, but a test more akin to

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201. *Id.* at 173. The evidence could, of course, be admitted for purposes other than proving character. *See, e.g.*, FED. R. EVID. 404(b) (detailing when evidence of "other crimes, wrongs, or acts" is admissible).

202. *See* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("[Character] is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.").

203. *See* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."); *see also* United States v. Williams, 458 F.3d 312, 317 (3d Cir. 2006) (noting "Rule 404(b)'s prohibition against propensity evidence").

204. Illinois v. Gates, 462 U.S. 213, 235 (1983).

205. *See supra* notes 153, 174 and accompanying text.

206. For an analysis of Justice Rehnquist's many logical errors throughout his opinions, see Andrew Jay McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741 (1988).

207. Brinegar v. United States, 338 U.S. 160, 173 (1949).

208. *Gates*, 462 U.S. at 230–35.

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

what "common men" would apply to *any* information source in their daily lives, as shown in the previous example of the car buyer. Justice Rehnquist conflated all "evidentiary and analytical rules," regardless of purpose, and deemed them all too complex for police and even for judges.[210]

In *Gates*, there is also the sense that police are men of action, in contrast to jurists—"library . . . scholars"[211] who would second-guess men who do their work "in the midst and haste" of an investigation.[212] These men are fighting crime and protecting "the people" from "the horrors of drug trafficking." They are to be respected and not second-guessed or scrutinized by the clever tricks of the intellectual. But ultimately, Justice Brennan got it right in his dissent that "[w]ords such as 'practical,' 'nontechnical,' and 'common sense,' as used in the Court's opinion, are but code words for an overly permissive attitude towards police practices in derogation of the rights secured by the Fourth Amendment."[213] It was evident *ex ante* that lowering the probable cause standard could only result in more searches that are ostensibly supported by probable cause—and given the turnkey nature of the probable cause standard, more arrests, too.

Last, the facts in *Gates* do not justify the Court's antipathy toward reflection by police. The Bloomingdale police were not really "in the

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210. Even if the inquiry were complex, courts over time would be able to clarify and categorize, creating rules, or at least rules of thumb, for police to follow. Also, police could be trained. Police training can be quite sophisticated—and geared toward aggressively circumventing Supreme Court rulings. For example, police have been trained to avoid the intricacies of the requirements stemming from *Miranda v. Arizona*, 384 U.S. 436 (1966). *See, e.g.*, Missouri v. Siebert, 542 U.S. 600, 605–06 (2004) (describing how the officer testifying in the case had applied a technique he had been trained to use to circumvent *Miranda*); *see also* Charles D. Weisselberg, *Mourning* Miranda, 96 CAL. L. REV. 1519 (2008) (discussing police interrogation training).

211. *Gates*, 462 U.S. at 232 (internal quotation marks omitted) (quoting United States v. Cortez, 449 U.S. 411, 418 (1981)).

212. *Id.* at 235 (internal quotation marks omitted) (quoting United States v. Ventresca, 380 U.S. 102, 108 (1965)).

213. *Id.* at 290 (Brennan, J., dissenting). The Court quoted this language from the dissent in its opinion in an effort to refute it and made the ad hominem and irrelevant statement that "[a]n easy, but not a complete, answer to this rather florid statement would be that nothing we know about Justice Rutledge suggests that he would have used the words he chose in *Brinegar* in such a manner." *Id.* at 241 (majority opinion). The fact is, the use of these words in *Brinegar* was not "in such a manner"; in that case, as described above, the Court was comparing the probable cause standard with rules geared toward keeping out unfairly prejudicial albeit arguably relevant and reliable evidence from the jury. *Brinegar*, 338 U.S. at 173. In *Gates*, the Court was reducing the probable cause standard such that it would become harder for police and magistrates to screen out unreliable evidence. *Gates*, 462 U.S. at 234–35; *see also* Kamisar, *supra* note 144, at 578 ("It is about as difficult to be against 'flexibility,' 'practicality,' and 'common sense' as it is to be against the flag, motherhood, and apple pie . . . .").

midst and haste" of an investigation, at least in the sense of exigent circumstances. They could have waited and developed their investigation properly instead of stopping the Gateses when arriving back in Bloomingdale. Justice Rehnquist also made a telling factual error in the Court's opinion by referring to the month of the events as March instead of May,[214] which suggests that the Court likely did not pay close attention to the facts section of its opinion—and, by inference, to the facts in this case. That is because the facts did not really matter; they were merely the best factual situation for the Court to use to eliminate the *Aguilar-Spinelli* standard and lower the overall probable cause standard.

The anti-intellectualism putatively served a justifiable intention,[215] as Justice Rehnquist alluded to in the following:

> Finally, the direction taken by decisions following *Spinelli* poorly serves "[t]he most basic function of any government": "to provide for the security of the individual and of his property." The strictures that inevitably accompany the "two-pronged test" cannot avoid seriously impeding the task of law enforcement. If, as the Illinois Supreme Court apparently thought, that test must be rigorously applied in every case, anonymous tips would be of greatly diminished value in police work . . . . Yet, such tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that leaves virtually no place for anonymous citizen informants is not.[216]

In 1984, the year after *Gates* was decided, the Nation saw what was prefigured in *Gates*—the introduction of the good faith exception to the exclusionary rule, which blocked suppression of evidence when police were deemed to have seized it in good faith reliance on an invalid search warrant.[217] But after *Gates*, as one commentator has noted, the good faith standard was "superfluous" because the probable cause standard and the standard of review had been so diluted.[218]

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214. *Gates*, 462 U.S. at 227.

215. *See* HOFSTADTER, *supra* note 7, at 22 (explaining that "anti-intellectualism is usually the incidental consequence of some other [often justifiable] intention").

216. *Gates*, 462 U.S. at 237–38 (first alteration in original) (citations omitted).

217. United States v. Leon, 468 U.S. 897, 904–05 (1984).

218. Wasserstrom, *supra* note 143, at 391; *see also* Craig M. Bradley, *The "Good Faith Exception" Cases: Reasonable Exercises in Futility*, 60 IND. L.J. 287, 290–91 (1985) (pointing out the redundancy of the good faith exception after *Gates*); Kamisar, *supra* note 144, at 588–89

Notably, the Court could have announced this good faith exception in *Gates*: The Court had asked the parties to brief the issue, but then decided that it could not decide the issue because the parties had not raised it below.[219] It was as if the *Gates* Court saw the chance to lower the entire probable cause standard in warrant *and* non-warrant cases and attempted to seize that opportunity.[220] Of course, the good faith exception loses some of its justification after *Gates*: It seems strange to announce that evidence will not be excluded when police rely in good faith on a defective warrant when the warrant was issued under a lenient and deferential standard.

C. Davis v. United States*: Police Must Honor Only Clear Requests for Counsel by a Suspect, Though the Suspect "Need Not Speak with the Discrimination of an Oxford Don"*

In *Davis v. United States*,[221] the Court fashioned a pro-police rule in the context of its *Miranda* jurisprudence.[222] Under *Miranda v. Arizona*,[223] police may not question an accused during custodial interrogation if the accused indicates that he "wishes to consult with an attorney."[224] The *Davis* Court, per Justice O'Connor, made it clear that it would not require police officers to think rigorously—here, in determining whether a suspect during custodial interrogation had requested counsel.[225]

United States Navy investigators interrogated Davis, a sailor, because he was suspected of beating a fellow pool player to death with a pool cue.[226] Davis was advised of his *Miranda* rights and waived them.[227] After about ninety minutes, however, Davis said, "Maybe I should talk to a lawyer."[228] The interrogators later said that they asked Davis to clarify whether he was requesting counsel, and Davis

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(explaining that the Court does not need to adopt a good faith exception to the exclusionary rule because *Gates* essentially creates that exception).

219. *Gates*, 462 U.S. at 217 (concluding that the Court lacked jurisdiction over the good faith exception issue because the issue was not raised below in the Illinois courts).

220. *See* Massachusetts v. Upton, 466 U.S. 727, 732–33 (1984) (per curiam) (emphasizing—in a warrant case—that *Gates* did not "merely refine or qualify the 'two-pronged test'" but instead changed the probable cause standard to a "totality-of-the-circumstances" test).

221. 512 U.S. 452 (1994).

222. *See id.* at 459 (declining to "require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney").

223. 384 U.S. 436 (1966).

224. *Id.* at 444–45.

225. *Davis*, 512 U.S. at 461 ("[W]e decline to adopt a rule requiring officers to ask clarifying questions [to determine whether a suspect is requesting counsel].").

226. *Id.* at 454.

227. *Id.* at 454–55.

228. *Id.* at 455.

said, "No, I don't want a lawyer."[229] An hour later, Davis said, "I think I want a lawyer before I say anything else," and the questioning ended.[230] The interrogation ended too late for Davis, who gave incriminating information that the government later used against him at court-martial, where he was convicted of murder.[231]

The Supreme Court held that Davis's first statement was not a request for counsel because it was not clear enough.[232] In coming to this conclusion, the Court expressed the now familiar fear that allowing such statements to be taken as requests for counsel would result in a termination of the interrogation, per the *Edwards* rule,[233] and the loss of evidence. Justice O'Connor wrote the following:

> In considering how a suspect must invoke the right to counsel, we must consider the other side of the *Miranda* equation: the need for effective law enforcement. Although the courts ensure compliance with the *Miranda* requirements through the exclusionary rule, it is police officers who must actually decide whether or not they can question a suspect. The *Edwards* rule . . . provides a bright line that can be applied by officers in the real world of investigation and interrogation without unduly hampering the gathering of information. But if we were to require questioning to cease if a suspect makes a statement that *might* be a request for an attorney, this clarity and ease of application would be lost. *Police officers would be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he has not said so, with the threat of suppression if they guess wrong.* We therefore hold that, after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney.[234]

Thus, as in *Gates* and *Belton*, police officers may charge ahead—here, in their interrogation until they are essentially hit over the head with a request for counsel. As if pronouncing a metaphysical truth, the *Davis* Court stated that "the suspect must unambiguously request

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 461–62.

233. *See* Edwards v. Arizona, 451 U.S. 477, 484–85 (1981) (holding that if a suspect invokes his right to counsel, interrogation must cease immediately).

234. *Davis*, 512 U.S. at 461 (second emphasis added).

counsel," so that "'a statement either is such an assertion of the right to counsel or it is not.'"[235] The Court added the following:

> Although a suspect need not "speak with the discrimination of an Oxford don," he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.[236]

Davis thus suggests that no Oxford don is required nor *desired* by the Court in the "real world of investigation and interrogation."[237] The Court set up what is essentially an impossible standard: The suspect must be clear, but not so clear as an Oxford don. Furthermore, given the relatively low level of education obtained by many of the individuals arrested, it is likely that the Court did not believe that *any* suspect could possibly speak with such clarity. Thus, not to require this higher level of clarity is really to lose nothing at all. Additionally, is the Court sneering? If so, is it sneering at suspects or at Oxford dons? Is this an instance of anti-intellectualism—of locating the highly incongruous specter of an Oxford don in this rough and tumble world?

The *Davis* Court's opinion, at first glance, appears to be based in solid reasoning. The *Edwards* rule provides strict precedent: When the suspect requests a lawyer, all interrogation must cease until he has one.[238] The Court, at least initially, appears to abide by precedent in quoting *Edwards*, which said that police may not "'reinterrogate an accused in custody if he has *clearly asserted* his right to counsel.'"[239] The Court held, however, openly and contrary to the principles of *Miranda*, that it would not accommodate the suspect who *is* intimidated by the overall interrogation from making a clear request for counsel: "We recognize that requiring a clear assertion of the right to counsel might disadvantage some suspects who—because of fear, intimidation, lack of linguistic skills, or a variety of other reasons—will

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235. *Id.* at 459 (quoting Smith v. Illinois, 469 U.S. 91, 97–98 (1984)).

236. *Id.* (citations omitted).

237. *Id.* at 461.

238. *Edwards*, 451 U.S. at 484–85 ("We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.").

239. *Davis*, 512 U.S. at 459 (emphasis added by the Court) (quoting *Edwards*, 451 U.S. at 485).

not clearly articulate their right to counsel although they actually want to have a lawyer present."[240]

Instead, according to Justice O'Connor's opinion, the mere provision of the *Miranda* warnings itself was sufficient: "[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves"[241] because "'full comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.'"[242] This is the legal fiction that accompanies the bright-line rule.

A suspect who requests counsel ambiguously likely does so because he is intimidated, as the Court itself noted.[243] Thus, the suspect's ambiguous request might be symptomatic of intimidation, which is an indication that the suspect has *not* in fact comprehended his or her rights "fully"—and thus the *Miranda* warnings have failed at the outset. This line of reasoning, however, is not addressed at all by the *Davis* Court. According to the Court, a full comprehension of *Miranda* rights apparently meant *a full comprehension of the* Miranda *jurisprudence,* even when precedent does not dictate such a requirement. As such, a citizen must know not only that he is entitled to an attorney if he requests one, but also that he *must make his request unambiguously.* To reflect this understanding, it would appear that the *Miranda* warnings themselves should be amended to include this caveat. The addition of relatively little language would reflect this understanding: "Any request for a lawyer must be made clearly and unambiguously." It is unlikely the Court will create such a requirement, however.[244] The

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240. *Id.* at 460; *see also id.* at 469–70 (Souter, J., concurring in the judgment) (recognizing the same concern). Commenting on this language, Charles Weisselberg wrote, "In large part, *Davis* undermined the *Miranda* Court's assumption. The *Davis* majority could not have mistaken the import of its ruling . . . ." Weisselberg, *supra* note 210, at 1588. The *Davis* decision has invited further criticism. *See, e.g.*, WELSH S. WHITE, *MIRANDA*'S WANING PROTECTIONS 117–18 (2001) (criticizing the *Davis* Court's assumption that suspects are aware of their rights); Sandra Guerra Thompson, *Evading* Miranda*: How* Seibert *and* Patane *Failed to "Save"* Miranda, 40 VAL. U. L. REV. 645, 663–65 (2006) (arguing that the *Davis* Court should have required law enforcement officers to ask clarifying questions when suspects are vague or ambiguous about requesting counsel).

241. *Davis*, 512 U.S. at 460 (majority opinion).

242. *Id.* (alteration in original) (quoting Moran v. Burbine, 475 U.S. 412, 427 (1986)).

243. *Id.*

244. The Court seems comfortable letting citizens bear the responsibility of knowing and asserting their rights without any help from police. *See, e.g.*, Tracey Maclin, *The Good and Bad News About Consent Searches in the Supreme Court*, 39 MCGEORGE L. REV. 27, 65–67, 76–78 (2008) (discussing the prominence of Justice Kennedy's view that citizens must know their rights and affirmatively assert them in the context of refusal of consent under the Fourth Amendment).

result of *Davis* is that the police's objective of gathering evidence is preferred over civil liberties.

Against this background, the Court's somewhat antagonistic approach to judgment calls made by police officers seems inappropriate. The Court considered the rule that when a suspect makes "an ambiguous or equivocal statement,"[245] police must then ask clarifying questions; however, the Court did not adopt this rule.[246] In fact, the government's position was that it had complied with such a requirement.[247] Davis had disagreed with the Court's adoption of such a rule and had argued that it would give too much discretion to investigators to keep interrogating in the name of obtaining clarification, including to the point of intimidating the suspect to say he was not asking for counsel.[248]

Davis had also argued that prohibiting interrogators from asking clarifying questions would create a bright-line rule, thus demonstrating that bright-line rules do not necessarily benefit either party.[249] Davis's proposed rule was that if a statement "made by a suspect during custodial interrogation could reasonably be understood, in context, as a request for counsel," then it was such a request.[250] An ambiguous request could, after all, be a request. Davis was probably correct, as his overall exchange with investigators showed that, notwithstanding the investigators' clarifying question, Davis was intimidated and requested counsel.[251] When Davis said he was not requesting counsel in response to the clarifying question, he likely said so because he felt intimidated.

Instead, the *Davis* Court's holding does not require police to think or to weigh whether a request has been made. According to *Davis*, if the police have to guess, the suspect has not made a clear enough request; therefore, there was no request because a statement

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245. *Davis*, 512 U.S. at 461.

246. *Id.* at 461–62.

247. Brief of Respondent, *Davis*, 512 U.S. 452 (No. 92-1949), 1994 WL 381973. The government argued that it had acted properly by asking clarifying questions, as opposed to ending the interrogation. *Id.* at 15–20. For support, the government argued that *Edwards* could be read as requiring police to seek clarification when a suspect makes an ambiguous request for counsel. *Id.*

248. *See* Reply Brief of Petitioner at 7–10, *Davis*, 512 U.S. 452 (No. 92-1949), 1994 WL 192041.

249. Brief of Petitioner at 30–36, *Davis*, 512 U.S. 452 (No. 92-1949), 1993 WL 723479.

250. Reply Brief of Petitioner, *supra* note 248, at 1.

251. *See id.* at 8 (explaining that the act of asking clarifying questions "will either have a coercive effect, or be likely to be perceived as such by a suspect").

is either a request for counsel, or it is not.[252] As such, after *Davis*, police officers hold a decisive advantage—no thinking is required of them. One wonders how a suspect might feel if he asks ambiguously for counsel—because he is intimidated—and police ignore that request and continue interrogating him. The Court appeared to acknowledge the suspect's plight, however, by stating that "it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney."[253] In practice, the rule actually *prevents* such good practice because there is little incentive for police to ask for clarification.

Finally, although the standard calls for a "reasonable officer,"[254] this is a misnomer. A reasonable officer would *reason*, comprehend the power disparity, and understand that some suspects, "because of fear, intimidation, lack of linguistic skills, or a variety of other reasons . . . will not clearly articulate their right to counsel although they actually want to have a lawyer present."[255] The reasonable officer—especially one having respect for a suspect's rights—would ask for clarification, which, according to the Court, is good police practice. The police officer is allowed to prevail over an intimidated citizen, who, because of fear or lack of education, "fails to meet the requisite level of clarity."[256] The Court effectively lowered the standard of reasonableness to one in which the police may be practically insensate to the suspect's concerns, thus putting the burden on the citizen to take control of a situation that the police very much have power over.[257]

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252. *See Davis*, 512 U.S. at 459 ("'[A] statement either is such an assertion of the right to counsel or it is not.'" (quoting Smith v. Illinois, 469 U.S. 91, 97–98 (1984))).

253. *Id.* at 461.

254. *Id.* at 459.

255. *Id.* at 460.

256. *Id.* at 459.

257. The Court has made similar requirements of citizen-suspects in other cases. *See, e.g.*, Maclin, *supra* note 16, at 1303 (stating that the police practice of stopping and questioning a person is "unrealistic and unfair" because most people will not feel comfortable denying the police officer's request and because the Court's approach adopts the police officer's perspective as opposed to the citizen's as to whether there is a constitutional violation); Maclin, *supra* note 244, at 65–82 (arguing that after *United States v. Drayton*, 536 U.S. 194 (2002), "if [citizens] do not want to be searched [by police], it is their responsibility to know and assert their rights and tell the police to leave them alone"). The intimidation factor, of course, is likely to be lower in the street than in a custodial interrogation at a police station—this distinction animated *Miranda*. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966) (requiring procedural safeguards only in the context of "custodial interrogation").

D. Atwater v. City of Lago Vista*: "We Cannot Expect Every Police Officer to Know the Details of Frequently Complex Penalty Schemes"*

In 1997, Gail Atwater was driving with her minor children in Lago Vista, Texas.[258] She was pulled over by police officer Bart Turek after he observed that neither Atwater nor her children were wearing their seatbelts while riding in the front seat of the pickup truck.[259] Though the offense was punishable by only a fine, state law authorized arrest for the offense.[260] Officer Turek decided to arrest her and did so in an abusive manner: According to the Court, Turek subjected Ms. Atwater to "merely gratuitous humiliations . . . [and was] (at best) exercising extremely poor judgment."[261] Officer Turek did not cite any need to arrest Atwater at the time.[262] Ms. Atwater and her husband filed a lawsuit under Section 1983 for violation of her Fourth Amendment right to be free from unreasonable seizure.[263]

The Court rejected Ms. Atwater's arguments that the arrest was unconstitutional.[264] First, it rejected her historical argument that at common law, warrantless arrests for misdemeanors were permitted only when a breach of the peace was committed in the officer's presence or was "about to be committed or renewed in his presence."[265]

1. "No Compelling Need" for Arrest Is No Reason Not to Arrest

Moving past historical inquiry as inconclusive,[266] the Court secondly considered Atwater's argument for what is known as "reasonableness balancing,"[267] in which Atwater argued "for a modern arrest rule, one not necessarily requiring violent breach of the peace, but nonetheless forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[268] The compelling need could be shown in cases in which the person

258. Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001).
259. *Id.* at 323–24.
260. *Id.* at 323.
261. *Id.* at 346–47.
262. *Id.* at 369–70 (O'Connor, J., dissenting).
263. *Id.* at 325 (majority opinion).
264. *Id.* at 323 (holding that an officer's warrantless arrest of a citizen for a minor criminal offense did not violate the Fourth Amendment).
265. *Id.* at 328 (citation and internal quotation marks omitted); *see also* Davies, *supra* note 144 (criticizing the *Atwater* Court's treatment of plaintiff's historical argument).
266. *Atwater*, 532 U.S. at 345.
267. *Id.* at 346.
268. *Id.*

who committed the crime posed a danger to others, a danger to continue the criminal activity, or was wanted on an outstanding arrest warrant.[269]

The Court began by acknowledging the logic of Atwater's argument:

> If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. . . . Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.[270]

As Justice O'Connor noted in dissent, "In my view, the Fourth Amendment inquiry ends there."[271] Instead, Justice Souter, who was writing for the majority, used anti-intellectualist reasoning and departed on a rhetorical tour de force (indeed, bordering on farce) that made it appear that to require the police to think would endanger us all:

> [W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[272]

There is the sense, as in *Gates*, that judicial review is somehow inappropriate and even unfair—standards should be applied with "a fair prospect of surviving judicial second-guessing months and years

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269. *See id.* at 346–47.

270. *Id.*

271. *Id.* at 371 (O'Connor, J., dissenting).

272. *Id.* at 347 (majority opinion) (citations omitted). The Court added that Fourth Amendment rules should not be "'qualified by all sorts of ifs, ands, and buts.'" *Id.* (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

after an arrest or search is made."[273] It is as if the judges will have months and years to develop ways to "second-guess" (a pejorative term) law enforcement, to scrutinize and criticize a police officer who had to act quickly. It is as if the typical judge is opposed to the police.

2. *Complications Arise*

The Court continued in the following vein: "[C]omplications arise the moment we begin to think about the possible applications of the several criteria Atwater proposes for drawing a line between minor crimes with limited arrest authority and others not so restricted."[274] For example, the Court rejected the line between "'jailable' and 'fine-only' offenses"[275] because more complications arose: The police may not be able to distinguish between the two penalties.[276]

These "complications"[277] are not, however, all that complicated: The Court actually overcomplicated the situation, as a cursory look will show. For example, why *can't* we expect officers to know the law—especially the difference between jailable and non-jailable offenses that police encounter on a daily basis? Are all laws "frequently complex penalty schemes"?[278] Perhaps they "frequently" are, but that is no reason to treat the exception as the norm. The Court did not support this assertion with any empirical evidence of penalty schemes that are *too* complex for police to manage (this would be the relevant inquiry, rather than an inquiry into the merely complex).[279] Justice Souter simply supplied a citation to *Berkemer v. McCarty*,[280] which itself was devoid of empirical evidence (and which also emphatically left police with a rule that required them to think in a situational, "it depends," manner).[281] As a normative matter, don't we want police to know the law?[282] There are echoes of Justice Rehnquist's claims in

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273. *Id.*

274. *Id.* at 348.

275. *Id.*

276. *Id.* ("It is not merely that we cannot expect every police officer to know the details of frequently complex penalty schemes . . . but that penalties for ostensibly identical conduct can vary on account of facts difficult (if not impossible) to know at the scene of the arrest.").

277. *Id.*

278. *Id.*

279. *Id.* (considering details of "complex penalty schemes").

280. 468 U.S. 420 (1984).

281. *Atwater*, 532 U.S. at 348; *see also Berkemer*, 468 U.S. at 430–31 (discussing possible "guesses" a police officer might have to make); *infra* Part IV.B.

282. Wayne Logan wrote, "*Atwater* suggests that police cannot, and should not be expected to, know the law, a tenet contrary to both decisional law and common sense." Logan, *supra* note 164, at 457.

Gates that some laws are just too complex for police and even judges to administer.[283] The problems with police not knowing the law are many, but one that arises here is that the arrest can ultimately lead to a "street trial": Once the suspect is arrested, he may be searched incident to that arrest—and further searching might include his entire vehicle if he gives "consent" or if police decide to impound the car.[284] If contraband is found, the suspect becomes a defendant, and in a possession case, there is really no defense.[285] Arrest and trial, in effect, are carried out by someone who is not required to know the law—the police officer. Moreover, the procedures are carried out under a rule fashioned precisely *because* the officer, in the Court's view, cannot be expected to know the law. Lurking deep beneath the surface is a lawlessness and a sense of a denial of due process.[286]

3. *Jailable Versus Fine-Only Offenses*

The Court also conflated sentencing issues with arrest issues in claiming that an officer should not have to be able to distinguish between jailable and fine-only crimes.[287] At first blush, this seems reasonable—but only from the point of view of the police and not of a citizen who might be completely surprised by this exercise of government power.[288] By radioing headquarters, however, the officer can

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283. Illinois v. Gates, 462 U.S. 213, 235–36 (1983) (suggesting that complex evidentiary and analytical rules are difficult for police to apply in "informal, often hurried context[s]").

284. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 375–76 (1987) (concluding that police have broad discretion about which cars to impound and may conduct an inventory search of the car according to standardized procedure).

285. *See* Dubber, *supra* note 2, at 856–58 (explaining that the increasingly expansive interpretation of possession statues has made possession "far less vulnerable to legal challenges").

286. *See infra* Part V (discussing how anti-intellectual attitudes prevent judges, police, and lawyers from considering whether constitutional rights are violated). Logan suggests that ultimately the sort of government harm in *Atwater* could rise to a due process violation. *See* Logan, *supra* note 164, at 464.

287. Atwater v. City of Lago Vista, 532 U.S. 318, 348 (2001).

288. This may raise a due process issue of notice or a Fourth Amendment issue of reasonable expectation of privacy. *See* Logan, *supra* note 164, at 464 (due process); Shawn M. Mamasis, Note, *Fear of the Common Traffic Stop—"Am I Going to Jail?" The Right of the Police to Arbitrarily Arrest or Issue Citations for Minor Misdemeanors in* Atwater v. City of Lago Vista, 27 T. MARSHALL L. REV. 85, 96–97 (2001) (reasonable expectation of privacy). Regarding point of view, Kit Kinports notes the following about the Court with respect to Fourth Amendment and confessions cases:

> [T]he Court shifts opportunistically from case to case between subjective and objective tests, and between whose point of view—the police officer's or the defendant's—it views as controlling. Moreover, these deviations cannot be explained either by the principles the Court claims underlie the various constitutional provisions at issue or by the attributes of subjective and objective tests themselves.

fairly reliably find out whether the citizen has a police record or is wanted on an outstanding warrant.[289] Presumably all officers do that after stopping a motorist, and such a fact could be weighed in the officer's determination of whether to make an arrest. Instead, the *Atwater* Court effectively treated *all* citizens as having prior records or outstanding bench warrants; it turned the exception into the norm. It made it so that the officer need not bother checking whether such is the case if he or she does not want to, which could lead to a danger of under-inclusiveness and false negatives—police *not* arresting people who *should* be arrested. As to whether the marijuana is "a gram above or a gram below the fine-only line,"[290] perhaps the police—whose cars are crammed with radios, firearms, first-aid kits, flashlights, handcuffs, and the like—should simply add a scale to this mix in order to weigh any drugs they seize since there is a "fine-only" line, created by state or federal law, that should be honored.[291]

The Court continued spinning its supposedly complex web by noting that Atwater's proposed rule contained additional "refinements"[292] and that Atwater proposed that her limitation of drawing the line at non-jailable traffic offenses be "qualified by a proviso authorizing warrantless arrests where necessary for enforcement of the traffic laws or when [an] offense would otherwise continue and pose a danger to others on the road."[293] But what were Atwater's "refinements" up to now? That the police know and follow the law? That the police not treat every citizen as a career criminal? Now Atwater has proposed a "limitation," one that is even "qualified by a proviso," which sounds enormously complicated. But perhaps just calling this all a "suggestion" would be more accurate and sound less complicated.

Kit Kinports, *Criminal Procedure in Perspective*, 98 J. CRIM. L. & CRIMINOLOGY 71, 71 (2008).

289. Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 359 (2002).

290. *Atwater*, 532 U.S. at 348–49.

291. Justice Souter would likely respond with something such as the following: "But even then, scales can sometimes be inaccurate and improperly calibrated, which could cause a nefarious drug dealer to go free." This hypothetical fear seems unjustified. *See* Frase, *supra* note 289, at 359 (determining that drug amounts "will rarely be an issue in traffic cases"); Logan, *supra* note 164, at 456 (noting that "such precise line-drawing is relatively rare in the course of police work").

292. *Atwater*, 532 U.S. at 349.

293. *Id.* (alteration in original) (citation and internal quotation marks omitted).

4. Administrability

The Court ultimately rejected Atwater's proposed rule due to administrability concerns.[294] According to the *Atwater* majority, "Atwater's various distinctions between permissible and impermissible arrests for minor crimes [were] 'very unsatisfactory line[s]' to require police officers to draw on a moment's notice."[295]

Here, it becomes clear that the Court is rigging the rule—giving the police a two-headed coin—so that whenever an officer is not absolutely certain whether he has the authority to arrest, *the officer will win.* The officer can arrest the suspect without any consequence to the officer. If the officer is unsure whether arrest is appropriate, he need not ponder or reflect: He automatically wins because making the police think is to put the police "*in an almost impossible spot.*"[296] The Court does not clarify exactly what is "impossible" about an officer's decision to arrest someone, knowing that, if he arrests the suspect when it is not reasonable to do so, the officer may be subjected to a lawsuit and any evidence seized as a result of the arrest might be excluded. Also, the doctrine of qualified immunity will protect the officer who guesses wrong in a close case—and, according to the Court, *all* the cases are painfully close. The Court, however, actually dismissed the idea that qualified immunity would protect officers in a footnote.[297] Specifically, the *Atwater* majority was concerned that a fear of liability may inhibit police officers from doing their job.[298]

This reasoning, of course, applies to some extent in practically all actions taken by all government actors. The only way to eliminate the "'specter of liability'"[299] would be to eliminate liability itself by granting blanket immunity to all government officials. The Court depicts the law itself, at least the law that can hold a government official accountable to a citizen, as an evil and as an impediment to government action. Moreover, the officer should not have to think *at all.* The

294. *Id.* at 350 ("Atwater's rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur.").

295. *Id.* (quoting Carroll v. United States, 267 U.S. 132, 157 (1925)).

296. *Id.* (emphasis added).

297. *See id.* at 351 n.22 ("The doctrine of qualified immunity is not the panacea the dissent believes it to be."). Frase suggests that the Court was troubled by the lower court's refusal to grant immunity for Officer Turek. Frase, *supra* note 289, at 362–63. As Frase noted, six weeks after *Atwater*, the Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), which "solved many of these problems by broadening the criteria establishing qualified immunity and encouraging trial courts to rule on immunity claims at an early stage of litigation." Frase, *supra* note 289, at 362.

298. *Atwater*, 532 U.S. at 351 n.22.

299. *Id.* (quoting *id.* at 368 (O'Connor, J., dissenting)).

officer is acting, after all, "on the spur (and in the heat) of the moment,"[300] with "events . . . unfolding fast."[301] But would the officer really be unable to tell whether the conduct qualified as worthy of arrest? The nature of exceptional situations is that one can tell when they arise, especially in a situation where it is necessary (or, if that standard is too strict, "reasonable") to arrest another human being.[302] Whether imposing such harms on an individual is appropriate would become clear in a given situation, even to an officer acting "on the spur (and in the heat) of the moment."[303]

Also, the Court's concern that evidence might be excluded if a police officer were deemed to have inappropriately arrested a person seems improper. That is how the constitutional ball bounces—though the exclusionary rule's potency is dwindling.[304] Unless the Court actually, *sub rosa*, sees the rule it crafted in *Atwater* as a way of sweeping up a large number of people in order to sort out the "criminals," then exclusion of evidence should not worry the Court. Exclusion merely returns the police and the citizen to the *status quo ante*. Nevertheless, when did excluding evidence for wrongful, unconstitutional police conduct become a negative to be thrown into the balance?[305] It only can be seen as a negative if the intention is to sweep up a large number of individuals who are not clearly criminals. In any event, there are several exceptions to the exclusionary rule, and thus exclusion is not certain.[306] Thus, the Court seems to fear lawsuits against police and other litigation, presumably in the form of suppression hearings, and the loss of evidence because the law prevents police from acting aggressively.

Is there anything inherently undesirable about the things that the Court fears? If police violate citizens' rights, the police should have to answer for it in court if necessary. Police should feel "inhibit[ed]"[307]

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300. *Id.* at 347.

301. *Id.* at 351 n.22.

302. Justice O'Connor discussed some consequences of arrest in her dissenting opinion. *See id.* at 364–65 (O'Connor, J., dissenting); *see also* Logan, *supra* note 164, at 432–34.

303. *Atwater*, 532 U.S. at 347 (majority opinion).

304. *See, e.g.*, Herring v. United States, 129 S. Ct. 695, 698 (2009) (holding that the exclusionary rule does not apply to evidence seized incident to an arrest that resulted from negligent recordkeeping by police); Hudson v. Michigan, 547 U.S. 586, 601–02 (2006) (holding that evidence obtained after the police's violation of the "knock-and-announce" rule is not subject to the exclusionary rule).

305. *See* DRIPPS, *supra* note 70, at 130 ("The Constitution, moreover, *justifiably* exalts security against false convictions and arbitrary restraint over the discovery of evidence of guilt.").

306. *See, e.g.*, *Hudson*, 547 U.S. at 602 (suggesting that impermissible manner of entry "does not necessarily trigger the exclusionary rule").

307. *Atwater*, 532 U.S. at 351 n.22.

in deciding whether to apply their powers. Such inhibition inheres in the Bill of Rights. The same goes for loss of evidence, the possibility of which is presumed in the Bill of Rights. For example, the Fourth Amendment limits government authority to search,[308] which means that the government will not get to search citizens, homes, and persons for every bit of contraband—so this normal loss is hardly a cost to be considered in the balance.[309] What is wrong with litigation as a way of proving any and all of the above? In fact, if the Court wishes to limit docket growth,[310] it should not eliminate litigation brought for alleged violations of constitutional rights. Unfortunately, the Court aimed to limit civil rights cases brought by individuals the Court does not deem worthy of filing a lawsuit—individuals that the Court thinks do not merit any consideration when they complain that they were arrested for no reason and in a harassing manner, as Gail Atwater was. These are the cases that the Court *should* be hearing. Instead, the Court has prevented itself from being able to comment meaningfully on the explosion of minor offenses and the increase in state and federal power to sweep up a large number of people for violating these minor offenses.[311]

5. No "Tie Breaker"

The Court then considered, but abruptly rejected, a reasonable solution—and made its antipathy to thinking by police clear by relying once again on the anti-intellectual language from *Belton*:

> One may ask, of course, why these difficulties may not be answered by a simple tie breaker for the police to follow in the field: if in doubt, do not arrest. The first answer is that in practice the tie breaker would boil down to something akin to a least-restrictive-alternative limitation, which is itself one of those "ifs, ands, and buts" rules, *New York v. Belton*, 453 U.S., [sic] at 458, generally thought inappropriate in working out Fourth Amendment protection. Beyond that, whatever help the tie breaker might give would come at the

308. U.S. CONST. amend. IV (prohibiting "unreasonable searches and seizures").

309. *See* DRIPPS, *supra* note 70, at 127 (suggesting that the balancing process is illegitimate and unwise because it considers constitutional violations to be "desirable" and "view[s] the 'loss' of the evidence as a 'cost,'" which translates into "treat[ing] the acquisition of the evidence as a gain").

310. *Atwater*, 532 U.S. at 350 (noting that Atwater's proposed rule would increase litigation).

311. *See* Logan, *supra* note 164, at 458–59 ("In the wake of *Atwater*, jurisdictions can continue to indulge their tendency to proliferate criminal laws without need for reflection."). *See generally* Dubber, *supra* note 2, at 843–45 (discussing the various minor offenses that have arisen from our "preventive regime of incapacitation").

> price of a systematic disincentive to arrest in situations where even Atwater concedes that arresting would serve an important societal interest. . . . Multiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked, as Atwater herself acknowledges.[312]

The tie breaker should not have been rejected; it makes good sense. What the tie breaker would reflect is the norm that if the government cannot articulate, as Justice O'Connor suggested, a good reason to restrain a person's liberty by arresting the person who has committed a minor crime, the government should not arrest that person. We require at least reasonable suspicion for police to conduct a *Terry* stop,[313] which is far less intrusive than the full-blown arrest to which Gail Atwater was subjected. It is irrelevant that the person arrested is or is not a "criminal"; for example, unlike in a *Terry* stop, law enforcement may arrest a person based on probable cause that the person simply committed a "crime."[314] Furthermore, the number and variety of crimes have increased enormously over the years,[315] and many crimes denote conduct that is not harmful and does not stigmatize the accused. Violating what turns out to be a "public welfare offense,"[316] a mere *malum prohibitum* rather than a *malum in se*, should not automatically subject a person to an arrest.

This rejection reveals that anti-intellectualism turns out to be the actual rationale for the Court's decision. While the Court made a move that looked like it was discussing appropriate constitutional tests, in fact it was not. The Court stated that the tie breaker would be "something akin" to a particular constitutional test.[317] But the Court

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312. *Atwater*, 532 U.S. at 350–51 (citations omitted). Notably, LaFave, who originated this language, has written that the bright-line rule in *Atwater* fails to meet all of the necessary criteria for a bright-line rule. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 5.1(i) (4th ed. 2004); *see also* Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1196 (1988) (discussing how the Supreme Court's balancing analysis regarding the Fourth Amendment does not regularly take into account harm to individual rights).

313. Terry v. Ohio, 392 U.S. 1, 21 (1968).

314. *See Atwater*, 532 U.S. at 354 (holding that Atwater's arrest satisfied constitutional requirements when the officer "had probable cause to believe that Atwater had committed a crime in his presence"). It is hard to think of Gail Atwater as a criminal.

315. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703 (2005); *see also* Logan, *supra* note 164, at 430–33 (noting that many arrests are made that are not reported and stating that "even the reported case law suggests a markedly expansive use, and apparent abuse, of the misdemeanor arrest power").

316. Francis Bowes Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 56 & n.4 (1933).

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

did not remain on that topic and discuss that test; it simply said that "something akin" to such a test would be an "if, and, and but" rule—which the Court had already expressed disdain for earlier in the opinion and in *Belton*.[318] Such a rule is "generally thought inappropriate"[319] under the Fourth Amendment—but not necessarily. By attaching consequences to the test, the Court avoided the rule that would have required the police to *think* before arresting. The same reasoning applied in *Davis*, which is discussed above: If there is doubt about whether a suspect has requested an attorney, then the police do not have to engage the doubt, but instead may proceed as if no attorney has been requested.[320] The "cost" of adopting rather than dismissing a pro-civil liberties tie breaker would be that there would be fewer arrests, where *some* of the foregone arrests could turn out to have been, by the sheer force of dumb luck or an unarticulated hunch, arrests that turned up a person suspected of another crime and on the run, or contraband. This rank over-inclusiveness is what the Court sought to engrave in the law in *Atwater*. It seems strange that the Court is worried about *under-enforcement*. Even a casual reading of the Bill of Rights shows that the Constitution *mandates* under-enforcement.[321]

Last, the Court placed undue emphasis on the fact that Atwater "concede[d]" that some arrests made under this new over-inclusive regime might benefit society. Here, the Court should have looked beyond the arguments of Atwater herself.[322] But the Court appears to have limited itself to considering *only* what Atwater suggested. This "non-thinking" by the Court made the opinion appear to be a contest between the Court and Atwater.

The Court offered the consolation that the States could regulate arrest through statutes and that doing so would be within their interest.[323] Quoting *Whren v. United States*,[324] the Court also noted that an arrest of an individual is actionable if it is "'conducted in an extraordinary manner, unusually harmful to [his] privacy or even physical in-

318. *See* New York v. Belton, 453 U.S. 454, 458 (1981) (quoting *Case-by-Case Adjudication*, *supra* note 104).

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

320. *See supra* Part III.C.

321. *See* DRIPPS, *supra* note 70, at 130.

322. *Cf.* Frase, *supra* note 289, at 419 ("Supreme Court decisions are also strongly influenced by the arguments that the parties choose to make and emphasize."). In addition to criticizing the Court, Frase faulted Atwater and her supporting amici for not raising and focusing on a winning argument. *See id.*

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

324. 517 U.S. 806 (1996).

terests.'"[325] In *Whren*, however, the arrest was not ultimately actionable.[326] The unanimous *Whren* Court concluded that the defendants' claim that they were pulled over based on racial animus is not actionable under the Fourth Amendment because the officer's subjective intentions are irrelevant under Fourth Amendment analysis, and such a claim could be brought only under the Equal Protection Clause of the Fourteenth Amendment.[327] To do that, however, the defendant would have to go well beyond his own case to find evidence of other racially-based traffic stops.[328] Citing *Graham v. Connor*,[329] the Court also pointed out that excessive force is "actionable" under Section 1983.[330] The Court then said, "The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most local lawmakers and law-enforcement officials, is a dearth of horribles demanding redress."[331]

The putative promise of political accountability is chimerical. Many of the people arrested will not seek accountability for a number of reasons, including that they are poor and powerless, and some simply may be glad that they were not treated worse.[332] Also, the "dearth of horribles" is misleading. Although a reasonable observer might have assumed that it is likely that there were very few arrests such as Atwater's, given that police might have doubted their authority to make them, in fact there had been many such arrests.[333] In any event, the Court took an *ex post* view when it should have taken—as good rule-creators should—an *ex ante* view. It should have seemed likely to the Court at the time that, going forward, there would be a large number of such "horribles." But by its opinion in *Atwater*, the Court *erased* the language to talk about these "horribles" judicially. A person arrested unnecessarily, like Gail Atwater, cannot maintain a Section 1983 action based on a claim that an arrest was unnecessary. Cases could only be brought under the Fourteenth Amendment, and those cases would have to prove animus based on a suspect classification, a difficult endeavor.[334]

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325. *Atwater*, 532 U.S. at 352–53 (alternation in original) (quoting *Whren*, 517 U.S. at 818).

326. *Whren*, 517 U.S. at 819.

327. *Id.* at 813.

328. For a discussion of the difficulty of succeeding on an equal protection theory regarding pretextual stops, see Maclin, *supra* note 11, at 116–18.

329. 490 U.S. 386 (1989).

330. *Atwater*, 532 U.S. at 353 (citing *Graham*, 490 U.S. at 395–96).

331. *Id.*

332. *See* Logan, *supra* note 164, at 448–49.

333. *Id.* at 430–33.

334. Maclin, *supra* note 11, at 116–18.

6. It Is Not Really So Hard

As this Article has shown, the Court overcomplicated its analysis.[335] It could have adopted Atwater's proposed rule stemming from reasonableness balancing, "forbidding custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[336] In dissent, Justice O'Connor offered a slightly more pro-police standard that is not overly complicated and might even be an easy, case-by-case inquiry echoing the *Terry* standard:

> [W]hen there is probable cause to believe that a fine-only offense has been committed, the police officer should issue a citation unless the officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion" of a full custodial arrest.[337]

After all, we are talking about handcuffing a person and taking her away to a jail, which can be a traumatic and dangerous experience.[338] Indeed, some states do impose requirements on police rather than offering them the "constitutional carte blanche"[339] that Justice O'Connor described the Court as giving police in *Atwater*.[340] These requirements are preferable to no standard. The Court said it was better for states, rather than the Court, to legislate in this area: "It is of course easier to devise a minor-offense limitation by statute than to derive one through the Constitution, simply because the statute can let the arrest power turn on any sort of practical consideration without having to subsume it under a broader principle."[341] Thus, according to the Court, it is not too difficult, as a general principle, to exert control over police arrest power. Moreover, is a broad, constitutional principle so hard? After all, the principle would be less rigorous than

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335. Frase, who was involved in the case as an amicus on the side of Atwater, said that the Court might have seen the case as complex because Atwater and her supporting amici presented the Court with a large number of possible options for rulemaking. Frase, *supra* note 289, at 419. Frase, however, may be too solicitous of the Court.

336. *Atwater*, 532 U.S. at 346.

337. *Id.* at 366 (O'Connor, J., dissenting) (alteration in original) (quoting Terry v. Ohio, 392 U.S. 1, 21 (1968)).

338. *Id.* at 364–65; s*ee also* Logan, *supra* note 164, at 433–34.

339. *Atwater*, 532 U.S. at 366.

340. *See id.* at 355–60 (Appendix to the Opinion of the Court); *see also* Frase, *supra* note 289, at nn.407–13.

341. *Atwater*, 532 U.S. at 352 (majority opinion). The idea of leaving it up to legislatures, long trying to appear "tough on crime"—particularly after 9/11—is of dubious merit, however. *See* Logan, *supra* note 164, at 446–49.

the one that a police officer must apply as a matter of constitutional law when deciding whether to use deadly force against a fleeing suspect, according to the Court's 1985 decision in *Tennessee v. Garner*.[342] There, the officer is most likely to be under enormous stress, but somehow *can* be expected to make such a prediction of future dangerousness.[343] Regarding the rationale in *Atwater* that the suspect might flee and not pay the fine, this does not seem to be a critical point because the citation can simply be mailed to the person. A rule permitting arrest on these grounds would also work an injustice because it would be applied disproportionately to people who are traveling through the area or who appear poor and ultimately unable to pay. Thus, it would not be hard to require *some* thinking by police, who are, after all, acting without warrants and who are observing offenses for which there often is no evidence beyond the officer's observations: Consider victimless crimes such as not wearing a seatbelt, speeding, failing to signal, and the like. There is too much room for abuse, for trumped-up arrests.[344] An objective standard would benefit the citizen and serve as a brake—or at least a speed bump—against police abuse of power.

7. *Just Sweep the Streets*

Justice Souter was ultimately sanguine about Gail Atwater's tribulation. For example, he wrote, "The arrest and booking were inconvenient and embarrassing to Atwater, but not so extraordinary as to violate the Fourth Amendment."[345] Perhaps the arrest *qua* arrest was not extraordinary,[346] but the fact of the matter is that an *arrest* is extraordinary—at least before *Atwater*. The Court treated arrest dismissively, as if it were just another government function such as passing through customs, undergoing a health inspection, or registering a car.

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342. 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."); *see also* Logan, *supra* note 164, at 458 (discussing how "such judgments permeate everyday police work, for example, in assessing probable cause and reasonable suspicion, and even in the high-stakes decision of whether deadly force is permissible").

343. Moreover, it appears that this decision whether to shoot, to apply this restraint under the Fourth Amendment, is something of a "less-restrictive-alternative limitation" that is "one of those 'ifs, ands, and buts' rules generally thought inappropriate in working out Fourth Amendment protection." *Atwater*, 532 U.S. at 350 (citation omitted) (quoting New York v. Belton, 453 U.S. 454, 458 (1981)).

344. TASLITZ ET AL., *supra* note 3, at 239 (discussing police "testilying").

345. *Atwater*, 532 U.S. at 355.

346. For various accounts of Fourth Amendment violations, see JAMES BOVARD, LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY 227–57 (1994).

But an arrest is something more. It is a function reserved for the criminal or the outlaw and not for the ordinary citizen or the "soccer mom" as Gail Atwater has been described.[347]

In *Atwater*, the Court based its rule on the goal that police do not have to think about the propriety of whether to arrest a person who has committed a minor traffic violation in the officer's presence. To think would be to hesitate, and perhaps, to decide not to arrest. The result *might* be a loss of evidence—usually contraband—that the government otherwise would not have obtained. Then, society would lose this putative benefit to its safety. No risk that crime may occur can be allowed.[348] In other words, *Atwater* stands for the proposition that the Court believes that thinking might impede the smooth, efficient exercise of state power.[349] Smooth operation of state power, or "administrability," is an important concern in the War on Crime. Whether there is collateral damage to people like Gail Atwater is of no concern to the Court.

E. Devenpeck v. Alford*: The Rookie Cop Standard Becomes the Law*

In *Devenpeck v. Alford*,[350] the Court repeated the mantra that what an officer thinks does not matter[351] and emphasized that only the ob-

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347. Logan, *supra* note 164, at 419; Barton Aronson, *Why the "Soccer Mom" Should Win the Seat-Belt Case: The Problem with Custodial Arrests for Offenses That Are Not Punishable with Jail Time*, FINDLAW'S WRIT, Dec. 15, 2000, http://writ.news.findlaw.com/aronson/20001215.html.

348. For an interesting account of the government's intolerance of a risk of a terror attack post-9/11, see RON SUSKIND, THE ONE PERCENT DOCTRINE: DEEP INSIDE AMERICA'S PURSUIT OF ITS ENEMIES SINCE 9/11 62, 79, 123–24, 213–16 (2006) (discussing the Bush Administration's policy of a refusal to tolerate even a one percent risk of a terror attack after 9/11—a one percent risk would be treated as a certainty, and all action would be taken to prevent the harm from occurring).

349. *See* Logan, *supra* note 164, at 465 ("In announcing its bright-line rule—that any and all legal violations can justify warrantless custodial arrest—the Court underscored its determination to withdraw from its oversight of the daily work of police."); *see also* Frase, *supra* note 289, at 415 ("The Supreme Court's decision in *Atwater* makes little sense based on the facts of the Petitioner's case, creates substantial potential for abuse of the arrest power, and is not supported by the reasons stated in Justice Souter's majority opinion.").

350. 543 U.S. 146 (2004).

351. *See id.* at 153 ("Our cases make clear that an arresting officer's state of mind . . . is irrelevant to the existence of probable cause."). Scholars have seized the opportunity to critique this "mantra." *See, e.g.*, John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 123 (1982) (arguing that it should not be considered "heresy" to argue that an officer's subjective state of mind may be considered and that some searches such as bad faith searches should be unconstitutional); George E. Dix, *Subjective "Intent" as a Component of Fourth Amendment Reasonableness*, 76 MISS. L.J. 373, 388, 472 (2006) ("[R]easonableness might properly require a showing that a sweep was in fact motivated by actual concern [of harm to others].").

jective facts matter.[352] The facts of this case are curious. Jerome Alford, a regular citizen, helped stranded motorists change a tire.[353] As the police came upon the stranded motorists, Alford quickly drove away.[354] After the police learned that Alford had helped and that the stranded motorists believed Alford was a police officer, the police found Alford and pulled him over.[355] While questioning him about their belief that he was impersonating a police officer, the officers became distracted when they saw that Alford was tape recording the encounter.[356] The police believed such recording violated Washington's privacy law.[357] The officers arrested Alford for that, despite Alford's protest that taping roadside conversations with police was not illegal in Washington according to a Washington state court opinion—a copy of which Alford said he had in his car.[358] He filed a lawsuit under Section 1983 but lost and appealed, arguing that no evidence supported the jury's verdict.[359] The police made two arguments on appeal: (1) there *was*, after all, probable cause to arrest Alford—for impersonating a police officer and obstructing a police officer; and (2) the officers had qualified immunity.[360] The United States Court of Appeals for the Ninth Circuit rejected the argument that there was probable cause because the two offenses, impersonating a police officer and obstructing a police officer, were not "closely related" to the alleged violation of the state privacy law for which Alford was in fact arrested.[361] The court also rejected the police officers' defense of qualified immunity because "no objectively reasonable officer could have concluded that arresting [respondent] for taping the traffic stop was permissible" given the case law.[362] The court therefore reversed the jury's verdict after it concluded that no evidence supported it.[363]

The Supreme Court, per Justice Scalia, reversed. The effect of the holding was that because the police had probable cause for *some-*

352. *Devenpeck*, 543 U.S. at 153.
353. *Id.* at 148.
354. *Id.*
355. *Id.* at 148–49.
356. *Id.* at 149.
357. *Id.*
358. *Id.* at 149–50. Alford was correct. *Id.* at 151 (explaining that the jury was instructed that Alford's taping was not a crime).
359. *Id.* at 151–52 (noting that the Court of Appeals for the Ninth Circuit reversed the jury's verdict against Alford on this ground).
360. *Id.* at 152.
361. *Id.* (internal quotation marks omitted) (quoting Alford v. Haner, 333 F.3d 972, 976 (9th Cir. 2003)).
362. *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Alford*, 333 F.3d at 979).
363. *Id.*

thing, whether they knew the law or not, and regardless of whether they had informed Alford that his committing these two offenses—impersonating a police officer and obstructing a police officer—was the reason for his arrest, the arrest was proper. Justice Scalia reasoned that a police officer's subjective state of mind does not matter.[364] Instead, he explained, "'[E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.'"[365] He rejected the Ninth Circuit's decision that probable cause for impersonating a police officer could not suffice here to justify the arrest because it was not "closely related" to the crime for which Alford was arrested[366]—the "closely related" requirement presumably would give an arrestee some notice of why he had been taken into custody. According to Justice Scalia, such a requirement could not stand because the determination of whether the offense later used to justify the arrest was "closely related" to the offense given to the arrestee as the reason for the arrest depends on the officer's subjective intent.[367]

Justice Scalia noted that to base the legality of an arrest on whether the officer told the suspect the correct legal reason for which he was arresting him could lead to, *inter alia*, future situations in which an arrest made by a veteran with a wide knowledge of different crimes would be valid, "whereas an arrest made by a rookie [who did not know the law] *in precisely the same circumstances* would not."[368] The Court declined to "ascribe to the Fourth Amendment such arbitrarily variable protection."[369] Thus, according to the *Devenpeck* Court, an officer's experience and training do not seem to matter. The Court made it so that a rookie can have her arrests validated, even if she was wrong at the time. As for the citizen, however, there is no second chance: A citizen who commits a crime apparently does not deserve one.[370] What of the citizen's need for notice of why he was arrested? According to the *Devenpeck* Court, there is no constitutional right to

364. *Id.* at 153 (citing Whren v. United States, 517 U.S. 806, 812–13 (1996)).

365. *Id.* (alteration in original) (quoting Horton v. California, 496 U.S. 128, 138 (1990)).

366. *Id.* at 152.

367. *Id.* at 153–54.

368. *Id.* at 154.

369. *Id.*

370. *See id.* at 155 ("Those are lawfully arrested whom the facts known to the arresting officers give probable cause to arrest.").

know the charge at the time of arrest.[371] Therefore, the Court found intolerable any rule that would invalidate an arrest justified by an offense not closely related to the offense that the officer initially informed the arrestee he had committed.[372] The Court explained that such a rule would create "perverse consequences," as police would either give no reasons or give as many reasons as they possibly could.[373] Such results, however, seem unlikely if the officer is required to give the correct reason for the arrest. No silence would be allowed, and a jumble of reasons, if incorrect, could not validate the arrest. The officer would have to effectuate the arrest based on what he thinks are proper legal reasons.

As for *when* the citizen must find out why he was arrested, Justice Scalia cited *County of Riverside v. McLaughlin*,[374] stating that Alford or other such citizens "will not be left to wonder for long" as to why they were arrested because, constitutionally, there had to be a prompt probable cause hearing where they could find out.[375] The *McLaughlin* rule, however, regards holding an arrestee for up to forty-eight hours before such a hearing as presumptively reasonable.[376]

Therefore, *Devenpeck* nixed any requirement that the police need to know the law.[377] The Court said it would not let a rookie officer's lack of knowledge of the law invalidate an arrest. There is, then, no requirement that the police should try to discuss with the suspect the reason for the arrest. That is unfortunate because such discussion could reveal that the police were making a mistake that they could remedy by releasing the suspect on the spot. To require the police to

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371. *Id.* Justice Scalia did note, however, that "it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody." *Id.*

372. *Id.*

373. *Id.*; *see infra* Part V (discussing the desirability of having government actors provide reasons to individuals when imposing substantial burdens).

374. 500 U.S. 44 (1991).

375. *Devenpeck*, 543 U.S. at 155 n.3 (quoting *McLaughlin*, 500 U.S. at 53). This hearing is held pursuant to *Gerstein v. Pugh*, 420 U.S. 103 (1975), which explains that a state "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint . . . and this determination must be made by a judicial officer either before or promptly after arrest." *Id.* at 125.

376. *McLaughlin*, 500 U.S. at 56–57 (holding that the arrestee has the burden to prove that a delay within that time period is unreasonable; after forty-eight hours, "the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance").

377. *Devenpeck*, 543 U.S. at 153 ("As we have repeatedly explained, 'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action.'" (quoting Whren v. United States, 517 U.S. 806, 813 (1996))).

think, as we have seen, is bad in the eyes of the Court; so is putting any value in *what* police think. If a citizen engages in conduct that is a crime—any crime—then arrest is proper, even if neither he nor the police know why he was arrested. As long as a court can figure it out later, then the arrest is proper. This result echoes Jeremy Bentham's Panopticon[378] or George Orwell's Big Brother[379]: The citizen is observed at all times. The police do not have to know the law; rather, they just need to have a gut feeling or a hunch that something is amiss. Then, the machinery of search incident to arrest, interrogation, and trial will be set in motion. No evidence will be lost.

It seems, however, that the police should only arrest people if they have good reason to conclude that a crime has been committed. Taken to its extreme, the police might arrest anybody for any conduct they find disagreeable, or feel might possibly be criminal, in the hope that a court would be solicitous and determine that a crime, any crime, was actually committed.[380] The citizen might be held while police and prosecutors try to ascribe criminality to the conduct.[381] The message to police is the following: Do not think, just arrest. The court will do the thinking for you.

F. Virginia v. Moore*: "State Law Can Be Complicated Indeed"*

In 2008, the Supreme Court once again relied on anti-intellectualism to uphold broad arrest power. After David Lee Moore was arrested for driving with a suspended license, a search turned up sixteen grams of crack cocaine and over five hundred dollars in cash.[382] Moore later challenged the search as the fruit of an illegal arrest because Virginia law prohibits arrest for driving with a suspended license except under certain circumstances that the Commonwealth did not

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378. *See generally* JEREMY BENTHAM, THE PANOPTICON Writings (Miran Bozovic ed., 1995).

379. *See* ORWELL, *supra* note 111, at 1–2 ("Big Brother Is Watching You").

380. Although extreme, such police conduct is possible. George Dix, on the other hand, has characterized such an argument as "fanciful." Dix, *supra* note 351, at 465–66 (characterizing and agreeing with LaFave's argument regarding this topic). Despite views to the contrary, an officer might use arrest as a means to harass. Moreover, an officer who is intent on harassing an individual may even engage in "testilying" about the individual's conduct. *See supra* note 3. *Devenpeck* would seem to give the officer more time to invent a story.

381. *Cf. McLaughlin*, 500 U.S. at 56 ("Examples of unreasonable delay [within the forty-eight hour period to establish probable cause] are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."). *Devenpeck* would appear to permit delay for officials to decide how to charge the person they have arrested.

382. Virginia v. Moore, 128 S. Ct. 1598, 1601 (2008). The search was of his hotel room rather than his car; Moore gave consent for the search. *Id.* at 1601 n.1.

claim existed in this case.[383] Under Virginia law, a police officer cannot arrest a motorist for driving with a suspended license unless the motorist "fail[s] or refuse[s] to discontinue" the violation, the officer believes the motorist is "likely to disregard a summons," or the officer reasonably believes the motorist is "likely to cause harm to himself or to any other person."[384] Here, the arresting officer did not have reason to believe that any of these problems were likely to occur with Moore. The reasoning required by this Virginia law turns out to be the very sort of reasoning by a police officer that the *Atwater* Court said was too difficult for a police officer to carry out,[385] but the Court did not mention that here.

In a 9-0 ruling, with a majority opinion by Justice Scalia and Justice Ginsburg concurring in the judgment, the Court ruled that the Fourth Amendment was not violated by the police's violation of Virginia law and that the evidence would not be excluded.[386] The Court came to this conclusion by reasoning that because history did not provide a clear answer,[387] the Court would apply "traditional standards of reasonableness" by assessing the intrusion upon an individual's privacy and the legitimate governmental interests at stake.[388] The Court explained, "[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable."[389]

The Court still had to deal with the question of the state law prohibition. The Court pointed to precedent that held that the Fourth Amendment does not rely on state law,[390] and explained that to exclude the evidence here would frustrate state policy because Virginia did not itself use exclusion as a remedy for a violation of the no-arrest law.[391]

The consequence was that the Fourth Amendment was not affected by state law,[392] perhaps especially where the state law does not require excluding the evidence.[393] The Court held that an officer

383. *Id.* at 1602.
384. VA. CODE ANN. § 19.2-74 (2008).
385. *See supra* Part III.D.
386. *Moore*, 128 S. Ct. at 1608.
387. *Id.* at 1604.
388. *Id.*
389. *Id.*
390. *Id.* at 1604–05.
391. *Id.* at 1606.
392. *Id.* at 1607.
393. *See id.* at 1606.

may arrest for any misdemeanor committed in his or her presence.[394] Whether a state desired to give more protections than the Fourth Amendment provides, such as by making some offenses non-incarcerable, is of no matter under the Fourth Amendment.[395] The anti-intellectualism was subtler here than in *Atwater*, but that is probably because it did not need to be so pronounced. In reasoning that the Fourth Amendment should not turn on state law, Justice Scalia wrote the following:

> Even if we thought that state law changed the nature of the Commonwealth's interests for purposes of the Fourth Amendment, we would adhere to the probable-cause standard. In determining what is reasonable under the Fourth Amendment, we have given great weight to the "essential interest in readily administrable rules."[396]

Referring to *Atwater*, Justice Scalia wrote the following: "If the constitutionality of arrest for minor offenses turned in part on inquiries as to risk of flight and danger of repetition, officers might be deterred from making legitimate arrests. We found little to justify this cost . . . ."[397] According to the *Atwater* Court, the officer would be either deterred because of the "specter of liability" from a Section 1983 suit or because of the exclusion of the evidence.[398] Reflection is therefore bad where it might prevent police from exercising power.[399] What is interesting here is that Virginia itself had decided to risk this cost by enacting a no-arrest statute,[400] aiming to either save the money incurred in full-blown custody arrests or to protect privacy more fully than the Fourth Amendment.[401]

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394. *Id.* at 1604.

395. *Id.* at 1608.

396. *Id.* at 1606 (quoting Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)).

397. *Id.* (citation omitted).

398. *Atwater*, 532 U.S. at 351 n.22.

399. *See id.* at 351 ("[W]hatever help the tie breaker might give would come at the price of a systematic disincentive to arrest in situations where even Atwater concedes that arresting would serve an important societal interest.").

400. Indeed, the *Moore* Court observed the following:

> The Virginia statute . . . calls on law enforcement officers to weigh just the sort of case-specific factors that *Atwater* said would deter legitimate arrests if made part of the constitutional inquiry. It would authorize arrest if a misdemeanor suspect fails or refuses to discontinue the unlawful act, or if the officer believes the suspect to be likely to disregard a summons.

Moore, 128 S. Ct. at 1606.

401. *See id.* at 1605–06 ("Arrest ensures that a suspect appears to answer charges and does not continue a crime, and it safeguards evidence and enables officers to conduct an in-custody investigation." (citing WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 177–202 (Frank J. Remington ed., 1965))).

But none of that mattered. The Court continued with the following:

> Incorporating state-law arrest limitations into the Constitution would produce a constitutional regime no less vague and unpredictable than the one we rejected in *Atwater*. The constitutional standard would be only as easy to apply as the underlying state law, *and state law can be complicated indeed*. The Virginia statute in this case, for example, calls on law enforcement officers to weigh just the sort of case-specific factors that *Atwater* said would deter legitimate arrests if made part of the constitutional inquiry.[402]

The Court relied on its trope of over-complicating, as it did in *Atwater*, when it stated that "state law can be complicated indeed."[403] Apparently, Virginia did not find the law too complex when deciding to enact it. So why should the Court second-guess the Virginia legislature, rather than applying principles of respect and comity?[404] Here, the state law is not so hard to apply—we do not know why the officer violated it. Perhaps it was due to confusion or willfulness.

Under Virginia law, the officer must make the same sort of determination that officers must make in deciding whether to conduct a *Terry* stop or frisk, or a full-blown search or seizure: There must be some coherent reason to intrude. That type of thinking is not too difficult for police officers. Moreover, Justice Scalia did not specifically argue that *this* law was too complicated. It is therefore unclear how legitimate arrests would be deterred any more than legitimate *Terry* stop and frisks would be deterred because police feared they did not have reasonable suspicion. This is how things work whenever there is a standard. Such standards exist to protect citizens from government intrusion. Ultimately, in a nation that honors limited government, police *should* be hesitant to arrest, stop, or search.

The *Moore* Court dwelled on the purported complexity of applying state law, which affects police and judges:

> Finally, linking Fourth Amendment protections to state law would cause them to "vary from place to place and from time to time" . . . . Even at the same place and time, the Fourth Amendment's protections might vary if federal of-

402. *Id.* at 1606 (emphasis added).

403. *Id.*

404. *See id.* at 1604 ("Our decisions counsel against changing this calculus when a State chooses to protect privacy beyond the level that the Fourth Amendment requires. We have treated additional protections exclusively as matters of state law.").

> ficers were not subject to the same statutory constraints as state officers.[405]

Again, linking the protections of the Fourth Amendment to state law is not so complicated as the Court says; nor is consistency even a constitutional requirement. First, some Fourth Amendment protections *are* linked to state law. All arrests are. If the officers in *Moore*, *Atwater*, or *Devenpeck* had arrested a person for conduct that was not a crime under state or federal law, both of which the officer might enforce, then those arrests would not have been legal. Yet, an arrest in a neighboring state for the same conduct where the conduct *was* illegal would have been a legal arrest under the Fourth Amendment. State law would have been decisive. Moreover, Fourth Amendment law concerning whether the event of police officers opening containers found in an inventory search of an impounded automobile is constitutional has hinged on the particular police department's rules and whether those rules give officers too much discretion.[406] Such variety can cause the Fourth Amendment to vary from town to town. State law may also be dispositive with regard to other Fourth Amendment issues, such as Section 1983 cases regarding excessive force in arrest.[407] As Wayne Logan has stated, "[T]he court has not spoken with one voice on this important question . . . ."[408] Likewise, and contrary to the Court's concern, federal officers often operate under different "statutory constraints"[409] than state officers. Furthermore, given that federal agents are less likely to pull over cars for traffic violations than are state and municipal police, this rationale does not appear to apply in *Moore*. In most cases, individual police officers will not trouble themselves with the differing standards. For instance, the Virginia officer in Virginia would know that he or she must follow Virginia law, whereas the South Dakota officer in South Dakota would know that he or she must follow South Dakota law.

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405. *Id.* at 1607 (quoting Whren v. United States, 517 U.S. 806, 815 (1996)).

406. *Compare* Florida v. Wells, 495 U.S. 1, 4–5 (1990) (suppressing evidence because police opened a container found in an inventory search when there was no department policy on this issue, thus conferring too much discretion), *with* Colorado v. Bertine, 479 U.S. 367, 369 (1987) (declining to suppress evidence found in a container in an inventory search because police followed the department's standardized procedure that mandated opening the container).

407. *See, e.g.*, Hygh v. Jacobs, 961 F.2d 359, 364 (2d Cir. 1992) (stating that "§ 1983 actions that are premised upon traditional torts generally incorporate the law of the pertinent state jurisdiction" and applying New York's statutory definition of deadly physical force).

408. Logan, *supra* note 164, at 449–51 (cataloging Supreme Court cases that show deference to state law and those that do not).

409. *Moore*, 128 S. Ct. at 1607.

In addition, federal judges could initially work to gain familiarity with the underlying state law issue. In *Moore*, however, it is as if the Justices did not want to have to adjudicate a complex Fourth Amendment issue on differing grounds.

At the end of the day, the Court *could have* formulated a simple answer or a bright-line rule. It could have simply concluded that a search incident to a legal arrest is not valid if the arrest itself is not legal, and that constitutionality can turn on state law. This proposed rule would better effectuate state policy by honoring state law rather than ignoring it. It should not matter that some states such as Virginia do not provide exclusion as a remedy for a violation of the Fourth Amendment.[410] Perhaps the lawmakers believed that exclusion would occur under the Fourth Amendment rather than under Virginia law. It may also be that state lawmakers would leave out exclusion as a way of avoiding the political fallout from such a rule and would instead leave it to the Constitution to require such exclusion. Such apparent political maneuvering is certainly not commendable, but it is something that the Court might have considered to have occurred. Instead, the Court comprehensively blocked the protections of the Fourth Amendment to any citizen who suffers a full custody arrest in violation of the laws of their own state, which could be seen as a police officer's overreach under the color of state law. As a result of its ruling, the *Moore* Court not only blocked the possibility of excluding the evidence seized from Moore, but it blocked any Section 1983 suit he might have filed.

Rather than aiming to prevent state law involvement in the Fourth Amendment, the Court is instead seeking to inhibit the requirement of *rigorous thinking* on the part of police. This is evident given that state law is already involved in some Fourth Amendment cases. Any rigorous thinking might give the officer pause in deciding whether to arrest. It is as if the Court wanted to maintain the power of law enforcement to sweep up suspected misdemeanants without hesitation and with impunity.[411] Of course, in *Moore*, the Court saw the scenario of what it explicitly sought to avoid by its ruling in *Atwater*—a Section 1983 case—which gave police the power to sweep up citizens, thereby reflecting a loss of evidence. If Moore had not been arrested for a traffic violation, he would not have been searched, and the con-

410. *See id.* at 1606 ("Virginia does not, for example, ordinarily exclude from criminal trials evidence obtained in violation of its statutes.").

411. This power is similar to the broad powers conferred on police by vagrancy laws such as the one the Court struck down as overbroad in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165–68 (1972).

traband would not have been found. The Court apparently found it necessary to avoid this situation.

Did the Court in fact err in its holding? It is perhaps logical that since Virginia would not exclude the evidence obtained as a result of the illegal arrest under Virginia law, then the Supreme Court of the United States should not provide more protection than Virginia provided.[412] In fact, Justice Ginsburg's line of reasoning in her concurring opinion reflects this assertion.[413] Given that the anti-intellectualism seems unnecessary to the holding, why then did the Court decide to include it? Perhaps the rhetoric was seen as necessary to convince observers who found it hard to let go of the syllogistic argument about searches incident to *legal* arrest.

In any event, *Moore*'s legacy will be that a police officer, as far as the Fourth Amendment is concerned, need not follow, much less know, his or her own state laws.[414] This is another way of saying that the *Court* need not consider this category of government conduct, or the violation of state no-arrest laws, in the future.

IV. THINKING ABOUT A SUSPECT'S RIGHTS *IS* POSSIBLE: TWO CASES

The Supreme Court's anti-intellectualism in the cases examined above was unwarranted because there were no exigencies that required immediate, automatic, even robotic, action by police. It is merely the Court's policy preference that police need not consider suspects' rights in certain situations. This preference is clearly evident in the Court's reasoning in two cases where the Court eschewed anti-intellectualism and required police to think about suspects' rights—even when an exigency was clearly involved.

A. Tennessee v. Garner*: Police Can Make Split-Second Decisions After All*

If the anti-intellectualism in the prior cases is to be believed, the Supreme Court has held—albeit inexplicably—that police *are* capable of meaningful reflection and accurate discernment in cases involving

412. *See Moore*, 128 S. Ct. at 1609 (Ginsburg, J., concurring in the judgment) ("Moore would have us ignore, however, the limited consequences Virginia attaches to a police officer's failure to follow the Commonwealth's summons-only instruction.").

413. *See id.* ("The Fourth Amendment . . . does not put States to an all-or-nothing choice . . . . A state may accord protection against arrest beyond what the Fourth Amendment requires, yet restrict the remedies available when police deny to persons they apprehend the extra protection state law orders.").

414. *Id.* at 1602 (majority opinion) ("Under state law, the officers *should have* issued Moore a summons instead of arresting him." (emphasis added)).

the use of deadly force. In *Tennessee v. Garner*,[415] the Supreme Court, per Justice White, announced the following at the onset of its opinion:

> This case requires us to determine the constitutionality of the use of deadly force to prevent the escape of an apparently unarmed suspected felon. We conclude that such force may not be used unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.[416]

In *Garner*, a police officer responded to a burglary.[417] He saw the burglar flee and shot him in the back of the head as he tried to climb a fence.[418] The burglar turned out to be an unarmed teenager.[419]

The Court concluded that history did not provide an answer because historical circumstances such as police weaponry and the definition of felony had changed.[420] It went on to balance the reasonableness of the intrusion. Given that several states and police departments limit police use of deadly force,[421] the Court imposed limits on the police:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead. The Tennessee statute is unconstitutional insofar as it authorizes the use of deadly force against such fleeing suspects.
>
> It is not, however, unconstitutional on its face. Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect

415. 471 U.S. 1 (1985).
416. *Id.* at 3.
417. *Id.*
418. *Id.* at 3–4.
419. *Id.* at 4.
420. *Id.* at 13–16.
421. *Id.* at 18–19.

> threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given. As applied in such circumstances, the Tennessee statute would pass constitutional muster.[422]

At this point, the limits might seem strange: The police officer is expected to apply the same reasoning that was deemed practically impossible in *Atwater* and other cases? Here, the suspect is more likely to be dangerous, as he is committing a felony and *is* fleeing. Conversely, in *Atwater*, the Court allowed the arrest of *any* misdemeanant who was already under police control without *any* evidence (much less probable cause) that the misdemeanant posed a danger, would continue the offense, or would not return for trial.[423]

Granted, the suspect's interest is greater here than the liberty interest in *Atwater*. Nevertheless, the differences reflect the Court's antipathy to less significant constitutional rights, as those interfere with police prevention of danger and crime-prevention, including minor crimes.[424]

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422. *Id.* at 11–12.

423. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 340 (2001) ("We simply cannot conclude that the Fourth Amendment, as originally understood, forbade peace officers to arrest without a warrant for misdemeanors not amounting to or involving breach of the peace.").

424. The extent to which *Garner* controls police use of deadly force in contexts differing from that of *Garner* is now unclear. *See* Scott v. Harris, 550 U.S. 372, 382–83 (2007) (stating that *Garner* was simply an application of the Fourth Amendment's reasonableness balancing test in a particular circumstance). In *Harris*, the Court engaged in reasonableness balancing in the context of a high-speed car chase in which police rammed the car driven by a man who had been speeding and had fled when pursued by police for more than ten miles at a speed exceeding eighty-five miles per hour. *Id.* at 374–75. Here, the Court also engaged in reasonableness balancing, *id.* at 381, when making the following holding: "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

In his concurrence, Justice Breyer, who agreed with Justice Ginsburg's separate concurrence, stated that this holding was "too absolute." *Id.* at 389 (Breyer, J., concurring). In her concurring opinion, Justice Ginsburg underscored that she did "not read today's decision as articulating a mechanical, *per se* rule," and that a closer look at the circumstances of the chase would be necessary. *Id.* at 386 (Ginsburg, J., concurring).

That said, one might ask if the police or courts will engage in much deliberation regarding high-speed car chases. *Harris* has a certain degree of anti-intellectualism in that the Court, in an 8-1 decision, decided that the case was simple. Having watched the police dashboard's videotape of the events, the Court stated, "We are happy to allow the videotape to speak for itself." *Id.* at 378 n.5 (majority opinion). Based on its view of the video, the Court reversed the lower courts' holdings that summary judgment was not warranted

B. Berkemer v. McCarty*: "The Doctrinal Complexities That Would Confront the Courts If We Accepted [the Police] Proposal Would Be Byzantine"*

An alternative to anti-intellectualism in criminal procedure is presented in *Berkemer v. McCarty*,[425] a *Miranda* case with Fourth Amendment overtones, which was decided after *Belton* and *Gates*. The case is notable because while Justice Marshall, who wrote for the Court, expressed concern that the rules proposed by the litigants might be difficult to administer because police would have to think, the case is not anti-intellectual. Rather, the Court unapologetically left police with a rule that gave them the responsibility to think.

In *Berkemer*, the question was whether a motorist, Richard McCarty, who was pulled over after an Ohio State Highway Patrol officer observed him commit a misdemeanor traffic offense, was "in custody" for the purposes of *Miranda*.[426] When the officer observed that McCarty appeared intoxicated, he gave him a field sobriety test, which McCarty failed.[427] The officer questioned McCarty and received incriminating responses that McCarty had been drinking beer and smoking marijuana.[428] The officer arrested McCarty and took him to a county jail where he was tested for alcohol and booked, and where he made more incriminating remarks.[429] McCarty was never given *Mi-*

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in this case and concluded that no reasonable juror could find that the police's use of deadly force was not justified. *Id.* at 386.

But there *was* further thinking to be done. As Dan Kahan, David Hoffman, and Donald Braman have argued, the majority arrogated to itself a question that might be answered differently by different people, depending on the views those people have regarding various issues, including the proper relationship between police and citizens. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 841 (2009). Justice Scalia wrote that the police chase was "a Hollywood-style car chase of the most frightening sort," *Harris*, 550 U.S. at 380, whereas Justice Stevens took a more sanguine view, *see id.* at 390 (Stevens, J., dissenting). Might the Court's 8-1 holding encourage police to view most car chases as seriously dangerous so that they may employ deadly force to stop the fleeing driver? If so, might this case result in car chases being classified under a bright-line rule?

For a discussion that *Harris* has essentially overruled *Garner*, see Note, *Retreat: The Supreme Court and the New Police*, 122 HARV. L. REV. 1706, 1723–26 & n.19 (2009) (citing recent deadly force cases in which courts have focused on *Harris*).

425. 468 U.S. 420 (1984).

426. *Id.* at 422–24. The *Miranda* warnings were designed to counter the coercion inherent in custodial police interrogation; there is no need for police to give the warnings unless there is both custody and interrogation. *See* Miranda v. Arizona, 384 U.S. 436, 441 (1966) (exploring the issue of "applying the privilege against self-incrimination to in-custody interrogation").

427. *Berkemer*, 468 U.S. at 423.

428. *Id.*

429. *Id.* at 423–24.

randa warnings.[430] McCarty moved to suppress his statements but failed and was subsequently convicted.[431] The Court granted certiorari to "resolve confusion . . . regarding the applicability of our ruling in *Miranda* to interrogations involving minor offenses and to questioning of motorists detained pursuant to traffic stops."[432]

The Court decided that police *can* think. The clarity of the rule was important, Justice Marshall wrote, but the Court drew the clarity in a particular way. Instead of adopting the blanket rules that the parties suggested, the Court came out somewhere in the middle—in the situational land of "it depends." The county sheriff suggested the rule that any arrest for a misdemeanor traffic violation is not "custody" for the purposes of *Miranda*, so the person arrested may be interrogated without warnings.[433] McCarty suggested the alternative rule that all "roadside questioning of a motorist detained pursuant to a routine traffic stop should be considered custodial interrogation."[434] The Court concluded that whether a person was in custody for the purposes of *Miranda* depended on the circumstances:

> [T]he safeguards . . . become applicable as soon as a suspect's freedom of action is curtailed to a "degree associated with formal arrest." If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him "in custody" for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*.[435]

That is, the Court did not express the antipathy to "it depends" thinking the way it had in *Belton* and the way it would in *Atwater*, *Davis*, and *Moore*. Justice Marshall explained the following:

> Admittedly, our adherence to the doctrine just recounted will mean that the police and lower courts will con-

430. *Id.* at 424.

431. *Id.* at 424–25.

432. *Id.* at 426–27 (footnote call numbers omitted).

433. *Id.* at 429. The sheriff actually offered other distinctions, such as making an exception only for driving while intoxicated, or drawing the "line between felonies and misdemeanors." *Id.* at 429 n.11. The Court refused to take the bait and said that it would not differentiate between the suggestions, which all "suffer[ed] from similar infirmities." *Id.*

434. *Id.* at 435 (citation omitted). The Court noted that this may have been somewhat qualified. *Id.* at 435 n.22 ("In his brief, respondent [McCarty] hesitates to embrace this proposition fully, advocating instead a more limited rule [that would limit application of *Miranda* to only those situations in which] the police officer had probable cause to arrest the motorist for a crime."). The Court noted that such a rule would be difficult to administer because the officer would have to monitor the information as it flowed to him and determine when there was probable cause. *Id.*

435. *Id.* at 440 (citations and internal quotation marks omitted).

> tinue occasionally to have difficulty deciding exactly when a suspect has been taken into custody. Either a rule that *Miranda* applies to all traffic stops or a rule that a suspect need not be advised of his rights until he is formally placed under arrest would provide a clearer, more easily administered line. However, each of these two alternatives has drawbacks that make it unacceptable. The first would substantially impede the enforcement of the Nation's traffic laws—by compelling the police either to take the time to warn all detained motorists of their constitutional rights or to forgo use of self-incriminating statements made by those motorists—while doing little to protect citizens' Fifth Amendment rights. The second would enable the police to circumvent the constraints on custodial interrogations established by *Miranda*.[436]

It is not the best possible rule for citizens. The best rule would have been McCarty's: All traffic stops that involve questioning are considered custody for purposes of *Miranda*.[437] But the Court likened those stops to *Terry* stops—a lower level of restraint—for which *Miranda* warnings were not required.[438] Nevertheless, the Court at least concluded that *some* of the stops would be custody, whereas under the sheriff's proposed rule, no formal arrests for misdemeanor traffic offenses would be custody.[439] Had the Court followed the path it had carved in *Belton*, it would have simply given police the power to interrogate without warnings in *any* traffic stop.

Perhaps this case is different from the other, pro-police cases discussed because the Court may have determined that there was not, in almost two decades after *Miranda*, significant confusion in determining whether a suspect was in custody; thus, the Court actually went with a fairly clear rule. It may be that the Fifth Amendment right is seen as more important than the Fourth Amendment right, although the 1994 pro-police *Davis* decision makes such a pronouncement difficult to sustain.[440] Or perhaps Justice Marshall performed his own *jiu jitsu* on the pro-police Justices by showing that complexities arising from the purportedly pro-police rule could lead to a loss of evidence. Concerning the rule proposed by the sheriff, Justice Marshall penned the following:

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436. *Id.* at 441.

437. *Id.* at 435.

438. *Id.* at 439–40.

439. *Id.* at 429.

440. *See supra* Part III.C.

> The police often are unaware when they arrest a person whether he may have committed a misdemeanor or a felony. Consider, for example, the reasonably common situation in which the driver of a car involved in an accident is taken into custody. Under Ohio law, both driving while under the influence of intoxicants and negligent vehicular homicide are misdemeanors, while reckless vehicular homicide is a felony. When arresting a person for causing a collision, the police may not know which of these offenses he may have committed. Indeed, the nature of his offense may depend upon circumstances unknowable to the police, such as whether the suspect has previously committed a similar offense or has a criminal record of some other kind. It may even turn upon events yet to happen, such as whether a victim of the accident dies. It would be unreasonable to expect the police to make guesses as to the nature of the criminal conduct at issue before deciding how they may interrogate the suspect.
>
> *Equally importantly, the doctrinal complexities that would confront the courts if we accepted petitioner's proposal would be Byzantine.* Difficult questions quickly spring to mind: For instance, investigations into seemingly minor offenses sometimes escalate gradually into investigations into more serious matters; at what point in the evolution of an affair of this sort would the police be obliged to give *Miranda* warnings to a suspect in custody? What evidence would be necessary to establish that an arrest for a misdemeanor offense was merely a pretext to enable the police to interrogate the suspect (in hopes of obtaining information about a felony) without providing the safeguards prescribed by *Miranda*? The litigation necessary to resolve such matters would be time-consuming and disruptive of law enforcement. And the end result would be an elaborate set of rules, interlaced with exceptions and subtle distinctions, discriminating between different kinds of custodial interrogations. Neither the police nor criminal defendants would benefit from such a development.[441]

The language is certainly reminiscent of the language of anti-intellectualism. It sounds pro-police in that it sympathizes with difficulties in decision-making. It seems that Justice Marshall's reasoning revealed that to side with the pro-police rule would essentially vitiate *Miranda* in situations in which it clearly would apply.

The best citizens could do in *Berkemer* was to limp out with a ruling that *Miranda* applies in some traffic stops, but not all, and that it

441. *Berkemer*, 468 U.S. at 430–32 (emphasis added) (citations and footnote call numbers omitted).

applies for all arrests, regardless of the purpose of the arrest. The opinion is not anti-intellectual in the sense that it *prevents* the sort of sweeping up that police may practice under *Atwater*, *Moore*, *Belton*, and other Fourth Amendment cases: Pull a motorist over, arrest him for the minor traffic offense (an offense either real or imagined, as in *Devenpeck*—or police could just lie and say that an offense was committed), search the passenger compartment of his car and the containers in the compartment, and even impound the car and search the trunk as well. Under the sheriff's proposed rule, police would have been able to pull over a citizen and interrogate him or even arrest him for a minor offense and interrogate him, and, in some instances, get incriminating information about other crimes from the citizen before it became clear, in the eyes of the Court, that the *Miranda* warnings were required. Perhaps the Court found this to be too offensive or too totalitarian of an option.

V. WHAT'S SO BAD ABOUT ANTI-INTELLECTUALISM IN AMERICAN CRIMINAL PROCEDURE?

A. *Abandonment of Rule of Law and Reason-Giving*

Anti-intellectualism of the sort this Article has identified is incommensurate with the rule of law. Courts are designed primarily to resolve individual disputes of fact and law rather than to create broad policies. In short, they are designed to think about whether constitutional rights have been violated in individual situations. In many of the cases discussed above, the Court rejected such thinking by claiming—erroneously and tendentiously—that thinking would be too difficult for the police or for judges. Although one might argue that the Supreme Court is not merely a court but also a policymaking body, the Court in these cases creates rules that *prevent* the resolution of individual complaints. So, the Court's anti-intellectualism is made into law that will be followed in lower courts.

This anti-intellectualism arises from a fear that *not* to give police the power to rely on hunches, or even dumb luck as in *Belton* and *Atwater*, will result in slippage in the War on Crime: Evidence will be lost and crooks will escape. Therefore, giving police the power to decide whether to search passenger compartments of vehicles or to arrest someone who has committed only a minor traffic offense allows the police to rely on, at best, hunches, or worse, racism and other biases.[442] There is no reason to seize the Ms. Atwaters of the world.

442. *See infra* Part V.C.

There is no reason to search the passenger compartments of the Mr. Beltons of the world. But by dismissing, with the rhetoric of anti-intellectualism, the argument that any police search or seizure should be supported by reasonable suspicion or probable cause, the Court has extinguished thinking itself. Allowing government actors to use extraordinary powers against citizens—rummaging through their belongings, handcuffing them, and locking them in jails—should be based on reason. Instead, police are given the power to be arbitrary and capricious—the very opposite of law. Impliedly, the Court seems to be admitting a belief that the War on Crime cannot be won by legal means, but only by government actors who violate the law.

The dangers of giving police broad discretion to pick and choose whom they will search or seize have been a focus of criminal procedure scholars for decades. These scholars have pointed out that this discretion is dangerous to an ordered democracy and perpetuates racism and other prejudices against racial and political minorities.[443] The first danger—the danger to democracy—is well known and will be merely mentioned: Allowing what are essentially suspicionless searches violates the thrust of the Fourth Amendment and is a gateway to tyranny, petty and otherwise.[444] The second danger is that allowing police discretion and even lawlessness does not promote a healthy relationship between citizens and their government. As Elizabeth Joh has observed, "Researchers in the field of procedural justice have repeatedly pointed out the correlation between personal experiences and general attitudes towards the law."[445] A person who is treated fairly—regardless of the outcome—will be more likely to respect and

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443. Elizabeth E. Joh, *Discretionless Policing: Technology and the Fourth Amendment*, 95 CAL. L. REV. 199, 201–02, 208–11 (2007) (surveying scholarship).

444. Justice Jackson famously wrote the following:

> These . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

Brinegar v. United States, 338 U.S. 160, 180–81 (1949) (Jackson, J., dissenting). In a well-known article, Anthony Amsterdam observed, "[The Fourth Amendment opposes] searches and seizures . . . conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This . . . concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 411 (1974).

445. Joh, *supra* note 443, at 232.

comply voluntarily with the law, and vice versa.[446] One elemental problem is that the Court's allowing police to use their discretion without giving any explanation discounts an important part of the relationship between government and the governed in a democracy—reason-giving. As Robert Bone points out, many legal scholars have argued that the government "has a moral obligation to give reasons when it imposes substantial burdens on individuals."[447] This moral obligation has been viewed as grounded in the values of respect and dignity as well as in the value of preventing arbitrary government action.[448] But in the cases discussed above, no reason-giving is ever necessary: Police are simply empowered to search or seize if they wish to do so. Indeed, in *Devenpeck*, Justice Scalia wrote that the police need not give a citizen any reason why they are arresting him—surely a "substantial burden on [the] individual[ ]"[449]—since the citizen can learn the reason at some point in the subsequent forty-eight hours from a prosecutor or judge.[450] Requiring the police to give a reason at the time of arrest would not only help avoid arrests based on mistakes (which is discussed below), but it would also avoid stripping of the individual's dignity, a value that has been recognized by criminal procedure scholars.[451]

Technically, the government is supposed to serve its citizens and not the other way around; we are not its servants who may be removed from the streets at will and without explanation. But an even deeper lack of respect lurks. Even if an arrestee is actually told the crime for

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446. *Id.* at 232–33.

447. Robert G. Bone, Twombly, *Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 903–04 (2009) (citing sources). Bone discusses the need for reason-giving not in the context of criminal procedure but in civil procedure—particularly, complaints in civil lawsuits—and concludes that "the fairness argument based on reason-giving has force in the pleading context." *Id.* at 907.

448. *Id.* at 903–04 (citing, *inter alia*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 663–64, 666 (2d ed. 1988) (1978)). Bone points out that not all government action requires explicit reason-giving: A judge's evidentiary rulings, a jury's verdict, and a judge's sentencing a criminal are examples of where reason-giving may be avoided. *Id.* at 904 (citing Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634, 637 (1995)). Bone notes, however, that the reasons can be inferred through the arguments made, so the aggrieved person is not left entirely in the dark. *Id.* at 904. Furthermore, the reasons can be given on appeal. In the searches and seizures discussed in this Article, however, no reason need *ever* be given for *why* the police decided to search or seize the particular suspect, even when a casual observer would recognize (or at least suspect) that the arrest violated the norm (if not the Constitutional mandate) of equal protection of law.

449. *Id.* at 903.

450. Devenpeck v. Alford, 543 U.S. 146, 155 & n.3 (2004) (citing County of Riverside v. McLaughlin, 500 U.S. 44, 53 (1991)).

451. *See, e.g.*, Sundby, *supra* note 128, at 1783 (explaining the importance of a government recognizing the human dignity of its citizens).

which he is being arrested—which, after all, is what was at issue in *Devenpeck*—the Court has essentially said that the police need *never* tell him why *he* was arrested for the particular violation when practically no other citizen who committed the violation was ever arrested for it.[452]

A citizen who is arrested for a violation for which others are not arrested will likely harbor deep suspicions against the arresting officer. Observers and those who later hear about the arrest may also end up harboring such suspicion. Indeed, in *Atwater*, there is a sense that the officer singled out Gail Atwater to abuse her. The Court noted that Officer Turek had stopped Ms. Atwater at some earlier point under the mistaken accusation that she was violating the seatbelt rule.[453] But even this sense was not enough for the Court to rule in that case that the arrest was unconstitutional. Although this argument is veering into the area of motive, as opposed to intent, it nevertheless is important for a person to know the officer's reason—or motive—for arresting him for a crime that no one else is arrested for, even if to do so in some cases is difficult, as Margaret Raymond has argued.[454] At issue is a substantial intrusion by the government and the reasons for that intrusion.[455] The officer's subjective intent

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452. *See* Maclin, *supra* note 11, at 113 (discussing a study showing that on one section of the New Jersey Turnpike, ninety-eight percent of the drivers were committing traffic offenses).

453. Atwater v. City of Lago Vista, 532 U.S. 318, 324 n.1 (2001).

454. *See* Margaret Raymond, *On Rights and Responsibilities: A Response to* The Problem of Pretext, 116 YALE L.J. POCKET PART 369, 373 (2007). George Dix argues forcefully that subjective and not merely objective inquiry into a police officer's state of mind be carried out as part of Fourth Amendment reasonableness. *See* Dix, *supra* note 351, at 478. Dix argues that there is "absolutely nothing" to support the view that inquiring into a police officer's mental state would be difficult, impractical, or produce inaccuracies. *Id.* Dix also notes that the justice system mandates "substantive culpable mental state requirements for conviction of offenders" and that there is no suggestion that "law enforcement officers are more inscrutable" than these offenders. *Id.* Nor would this inquiry be too onerous. According to Dix, Oregon courts consider the officer's objective and subjective state of mind in the probable cause determination under that state's constitution, and it has not proved impossible or too costly. *Id.* at 473.

455. Motive is not so difficult to determine: Lawyers often offer evidence of motive. Raymond correctly states that "[m]otive, unlike intent, is something into which the criminal law inquires only rarely, and for good reason." Raymond, *supra* note 454, at 373. Although Raymond does not explain why this is good, it is assumed she means that it would be difficult to inquire into motive. That said, evidence of motive is often proved in criminal cases, even if not actually required. *See, e.g.*, People v. Estep, 49 Cal. Rptr. 2d 859, 862–63 (Cal. Ct. App. 1996) (characterizing motive as "merely one circumstance in the proof puzzle" and finding no error in the trial court's jury instruction that "'[m]otive is not an element of the crime charged and need not be shown'"); State v. Elwell, 209 P. 616, 617 (Or. 1922) ("Evidence of motive is relevant in criminal prosecutions to identify the accused as the one who committed the crime, and not to show that the crime has been

may, at times, involve racial or personal animus. The Court's anti-intellectual position in the cases discussed above prevents any discussion about the danger of police singling out individuals for untoward or even downright unconstitutional reasons. The important point to this argument is that the Court just as easily *could* allow such discussion if it did not let anti-intellectualism inform its decisions.

The Court's encouragement of lawlessness in these situations appears to be saying that we have a system of law, just not on the streets. The Court succumbs to excessive fear and sedulously avoids intellectual inquiry that could threaten its broad grant of power to police.

B. Inaccuracy and Effect on Public Safety

If arguments based on respect for individuals seem too precious to some people in what some might characterize as a scared, post-9/11 era, then there are some realities that are not so precious. One such reality is that police hunches are likely to be inaccurate. As The Honorable Harold Baer, Jr., a federal district court judge from the United States District Court for the Southern District of New York, has argued, "[W]hile hunches may be useful in other limited settings, they raise cause for concern in the dynamic and dangerous field of law enforcement, where the liberty we value so highly is an ingredient to be considered in most police activity."[456] Judge Baer defined hunches as "intuitive judgments that rise to our consciousness without explanation."[457] They come from our "'adaptive unconscious,'" a part of the brain, and "derive from an individual's pattern recognition, memories, and experience."[458] Judge Baer further explains that "[s]ince hunches are heuristic, rather than analytical, in nature, they are based on all of our experiences"[459] and "may be biased by experiences and personal morals, which inevitably affect their accuracy."[460] Moreover, as Judge Baer observed, police are more likely to interpret normal

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committed."). Presumably, to pursue a Fourth Amendment claim based on improper motive (if it were allowed) would be at the § 1983 plaintiff's, or criminal defendant's, behest, and the aggrieved party would have the burden of production and proof. Motive could be proved in the usual way—by evidence and inference.

456. The Honorable Harold Baer, Jr., *Got a Bad Feeling? Is That Enough? The Irrationality of Police Hunches*, 4 J.L. ECON. & POL'Y 91, 92 (2007). Judge Baer is well known for provoking the wrath of "Law and Order Conservatives" in the 1990s when he granted a motion to suppress under the Fourth Amendment for lack of probable cause; Members of Congress circulated an impeachment petition. *See id.* at 92–93.

457. *Id.* at 98 (citing Gerd Gigerenzer & Henry Brighton, *Can Hunches Be Rational?*, 4 J.L. ECON. & POL'Y 155, 156 (2007)).

458. *Id.*

459. *Id.* (footnote call number omitted).

460. *Id.*

events as criminal because they see so much criminal activity; this results from the "'availability heuristic.'"[461] "Unlike the ordinary citizen, police officers face hostile and frightening situations daily and consequently fall easy victim to unconscious feelings of bias, prejudice, and the availability heuristic. Police officers, then, are likely to come to work with more 'baggage' than the private citizen."[462]

Indeed, it is unlikely that police hunches—even if we were to believe that they could be exercised without improper bias—will ever be systematically reliable. Although some readers might think that seasoned and hardened police can hone their hunches like the experts Malcolm Gladwell discusses in *Blink*,[463] those readers would almost certainly be incorrect.[464] This sort of expertise requires immediate feedback as well as judicious analysis. Here, the police are not getting feedback about all of the criminals they are missing, all of the middle-class Caucasians they are not stopping who *do* have drugs or who are otherwise involved in criminal activity. Instead, police often simply are learning from veteran police officers who have spent their careers focusing on minority neighborhoods.[465] We do not know how many minorities the police are stopping and searching—in all the ways allowed by the cases discussed above—without finding drugs. Thanks to the Supreme Court, the people who are needlessly and fruitlessly searched or arrested have no way of complaining, at least under the United States Constitution. There exists no official data pool. Police themselves do not appear to keep these sorts of statistics.[466] The sort of feedback required for the development of the kind of expertise

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461. *See id.* at 98–102.

462. *Id.* at 100.

463. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING (2005).

464. *See* Baer, *supra* note 456, at 98–100 (discussing one of Gladwell's examples, a counterfeit Greek *kouros* statue that the Getty Museum bought, believing it to be more than two thousand years old, and stating that "[the art expert] could afford to offer a hunch with relatively benign consequences," while "[i]n the dangerous reality of law enforcement, hunches may result in different and far more serious consequences, both for the citizen and for the police officer").

465. *See id.* at 100–02, 104–05 (discussing Andrew J. McClurg, *Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying*, 32 U.C. DAVIS L. REV. 389 (1999)). McClurg suggests *not* pairing veterans with rookies, as a way of breaking the chain by which police pass down ideas such as loyalty to one another at all costs, including protecting fellow officers involved in corruption. *See* McClurg, *supra*, at 442–43.

466. Even if police kept such statistics, citizens might not be able to obtain them. Elizabeth Joh observed the following:

> Unlike these other actors [in the Executive Branch], however, discretion in law enforcement is usually exercised covertly and with minimal oversight. Most citizens lack the equivalent of a sunshine law to review the decisions made by officers in their local police departments. In contrast, a number of federal, state, and

that can work in a blink is not available. We have no way of testing police claims about their own expertise. An obvious danger of police inaccuracy means that when they are spending their time stopping, searching, and even jailing people who are not criminals, they are taking time away from the patrols and investigations that could lead them to real criminals, with an attendant, salutary effect on public safety. Another danger is that police waste citizens' time, making it less likely that these citizens will cooperate with police when the police conduct real investigations.[467]

C. Perpetuation (Unwitting or Not) of Racial and Cultural Stereotypes

Another problem is that permitting police to act on hunches perpetuates racial and cultural stereotypes, especially throughout the criminal justice system where these stereotypes can do the most harm. Police come to the job—as we all do—with various biases. Some of these biases are racist;[468] others are political or cultural.[469] It is known that one way to limit racial and cultural bias is through education, formal and otherwise.[470] Alas, as Judge Baer notes, "The presence of the availability heuristic makes it even harder [to educate police beyond such biases]."[471]

But police are the tip of the spear of the Executive Branch. They are the ones who choose whether to have intrusive encounters with

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> local statutes, such as the Freedom of Information Act, exist to provide this information regarding other executive decisions.

Joh, *supra* note 443, at 206 (footnote call numbers omitted).

467. Both of these dangers are discussed more in-depth in a related context. *See* Foley, *supra* note 193, at 1042–55. These dangers are accentuated in a mass roundup of terrorist suspects who are mostly innocent and not identified accurately because of the lack of rules and procedures set up to identify actual terrorists. *See id.* The idea is the same, however, in that the roundup of prisoners who ended up at Guantanamo and other United States anti-terror prisons was based on such inaccurate information that it was similar to police acting on hunches and biases. *See* DAVID A. HARRIS, GOOD COPS: THE CASE FOR PREVENTIVE POLICING (2005) (comparing good police practices studied among several departments and contrasting positive "preventive policing," which seeks to protect, *inter alia*, constitutional rights, with post-9/11 "Ashcroft policing").

468. *E.g.*, Baer, *supra* note 456, at 100 (discussing findings of the Christopher Commission, which reviewed Los Angeles Police Department conduct: "[T]he Commission found a pervasive racial and ethnic bias, which the police officers brought to the force, and which colored their actions, and by definition their hunches" (footnote call number omitted)).

469. Maclin, *supra* note 11, at 111 & n.125 (discussing a 1969 study, cited in a brief in *Delaware v. Prouse*, 440 U.S. 648 (1979), in which fifteen college students with good driving records were suddenly stopped numerous times after putting Black Panther bumper stickers on their cars, and discussing news accounts of police stopping drivers for ACLU and NRA bumper stickers and even stopping males for wearing long hair).

470. *See* Baer, *supra* note 456, at 100.

471. *Id.*

citizens—encounters that have a much greater and more immediate effect on the citizen than, say, contact from a clerk in the Registry of Deeds. The police officer's hunch might be based on a racial stereotype—for example, a stereotype that young black males are more likely to possess drugs than are other people.[472] So, even if prosecutors eventually are educated such that they suffer less from racial biases, prosecutors (and judges) encounter a steady stream of racial minorities presumptively branded as criminals. The availability heuristic can cause bias to pervade the entire system: The prosecutor who mostly sees African-American criminals might, over time, acquire some of this bias himself. The same goes for judges, who are, after all, only human. In this way, racial stereotypes can proliferate.

This is to say nothing of deliberate racism, often called "pretext," about which much has been written.[473] It is hard to prove deliberate racism.[474] This unconscious racism, however, may be a deeper threat.[475] It is harder to detect, certainly, even by its purveyors, who may believe they are acting "normally." And when police do not have to give reasons for discretionary searches or seizures, conscious and unconscious racism may prevail.

The well-known facts suggest that this is precisely what is going on. Numerous studies have shown that police focus on minorities in street encounters and traffic stops.[476] Prison statistics reveal that minorities make up the majority of the United States prison population.[477] There is also evidence that police target specific

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472. It might also be based on the availability heuristic. *See supra* text accompanying notes 459–62.

473. *See, e.g.*, TASLITZ ET AL., *supra* note 3, at 476–79. *See generally* DAVID A. HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2002). Studies have shown that policing by using racial profiling is less effective in detecting "drugs, guns, and bad guys" than policing that does not employ racial profiling. David A. Harris, *Racial Profiling Revisited: "Just Common Sense" in the Fight Against Terror?*, 17 CRIM. JUST. 36 (2002). For an argument that much police profiling is actually unconscious and that the profiling debate should take cognitive models of behavior into account, see Alex Geisinger, *Rethinking Profiling: A Cognitive Model of Bias and Its Legal Implications*, 86 OR. L. REV. 657 (2007).

474. Maclin, *supra* note 11, at 116–18 (discussing the difficulty of establishing equal protection claims for pretextual stops).

475. Not to mention the more extensive unconscious racism that pervades our culture. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318–27, 330–44 (1987).

476. *See, e.g.*, Baer, *supra* note 456, at 100–01 (citing studies and reports about Los Angeles and New York City); Maclin, *supra* note 11, at 93–94 (discussing numerous studies confirming that police engage in racial profiling).

477. *See* PAIGE M. HARRISON & ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2005 8 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/p05.pdf. In 2005, African-Americans made up forty percent of the Nation's total prison population, Hispanics made up twenty percent, and Caucasians made up thirty-five percent. *Id.* By contrast, according

neighborhoods, believing those neighborhoods to be the locus of crime. A study conducted by prison inmates in New York showed that seventy-five percent of all prisoners in New York come from just seven blighted neighborhoods in New York City.[478] In this way, police believe the criminals are in these neighborhoods—or in particular cars or wearing certain sweatshirts or sneakers—and look there for crime. And they often find it, usually in the form of drug possession. One wonders, however, if police would find similar law-breaking if they focused on affluent Caucasian neighborhoods. They would find cocaine, marijuana, prescription drugs—the whole apothecary. But these affluent whites just do not look like criminals to many people in our society,[479] especially to the police, who are likely to be uncritical products of our society's mores, stereotypes, and biases. Given that intellectuals are known—and sometimes despised—for questioning social mores, shibboleths, and stereotypes, it would seem that a healthy dose of intellectualism would prevent the cancer of racism from pervading our criminal justice system. The Supreme Court should think about these concerns that the Justices brush aside as the poppycock and drivel of effeminate intellectuals.[480] Our law requires more intellectualism, not less.

VI. CONCLUSION

We have seen that the Supreme Court's reasoning has been anti-intellectual at times when some Justices appear to have felt the need to protect what they see as effective law enforcement. The Court has accepted the idea that police officers should, in some instances, be free to follow their instinct—be free to *not* articulate reasons for searching and seizing—notwithstanding the constitutional limits of probable cause and reasonable suspicion. Police have been given this

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to United States Census Bureau estimates for 2008, Black persons make up nearly thirteen percent of the overall Nation's population, persons of Hispanic or Latino origin make up just over fifteen percent, and White persons not Hispanic make up just over sixty-five percent. United States Census Bureau, USA QuickFacts, http://quickfacts.census.gov/qfd/states/00000.html (last visited Feb. 17, 2010).

478. *See* Frances X. Clines, *Ex-Inmates Urge Return to Areas of Crime to Help*, N.Y. TIMES, Dec. 23, 1992, at A1 (describing a study, conducted by prisoners at a "think tank" at New York's Green Haven Prison, as "accepted research").

479. Baer, *supra* note 456, at 98–99 (discussing Implicit Association Tests that detect unconscious racism).

480. The equation of intellectualism with effeminacy—as Hofstadter points out is often the case, *see* HOFSTADTER, *supra* note 7, at 18–19—is a further barrier to encouraging intellectualism among police. *See* TASLITZ ET AL., *supra* note 3, at 480 (discussing police culture in which "[s]ome police exhibit distrust and suspicion of civilians, 'macho' attitudes, a tendency toward conservatism, and a desire for tidiness and order").

discretion as a result of the judicial reasoning that any rule guiding police and requiring meaningful thought and inquiry would be too difficult or too unwieldy for police and judges to follow.

This anti-intellectual rhetoric and reasoning is actually antagonistic to civil liberties in ways that, until now, have gone unnoticed. It is not the thinking about the rights, but the rights themselves, that the Court sees as getting in the way of the government's War on Crime. We have seen that police *are* required to think rigorously when doing so would protect a most basic civil liberty—the right to not be killed by the government without good reason. That the Court in *Tennessee v. Garner*[481] sees police as able to think about the danger a fleeing suspect poses[482]—an inherently split-second decision—belies the conclusion in *Atwater v. City of Lago Vista*[483] that police officers are unable to make this same determination when faced with the supposedly split-second decision of whether to arrest a motorist who has committed a minor traffic offense.[484] Indeed, if the officer needs more time to decide whether to arrest the suspected traffic misdemeanant, he can take that time. There is no pressing danger; no one is fleeing.

This is not to say that there may not, at times, be dangers that police can sense—crimes that police officers could disrupt but for constitutional requirements of restraint. Legal standards that force police to articulate their reasons for infringing on rights will, at times, get in the way of policing that relies on hunches and dumb luck. Indeed, as Hofstadter observed, "In a certain sense . . . intellect *is* dangerous. Left free, there is nothing it will not reconsider, analyze, throw into question."[485] Government antipathy toward intellectuals and intellect is, therefore, natural to a certain extent. But Hofstadter also reminds us that it is more dangerous for a government to ignore intellectuals and to banish thought and reflection from public discourse.[486] Similarly, a government that opposes civil liberties and paints them as unnecessary and even as subversive is, in the long run,

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481. 471 U.S. 1 (1985).

482. *See supra* Part IV.A.

483. 532 U.S. 318 (2001).

484. *See supra* Part III.D.

485. HOFSTADTER, *supra* note 7, at 45. Hofstadter further explained the following:

> "Let us admit the case of the conservative," John Dewey once wrote. "If we once start thinking no one can guarantee what will be the outcome, except that many objects, ends and institutions will be surely doomed. Every thinker puts some portion of an apparently stable world in peril, and no one can wholly predict what will emerge in its place."

Id. (footnote call number omitted).

486. *Id.* ("[T]he only assurance that can be given to any community is that it will be far worse off if it denies the free uses of the power of intellect than if it permits them.").

a law-breaking government—a government that is more dangerous to ordered liberty than a government that respects citizens' rights and accepts that it cannot prevent and punish all crime.

Anti-intellectualism in criminal procedure must be faced and challenged on these terms, lest it continue to take us down the road toward an oppressive, prejudicial society where arbitrary police behavior is the rule, a society where there are no citizens—just criminals we have not yet caught.