Arrests Without Prosecution and the Fourth Amendment

Surell Brad

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Criminal Law Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol59/iss1/4

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
ARTICLES

ARRESTS WITHOUT PROSECUTION AND THE FOURTH AMENDMENT

SURELL BRADY*

INTRODUCTION ...................................................... 2

I. THE FOURTH AMENDMENT ........................................ 9
   A. The Text ............................................... 9
   B. Drafting History ........................................ 10
   C. Application to Arrests .................................. 12
   D. State Laws and the Fourth Amendment ................. 17

II. THE MAGNITUDE AND CAUSES OF THE PROBLEM .......... 19
   A. The Operation of State Criminal Laws ................. 19
   B. State Arrest Laws ..................................... 20
   C. State Charging Practices ............................... 21
      1. Police Control of Charging ....................... 21
      2. Relaxed Charging Methods Used by Prosecutors .... 22
      3. Failure to Exercise Prosecutorial Discretion ...... 24
      4. The Role of Politics in Arrests .................... 26
      5. A Blind Eye to Negative Police Attitudes .......... 27
   D. Arrest Statistics ....................................... 31
   E. Prosecution Statistics .................................. 36

* Associate Professor, University of Maryland School of Law. B.A., Pomona College; J.D., Cornell Law School. I offer sincere but inadequate thanks to Katherine Gruenheck, Esq., Washington, D.C.; University of Maryland School of Law colleagues Barbara Bezdek, David Bogen, Richard Boldt, and Karen Czapanskiy for their thoughtful help throughout the drafting process; and research assistants Cathy Hinger and Paula Nightingale.

This Article is dedicated to Professor Leo Flynn, Pomona College, Claremont, California. Professor Flynn made constitutional law come alive for a number of us even before we entered law school. His wisdom and sense of fairness have served as a model for tackling these fundamental issues.
Most of what is believed about crime and about the criminal justice system is false or irrelevant.¹

INTRODUCTION

This Article tests Charles Silberman's generalizations about crime and the criminal justice system through one aspect of that system, the relationship between the arrests of individuals pursuant to state laws and prosecutions for the criminal offenses for which they are arrested. An examination of that relationship reveals at least two "falsehoods" in terms of the general public's perceptions of crime. Many, if not most, members of the public assume that: (1) individuals are arrested

because they are guilty of crimes; the fact that most prosecutions result in convictions or guilty pleas proves the point; and (2) those cases in which prosecution does not occur usually are victims of technical rules of criminal procedure, such as the exclusionary rule, or some other dynamic over which prosecutors are assumed to have little or no control. 2 Contrary to those widely held beliefs, in a number of large jurisdictions, the majority of criminal cases at the state level, both misdemeanors and felonies, are dismissed without prosecution. 3 The majority of dismissals are made by prosecutors before the cases reach trial without proof of guilt. 4 For cases that are dismissed by the courts after prosecution has begun, prosecutors report that those cases are rarely dismissed due to "technical" problems such as the exclusion of evidence. 5

Silberman’s claim of irrelevance may be overstated. It is striking, however, that the volume of material written about the Fourth Amendment guarantee against unreasonable searches and seizures does not deal with whether the constitutional rights of literally millions of individuals are violated through practices in which the state arrests individuals but is not required to demonstrate its intention or its ability to prosecute them. The plight of those individuals, still clothed with the presumption of innocence, apparently eludes constitutional consideration.

Searches are the primary focus of much of the controlling decisional law on the Fourth Amendment. The constitutionality of arrests might be discussed in those cases, but often as an incidental matter; for example, whether a search was "incident to" a valid arrest. Several recent cases reflect this tendency. In Wilson v. Arkansas, 6 the Supreme Court considered whether the Fourth Amendment prohibits no-

2. See generally id. at 258-308.
3. See infra notes 172-201 and accompanying text (discussing the low correlation between arrests and prosecutions).
4. See infra notes 238-283 and accompanying text (discussing various factors responsible for a low prosecution rate).
5. See Steven Duke, Making Leon Worse, 95 Yale L.J. 1405, 1406 (1986) (discussing a study published in 1984 by the National Center for State Courts which documented that, in seven cities, motions to suppress were filed in only 39% of the cases involving search warrants); Jerold H. Israel, Excessive Criminal Justice Caseloads: Challenging the Conventional Wisdom, 48 Fla. L. Rev. 761, 772 (1996) (contending that "suppression motions tend to be common only in a limited class of cases"). Professor Duke discussed results of a study which found that out of 7767 felony cases involving warrantless searches "in nine counties in three states, fewer than 5% of the defendants filed motions to suppress physical evidence." Duke, supra, at 1409 (footnotes omitted).
knock entries during the execution of search warrants.\footnote{7} The Court has also examined whether the Fourth Amendment allows police randomly to request consent to search without articulable suspicion.\footnote{8}

A more recent trend focuses on vehicle stops and subsequent searches. For example, in \emph{Whren v. United States},\footnote{9} the Supreme Court addressed whether the stop and temporary detention of a motorist for a minor traffic violation is inconsistent with the Fourth Amendment's prohibition against unreasonable seizures if a reasonable officer would not "have been motivated to stop the car by a desire to enforce traffic laws."\footnote{10} In \emph{Pennsylvania v. Mimms},\footnote{11} the Court addressed the authority of the police to order a driver out of his vehicle during a traffic stop. In \emph{Mimms}, an officer observed a bulge in the driver's jacket when the driver exited his vehicle and subsequently frisked the driver and found a loaded revolver.\footnote{12} Yet another case, \emph{Maryland v. Wilson},\footnote{13} addresses whether the Fourth Amendment prohibits police from ordering passengers out of a car during a traffic stop. In \emph{Wilson}, a quantity of cocaine fell to the ground when the passenger got out of the car.\footnote{14} In the vehicle cases, the Supreme Court has weighed the nature and degree of the seizures against concerns about protecting police officers when they approach vehicles to enforce traffic laws.\footnote{15}

\footnotesize{7. \textit{See id.} at 929 (stating that "the common law of search and seizure recognize[s] a law enforcement officer's authority to break open the doors of a dwelling, but generally indicat[es] that he first ought to announce his presence and authority" and holding that the common-law "'knock and announce' principle forms a part of the reasonableness inquiry under the Fourth Amendment").}


10. \textit{Id.} at 808.
15. \textit{See id.} at 412 (finding the justification of an officer's safety "'both legitimate and weighty'" (quoting \emph{Mimms}, 434 U.S. at 333)); \textit{see also id.} (noting that "[o]n the other side of the balance" the court considers "the intrusion into the driver's liberty occasioned by the officer's ordering him out of the car").}

The more recent noncustodial detention cases grew out of \emph{Terry v. Ohio}, 392 U.S. 1 (1968). \emph{Terry} sanctions stops of individuals on public streets and pat-downs of external clothing based on an officer's "articulable suspicion" that the person (1) had committed or was in the process of committing a crime; and (2) posed a threat of eminent danger to the police officer or the public. \emph{Terry}, 392 U.S. at 27, 30, 31 (Harlan, J., concurring). The Court held that "the specific reasonable inferences" that an officer was "entitled to draw from the facts in light of his experience" justified the brief detention and superficial search even though the officer did not have probable cause for a full-blown arrest. \textit{Id.} at 27, 30.
sumptive right to be left alone against whether prosecution is intended or is likely to occur.

One potential result of the Fourth Amendment cases selected for Supreme Court review is a perception that the amendment primarily protects guilty persons who challenge their convictions on the ground that procedural errors committed by police officers require that key evidence not be used against them.\textsuperscript{16} By contrast, relatively little attention is paid by the public, by courts, or by scholars to the most intrusive seizures—custodial arrests that result in the loss of freedom and consequential economic and social harm to individuals, but which do not follow constitutionally prescribed procedures.\textsuperscript{17} In comparative terms alone, the number of persons who litigate their Fourth Amendment rights after conviction is largely irrelevant compared to the millions of individuals who are arrested each year throughout the country, but who never get their "day in court" to challenge the charges and evidence against them and hold the prosecution responsible for proving their guilt.\textsuperscript{18}

Scholarly consideration of the Fourth Amendment has focused on the history of the amendment,\textsuperscript{19} theories about interpreting the amendment,\textsuperscript{20} and particular standards used in applying the amend-


\textsuperscript{17} Articles by Professor Tracey Maclin, Boston University School of Law, are a notable exception. See Tracey Maclin, \textit{Race and the Fourth Amendment}, 51 Vand. L. Rev. 333 (1998); Tracey Maclin, Terry v. Ohio's Fourth Amendment Legacy: Black Men and Police Discretion, 72 St. John's L. Rev. 1271 (1998).

\textsuperscript{18} See infra notes 58-73.


\textsuperscript{20} See Akhil Reed Amar, \textit{Fourth Amendment First Principles}, 107 Harv. L. Rev. 757, 759 (1994) (arguing for a Fourth Amendment analysis centered on "first principles" such as focusing on the language of the Fourth Amendment "that all searches and seizures be reasonable" and on the "lost linkages between the Fourth and Seventh Amendments"); Craig M. Bradley, \textit{Two Models of the Fourth Amendment}, 83 Mich. L. Rev. 1468, 1471 (1985) (suggesting that "current fourth amendment law, complete with the constant tinkering
ment. Much of the scholarly discourse concerning arrest relates to police discretion to arrest and to law enforcement goals that may influence that discretion. Others have written about and have litigated the abuses of that discretion such as unreasonable force by police in making arrests, arrest practices that result in a disproportionate number of minorities—particularly black males being arrested, and motives of police officers in making arrests that may be illegal in and of themselves, such as those that target individuals because of their race.

Often, the prosecution function is examined with respect to the virtually impenetrable discretion held by prosecutors and the diff-

which it necessarily entails, should be abandoned altogether” and asserting that there are only two methods for interpreting the Fourth Amendment); Morgan Cloud, The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Interpretation, 48 STAN. L. REV. 555, 556 (1996) (proposing a return to the theories on the Fourth Amendment expounded by the Supreme Court during the infamous Lochner era of the early twentieth century); Silas J. Wasserstrom & Louis Michael Seidman, The Fourth Amendment As Constitutional Theory, 77 GEO. L.J. 19, 20-21 (1988) (discussing the “remarkable consensus” that the Supreme Court has “made a mess of search and seizure law” and juxtaposing various constitutional theories through the lens of the Fourth Amendment).

21. See Elise Bjorkan Clare et al., Warrantless Searches and Seizures, in Twenty-Fifth Annual Review of Criminal Procedure, 84 GEO. L.J. 743 (1996) (explaining the various standards applied for fifteen types of warrantless searches and seizures); James M. Humphrey IV, “Everybody Out!”: The Supreme Court Grants Police the Authority to Automatically Order Passengers Out of Lawfully Stopped Vehicles in Maryland v. Wilson, 31 CREIGHTON L. REV. 997, 1026 (1998) (discussing a number of standards used in Fourth Amendment jurisprudence, such as the “brightline rule making in the automobile context” (internal quotation marks omitted)).

22. See Barbara Fedders, Lobbying for Mandatory-Arrest Policies: Race, Class, and the Politics of the Battered Women’s Movement, 23 N.Y.U. REV. L. & SOC. CHANGE 281, 286-96 (1997) (constructing the mandatory arrest policy relating to domestic violence and how this policy may not reflect the experiences of low-income women and women of color); Nancy James, Domestic Violence: A History of Arrest Policies and A Survey of Modern Laws, 28 FAM. L.Q. 509, 511-13 (1994) (discussing how, until recently, most police forces had a policy of nonarrest in domestic disputes); see also Terry A. Maroney, Note, The Struggle Against Hate Crime: Movement At A Crossroads, 73 N.Y.U. L. REV. 564, 600-02 (1998) (noting that police often fail to label a crime as bias-motivated even though the law may require police to report such crimes and asserting that ultimately the power to label crimes as bias-motivated “remains firmly vested in the police”).

23. See generally Wes Daniels, Derelicts, Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates, 45 BUFF. L. REV. 687, 708-15 (1997) (discussing trial court rulings, reversed on appeal, that arresting homeless people amounts to punishment for trying to obtain the essentials of life, such as shelter and food); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities and New Policing, 97 COLUM. L. REV. 551, 646-50 (1997) (discussing the problem of police discretion in the enforcement of laws regulating minor forms of street misconduct, which implicates the void-for-vagueness doctrine); Matthew Siegel, Note, Africa v. City of Philadelphia: The Third Circuit Drops a Bomb on Fourth Amendment Protections, 7 TEMP. POL. & C.R. L. REV. 167, 170, 180-90 (1997) (arguing that when excessive force is used against individuals during an arrest, qualified immunity for those law enforcement officials should not exist).
culty of challenging that discretion, absent proof of “intentional or purposeful” prosecution. Allegations of prosecutorial misconduct tend to focus attention on an individual prosecuting attorney and not necessarily on the entire system of which she is a part.

The scholarship thus far has contributed richly to constitutional law. I propose to add to those discussions a consideration of the presumed end result of arrest, prosecution, and whether the Fourth Amendment requires that the government ensure that arrests are used only to begin the process of prosecution and not as ends unto themselves. From a practical standpoint, without a correlation of arrests to prosecution, we cannot have a clear perspective on the effectiveness of our criminal justice system. From a legal standpoint, we cannot be sure whether the criminal justice system operates as intended—to charge and to sanction those who are found guilty of crimes—or, instead, serves as a “shortcut” of the procedural guarantees of the Constitution. Those guarantees include due process, the right to confront witnesses and evidence, and a prohibition on punishment unless the government proves its case beyond a reasonable doubt before a jury of the accused’s peers or an impartial judge.

24. See Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 13.2, at 623-25, 627-38 (1992) (discussing the broad discretion prosecutors have when deciding whether to prosecute and stating that it is difficult to prove discriminatory prosecution due, in part, to the required elements “that other violators similarly situated are generally not prosecuted,” “that the selection of the claimant was ‘intentional or purposeful,’” and “that the selection was pursuant to an ‘arbitrary classification.’” (citations omitted)); cf. Maroney, supra note 22, at 566-67 & n.14 (stating that “[p]rosecutors at worst undercharg[e], refus[e] to charge, or encourag[e] leniency, and at best fail to give the problem [of bias crimes] serious attention”).

25. See Buckley v. Fitzsimmons, 509 U.S. 259, 261 (1993) (considering a prosecutor’s alleged false statements used to secure an indictment); Burns v. Reed, 500 U.S. 478, 482-83 (1991) (considering a claim that a prosecutor failed to disclose a confession that was obtained through hypnosis); United States v. Talley, 124 F.3d 758, 765-66 (10th Cir. 1999) (finding that a prosecutor violated an in limine order when questioning a witness); People v. Hill, 952 P.2d 673, 684-94 (Cal. 1998) (holding that a prosecutor committed misconduct by mischaracterizing evidence, referring to facts not in evidence, making derogatory comments about the defense counsel, and intimidating a defense witness); Commonwealth v. LaCava, 666 A.2d 221, 231 (Pa. 1995) (reversing on the grounds of the prosecutor’s misconduct during the sentencing phase).

26. See U.S. Const. amend. V, XIV.

27. See U.S. Const. amend. VI; see also Maryland v. Craig, 497 U.S. 836, 845 (1990) (“The central concern of the Confrontation Clause [of the Sixth Amendment] is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”). The Sixth Amendment also guarantees defendants the assistance of counsel and compulsory process for defense witnesses at trial. See U.S. Const. amend. VI.

28. See U.S. Const. amend. VI.
This issue has involved examining available data about the relationship between arrests and prosecutions in a number of large jurisdictions in the United States and investigating historical and interpretive treatment of the Fourth Amendment. That examination has led me to the thesis that it is unreasonable within the meaning of the Fourth Amendment for the government to arrest individuals when the government lacks a contemporaneous intention and/or ability to prosecute the individuals for the offenses charged. The governmental entities relevant to this Article are each of the fifty states, their respective local subdivisions, and the District of Columbia as they each enact and enforce criminal laws by arrest and by prosecution. Data on arrests and on prosecutions for each of the years 1990 through 1994 is used to demonstrate arrest and prosecution ratios.

My premise does not require that a state guarantee that all or most prosecutions will lead to convictions, or even that a prosecutor will be able to garner sufficient evidence to prove a particular case beyond a reasonable doubt. The Fourth Amendment, however, requires that the government be held accountable for whether its own actions, or nonfeasance, have resulted in a system in which the majority of arrests become an end unto themselves. This question of governmental accountability takes Fourth Amendment analysis beyond determining whether the Fourth Amendment was violated in a single interaction between an individual and a police officer. It requires viewing the constitutional safeguards as first, a delineation between individual rights and the limited authority of government to interfere with those rights and, second, as a requirement that the system of law

29. It could, of course, be argued that the underlying assumption of this Article—that individuals are "punished" by arrest when they do not receive all of the constitutional rights that apply to criminal cases—is, in essence, a claim of violations of due process. This Article, however, follows the Supreme Court's holdings that constitutional issues should be considered by reference to specific constitutional rights, such as the Fourth Amendment, rather than more general concepts of due process. See Albright v. Oliver, 510 U.S. 266, 271-75 (1994) (concluding that substantive due process is a generalized claim that will not bring relief when the constitutional protection asked for exists in a particular amendment); Graham v. Connor, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against . . . physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." (citation omitted)).

30. See infra notes 143-154 and accompanying text and tables (demonstrating the relationship between arrests and prosecution).

31. See infra notes 143-154 and accompanying text and references to tables in Appendix C.

32. See generally infra notes 58-84 and accompanying text (discussing the application of the Fourth Amendment to arrests).
enforcement and prosecution be held accountable to enforce the constitutional protections on behalf of each individual.

Part I gives a brief overview of the language and of the judicial interpretation of the Fourth Amendment and its relationship to state arrest laws. Part II examines the operation of state arrest laws, statistics on arrests and on prosecutions, and the respective roles of police, prosecutors, and the criminal justice system in creating a volume of arrests that jurisdictions are unable to handle effectively. Part III measures the ratio of arrests to prosecutions by the reasonableness standard of the Fourth Amendment.

Part IV discusses the requisite standard for determining reasonableness, which is a weighing of harm to individual Fourth Amendment rights against concrete law enforcement rationales. Part V explores possible legal “distractions” that may prevent a coherent and consistent articulation of the Fourth Amendment’s limitations on seizures, such as the concept of federalism and historical interpretations. Finally, Part VI sets out possible solutions by courts, by legislatures, by administrative agencies, and by litigants.

I. THE FOURTH AMENDMENT

A. The Text

The Fourth Amendment provides:

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

On its face, the amendment protects “the people” from governmental action in regards to searches, seizures, and warrants. Second, it identifies several specific “zones” entitled to protection: it distinguishes between persons, their houses, and their papers and personal effects. Neither the language of the amendment, nor anything remaining of or even alluded to in its drafting or ratifying history,

33. See infra notes 39-84 and accompanying text.
34. See infra notes 85-232 and accompanying text.
35. See infra notes 233-283 and accompanying text.
36. See infra notes 284-399 and accompanying text.
37. See infra notes 400-485 and accompanying text.
38. See infra notes 486-512 and accompanying text.
39. U.S. Const. amend. IV.
reveals priorities among the zones. It does not give priority to houses over persons standing on streets; word placement would, if anything, indicate that "persons" are the primary consideration. The language of the amendment does treat the zones in the conjunctive; a person is guaranteed protection from unreasonable search and seizure whether he is in his house or not. The amendment applies even if a person's papers are not in or on his property at the time of search or seizure.40

B. Drafting History

The language varies little from the first version drafted by James Madison and presented to the House of Representatives on June 8, 1789, during the First Congress. The first version read:

The rights of the people to be secured in their persons, their houses, their papers, and their other property from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.41

The amendments then were delegated to a select committee.42 On July 28, 1789, the House issued a committee report, as a committee of the whole, on the amendments proposed by Madison.43 Language changes appeared in the provision relating to search and seizure:

The rights of the people to be secured in their persons, their houses, their papers and their other property effects from all unreasonable searches and seizures, shall not be violated by warrants issuing, without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized.44

40. See generally John Hart Ely, Democracy and Distrust 96-97 (1980) (noting that the Fourth Amendment's language and specific references to areas of protection are not procedural, but recognize broader concepts of limitations on government intrusion).


42. See id. at 103 (The Congressional Register, 21 July 1789).

43. See id. at 29-33 (House Committee Report, July 28, 1789).

44. Id. at 31. Strikeouts have been added to denote text that has been deleted from the Madison version and underlining has been added to denote text added by the House Committee.
The House Committee Report deleted the original language referencing unreasonable searches and seizures. Obviously, that was more than a "minor" word change. Yet, constitutional scholar Bernard Schwartz concluded that the omission was simply inadvertent.

On August 13, 1789, the House resolved itself into a committee of the whole again to consider the proposals of Madison and the select committee. Amendment-by-amendment consideration occurred between August 14 and 18; discussions are known to have taken place regarding the present First Amendment's guarantees of religion, assembly, speech, and press; the provisions regarding the right to bear arms and quartering of soldiers; provisions relating to double jeopardy, self-incrimination, just compensation and due process that became the Fifth Amendment; and provisions regarding bail, fines and punishments that became the Eighth Amendment. The precursors to the Fourth and Ninth Amendments received brisk approval.

The Gazette reports that Representative Gerry asserted that the language "by warrants issuing" in the search and seizure provision was not strong enough. He proposed the language "and no warrant shall issue" instead. The Congressional Register for August 17, 1789, however, documents Representative Benson, rather than Representative Gerry, as objecting to the words "by warrants issuing" and proposing it to be altered to read "and no warrant shall issue." Either way,

45. See id.
46. BERNARD SCHWARTZ, THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS 177 (Madison House 2d ed. 1992). The legislative history reveals no other explanation, yet Professor Schwartz's assumption may not be the only possibility. The deletion would make the right against searches and seizures absolute, and not subject to weighing under a reasonableness standard. The searches and seizures language connotes formal and specific official action; its deletion could give broader protection from official action, such as prohibiting any official method of obtaining personal papers, as by subpoena, or effects, as by forfeiture.

Leonard Levy's analysis of the Fourth Amendment does not make the broader reading implausible. He asserted that the Fourth Amendment reflects a "myth" that English law, particularly the Magna Carta, prevented the government's encroachment on private premises. LEONARD LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS AND HISTORY 147-48 (1995). Thus, the broader language could have been intended to make clear that the protection extended also to intrusions by the sovereign, as well as to those of any other governmental entities or private parties.

47. See CREATING THE BILL OF RIGHTS, supra note 41, at 104-07 (The Daily Advertiser, 14 August 1789).
48. See SCHWARTZ, supra note 46, at 174-78.
49. See id. at 177.
50. CREATING THE BILL OF RIGHTS, supra note 41, at 181 (internal quotation marks omitted) (Gazette of the United States, 22 August 1789).
51. Id.
52. Id. at 188 (internal quotation marks omitted) (The Congressional Register, 17 August 1789); see id. at 31 n.20 (noting the discrepancy between the Gazette and The Congressional
the statement is the only expression of the purpose of the change—that under no circumstances could a warrant be issued without the procedural safeguards specified in the Fourth Amendment. The proposed language appeared, separating the amendment into two clauses, by August 24, 1789, when the House approved the amendments and resolved that they be submitted for ratification by the states. The House finished consideration of the amendments on August 24, 1789. The Senate considered them between August 24 and September 9. The Senate version of the Fourth Amendment was not altered again in Conference Committee. Little record of any Senate debate on the amendment as a whole is available.

C. Application to Arrests

The structure of the Fourth Amendment creates two clauses. The first explicitly covers both searches and seizures and measures them each by a reasonableness standard. The second, the warrant clause, specifies the process for obtaining warrants and the contents of warrants. The Supreme Court has applied the Fourth Amendment to all seizures, even those involving only a brief detention of per-

Record). According to both the Gazette and The Congressional Register, the proposal lost on a vote. See id. at 181, 188.

53. See id. at 39 (House Resolution and Articles of Amendment, August 24, 1789). Representative Livermore moved during debate on August 17 that “and not” be deleted between “affirmative and particularly” in the warrant clause; the House retained the stronger language. Id. at 188 (internal quotation marks omitted) (The Congressional Register, 17 August 1789).

54. See Schwartz, supra note 46, at 181.

55. See id. at 181-84.

56. See id.

57. See id. at 181. Because the “Senate sat behind closed doors until February, 1794,” the essence of speeches and of formal action taken in the Senate relating to the Bill of Rights are found only in the Annals of Congress and the Senate Journal; those accounts, however, are not verbatim and do not tell us anything “of the discussion during Senate debates.” Id. Madison’s own intentions and understandings of his drafting mandate are reflected in his correspondence. See id. at 160-69. His personal notes, however, were not made public until 1840. See James Etienne Viator, The Fourth Amendment in the Nineteenth Century, in The Bill of Rights: Original Meaning and Current Understanding, supra note 16, at 172.

Most of the congressional comments about the amendments were either word-smithing or discussions about the necessity for amendment. See Schwartz, supra note 46, at 162-65 (discussing Madison’s proposed Amendments and noting that some believed they were unnecessary); Robert J. Morgan, James Madison On The Constitution and the Bill of Rights 132-34 (1988) (noting that even Madison was originally an opponent of the Bill of Rights).

58. See U.S. Const. amend. IV; see also supra note 39 and accompanying text (providing the full text of the Fourth Amendment).
ARRESTS WITHOUT PROSECUTION

The Supreme Court has, however, created a different standard to determine the constitutionality of arrests versus the standard for searches. A seizure occurs at whatever point a reasonable person believes he is no longer free "to disregard the police and [to] go about his business." Therefore, if a police officer restrains an individual by "physical force or show of authority," a seizure has occurred. The primary, if not sole, purpose of a seizure is to "set[ ] the criminal justice mechanism in motion."

The standard for a lawful arrest, whether with a search warrant or without, is probable cause. Probable cause requires a showing that the facts and the circumstances would lead the officer to believe that a crime has been committed by the arrestee.

The Court has not explicitly answered the debate over whether the warrant clause of the Fourth Amendment, which requires specificity and a statement of probable cause made under oath to a judicial officer, drives the amendment. The Court has, however, borrowed

59. See United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975) ("The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest" (citing Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 10-19 (1969)).


61. California v. Hodari D., 499 U.S. 621, 628 (1991); see Florida v. Bostick, 501 U.S. 424, 434 (1991) (explaining that "a seizure does not occur simply because a police officer approaches an individual and asks a few questions"; rather, "[t]he encounter will not trigger Fourth Amendment scrutiny unless it loses its consented nature").

62. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

63. Tennessee v. Garner, 471 U.S. 1, 10 (1985). In Garner, the Court found that the use of deadly force is a "self-defeating way of apprehending a suspect" and as such, "guarantees that the [criminal justice] mechanism will not be set in motion." Id.; see also infra notes 256-262 (discussing Garner).

64. See U.S. CONST. amend. IV (dictating that "no Warrants shall issue, but upon probable cause"); Beck v. Ohio, 379 U.S. 89, 91 (1964) (stating that, in the absence of a search warrant, "[w]hether [an] arrest [is] constitutionally valid depends... upon whether, at the moment the arrest was made, the officer[ ] had probable cause to make it").

65. See Beck, 379 U.S. at 91 (defining probable cause as "facts and circumstances" within an officer's knowledge "of which... [he] had reasonably trustworthy information... sufficient to warrant a prudent man in believing" that an offense was occurring or had occurred).

66. See Henry v. United States, 361 U.S. 98, 100-02, 104 (1959) (discussing the early roots of the Fourth Amendment's probable cause requirement and measuring the standard against reasonableness); see also Coolidge v. New Hampshire, 403 U.S. 443, 492 (1971) (Harlan, J., concurring) (arguing that upholding a conviction despite a warrant violation
both from the "reasonableness" standard of the first clause and the "probable cause" element of the second clause to justify warrantless arrests. As long as probable cause is present, warrantless arrests in open fields and in public places are explicitly authorized by controlling case law. There is also an exception to the warrant requirement for searches if a search is made incident to a valid arrest. By con-

would "go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence"). In Coolidge, Justice Harlan noted that some scholars believe that "emphasizing the warrant requirement over the reasonableness of the search" reverses the historical basis of the Fourth Amendment. Id.; see also Payton v. New York, 445 U.S. 573, 621 (1980) (Rehnquist, J., dissenting) (noting that there is "significant historical evidence" that the framers of the Constitution did not intend that the warrant requirement would be elevated above the necessity of probable cause).

67. See Hester v. United States, 265 U.S. 57, 59 (1924) (noting that the "special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields").

68. See United States v. Watson, 423 U.S. 411, 423 (1976) (finding that although an officer's "judgements about probable cause may be more readily accepted when backed by a warrant issued by a magistrate" requiring such a practice is not necessary "when the judgement of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause").

69. See United States v. Robinson, 414 U.S. 218, 235 (1973) ("[I]n the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

The Court has also recognized a warrantless search exception for vehicles and ensuing arrests. See Husty v. United States, 282 U.S. 694 (1931); Carroll v. United States, 267 U.S. 132 (1925). The Supreme Court used Carroll to articulate the distinction between requiring a warrant for search of a private dwelling and instances where "it is not practicable to secure a warrant," because of the mobility of the vehicle. Carroll, 267 U.S. at 153. Carroll holds that a misdemeanor/felony distinction is no longer viable in judging warrantless searches and seizures, and that seizure of contraband goods and arrest of the transporter are separate issues, as long as each is sustained by reasonable cause. Id. at 158-59. The case, however, is dubious authority for a probable cause standard. Police officers originally attempted to arrange a purchase of illegal liquor from Carroll, who left to procure the liquor, apparently got suspicious, and did not return. See id. at 135. A couple months later, the officers saw Carroll driving near the border of Detroit. See id. The officers stopped the car on the belief that Carroll was engaged in bootlegging liquor, and because of knowledge that illegal activity often occurred at the international border. See id. The Court was satisfied that probable cause existed because the scene of the search and seizure was a major point for illegal importation, and the officer believed that the Carroll "boys" were involved in illegal whiskey transport. See id. at 160. The Court did not address whether the information available to and suppositions made by the arresting officers constituted probable cause.

Husty is also a Prohibition Act case. The petitioners filed motions to suppress evidence based on the warrantless search of an automobile. See Husty, 282 U.S. at 699. The Court found that, for illegal transporting cases, "[t]o show probable cause it is not necessary that the arresting [and searching] officer should have had before him legal evidence of the suspected illegal act." Id. at 700-01 (citing Dumbra v. United States, 268 U.S. 435, 441 (1925); Carroll, 267 U.S. at 132). In Henry v. United States, the Court clarified that an officer "must have reasonable grounds to believe that the particular package carried by the citizen is contraband." 361 U.S. 98, 104 (1959).
trast, most warrantless searches and seizures inside homes are “presumptively unreasonable.” The warrant requirement for searches and seizures made inside homes is relaxed only under a few well-recognized exigent circumstances, such as the hot pursuit of a fleeing suspect, the danger that evidence will be destroyed, and the possibility of danger to a third person. The end result of this case law is that the arrests of millions of individuals do not receive the protection of the warrant clause—unless the individuals are in their homes.

The Court-made formula that probable cause equals reasonableness for arrests also has relaxed one of the explicit requirements of the warrant clause. Warrantless arrests omit the other vital requirement of the warrant clause that a neutral and detached judicial officer, instead of a police officer, determines whether probable cause exists to justify arresting an individual. Individuals exercising their presumed rights to use public streets and facilities are subject to seizure prior to a judicial determination of probable cause. The conclusion that an arresting officer’s determination of probable cause is sufficient to seize an individual contradicts the warrant clause. It cannot be reconciled with the judgment that

\[\text{[t]he point of the Fourth Amendment . . . is not that it deprives law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.}\]


71. See Welsh, 466 U.S. at 750 (discussing exigent circumstances); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (deciding that an ongoing fire is an exigent circumstance); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (recognizing the hot pursuit of a fleeing felon as an exigent circumstance); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (finding that the destruction of evidence qualifies as an exigent circumstance).

72. See Gerstein v. Pugh, 420 U.S. 113 n.12 (1975) (finding that the Fourth Amendment has a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversations" (quoting United States v. United States District Court, 407 U.S. 297, 316 (1972))).

73. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (footnote omitted). In Johnson, narcotics officers were tipped off that individuals were smoking opium in a hotel room. See id. at 12. The officers smelled opium when they arrived in the hotel hallway. See id. They demanded entry and conducted a search. See id. The Court held that, although the odor might have been enough to convince a magistrate to issue a warrant, it did not justify entering without a warrant. See id. at 16, 17.
Case law, however, has qualified the purpose of the amendment insofar as arrests are concerned. The safeguard that probable cause must be determined in the first instance by neutral and detached judicial officers is strictly enforced only for individuals within the four walls of their homes.

Instead of applying the amendment as written, in *Gerstein v. Pugh*, the Court held that the requirement of a judicial determination of probable cause can be satisfied as long as an arrestee is brought before a judicial officer in a "timely" manner after arrest.\(^{74}\) Timeliness subsequently was defined to mean within forty-eight hours of arrest.\(^{75}\)

In *Welsh v. Wisconsin*, the Court explained the reason for its different treatment of arrests, which the Court holds usually do not require warrants, on the one hand, and searches in private premises, on the other hand, which virtually always require warrants.\(^{76}\) The distinction is that "[i]t is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'"\(^ {77}\) That rationale has a profound impact on the Fourth Amendment rights of millions of people each year. It is a direct factor in the volume of arrests that overwhelm the criminal justice system's ability to handle them, as demonstrated by the statistics cited in Part II.\(^ {78}\) It has created a schism between those who are shielded from arrest and its consequences by virtue of the presumed "sanctity" of their homes and those who interact with the police on an hourly and daily basis as they travel public roads and frequent public places.

Part IV considers whether this historical justification is valid.\(^ {79}\) But the assumption in *Welsh* and in other cases that the "rationale" of the Fourth Amendment supports the public place/private place distinction for arrests is, at best, an interpretation read into words that do not convey that message. More to the point, it is axiomatic that an interpretation that subjects millions of individuals to arrest each year

---

75. See *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991). The *McLaughlin* rule was held to be retroactive for cases pending on the date the rule was announced. See *Powell v. Nevada*, 511 U.S. 79, 80 (1994). The majority and dissent in *Powell* each marshaled support on the question of whether a violation of the 48-hour rule would vitiate the ensuing prosecution. The suppression issue was not reached, however, because it was not raised, argued, or decided below. See *id.* at 84-85.
76. *Welsh*, 466 U.S. at 748-49.
77. *Id.* at 748 (quoting United States v. United States District Court, 407 U.S. 297, 313 (1972)).
78. See *infra* notes 85-232 and accompanying text.
79. See *infra* notes 284-399 and accompanying text.
based upon judgments by police officers alone is such a skewed result that it requires reconsideration.

\[ \text{ARRESTS WITHOUT PROSECUTION} \]

\[ \text{17} \]

\[ D. \text{ State Laws and the Fourth Amendment} \]

Between 1791 and 1949, the Bill of Rights, including the Fourth Amendment, applied only to the federal government—to searches and seizures by federal law enforcement agents.\(^8\) The relatively few federal law enforcement agencies and criminal statutes during that period, no doubt, made it easier to scrutinize the actions of federal officers with arrest powers and the outcomes of federal prosecutions.\(^8\)

In 1949, the Supreme Court found that the Fourth Amendment, because of its fundamental nature, applies to the states through the Due Process Clause of the Fourteenth Amendment.\(^8\) In 1961, the

---

\[^8\] See Lessee of Livingston v. Moore, 32 U.S. 469, 551-52 (1833) (finding that the amendments do not apply to the states); see also Barron v. Mayor of Baltimore, 32 U.S. 243, 247-51 (1833) (holding that the Fifth Amendment's prohibition against taking private property for public use "without just compensation" is not a limitation upon state governments).

\[^8\] By 1812, federal prosecutions were authorized only for offenses designated by statute. See Levine, supra note 46, at 402-04 (discussing the downfall of the federal common law offenses). Prior to 1812, federal courts recognized federal common law offenses. See id. at 402-05. In United States v. Hudson & Goodwin, the Court declared that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence," and therefore, the circuit courts of the United States cannot exercise common law jurisdiction in criminal cases. 11 U.S. 32, 33, 34 (1812); see also Levine, supra note 46, at 405 (examining the Court's decision in United States v. Hudson & Goodwin).

Many Supreme Court decisions on search and seizure, up through the 1940s, involved relatively few federal statutes. The majority of these early cases fell under the National Prohibition Act. See, e.g., Nathanson v. United States, 290 U.S. 41 (1933); Sgro v. United States, 287 U.S. 206 (1932); Marron v. United States, 275 U.S. 192 (1927); McGuire v. United States, 273 U.S. 96 (1927); Byars v. United States, 273 U.S. 28 (1927); Albrecht v. United States, 273 U.S. 1 (1927); Dumbra v. United States, 268 U.S. 435 (1925); Carroll v. United States, 267 U.S. 132 (1925). A number of cases also fell under the War Powers Act. See, e.g., United States v. Di Re, 332 U.S. 581 (1948); Harris v. United States, 331 U.S. 145 (1947); Davis v. United States, 328 U.S. 582 (1946).

Nonetheless, even with relatively few federal agencies and statutes at play, the federal law enforcement system was burgeoning. The Prohibition Era and the Eighteenth Amendment produced an unprecedented number of federal prosecutions. See Charles D. Bonner, Comment, The Federalization of Crime: Too Much of a Good Thing?, 32 U. Rich. L. Rev. 905, 911 (1998).

\[^8\] See Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

The Wolf decision does not report any of the facts or procedural play in the case. Rather, the Court identified the sole issue of the case to be whether the admission in a state court trial of evidence seized in violation of the Fourth Amendment constituted a
Court ruled that the exclusionary rule that was recognized in 1914 in *Weeks* also applies to state court prosecutions. By these rulings, the number of criminal cases implicating the Fourth Amendment grew exponentially after 1961. At the same time, the actions of thousands of state and of local prosecutorial and law enforcement agencies, and the laws and practices of ultimately fifty states and the District of Columbia governing that authority, became subject to Fourth Amendment scrutiny.

---

violation of the Due Process Clause of the Fourteenth Amendment. *See id. at 25-26.* *Wolf* does not extend the exclusionary rule announced in *Weeks v. United States*, 232 U.S. 383 (1914), to state cases. *Id. at 30-31.*

*Weeks* establishes the inadmissibility at trial in federal prosecutions of evidence seized in violation of the Fourth Amendment. *Weeks*, 232 U.S. at 393, 398. The decision emphasizes that the courts "are charged at all times with the support of the Constitution" and are to enforce the "limitations and restraints" imposed on government officials by the Fourth Amendment. *Id. at 392.*

83. *See Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "all evidence obtained by searches and seizures in violation of the Constitution is... inadmissible in a state court").

84. Professor Jerold H. Israel has noted the "monumental impact" of application of the Fourth Amendment to state court cases: "[i]n a single decade those rulings expanded the reach of constitutional regulation of criminal procedure many times beyond that which had been attained through all of the Court's rulings over the previous 170 years." Jerold H. Israel, *Twelfth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1981-1982—Forward: Selective Incorporation Revisited*, 71 GEO. L.J. 253, 253 (1982).

Professor Israel estimated that more than 90% of both felony and misdemeanor cases, respectively, in the United States are prosecuted pursuant to state laws. *See id. at 254 n.4.* Documented criminal case comparisons between federal and state courts by the Bureau of Justice Statistics of the U.S. Department of Justice indicate that, by 1990, federal cases accounted for only four percent of all felony convictions. *See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1994*, at 485 tbl.5.47 (Kathleen Maguire & Ann L. Pastore eds., 1995) [hereinafter 1994 SOURCEBOOK].

*Cf. Walter Berns, Taking the Constitution Seriously* 126-27 (1987) (asserting that the Bill of Rights "played almost no role in the securing of rights" during the amendments' first 125 years). Berns's comments were part of academic discussions about the cause of the relative lack of fanfare when the Bill of Rights was ratified. The public quiet that met them after two years of congressional "sturm und drang" has led another scholar to conclude that the new nation's leaders and citizens did not consider them to be "the most consequential part of the Constitution." Robert A. Goldwin, *From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution* 174 (1997).

Professor Bernard Schwartz also explained another possible reason for the understated presentation of the ratified Bill of Rights. The first Congress was split on whether it should have taken precious time away from other pressing matters of the new national government to consider the amendments. *See Schwartz, supra* note 46, at 187. From this perspective, the Framers would not have wanted to draw particular notice to the completion of the amendments, and thereby highlight how many other things were held in abeyance during the amending process. The enumerated rights also were familiar; all of the amendments, in some form, had been proposed by the states themselves during their constitutional ratifying conventions. *See Goldwin, supra*, at 89. Once they were secure within the new nation's organic laws, the natural order of things for many was restored, and clamor was no longer necessary.
II. THE MAGNITUDE AND CAUSES OF THE PROBLEM

A. The Operation of State Criminal Laws

State laws, often supplemented by state common law, define criminal conduct, requisite elements of proof, and penalty ranges for offenses committed within the states' respective borders. Those laws govern the standards for arrest upon probable cause to believe that a state criminal law has been violated, to the extent that those laws are not inconsistent with the Constitution.\footnote{See Ker v. California, 374 U.S. 23, 37 (1963) (stating that "the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution"); the lawfulness of ... arrests by state officers is to be determined by [state] law" (citations omitted)).} State laws also establish the jurisdiction of specific state courts over specific criminal prosecutions, such as courts of general or limited jurisdiction, misdemeanor and/or felony cases,\footnote{See, e.g., TEX. CRIM. CODE P. ANN. art. 4.10 (West 1999) (establishing the exclusive jurisdiction of county courts over bail bonds in criminal cases).} and designate the prosecuting authority for each geographical or jurisdictional division within each state.\footnote{See, e.g., CAL. CONST. art. XI, § 1 (district attorneys for each county); N.Y. COUNTY LAW § 700 (McKinney 1991) (stating that "[i]t shall be the duty of every district attorney to conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed").} Those laws and the courts created pursuant thereto establish criminal procedure and rules for the prosecution of criminal cases in each state.\footnote{Professor Richard Boldt, University of Maryland School of Law, has raised the issue of the nature of those amendments now applicable to the states by incorporation. Prior to incorporation, each of the amendments were limitations on government action, because the Constitution granted the federal government only those powers expressly delegated to it. State powers, however, are "reserved" through the Tenth Amendment. See U.S. CONST. amend. X.} The Court has refused to establish "bright lines" to ensure an exact fit between individual state criminal laws and the constitutional protection against unreasonable search and seizure granted to all persons by the Fourth Amendment.\footnote{Perhaps Justice Harlan answered Professor Boldt's question. Despite his preference for leaving the states "some elbow room" in their enforcement of criminal law, Justice Harlan eventually came down on the side of supporting "sound Fourth Amendment principles at the possible expense of state concerns." Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., concurring). The amendments do not break out neatly into "fundamental" and "nonfundamental" language. Efforts to wring out such distinctions would make the amendments even less certain of consistent application than if they were subject to individual interpretations by each of the states.} The result is a patchwork quilt of law enforcement and of prosecutorial practices that leave in doubt

\[\text{\footnote{See generally Roald Y. Mykkeltværd, The Nationalization of the Bill of Rights: Fourteenth Amendment Due Process and the Procedural Rights 109 (1983) (discussing how "every constitutionally mandated change in Fourth Amendment law" would "apply to the states through the Fourteenth Amendment," and this application of the amendment.}}\]
rather than uphold the protection available under the Fourth Amend-
ment to millions of people arrested each year.

B. State Arrest Laws

Citations to and warrantless arrest standards of the general arrest
laws of each of the fifty states and the District of Columbia are set out
in Appendix A. The state laws prescribe by whom arrests can be
made, and standards, if any, for conducting arrests. Under those
arrest laws, custodial arrests are made in two ways. After issuance of
an indictment or of an information, or after charges are made to po-
lice by a private citizen, a warrant can be issued for the arrest of the
individual who is the subject of the indictment, information, or
charge. Or, if a police officer believes probable cause exists, or an
offense occurs in his presence, he may make an arrest without a war-
rant. Thirty-two states and the District of Columbia authorize arrests
without a warrant for misdemeanors if the offense is committed in the
presence of the arresting officer; twenty-two states authorize warrant-
less arrests for misdemeanors if the arresting officer has a formulation
of "reason to believe" or of "probable cause" to believe that the arres-
tee has committed a misdemeanor, as through the report of another
person, even if the officer did not see the offense being committed.
All of the states and the District of Columbia authorize warrantless
arrests for felonies if the arresting officer has some formulation of
"probable cause" to believe that the person has committed a felony,
which can, but does not have to, include felonies committed in the
officer’s presence.\textsuperscript{96}

The state arrest laws, particularly those authorizing warrantless ar-
rests, have at least three immediate consequences. First, the use of
warrants for arrest becomes the exception, rather than the rule.\textsuperscript{97}
Second, the blanket authority of police officers to conduct arrests for
misdemeanors without warrants undoubtedly results in far more ar-
rests than if a “cooling off” period occurred between the alleged crim-
inal incident and the arrest. The Fourth Amendment anticipates the
benefit of that interim period—that a neutral, detached judicial of-
icer will intervene to determine whether probable cause exists for an
arrest.\textsuperscript{98} Third, such broad police authority coupled with operational
stresses in the court systems effectively removes the buffer between the
government and that individuals that the Framers intended the
Fourth Amendment to provide.\textsuperscript{99}

\textbf{C. State Charging Practices}

\textbf{1. Police Control of Charging.}—The methods of charging cases
varies among the states and even among jurisdictions within a state.
Those methods allow the majority of arrests to become “cases” in the
criminal justice systems of each jurisdiction either without any or with
little scrutiny of prosecutorial merit or feasibility.\textsuperscript{100} An arrest consists
of physical detention of a suspect based on probable cause to believe
he has committed a specific criminal offense. Other administrative
steps, such as booking, photographing the suspect, and fingerprint-

\textsuperscript{96} See also LaFave & Israel, supra note 24, § 1.2 (stating that in most jurisdictions a
police officer with probable cause can make a warrantless arrest in felony cases).

\textsuperscript{97} See LaFave, supra note 93, at 15 (explaining that it is “routine” to make warrantless
arrests).

\textsuperscript{98} See Katz v. United States, 389 U.S. 347, 357 (1967) (stating that “the Constitution
requires ‘that the deliberate, impartial judgment of a judicial officer . . . be interposed
between the citizen and the police’” (quoting Wong Sun v. United States, 371 U.S. 471,
481-82 (1963))); Warden v. Hayden, 387 U.S. 294, 301 (1967) (mandating that the Fourth
Amendment was “intended to protect . . . from searches under indiscriminate, general
authority. Protection . . . was assured by prohibiting all ‘unreasonable’ searches and
seizures, and by requiring the use of warrants, . . . thereby interposing ‘a magistrate be-
tween the citizen and the police’” (quoting McDonald v. United States, 335 U.S. 451, 455
(1948))); Beck v. Ohio, 379 U.S. 89, 96 (1964) (stating that “[a]n arrest without a warrant
bypasses the safeguards provided by an objective predetermination of probable cause”).

\textsuperscript{99} See infra notes 100-104 and accompanying text (discussing police discretion); see
also infra notes 105-117 and accompanying text (discussing prosecutorial discretion).

\textsuperscript{100} See Bureau of Justice Statistics, U.S. Dep’t of Justice, Bulletin: Prosecutors
(notuing that “95% of prosecutors receive felony cases from three or more arresting
agencies”).
ing, occur after the arrest and after the police identify the offense or offenses committed.\textsuperscript{101}

In misdemeanor cases, charging often is complete upon a sworn declaration, usually called a probable cause statement, arrest report, or charging statement, made by the arresting officer or a citizen who has made a complaint to the police.\textsuperscript{102} For many misdemeanor cases, the entire process from arrest to disposition of the case involves relatively few stages; the prosecutor is likely to see the case file for the first time the day before or the morning of the scheduled trial.\textsuperscript{103} This process means that no prosecutorial review occurs at a meaningful time, unless a case is continued to a new trial date on the motion of either the defense, the prosecution, or the court in the case of administrative problems. Thus, an individual’s loss of freedom and the prosecutorial merit of most of those cases stand or fall solely on a police officer’s judgment about the legal sufficiency of the evidence and of the rules of law applicable to the cited offense(s), and on the officer’s judgment about the merit of an individual case from a public policy perspective. Even assuming complete good faith on the part of arresting officers, the likelihood of many such cases being “triable” is not high. But these cases drive the engine or, more accurately, clog the engine of criminal justice throughout the country.

2. Relaxed Charging Methods Used by Prosecutors.—More prosecutorial review occurs in felony cases. Since 1870, however, federal prosecutions for less serious felony cases frequently have been initiated by use of an information rather than an indictment by a

101. See LAFAVE & ISRAEL, supra note 24, § 1.4.
102. See, e.g., KAN. STAT. ANN. § 22-2303.
103. The prosecutor’s role at this stage has been described as follows: Typically, the prosecutor will make the charging decision by consulting the report the police have provided. As long as the report contains elements of a prima facie case (something the prosecutor can easily determine), this report in testimonial form typically will be sufficient to meet the pretrial screening requirements imposed to justify the detention and charging of the defendant. . . . The prosecutor can rely on this kind of evidence to meet these requirements, secure in the knowledge that the overwhelming percentage of cases will end in a plea bargain. Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 RUTGERS L. REV. 1317, 1361-62 (1997) (footnotes omitted). Givelber’s assumption that most of the cases charged will end in plea bargains is not consistent with the prosecution rates in a number of large jurisdictions. See infra notes 172-201 and accompanying text.

Yet Givelber’s overall view of the method of charging is consistent with an earlier assessment that, “‘[u]nless the police report on its face reveals an inconsistency or barrier to conviction, the prosecutor accepts the general conclusion of the police without making an independent investigation or evaluation of the evidence.’” Id. (quoting LLOYD L. WEINREB, DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES 58 (1977)).
grand jury. Many states also have adopted the practice of charging felonies by information rather than by the more cumbersome—and costlier—grand jury process. An information may be issued on the sworn certification of the prosecutor alone; there is no process to measure whether a prosecutor signing an information has any more knowledge about the case than whatever a police officer has related to her. There is, for example, no requirement that a prosecutor interview witnesses before charging by information.

Indictments, by contrast, require empaneling grand juries, subpoenaing witnesses, and convincing a grand jury of probable cause that a felony has been committed and that the "target" of the investigation committed it. Even though the prosecutor guides the proceedings and selects what evidence is presented to a grand jury, there is, theoretically at least, the presumption and the possibility of an independent assessment of evidence by the grand jurors.

Presentation to a grand jury presumptively requires gathering credible evidence and assessing the sufficiency of the evidence to support the elements of the criminal offense(s). At the very least, the grand jury process requires a prosecutor to explain to the grand jurors the legal elements of each offense and how the proffered evidence supports the elements. Again, theoretically at least, the grand jury process puts the burden on the prosecutor to display a modicum of evidence for each count of an indictment.

Indictment by a grand jury, however, is not required to initiate all criminal prosecutions. The Fifth Amendment provides, in pertinent part, that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a

104. See Albrecht v. United States, 273 U.S. 1, 7 (1927) ("The practice of prosecuting lesser federal crimes by information, instead of indictment, has been common since 1870.").

105. Cf. Bureau of Justice Statistics, U.S. Dep't of Justice, Bulletin: Prosecutors in State Courts, 1992, at 6 tbl.10 (1993) [hereinafter Prosecutors in State Courts, 1992] (reporting that for the period from July 1, 1991 to June 30, 1992, only 28% of felony cases filed in state courts were charged by indictment); Tex. Const. art. V, § 12 (amended 1891) (defining an information as "a written instrument presented to a court by an attorney for the State charging a person with the commission of an offense" and establishing that use of informations is "provided by law").

106. Cf. Albroch, 273 U.S. at 6 (stating that when the United States Attorney files an information under his oath of office, "his official oath may be accepted as sufficient to give verity to the allegation of the information").

107. See generally LaFave & Israel, supra note 24, § 15.1 (describing the process of indictment by grand jury).

Grand Jury." According to prosecutors and at least one survey, grand juries are not used in the majority of felony cases.

3. Failure to Exercise Prosecutorial Discretion.—Prosecutorial discretion assumes that prosecutors make professional judgments based on careful review of the merits of individual cases, both from a legal and a public policy perspective. Yet, most of the cases that are the subject of this Article represent a failure of the prosecution function. The large numbers of dismissals in certain jurisdictions, and the way in which they often occur, literally days before or on the day of a scheduled trial, are evidence that the "crunch" of caseloads is driving prosecutorial decisions far more than considerations about the rights of persons arrested, or legal or policy considerations about the prosecutorial merit of individual cases. In millions of cases, prosecutorial discretion is exercised, if at all, only after the deprivation of individual freedom by arrest.

In an article discussing prosecutorial attitudes about hate crimes, Terry Maroney discussed the broad discretion that prosecutors have. Maroney made the charge that this broad discretion allows prosecutors, for example, to elect not to bring hate crime prosecutions. He asserted that decisions to prosecute are often reserved for what might be termed "paradigmatic"—extraordinary or unusual, cases.

The systemic arrests without prosecution present a mirror image of Maroney’s description of hate crime prosecutions. The most common, if not mundane, criminal cases are allowed to remain in the system without the application of prosecutorial discretion. It takes

110. See Prosecutors in State Courts, 1992, supra note 105, at 6. In the BJS/Census Bureau survey for 1992, prosecutors reported having grand juries available in 44% of their districts. Id. The mean percentage of all felony cases brought by grand juries was 28%. See id. According to the survey, in 57% of the districts covered by the survey, even misdemeanors were brought by grand jury. Id. As discussed, supra, use of a grand jury may ensure more careful review of evidence prior to charging. However, extensive use of grand juries for misdemeanor cases begs the question whether prosecutorial resources are expended wisely.
111. Maroney, supra note 22, at 602-09.
112. Id. at 602-03.
113. Id. at 617. The disproportionate attention paid to extraordinary or to sensational cases creates an erroneous public perception of the extent and of the nature of crime in the United States. That attention also can mask the fact that many other serious cases "get lost" in the system due to lack of preparation. See id. at 604-06.
114. See supra note 103 and accompanying text (discussing the failure of prosecutors to review cases adequately and exercise discretion by dropping charges when appropriate). But see Gerard E. Lynch, Our Administrative System of Criminal Justice, 66 Fordham L. Rev.
the more extraordinary or unusual criminal cases for prosecutors to marshal the activity and the preparation that will enable cases to proceed to prosecution.\textsuperscript{115}

The doctrine of prosecutorial discretion makes judges unwitting participants in this passive approach to most criminal cases. The wall of prosecutorial immunity blocks out inquiries or complaints from judges about the volume of cases dismissed.\textsuperscript{116} Prosecutors are not required to articulate reasons for dismissal of cases that will not receive further judicial review or that will not require the defendants to comply with any conditions that might protect the public from defendants who pose a danger to society.\textsuperscript{117}

\textsuperscript{2117, 2140} (1998) (asserting that, "[p]rosecutors' decisions on whether to pursue a particular case, and what level of punishment to demand, are ... routinely influenced by questions of priority and cost"). That statement presupposes that prosecutors routinely "weigh" cases by their legal or societal merit, against known resource factors. Statistics regarding case dismissals without prosecution do not bear out the assumption of such a weighing process. The dismissal rates suggest that decisions to proceed or not are often reactive. The happenstance occurrences of a witness failing to appear for trial or of the total number of cases on a court docket on a given day, for example, are the usual prosecution determinants in that kind of environment; the relative priority or cost of a given case is not the driving force. And even some of the actual determinants are serendipitous, such as the adequacy of the police investigation or of a witness's presence at court.

\textsuperscript{115}. Cf. \textsc{Malcolm M. Feeley, The Process is the Punishment: Handling Cases in a Lower Criminal Court} 177 (1979) (examining criminal cases primarily in the Court of Common Pleas in New Haven, Connecticut, and asserting that "the prosecution is relatively passive in the criminal process"). Feeley described the dynamic of cases that are prosecuted in the same way Maroney analyzed cases that are not:

This passive stance is also reflected in the way prosecutors develop—or perhaps more accurately do not develop—their cases. Only in rare cases that involve a particularly serious charge, a well-known "bad guy," or a serious injury will the prosecutor carefully read through the file before arraignment or first appearance . . . he may even have to rely on the defendant or his attorney to supply details on the incident or information about the defendant's prior record.

\textit{Id.} at 178-79.

\textsuperscript{116}. \textit{See id.} at 69 (stating that "the judge's function is to ratify the decisions of the prosecutors and defense attorneys").

\textsuperscript{117}. Jurisdictions often resort to conditional dismissals of criminal cases. They might be called, for example, probation before judgment, suspension of proceedings, or diversion. \textit{See, e.g., Md. Rule 4-248} (stipulating that on the State's Attorney's motion, the court may "stet" the charge—put the case on an inactive docket, provided that the defendant does not object). These dispositions enable defendants to avoid entry of a conviction and of a potential punishment if the defendants meet certain conditions for a specified time. \textit{See, e.g., The Maryland Institute for Continuing Professional Education of Lawyers, Criminal Practice and Procedure in the District Court of Maryland} § 8.9 (Maureen L. Rowland ed., rev. ed. 1995) (stating that "[i]n many cases the prosecutor will place conditions on the entry of a stet" and noting that "[a]lthough placement of conditions on the entry of a stet is a frequently used technique, there is no authority in the Maryland Rules or in case law for placement or conditions on the entry of a stet"). The conditions may range from no additional arrests during the covered period, to attending and satisfac-
4. The Role of Politics in Arrests.—Political factors also encourage more arrests for state law violations. Public officials and law enforcement officers often cite the high volume of arrests as proof of an aggressive and effective battle against crime. The lack of scrutiny of case outcomes leaves these claims unchallenged. Instead, theories about the deterrent effect of so-called zero-tolerance arrest policies become the law enforcement rationale, even with conflicting views about the theories, or conflict between the theories and constitutional safeguards.

Michael Tonry has documented this dynamic in the War on Drugs, which has caused the arrest rate to rise dramatically since 1980. He made the case that the Reagan and the Bush administrations declared the war, even though the use of illegal drugs was steadily declining. The war message filtered down to the “troops” in local police departments that more drug arrests were needed. The combination of personnel incentives for police officers to log in more arrests, and social circumstances that made it easier for police to
torily completing a course of drug or alcohol treatment, to making monetary restitution to a victim. See id.

118. See Daniel Pedersen, Go Get the Scumbags, NEWSWEEK, Oct. 20, 1997, at 32 (citing evidence that aggressive police tactics in New Orleans by its city police chief may correlate with significant reductions in incidences of armed robbery and homicide); David Whitman, On Not Believing the Good News, U.S. NEWS & WORLD REP., Dec. 29, 1997, at 4446 (noting one reason that New York Mayor Rudolph Giuliani and Police Chief William Bratton have been effective in cutting crime is that they have “started arresting people for minor ‘quality of life’ offenses”).

119. See John A. Martin & Michelle Travis, Defending the Indigent During A War on Crime, 1 CORNELL J.L. & PUB. POL’Y 69, 71-74 (1992) (noting that despite the claim of some public officials that new policing methods are cutting crime rates, others believe that shifting demographics are causing the drops in crime rates). Martin and Travis noted, for example, that a decrease in the number of persons within the 16-25 age range, which is considered the most crime-prone age group, might impact the numbers of crimes committed. Id. at 72.

120. See id. at 82-89 (arguing that the Supreme Court’s decisions in the early 1990s moved constitutional law “[t]oward the right” in part to help promote “tactics developed and implemented in the nation’s war on crime”).

121. Michael Tonry, Race and the War on Drugs, 1994 U. CHI. LEGAL F. 25, 25. Tonry noted that between 1980 and 1993, “American prison and jail populations tripled . . . primarily due to increased numbers of drug convictions.” Id. (citation omitted).

122. Id. at 28.

123. See id. at 26 (noting that in many cities, “[m]assive arrests and street sweep tactics” were employed).

124. Although police departments deny the existence of quotas for numbers of arrests, news accounts describe allegations that performance standards or psychological pressure are used by the departments to maintain high arrest totals. See Robin Topping, Ruling: Nassau Had Illegal DWI Quota, NEWSDAY, Feb. 27, 1997, at A27 (reporting that officers who made drunk driving arrests were awarded overtime shifts); Troopers See Transfers As Reprisals, THE DALLAS MORNING NEWS, May 4, 1998, at 17A (reporting allegations by state troopers
target low-income minority communities, caused the arrest rate to burgeon.125 From the perspective of Tonry, and others, the legitimate goals of the "war," including assisting minority communities in removing a scourge, came at the price of a disproportionate social and economic negative impact on blacks. Between 1985 and 1989, the number of arrests of blacks for drug violations almost doubled, from 210,298 to 452,574, while those of whites grew by only 27%.126

The combination of allowing police officers alone to determine if the majority of cases merit arrest, having more "stream-lined" charging methods used by prosecutors, and having political messages that "more arrests are good" have flooded the criminal justice system.127 This "flood" probably is the primary cause of the phenomenon of so many arrests not resulting in prosecution.128

5. A Blind Eye to Negative Police Attitudes.—Justice McReynolds, dissenting in Carroll v. United States,129 warned that warrantless arrests by police officers posed "no limit to the power of a police officer."130 The dangers of such broad discretion can exist simultaneously with probable cause. Arrests on charges that will not be prosecuted are one direct result of such discretion. A volume of cases that overwhelm the capacity of the criminal justice system to prosecute them puts the general public at risk.

Except among camps of criminology and sociology theorists, the purposes of arrest often are unarticulated, the standards for the exercise of the decision to arrest are virtually nonexistent, and the requirement of a nexus between millions of arrests and legitimate state that "quantitative expectations" are de facto quotas); Thomas Ott, Police Say Mentor Still Using Quotas, The Plain Dealer (Ohio), Oct. 27, 1998, at 1B (reporting that a police union filed grievances protesting the use of quantitative performance standards).

125. See Tonry, supra note 121, at 52-55 (providing a number of reasons why it is easier to make arrests in minority neighborhoods that are "socially disorganized" and asserting that because it is easier, police officers are more likely to make arrests in minority neighborhoods than in other neighborhoods because the number of arrests that a police officer makes has "long been a conventional measure of productivity and effectiveness").

126. See id. at 54-55.

127. See app. C, tbl.1 (comparing the annual number of arrests for less serious offenses in the United States with the annual number of arrests for more serious offenses).

128. Cf. Israel, supra note 5, at 772-77 (recognizing that criminal caseloads have grown, but arguing that other cultural and attitudinal factors are responsible for the perceived failure of the criminal justice system). But cf. Feeley, supra note 115, at 249-57 (arguing that an increase in caseload does not result in fewer trials and motions, more plea bargains, more lenient sentences, or more restrictive pretrial releasing policies).

129. 267 U.S. 132 (1925).

130. Id. at 165 (McReynolds, J., dissenting) (quoting Pinkerton v. Verberg, 44 N.W. 579, 582-83 (Mich. 1889)).
interests does not exist, whether they are public safety, maximization of limited resources, or similar goals. Limiting the constitutional standard for arrests to probable cause turns a blind eye to recognized and documented police attitudes when they do exist.

What might be termed "show arrests" occur either to maintain respect for police, or to give an impression of "full enforcement." Even more problematic are decisions to arrest because police, although able to articulate probable cause, use an arrest to serve other law enforcement interests besides prosecuting the instant charge, such as punishment of the arrestee, a kind of social reorganization directed at "undesirables," or the desire to gather evidence of other crimes through interrogation and search made pursuant to the current arrest.

In *Whren v. United States*, the Supreme Court refused to consider possible ulterior motives of police officers who have a lawful ground—probable cause, to detain an individual or to make an arrest. That holding could be read to sanction use of the arrest power, even if there is no intention or ability to prosecute the arrestee for the offense charged. At the very least, that interpretation of *Whren* keeps the floodgates of arrests open. At the worst, it fails to measure Fourth Amendment compliance by one reality of police work.

131. The lack of articulated standards, goals, and accountability for arrests are not a new phenomenon resulting, for example, just from the recent surge in drug-related offenses. See LaFave, supra note 93, at 492-524 (identifying the lack of articulated standards, goals, and accountability for arrests 15 years before the war on drugs); see also Frank J. Remington, *LaFave On Arrest and The Three Decades That Have Followed*, 1993 U. Ill. L. Rev. 315, 315-21 (arguing that LaFave's 1965 recommendation that police should recognize their broad exercise of discretion, but that their discretion needs to be critically reevaluated continuously, remained a valid recommendation in 1993).

132. Arrests to force "respect" for police are rife with subjective motivations. They may, for example, enable a police officer to exact a measure of revenge, even when his own manner, or lack of manners, has caused an encounter to escalate. Cf. Lawrence Sherman, "Policing for Crime Prevention," in U.S. Dep't of Justice, Office of Justice Programs, *Preventing Crime: What Works, What Doesn't, What's "Promising"* (NCJ 165366, Feb. 1998) 8-1.

133. See LaFave, supra note 93, at 146-49 (identifying situations where police may arrest a suspect to "maintain respect for the police" or to "avoid the impression of non-enforcement").

134. See id. at 149-77 (providing hypothetical situations where police may arrest a suspect to serve other law enforcement interests and describing situations and reasons why police may arrest to control a prostitute or transvestite, or to sanction gambling and liquor law violations).


136. Id. at 813. The Court dismissed the idea that a police officer's ulterior motive, such as the desire to investigate an informant's tip that a suspect is carrying illegal drugs, may invalidate the officer's actions that are otherwise legally justified. Id.
In *Whren*, police observed a truck sitting at a stop sign for an "unusually long time," saw the truck make a turn without signaling, and then speed off at "an unreasonable" speed.\(^{137}\) When the officers approached the truck in response to the traffic violations, they observed plastic bags of what appeared to be crack cocaine in Whren's hands.\(^{138}\) Thus, Whren's arrest was based on a sighting of suspected illegal drugs in plain view.

Whren's articulation of a pretext theory was that a reasonable officer would not have stopped the vehicle for the specified traffic offenses.\(^{139}\) He speculated that police could use routine traffic violations to accomplish ulterior motives unrelated to the stated justification for a traffic stop.\(^{140}\) The short answer to the claims in *Whren* would have been that the petitioners made no showing whatsoever of ill motive or of pretext in the case. The Court recognized that "[t]he foremost method of enforcing traffic and vehicle safety regulations . . . is acting upon observed violations."\(^{141}\)

Instead of limiting the decision to the facts before it in *Whren*, the Court can only be said to have reached to articulate a broader proposition. The Court stated that "[s]ubjective intentions [of police officers] play no role in ordinary, probable-cause Fourth Amendment analysis."\(^{142}\) The one exception recognized by the Court is discrimination.\(^{143}\) That broad declaration regarding possible motives of police officers, without facts before it that might have illuminated or have informed it, perpetuates the power of individual police officers to determine the amount of protection available to individuals under the Fourth Amendment.\(^{144}\)

---

137. *Id.* at 808.
138. See *id.* at 808-09.
139. See *id.* at 814.
140. See *id.* at 810.
141. *Id.* at 817 (internal quotation marks omitted) (quoting Delaware v. Prouse, 440 U.S. 648, 659 (1979)).
142. *Id.* at 813.
143. *Id.* (stating that "the Constitution prohibits selective enforcement of the law based on considerations such as race").
144. The Court's treatment in *Whren* of prior motivation cases to draw that broad conclusion may have been too glib. The *Whren* opinion asserts that the Court has questioned police motive only in cases where probable cause was not established, such as inventory and administrative searches. *Id.* at 811. However, the opinion obfuscates the probable cause and police motive issues that existed in the cited cases.

First, *Colorado v. Bertine*, 479 U.S. 367 (1987), holds that "[t]he policies behind the warrant requirement [and the related concept of probable cause,] are not implicated in an inventory search," *id.* at 37 (citing South Dakota v. Opperman, 428 U.S. 364, 371 (1976)), because probable cause is the antecedent to inventory searches. As the Court pointed out in *Whren*, inventory searches occur after police have arrested a driver and seized his vehi-
Even the allowance in *Whren* that an underlying motive of racial discrimination would be sufficient to look past probable cause is hollow. 145 Challenges to arrests and to prosecutions on the grounds of racial bias are judged by a standard that renders the current racial disparities in the criminal justice system unassailable.

As Michael Tonry pointed out, disparate impact is sufficient to make a prima facie case of racial or of other discrimination in employment, for example. 146 The de facto discrimination analysis, however, does not apply to contexts such as the arrest rate. 147 Despite recogni-

---

145. See supra note 142.


147. To prove a claim of selective prosecution based on race, a claimant must prove the existence of discriminatory effect and discriminatory intent. See United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)). By contrast, the Court recognizes that the disparate impact of employment practices may constitute employment discrimination. The Court held that Title VII of the Civil Rights Act of
tion in Whren that racial discrimination in arrests would present an appropriate constitutional issue, the decision did not alter existing precedent regarding application of a disparate impact analysis. Thus, Whren does not offer any way to examine the possibility of underlying racial animus in arrests. That cause appears foreclosed, even though police candidly admit that they target minorities for stops and arrests.\footnote{148}

D. Arrest Statistics

If the annual number of arrests in the United States is an accurate measure of the criminal justice system's ability to prevent and to mete out appropriate sanctions for crime, then the war against crime has already been won.\footnote{149} The actual numbers probably far exceed the public's general knowledge. The numbers also test Charles Silber-


Once the plaintiff presents a prima facie case of employment discrimination, the burden shifts to the employer to articulate nondiscriminatory reasons for the challenged employment decision. \textit{See} McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The plaintiff is subsequently given the opportunity to demonstrate that the articulated reasons are mere pretext. \textit{See id.} An employer's failure to proffer a nondiscriminatory justification does not automatically entitle the plaintiff to judgment; however, a fact-finder may infer that the silence hides discriminatory intent. \textit{See} St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

By contrast, in criminal prosecutions, no such evidentiary shifting is available to prove discrimination. A claimant must demonstrate not just that a significant number of members of a racial group were prosecuted, but must also introduce evidence showing that comparable numbers of individuals of another racial group committed the same offense but were not prosecuted. \textit{See id.} In Armstrong, the Court found that the claimant's evidence regarding 24 defendants was insufficient. \textit{Armstrong}, 517 U.S. at 458, 470. It also held that a claimant is not even entitled to discovery regarding prosecutions unless he produces "credible evidence" that similarly situated defendants of other races could have been prosecuted but were not. \textit{Id.} at 470.

In McCleskey v. Kemp, 481 U.S. 279, 298-99 (1987), the Court rejected a discrimination challenge to the death penalty, despite substantial evidence of its disproportionate application to blacks. The Court held that proof of Georgia's application of the death penalty more often against blacks than whites amounted only to a "discrepancy that appear[ed] to correlate with race," and did not prove an intent to discriminate. \textit{Id.} at 312.

\footnote{148} See Tonry, \textit{supra} note 121, at 54 ("the police chief in Charlottesville, Virginia, . . . observed that anti-drug efforts were 'directed mainly at minorities living in poor inner-city neighborhoods'" (quoting B. Drummond Ayers, \textit{Drug Charges Embarrass University of Virginia}, N.Y. TIMES I-26 (Mar. 24, 1991)).

\footnote{149} See \textit{id.} at 56 tbl.1 (indicating that between 1985 and 1989 the total number of arrests annually increased dramatically from 700,009 to 1,074,345).
man's first hypothesis that most of what is believed about the criminal justice system is false. Despite public and official focus on serious crimes, most arrests are for low-level crimes. Increases in arrests for the period studied, with the exception of drug cases, have been for nonserious crimes.

Estimated total numbers of arrests by state and by local law enforcement agencies are reported annually by the Federal Bureau of Investigation (FBI) through its Uniform Crime Reporting (UCR) program. The UCR gathers data from local law enforcement agencies nationwide and some centralized state reporting systems. The data is published in the FBI's annual reports, *Crime In the United States: Uniform Crime Reports*.

The FBI reports the UCR arrest data in two crime categories: Part I and Part II offenses. The Part I offenses are used by the FBI to create a "crime index" to measure "fluctuations in the overall volume and rate of crime." The offenses included in the "index" and "nonindex" categories, respectively, are listed in Appendix B.

The index offenses correspond to felony offenses in numerous state penal codes, and nonindex offenses correspond to state misdemeanor offenses. The FBI, however, does not distinguish between felonies and misdemeanors in the UCR because punishments,
which may control felony-misdemeanor classifications, vary among
state laws. This method of reporting in the largest criminal statistical
database contributes to the difficulty of correlating the statistics
reported nationally with the extent or impact of crime throughout the
United States. The state law categorizations of offenses as either mis-
demeanors or as felonies are indications of perceptions in communi-
ties about the gravity of or threat posed by specific offenses. The FBI's
index system ignores those distinctions. Thus, the UCR treats thefts,
no matter what the value of the stolen property, on par with thefts of a
far greater value. Additionally, thefts are given the same treatment as
robbery, even though robbery is a crime of violence, or is the threat of
violence.

Total arrests reported in the UCR program for the years 1990-
1994 nationwide are in Appendix C, Table 1.

In the UCR program, an "arrest" is defined as "each time a person
is taken into custody, notified or cited for criminal infractions
other than traffic violations." The number of arrests are counted
rather than the number of individuals arrested, because a person may
be arrested more than once during a reporting period. Some jurisdic-
tions do not have data available for each reporting period, and
some do not report data covering an entire calendar year; therefore,
the "total" arrest figures are estimated. The quoted arrest figures
may also include rounding off.

State laws authorize police officers to exercise discretion between
making a full-custody arrest and issuing a notice or citation, some-
times also called a summons. Typically, these are forms (resem-

---

158. 1995 UCR, supra note 152, at 1.
159. For example, Maryland defines robbery as the "felonious taking and carrying away
of the personal property of another, from his person or in his presence, by violence, or by
land defines larceny as the "felonious taking and carrying away of the personal property of
another with intent to deprive the owner of his property permanently." Fletcher v. State,
189 A.2d 641, 643 (Md. 1963). Therefore, in Maryland, robbery requires violence or a fear
of violence while larceny does not.
160. 1995 UCR, supra note 152, at 207.
161. See id.
162. See id. (explaining that for the 1995 reporting period, reporting problems at the
state level caused Delaware and Pennsylvania to provide partial data, and caused New
Hampshire to provide no data). The arrest figures in the UCR consist of statistics provided
by individual law enforcement agencies, and estimates for jurisdictions or agencies that did
not report to the UCR in a particular year, or part of a year. See 1990 UCR, at 176, tbl.26,
explanatory note 1.
163. See 1995 UCR, supra note 152, at 208 tbl.29 n.2.
164. See generally N.Y. Crim. Proc. Law § 130.10 (McKinney 1992) (stating that sum-
mons are available for use in lieu of an arrest warrant); Albrecht v. United States, 273
bling traffic tickets) issued by police officers at the scene and that identify the defendant, specify the offense and date, and inform the defendant that he is required either to appear in court on a particular date, or to contact a court administrative office so that a date and time for his initial appearance can be set.

Arrest data reported through the UCR or through individual jurisdictions does not specify the percentage of arrests that fall into this latter category. Some percentage of the notice, citation, and summons "arrests," however, will subsequently result in full custodial arrest. Bench warrants are issued for arrest when a defendant does not appear at court at the time and on the date specified in a summons or in a notice issued pursuant to a summons. In 1992, the failure-to-appear rate for felony defendants in the seventy-five largest counties in the United States was estimated to be twenty-five percent; the percentage of "no shows" in summons cases might well be higher, given the less serious nature of offenses prosecuted by summonses—instilling defendants with less fear of consequences if they fail to appear—and the irregular and poor quality of life exhibited through some misdemeanor and petty offenses—loitering and trespassing.

As shown in Appendix C, Table 1, the vast majority of arrests are made for nonindex—less serious—offenses. Given the numbers of arrests and the dearth of police resources for follow-up investigations, it is almost a foregone conclusion that a nonindex arrest lacking an

U.S. 1, 8 (1927) (recognizing that "a defendant may be brought before the court by a summons, without an arrest").

165. Cf. N.Y. CRIM. PROC. LAW § 130.10 (McKinney 1998) (granting the court authority to issue a warrant for arrest if the defendant does not appear).

166. Cf. 1994 Sourcebook, supra note 84, at 495 tbl.5.62 (detailing the "[r]eleased felony defendants who failed to make a scheduled court appearance in the 75 largest counties"). BJS has published its Sourcebook of Criminal Justice Statistics annually since 1972. Id. at iii. The Sourcebook separates the arrest data from the UCR program, in part, by demographics of arrestees and victims, by budgetary and staffing information about law enforcement agencies nationwide, by the incidence of drug use in the commission of offenses, by the average time between arrest and case conclusion, and by discrete information about corrections populations. See id.; see also David W. Neubauer, Criminology: Improving the Analysis and Presentation of Data on Case Processing Time, 74 J. CRIM. L. & CRIMINOLOGY 1589, 1597 (1983) (stating that issuances of bench warrants range from 5% of cases in one city to 21% in another).

167. See JEROME MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 10-12 (1996) (documenting 175 arrest warrants for minor crimes outstanding on a single day in Duval County, Florida, during a monitoring project conducted between 1989 and 1994; the offenses included "[d]og running loose without leash"; "[h]arvest of redfish in closed season (oversize redfish)"); and "[o]perating a wrecker without registering with sheriff").

168. See infra app. C, tbl.1.
evidentiary component at the time of arrest—the identity of witnesses or witness interviews—will not be prosecuted. Thus, the law enforcement rationale for making arrests on the basis of minimal evidence cannot be validated.\(^{169}\)

From the volume of arrests for less serious offenses, little arithmetic is necessary to determine their toll on every phase of the criminal justice system—police, prosecutors, courts, and jails—and the consequential drain on resources from most index crimes—serious offenses. The hours spent by police officers conducting the booking process for each arrest, and perhaps waiting at court before a decision is made to dismiss a case, also have severe consequences for public safety. In some jurisdictions, the arresting officer—and his partner—may have to transport the prisoner.\(^{170}\) In jurisdictions that provide prisoner transport by special police units, it stands to reason that an arresting officer would have to make a radio request for transport and then would have to wait at the arrest scene until another police unit is available to transport the prisoner to jail. In either instance, one or more police officers are “out of commission” for the time taken to wait for transport or to drive to the jail, and to complete paperwork about the underlying incident and the arrest. The number of hours spent in processing the large volume of arrests means fewer hours available for investigation and on-the-street presence by police to deter crime.\(^{171}\) It is as though the entire system is geared toward ex-

\(^{169}\) The high dismissal rates also disclose another prosecution anomaly. Given the number of state laws that authorize warrantless arrests, if offenses are committed in the presence of police officers, one might assume that proving such cases would be relatively straightforward; police officers, far more than members of the public, are, in essence, “captive” government witnesses. Therefore, for example, it would be logical to expect higher conviction rates in drug possession cases. Conviction statistics, however, do not correlate with such logic. See infra app. C, tbl.2 (presenting the number of arrests and convictions in 1990 for several categories of offenses, including drug offenses).

\(^{170}\) In Maryland, for example, a state officer is required to wait for another officer when more than one suspect is to be transported. See Maryland State Police, Patrol Manual ch. 28, § III, Sub. 4-3 (2 ed. June 30, 1993) (on file with author).

\(^{171}\) Some scholars question whether police are generally capable of improving conviction rates by more investigation. See Weinreb, supra note 103, at 48-49 (arguing that “in the vast majority of cases, all the information on which proof of guilt and a conviction ultimately depend is contained or indicated either in the police report or documents like witnesses’ statements” and that whatever gaps remain, they “are not likely to depend on unknown information which further inquiry [would] reveal”). If that conclusion is valid, it bears out the assumption of this article that the state does not have the ability to prosecute perhaps as many as half of the individuals arrested.

Even advocates for more effective prosecution of domestic violence cases acknowledge that domestic violence mandatory-arrest laws contribute to crowded dockets without yielding convincing proof that the arrests achieve the desired result of lower recidivism. See
pending as much time as possible on the least likely outcome: prosecution.

E. Prosecution Statistics

Quantifying the arrest/prosecution ratio remains elusive. Despite hundreds of pages published annually by the FBI and the Bureau of Justice Statistics (BJS), those agencies do not report complete statistics for criminal case outcomes in state courts. Statistics are equally as hard to come by from the individual prosecuting authorities (usually counties) themselves. Therefore, in the absence of precision, this Article offers "snapshots" of data for the years 1990 through 1994 to show the relationship of arrests to prosecution. The snapshots confirm that there is not a high correlation between arrests and the perceived end of criminal justice, prosecution. On that basis alone, the reasonableness of thousands of arrests, when measured against the Fourth Amendment, is in doubt.


172. None of the data gathered is case-specific, and it is not possible to follow an individual arrestee as his case proceeds from arrest to disposition, whether by dismissal, by verdict, or by guilty plea. Thus, the annual prosecution statistics may include cases that were begun by arrest in prior years. The snapshot approach is still useful because of the five-year period covered; the jurisdictions report an average and a median time of less than a year from arrest to disposition by conviction. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1995, at 509 tbl.5.62 (Kathleen Maguire & Ann L. Pastore eds., 1996) [hereinafter 1995 SOURCEBOOK] (calculating the "[a]verage and median number of days between arrest and conviction for felony cases disposed by state courts").

173. In 1998, Harvard Law Review published an overview of trends in incarceration and in victimization. See Note, Developments In the Law: Changes In Prison and Crime Demographics, 111 HARV. L. REV. 1875 (1998). Among its conclusions were that, "[criminal law] enforcement has improved," and "a person is far more likely to be convicted today than he or she was a decade ago." Id. at 1880. The first assertion used arrest rate data in a vacuum. The second is incorrect if arrests for a broad category of offenses are considered.

First, as proof of improvements in enforcement, the article asserts that the arrest rate for violent crimes rose almost 50% over the relevant decade, and that that figure outstripped growth of the crime rate. Id. at 1878-79. The violent crime arrest rate versus the violent crime rate would be a more relevant comparison to demonstrate the net effectiveness of law enforcement efforts against violent crime. Second, for the reasons discussed in this article, an increase in the violent crime arrest rate alone does not prove the quality of enforcement; statistics used in this Article demonstrate that high dismissal rates continued throughout the past decade.

Third, the Note contends that the probability of a state law arrest resulting in a conviction rose between 20% and 40% between 1984 and 1988, citing the following: murder (17% conviction increase), robbery (7% conviction increase), aggravated assault (4% conviction increase), and drug trafficking (13% conviction increase). Id. at 1880, 1880 n.22. Those offenses are all "index" offenses. See app. B. As demonstrated in the arrest statistics published by the FBI, those crimes constitute fewer than three million of the more than 14
To test out the conclusion that most arrests do not result in prosecution, statistics maintained by law enforcement agencies in some of the largest jurisdictions in the United States were requested. The most complete data was provided by the City of Los Angeles (California); Riverside County (California); and Kings County (New York). The information is documented in Appendix C, Tables 5, 6, and 10-12. The information captured by the statistics, however, is not uniform from one jurisdiction to another, so each “snapshot” does not contain identical information. This lack of uniformity is due, in part, to the large number of law enforcement agencies in each state; the fact that several separate agencies, such as police, sheriffs, prosecutors, and the courts, may each maintain discrete databases in larger jurisdictions; and to the variation among jurisdictions of types of criminal courts, perhaps making it difficult to capture information at each stage of the process.

To overcome some of those inconsistencies, the Article focuses on several large jurisdictions reporting at least two junctures or decision points in the life of a criminal case: (1) arrest and/or charging, for the number of cases entering the system each year; and (2) specific disposition statistics, where available, such as estimates about court dismissals and acquittals and data about the number of convictions.

To account for the large number of law enforcement agencies in each state, the fact that several separate agencies, such as police, sheriffs, prosecutors, and the courts, may each maintain discrete databases in larger jurisdictions, and to the variation among jurisdictions of types of criminal courts, perhaps making it difficult to capture information at each stage of the process, the Article focuses on several large jurisdictions reporting at least two junctures or decision points in the life of a criminal case: (1) arrest and/or charging, for the number of cases entering the system each year; and (2) specific disposition statistics, where available, such as estimates about court dismissals and acquittals and data about the number of convictions.


The populations of counties throughout the United States, based both on the 1990 Decennial Census and on estimates as of July 1, 1996, are contained in Bureau of the Census, U.S. Dept. of Commerce, U.S. Population—By States and Counties; Land Areas 420-38 (1996).

See Bureau of Justice Statistics, U.S. Dep’t of Justice, Executive Summary: Law Enforcement Management and Administrative Statistics, 1997, at 1 (1999) (stating that “[a]s of June 1997, there were more than 700 general purpose state and local law enforcement agencies with 100 or more full-time sworn personnel that included 50 or more uniformed officers responding to calls for service”).

The Author has notes and records of responses for data during research for this Article. Dade County, Florida, provided arrest statistics for the county, but did not include Miami, the most populous area within the county. Middlesex County, Massachusetts, reported arrest statistics but no information on charging, convictions or on other dispositions. A request for data to Cook County, Illinois, yielded arrest data by offense from the Chicago Police Department, but no prosecution information. The administrative office of the Arizona Supreme Court provided data for Maricopa County by type of case (criminal, civil, or juvenile); the criminal cases were listed by the number of cases filed, disposed of, and pending, but with no definition of disposition. Kings County, Washington, did not respond.

The court systems may be either unitary (one court of general jurisdiction) or non-unitary (a limited jurisdiction court that handles the early stages of a criminal case, and a court of general jurisdiction for trials of criminal cases).
tions and guilty pleas. Often, the only information regarding dispositions is the number of convictions or percentages of cases resulting in convictions. That factor requires another level of extrapolation.

First, I have assumed that the number of cases actually prosecuted will consist of the number of convictions and guilty pleas plus the number of acquittals plus the number of cases dismissed at the trial stage. Each category represents the state's effort to prove charges against arrestees. Second, where jurisdictions do not report acquittals or court dismissals, I assume that the statistics provided by the federal government about the incidence of those outcomes hold true for most jurisdictions. Finally, cases that do not result in a guilty plea, trial, acquittal, or court dismissal are "not prosecuted" within the meaning of this Article.

1. Felonies.—Tables 2, 3, and 4, Appendix C show estimated data from the FBI and the BJS for the numbers of felony convictions in all state courts for 1990, 1992, and 1994, respectively.

According to these numbers, in 1990, felony convictions constituted only 28% of the number of index arrests nationwide, and 6% of all arrests. For 1992, felony convictions equalled 31% of the index arrests, and also 6% of the total of all arrests. For 1994, felony convictions constituted 30% of index arrests, and 6% of all arrests.

Using statistics from the seventy-five largest counties nationwide, BJS reported that 31% of felony cases adjudicated in 1990 resulted in court dismissals or in acquittals. For 1992, the combined "not convicted" category was estimated to be 27%. The percentage of adju-
Arrests Without Prosecution

The percentages given for acquittals and for court dismissals are fractions of the total number of cases prosecuted. It is highly improbable that the number of cases resulting in acquittals or in court dismissals was larger than the number resulting in convictions. Even if cases resulting in acquittals and in court dismissals are factored in to determine the number of felony cases prosecuted in 1990, 1992, and 1994, respectively, the data still represents that the number of felony cases prosecuted did not amount to a majority of felony arrests.

Data maintained by individual jurisdictions may give a fuller picture of case outcomes. Yet, case outcomes are not included in the FBI's Uniform Crime Reports, so researchers are left to "sample" data from individual jurisdictions.

For Kings County, New York, the data on Table 5, Appendix C shows that, on average, only 33% of felony arrests during the five-year period resulted in felony prosecutions. Even assuming that some of the felony arrests resulted in cases filed as misdemeanors, it is probable that more than half of the felony arrests still were not even charged. In addition, even if the likely ranges of acquittals and of court dismissals are factored in with the number of convictions as has been discussed—acquittals constituting 1% to 5% of the cases and of the dismissals 13% to 32% of the cases prosecuted, it is still unlikely that the total percentage of Kings County cases ending in prosecution amounted to even 50% of the number of arrests each year.

As shown in Table 6, Appendix C, Riverside County, California, reports that approximately 50% of felonies requested were actually filed for each of the five years. California's arrest laws, similar to

---


185. For example, in 1992, if the number of convictions (893,630) represented 63% of felony cases adjudicated, then the total number prosecuted was 1,418,460. The FBI reported 2,888,200 arrests in 1992. Thus the rate of prosecution is 1,418,460/2,888,200 or 49%.

186. See app. C, tbl.5. The annual rate of felony prosecutions per felony arrest for Kings County, New York is as follows: 1990 = 31.1% (13,332/42,929), 1991 = 36.8% (15,075/41,006), 1992 = 38.5% (13,901/36,123), 1993 = 34.7% (12,171/35,113), and 1994 = 26.1% (10,416/39,879). See id.

187. See supra note 178 (discussing the ranges for nonconviction in 1988 among 14 states).

188. Riverside County does not define "requested." I have assumed, however, that it refers to "requests" by police or by members of the public that criminal charges be filed. See app. C, tbl.6.
those of other states, authorize arrests without warrant for felonies.\textsuperscript{189} Thus, it can be assumed that most case filings would occur after arrest either by issuance of an information by the prosecutor or by grand jury indictment.\textsuperscript{190} However, the number of convictions was only one fourth of the number of cases requested.\textsuperscript{191} Like Kings County, New York,\textsuperscript{192} even if acquittals and court dismissals are added to the number of convictions, the data suggests that the number of prosecutions did not equal half of the number of felony arrests in Riverside County.\textsuperscript{193}

A study published in 1970 documented similar gaps and disparities between the number of felony arrests and the number of conviction rates in six large jurisdictions.\textsuperscript{194} An examination of felony case dispositions from January to June 1977 also yielded similar results.\textsuperscript{195}

2. Misdemeanors.—Data on the disposition of misdemeanor cases, presumably constituting the majority, if not all, of the nonindex offenses, are not included in the FBI’s annual \textit{Crime In the United States} or BJS’s \textit{Sourcebook}. BJS has, however, published ranges of conviction rates for misdemeanor cases from 1991 through 1994, although the reporting method is not uniform throughout the time period.\textsuperscript{196} That data appears in Table 9, Appendix C.

Misdemeanor case data reported by several large jurisdictions themselves produced lower conviction rates than those reported from

\begin{enumerate}
\item[189.] See app. A.
\item[190.] See supra text accompanying note 100 (discussing this Article’s assumption that “felony requests” or requests for criminal charges largely occur after individuals have already been arrested).
\item[191.] See app. C, tbl.6.
\item[192.] See app. C, tbl.5.
\item[193.] See app. C, tbl.6 (demonstrating in Riverside County that on average 21,454 felony requests were made and 9355 felonies were filed between 1990 and 1992).
\item[195.] See KATHLEEN B. BROSI, U.S. DEP’T OF JUSTICE, A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING 7 (1979); app. C, tbl.8 (Felony Case Disposition from Arrest January-June 1977).
\end{enumerate}
the BJS/Census Bureau surveys of prosecutors. One possible reason for this discrepancy is that the BJS's conviction rate may represent the percentages of convictions in cases that were actually prosecuted, rather than the percentages of convictions for all cases in which an arrest occurred. Data reported directly by jurisdictions makes that assumption likely.

The misdemeanor conviction data for the City of Los Angeles, Kings County, New York, and Riverside County, California, appears in Tables 10, 11, and 12, Appendix C, respectively. The data indicates that only Los Angeles obtained convictions in (and, therefore, necessarily prosecuted) more than 50% of the number of misdemeanor cases in the period between 1990-1995. Riverside and Kings Counties' respective misdemeanor conviction rates bear out the contention that misdemeanor prosecutions equal fewer than 50% of the number of arrests for misdemeanors in large jurisdictions.

F. Measuring The Intention Or Ability To Prosecute

A few factors are generally cited for the failure to prosecute criminal cases. The factors most commonly articulated give the impression that dismissals occur because of circumstances beyond the presumed control of state law enforcement, of prosecutors, and of courts. Among the most commonly cited factors are victim and/or witness reluctance, unavailability of prosecution or defense witnesses, and

197. Compare data in app. C, tbls.9, 10, 11, & 12 (reporting misdemeanor convictions on national scale and at a county level).
198. See generally Feeley et al., supra note 115, at 21 (discussing the differing results for rates of conviction when viewed from various "starting points").
199. See app. C, tbls.10, 11, & 12 (demonstrating the higher reported rates of conviction at the county level).
200. The conviction rate for misdemeanor crimes in Los Angeles from 1990–1994 is as follows: 1990: \( \frac{136,976}{219,541} = 62.4\% \), 1991: \( \frac{125,671}{197,575} = 63.6\% \), 1992: \( \frac{112,925}{176,710} = 63.6\% \), 1993: \( \frac{113,226}{161,238} = 70.2\% \), and 1994: \( \frac{122,653}{161,750} = 75.8\% \). The average conviction rate for misdemeanors from 1990-1994 was 67.1%. See app. C, tbls.10, 11, & 12.
201. Common sense suggests that jurisdictions would make far more arrests for misdemeanors than for felony offenses, and studies indicate that the largest increases in arrests over the last decade have been for less serious offenses. See Miller, supra note 167, at 11-22 (documenting prevalence of arrests for consensual and nonindex offenses). For the years examined in this Article, the FBI reports almost a five-to-one ratio between nonindex (i.e., less serious) offenses and index offenses. See app. C, tbls.1, 2, 3, and 4. The FBI figures may mean that the misdemeanor/felony difference is even greater than 5:1. As discussed supra, the index categories include some offenses, such as some forms of burglary, that are classified as misdemeanors under state law. Inclusion of the numbers of those offenses would swell the misdemeanor figures. However, statistics from the jurisdictions discussed in this Article do not approach the 5:1 misdemeanor/felony ratio; Kings County, New York, for example, reports fewer misdemeanor than felony arrests for the period examined.
writs of extradition filed by other states.\textsuperscript{202} State prosecutors also report dismissals by courts due, in part, to “search or seizure problems,” and legal issues relating to self-incrimination, speedy trial time restrictions, and the right to counsel.\textsuperscript{203}

According to statistics reported by the federal government, however, dismissals during prosecution (as by the court, on the grounds of one or more of the legal issues cited above) account for approximately only 27\% to 31\% of the felonies that actually proceed to prosecution.\textsuperscript{204} Thus, the majority of cases are dismissed by prosecutors at various decision points after arrest but before reaching the trial stage. The dismissal rates persist even though guilty pleas account for the vast majority of convictions.\textsuperscript{205} The guilty plea rate suggests that the conviction rate would be higher if more cases were prosecuted. A low prosecution rate compared to arrests, therefore, must be caused by numerous factors or a combination of factors that are dependent on police and on prosecutors.

Those factors might be: (1) the absence of sufficient evidence for prosecution, despite probable cause for an arrest; (2) erroneous interpretations of the requisite elements of criminal offenses by police officers when making arrests; (3) a prosecutor’s determination that requisite evidence was obtained unlawfully; (4) cases that may not merit prosecution under prevailing community standards; and/or (5) the inability to review, to develop, or to prepare potentially meritorious criminal cases because of the volume of cases entering the system by arrest.\textsuperscript{206} Even without exact data regarding outcomes at particular

\textsuperscript{202} See Prosecutors in State Courts, 1992, supra note 105, at 6 & tbl.9. Sixty-nine percent of prosecutors reported that they had “declined, diverted, or deferred” cases because of victim reluctance and 37\% because of witness reluctance; 49\% of prosecutor's offices reported court dismissals due to unavailability of prosecution witnesses, and 32\% of offices contended with writs of extradition by other states. Id.\textsuperscript{203}  See supra text accompanying notes 182-184 (discussing the data which provides that of the cases adjudicated between 1990 and 1994, between 27\% to 31\% were dismissed by the court).

\textsuperscript{204} See Prosecutors in State Courts, 1996, supra note 196, at 5 tbl.6 (reporting the mean of felony conviction rate of prosecutors' offices for the years 1992 (83\%), 1994 (86\%), and 1996 (86\%)).

\textsuperscript{205} See Prosecutors in State Courts, 1996, supra note 196, at 5 tbl.6 (reporting the mean of felony conviction rate of prosecutors' offices for the years 1992 (83\%), 1994 (86\%), and 1996 (86\%)).

\textsuperscript{206} See supra text accompanying notes 127-128 (concluding that the “flood” of arrests in recent years has resulted in a decrease in the rate of prosecutions). But see Feeley, supra note 115, at 244-77 (concluding that data in his study does not support the claim that there is a relationship between heavy caseloads and lack of trials, and asserting that even without a trial, the typical adversarial relationship can exist outside of the courtroom, including plea bargain negotiations and formal motions by the defense and prosecution); Israel, supra note 5, at 766-74 (challenging the “conventional wisdom” that attributes the problems of our judicial system to excessive caseloads and arguing the need for reevaluation of the goals of the criminal justice system to facilitate better resource allocation).
stages of criminal cases, there is even less data available to confirm assertions that a majority of the "failed prosecutions" occur despite the best efforts of police and prosecutors. The persistent failure to prosecute across a number of large jurisdictions over a twenty-year period, coupled with law-and-order rhetoric throughout the period blessing the work of police and of prosecutors, lends great weight to the conclusion that low prosecution rates have become part of a criminal justice "culture" in many of the largest jurisdictions, where better outcomes are not expected.\textsuperscript{207} Even if a jurisdiction does not require greater accountability in the use of its resources, each jurisdiction nonetheless is required to demonstrate the reasonableness of so many arrests.\textsuperscript{208}

1. Case Preparation By Prosecutors.—It is possible to judge a prosecutor's intentions about a case, or an entire system of cases, by steps taken at each stage of a criminal case. The steps, and the importance attached to each of them, are not secrets or shifting sands for prosecutors or for defense attorneys. The rules of criminal procedure promulgated or enacted by each state are the road maps. A prosecutor can help ensure or virtually prevent prosecution by her role at each juncture.

First, because most cases come to prosecutors after arrest,\textsuperscript{209} prosecutors have the opportunity to scrutinize police reports for sufficiency of the evidence.\textsuperscript{210} "Barebones" police reports immediately should flag the need for follow-up interviews or for further investigation. At that first juncture, prosecutors have access to the criminal history and to the social services information about defendants.\textsuperscript{211}

\textsuperscript{207} See supra notes 127-128 and accompanying text (establishing the attrition rates of criminal cases in five jurisdictions in 1977); see also Brosi, supra note 195, at 10, 16-19 (arguing, in her 1979 study, that many cases are dropped for reasons that might have been avoided or corrected—a witness failing to appear, problems with witness testimony, and evidence related problems). Kathleen Brosi, on behalf of the Department of Justice, authored her report on felony case processing in 1979. The problems to which she refers in Cross-City Comparison, particularly the low rates of prosecution, mirror the problems in our criminal justice system today. See app. C, tbl.2 (State Court Felony Convictions/Arrests). This twenty-year span of low prosecution rates is indicative, not of an evolving problem, but rather an imbedded "culture" of inadequate prosecution.

\textsuperscript{208} See app. A (describing individual state standards for arrest and finding that while virtually every state permits warrantless arrests, all have some standard of "reasonableness" for such arrests—the offense must occur in the officer's presence, the officer must have probable cause for the arrest, or there must exist reasonable grounds for such arrest).

\textsuperscript{209} See supra note 100 (noting that a 1990 BJS study concluded that 95% of prosecutors nationwide first learned of felony cases after an arrest took place).

\textsuperscript{210} See supra note 103 (describing the prosecutor's role after an arrest has taken place).

\textsuperscript{211} See Prosecutors in State Courts, 1992, supra note 105, at 4 (asserting that almost all of the Nation's prosecutors reported using adult criminal history data during the course
Either source could inform the determination of an arrestee’s “criminality”—both society's “need” to prosecute the individual and the requisite mens rea.

Second, as each victim of or witness to an offense is identified, the prosecutor has the opportunity to cultivate those relationships to establish enough rapport to make cooperation by the victim or by the witness more likely.\textsuperscript{212} If a prosecutor remains passive toward the participants, the missing or reluctant witness phenomenon is virtually guaranteed.\textsuperscript{213}

Third, textbook methods of investigation and of witness preparation make or break any criminal case. The steps are so basic to rudimentary case preparation that they are taught in law schools.\textsuperscript{214}

A prosecutor has a number of additional sources of information to maximize the chances of prosecution and even of conviction. A prosecutor’s office, unlike that of defense attorneys, has available an overview of all criminal defendants and cases pending or recently concluded in the jurisdiction. “Massaging” that information can result in (1) the application of years of prosecutorial experience to assess the relative “value” of any given case;\textsuperscript{215} (2) an early indication that a defendant’s record provides limited options for disposition of the current case; and (3) data about the number and relative “weight” of cases pending so that the chances of convicting serious offenders can be given priority.\textsuperscript{216}
Each of these methods is used in varying degrees by most prosecution offices. The high rate of guilty pleas indicates the use of defendants' prior criminal records as leverage. However, the fairly consistent low rate of prosecutions compared to total number of arrests each year in a number of jurisdictions has put the prosecutors' offices on notice that their case-handling methods and their judgments are not appropriate for the task. Such a record, over a twenty-year period, is positive proof that the affected jurisdictions do not intend and/or cannot prosecute the majority of individuals subjected to arrest.

The Sisyphean routine of prosecution is well known. Each day is met with hundreds of cases set for “trial,” usually without any prior hearing or interaction between the prosecution and the defense, and as often without a prosecutor's familiarity with the case or with the witnesses. The Supreme Court has taken notice of the “frequent result” of “futility and failure” in such a system. The Court quoted Dean Edward Barrett:

Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense lawyers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything longer, and so there is no choice but to dispose of the cases. Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.

The quotation is an example of the atmosphere created by and perpetuated by the current—and longstanding—approach to crimi-
nal cases in a number of jurisdictions. The "great numbers of defendants" and more cases than can be investigated are referred to as though no one is exactly sure how they have all appeared. Nowhere is there a requirement of a better correlation between the numbers of arrests and following those cases through to a determination of guilt or acquittal.

2. Case Screening By Prosecutors.—In practice, more emphasis must be placed on the prosecutors' ability (if not duty) to screen cases for prosecutorial merit early in the process.220 This practice and interaction between individual police officers and prosecutors would serve several purposes: (1) add a level of accountability to the arrest process; (2) ensure that police and prosecutors are coordinating their efforts toward optimum results; and (3) train police officers in the requisite factual and legal bases for successful prosecution. Jurisdictions in which the decision to arrest is not reviewed sooner experience a higher rate of case dismissals.221 In those jurisdictions, an individual arrestee remains a pawn in a chess game where the outcome—no prosecution—is known virtually to a mathematical certainty.

As shown on Tables 1-5, the most comprehensive data collection on arrests and on prosecutions, those reported by the FBI and the BJS, and that available "randomly" from large jurisdictions, demonstrate that convictions as a percentage of the overall numbers of arrests have remained relatively stable throughout the period considered in this Article, 1990-1994.222 Those figures also show that the consistent pattern is that most arrests do not result in prosecution, whether by guilty plea or by verdict after trial.223 The odds of any given case proceeding to actual prosecution in such an environment depend on an astrological phenomenon of the orbits of defendant, witnesses, and evidence. If a bare minimum of any of those factors is

220. See Standards Relating to the Prosecution Function § 3.4 (stating that a prosecutor should establish standards for evaluating complaints to determine whether criminal proceedings should be instituted); id. § 3.4 cmt. b (furnishing a method of measuring the successfulness of the screening process so that if the prosecutor's screening processes are effective, acquittals should not be frequent; a high acquittal rate is itself a prime indicator of the inadequate exercise of discretion in making the charge). But see Crime and Justice in America, supra note 216, at 188 (stating that "usually, once an arrest is made and the case is referred to the prosecutor, most prosecutors screen cases to see if they merit prosecution").

221. See Crime and Justice in America, supra note 216, at 188 (discussing prosecutorial screening units and finding that "jurisdictions that accepted most or all arrests usually had high dismissal rates").

222. See app. C, tbls.1-5.

223. See id.
present at the time a case is called for trial, there is some possibility that the case might proceed to prosecution. Yet, more often than not, the planets are not in alignment, resulting in dismissal of the majority of cases for which individuals have been arrested.

3. Evidence of a Systemic Inability to Prosecute More Cases.—For felony cases, the data indicates that convictions are obtained, whether by guilty plea or by guilty verdict, in the vast majority of cases that actually proceed to prosecution. That correlation, from a law enforcement perspective, argues in favor of concentrating more resources on preparing cases for trial. Statistics over many years, including the period considered here, however, suggest either an indifference to a relationship between arrest and prosecution, or the inability to prosecute more cases. The law enforcement rationale for arrests has to be measured against the government’s ability to prosecute the individuals who are arrested.

The intention to prosecute a person for the arrest charge is not measured here in terms of the discretionary function of deciding which laws to enforce or which cases to bring based on either legal or on public policy considerations. If arrest/prosecution ratios are a function of criminal justice resources, however, it is appropriate to require that the state demonstrates its intention to prosecute most of the individuals it arrests, as by allocating or by reallocating sufficient resources to bring about that result. The Fourth Amendment prohibits arrest unless the state intends and is able to carry through each step of the criminal justice system as defined by Amendments IV, V, VI, and VIII.

224. See supra note 205 (discussing the ten-to-one ratio of felony convictions resulting from guilty pleas to convictions resulting from guilty verdicts).

225. The Fourth Amendment states:

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

U.S. CONST. amend. IV; see supra notes 39-40 and accompanying text.

226. The Fifth Amendment states, in relevant part, that

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. amend. V.

227. The Sixth Amendment states, in relevant part:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

228. See supra note 205 (discussing the ten-to-one ratio of felony convictions resulting from guilty pleas to convictions resulting from guilty verdicts).
The comparison of police resources, prosecution budgets, and court caseload statistics would be an objective measure of the arithmetical likelihood of a given number of arrests resulting in prosecution; budgetary and other resource limits in every jurisdiction make that number finite. The likelihood of an increase in prosecution resources or in decisions to reallocate more existing resources to prosecution also would be a determinant. Evidence is lacking, however, that the criminal justice resources necessary to ensure prosecution are likely to be increased significantly in any jurisdiction.

To the contrary, the evidence is that there will "never" be sufficient resources to close the gap between the numbers of arrests and the cases actually resulting in prosecution, if current patterns continue.\(^2\)

The resource side of the equation has been virtually constant. Jurisdictions face taxing and revenue limitations, usually caused by voter choices or by shifts in their respective tax bases.\(^3\) Other social and economic needs compete for public funding.\(^4\) Funding sources remain uncoordinated so that increased appropriations may be available for "bells and whistles," such as new police cars, but not for systemic overhauls.\(^5\) Theoretically, one could read into the funding dynamic that in each jurisdiction members of the public have

obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

U.S. Const. amend. VI.

228. The Eighth Amendment states, in relevant part, that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

229. See Israel, supra note 5, at 770-71 (reporting that while the rate of index crimes increased by 278% between 1960 and 1985, the increased per capita spending on police, accounting for inflation, was only 73% over the same period (citing 1995 Sourcebook, supra note 172, at 354-55; Bureau of Justice Statistics, U.S. Dep’t of Justice, Report to the Nation on Crime and Justice 120 (2d ed. 1988))).

230. See generally Israel, supra note 5, at n.25 (stating that “since almost 90% of criminal justice financing comes from state and local governments, the primary competitors are the government services . . . such as education, waste disposal, local transportation, and certain aspects of public welfare support; . . . the courts simply have no political clout in budgetary terms” (citing Alexander Smith & Harriet Pollack, The Courts Stand Indicted in New York City, 68 J. Crim. L. & Criminology 252, 257 (1977))).

231. See id. at 769-70 (stating that “the war on drugs initiated during the 1980’s increased competitive demands for funding from other areas of government, and difficulties in obtaining coordinated spending increases among police prosecution, and courts—led to an overall failure of funding to keep up with the increase in crime, arrests, and prosecutions”).

232. See generally 1994 Sourcebook, supra note 84, at 6 tbl.1.6 (reporting that in the fiscal year of 1992, of the total state and local budget for justice system activities, 43.1% went to police protection and 36.2% to corrections, while only 20.7% went to judicial and to legal service).
made an assessment of the limits of their "public interest" as far as law enforcement is concerned.

At the very least, one can presume that the public expects that the finite law enforcement resources made available through the political process will be used with professional judgment. Continuation of or increases in arrest rates that grossly outpace the allocated criminal justice resources run on a track unrelated to manifested public interests. One likely result is an arithmetical impossibility to prosecute the majority of cases brought into the system by arrests. The other is the creation of a "subsociety" within law enforcement that sacrifices the freedom of millions of individuals to unarticulated, and probably unattainable ends.

III. "UNREASONABLE" IN TERMS OF LACK OF PROSECUTION

A. Constitutional Requirements for Prosecution

The Fourth, Fifth, Sixth, and Eighth Amendments to the Constitution relate to the criminal justice process. The amendments recognize the discrete phases of the process and the two possible "end" points of the system, trial, or a knowing and voluntary guilty plea and, if the defendant is convicted, punishment. The Fifth Amendment requires that capital and "infamous" crimes be charged by presentment or information (the "charging" phase), prohibits a person from being put in jeopardy twice for the same offense (the trial phase), and protects an individual against self-incrimination (at any time during the process).233

The Sixth Amendment guarantees rights during trial itself as follows: a speedy and public trial, the right to be informed of the charges, and assistance of counsel.234 Additionally, the Sixth Amendment provides that a person is entitled during a trial to a jury of his peers, appropriate venue for the trial, the right to confront witnesses against him, and compulsory process to secure evidence.235 The Eighth Amendment guarantees reasonable bail at the commencement of the criminal proceedings and prohibits cruel and unusual punishment at the penultimate stage of the criminal justice process.236

233. U.S. CONST. amend. V; see supra note 226 (providing relevant text).
234. U.S. CONST. amend. VI; see supra note 227 (providing relevant text).
235. Id.
236. U.S. CONST. amend. VIII; see supra note 228 (providing relevant text).
B. The Purpose of Arrest In Prosecution

Within that progressive scheme of criminal prosecution, an arrest serves as the manner in which an individual is “introduced” into the system.\(^{237}\) At least two constitutional rights must occur in conjunction with the arrest. The arrest provides the first opportunity for the defendant to be told the nature of the charges against him as required under the Sixth Amendment\(^{238}\) and to have a reasonable bail set, as specified in the Eighth Amendment.\(^{239}\) The bail determination is made by balancing an individual’s presumptive right to freedom before trial with conditions necessary to ensure a defendant’s presence at trial when the state will carry its ultimate burden of proving the arrestee’s guilt, whether through the defendant’s guilty plea, or through conviction after trial, beyond a reasonable doubt.\(^{240}\) The bail determination may also include consideration of whether a defendant poses harm to the public in the period before a trial is commenced.\(^{241}\)

This scheme demonstrates that an arrest constitutes only one step toward the ultimate goal of presenting evidence against an individual for commission of an offense within the constraints of the constitutional procedural requirements. The system and the constitutional

\(^{237}\) See LaFave, supra note 93, at 4 (defining arrest as a distinct operational step in the criminal justice process, namely, the decision to detain an individual so that the official process may be invoked).

\(^{238}\) U.S. Const. amend. VI; see supra notes 226, 234-235 and accompanying text. The Supreme Court, in Gerstein v. Pugh, 420 U.S. 103 (1975) held that the Fourth Amendment requires “a timely judicial determination of probable cause as a prerequisite to detention.” Id. at 126. In Gerstein, the Court reasoned that “a policeman’s on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest.” Id. at 113-14. The Court also stated that “[o]nce the suspect is in custody, . . . the reasons that justify dispensing with the magistrate’s neutral judgment evaporate,” and “the suspect’s need for a neutral determination of probable cause increases significantly.” Id. at 114.

\(^{239}\) U.S. Const. amend. VIII; see supra notes 228, 236 and accompanying text.

\(^{240}\) See Stack v. Boyle, 342 U.S. 1, 4 (1951) (stating that “federal law has unequivocally provided that a person arrested for a non-capital offense shall be admitted to bail . . . [because] [t]his traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction” (citing Hudson v. Parker, 156 U.S. 277, 285 (1895)). The Court also noted that “the right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty.” Id. at 4-5 (citing Ex parte Milburn, 9 Pet. 704, 710 (1835)).

\(^{241}\) See United States v. Salerno, 481 U.S. 739, 755 (1987) (holding that the Bail Reform Act of 1984, which allows a federal court to detain an arrestee prior to trial if the government demonstrates by clear and convincing evidence after an adversary hearing that the arrestee poses a threat to the safety of individuals or to the community which no release conditions can dispel, does not facially violate the Constitution).
scheme do not permit arrest for any other purpose. Therefore, in determining whether an arrest is "reasonable" within the meaning of the Fourth Amendment, it is necessary to consider whether an individual is seized solely to facilitate the ultimate permissible goals of the criminal justice system. The data presented indicates that, in far too many cases, arrests occur in jurisdictions irrespective of whether prosecution by the state, with the opportunity for the defendant to challenge the state's case, will occur. For purposes of the Fourth Amendment, therefore, those arrests are unreasonable because they are not related to a constitutional outcome.

Much of the Fourth Amendment arrest precedent has focused on probable cause to make an arrest as the outer limit of constitutional consideration. That scrutiny conforms to one aspect of the Fourth Amendment, only stated expressly in the second clause relating to warrants, that a seizure must be based on probable cause. It is an appropriate case-specific standard when the initial justification for seizing a suspect or for conducting a search is at issue. The existence of probable cause, however, is not the sole measure of reasonableness under the Fourth Amendment.

As a practical matter, judicial scrutiny of probable cause determinations by police generally do not add much reassurance that even the nominal standard is being met. Professor Abraham S. Goldstein

242. As discussed supra note 133 and accompanying text, LaFave, however, has noted that, in practice, people are arrested for other purposes. He stated, for example, that while taking people into custody for purposes of prosecution is clearly contemplated by the law, . . . some are arrested for purposes other than prosecution. For example, it has long been a practice to arrest intoxicated persons and release them when they are sober, the purpose of the arrest is to provide for the well-being of the drunk and the purpose of his release is to avoid the cost of a judicial proceeding thought to accomplish nothing in the way of rehabilitation or prevention.

LaFave, supra note 93, at 12. LaFave noted, however, that "[t]he problems created by the arrest and release of a drunk for whom these are adequate grounds for arrest are obviously different from those created by arrest of persons on insufficient evidence" but these two situations have not been sufficiently "differentiated in either law or practice." Id. at 13.

243. See Whren v. United States, 517 U.S. 806, 818 (1996) (stating that "the only cases in which the court has found it necessary to perform the 'balancing' analysis [weighing the governmental and individual interests,] involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or physical interests"); Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (stating that the standard of probable cause "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime").

244. U.S. Const. amend. IV; supra note 225.

245. The Fourth Amendment also requires warrants to be supported "by Oath or affirmation," particularly describing the places to be searched and the persons or things to be seized. Id.
has examined the method by which probable cause is in fact scruti-nized by magistrates and by judges in issuing warrants.\textsuperscript{246} His article asserts that there is no reason to assume that judicial officers employ more rigid scrutiny of probable cause after-the-fact of arrest.\textsuperscript{247}

According to Professor Goldstein, court review of probable cause often does not amount to "independent judicial determination."\textsuperscript{248} If the judicial officer does not question the affiant about underlying facts and circumstances or go behind hearsay and "boiler plate" assertions, the claim of probable cause by a police officer remains untested.\textsuperscript{249}

The post-arrest probable cause hearings themselves impede independent scrutiny. More often than not, they are part of a long docket.\textsuperscript{250} The pressure to move quickly through the docket and the desensitizing process of hearing so many identical assertions over the space of a few hours is enough to make any magistrate or judge too impatient or too weary to delve deeply.\textsuperscript{251} In such a system, logically, all of the pressure would be to maintain the status quo (assume the validity of an arrest and move the defendant along to another court, judge, or docket).

As a matter of law, the Fourth Amendment itself requires scrutiny of more than the arresting officer's belief that probable cause existed. Despite the views of some that only a very narrow inquiry is necessary, there are case law examples of other factors that can render a search or seizure unreasonable. In \textit{Chimel}, the Court distinguished between the existence of probable cause and the additional factors that may

\textsuperscript{246} See Abraham S. Goldstein, \textit{The Search Warrant, the Magistrate, and Judicial Review}, 62 N.Y.U. L. Rev. 1173 (1987). Professor Goldstein's article examines the impact of \textit{United States v. Leon}, 468 U.S. 897 (1984), on judicial review of search warrant affidavits. Goldstein contended that \textit{Leon}'s good faith modification for application of the exclusionary rule may have a salient effect. \textit{Id.} at 1175. In his view, \textit{Leon} may encourage police officers to use warrants, because they will be "rewarded" for their good faith efforts and be subject to less judicial scrutiny. \textit{Id.} at 1176-77.

\textsuperscript{247} \textit{Id.} at 1202-03 (stating that "[f]or the most part, ... lower courts have tended to avoid the probable cause issue and have moved directly to the 'defense' of good faith reliance").

\textsuperscript{248} \textit{Id.} at 1187.

\textsuperscript{249} \textit{See id.} at 1182-83.

\textsuperscript{250} The arrest statistics for individual counties, cited in Tables 5 and 6 in Appendix C, can be divided by the average number of court days (assume 250 days) to determine the approximate number of probable cause hearings (for felony arrests) heard each day. For example, in Kings County, New York in 1990, 42,932 felony arrests took place. \textit{See} app. C, tbl.5. This averages to 171 probable cause hearings per court day in 1990.

\textsuperscript{251} \textit{Cf.} Goldstein, \textit{supra} note 246, at 1201 (stating that the Court's inquiry into matters on post-warrant review is "meant to probe more deeply into the officer's experience and state of mind" than the use of an objective "reasonable officer" standard connotes).
draw the reasonableness of a search or seizure into question.\textsuperscript{252} The Court acknowledged that reasonableness depends upon "the facts and circumstances— the \textit{total} atmosphere of the case," viewed against Fourth Amendment principles.\textsuperscript{253} Even though the police officers in \textit{Chimel} had an arrest warrant certifying probable cause for his arrest, the Court held that the ensuing search of Chimel's entire house was unreasonable.\textsuperscript{254}

The totality-of-circumstances approach must apply to arrests and to the Fourth Amendment principles underlying arrests.\textsuperscript{255} If the state does not intend to or cannot ensure that the constitutionally mandated "mechanism" will be available following arrests, the arrests have no constitutional footing. They are, therefore, unreasonable as a matter of law, irrespective of the existence of probable cause.

Other cases also have made clear the distinction between probable cause and the totality-of-circumstances test for determining reasonableness under the Fourth Amendment. In \textit{Tennessee v. Garner},\textsuperscript{256} the Court struck down a state statute that authorized the use of deadly force against unarmed fleeing suspects.\textsuperscript{257} The plaintiff brought a suit for damages under 42 U.S.C. § 1983 for the death of his son, who was shot and killed by police when seen fleeing a house after a report of a burglary.\textsuperscript{258}

For the Court, balancing all circumstances in the case led to the conclusion that, "notwithstanding probable cause to seize a suspect, an officer may not always do so by killing him."\textsuperscript{259} The state had argued that "[b]eing able to arrest such individuals is a condition prece-

\textsuperscript{252} Chimel v. California, 395 U.S. 752, 762-63 (1969) (discussing the reasonableness of search and seizure in light of factors such as officer safety and the preservation of evidence).

\textsuperscript{253} Id. at 765 (emphasis added) (quoting United States v. Rabinowitz, 339 U.S. 56, 66 (1950)).

\textsuperscript{254} Id. at 753-54, 768.

\textsuperscript{255} See id. at 765 (noting that a case's surrounding "facts and circumstances must be viewed in the light of established Fourth Amendment principles").

\textsuperscript{256} 471 U.S. 1 (1985).

\textsuperscript{257} Id. at 4-5 & n.5, 22 (invalidating \textit{TENN. CODE ANN. § 40-7-108} (1982)).

\textsuperscript{258} See \textit{Garner}, 471 U.S. at 3-5. Section 1983 provides in pertinent part that

\textit{[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.}

\textsuperscript{259} Garner, 471 U.S. at 9.
dent to the state's entire system of law enforcement." The Court responded that apprehending a suspect is the way of "setting the criminal justice mechanism in motion" but that deadly force was a "self-defeating way" of accomplishing that goal.

Garner is the appropriate lens through which to measure arrest practices. Arrest is the starting point, not the end result, of criminal prosecution. Even if probable cause exists, a court must ensure that all of the circumstances surrounding an arrest, when measured against Fourth Amendment principles, constitute reasonableness. The systematic practice of arresting individuals without intending or being able to weigh the cases under the government's requisite burden of proof renders the nonprosecution arrests unreasonable.

The nature of the state's interaction with individuals at the point of arrest justifies this scrutiny. Arrests immediately deprive individuals of liberty and freedom of movement. As discussed, arrest decisions are ripe environments for individual and for subjective decisions by law enforcement officers who struggle daily with frustration over diminishing returns from their persistent efforts, the constant danger, the attendant stress, and the critical assessment by the general public.

The Fourth Amendment does not draw distinctions between separate components of a government. Thus, it does not confine "unreasonable" only to the acts of some parts of a government, such as police officers. It requires assessment whenever any government action infringes an individual's right to be left alone by government absent reasonableness.

Reading the Fourth Amendment to elevate a police officer's probable cause decision to the status of the sole determinant of reasonableness creates a false dichotomy between the state and the individual employees or agents of the state. Governmental power is
carried out through the institutions and through individuals empowered to act on behalf of a government. In the area of criminal law and procedure, states act, first, through their legislatures in defining and in setting penalties for criminal offenses. The legislatures, in turn, delegate many of the day-to-day responsibilities of law enforcement to individuals acting in specific roles on behalf of the state such as judges, prosecutors, and police officers. Each authorized individual, however, is vested with, and may carry out only as much multi-layered authority as has been delegated by the state.

The multi-layered criminal justice systems, composed of legislative, judicial, prosecutorial, and law enforcement actors, mean that Fourth Amendment violations may occur through the actions of any part, or combination of parts, of a government. Setting probable cause as the sole determinant of reasonableness overlooks both the concept of agency inherent in the exercise of governmental action and the systemic practices that may also violate the Fourth Amendment. The government as a sovereign entity remains liable for interfering with the right of the people, irrespective of which individual officer of the state may cause the circumstances that amount to a violation.

The state, through its agents, the police, is authorized to detain an individual temporarily under the probable cause standard. The purpose of the temporary detention is to facilitate administrative matters related to the arrest. The state, and its agents, are required to

266. See generally LaFave & Israel, supra note 24, § 1.2, at 6-9 (discussing the responsibilities of police officers, prosecutors, magistrates, and trial judges and remarking on the wide discretion exercised by each in the criminal justice system).

267. For example, in Monell v. New York City Department of Social Services, the Court found that the “person” language of 42 U.S.C. § 1983 included municipalities for purposes of civil rights liability. See 436 U.S. 658, 688-90 (1978) (finding that “the ‘plain meaning’ of § 1 [of the Civil Rights Act] is that local government bodies were to be included within the ambit of the persons who could be sued” and concluding that this analysis “compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies”); supra note 258 (providing the relevant text of 42 U.S.C. § 1983). But see Monel, 436 U.S. at 694 (concluding that “a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents” under respondent superior). To recover damages from a municipality, the Court required that a plaintiff prove that the municipality actually approved or adopted the challenged custom or practice. See id. (explaining that “it is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983”).

268. See supra notes 64-68 and accompanying text (discussing the probable cause standard).

269. See LaFave, supra note 93, at 4 (defining arrest as a distinct step in the larger criminal justice process).
present a detainee for a judicial hearing and determination of probable cause for any detention beyond that necessary to accomplish the steps of booking and of charging. Any person held by a state up to the date of trial is subject to reasonable bail.\textsuperscript{270} In state prosecutions, the standards for bail are prescribed by state law.\textsuperscript{271}

The arrest and temporary pretrial detention of individuals under the probable cause standard enable the state to prepare to prove its burden in a criminal trial. The Sixth Amendment’s guarantee of a trial in criminal cases encompasses the due process requirements that an accused be afforded a jury determination of guilt, and that proof of guilt must be beyond a reasonable doubt.\textsuperscript{272} There is a fundamental and quantitative difference between probable cause and the reasonable doubt standard. As the Supreme Court has explained it, probable cause means a “reasonable ground” for belief of guilt, and that is less than the evidence sufficient to convict.\textsuperscript{273} The higher standard of beyond a reasonable doubt is a safeguard against conviction of the innocent.\textsuperscript{274} The elevated standard also maintains respect for and confidence in the criminal justice system.

The constitutional scheme requires that the acts of arrest and of lodging criminal charges be carried through to the conclusion and according to the standards prescribed by the Fifth, Sixth, and Eighth Amendments.\textsuperscript{275} Therefore, constitutional scrutiny of a jurisdiction’s arrest practices cannot occur solely in relation to the physical act of arrest.

The question of whether arrests without a contemporaneous intention or without an ability to prosecute individuals for the charged offenses is unreasonable within the meaning of the Fourth Amendment and requires focusing on and measuring systemic state practices rather than looking only at the facts of a particular arrest in an individual case. This focus is appropriate, because the Fourth Amendment, like the other provisions in the Bill of Rights, preserves

\textsuperscript{270} U.S. Const. amend. VIII.
\textsuperscript{271} See, e.g., Md. Rules 4-216 and 4-217.
\textsuperscript{274} See Cage, 498 U.S. at 40.
\textsuperscript{275} See U.S. Const. amends. V, VI, VIII; supra notes 226-228; see also 1 Fowler V. Harper & Fleming James, Jr., The Law of Torts § 3.18 (1956) (“To be lawful, not only must an arrest be made on a proper occasion but, whether by officer or citizen, it must be made for the purpose of apprehending the person arrested and taking him before a court or public official.”).
individual rights in the face of sovereign authority asserted to interfere with that right.\textsuperscript{276}

In the cases of the arrests discussed in this Article, the states are asserting their respective sovereign authority in a systematic way against many individuals. That system is the gravamen of the Fourth Amendment violation. For jurists and scholars who need to find a footing in the Framers' experience to justify a constitutional interpretation that scrutinizes a systematic practice rather than only one application of the practice, one exists. The use of general warrants, which was at least part of the history that resulted in the Fourth Amendment,\textsuperscript{277} was a parallel experience. The attack on general warrants similarly was directed at a practice—the arbitrary use of the warrants—not only at the application of a warrant in a particular case.\textsuperscript{278} Among the evils of the general warrants was their use to seize individuals, not with a mind toward an ultimate lawful process, but as harassment or intimidation because of the individuals' political or religious views, or commercial competition.\textsuperscript{279} The net result of the practices was condemnation of the system of using general warrants; not simply

\textsuperscript{276} See Edmond v. Goldsmith, 183 F.3d 659, 661 (7th Cir. 1999) (holding that a general crime roadblock system violates the Fourth Amendment and recognizing that the reasonableness inquiry may focus on an individual stop by police, or on the entire program).

\textsuperscript{277} See George Anastaplo, The Amendments to the Constitution: A Commentary 69-70 (1995) (explaining how the Fourth Amendment was drafted, in part, to protect against traditional abuses such as the use of general warrants); Barbara C. Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 Temp. L. Rev. 221, 254 (1989) (“The fourth amendment was designed to prevent the arbitrary and indiscriminate searches permitted by general warrants and writs of assistance.”).

\textsuperscript{278} See Anastaplo, supra note 277, at 69-70 (discussing general warrants broadly and characterizing them as a form of abuse, as opposed to specific instances of abuse); Salken, supra note 277, at 254 (“General warrants and writs of assistance were harmful because they delegated to the officer the power to decide whom to search and for what to search . . . without a showing of individualized suspicion that evidence of criminal activity would be found in a particular place.”).

\textsuperscript{279} See Lasson, supra note 19, at 22-34 (discussing the use of the search power by dyers to search for cloth, by tallow makers to search for oil, in addition to using it for seizing political and religious materials for censorship and seizing property of competitors); Salken, supra note 277, at 255 (describing how general warrants were used in England in the 1600s “to suppress unwelcome printing”); Cloud, supra note 19, at 1717 (noting how it is well known that general searches and seizures were used in England “to suppress religious heresy . . . and political dissent” and remarking on Cuddihy’s “account of how seventeenth-century Catholics used these methods to suppress Protestants and how Protestants did the same to Catholics when the opportunity arose”); id. (noting Cuddihy’s explanation that general searches were used in America “in the south to control slaves”).
a determination on behalf of individual victims of the practices in individual cases.\textsuperscript{280}

Systemic abuses of governmental power are as corrupting, if not more so, than the judgment of an individual agent of the state, such as a police officer determining the existence of probable cause. In \textit{Edmonds v. Goldsmith},\textsuperscript{281} Judge Posner, writing for the majority panel, stated that: "Because it is infeasible to quantify the benefits and costs of most law enforcement programs, the program approach might well permit deep inroads into privacy."\textsuperscript{282} Systemic arrest practices that ignore the constitutional parameters of criminal justice and law enforcement are additional inroads into the protections of the Fourth Amendment. The fact that the practice of arrests without prosecution has persisted over time and involved such a large number of criminal cases does not make the practice legitimate. "Long usage" cannot legitimize a practice not found within, or that is contrary to, the explicit constitutional protections of the Fourth, Fifth, Sixth, and Eighth Amendments.\textsuperscript{283}

\section*{IV. BALANCING INDIVIDUAL RIGHTS AND STATE INTERESTS}

The premise of this Article is that individuals are harmed if they are arrested when the state does not have a contemporaneous intent or ability to fulfill the only lawful purpose of arrest—to attempt to prove an individual's guilt beyond a reasonable doubt and to afford him the constitutional protections to which he is entitled in answering the state's charges against him.

To achieve a balance between the individual liberties recognized in the Fourth Amendment and governmental interests, the state should be required to demonstrate why it is necessary that the independent right be infringed and that the deprivation is the best means available to meet the stated need. This analysis would insure that the government action is, in fact and in law, reasonable, and not merely convenient.

Most of the impetus for the Bill of Rights was concern that, without a separate and a distinct articulation of individual rights, such

\begin{itemize}
  \item \textsuperscript{280} See Cloud, supra note 19, at 1724, 1725 (discussing Cuddihy's conclusion "that objections to general warrants and general searches alike rested upon broad concerns about protecting privacy, property, and liberty from unwarranted and unlimited intrusions").
  \item \textsuperscript{281} 183 F.3d 659 (7th Cir. 1999).
  \item \textsuperscript{282} Id. at 662.
  \item \textsuperscript{283} See \textit{Lasson}, supra note 19, at 47-48 (discussing early English cases in which general warrants were found illegal and noting that these cases found the argument of long usage ultimately unpersuasive).
\end{itemize}
rights could be subsumed within and thereby obliterated by the new federal government's executive powers.\textsuperscript{284} In that regard, James Madison articulated the possibility that "Congress might even establish religious teachers in every parish, and pay them out of the Treasury of the United States, leaving other teachers unmolested in their functions."\textsuperscript{285} The specific amendments within the Bill of Rights were designed to draw a sharp line of demarcation between governmental discretionary or "necessary and proper" authority on the one hand, and the specific individual rights enumerated therein.\textsuperscript{286} As described by Justice Brandeis, the Fourth Amendment "conferred, as against the Government, the right to be let alone."\textsuperscript{287} That purpose and ordering of priorities in drafting the Bill of Rights remain intact for those amendments, including the Fourth Amendment, that have been applied to the states through the Fourteenth Amendment by the selective incorporation doctrine.\textsuperscript{288} That structure does not subsume the Fourth Amendment's guarantees within the "necessary and proper" functions of law enforcement.

States retain the authority to enact criminal laws for offenses committed within their respective borders and to specify how and by

\textsuperscript{284} See Schwartz, supra note 46, at 119-21 (discussing the impetus for the Bill of Rights, and quoting Chief Justice Marshall stating that "[s]erious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to the union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty" (internal quotation marks omitted) (quoting Barron v. Mayor of Baltimore, 7 Pet. 243, 250 (U.S. 1833))).

\textsuperscript{285} Morgan, supra note 57, at 139 (internal quotation marks omitted) (quoting The Papers of James Madison, vol. 13, 375-76 (Charles F. Hobson et al., eds. 1981)).

\textsuperscript{286} See John E. Nowak et al., Constitutional Law 412 (2d ed. 1983) (discussing the Bill of Rights and the purpose of its adoption, and noting that "the drafters of the Bill of Rights designed the amendments as a check on the new national government").

\textsuperscript{287} Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

\textsuperscript{288} See Ker v. California, 374 U.S. 23, 30-34 (1963) (reiterating that the Fourth Amendment applies to the states through the Fourteenth Amendment and finding that the constitutionality of a state search would be determined by the same standards that apply to federal searches under the Fourth Amendment); Mapp v. Ohio, 367 U.S. 643, 657 (1961) ("Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth Amendment, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government"); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (finding that the Fourth Amendment is "enforceable against the States through the Due Process Clause" of the Fourteenth Amendment). The Fourteenth Amendment mandates, in part, that

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV.
whom those laws are to be implemented. The authority reserved for the states, however, does not give carte blanche to the states for the way in which they enforce criminal laws. As Garner made clear, not every method employed by the states in carrying out the law enforcement function can be presumed to be or, in fact is, constitutional.

A. Individual Harm

Distinct harm occurs at approximately three stages after police make a decision to arrest an individual. In the arrest phase, the individual is subjected to (a) the loss of freedom when the police undertake an investigatory stop, (b) an exacerbation of the loss of freedom when the individual actually is placed under arrest, usually handcuffed, placed behind bars, and loses freedom of association and movement, and (c) public humiliation and embarrassment, especially because the majority of arrests occur in public places.

289. See LaFave & Israel, supra note 24, § 1.2 (discussing the allocation of state and federal authority and noting that "[j]ust as each state can shape its substantive criminal code to fit the value judgments and traditions shared by its people, each can also shape the procedures that will be used in enforcing that code"). Arrest laws typically are written as authorizations for arrest, not as mandatory directions to police officers, thereby leaving police officers with wide discretion in the decision of whether to take a person into custody. See id. at 77-78 (explaining that "[a] great majority [of arrest laws] are in permissive terms, usually indicating that the police 'may' arrest upon a given quantum of evidence"). The range of police discretion is reflected in the presumptive qualified immunity available to police officers in the performance of their duties, including arrest. See Davis v. Scherer, 468 U.S. 183, 197 (1984) (holding that "[a] plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official’s qualified immunity only showing that those rights were clearly established at the time of the conduct at issue").

An exception to the discretion rule has grown out of advocacy for a more effective law enforcement response to domestic violence. As of 1994, seven states had statutes mandating arrest if an officer had probable cause to believe domestic violence had occurred. See James, supra note 22, app. at 516 (finding that arrest laws mandate that a police officer "shall" arrest upon probable cause in the following states: Connecticut, Kansas, Nevada, Oregon, Rhode Island, South Dakota, and Wisconsin).

Law enforcement strategies also depend on police discretion to refrain from making an arrest in a situation that otherwise might justify taking a suspect into custody. The new emphasis on community policing often places higher priority on preventing crime than on "reacting" to it by arrest and prosecution. Other changes in the police function, whether driven by finite resources or an unrealistic public expectation of the role of police, similarly depend on judgment calls about individual instances of law-breaking. See Herman Goldstein, The New Policing: Confronting Complexity, in Crime and Justice in America, supra note 216, at 97-100.

290. See Tennessee v. Garner, 471 U.S. 1, 22 (1985) (striking down as unconstitutional a Tennessee statute that authorized the police to use force against unarmed fleeing suspects); supra notes 256-262 (discussing Tennessee v. Garner).

291. As mentioned, most prosecutors—prosecutor offices—do not know about felony cases in their districts until after the arrests are made. See Prosecutors in State Courts, 1990, supra note 100, at 3. That means prosecutors were not involved in obtaining arrest warrants or issuing informations before arrests in the majority of cases. Although some
The post-arrest phase consists of the following: (a) prolonged detention if the individual is not released on personal recognizance;\(^{292}\) (b) costs of satisfying a bond requirement to be released pending trial\(^{293}\) and/or retaining an attorney if the arrestee is not entitled to appointed counsel; (c) restrictions on day-to-day freedom of movement depending on the conditions of pretrial release;\(^{294}\) (d) economic loss caused by missing work time during arrest, arraignment, and/or bail proceedings;\(^{295}\) and (e) strain and disruption of familial and/or social relationships throughout all phases, and even after the formal proceedings are concluded.\(^{296}\)

Police agencies may apply directly to judicial officers for arrest warrants without a prosecutor's knowledge, the prevalence of warrantless arrest laws suggests those are rare instances. As discussed, Supreme Court case law upholds warrantless arrests in public places. See Florida v. White, 119 S. Ct. 1555, 1559 (1999) (explaining that "although a warrant presumptively is required for a felony arrest in a suspect's home, the Fourth Amendment permits warrantless arrests in public places where an officer has probable cause to believe that a felony has occurred") (citing United States v. Watson, 423 U.S. 411, 416-24 (1976)). Additionally, as Appendix A indicates, each jurisdiction authorizes warrantless arrests.

292. In 1990, data from a sample of 39 of the 75 most heavily populated counties in the United States was used to estimate the pretrial detention rates as 32% for arrests on public-order (nondriving) offenses, 35% for drug offenses, 33% for property offenses, and 37% for violent offenses. See Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics—1992, at 533 tbl.5.61 (Kathleen Maguire et al. eds., 1993) [hereinafter 1992 Sourcebook]. The 1992 pretrial detention rates, gathered from a sample of 40 of the 75 most populous counties in the United States, were 42% for public order arrests other than those involving driving or weapons, 29% in weapons cases, 32% for drug offenses, 37% for property offenses, and 42% for violent offenses. See 1995 Sourcebook, supra note 172, at 510 tbl.5.63. Other public-order offenses—public-order offenses other than those involving driving or weapons—"[i]nclude[ ] flight/escape, parole or probation violations, prison contraband, habitual offender, obstruction of justice, rioting, libel and slander, . . . treason, perjury, prostitution/pandering, bribery, and tax law violations"). Id. app. 15, at 681.

293. Of arrestees released before trial in 1992, in a sample of 40 out of the 75 largest counties, 25% of the releases were based on financial terms. See 1995 Sourcebook, supra note 172, at 511 tbl.5.65. Public-order arrests, not involving driving or weapons violations, resulted in bail amounts under $2,500 in 30% of the cases, $2,500-$9,999 in 27% of the cases, $10,000-$19,999 in 15% of the cases, and $20,000 or more in 29% of the cases. See id. at 511 tbl.5.66; supra note 292 (defining other public-order offenses).

294. See generally Hon. John L. Weinberg, Federal Bail and Detention Handbook 6-6 (1999) (discussing possible conditions of pretrial release such as "Third-Party Custody" and "Restrictions on Personal Associations, Place of Abode, or Travel").

295. See Ronald Goldfarb, Ransom: A Critique of the American Bail System 32 (1965) (noting that "[w]hen the defendant who cannot afford bail goes to jail before trial, he loses his present earning capacity, and often his job").

296. See Elise Zealand, Protecting the Ties that Bind from Behind Bars: A Call for Equal Opportunities for Incarcerated Fathers and Their Children to Maintain the Parent-Child Relationship, 31 Colum. J.L. & Soc. Probs. 247, 249 (1998) (discussing the effects of incarceration on family relationships and characterizing prisoners' families as "the unintended victims of incarceration" (citation omitted)); see also supra note 304 and accompanying text.
The third phase consists of collateral and consequential harm. Arrest and pending criminal charges can produce emotional and psychological harm for the arrestee and for family members. This harm is not necessarily “healed” if charges are dismissed without prosecution.\(^{297}\) Employers or prospective employers may decide that an arrest and pending criminal charges “disqualify” an individual for employment.\(^{298}\)

If an arrestee were previously convicted of a crime, the new arrest can “rekindle” the earlier case, even if the individual has paid the “costs” of the earlier crime, as by a term of imprisonment, fine, supervised probation, or any combination of those sanctions.\(^{299}\) For a parolee or person on probation, a new arrest can constitute a violation of the conditions of parole or probation, posing the prospect, at the very least, of more intense scrutiny of day-to-day activities, if not the revocation of parole or probation.\(^{300}\) The relaxed evidentiary standards for revocation proceedings make it possible to incarcerate the individual again based solely on a police officer’s recitation of probable cause for the new arrest, or even a probation officer’s interpretation of the facts alleged to support the new arrest.\(^{301}\)

\(^{297}\) Cf. Goldfarb, supra note 295, at 42 (noting that “most important of all these disadvantages [of pre-trial incarceration] are not the pragmatic problems but the basic, spiritual loss to the imprisoned defendant”).

\(^{298}\) In those states that authorize expungement of criminal records in certain circumstances, expungement does not necessarily protect an individual’s employment opportunities. For example, Maryland law authorizes the expungement of police and court records if an individual is arrested but not charged, or if the defendant is acquitted, or the charges are dismissed. See Md. Ann. Code art. 27, §§ 736-737 (1996 & Supp. 1998). The statute enables an individual not to have to disclose to an employer or to a prospective employer any information related to the expunged records. Md. Ann. Code art. 27, § 740 (1996). The statute prohibits an employer from failing to hire or discharging an individual for refusing to disclose such information. Id. It does not, however, require employment or continued employment of an individual who has been arrested. Id.

\(^{299}\) See Howard Abadinsky, Probation and Parole: Theory & Practice 186 (2d ed. 1977) (describing how sentences left over from prior convictions are relevant when determining the proper punishment for parole violations).

\(^{300}\) See id. at 184-86 (discussing how some parole officers, without resorting to judicial authority, can issue violation warrants, which mandate preliminary hearings and revocation hearings that might ultimately lead to revocation of parole or of criminal prosecution); id. at 105-10 (similarly discussing procedures following alleged violations of probation and of subsequent revocation).

\(^{301}\) See Gerstein v. Pugh, 420 U.S. 103, 121 n.22 (1975) (recognizing that “revocation proceedings may offer less protection from initial error than the more formal criminal process”). Revocation of parole is not part of a criminal prosecution, so that an individual is afforded only minimal due process rights in the parole revocation process. See Morrissey v. Brewer, 408 U.S. 471, 480 (1972). No rules of procedure or evidence are constitutionally prescribed; therefore, the process may be “flexible” and permit consideration of materials such as letters and affidavits that would not be admissible in a criminal trial. See id. at 489. The procedure for revocation of probation after sentence has been imposed is “constitu-
Finally, an arrest record can follow an individual regardless of the outcome (for example, dismissal) of the criminal charges. Even in states that have laws that authorize expungement of police and/or court records upon dismissal of charges, those laws are not always "self-executing" at the moment of dismissal of charges. A waiting period or some other procedural requirement might be imposed before expungement is allowed. Criminal defense attorneys may view expungement proceedings as separate civil actions, requiring either a separate fee agreement or even a different attorney. Additionally, the arrestee may not even be aware that steps can be taken to expunge criminal records, even in jurisdictions that have expungement laws.

In individual instances, the Court, in dicta, has recognized some of the negative consequences of arrest. Those pronouncements, however, often sound regrettably as though the author of the opinion is still pondering, as a theoretical matter, whether the harm actually occurs. In Gerstein, the Court focused on the harm incident to prolonged pretrial detention, equally applicable to an arrest itself, which might "imperil [a] suspect's job, interrupt his source of income, and impair his family relationships." One justice has described an arrest as an "offense to the dignity of the citizen who is arrested, handcuffed," indistinguishable from parole revocation. See Gagnon v. Scarpelli, 411 U.S. 778, 782 n.3 (1973).


303. For example, in Maryland, a petition for expungement cannot be filed earlier than three years from the date of an acquittal, a dismissal of charges, or completion of probation before judgment. See Md. Ann. Code art. 27, § 737(d)-(e). In the event of an acquittal or dismissal, a defendant may file a petition for expungement earlier than three years after the acquittal or dismissal, if he files with the petition a general waiver and release of liability for tortious conduct based on the charge that resulted in acquittal or dismissal. See id. § 737(d).

See also Tex. Crim. P. Code Ann. § 55.01 (West 1979 & Supp. 1999) (stating that a person is entitled to expungement of records relating to a felony or a misdemeanor if he is acquitted, or pardoned after conviction, or each of the following conditions are met: (1) no indictment has been presented against him, or an indictment was dismissed because of mistake, false information, or a similar reason indicating an absence of probable cause; (2) the person is released, the charge has not resulted in a final conviction, and is no longer pending; and (3) the person has not been convicted of a felony in the five years preceding his arrest in the expunction case); Tex. Alco. Bev. Code Ann. § 101.73 (West 1995) (stating that a person may apply for an expungement of records of conviction for consumption on premises licensed for off-premises consumption after the first anniversary of conviction containing a sworn statement of no additional alcohol consumption conviction during the previous 12 months). But see N.Y. Correction Law § 168-n(5) (McKinney Supp. 1998) (stating that the court shall order expungement of records related to a sex offender status upon reversal of conviction).

304. Gerstein, 420 U.S. at 114.
and searched on a public street.”

Justice Powell stated that, “custodial arrest is the significant intrusion of state power into the privacy of one’s person.”

One measure of how the state regards harm caused by state action is the remedies for the harm and/or sanctions for abuse of authority that creates the harm. However, improvident, arbitrary, or unlawful, seizures of individuals have virtually no legal consequences and no remedy for the individuals. There seem to be two main conceptual hurdles that prevent judicial recognition that the arrest and the charging practices of the state violate the Fourth Amendment in the sense argued here. As demonstrated in Whren and in other cited cases involving actions of police officers in making vehicle stops, the Supreme Court has measured police conduct against various degrees of intrusion. In so doing, it has, for example, determined that fears for an officer’s safety in approaching an occupied vehicle outweighed the embarrassment or inconvenience of ordering the driver and/or passengers out of a stopped vehicle.

The Supreme Court, however, has not consistently or frequently weighed the extent of the intrusion caused by full custody arrest—or other seizure, as by shooting—against specific and articulated law enforcement goals. Garner was a rare exception. In Garner, the State argued that criminal apprehension was a significant interest. The State explained its view that the assumed deterrence of police authority to use deadly force would significantly aid its apprehension ef-

305. Arizona v. Evans, 514 U.S. 1, 23 (1995) (Stevens, J., dissenting). Justice Stevens was discussing an arrest that took place on a public street “simply because some bureaucrat had failed to maintain an accurate computer data base.” Id.

306. United States v. Robinson, 414 U.S. 218, 237 (1973) (Powell, J., concurring). Justice Powell’s comment supported the proposition that a lawful arrest authorizes a full search of the arrestee’s person. See id. (asserting that “I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person.”).

307. See infra notes 321-330 and accompanying text (discussing legal obstacles to redress in cases of unlawful seizure).

308. See supra notes 144-243 and accompanying text.

309. See Maryland v. Wilson, 519 U.S. 408, 414-15 (1997) (explaining that “danger to an officer from a traffic stop is likely to be greater where there are passengers in addition to the driver in the stopped car” and holding that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop”); Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977) (per curiam) (describing a traffic stop as “a mere inconvenience [that] cannot prevail when balanced against legitimate concerns for the officer’s safety”).

310. Tennessee v. Garner, 471 U.S. 1, 10 (1985) (“Being able to arrest . . . is a condition precedent to the state’s entire system of law enforcement.” (quoting Brief for Petitioners at 14)).
forts. The Supreme Court, however, did not accept the State's calculus at face value. The Court analyzed the testimony of the pursuing officer, and made an independent assessment of whether the State's generalizations about its law enforcement goals outweighed the civil rights of the decedent.

The point of the Garner decision is not to criticize governmental action which, in hindsight, does not meet assumed expectations. Its prophylactic rule, however, is that the government is responsible if its calculus lacks adequate reasoning or factual support. The consequences of arrest are concrete and certain. The Fourth Amendment requires that the state justifies arrests at the outset, as likely to achieve permissible and articulated law enforcement goals. In an environment and with a history where so many arrests do not lead to prosecution, the presumption that arrests will initiate criminal prosecutions is not reasonable.

There is so little scrutiny of the consequences of the system-wide practices discussed here, that the situation amounts to a virtual wall of silence about the consequences of arrest on tens of thousands of individuals every year in the United States. This state of affairs tempts one to hypothesize, not that individual officers, prosecutors, or justices or judges cannot imagine what their own reaction would be to arrest, the risk of pretrial detention, ensuing personal shame, psychological harm, and loss of reputation, but that the persons most likely to be arrested are not "real" or simply cannot be likened to those who make the arrest and the prosecution decisions. Thus, the actual circumstances of arrest and of lingering criminal charges remain theory rather than a day-to-day legal and policy issue.

311. See id. at 9 (recognizing the State's argument that "overall violence will be reduced by encouraging the peaceful submission of suspects who know that they may be shot if they flee").

312. Id. at 3-4 (discussing the arresting officers' testimony). One of the officers testified that he did not see a weapon and that he was "reasonably sure" that the suspect was unarmed. See id. at 3. The officer thought Garner was about 5'5" or 5'7" tall, and 17 or 18 years of age. See id. at 3-4. Garner, however, was unarmed, 15 years old, and 5'4" tall. See id. at 4 n.2.

313. See id. at 8-10.

314. The Garner Court acknowledged the important goals of effective law enforcement and was careful not to criticize them in its decision. The Court noted: "[w]ithout in any way disparaging the importance of these goals, we are not convinced that the use of deadly force is a sufficiently productive means of accomplishing them to justify the killing of non-violent suspects." Id. at 10.

315. See id. at 21 (concluding that the officer's decision to use deadly force was not reasonably arrived at and therefore the action taken by the officer was not justified).
As the facts and authorities move, actual arrests and charging decisions are boiler plate processes, as though they are unlinked to serious constitutional standards. This situation has rendered the Fourth Amendment literally irrelevant to millions of individuals who are arrested each year. The most obvious social cost of the system is that a class of "The Arrested" has grown up, primarily in large urban areas.\(^{316}\) That categorization of many members of minority communities virtually guarantees permanent social and economic disadvantage.

In *Sibron v. New York*,\(^{317}\) the Court set out a principle for the universe of cases into which most arrests fall:

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constit-

---

316. For each of the years 1990-1994, more arrests occurred in cities having populations larger than 100,000 (Group I and Group II cities) than in each of the four other city sizes measured by the FBI. See *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports* 1990, at 176 tbl.26 (1991) [hereinafter 1990 UCR] (36% of arrests); *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports* 1991, at 215 tbl.31 (1992) (37%); *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports* 1992, at 219 tbl.31 (1993) (36%); *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports* 1993, at 218 tbl.30 (1994) (36%); *Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports* 1994, at 219 tbl.31 (1995) (38%). These percentages each represent the ratio of total arrests in cities over 100,000 to the total number of arrests nationwide; however, the total national arrest figures contained in the UCR tables cited above are lower than the annual arrest totals reported in the UCR tables that quantify arrests by index or nonindex offense category. Cf., e.g., 1990 UCR, supra, at tbls.24, 26. One possible explanation for the difference is that the offense category arrest tables are each based on arrest figures supplied by reporting agencies and estimated arrests for unreported areas. See, e.g., id. at 174, tbl. 21 n.1. One could surmise that the arrest totals categorized by city size include only data supplied by reporting agencies. Of 11,865,793 total arrests reported by geographic area in 1994, 9,169,197 are reported for cities, 4,168,290 in suburban areas, 1,882,094 in suburban counties, and 814,502 in rural counties. 1995 *Sourcebook*, supra note 172, at 396, tbl.4.3.

Numerous studies show the impact of arrest policies on large urban areas. One concluded that in 1991 almost one-third of black men aged 20-29 living in Los Angeles County had been jailed in that year. See *Miller*, supra note 167, at 5. A 1990 study by the Rand Corporation asserted that one-third of all African-American men aged 18-21 living in Washington, D.C. had been arrested and charged with an offense. See *id.* at 7. Data from a "one-day" profile conducted by the National Center on Institutions and Alternatives in 1992 concluded that approximately 75% of all 18-year-old African-American males in Washington, D.C. could expect to be arrested at least once before age 35. See *id.* An earlier study based on arrests during 1968-1972 in the 56 largest cities predicted that one out of four males living in a large city would be arrested for a felony at some point in their lives. See *id.* at 6.

tional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.\textsuperscript{318}

This language was directed to the argument that Sibron's appeal was moot because he had completed his jail sentence by the time the case reached the Supreme Court.\textsuperscript{319} In the case of unlawful arrests, however, the Court has left individuals "remediless and defenseless."

Supreme Court precedent holds that the illegality of an arrest, in and of itself, does not prevent the state from going forward with a prosecution. Or, for many arrests examined here, despite illegal arrests, the state may continue its hold on the individual through pre-trial detention, bail on conditions that restrict an individual's activities, or the stigma and the disabilities to which individuals may be subjected by having criminal charges outstanding.\textsuperscript{320}

In \textit{Albrecht v. United States},\textsuperscript{321} the Court distinguished between the legality of the charging document and the legal basis for an arrest.\textsuperscript{322} It phrased the issue as one of "jurisdiction"; if the charging document were valid (or could be validated by amendment), a court had jurisdiction over a defendant and the prosecution could proceed, even if the arrest itself were illegal.\textsuperscript{323} The arrest was illegal in \textit{Albrecht} because the affidavits were not notarized in conformance with federal law.\textsuperscript{324} By the logic of the \textit{Albrecht} decision, an illegal arrest apparently constitutes a form of "no-harm, no-foul," even though it effectively eliminates the guarantee against unreasonable seizures of persons.\textsuperscript{325}

\textsuperscript{318} \textit{Id.} at 52-53 (footnote omitted) (emphasis added); see also \textit{Chimel v. California}, 395 U.S. 752, 766 n.12 (1969) ("The [Fourth] Amendment is designed to prevent, not simply to redress, unlawful police action.").

\textsuperscript{319} \textit{See Sibron}, 392 U.S. at 52.

\textsuperscript{320} \textit{See Payton v. New York}, 445 U.S. 573, 592 n.34 (1980) (noting that "a defendant must stand trial . . . even if the arrest is illegal" (citing \textit{United States v. Crews}, 445 U.S. 463, 474 (1980))); \textit{Crews}, 445 U.S. at 474 (explaining that "[a]n illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction"); \textit{Gerstein v. Pugh}, 420 U.S. 103, 119 (1975) (declining to "retreat from the established rule that illegal arrest or detention does not void a subsequent conviction").

\textsuperscript{321} 273 U.S. 1 (1927).

\textsuperscript{322} \textit{Id.} at 5. The \textit{Albrecht} Court explained that 

[a]s the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of the clause in the Fourth Amendment which declares that "no warrants shall issue but upon probable cause, supported by oath or affirmation." But it does not follow that because the arrest was illegal, the information was or became void.

\textit{Id.} (internal citations omitted).

\textsuperscript{323} \textit{Id.} at 8 (explaining that "a false arrest does not necessarily deprive the court of jurisdiction of the proceeding in which it was made").

\textsuperscript{324} \textit{Id.} at 5 (finding that "[a]s the affidavits on which the warrant issued had not been properly verified, the arrest was in violation of . . . the Fourth Amendment").

\textsuperscript{325} \textit{See supra} notes 321-324 and accompanying text.
A rule is needed as a deterrent to the current and long-standing systems in some jurisdictions where individuals are arrested even though the jurisdictions will not or cannot prosecute them. As the Court made clear in *Arizona v. Evans* and in *Illinois v. Gates*, the legality of an arrest and the decision to impose an exclusionary rule are separate issues. The point of the separate consideration is that, while the former is a decision about the facts of an individual case, the latter serves to set a standard of governmental action for society as a whole. The Court stated in *Weeks* that "[t]o sanction such proceedings [prosecutions with the use of illegally seized evidence] would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action."

328. See *Evans*, 514 U.S. at 10 (stating that "[t]he question whether the exclusionary rule's remedy is appropriate in a particular context has long been regarded as an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct" (quoting *Illinois v. Gates*, 426 U.S. 213, 233 (1983))) (citing United States v. Harens, 446 U.S. 620, 627-28 (1980); Stone v. Powell, 428 U.S. 465, 486-87 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974))).
329. *Weeks v. United States*, 232 U.S. 383, 394 (1914). As noted, the *Weeks* decision concerns the admissibility of evidence seized in violation of the Fourth Amendment. *Id.* at 386, 394. *Weeks* established the so-called exclusionary rule, the purpose of which is to deter police officers from conducting illegal searches or seizures by prohibiting the admission of evidence that has been seized illegally. *Id.* at 394-98; see also *Calandra*, 414 U.S. at 348 (noting that "standing to invoke the exclusionary rule has been confined to situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search," and further noting that "[t]his standing rule is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction of the victim of the search" (citations omitted)).

In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court announced a modification of the exclusionary rule. *Leon* holds that, where police officers were acting in good faith, the exclusionary rule should not bar use of evidence obtained by those officers. *Id.* at 926. *Leon*, however, does not prohibit the use of the exclusionary rule as a deterrent in appropriate cases. *Id.* at 921-22 (discussing the deterrence function of the exclusionary rule, but concluding that "[p]enalizing the officer for the magistrate's error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations").

In *Leon*, police officers obtained a search warrant based upon information from known informants after an extensive investigation. *Id.* at 901-02. In hearing motions to suppress, the trial court determined that the warrant was insufficient because it did not establish an informant's credibility or his personal knowledge of facts that he related to the investigating officers. *See id.* at 903 n.2. The Supreme Court was satisfied that the police officers conducted the search pursuant to the warrant in good faith; the officers had not submitted false or deceptive information to the magistrate. *Id.* at 902. The Court found that, in such circumstances, the deterrent purpose of the exclusionary rule would have no effect because the police officers did not knowingly violate the law. *Id.* at 918-19 (concluding that "even assuming that the [exclusionary] rule effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct
In *Leon*, the Court pointed out that the exclusionary rule is a "judicially created remedy" and not a "personal constitutional right of the party aggrieved." However, that is a recognition that the absence of explicit sanctions within the Fourth Amendment itself does not mean that the courts lack power to fashion remedies to deter violations of the guarantee against unreasonable searches and seizures. Yet courts have failed to consider and to sanction the patterns of arrest described here. The context in which the Bill of Rights was drafted may offer one possible intellectual explanation for the lack of explicit provisions to address Fourth Amendment violations.

Much of the public and political discussion leading up to the presentation of Madison's draft of the Bill of Rights in 1789 focused on the question of the necessity of a specific enumeration of individual rights. One of the main arguments against the amendments was that they were unnecessary because the Constitution ensured that the national government would have only those powers enumerated therein. Therefore, individuals were guaranteed freedom and non-

---

30. Id. at 906 (quoting *Calandra*, 414 U.S. at 348).
31. See *Boyd v. United States*, 116 U.S. 616, 638 (1886) (remediying Fourth and Fifth Amendment violations by excluding the product of illegal searches from evidence).
32. See *Levy*, *supra* note 46, at 3-10 (describing the various arguments surrounding the question of whether it was necessary to include a specific enumeration of rights in the Constitution).
33. See *Anastaplo*, *supra* note 277, at 11 (recognizing the argument that "there was no need to provide assurances for additional rights, since the powers of the proposed Congress did not extend to putting those rights in jeopardy"); *Levy*, *supra* note 46, at 4 (citing James Wilson's line of reasoning that the federal government's "authority rested on enumerated powers. Therefore everything not delegated to the United States was reserved to the people or the states").

Others argued that the Constitution did not need to specify individual rights because state constitutions already protected such rights. See, *e.g.*, *Anastaplo*, *supra* note 277, at 15. That begged the question, in Professor Anastaplo's view, of the relationship between the state constitutions, on the one hand, and the new national Constitution on the other. *Id.* at 15-16. Tension between federal and state criminal procedural rights presumably became moot after the selective incorporation doctrine was applied. In addition, the
interference except in those instances and to the extent that governmental action is specifically authorized.\textsuperscript{334}

Leonard Levy characterized the Constitution-writing process as "measuring the powers of government, not the rights of the people."\textsuperscript{335} The language of the amendments supports that interpretation. The Fourth Amendment, for example, references "[t]he right of the people" to be free from unreasonable searches and seizures.\textsuperscript{336} The amendment is worded to emphasize the limits of government authority, and not to wax eloquently about the derivation or breadth of the referenced right, or how to ensure that it is not violated.

Lip service is paid by the Supreme Court and by the lower courts to the availability of post-arrest remedies, such as actions for damages under 42 U.S.C. § 1983.\textsuperscript{337} As a matter of law, however, the civil remedy does not act as a deterrent to the unconstitutional practice of arresting individuals without the intent or the ability to prosecute them. Furthermore, as a practical matter, the remedy is virtually unavailable to the millions of individuals who are arrested each year.

There is a hierarchy of defenses that make § 1983 largely ineffectual. First and foremost, states are not subject to damage actions

\textsuperscript{334} The Supreme Court has described the effect of the Fourth Amendment as the following:

The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law.


\textsuperscript{335} Levy, supra note 46, at ix.

\textsuperscript{336} U.S. Const. amend. IV.

\textsuperscript{337} See infra notes 338-358 (discussing court imposed obstacles to recovery under § 1983); infra note 486 (providing, in part, the text of 42 U.S.C. § 1983).
under § 1983 because the civil rights statute does not abrogate state sovereign immunity.\textsuperscript{338} Therefore, under § 1983, the states are immune from monetary liability for the operation of their arrest laws.\textsuperscript{339} Monetary liability would provide the greatest incentive for states to ensure that their law enforcement practices and laws are constitutional. In the absence of that remedy, the courts should strive to uphold constitutional protections related to arrest by fashioning other remedies proportionate to the harm inflicted.

Second, as discussed, \textit{Monell} is a hurdle to suits for damages against local cities and counties as well.\textsuperscript{340} Those jurisdictions employ the vast majority of law enforcement officers with arrest powers and have the most direct control over their actions.\textsuperscript{341} As with states, the absence of financial incentives for county and for local governments to uphold the Fourth Amendment requires court-fashioned sanctions. In \textit{City of Los Angeles v. Lyons},\textsuperscript{342} however, noteworthy for its strongly-worded dissent, the Court declined to hold a city financially liable even for life-threatening arrest practices.\textsuperscript{343}

In \textit{Lyons}, the Court held that an individual who was subjected to a choke hold by police without provocation during a traffic stop lacked standing for damages and even for injunctive relief under § 1983.\textsuperscript{344} The Court framed the standing issue as whether the plaintiff would be subjected to choke holds in the future, not whether the practice of the Los Angeles Police Department was unreasonable when applied against the plaintiff or might be applied against others in the future.\textsuperscript{345} The opinion reads like a stretch to bar § 1983 relief.

\textsuperscript{338} See Will v. Michigan Dep't of State Police, 491 U.S. 58, 67 (1989) ("We cannot conclude that § 1983 was intended to disregard the well established immunity of a State from being sued without its consent.").

\textsuperscript{339} See id.

\textsuperscript{340} See supra note 267.

\textsuperscript{341} See 1995 \textit{Sourcebook}, supra note 172, at 20 tbl.1.17 (showing that local governments employ 79.7\% of criminal justice system employees who engage primarily in "police protection" activity as opposed to state governments, which employ 10.1\% and the Federal government, which employs 10.2\% of such employees).

\textsuperscript{342} 461 U.S. 95 (1983).

\textsuperscript{343} Id. at 91, 112-13.

\textsuperscript{344} Id. at 105 (denying standing to respondent Lyons, because he "failed to demonstrate a case or controversy with the City that would justify the equitable relief sought" (footnote omitted)).

\textsuperscript{345} Id. The Court stated:

That Lyons may have been illegally choked by the police . . . while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.
At the outset, the Court and the City agreed that the case was not moot, even though the City had voluntarily imposed a moratorium on the use of choke holds after numerous deaths.\textsuperscript{346} The Court maintained that the controversy was still alive because the moratorium could be lifted at any time.\textsuperscript{347} The plaintiff was not, however, entitled to benefit from that logic. Justice Marshall, in his dissent, argued that the majority opinion "immunizes from prospective equitable relief any policy that authorizes persistent deprivations of constitutional rights as long as no individual can establish with substantial certainty that he will be injured, or injured again, in the future."\textsuperscript{348}

Third, § 1983 actions often are unsuccessful because the doctrine of qualified immunity applies presumptively to actions of individual law enforcement officers.\textsuperscript{349} Additionally, state arrest laws themselves give the officers a blanket shield of immunity. To overcome the presumption of qualified immunity, a plaintiff must demonstrate that the individual, acting under color of law, acted either contrary to well-established law, or in a manner that the individual could not have believed was lawful.\textsuperscript{350}

As demonstrated in Appendix A, the legal threshold for an individual officer's decision to arrest an individual is set out in the respective laws of each of the fifty states and the District of Columbia. The state statutes generally set probable cause as the standard for warrantless arrests.\textsuperscript{351} As far as § 1983 is concerned, a police officer's decision

\textsuperscript{346} See id. at 101 (agreeing with the City's argument "that the case is not moot, since the moratorium by its terms is not permanent").

\textsuperscript{347} Id.

\textsuperscript{348} Id. at 137 (Marshall, J., dissenting).

\textsuperscript{349} Cf. Wilson v. Layne, 119 S. Ct. 1692, 1696 (1999) (explaining that "government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known'" (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982))).

\textsuperscript{350} See Davis v. Scherer, 468 U.S. 183, 191 (1984) (explaining that such individuals "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (quoting Harlow, 457 U.S. at 818)).

\textsuperscript{351} See, e.g., Md. Ann. Code art. 27, § 594B(C) (1996 & Supp. 1998) (explaining that "[a] police officer may arrest a person without a warrant if the officer has probable cause to believe that a felony has been committed or attempted and that such person has committed or attempted to commit a felony whether or not in the officer's presence or view."). As shown in Appendix A, numerous states also authorize warrantless arrests when an offense is committed in the presence of a police officer. The "in the presence" formulation also constitutes probable cause, and is not a separate legal distinction. An officer's observation of a crime would give that officer a reasonable belief that a crime occurred, and that the person the officer observed committed it. See Henry v. United States, 361 U.S. 98, 102
to arrest can easily be made to fit the statutory requirements of arrest. Many scenarios and assumptions fall within the probable cause formulation; the odds are greatly in favor of police officers articulating enough "belief" to meet the threshold.

The interaction of statutory standards for arrest and the practical realities of how those standards are applied calls into question whether qualified immunity should be presumed when police officers make arrests. The statutory bases for arrest prescribed in state laws are, in actuality, legal conclusions rather than legal standards. They do not define or delineate permissible official action. Each police officer is allowed to decide for himself whether the circumstances of a particular case constitute probable cause. Thus, there is, in reality, no "established law" of probable cause. As long as an officer states his belief that the facts before him constituted a crime and that the arrested individual committed that crime, there is precious little likelihood that the officer will be held liable under § 1983 for an unreasonable arrest.

Finally, prosecutors cannot be held financially liable under § 1983 for their decisions to go forward on a case or group of cases or

(1959) (stating that "[p]robable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed" (citing Stacey v. Emery, 97 U.S. 642, 645 (1878))); Carroll v. United States, 267 U.S. 132, 161 (1925) ("If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been omitted, it is sufficient." (quoting Stacey, 97 U.S. at 645)).


353. Individuals are arrested even though their conduct is not covered by applicable criminal statutes. Those arrests surely are unreasonable within the meaning of the Fourth Amendment. The reluctance of courts to apply § 1983 towards police officers and municipalities in such situations has the effect of sanctioning flagrant abuses of power. As pressure mounts on police departments to protect the "quality of life" in neighborhoods, it is foreseeable that arrests will proliferate for individuals who gather on public streets and frequent public areas. See Herman Goldstein, The New Policing: Confronting Complexity, in CRIME AND JUSTICE IN AMERICA, supra note 216, at 95, 97 (discussing the increase in community policing and stating that "the new forms of policing expand the police function from crime fighting, without an abdication of that role, to include maintaining order, dealing with quality-of-life offenses, and fixing the "broken windows"); supra note 289. It can be expected that more individuals will be arrested for "loitering," for example. Police officers could construe loitering ordinances and statutes to allow them to order individuals away from particular locations or public streets, and to arrest individuals who disobey those orders.

It can also be expected that states will argue that such "mistakes" of law by police officers fall within Leon's good faith test for application of the exclusionary rule. For purposes of § 1983 and the exclusionary rule, courts should consider whether police officer claims of "ignorance of the law" mask either an indifference to appropriate legal standards, or even conscious disregard of them.
to dismiss cases. In *Imbler v. Pachtman*, the Court held that prosecutorial discretion is absolutely immune from liability. *Imbler* relied on *Griffith v. Slinkard*, the first case, in the United States, on prosecutorial immunity from a suit. *Griffith* upheld a prosecutor's absolute immunity in the face of a claim that he allowed a case lacking probable cause to go forward. *Imbler* recognized the difference between qualified immunity, which is available to police officers, and the absolute immunity of prosecutors and judicial officers. The Court explained:

The procedural difference between the absolute and the qualified immunities is important. An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial.

The absolute immunity afforded prosecutors in the performance of their prosecutorial duties is based on prudential considerations of preventing harassment of public officials and encouraging courage and independence in prosecutorial decisionmaking. The Court has also surmised that the possibility of civil liability of prosecutors could put the criminal justice system itself in jeopardy. The Court's decisions on prosecutorial immunity, however, take generalizations about law enforcement interests at face value, instead of considering whether those generalizations are accurate. Courts need to consider

---

355. *Id.* at 431. *Imbler* was a § 1983 suit for malicious prosecution. *Id.* at 410. Following Imbler's conviction for felony murder, the state court prosecutor notified the Governor of California that he had uncovered evidence substantiating Imbler's claimed alibi, and casting doubt on a key government witness. *See id.* at 412.
356. 44 N.E. 1001 (Ind. 1896).
357. *See id.* at 1002 (explaining that "[t]here is . . . no more liability against the prosecuting attorney than there is against the grand jury for the return of an indictment maliciously and without probable cause").
359. *See Imbler*, 424 U.S. at 422-23 (noting that the "common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors" and that these considerations include preventing harassment and allowing the prosecutor to exercise discretion).
360. *See id.* at 426-29 (considering the effect that constant fear of defendant retaliation would have on prosecutors trying to do their duty); Malley v. Briggs, 475 U.S. 335, 343 (1986) ("Exposing the prosecutor to liability for the initial phase of his prosecutorial work could interfere with his exercise of independent judgment at every phase of his work, since the prosecutor might come to see later decisions in terms of their effect on his potential liability.").
carefully whether the asserted working assumptions about law enforce-
ment and prosecution have overtaken explicit constitutional
provisions.

*Imbler* presented an opportunity for the Court to make a distinc-
tion between cases where prosecutorial decisionmaking merits immu-
nity, and those where it does not. *Griffith* presented a claim that the
prosecutor caused a case to go forward, even though he knew prob-
able cause was not present. The prosecutor in *Imbler*, by contrast,
took the extraordinary steps of continuing to investigate facts of the
case even after conviction and sentencing, and then disclosing excul-
patory information. Thus, the two cases present both extremes of
prosecutorial discretion, yet the Court treated them as of a piece. The
Court’s historical fears about the chilling effect of prosecutorial liabil-
ity have supplanted the creation of a standard of review to distinguish
between the good faith cases and those involving improper
conduct.

---

363. A more recent case involving prosecutorial immunity, *Kalina v. Fletcher*, 522 U.S. 118 (1997), shows how distinctions can be made about a prosecutor’s actions. *Kalina* affirmed the traditional absolute immunity for a prosecutor’s decisions relating to charging crimes. See id. The Court, however, stated that a prosecutor was only entitled to qualified—not absolute—immunity for the evidentiary affirmation in the procurement of an arrest warrant, a role traditionally performed by police and not by prosecutors. Id. It is too soon to know whether the Court will follow *Kalina’s* example of parsing individual prosecutorial decisions to determine whether some do not merit absolute immunity. See also *Buckley v. Fitzsimmons*, 509 U.S. 259, 275 (1993) (holding that prosecutors were entitled only to qualified immunity for their actions in acquiring a bootprint before a special grand jury was empaneled and stating that “[t]he prosecutors’ conduct occurred well before they could properly claim to be acting as advocates”); *Burns v. Reed*, 500 U.S. 478, 494 (1991) (holding that a prosecutor could claim only qualified immunity for the act of giving advice to police resulting in a confession obtained under hypnosis, and stating that “[a]bsolute immunity is designed to free the judicial process from the harassment and intimidation associated with litigation. That concern therefore justifies absolute prosecutorial immunity only for actions that are connected with the prosecutor’s role in judicial proceedings, not for every litigation-inducing conduct”).

The focus of the *Kalina* and *Imbler* opinions on the actions of prosecutors that constitu-
tute prosecutorial discretion assumes that prosecutors are, in fact, making knowing and
intentional decisions about the cases before them. As the discussion about charging prac-
tices indicates, however, many criminal cases are initiated without the exercise of
prosecutorial discretion. See supra notes 100-148 and accompanying text. Those cases, pri-
marily misdemeanors, are initiated solely upon the charging decisions of arresting police
officers. Prosecutors literally become aware of the cases for the first time when they appear
at a hearing or on the scheduled trial date. In those instances, prosecutorial discretion has
not been exercised. Thus, judicial abstention and application of absolute immunity are
not appropriate. The state should be held responsible for its failure of the prosecution
function, especially where the failure either encourages, or does not guard against, Fourth
Amendment violations.
The sum total of the Court's approach to remedying violations of Fourth Amendment rights during arrests makes the likelihood of prevailing in a § 1983 suit so slim that the statute does not serve as an effective deterrent against illegal arrests.364

B. The Public Interest

1. Measuring the Public Interest.—Most of the controlling law on the Fourth Amendment regarding arrests constitutes what Justice Scalia has termed the Supreme Court's "own (quite irrefutable because entirely value laden) 'balancing' of the competing demands of the individual and the State."365 Scalia's characterization of the standards as "irrefutable" is on the mark. Except on rare occasions, such as Tennessee v. Garner,366 the Court has not looked behind the "irrefutable" or even supposed (because not articulated) justifications for law enforcement practices. There is currently no burden on states to justify any of their routine practices with regard to arrests.

The justification for decisions to arrest a person and to charge him with a crime, and whether to detain him until the case is dismissed or release him before final disposition with restrictions on his freedom, should be easy to articulate. Requiring articulation is the only way to ensure that the guarantees in the Bill of Rights are not subsumed, just as some of the Framers feared, by the day-to-day functions and assumed prerogatives of the states.367

It is a straightforward proposition that law enforcement is necessary to protect public interests and the safety of individuals and their property. That common sense theory aside, the practical application of arrest laws, as discussed in this Article, has two main problems that undermine the law enforcement rationale. First, for millions of arrests, the state does not articulate how most individual arrests or even categories of arrest further its interests sufficiently to overcome the presumptive right of individuals to be left alone that is embodied in

364. In Imbler, the Court wanted to "emphasize" that the absolute immunity from financial liability available to prosecutors "does not leave the public powerless to deter misconduct or to punish that which occurs." Imbler, 424 U.S. at 428-29. The Court stated that criminal prosecution and professional discipline were sufficient alternative "checks" on prosecutorial misconduct. Id. at 429. It is necessary then to consider whether either of those sanctions are applied frequently enough to constitute a "check."


366. 471 U.S. 1 (1985); see supra notes 256-262 and accompanying text.

367. See Mykeltvedt, supra note 89, at 1-13 (noting that some of the framers of the Fourteenth Amendment thought its purpose was to make the Bill of Rights wholly applicable to state governments).
the Fourth Amendment. Second, operation of the arrest power, as discussed here, is counter to the public interest.

*Garner* is an example of how a court can and should weigh the individual right/government interest equation. The Court reiterated that reasonableness under the Fourth Amendment depends on both when and on how a seizure takes place. The state contended that the discretion to use deadly force against burglary suspects was essential, in view of the danger of violence during apprehension. In considering that contention, the Court relied on the *Uniform Crime Reports* published by the FBI that are used in this Article to document the incidences of arrests and convictions. The statistics used by the Court documented that only 3.8% of all burglaries from 1973 through 1982 involved violence. The Court also noted that the FBI categorized burglary as a property, rather than a violent crime.

In addition, the Court was persuaded by research showing that deadly force laws similar to Tennessee's "actually do not protect citizens or law enforcement officers, do not deter crime or alleviate the problems caused by crime, and do not improve the crime fighting ability of law enforcement agencies." The Court found support for that view in a "long-term movement" by states and by police agencies away from use of deadly force toward any fleeing felon, without proof of the felon's dangerousness.

---

368. See generally Anastaplo, supra note 277, at 69-71 (discussing the development of the right not to be subjected to unreasonable searches and seizures).

369. See Garner, 471 U.S. at 8-12 (discussing the application of a "balancing of competing interests" to determine whether the use of deadly force on a fleeing suspect is constitutional in the presence of mitigating circumstances (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981))).

370. Id. at 9-11 (finding that the use of deadly force is a seizure of a suspect's life and that such seizure is unconstitutional unless the officer has probable cause to believe the suspect poses a threat of serious harm to either the officer or to others).

371. See id. at 11.

372. Id. at 21.

373. Id.; see supra notes 154-159 and accompanying text (regarding compilation of the FBI statistics).


375. Id. at 18. The dissent argued that a constitutional challenge to a state statute "does not impose a burden on the State to produce social science statistics or to dispel any possible doubts about the necessity of the conduct." Id. at 28 (O'Connor, J., dissenting). Nonetheless, the dissent relied on Department of Justice statistics showing the number of violent crimes committed during burglaries. Id. at 26-27. Justice O'Connor seemed to be swayed because less restrictive deadly force laws had "the approval of nearly half of the state legislatures," as well as a history predating the Fourth Amendment. Id. at 32.

For the dissent, however, the ultimate consideration for determining the reasonableness of the use of deadly force pursuant to the Tennessee statute was the knowledge, or lack thereof, of the individual officer pursuing the suspect. Id. at 29-30. In Garner, the
The Court's examination of the stated law enforcement rationale in *Garner* against the public interest resulted in a determination that the public interest was not served by the state's deadly force statute. In view of the large and varied number of offenses in which arrest is authorized solely upon the decision of individual police officers, coupled with the large numbers of those arrests that do not result in prosecution, the courts should affirmatively inquire into whether Fourth Amendment rights are properly balanced against law enforcement interests.

2. Threats to the Public Interest.—It is an understatement to say that arrest practices since the 1970s have not been a "sufficiently productive means of accomplishing" the ultimate ends of law enforcement. The rising crime rates during the 1980s and 1990s refute the assumed utility of the arrest practices. If those rates are viewed in relation to the number of arrests during the period, the deterrent value of arrests is dubious.

Arrests have a consequential negative impact on the persons arrested and on their families, yet the record discussed in this Article discloses more than ten million arrests annually. These facts, coupled with crime rates throughout the period, lead to the conclusion that some other factor is at work that refutes the logical conclusion that arrests deter the commission of crime. In response to that enigma, one might conclude that the "wrong" people are being arrested; the crime rate (even adjusted by recent downward trends) and prosecution rates suggest that millions of criminals apparently remain free.

Police officer testified at trial that he was "reasonably sure" and "figured" that Garner was unarmed and thought that Garner was 17 or 18 years old and about 5'5" or 5'7" tall. *Garner*, 471 U.S. at 3-4 (citation omitted). Additionally, Justice O'Connor noted the officer who "pursued a suspect in the darkened backyard of a house that from all indications had just been burglarized," was not certain if the suspect was alone or armed, nor did he know what happened in the house. *Garner*, 471 U.S. at 29-30 (O'Connor, J., dissenting). Taking these facts into consideration, Justice O'Connor concluded by stating:

> Whatever the constitutional limits on police use of deadly force in order to apprehend a fleeing felon, I do not believe they are exceeded in a case in which a police officer has probable cause to arrest a suspect at the scene of a residential burglary, orders the suspect to halt, and then fires his weapon as a last resort to prevent the suspect's escape into the night.

*Id.* at 32.

376. *Garner*, 471 U.S. at 9-10 (discussing how the use of deadly force not only "frustrates the interest of the individual," but is a "self defeating way of apprehending a suspect and so setting the criminal justice mechanism in motion").

377. *Id.* at 10.

378. See app. C, tbls.2, 3, & 4 and accompanying text.

379. See supra notes 172-201 and accompanying text.
An equally plausible explanation is that arrest practices do not deter crime because “the word is out” that arrests do not lead to prosecution in a large number of cases. Thus, hardened criminals or repeat offenders might be willing to risk arrest through the commission of crimes, because it is only a temporary inconvenience. The odds of a longer lasting or more severe sanction are not great because the dismissal rate is so high. That “cost-benefit analysis” by some offenders means that current wholesale arrest practices produce a distinct harm to the public interest because they are not working. State arrest laws and practices have to be judged from the perspective of the harm they cause to individual rights and to the larger public interest.\textsuperscript{380}

Despite a law enforcement rationale that frequent arrests deter crime and/or create respect for law, common sense and empirical data undercut that assertion.\textsuperscript{381} It is not difficult to test the respect-for-law argument. On any given work day in any major city in the country, the halls of the local courthouse are teeming with individuals brought before the bar of justice, often accompanied by family members, neighbors, or friends who are equally disoriented about the process about to unfold. Arrestees who were not able to post bond might be brought through a courtroom hallway shackled together, like an insolent daisy chain.

The criminal courtrooms are a beehive of activity. They are one of the few urban venues that are usually filled to capacity before 10:00 a.m. The assembled crowd is treated to an endless drone of names and case numbers. Many of the outcomes are bewilderingly familiar. The court or prosecutor will announce that a case is dismissed and that a defendant is discharged, at times, even before the defendant has had sufficient time to make his way through the crowd to stand before the bench. Usually no reason is given when a case is dismissed.

That scenario, replicated hundreds, if not thousands, of times in our nation’s courts every day, undermines the perception of effective law enforcement. The most dangerous result is that defendants who pose a genuine threat to society quickly surmise that the odds of being

\textsuperscript{380} Obviously, the overwhelming majority of the law enforcement community does not contend that every law violation necessitates an arrest. One element of the discretion held by law enforcement officers is the authority not to make arrests in given circumstances. Common sense and hard budgetary facts make it clear that no system could bear the financial burden of pursuing every law violation. \textit{Cf.} Goldstein, \textit{supra} note 289, at 95 (stating that “we need to be aware of the avalanche of business that . . . [an] expansion of the police function invites lest it constitute a serious self-inflicted wound”). Those limitations demand a far more judicious and rational arrest policy than many jurisdictions demonstrate.

\textsuperscript{381} \textit{See infra} note 385.
sanctioned for criminal conduct are in a defendant's favor. To the many urban residents who are disaffected from the criminal justice system, these daily outcomes can only reinforce a sense that there is no sense to the system. When so many cases are dismissed, it is not irrational to speculate that the stated reasons for many arrests were fabrications.

Even those citizens who harbor some faith in the fairness and in the rationality of the system must become disillusioned by the perception that "nothing" happens in the courts, despite the time spent and the large number of people involved.382 The competency of government officers is drawn into doubt from the perception that so many "weak" cases are filed. The same conclusion can result from the perception that the government is unable to prepare cases sufficiently to go to trial.

Poor public perception is not the only cost of a system filled to overcapacity with cases that are not prosecuted. Police officers spend countless hours off public streets preparing for the many cases that are not prosecuted. Arrest reports and other paperwork must be completed. Arrestees must be transported and processed for booking. Officers wait in courthouses for hours, often at the loss of sleep and rest, before they are informed that cases are dismissed. Any of the time spent on these activities are hours when police are not patrolling public streets, investigating cases that should be prosecuted, or doing other police work that might produce beneficial results.

Each of these circumstances presents a concrete danger to society. Any such danger warrants a close examination of the system that produces it. Those dangers, coupled with the deprivation of liberty for many citizens contrary to the criminal procedures required by the Constitution, require that the courts look behind blanket law enforcement rationales.

3. Deterrence as a Rationale.—Numerous studies have been designed to measure the effects of arrest, and of particular arrest policies, such as those aimed at particular categories of crimes.383 The

382. Cf. Feeney et al., U.S. Dep't of Justice, Arrests Without Conviction: How Often They Occur and Why 8 (1983) (discussing how case attrition offends the public's sense of justice in that the wrongs to be righted by the justice system are not being vindicated).

383. See, e.g., Lawrence W. Sherman, Policing for Crime Prevention, in Office of Justice Programs, U.S. Dep't of Justice, Preventing Crime: What Works, What Doesn't, What's Promising 8-1 (1997) (finding that robbery, disorder, gun violence, drunk driving, and domestic violence may be prevented by police action "but only by using certain methods under certain conditions").
studies range from those that are individual-specific and use recidivism as the measure for the effectiveness of arrest policies, to those that might be jurisdiction or offense based. These latter categories may study whether arrest policies directed at specific offenses have an impact on the future occurrence of those offenses, or whether a more general but increased arrest policy affects the incidence of crime generally, or affects the types of offenses. Whatever the methodology, the studies do not document that theories of deterrence correlate to the millions of arrests that take place annually throughout the United States.\textsuperscript{385}

Of more fundamental importance, our system does not sanction depriving some individuals of their constitutional rights to deter others. Some might assert, for example, that strict law enforcement against “squeegee” cleaners in New York City deters other forms of crime. Proponents of such policies might contend that deterrence occurs because more police are on the streets who can apprehend law breakers, or because the policy sends the message that any law violation, no matter how minor, will be prosecuted.

The Constitution requires that each individual be accorded his individual rights. The operating assumption has to be that an individual is arrested only for crimes that he has committed and only if the state has the intention—and the wherewithal—to prosecute the ar-

\textsuperscript{384} See, e.g., id. at 8-1, 8-16 (comparing policing techniques intended to prevent crime that focus either on the individual offender or categorical crimes).

\textsuperscript{385} The results of research about the effectiveness of increased arrests on crime rates are mixed. Out of seven studies on reactive arrests reported between 1974 and 1991, three studies documented no correlation between higher arrest rates and crime; one found a correlation beyond a “tipping point”—a threshold beyond which the effects of increased arrests become evident—with no effect for a number of arrests below the tip point; one reported a tipping effect of increased arrest rates on cities with populations under 10,000; however, another found no arrest rate effect for cities of more than 10,000. See id. at 8-17 fig.8-5a. One study showed that increased arrests correlated to a reduction in robberies, but not to four property crimes. See id. at 8-16, 8-17 fig.8-5a.

Similar disparate findings were made on the effect of increased arrest in drug market areas, for drunk driving and under “zero-tolerance” policies. See id. at 8-22 fig.8-6c, 8-23 fig.8-6d & 8-6e. Specific deterrence aimed at juvenile crime and domestic violence similarly yielded no exact correlation. See id. at 8-18 fig.8-5b.

\textsuperscript{386} Cf. David Whitman, On Not Believing the Good News, U.S. NEWS & WORLD REPORT, Dec. 29, 1997, at 3 (claiming that those arrested for minor "quality of life offenses" often had rap sheets for violent crimes or were carrying unregistered weapons and "[a]s a result, word spread on the street that it was a bad idea to carry weapons in public, which curbed street violence and drove more of it indoors, where innocent passersby were less likely to get hurt").
rested person in accordance with the law.\textsuperscript{387} Similarly, arrests cannot be used only to give the appearance of orderly neighborhoods or to demonstrate an effective police presence. Arrests for disorderly conduct, loitering, and other so-called "quality of life" offenses are lawful only if probable cause exists for the arrests, and if the purpose of the arrests is to initiate prosecution for the offenses.\textsuperscript{388} In\textit{Ex parte Quirin},\textsuperscript{389} the Court made clear that an individual's rights cannot be sacrificed for general theories of law enforcement. The Court stated that "[c]onstitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishments on some who are guilty."\textsuperscript{390}

4. \textbf{Negative Social Consequences}.—Numerous scholars have studied and have documented the numerical disparities between whites and nonwhites in the criminal justice system.\textsuperscript{391} One direct consequence and harm of the disparities is the psychological and economic impact the disparate treatment has on minorities.\textsuperscript{392} Despite evidence of the disproportionate representations of minorities in the criminal justice system, there is nonetheless a tendency among the majority population to dissociate feelings of alienation among minorities from their likely contributing factors. Such dissociation allows one to mar-

\textsuperscript{387} But see Baker v. McCollan, 443 U.S. 137, 145 (1979) ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released.").

\textsuperscript{388} See generally Papachristou v. Jacksonville, 405 U.S. 156, 165-68 (1972) (discussing the range of conduct that such vagrancy ordinances cover and finding its breadth unconstitutional in that it is so large and so vague that ascertainable standards of guilt and even-handed prosecution are lacking).

\textsuperscript{389} 371 U.S. 1 (1942).

\textsuperscript{390} Id. at 25.


Katheryn Russell cited Uniform Crime Reports data that estimates that blacks accounted for approximately 30\% of arrests between 1991 and 1995, despite constituting only 12\% of the population. Russell, supra, at 111-13 & tbl.7.2. She presented, however, numerous factors indicating that conclusions about the existence of or lack of racial discrimination in the criminal justice system may be flawed, because the conclusions, for example, do not measure other significant phases of police/citizen interaction. Id. at 28, 32-33. She pointed out that a traffic or investigatory stop of a black person by police often sets a dynamic in motion that is predictive that an arrest will occur. Id. at 32-33. If the identical profiles for such stops and attitudes accompanying the stops are not used on white persons, they are not at risk of arrest with the same frequency as black persons are.

\textsuperscript{392} See Russell, supra note 391, at 111-29 (discussing how police discretion, when making arrests, accounts for inflated arrest rates for blacks and noting the effect that arrest records will have on present and future employment).
vel, for example, at the phenomenon of so-called “black rage,” because it does not link the rage with the belief that minorities suffer poorer treatment by police than white persons. However, continuation of staggering numbers of arrests that do not result in prosecution cause the perceptions to solidify.

At least one consequential effect of the high arrest rate for minorities is the maintenance of a perpetual underclass. Even if the incidences of poverty, less education, and unemployment are relatively high among minority members even without entanglement with the criminal justice system, that status easily becomes a predictable and permanent fixture after an individual of color waltzes in handcuffs through booking and arraignment. As discussed, an arrest can “relate back” to a prior conviction, such that an individual remains locked into the criminal justice system in perpetuity.

The stigmatization of a criminal record is one effect of improvident arrests. Another effect is the documented correlation between arrests and unemployment. In a study of juveniles between 1940 and 1958, researchers found that “incarceration appears to cut off opportunities and prospects for stable employment later in life . . . job stability in turn has importance in explaining later crime.” For adults, another researcher concluded by 1992 that “[e]ven if most underclass males who are arrested do not go to jail, the experience of arrest can have long-term, even intergenerational repercussions . . . a criminal arrest record has detrimental consequences for labor market outcomes, with negative effects on employment as much as eight years later.”

Jerome G. Miller has documented research indicating the phenomenon of “racial labeling.” Social psychologists and sociologists contend that the stigma of having a criminal record can create and perpetuate social alienation that increases the likelihood of future law violations.

The probation and parole systems also intensify the negative effect of arrests, thereby contributing to perpetual disadvantage. Those systems mirror popular views about retribution, the need to be

---

393. See id. at 111-24 (illustrating how discretionary arrests inflate national black versus white criminal activity and arrest statistics); see also supra notes 291-298, 302-304, 342-345, and accompanying text.


396. See MILLER, supra note 167, at 112.
"tough" on law violators, and common fears about the risk of personal harm. These factors have led to the anomalous situation where "probation is now as likely as not to increase the risk of rearrest and imprisonment."\textsuperscript{397} Strict enforcement of minor conditions of release and an attitude of "[w]hen in doubt . . . revoke parole" create this contradictory result.\textsuperscript{398}

Finally, a high arrest rate among minorities, no matter what the outcome of the criminal charges, fixes a public perception of minorities that keeps the cycle alive. That perception undoubtedly is fed by news accounts, but its provenance is the many arrests of minorities.\textsuperscript{399}

\textsuperscript{397} Id.

\textsuperscript{398} William Dickey, "Reflections of a Former Corrections Director: Are Offenders Tougher Today?," \textit{Federal Probation} 56 no. 2, 43 (June 1992) (cited in Miller, \textit{supra} note 167, at 129); see also Miller, \textit{supra} note 167, at 131 (reporting that in 1993, more than one third of the 120,000 inmates in the California prison system were back in prison because their parole officers revoked parole due to minor violations, such as failing to report a new address, or missing appointments, and that readmission to prison for technical parole violations increased nationally from 14.5% to 30.5% of all prison admissions between 1977 and 1991).

\textsuperscript{399} Scholars contribute to the public perception by their reliance on "arithmetic." In \textit{Race, Crime and the Law}, for example, Randall Kennedy took on what he termed "a tendency to deny troublesome realities"—in particular, the tendency to "deny claims that blacks commit a disproportionate percentage of street crimes." \textit{Kennedy, supra} note 391, at 22 (emphasis added). Professor Kennedy's authority for the proposition that the amount of crime committed by blacks is statistics indicating blacks are arrested for 44.8% of all violent crime, 55.1% of homicides, 42.8% of those arrested for rape, and 60.9% of those arrested for robbery. \textit{Id.} at 22-23. Without analysis of the outcome of those arrests, the statistics are misleading.

Charles Silberman contributed to similar inexactitude by correlating arrest statistics with the presumed rates of commission of crimes by minority group members. Silberman, \textit{supra} note 1, at 161-65. Silberman extrapolated available data to prove his point that arrest rates generally correlate with the commission of crime. Silberman's methods also adopt some common assumptions that bear more careful treatment. He contended, for example, that the different arrest rate between blacks (higher) and Hispanics (lower) confirms the notion that arrests equal crimes committed. Because each group is subjected to racism, Silberman reasoned, the only reason for the different arrest rates must be that one group—blacks—in fact commits more crime than the other. \textit{Id.} at 161-62. That logic does not take into account, for example, whether the racial experience of the two groups differs, whether it be harassment by police, or the likelihood of a police encounter resulting in arrest.

Silberman also relied on victimization reports. He contended that those reports support his conclusion that arrests are an accurate measure of the commission of crimes by blacks because, for example, in 1975 robbery victims identified the offender as black 60% of the time, and blacks made up 58.8% of robbery arrests that year. \textit{Id.} at 616. That reasoning plays carelessly into public attitudes by which black men often are presumed to be the assailant or dangerous. \textit{See Russell, supra} note 391, at 76-86 (discussing the impact of racial hoaxes on crime); \textit{id.} at 26-46 (evaluating studies on disproportionate crime statistics against other factors, such as police treatment of black men).

Michael Tonry used similar statistics and reasoning for his conclusion that "[a]rests can by and large be taken as reasonable reflections of the involvement in serious crimes of
V. DISTRACTIONS FROM THE FOURTH AMENDMENT

One result of pressing for a direct relationship between arrests and outcomes in the criminal justice system is laying bare two decidedly opposite views of the Fourth Amendment. The one I propose requires government to justify both its systemic practices and its arrest decisions in individual cases. I do not presume the "need" for every arrest that occurs under current practices, whether the issue is viewed from the perspective of the public interest in safety or from theories of deterrence. On the available record, there is no basis for concluding that arrest rates correlate to the commission of crime. The rates at which prosecutors dismiss cases mean that the number of arrests does not establish the criminality of many individuals who are arrested. The ratio between arrests for serious offenses and those for nonserious offenses, and the subsequent effect on the nature of criminal cases in which most convictions are obtained, mean that arrest rates are not an accurate measure of public safety.

The countervailing view of law enforcement presumes justification for the manner by which individual states implement their respective arrest laws. Despite the fact that the public benefit derived from current arrest and from prosecution practices remains vague or even dubious, jurisdictions in the United States are not tasked by the courts with justifying arrests against the deprivation of individual liberty that so many individuals experience. A law enforcement rationale is taken at face value, even if it is not articulated. Under this latter

members of different racial groups." MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA 71 (1995). Tonry also relied on studies showing a correlation between victimization reports and offenses by members of minority racial groups. Id. at 68-80. The studies he used measured victimization reports for the crimes of robbery, assault, and larceny-crimes in which a victim is most likely to see his assailant. As discussed, however, those crimes represent a much smaller percentage of total arrests. And his data is current only through 1991; Professor Tonry's book did not have the "benefit" of statistics reflecting increased drug arrests through the 1990s. In addition, none of the cited data documents the relationship between arrests and case outcomes for minority groups in misdemeanor cases, the largest category of arrests.

Finally, Tonry made plain that researchers report an inability to document disparate racial treatment. Id. at 71. In an area so heavily laden with unspoken human motivations and incentives not to document racial animus, reliance on a statistical non-event may prove too much.

The tendency of some scholars to equate arrests with crime commission does not encourage disciplined and careful analysis of major issues of law or public policy. This tendency also undermines the principle that, under our criminal justice system, no one is presumed guilty until and unless proven guilty in the manner constitutionally provided. See also supra notes 124-126 and accompanying text.

400. See Gerstein v. Pugh, 420 U.S. 103, 111-12 (1975) (stating that probable cause is the standard for arrest and is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an
view, arrest practices are drawn into question only if the extraordinary occurs in individual cases, such as the fatal shooting in *Garner v. Tennessee.*

A. Fealty to Federalism

Two intellectual approaches may account for the latter interpretation. At least two distinct tensions are articulated in many Fourth Amendment cases. The first is whether the Supreme Court has the “authority” to review state court decisions and state laws about search and seizure. The second is a presumption that state law enforcement authorities enjoy virtually unfettered discretion in protecting the public interest, and a corollary assumption that judicial review (at least, review by the federal courts) undermines long-standing deference to that discretion. Each concern misperceives application of the Fourth Amendment to the states.

In *Wolf v. Colorado,* the Fourth Amendment was incorporated into the Fourteenth Amendment and thereby made applicable to the states. *Wolf* was not a decision on the choice of laws—state versus federal—available in Fourth Amendment cases; its determination that the Fourth Amendment involved fundamental values established a constitutional benchmark for state conduct. Despite the incorporation doctrine, however, the Supreme Court has continued to treat search and seizure issues as though state laws alone determine the legality of governmental action.

The Court’s efforts to inject the issue of federal-state relations into its Fourth Amendment jurisprudence have resulted in a diminu-
tion of an explicit individual guarantee. The federal-state game of "tug o' war" treats the Fourth Amendment's guarantee against unreasonable search and seizure as a "zero sum" game; if the amendment is enforced by its terms and given weight as a delineation between state powers and individual liberty, the reasoning seems to go, state sovereignty is perforce endangered. That approach confuses the issue of prescribing the bases and methods of search and seizure (an appropriate state function), on the one hand, and determining compliance with the Fourth Amendment (a judicial function) on the other. Ker v. California\(^4\) helped keep the area murky.

In Ker, the first Fourth Amendment case decided after Mapp involving application of the exclusionary rule to state prosecutions, the Court stated that Mapp "implied no total obliteration of state laws relating to arrests and seizures in favor of federal law."\(^4\) On that much, there is little genuine dispute. State laws continued to govern arrest and search practices generally.\(^4\)

The plaintiff in Ker, however, asserted that his Fourth Amendment rights had been violated.\(^4\) The issue was whether officers' unannounced entry into an apartment was illegal.\(^4\) If the search and seizure were illegal, Mapp required exclusion of any resulting evidence.\(^4\) The Court, however, framed the issue in a way that suggested a conflict between the federal and state law when one did not exist.\(^4\)

A California statute requires that officers first demand entry and state their purpose.\(^4\) A 1955 decision by the California Supreme Court required exclusion of evidence obtained by an unlawful search and seizure.\(^4\) The California courts had, however, affirmed an exception to the prior-announcement law, identical to that recognized

\(^{408}\) Id. at 31.
\(^{409}\) See United States v. Di Re, 332 U.S. 581, 589-90 (1948) (finding that, in the absence of a specific federal provision, state law governing warrantless arrests applies, even to arrests by federal law enforcement officers).
\(^{410}\) Ker, 374 U.S. at 24-25.
\(^{411}\) See id.
\(^{412}\) See id. at 30-31.
\(^{413}\) See id. at 34-37 (finding that, because the officers had no search warrant, the admissibility of the evidence turned on whether it was the product of a search incident to a lawful arrest and determining that the lawfulness of arrests for federal offenses are determined by state law as long as it is not in violation of the Constitution).
\(^{414}\) See CAL. PENAL CODE § 844 (West 1985).
\(^{415}\) See People v. Cahan, 282 P.2d 905, 906 (Cal. 1955) (excluding evidence obtained by officers who made forcible entries and seizures without search warrants on the grounds that such activity was a violation of constitutional guarantees).
under federal law—if exigent circumstances existed, police could make an immediate and forcible entry. The officers in *Ker* demonstrated a reasonable basis for believing that the suspects were trying to destroy evidence, one of the exigent circumstances recognized under federal law before *Wolf* and *Mapp*. The California trial and appellate courts upheld the conviction on the basis of the exception to the prior announcement statute. The California court decisions were consistent with federal Fourth Amendment law; the Supreme Court could have simply affirmed the California decision on that basis. Instead, the Court used the case as a platform to reinforce a view of the supremacy of state laws in the area of search and seizure.

The Court stated its responsibility to review state court findings regarding constitutional rights. The Court, however, characterized the "specific question" before it in the *Ker* case as "whether *Mapp* requires the exclusion of evidence in this case which the California District Court of Appeals has held to be lawfully seized." It is hard to imagine how the Supreme Court could have concluded that the California decision violated *Mapp*. *Mapp* extended the federal exclusionary rule to state court prosecutions; the incorporation doctrine extended the body of Supreme Court law regarding the Fourth Amendment to the states. Federal law upheld exceptions to the prior announcement rule identical to that recognized by the California courts.

Perforce, the Supreme Court upheld the conviction in *Ker*. The Court's formulation of the issue in *Ker*, however, would insulate many Fourth Amendment issues arising from state court prosecutions from federal court review for compliance with the Fourth Amendment. Convictions occur in state court prosecutions after search and

---

416. See People v. Maddox, 294 P.2d 6, 9 (Cal. 1956) (en banc) (concluding that compliance with prior-announcement law is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose).
417. See supra notes 404-413 and accompanying text.
419. Id. at 34.
420. Id. at 31.
421. *Mapp* v. Ohio, 367 U.S. 643, 660 (1961) (recognizing that the right to privacy embodied in the Fourth Amendment is enforceable against the states and that the prosecutorial practice of using unconstitutionally seized evidence in state courts is a violation of the Fourth Amendment).
422. See Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (concluding that "the common-sense approach utilized by most lower courts is required by the Fourth Amendment prohibition on 'unreasonable searches and seizures' and hold[ing] that an important factor to be considered when determining whether an exigency exists is the gravity of the underlying offense for which the arrest is being made").
seizure issues are decided by state courts adverse to defendants; federal review occurs only after state appellate courts affirm the search and seizure decisions. Ker's articulated reluctance to overturn state court Fourth Amendment decisions would make the constitutional issues unreviewable.

The Ker opinion also quoted Mapp's language that reasonableness under the Fourth Amendment does not lend itself to a "fixed formula." Ker utilized the statement for the proposition that variations among state criminal procedure laws should be given deference. Mapp's criticism of fixed formulas, however, related to varying fact situations presented by individual cases, not variations among state laws.

This tendency to see federal-state conflicts automatically when individual rights are at issue reenacts a tension that existed among the Framers in the 1700s about the appropriate role of the new national government. That tension was a fundamental disagreement about the states' relationship to the national government—whether the individual states would retain exclusive authority to determine their citizens' relationship to and rights vis-a-vis each state government. Antifederalists, such as Richard Henry Lee, wanted to use the opportunity of drafting the Bill of Rights to amend the new Constitution to protect powers of the states vis-a-vis the federal government. The Framers did not make the Bill of Rights applicable to the states; explicit application of individual amendments did not occur until many years later. The Framers, however, refused to enact proposed revisions

424. See generally LaFave, supra note 93, at 2-31 (discussing, as an overview, the general steps of the criminal justice process). See also supra notes 289-290 and accompanying text.

425. Ker, 374 U.S. at 33 (stating that the Court's responsibility to review the admissibility of evidence under the Constitution while reiterating that the reasonableness of a search is a substantive determination to be made by the trial court in light of the Fourth Amendment).

426. Id. at 32 (quoting Mapp, 367 U.S. at 653).

427. See supra note 402 and accompanying text.


429. Historians have documented the disparate, if not conflicting, political strains that swirled around ratification, including, of course, views about the relationship of the states to the new national government. See, e.g., Creating the Bill of Rights, supra note 41.

430. See id. at ix.

431. See Mykkelvedt, supra note 89, at 2, 11 (noting that "it had been settled constitutional doctrine that the first eight amendments of the Bill of Rights applied exclusively to the national government" and that "this doctrine had been rigidly upheld for one hundred years until court decisions allowed the due process clause to emerge as the constitutional provision which the Court has invoked to extend protection against adverse state actions for most of the important rights contained in the first eight amendments").
that were intended to preserve state autonomy in the face of the new national government.\textsuperscript{432}

After the theoretical and political venting about the need for or wisdom of enumerated individual rights, James Madison set to the task of drafting the Bill of Rights in the spring of 1789.\textsuperscript{433} He was aided by concrete proposals from the states.\textsuperscript{434} During the state constitutional ratifying conventions, eight states proposed amendments.\textsuperscript{435} Discounting duplication among the states' proposals, about 100 separate amendments were offered by the states.\textsuperscript{436}

Most of the proposals submitted by the states sought changes in the draft of the new Constitution relating to governmental structure, particularly with regard to ways in which the new form of government might usurp powers of the states.\textsuperscript{437} Madison's draft of the Bill of Rights submitted to the House in June 1789 included most of the individual rights recommended by the states, but none of the structural proposals.\textsuperscript{438} In response to political critics who highlighted that his draft ignored the many proposals for structural changes to the new government, Madison responded that the primary impetus for the amendments was the demands of the people in the states for guarantees of individual rights and not redesign of the relationship between states of the republic and the national government.\textsuperscript{439}

\textsuperscript{432} See Goldwin, supra note 84, at 89-90 (discussing Madison's intentional exclusion of every provision that related to governmental powers rather than individual rights).

\textsuperscript{433} See Morgan, supra note 285, at 132.

\textsuperscript{434} See id. at 133.

\textsuperscript{435} Maryland, Massachusetts, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, and Virginia proposed amendments. See Creating the Bill of Rights, supra note 41, at x-xi. Connecticut, Delaware, Georgia, and New Jersey ratified without proposing amendments, and Rhode Island did not ratify the Constitution until many years later. See id.

\textsuperscript{436} See id. at x-xi.

\textsuperscript{437} See id. at xi.

\textsuperscript{438} See Goldwin, supra note 84, at 80; see also supra notes 332-334 and accompanying text.

\textsuperscript{439} See Goldwin, supra note 84, at 81. Ironically, Madison took his own shot at using the Bill of Rights to effect a structural change in the relationship between the national government and the states. One of the amendments, in his initial draft, provided that "no [sic] state shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases; because it is proper that every government should be disarmed of powers which trench upon those particular rights." Morgan, supra note 285, at 140 (alteration in original) (quoting The Papers of James Madison 12:206-7).

Congress rejected that proposed explicit statement of limitations on state powers, as well as Madison's version of a "preamble," asserting the government's duty to aid citizens in achieving, among other things, "happiness and safety," and that the people retain the right to change their government when it becomes adverse to or inadequate for their interests. See Creating the Bill of Rights, supra note 41, at xiv-xvi.
The effect of incorporation of specific amendments into the Fourteenth Amendment years later was to set minimum standards for state conduct covered by the incorporated amendments. Incorporation reflected the substance of the rights protected by the amendments. Therefore, after incorporation, the individual guarantees of the Fourth Amendment had to be maintained, and distinguished from, the states' preferences for particular methods of search and seizure.

The Court eventually even asserted its supervisory power to ensure Fourth Amendment compliance in state prosecutions, when state laws or practices undercut the Fourth Amendment.\footnote{440} In Gerstein, for example, the Court held that an arrestee is entitled to a "timely" probable cause hearing after arrest.\footnote{441} Florida law at the time did not allow a preliminary hearing for a defendant charged by information rather than by indictment.\footnote{442} A defendant charged by information could get a judicial determination of probable cause only at arraignment, which was usually thirty days or more after arrest.\footnote{443} Even accepting that the practicalities and the administrative steps of arrest and booking necessitate "a brief period of detention," the Court held that "prolonged detention" required a probable cause determination.\footnote{444}

Ultimately, the Court concluded that the nonspecific "timely" probable cause requirement enunciated in Gerstein still was not ensuring the Fourth Amendment rights of arrestees in state prosecutions.\footnote{445} Therefore, the Court held in County of Riverside v. McLaughlin\footnote{446} that a probable cause determination must occur within forty-eight hours of arrest.\footnote{447} The County of Riverside combined arraignments with probable cause hearings. Although California law requires arraignment "without unnecessary delay" and, in any event, no later than two days after arrest,\footnote{448} the statute excludes weekends and holidays from the

\footnote{440. See Gerstein v. Pugh, 420 U.S. 102, 125 (1975) (finding that a state's criminal procedure "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial liberty, and this determination must be made by a judicial officer" to achieve constitutionality (internal footnote omitted)).}
\footnote{441. Id. at 126.}
\footnote{442. See id. at 116.}
\footnote{443. See id. at 116 n.18.}
\footnote{444. Id. at 114.}
\footnote{445. See County of Riverside v. McLaughlin, 500 U.S. 44, 50 (1991) (granting certiorari to resolve the conflicts as to what constitutes a "prompt" probable cause determination under Gerstein).}
\footnote{446. Id.}
\footnote{447. See id. at 56.}
\footnote{448. See CAL. PENAL CODE § 825 (West 1985).}
time computation, meaning arraignments could occur even five days after arrest and nonetheless comply with the state law. The Court explained why it became necessary to establish a specific time limit:

Significantly, [in Gerstein] the Court stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures. We acknowledged the burden that proliferation of pretrial proceedings places on the criminal justice system and recognized that the interests of everyone involved, including those persons who are arrested, might be disserved by introducing further procedural complexity into an already intricate system. Accordingly, we left it to the individual States to integrate prompt probable cause determinations into their differing systems of pretrial procedures. $^{449}$

The Court recognized that “state systems of criminal procedure vary widely.” $^{450}$ It concluded, however, that its ruling on the timeliness of probable cause determinations “gave proper deference to the demands of federalism.” $^{451}$

The experience of probable cause determinations, even after Gerstein, demonstrated that blanket deference to state laws related to criminal procedure could result in a patchwork of procedures so “fluid” that constitutional rights would dissipate. Constitutionalism, by contrast, fixes relationships and powers, and gives them permanence. Thereby neither vague nor unarticulated “realities of law enforcement,” $^{452}$ or “systemic complexity” within individual jurisdictions $^{453}$ can trump constitutional rights.

---

$^{449}$ McLaughlin, 500 U.S. at 58 (internal footnotes omitted) (discussing Gerstein, 420 U.S. at 119-24).

$^{450}$ Id. at 53 (quoting Gerstein, 420 U.S. at 123).

$^{451}$ Id.

$^{452}$ See id. (quoting Gerstein, 420 U.S. at 113).

$^{453}$ See id. (quoting Gerstein, 420 U.S. at 113).

$^{454}$ In Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Court discussed Ker and its presumed detente between the states and federal courts over criminal procedure. Id. at 451-53. New Hampshire law authorized justices of the peace to issue search warrants. See id. at 447 (discussing N.H. REV. STAT. ANN. § 595:1 (repealed 1969)). The state attorney general, who was a justice of the peace, and also prosecuting the case, signed a search warrant that turned up incriminating evidence. See id. New Hampshire argued that its search practices met Ker's test of “workable rules governing arrests, search and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States.” Id. at 452 (quoting Ker, 367 U.S. at 34).

The Coolidge Court did not pause to reflect on or to respond to the state's arguments about its need for flexibility and practicality. The opinion went back to basic principles, holding that:

[I]t is too plain for extensive discussion that this now abandoned New Hampshire method of issuing 'search warrants' violated a fundamental premise of both the
B. History as Stasis

The new national Constitution was written upon a clean slate won through the American Revolution. Whatever the mores or sovereign prerogatives of England or any of the nations that helped populate the new country had been, the new government structure would fit American needs and perceptions of the role of central government. The new government’s reallocation of powers was “unprecedented under the sun.” Fourth Amendment case law, however, still plays out a debate of whether it is a departure from English common law precedents or perpetuation of assumptions about citizenship and about individual rights from the seventeenth and eighteenth centuries.

By 1789, when the Bill of Rights was drafted and presented to Congress, the citizens of the United States had more than a century of local governance by the separate and respective states in which they lived. Although seven of the new eleven states had earlier adopted declarations of rights, their respective guarantees were not uniform. Those facts alone disprove an assumption that the citizens shared a common view about individual rights.

On this record, nonetheless, some contend that the amendments in the Bill of Rights either are transplants of rights attributed to England for hundreds of years, or should be interpreted according to English legal theories and social mores. The first impediment to accepting this “historical” view is the obvious contradiction between making a new nation “from scratch,” on the one hand, and leaving the definition of guiding principles to the history of the country from which Americans had declared themselves independent. Another is that the constitutional record does not support that view; the “histori-
cal" record consists of post hoc explications of the supposed reactions of the new Americans to the historical treatment of individual rights.

But an even more fundamental divergence between the Bill of Rights and its English antecedents is the relationship between citizens and their government. By the time the Constitution and the Bill of Rights were each drafted and ratified, the new nation was already deeply rooted in, and had been founded upon, a tradition of individual states having sovereignty apart from that of the national government. The United States Constitution explicitly limits the prerogatives of the national sovereign and reserves all other powers to the people, whether as states or as individuals. The underlying premise of the English "precedents," however, was that rights existed only to the extent that they were granted by the sovereign.

The contradiction of using English political and social norms to interpret the United States Constitution is played out in the distinction between arrests made in public places and entries into homes. As discussed earlier, warrantless arrests in public places have become the rule, while the warrant requirement is still rigidly enforced for most entries into private homes and living spaces. The stated rationale for distinguishing between arrests in public places and arrests in the home is that the Fourth Amendment is based on English progeny that supposedly recognized that "A man's home is his castle." We have come full circle back to Charles Silberman's declaration about the hapless choice between falsity and irrelevance in characterizations of criminal justice.

The referenced British tradition did not, in fact, embody the essence of the Bill of Rights' enumerations—that they were derived from the people themselves. The Magna Carta in 1215 and even the English Petition of Right in 1628 did not alter the fundamental

458. See id. at 52.
459. U.S. CONST. art. 1, § 10; U.S. CONST. amend. X.
460. See SCHWARTZ, supra note 46, at 51-52 (explaining that "colonial documents . . . did not really have the status of constitutions, since they were subject to alteration or repeal at the discretion of the legislature," or by the English Crown or Parliament, so that individual rights granted in those documents were not recognized as fundamental).
461. See supra notes 59-79 and accompanying text.
463. See supra note 1.
464. See SCHWARTZ, supra note 46, at 164-68; LASSEON, supra note 19, at 99, 105.
nature of the relationship between the sovereign and the governed.\textsuperscript{465} In England, any safeguards against unreasonable entry and search were at the pleasure of the sovereign.

The "castle" concept has been traced prior to the Fourteenth Century in Great Britain.\textsuperscript{466} The presumed sanctity of private homes is thought to go as far back as ancient biblical, Jewish and Roman practices.\textsuperscript{467} The Romans especially maintained household gods, making the inner sanctum pious as against every intrusion, even by state officers.\textsuperscript{468}

Another element of early Roman and British laws makes them dubious intellectual authority for the primacy of the home vis-a-vis government. Professor Lasson pointed out that Roman actions were private prosecutions.\textsuperscript{469} The perceived abuse was searches of a man's home by his accuser, who was a private individual, not the state.\textsuperscript{470} The many search and seizure abuses in England between the 1300s and the 1700s, which led to the prohibition on general warrants, also were committed by private citizens against other citizens.\textsuperscript{471} Neither those conditions, nor reactions to them, therefore, can provide the complete rationale for America's laws. As soon as the record makes it clear that English laws and social movements were not the exact models for American laws, it is less logical to insist that American laws be interpreted only or primarily with regard to those earlier foreign conditions.

Professor Lasson documented a law in 1335 that authorized innkeepers to search their guests, and Henry VI's authorization to dyers

\textsuperscript{465} See \textit{Schwartz}, supra note 46, at 2-14 (discussing the Magna Carta and the 1628 Petition of Rights as English antecedents to rights embodied in the Constitution). Schwartz contended that the true value of the Magna Carta is that it came into being at all, and that it became the core of the body of rights basic to the colonists' views of their prerogatives as a new nation. \textit{Id.} at 7. There is a distinction, however, between the \textit{impetus} to imagine and to create structures of government, on the one hand, and attributing the specific characteristics of a resulting governmental structure to specific historical premises or sources, on the other.

\textsuperscript{466} See \textit{Lasson}, supra note 19, at 13 (noting that even in ancient times, there was evidence of the concept that a man's house is his castle).

\textsuperscript{467} See \textit{id.} (noting that "Biblical literature affords a number of illustrative instances of a relatively strong respect for the dwelling as a place which was not subject to arbitrary visitation, even on the part of official authority").

\textsuperscript{468} See \textit{id.} at 15 (finding that, according to Roman history and law, "the house was not only an asylum but under the special protection of the household gods").

\textsuperscript{469} \textit{Id.}

\textsuperscript{470} See \textit{id.} at 15-17.

\textsuperscript{471} See generally \textit{id.} at 23-25 (discussing the development of general warrants in England, which arose from innkeeper and from trade union powers).
to seize competitors' cloth and to search shearmen in the 1400s. Henry VIII gave a dispensation to tallow makers (aided by town officials) to search for oil. Additionally, the Star Chamber Court and James I authorized broad searches by private citizens against religious dissidents, political enemies, and trade competitors throughout the 1600s.

As these examples show, the history of search and seizure for hundreds of years in England has primarily been concerned with private conduct, not with the state's authority to enter private homes or to seize personal property. The history of English abuses may have inspired the colonists to enact legal safeguards against invasion of their homes, whether by private citizens or by the government. It does not follow, however, from the supposed reaction to the English experience, that the Fourth Amendment was intended to protect private homes to the exclusion or to the diminution of the other zones expressly covered, such as seizures of persons.

As discussed, American courts also trace the Fourth Amendment to the use of general warrants or of writs of assistance in England and in the colonies. The evil of the warrants and of the writs was the lack of specificity of places to be searched or of things to be seized. They allowed officials to rummage through private property until incriminating evidence was discovered. In *Entick v. Carrington and Three Other King's Messengers*, the landmark case on general warrants, Lord Pratt decried the exercise of such "an unreasonable power" without specific and explicit legal authorization. General warrants were utilized in the American colonies until the mid-1700s, primarily to enforce customs laws. In 1776, Virginia's Bill of Rights outlawed warrants that authorized searches and seizures without evidence of a

---

472. *Id.* at 23-24 (discussing a practice that may have resulted in certain traders being granted general searching powers to enforce their organizational rules).
473. *See id.* at 24.
474. *See id.* at 24-29 (describing the Star Chamber Court).
475. *See id.* at 58-60 (examining colonist's arguments concerning England's policies towards searches of colonial property).
476. *See Boyd v. United States*, 116 U.S. 616, 624-25 (1886) (discussing the use of general warrants and of writs of assistance in England and in the colonies and remarking that the misuse of these instruments was "fresh in the memories of those who achieved our independence and established our form of government").
477. *See Boyd*, 116 U.S. at 625-26 (discussing the use of writs in colonial America and noting the problems relevant in empowering officers to search at their discretion).
478. 19 How. St. Tr. 1029 (1765).
479. *See id.; see also Lasson*, *supra* note 19, at 47-48.
480. *See Lasson*, *supra* note 19, at 51-55 (discussing the use of writs of assistance in the colonies).
violation, a specific statement of the offense alleged, and identification of persons to be seized.\textsuperscript{481}

Like the Virginia Bill of Rights, the Warrant Clause of the Fourth Amendment reflects condemnation of general warrants that originated in England. The outlawed general warrants were utilized originally and largely in connection with commerce; they empowered tradesmen and guilds to harass competitors, and powerful individuals to hound political and religious freethinkers. In the colonies, officials used them to ferret out contraband, evasion of customs duties, and other crimes in connection with trade.\textsuperscript{482} This history also fails to support the “castle” limitation or priority that some cases read into the Fourth Amendment.\textsuperscript{483}

Of equal importance to historical fidelity, there is another dangerous tangent in justifying the Fourth Amendment today by what Englishmen may or may not have intended or achieved in the Seventeenth and Eighteenth Centuries. That danger is reading American constitutional provisions through the lens of the social conditions prevailing in England at the time some of the “great rights” are believed to have been granted, and attitudes about those social conditions.

The \textit{Boyd} opinion, for example, cited Lord Camden in \textit{Entick} for the proposition that “[t]he great end for which men entered society was to secure their property . . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass.”\textsuperscript{484} The Magna Carta also was steeped in resentment against the king by landed classes.\textsuperscript{485} Incantation of these platitudes, without examination of the premises and of the conditions underlying American institutions, recasts our own organic documents and principles into the nondemocratic features of centuries of English law.

Ironically, the phenomenon experienced in the United States of a system where so many arrests do not result in prosecution looks strikingly like the Star Chamber and arrests-on-a-whim that England experienced. The result of those practices in the United States is a nation split between those who sit in marbled courtrooms and libraries of rich wood and stained glass who have no reason to fear the

\textsuperscript{481} See id. at 79 & n.3.
\textsuperscript{482} See id. at 51-78.
\textsuperscript{483} See id. at 57-60 (discussing “James Otis, Sr., of Barnstable, and eminent lawyer” in Massachusetts in 1760 and his abomination of the use of the writ of assistance in the colonies, particularly because such general warrants annihilate “one of the most essential branches of English liberty”—“[t]hat a man’s house was his castle”).
\textsuperscript{484} Boyd, 116 U.S. at 627.
\textsuperscript{485} See Schwartz, supra note 46, at 3-4.
arbitrary use of government power, on the one hand, and, on the other, those without castle or "papers or effects" who may be assumed to have nothing to lose. Such a result indeed may resemble seventeenth century England, but it does not hold a candle to this country's tenets.

VI. REMEDIES

The Fourth Amendment protects the right of the people against unlawful searches and seizures by the state. The state is the sum of its parts: legislatures, courts, prosecutors, and law enforcement officers. Each of those elements has the ability and the duty to ensure that arrests are used solely as the initiation of criminal prosecutions, rather than ends unto themselves, as the data discussed in this Article documents. The question is whether each component in fact exercises its authority to remedy the situation of arrests unrelated to constitutionally permitted outcomes, or whether remedies must be imposed to protect Fourth Amendment rights.

A. Class Actions for Injunctive and Declaratory Relief

If state officials do not take the initiative to ensure that arrests are made only when the state has the intention and the ability to prosecute arrested persons, judicial relief is available to require the nexus between arrests and the constitutionally required procedures in criminal cases. In addition to permitting claims for money damages against individuals acting under color of law and municipalities, declaratory and injunctive relief is available under 42 U.S.C. § 1983 to correct and to prevent infringements of constitutional rights.486

Plaintiffs in both *Gerstein v. Pugh*487 and *County of Riverside v. McLaughlin*488 sought declaratory and injunctive relief under § 1983.489 In both cases, the class representatives sought relief on behalf of themselves and on behalf of other individuals who were detained pursuant to state laws but not provided prompt determinations of probable cause.490 In *Gerstein*, the district court ordered officials in Dade

---

486. Section 1983 provides, in part, that a person acting under color of law who subjects or causes to be subjected any citizen to the deprivation of any rights, privileges, and immunities of the Constitution and laws "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." (emphasis added). 42 U.S.C. § 1983; see also supra notes 387-364 and accompanying text.
489. See *Gerstein*, 420 U.S. at 107 n.5; *McLaughlin*, 500 U.S. at 47.
County, Florida, to give the named plaintiffs immediate probable cause hearings and to submit a plan requiring probable cause determinations in all criminal cases instituted by an information. 491

The named plaintiffs in Gerstein were no longer in pretrial detention at the time of the Supreme Court review. 492 The Court recognized, however, that pretrial detention is by its nature temporary, and ruled that the right to probable cause determinations promptly after arrest falls within the class of cases that are "capable of repetition, yet evading review." 493 Cases in which individuals are arrested even though the state does not have a contemporaneous intention and ability to prosecute them for the charged crimes fit the Sosna "capable of repetition" category as well. Appellate review of those cases would also occur only long after charges are dismissed and the immediate conditions and restraints resulting from the arrests had been lifted. Continuation of the arrest practices still puts other citizens at risk of the arbitrary loss of freedom.

Gerstein and Sosna considered whether mootness of the named plaintiffs' claims (as by release from pretrial detention) also terminates the claims of unnamed members of the class. The Court declared that the class claims were not rendered moot. 494 The claims of persons arrested under the circumstances described in this Article do not become moot when charges are dismissed. The direct consequences of arrest, such as social stigma, interference with family and social relationships, difficulty in finding employment, and economic costs associated with arrest, bail, and retention of counsel can continue long after the dismissal of charges. 495 Thus, individuals subjected to arrest when the state knows it will not follow the cases through to prosecution experience harm even after the charges are dismissed.

Statistics used in this Article are broken down by individual jurisdictions. Claims for declaratory and injunctive relief pursuant to § 1983 also should identify relevant jurisdictions and specify state

491. Gerstein, 420 U.S. at 107-08. At the time the Gerstein § 1983 action was filed, Florida law required indictment by a grand jury only for capital offenses; all other criminal cases could be brought by an information issued by a prosecutor. Gerstein, 420 U.S. at 105. Even though the then Florida criminal procedure statute authorized adversary hearings for preliminary determinations of probable cause, Florida courts had held that a defendant charged by an information was not entitled to a preliminary hearing. See Gerstein, 420 U.S. at 105-06 (citations omitted).
492. Gerstein, 420 U.S. at 110 n.11.
493. Id. (quoting Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975)).
494. See id.; Sosna, 419 U.S. at 401-02.
495. See Gerstein, 420 U.S. at 110; Sosna, 419 U.S. at 402.
and/or local practices or laws that subject citizens to arrest under the circumstances described here. It would be appropriate for courts to consider plans submitted by the relevant jurisdictions in fashioning judicial relief in § 1983 suits.496

Injunctive relief could be designed to cover any phase of a criminal case leading up to the ultimate decision whether to dismiss a case or to prosecute. Prophylactic remedies based on evidence of the impact of particular arrest practices could be ordered.

For example, evidence about the resources of courts, prosecutors, and correctional services within a given jurisdiction and the number of criminal cases filed annually might justify limits on the number of criminal cases pending in the jurisdiction at any given time. Such court-ordered limits could yield benefits for law enforcement and for prosecution. Logically, fewer criminal cases to investigate and to prepare for trial should allow more thorough preparation for prosecution and the opportunity to devote more resources to particularly serious offenses or to types of offenders.

Statutes of limitations for particular offenses create the outside parameter for charging offenses. Even with limits imposed on the number of pending cases, prosecutors retain the authority to order their cases in a way that ensures prosecution within a given statutory limit.

B. Amendments to State Law

There are legal and practical reasons for state legislatures to reconsider laws relating to arrest. With the incorporation of the Fourth Amendment into the Fourteenth Amendment, each state became responsible for ensuring that its criminal laws comply with constitutional standards.497

As discussed in Part II, state arrest laws authorize warrantless arrests for both misdemeanor and felony offenses. Because of those broad arrest powers, there is virtually no limit to the number of criminal cases police officers initiate. State legislatures should be con-

496. The plans submitted by the Dade County defendants in Gerstein contained detailed post-arrest procedures; at the same time, the Florida Supreme Court issued procedural rules governing preliminary hearings. Gerstein, 420 U.S. at 108. The Court of Appeals for the Fifth Circuit held that the District Court should review the revised rules for constitutional compliance. See id. at 109. Even the state's amended rules did not guarantee probable cause determinations for defendants charged by information; therefore, the District Court declared Florida's practices unconstitutional. See id. at 109-10.

497. See Mapp v. Ohio, 367 U.S. 643, 655 (1961); see also supra note 82 (discussing Wolf v. Colorado, 338 U.S. 581 (1948) and the incorporation of the Fourth Amendment into the Fourteenth Amendment).
cerned about whether the arrest powers are effective in combating crime, and about whether they operate to widen social disparities.

The arithmetic in the statistics reported by individual jurisdictions warrant full-scale review of arrest laws. Counties where non-prosecution rates approach more than 40% should serve as bellwethers for more accountability. An examination of the types of cases dismissed would also yield hard evidence about the effectiveness of law enforcement and of prosecution. For example, although the public understandably focuses on crimes of violence, arrest and prosecution data indicate that felonies are as likely to be dismissed as misdemeanors in which violence does not occur.

The information gleaned from reexamination of the operation of state arrest laws also would yield valuable data about the use of financial resources devoted to law enforcement and to prosecution. Political pressure to increase arrests (so-called “zero tolerance” policies) are meaningless unless sufficient resources are added to prosecutorial and court budgets to handle the increase in criminal cases. On the other hand, a long-standing record of a high-dismissal rate despite a relatively static budget—little or no increase or decrease—draws into question the abilities of prosecution offices in a jurisdiction.

State legislatures need to reconsider whether their arrest laws provide sufficient guidance about the grounds for arrest. A high dismissal rate also calls into question the legality of many arrests. As discussed, numerous state laws authorize arrests without warrant when an offense is committed in the presence of a police officer. Presumably, the evidence necessary to prosecute such cases would be minimal or be already under the control of the witnessing officer(s), such as the arresting officer’s testimony and physical evidence or contraband he seized pursuant to the arrest.

Dismissals of many such cases without prosecution suggest that the arresting officers did not possess the modicum of information required by state arrest laws. Prosecutors should be required to dismiss cases as soon as they learn that arresting officers did not, in fact, witness the alleged offenses or, that the conduct witnessed does not constitute an offense. On balance, the rate of cases that do not result in

498. See app. C, tpls.1-8, 10-12 (providing data showing various city, state and federal arrest, trial disposition, and conviction rates).

499. Jerold Israel addressed this issue. He asserted that the effectiveness of some prosecution offices would not be enhanced by budget increases. Israel, supra note 5, at 778-79. He also contended that office work habits, morale, or individual work attitudes among prosecutors can result in low “productivity” irrespective of the relative sufficiency of prosecution budgets. Id. at 761-62.
prosecution should prompt state legislatures to rethink the operation of state arrest laws, as well as budget allocations associated with law enforcement and with prosecution.

C. Improving Police/Prosecutor Relations

The possibility of court-ordered remedies to correct the imbalance between arrests and prosecutions should also be a sufficient incentive for police and for prosecutors to rethink their arrest and prosecution policies and procedures. After all, a high dismissal rate supports the assumption that not every case, and, in some jurisdictions, not even half of the cases, resulting in arrest are prosecutable or meritorious. If an individual's presumptive right to freedom is balanced against speculation that charges against the individual are capable of being prosecuted (as opposed to obtaining a conviction), the individual right must prevail.500

One of the most important components of effective law enforcement is the relationship between police officers and prosecutors. Although each of the two entities possesses specialized skills related to the implementation of their respective tasks, prosecution of a given case requires coordination. For jurisdictions with high rates of non-prosecution, improvements in the prosecutability of cases will be evident only after that coordination is choreographed and implemented.

There are at least three crucial elements in the relationship between police and prosecutors: (1) articulation of prosecution policies; (2) police officer training in investigation and arrests, and controlling law for each aspect of arrest and charging; and (3) guidance about creating adequate evidentiary records. Whether, and to what extent, any of these elements is present may be dependent on political considerations within a jurisdiction501 and the availability of

500. Measuring the likelihood of an arrest leading to prosecution is not the same as measuring whether a prosecutor will be able to prove any particular criminal case beyond a reasonable doubt. In the former situation, state players can help determine the prosecutability of a case by testing it for legal sufficiency, requiring that the state components follow legal precedent, and allocating resources in a way that allows proper case preparation.

In the latter situation of obtaining a verdict against a criminal defendant, independent variants, such as witnesses and juries, combine to determine whether a conviction is obtained. If a prosecutor presents a case in good faith and with due diligence, the failure to obtain a conviction should not be attributed to the prosecution.

501. Conflicting political pressures might take the form of the desire of either (or both) the prosecutor's office or police department to emphasize its independence, rather than interrelationship; the need of either component to stress its own achievements to justify existing or increased financial resources; or, for elected officials, political "one-upmanship" to ensure votes.
financial resources. However, the anticipated budgetary and political costs might be illusory compared to the current expenditures on criminal cases that do not result in prosecution.

1. Training.—Standards adopted by the American Bar Association propose that prosecutors "aid in training police in the performance of their function in accordance with law." Classes conducted by prosecuting attorneys are a cost-effective method of preparing new and experienced officers for legal issues encountered in many criminal cases. Classroom interaction also would facilitate more productive relationships between police and prosecutors, at the departmental as well as individual levels.

The lack of training undoubtedly results in more non-prosecutable cases being charged. Under existing practices, however, there is no accountability for arrests in such cases, or their impact on the resources of the criminal justice system. Courts enable this dysfunction; they recognize that many criminal cases may receive little or no prosecutorial review until the brink of trial, yet they do not exercise their supervisory or review powers to require greater accountability. Silence from the bench about police officers who demonstrate lack of familiarity with applicable legal standards perpetuates the status quo of many failed prosecutions.

2. Articulation of Prosecution Policies.—Criminal justice statistics suggest that the articulation of law enforcement policies and priorities is one of the weakest elements in law enforcement. Comparable or disproportionate nonprosecution rates for felony and for misdemeanor cases is one indicator of a failure to prioritize cases for prosecution. For example, data from Kings County, New York, indicates that convictions occurred in 19% of felony arrests in 1994, but in 28% of misdemeanor arrests.

---

502. This might include training budgets, allocations for increased supervisory personnel, or reallocations to facilitate changes in employee duties (such as the need for follow-up investigation by police).

503. Standards Relating to the Prosecution Function § 2.7(b).


505. See app. C, tbs.5, 12 (showing felony case data and misdemeanor case data in Kings County, New York).
In Riverside County, California, in 1991\(^{506}\) convictions were obtained in 27% of felony cases presented for prosecution, and in 53% of misdemeanor cases.\(^{507}\) Nationwide, between 1990 and 1994, there were a total of 8,647,100 index arrests and 56,625,400 nonindex arrests. The data shows that 12,900 fewer index arrests were made in 1994 than in 1990, yet the number of nonindex arrests in 1994 was 466,500 cases higher than in 1990.\(^{508}\)

On their face, the arrest/request figures suggest policy determinations that nonserious cases are the law enforcement priorities in the cited jurisdictions. The conviction data supports either of two hypotheses: (1) greater preparation occurs in the prosecution of misdemeanor cases; or (2) prosecution of misdemeanor cases diverts resources from preparation of felony cases for prosecution.

Either dynamic calls for examination and articulation of policies regarding the use of law enforcement resources. These can occur by prosecutors issuing guidelines to police departments about the priority of specific offenses from the perspective of prosecution. Police departments also retain the discretion to instruct their officers in the manner in which arrest efforts should be expended.\(^{509}\)

The arrest/conviction statistics reveal one glaring irony. Despite the wide leeway and even immunity that police and that prosecutors enjoy in the exercise of their respective discretionary functions, in a number of large jurisdictions, that discretion is not being used to ensure effective case outcomes or to address adequately instances of violent crime.\(^{510}\)

Existing rules of civil and of criminal procedure contain mechanisms for such accountability. Federal Rule of Civil Procedure 11, for example, allows the imposition of sanctions if court filings do not have an adequate legal or factual basis, or a good faith argument for the extension or reconsideration of existing law.\(^{511}\) An attorney's sig-

---

506. The last year of the five-year period studied in this Article for which complete conviction statistics were available for both felony and misdemeanor cases in materials published by the Riverside County Office of the District Attorney was 1991.  
507. See app. C, tbls.6, 11 (showing felony case data and misdemeanor case data from Riverside County, California).  
508. See app. C, tbl.1 (showing state and local government arrests from 1990-94).  
509. Police departments do, of course, direct resources at particular targets. Neighborhood complaints might lead to concentrated prostitution arrests, for example. Similar directives are issued for drug "sweeps."  
510. See supra notes 172-201 and accompanying text (discussing data from 1990 through 1994 and the relationship of arrests to prosecution indicate a low correlation).  
511. Federal Rule of Civil Procedure 11 provides, in pertinent part: (b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper,
nature on a court filing is treated as the attorney’s certification of adequate facts or of supporting law. Where deprivations of individual liberty are concerned, prosecuting attorneys should be held to the same standard. To ensure that the largest number of criminal cases are held to that standard, police and prosecutors should be required to develop procedures enabling prosecutorial review of individual cases, and prosecutors should be required to certify that facts and applicable law justify warrantless arrests.\textsuperscript{512}

\section*{D. The Role of Defense Attorneys}

Our adversarial criminal justice system assumes that the state and the defense each will maximize their efforts toward the overall good of their respective clients. The statistics regarding the numbers of criminal cases that are dismissed without prosecution—often months after an individual’s arrest—beg the question of the performance of defense attorneys on behalf of their clients.

The Supreme Court’s declarations of the “critical stages” in a criminal case—when the right to counsel guaranteed by the Sixth Amendment attaches—are not the outer limits of participation by defense counsel. Private counsel is retained and public defenders are appointed in many cases soon after an individual’s arrest. The initial deprivation of liberty, the arrest, has already occurred by that time, but diligent defense efforts can ameliorate some of the consequences of that deprivation.

A defense attorney’s participation at a bail hearing, for example, can help ensure that the requirements of bail laws are adhered to, and that available review of initial bail determinations occurs. Challenges

\begin{itemize}
  \item an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
    \begin{enumerate}
    \item it is not being presented for any improper purpose . . . ;
    \item the claims . . . and other legal contentions therein are warranted by existing law . . . ;
    \item the allegations and other factual contentions have evidentiary support . . . ; and
    \item the denials of factual contentions are warranted on the evidence . . . .
    \end{enumerate}
\end{itemize}


512. The current law states:

\begin{itemize}
  \item In any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) . . . [the court] may award to a prevailing party, other than the United States, a reasonable attorney’s fee and other litigation expenses, where the court finds that the position of the United States was vexatious, frivolous, or in bad faith, unless the court finds that special circumstances make such an award unjust.
\end{itemize}

to probable cause for arrest at the earliest practicable time present the prospect of nonmeritorious cases being dismissed sooner. Those challenges must include thorough understanding of applicable offenses and their elements and effective oral advocacy. Initial client interviews and prompt preliminary investigation can strengthen motions to suppress evidence, based on illegality surrounding arrests, police questioning, and searches.

Defense attorneys should consider whether court delays are, in fact, in their clients' best interests. The defense bar often engages in wistful thinking that delays will result in the deterioration of the prosecution's case. Such courthouse "folklore" should not supplant diligent preparation and advocacy based on either the merits of pending charges or on the fairness of the prosecution's conduct in preparing and in presenting its case.

**Conclusion**

Arrest practices in the United States merit scrutiny and monitoring simply on the basis of the numbers of arrests that occur annually. Their toll on the lives of millions of individuals each year warrants reconsideration of the relationship between our government, state and federal, and the population. Wholesale arrests may be a sign that common assumptions of the American people about their government are incorrect. Arrest totals of more than fourteen million each year mean that American "liberty" has a distinctly more narrow connotation to a substantial portion of our population than civics platitudes convey.

Numerous scholars have pointed out the perception of criminal justice among minorities. Nonetheless, systemic overhauls of criminal justice practices occur rarely, and even more rarely with an eye toward addressing the facts and the perceptions of the mistreatment of minorities. Arrest practices themselves are not examined for the role they play in those facts and perceptions of maltreatment. The cause-and-effect dynamic is so stark that silence about arrest practices amounts to deliberate indifference to the protection of Constitutional rights of minorities.

On the one hand, arrest rates indicate that enormous sums are expended by every jurisdiction in the country for one aspect of law enforcement. On the other, we profess bewilderment that the large expenditures do not produce better results. At the same time, we also lament that we lack resources adequate to the task presented by crime.
Courts justify curtailment of individual rights related to criminal procedure on alleged financial impediments. Courts sanction less strict adherence to constitutional and to statutory rules because of heavy criminal caseloads, yet do not hold police and prosecutors accountable for the flood of cases created by arrests. Even the great numbers of improvident, if not abusive, arrests do not give voice to reforms. The bottom line is that claims about criminal justice in this country often are false. We perpetuate conveyor belt systems that deprive millions of individuals of basic constitutional rights. Ennui and indifference have taken the place of administration and decision-making in our prosecutors' offices and courts. In an absolute sense, our jurisdictions expend disproportionate resources on criminal justice compared to the results achieved.

Comparison of rates of victimization to conviction rates in many jurisdictions proves that our criminal justice efforts are largely irrelevant in the face of crime. Debate about criminal procedure and constitutional law miss the point if they do not address the phenomenon of the loss of liberty experienced by millions of people without benefit of the constitutional protections that the rest of us automatically assume accompany criminal prosecution.
<table>
<thead>
<tr>
<th>STATE</th>
<th>MISDEMEANOR</th>
<th>FELONY</th>
<th>DOMESTIC VIOLENCE</th>
<th>STANDARD</th>
</tr>
</thead>
<tbody>
<tr>
<td>ALABAMA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>ALASKA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>ARIZONA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE</td>
</tr>
<tr>
<td>ARKANSAS</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>CALIFORNIA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE BELIEF</td>
</tr>
<tr>
<td>COLORADO</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>CONNECTICUT</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: APPREHENDED IN ACE</td>
</tr>
<tr>
<td>DELAWARE</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE</td>
</tr>
<tr>
<td>DISTRICT OF COLUMBIA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>FLORIDA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>GEORGIA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>ANY CRIME: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>STATE</td>
<td>DOMESTIC VIOLENCE</td>
<td>MISDEMEANOR</td>
<td>FELONY</td>
<td></td>
</tr>
<tr>
<td>----------</td>
<td>------------------</td>
<td>------------</td>
<td>--------</td>
<td></td>
</tr>
<tr>
<td>Hawaii</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Idaho</td>
<td>NO</td>
<td>YES</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>Illinois</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Indiana</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Iowa</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Kansas</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Kentucky</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td></td>
</tr>
<tr>
<td>Louisiana</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>Maine</td>
<td>NO</td>
<td>NO</td>
<td>NO</td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td>MISDEMEANOR</td>
<td>FELONY</td>
<td>DOMESTIC VIOLENCE</td>
<td>STANDARD</td>
</tr>
<tr>
<td>------------------</td>
<td>-------------</td>
<td>--------</td>
<td>-------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: REASONABLE BELIEF</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: REASONABLE GROUNDS BELIEF PERSON COMMITTED OR PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>OR ON REASONABLE GROUNDS FELONY: IN OFFICER'S PRESENCE OR ON REASONABLE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>GROUNDS</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>&amp; BELIEF (A)WILL NOT OTHERWISE BE APPREHENDED, (B)MAY CAUSE PERSONAL</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>OR PROPERTY INJURY, (C)MAY DESTROY EVIDENCE, OR (D)IN OFFICER'S PRESENCE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>FELONY: REASONABLE GROUNDS</td>
</tr>
<tr>
<td>STATE</td>
<td>MISDEMEANOR</td>
<td>FELONY</td>
<td>DOMESTIC VIOLENCE</td>
<td>STANDARD</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------</td>
<td>--------</td>
<td>-------------------</td>
<td>-----------------------------------------------</td>
</tr>
<tr>
<td>NEW JERSEY</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td>NEW MEXICO</td>
<td>?</td>
<td>?</td>
<td>YES</td>
<td>STATUTES PROVIDE FOR ARREST ON A</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Supp. 1999)</td>
<td></td>
</tr>
<tr>
<td>NEW YORK</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE</td>
</tr>
<tr>
<td>N.Y. Crim Proc. Law § 140.10 (McKinney 1992</td>
<td></td>
<td></td>
<td>N.Y. Crim Proc. Law § 140.10(4) (McKinney</td>
<td>FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Supp. 1998)</td>
<td></td>
</tr>
<tr>
<td>NORTH CAROLINA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE</td>
</tr>
<tr>
<td>NORTH DAKOTA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1999)</td>
<td></td>
</tr>
<tr>
<td>OHIO</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>STATUTE PROVIDES FOR ARREST ON A</td>
</tr>
<tr>
<td>Ohio Rev. Code Ann. § 2935.03 (Anderson</td>
<td></td>
<td></td>
<td>OHIO REV. CODE ANN. § 2935.03(B)(3)(b) (</td>
<td>CRIME BY CRIME BASIS</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Anderson 1999)</td>
<td></td>
</tr>
<tr>
<td>OKLAHOMA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>2000); § 40.3 (West 1992 &amp; Supp. 2000)</td>
<td></td>
</tr>
<tr>
<td>OREGON</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>MISDEMEANOR: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1998)</td>
<td></td>
</tr>
<tr>
<td>PENNSYLVANIA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>STATUTE REQUIRES GOVERNMENT TO</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>1999)</td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td>MISDEMEANOR</td>
<td>FELONY</td>
<td>DOMESTIC VIOLENCE</td>
<td>STANDARD</td>
</tr>
<tr>
<td>---------------</td>
<td>-------------</td>
<td>--------</td>
<td>-------------------</td>
<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>SOUTHW CAROLINA</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>S.D. Codefied Laws §§ 23A-3-2, 23A-3-2.1 (Michie 1998)</td>
</tr>
<tr>
<td>TENNESSEE</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>Tenn. Code Ann. § 36-3-611, 36-3-619 (1996)</td>
</tr>
<tr>
<td>UTAH</td>
<td>YES</td>
<td>YES</td>
<td>YES</td>
<td>Uta Code Ann. § 77-36-2.2 (Supp. 1998)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: PROBABLE CAUSE AND REASONABLE GROUNDS BELIEF—CANNOT BE ARRESTED LATER OR WILL CAUSE INJURY UNLESS ARRESTED FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: WITHIN OFFICER’S VIEW FELONY: WITHIN OFFICER’S VIEW</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: PROBABLE CAUSE FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>MISDEMEANOR: IN OFFICER’S PRESENCE OR PROBABLE CAUSE WITH BELIEF PERSON MAY FLEE, DESTROY EVIDENCE, OR CAUSE INJURY FELONY: PROBABLE CAUSE</td>
</tr>
<tr>
<td>STATE</td>
<td>MISDEMEANOR</td>
<td>FELONY</td>
<td>DOMESTIC VIOLENCE</td>
<td>STANDARD</td>
</tr>
<tr>
<td>------------------------</td>
<td>-------------</td>
<td>--------</td>
<td>----------------------------------</td>
<td>-----------------------------------------------</td>
</tr>
</tbody>
</table>
A. INDEX OFFENSES

1. Murder and Nonnegligent Manslaughter.—The willful (nonnegli-
gent) killing of one human being by another.¹

2. Forcible Rape.—The carnal knowledge of a female forcibly and
against her will. It includes assaults or attempts to rape by force or
threat of force. It excludes statutory rape (without force) and other
sex offenses.²

3. Robbery.—The taking or attempting to take anything of value
from the care, custody, or control of a person or persons by force or
threat of force or violence and/or by putting the victim in fear.³

4. Aggravated Assault.—An unlawful attack by one person upon
another for the purpose of inflicting severe or aggravated bodily in-
jury. Attempts are included.⁴

5. Burglary.—The unlawful entry of a structure to commit a fel-
yony or theft. The use of force to gain entry is not required. Its three
subclassifications are forcible entry, unlawful entry where no force is
used, and attempted forcible entry.⁵

6. Larceny-Theft.—The unlawful taking, carrying, leading, or rid-
ing away of property from the possession or constructive possession of
another. It includes shoplifting, pocket-picking, purse-snatching,
thefts from motor vehicles, thefts of motor vehicle parts and accesso-
ries, bicycle thefts, etc. where no force, violence or fraud occurs. It
does not include embezzlement, "con" games, forgery, and worthless
checks. Thefts of motor vehicles are a separate category.⁶

7. Motor Vehicle Theft.—The theft or attempted theft of a motor
vehicle, including the stealing of automobiles, trucks, buses,
motorcycles, motorscooters, snowmobiles, etc. It excludes the taking
of a motor vehicle for temporary use by persons having lawful access.⁷

8. Arson.—Any willful or malicious burning or attempt to burn,
with or without intent to defraud, a dwelling house, public building,
motor vehicle or aircraft, personal property of another, etc. Fires of suspicious or unknown origins are excluded.\(^8\)

B. **Nonindex Offenses**\(^9\)

1. Other assaults.
2. Forgery and counterfeiting.
3. Fraud.
4. Embezzlement.
5. Stolen property, buying, receiving, possessing.
6. Vandalism.
7. Weapons, carrying, possessing, etc.
8. Prostitution and commercialized vice.
9. Sex offenses (except forcible rape and prostitution).
10. Drug abuse violations.
12. Offenses against family and children.
13. Driving under the influence.
15. Drunkenness.
16. Disorderly conduct.
17. Vagrancy.
18. All other offenses.
19. Curfew and loitering law violations.\(^{10}\)

---

8. *Id.* at 42.
9. *Id.* at 174 tbl.24.
10. Runaways are included among the non-index offenses. See *id.* This Article treats only arrests of adults. Curfew violations also would be juvenile offenses. It is not possible, however, to determine from the available data how many arrests in the “curfew and loitering law violations” category are for curfew as opposed to loitering, which would constitute adult arrests.
## APPENDIX C

### TABLE 1

**STATE AND LOCAL GOVERNMENT ARRESTS 1990-1994**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>ESTIMATED ARRESTS</th>
<th>NONINDEX ARRESTS</th>
<th>INDEX</th>
<th>AGNCS&lt;sup&gt;1&lt;/sup&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>14,195,100</td>
<td>11,271,800</td>
<td>2,923,300</td>
<td>12,401</td>
</tr>
<tr>
<td>1991</td>
<td>14,211,900</td>
<td>11,240,500</td>
<td>2,971,400</td>
<td>12,805</td>
</tr>
<tr>
<td>1992</td>
<td>14,075,100</td>
<td>11,186,900</td>
<td>2,888,200</td>
<td>13,032</td>
</tr>
<tr>
<td>1993</td>
<td>14,036,300</td>
<td>11,187,900</td>
<td>2,848,400</td>
<td>13,041</td>
</tr>
<tr>
<td>1994</td>
<td>14,648,700</td>
<td>11,738,000</td>
<td>2,910,400</td>
<td>13,124</td>
</tr>
</tbody>
</table>

---

1. These numbers represent the number of local county, and state law enforcement agencies reporting to the UCR program each year. *Cf.* Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States: Uniform Crime Reports 1995, at 278 (1996) [hereinafter 1995 UCR].


## Table 2
### State Court Felony Convictions/Arrests 1990

<table>
<thead>
<tr>
<th>Felony Convictions</th>
<th>Index Arrests$^1$</th>
<th>Nonindex Arrests</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL 829,344</td>
<td>TOTAL 2,923,300</td>
<td>TOTAL 11,271,800</td>
</tr>
<tr>
<td>VIOLENT 147,766</td>
<td>705,500</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>PROPERTY 280,748</td>
<td>2,217,800</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>DRUGS 274,613</td>
<td>NOT REPORTED SEPARATELY</td>
<td>DRUGS 1,089,500</td>
</tr>
<tr>
<td>WEAPONS 20,733</td>
<td>NOT REPORTED SEPARATELY</td>
<td>WEAPONS 221,200</td>
</tr>
<tr>
<td>OTHER$^2$ 105,484</td>
<td>NOT REPORTED SEPARATELY</td>
<td>NOT REPORTED SEPARATELY$^3$</td>
</tr>
</tbody>
</table>

1. See 1990 UCR, supra note 2 to tbl.1, at 174 tbl.24 (citing data for 1990 index and nonindex arrests).

2. "Other" is made up of nonviolent offenses such as receiving stolen property and driving while intoxicated. See id. at 527 n.f.

3. Of the total number of felony convictions in 1990, 751,993 resulted from guilty pleas and 77,351 by guilty verdict after trial. See id. at 528 tbl.5.51.


## Table 3

STATE COURT FELONY CONVICTIONS/ARRESTS 1992

<table>
<thead>
<tr>
<th>FELONY CONVICTIONS</th>
<th>INDEX ARRESTS</th>
<th>NONINDEX</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL 3 893,630</td>
<td>2,888,200</td>
<td>11,186,900</td>
</tr>
<tr>
<td>VIOLENT 165,099</td>
<td>742,130</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>PROPERTY 297,494</td>
<td>2,146,000</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>DRUGS 280,232</td>
<td>NOT REPORTED SEPARATELY</td>
<td>1,066,400</td>
</tr>
<tr>
<td>WEAPONS 26,422</td>
<td>NOT REPORTED SEPARATELY</td>
<td>299,300</td>
</tr>
<tr>
<td>OTHER 105,484</td>
<td>124,383</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
</tbody>
</table>


2. See 1992 UCR, supra note 4 to tbl.1, at 217 tbl.29. The Crime Index is used to "gauge fluctuations in the overall volume and rate of crime reported to law enforcement." See 1995 UCR, supra note 1 to tbl.1, at 5. The offenses included in the Crime Index are the violent crimes of murder, nonnegligent manslaughter, forcible rape, robbery, aggravated assault, the property crimes of burglary, larceny-theft, motor-vehicle theft, and arson. 1992 UCR, supra note 4 to tbl.1, at 5; see also Appendix B.

3. The numbers of convictions reported by the specific offense categories do not equal the "total figure. BJS does not explain the discrepancy. See 1995 SOURCEBOOK, supra note 1, at 497 tbl.5.44.
**Table 4**

**State Court Felony Convictions/Arrests 1994**

<table>
<thead>
<tr>
<th>Convictions¹</th>
<th>Index Arrests²</th>
<th>Nonindex Arrests³</th>
</tr>
</thead>
<tbody>
<tr>
<td>TOTAL 872,217</td>
<td>TOTAL 2,910,400</td>
<td>TOTAL 11,738,300</td>
</tr>
<tr>
<td>VIOLENT 164,583</td>
<td>778,730</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>PROPERTY 275,198</td>
<td>2,131,700</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>DRUGS 274,245</td>
<td>1,351,400</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>WEAPONS 31,010</td>
<td>259,400</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
<tr>
<td>OTHER 127,180</td>
<td>3,743,200</td>
<td>NOT REPORTED SEPARATELY</td>
</tr>
</tbody>
</table>

2. See 1995 Sourcebook, supra note 1 to tbl.5, at 394 tbl.4.1. Please note that the other category does not include traffic offenses. See id.
3. See id. Index and Nonindex Arrests are not reported separately. See id. According to the 1995 Sourcebook, the total number of Index Arrests was 2,910,400. Id. Therefore, the remaining 11,738,300 arrests are categorized as Nonindex. See id.
TABLE 5
KINGS COUNTY, NEW YORK 1990 POPULATION 2,299,285
FELONY CASE DATA

<table>
<thead>
<tr>
<th>YEAR</th>
<th>FELONY ARRESTS 2</th>
<th>FELONY PROSECUTIONS 3</th>
<th>CONVICTIONS 4</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>42,932</td>
<td>13,332</td>
<td>9,310</td>
</tr>
<tr>
<td>1991</td>
<td>41,013</td>
<td>15,075</td>
<td>10,509</td>
</tr>
<tr>
<td>1992</td>
<td>36,126</td>
<td>13,901</td>
<td>9,806</td>
</tr>
<tr>
<td>1993</td>
<td>35,116</td>
<td>12,171</td>
<td>9,529</td>
</tr>
<tr>
<td>1994</td>
<td>39,884</td>
<td>10,414</td>
<td>7,667</td>
</tr>
</tbody>
</table>

1. See New York State Division of Criminal Justice Services, *Criminal Justice Indicators, Kings County: 1990-1994* (last modified Nov. 28, 1997) http://criminaljustice.state.ny.us/cgi/internet/areastat/areastat.cgi, Table: Adult Arrests [hereinafter DCJS, *Kings County Indicators*].
2. See id.
3. See id. at tbl.5: Prosecutions.
4. See id. at tbl.5: Convictions and Sentences.
TABLE 6
RIVERSIDE COUNTY, CALIFORNIA 1990 POPULATION 1,170,4131 FELONY CASE DATA

<table>
<thead>
<tr>
<th>YEAR</th>
<th>FELONY REQUESTS</th>
<th>FELONY FILED</th>
<th>CONVICTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>21,644</td>
<td>8652/76533</td>
<td>4359/5199</td>
</tr>
<tr>
<td>1991</td>
<td>20,162</td>
<td>8829/10584</td>
<td>5543</td>
</tr>
<tr>
<td>1992</td>
<td>22,582</td>
<td>10,584</td>
<td>5553</td>
</tr>
<tr>
<td>1993</td>
<td>25,156</td>
<td>12,050</td>
<td>6569</td>
</tr>
<tr>
<td>1994</td>
<td>22,303</td>
<td>11,718</td>
<td>N/A</td>
</tr>
</tbody>
</table>

2. In the Eastern Division, in 1990, there were 4361 felonies requested. See Office of the District Attorney Riverside County, 1990 Annual Report 13 [hereinafter 1990 Annual Report]. In the Western Division, in 1990, there were 17,283 felonies requested. See id. at 19. Therefore, there was a total of 21,644 felonies requested in 1990. In the Eastern Division, in 1990, there were 1300 felonies filed. See id. at 13. In the Western Division, there were 7352 felony complaints filed. See id. at 19. Therefore, according to the 1990 Annual Report, there was a total of 8652 felonies filed.
3. If two numbers are presented in a category on these tables, the first represents the data found in the Riverside County Annual Report, and the second represents the data found in the Riverside County Biennial Report. For 1990, the Annual Report states that 8652 felony cases were filed. However, the 1992-1993 Biennial Report states that 7653 felony cases were filed in 1990. Office of the District Attorney Riverside County, 1992-1993 Biennial Report (unnumbered) (1993) [hereinafter 1992-1993 Biennial Report]. According to the 1990 Annual Report, there were 4359 felons convicted in superior court in 1990. 1990 Annual Report 1. According to the 1992-1993 Biennial Report, there were 5199 felony convictions. 1992-1993 Biennial Report (unnumbered).
4. In 1991, the Western Division reported 16,138 felonies requested. See Office of the District Attorney Riverside County, 1991 Annual Report 5 [hereinafter 1991 Annual Report]. In the Eastern Division there were 4024 felonies requested. See id. at 19. Therefore, there was a total of 20,162 felonies requested in Riverside County. In the Western Division, there were 7125 felony requests. See id. at 5. In the Eastern Division, there were 1345 felonies filed. See id. at 19. Therefore, there was a total of 8829 felony complaint requests. The 1992-1993 Biennial Report stated that a total of 10,584 felony requests was filed. 1992-1993 Biennial Report, supra note 3, tbl.6 (unnumbered). The total of felony convictions was 5543. See id. (unnumbered).
6. See id.
7. The Eastern Division, in 1994, requested 5842 felony cases. See Office of the District Attorney Riverside County, 1994-1995 Biennial Report (unnumbered) [hereinafter 1994-1995 Biennial Report]. The Western Division had 16,461 felony requests. See id. (unnumbered). Therefore, the total number of felonies requested was 22,303. The Eastern Division, in 1994, filed 2999 cases as felonies. See id. (unnumbered). The Western Division listed having 8451 felony requests filed in 1994 and as having 268 felony requests in 1994. See id. (unnumbered). Therefore, the total felony requests were 11,718. The two divisions of the Riverside County office, Eastern and Western, reported their respective 1994 data differently. The Eastern Division did not report the number of misdemeanor or felony convictions for 1994. The Western Division reported that the number of felony cases resulting in "conviction and sentencing" (6446) and gave a conviction rate of 98%. See id. (unnumbered). The Western Division also provided only the total number of misdemeanor cases filed and its own computation of the conviction rate for the misdemeanor cases that went to jury trial, 98%. See id. (unnumbered).
# Table 7

**1970 Felony Case Disposition Data**

<table>
<thead>
<tr>
<th>CITY OR COUNTY</th>
<th>COOK CO. (IL)</th>
<th>LOS ANGELES CO. (CA)</th>
<th>KINGS CO. (NY)</th>
<th>DETROIT CITY (MI)</th>
<th>BALTIMORE CITY (MD)</th>
<th>HARRIS CO. (TX)</th>
</tr>
</thead>
<tbody>
<tr>
<td>POPULATION</td>
<td>5.5 MIL</td>
<td>7.2 MIL</td>
<td>2.6 MIL</td>
<td>1.7 MIL</td>
<td>980,000</td>
<td>1.8 MIL</td>
</tr>
<tr>
<td>ARRESTS</td>
<td>22,000</td>
<td>69,000</td>
<td>15,000</td>
<td>20,000</td>
<td>8,000</td>
<td>16,000</td>
</tr>
<tr>
<td>IND/INF</td>
<td>5,000</td>
<td>21,400</td>
<td>3,000</td>
<td>9,000</td>
<td>6,500</td>
<td>7,000</td>
</tr>
<tr>
<td>GUILTY PLEAS</td>
<td>2,300</td>
<td>9,400</td>
<td>2,500</td>
<td>4,800</td>
<td>900</td>
<td>5,500</td>
</tr>
<tr>
<td>TRIALS</td>
<td>900³</td>
<td>10,400⁴</td>
<td>300³</td>
<td>900⁵</td>
<td>5,125⁷</td>
<td>360⁸</td>
</tr>
</tbody>
</table>

1. See McIntyre & Lippman, *supra* note 194 to main text, at 1156. See generally Feeney et al., *supra* note 382 to main text, at 21 (observing the attrition rate of cases in California at three distinct stages; the rate is 43% between arrests and the filing of charges, 26% between the filing and a case reaching trial court, and 14% after a case is in the trial court). The importance of prosecutorial screening in the criminal justice process is confirmed by the fact that the prosecutor alone would have had the authority to dismiss most cases during the first two stages. The percentage of cases dismissed in the third stage—those dismissed by the courts due to legal or evidentiary problems—is higher nationwide (between 27–31%) than percentages reported by Feeney et al. (14%). For discussion of this data, see *supra* main text accompanying notes 165-200.

2. IND/INF refers to indictments or informations.

3. In Cook County, there were 600 contested nonjury trials and 300 contested jury trials, for a total of 900 trials. See McIntyre & Lippman, *supra* note 194 to main text, at 1156.

4. In Los Angeles, there were 9500 contested nonjury trials, of which the “majority . . . [were] adjudicated on transcript of preliminary hearing,” and 900 contested jury trials, for a total of 10,400 trials. *Id.*

5. In Kings County, there were 100 contested nonjury trials and 200 contested jury trials, for a total of 900 trials. *See id.*

6. The City of Detroit had 600 contested nonjury trials and 300 contested jury trials, for a total of 900 trials. *See id.*

7. The City of Baltimore had 5000 contested nonjury trials and 125 contested jury trials, for a total of 5125 trials. *See id.* It is noted that “[j]uries are traditionally waived” in the City of Baltimore. *Id.*

8. In Harris County, there were 60 contested nonjury trials and 300 contested jury trials, for a total of 350 trials. *See id.*
### Table 8

**Felony Case Disposition From Arrest January-June 1977**

<table>
<thead>
<tr>
<th>JURISDICTION</th>
<th>Cobl CO. (GA)</th>
<th>D.C.</th>
<th>Salt Lake CO. (UT)</th>
<th>New Orleans (LA)</th>
<th>Los Angeles CO. (CA)</th>
</tr>
</thead>
<tbody>
<tr>
<td>NUMBER OF CASES</td>
<td>632</td>
<td>3,141</td>
<td>1,402</td>
<td>3,167</td>
<td>19,418</td>
</tr>
<tr>
<td>ACQUITALS</td>
<td>1%</td>
<td>2%</td>
<td>NONE/NA</td>
<td>3%</td>
<td>1%</td>
</tr>
<tr>
<td>CONVICTION/PLEA</td>
<td>62%&lt;sup&gt;2&lt;/sup&gt;</td>
<td>46%&lt;sup&gt;3&lt;/sup&gt;</td>
<td>NA&lt;sup&gt;4&lt;/sup&gt;/&lt;sup&gt;33%&lt;/sup&gt;</td>
<td>33%&lt;sup&gt;5&lt;/sup&gt;</td>
<td>21%&lt;sup&gt;6&lt;/sup&gt;</td>
</tr>
<tr>
<td>DISMISSALS</td>
<td>29%&lt;sup&gt;7&lt;/sup&gt;</td>
<td>49%&lt;sup&gt;8&lt;/sup&gt;</td>
<td>44%&lt;sup&gt;9&lt;/sup&gt;</td>
<td>55%&lt;sup&gt;10&lt;/sup&gt;</td>
<td>52%&lt;sup&gt;11&lt;/sup&gt;</td>
</tr>
<tr>
<td>REFERRALS AND OTHER PROSECUTIONS</td>
<td>2%</td>
<td>0%</td>
<td>1%</td>
<td>9%</td>
<td>24%</td>
</tr>
</tbody>
</table>

1. See Brosi, *supra* note 195 to main text, at 7 fig.2. Brosi also used the attrition rates of the above jurisdictions, both from arrest and from filing, to demonstrate the prosecutor’s unimpeded discretion. The attrition rates are as follows: Cobb County, Georgia, 31% from arrest, 14% from filing; District of Columbia, 49% from arrest, 35% from filing; Salt Lake City, 45% from arrest, 38% from filing; New Orleans, 55% from arrest, 17% from filing; Los Angeles, 52% from arrest, 34% from filing. *Id.* at 8. Brosi illustrated a prosecutor’s unlimited discretion by describing the prosecutor’s main function as “controlling the door to the court . . . the prosecutor decides which arrests result in court cases, and which will not.” *Id.* at 11. The scope of this control is great, as a prosecutor’s decision is generally not subject to review by the court. See also *supra* notes 111-117 to main text and accompanying text (asserting that prosecutors wield impenetrable discretion).

The prosecutor’s absolute discretion in deciding whether to charge has been upheld judicially, in both federal and state courts. See Wayte v. United States, 470 U.S. 598, 607 (1985) (stating that “[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review”); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (stating that “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury generally rests entirely in his discretion”); United States v. Cespedes, 151 F.3d 1329, 1333 (11th Cir. 1998) (stating that “[s]uch discretion is an integral feature of the criminal justice system, and is appropriate, so long as it is one based upon improper factors” (quoting United States v. LaBonte, 520 U.S. 751 (1997))); United States v. Bland, 472 F.2d 1329, 1335-36 (D.C. Cir. 1972) (stating that “as an incident of the constitutional separation of powers, the courts are not to interfere with the free exercise of the discretionary powers of the U.S. attorneys in their control over prosecutions”); State v. Krotza, 548 N.W.2d 252, 254 (Minn. 1996) (upholding the prosecutor’s broad charging discretion and stating that “under established separation of powers rules, absent evidence of selective or discriminatory prosecutorial discretion, the judiciary is powerless to interfere with the prosecutor’s charging authority”). But see main text accompanying notes 100-110 (regarding the lack of prosecutorial review of charging).

2. There were no convictions at trial, and 62% of felony cases ended in pleas. See Brosi, *supra* note 195 to main text, at 7 fig.2.
3. Six percent of felony cases ended with convictions at trial, and 40% ended with pleas, for a total of 46%. See *id*.
4. Data was not available for the percentage of convictions at trial. See *id*.
5. Six percent of the felony cases ended in convictions at trial, and 27% ended in pleas, for a total of 33%. See *id*.
6. Four percent of the felony cases end in convictions at trial, and 17% ended in pleas, for a total of 21%. See *id*.
7. Eleven percent of felony cases were dropped after filing, and 18% were rejected at screening, for a total of 29% ending in dismissals. See id.

8. Twenty-seven percent of felony cases were dropped after filing, and 22% were rejected at screening, for a total of 49%. See id.

9. Twenty-five percent of the felony cases were dropped after filing, and 19% were rejected at screening, for a total of 44%. See id.

10. Seven percent of the felony cases were dropped after filing, and 48% were rejected at screening, for a total of 55%. See id.

11. Twelve percent of the felony cases were dropped after filing, and 40% were rejected at screening, for a total of 52%. See id.
### Table 9

**BJS Misdemeanor Conviction Rates**

<table>
<thead>
<tr>
<th>PROSECUTOR OFFICE SIZE</th>
<th>25TH PERCENTILE</th>
<th>50TH PERCENTILE</th>
<th>75TH PERCENTILE</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONVICTION RATE</td>
<td>78%</td>
<td>88%</td>
<td>94%</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>POPULATION SERVED</th>
<th>MORE THAN 50,000</th>
<th>LESS THAN 50,000</th>
<th>[PART-TIME PROSECUTOR OFFICE]</th>
</tr>
</thead>
<tbody>
<tr>
<td>CONVICTION RATE</td>
<td>74%</td>
<td>90%</td>
<td>88%</td>
</tr>
</tbody>
</table>

2. *Id.* at 2 tbl.2.
**Table 10**

**Los Angeles City, California**¹ 1990 Population 3,485,000²  
**Misdemeanor Case Data**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>NUMBER REVIEWED</th>
<th>NUMBER CHARGED</th>
<th>CONVICTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>219,541</td>
<td>177,762</td>
<td>136,976</td>
</tr>
<tr>
<td>1991</td>
<td>197,576</td>
<td>155,609</td>
<td>125,671</td>
</tr>
<tr>
<td>1992</td>
<td>176,710</td>
<td>139,080</td>
<td>112,325</td>
</tr>
<tr>
<td>1993</td>
<td>161,238</td>
<td>125,655</td>
<td>113,226</td>
</tr>
<tr>
<td>1994</td>
<td>161,750</td>
<td>120,534</td>
<td>122,653</td>
</tr>
</tbody>
</table>

---


<table>
<thead>
<tr>
<th>YEAR</th>
<th>MISDEMEANORS REQUESTED</th>
<th>MISDEMEANORS FILED</th>
<th>CONVICTIONS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990¹</td>
<td>31,465</td>
<td>21,100/29,172</td>
<td>14,248</td>
</tr>
<tr>
<td>1991²</td>
<td>28,625</td>
<td>23,772/29,708</td>
<td>15,214</td>
</tr>
<tr>
<td>1992³</td>
<td>26,728</td>
<td>19,643</td>
<td>NA</td>
</tr>
<tr>
<td>1993⁴</td>
<td>26,782</td>
<td>20,430</td>
<td>NA</td>
</tr>
<tr>
<td>1994</td>
<td>25,774</td>
<td>18,294</td>
<td>NA</td>
</tr>
</tbody>
</table>

1. In the Eastern Division, there were 7730 misdemeanor requests and 4725 misdemeanors filed. See 1990 Annual Report, supra note 2 to tbl.6, at 13. These numbers do not include direct filings to the Court, which include all first-offense driving under the influence of alcohol or drugs.” Id. In the Western Division, there were 23,735 misdemeanor requests and 16,375 misdemeanor complaints filed. See id. at 19. Therefore, there was a total of 31,465 misdemeanor requests and 21,000 misdemeanors filed. However, according to the 1992-1993 Biennial Report there were 29,172 misdemeanors filed. See 1992-1993 Biennial Report, supra note 3 to tbl.6 (unnumbered).

2. In the Western Division, there were 21,365 misdemeanor requests and 19,283 misdemeanor complaints filed. See 1991 Annual Report, supra note 4 to tbl.6, at 5. In the Eastern Division, there were 7260 misdemeanors requested and 4489 misdemeanors filed. See id. at 19. Again, the numbers for the Eastern Division do not include direct filings to the court.” Id. Therefore, the total number of misdemeanor requests was 28,625, and the total number of misdemeanors filed were 23,772. However, according to the 1992-1993 Biennial Report there were 29,708 misdemeanors filed. See 1992-1993 Biennial Report, supra note 3 to tbl.6 (unnumbered).

3. In the Western Division, there were 20,526 misdemeanor requests and 13,994 requests filed as misdemeanors. See 1992-1993 Biennial Report, supra note 3 to tbl.6 (unnumbered). In the Eastern Division, there were 6202 misdemeanor cases requested and 5649 misdemeanors filed. Id. Misdemeanor requests “does not include misdemeanors filed by law enforcement directly.” Id. Therefore, there was a total of 26,728 misdemeanors requested and 19,643 misdemeanors filed. In their ten year retrospective, however, the 1992-1993 Biennial Report lists the number of misdemeanors filed at 29,708. Id.

4. In the Western Division, there were 19,451 misdemeanor requests and 14,565 requests filed as misdemeanors. See id. In the Eastern Division, there were 7331 misdemeanor cases requested and 5865 misdemeanors filed. See id. Misdemeanor requests “does not include misdemeanors filed by law enforcement directly.” Id. Therefore, there was a total of 26,782 misdemeanor requests and 20,430 misdemeanors filed.
## Table 12

**Kings County, New York Misdemeanor Case Data**

<table>
<thead>
<tr>
<th>YEAR</th>
<th>MISDEMEANOR ARRESTS(^1)</th>
<th>MISDEMEANOR CONVICTIONS(^2)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>26,110</td>
<td>11,897</td>
</tr>
<tr>
<td>1991</td>
<td>22,713</td>
<td>10,435</td>
</tr>
<tr>
<td>1992</td>
<td>25,663</td>
<td>9,742</td>
</tr>
<tr>
<td>1993</td>
<td>28,032</td>
<td>9,744</td>
</tr>
<tr>
<td>1994</td>
<td>40,774</td>
<td>11,349</td>
</tr>
</tbody>
</table>

---

1. DCJS, *Kings County Indicators*, supra note 1 to tbl.5, at tbl. Adult Arrests.
2. *Id.* at tbl. 5: Convictions and Sentences.