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Debunking Pre-Arrest Incident Searches

Joshua Deahl

The “search incident to arrest” exception to the Fourth Amendment’s warrant requirement permits officers to search a suspect upon making an arrest. It is the most commonly invoked justification for unconsented-to searches; indeed, incident searches far exceed searches conducted with a warrant. This seemingly straightforward exception has wilted in recent years as courts have done away with the prerequisite of an arrest, permitting incident searches so long as there is pre-search probable cause to arrest. The result has been to grant authority to search any person engaged in the most minor of offenses—e.g., speeding, littering, jaywalking—even absent an arrest, injecting routine warrantless searches into this most common form of police-citizen encounter.

This Article takes aim at pre-arrest incident searches and diagnoses two doctrinal missteps courts make in permitting them. The first is ignoring that Fourth Amendment intrusions must be judged “at their inception,” a maxim that dictates any post-search arrest is irrelevant to the constitutional calculus (except as evidence of some pre-search fact). The second is that they interpret Whren v. United States—in which the Supreme Court held that a seizure supported by probable cause was valid without regard to whether it was pretextual—as an evidentiary bar to considering officer intentions in Fourth Amendment inquiries. That is wrong too: Whren is not an evidentiary bar at all. While officer intentions are irrelevant to certain objective questions (like probable cause), they matter when discerning whether a custodial arrest is under way. Once these two mistakes are corrected, a straightforward rule emerges: incident searches are permitted only if there is a custodial arrest (be it completed or in-progress) at a search’s inception.

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Correcting the two missteps above has broad implications. Reinvigorating the principle that intrusions must be judged at their inception has reverberations in all manner of Fourth Amendment analyses. Likewise, treating Whren as a broad evidentiary bar to considering officer intentions is a pervasive yet ultimately mistaken approach. This Article offers a course correction on an issue that has deeply divided appellate courts and is likely to soon receive Supreme Court consideration.

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INTRODUCTION

The “search incident to arrest” exception to the Fourth Amendment’s warrant requirement is the most commonly invoked justification for unconsented-to warrantless searches. It permits searches of an arrestee’s person, areas within her immediate grasp, and (sometimes) a vehicle outside her grasp. Given its prevalence, the Supreme Court has commented that it is “something of a misnomer” to call the search incident to arrest an exception to the warrant requirement at all, “as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant.” There is just one condition, both necessary and sufficient, for justifying an incident search: the fact of a lawful custodial arrest.

A custodial arrest in this context is different from a mere Fourth Amendment seizure that courts sometimes refer to as an “arrest.” It involves the “taking of a suspect into custody and transporting him to the police station” for booking on charges. There is a trend, however, of courts disposing of this lone predicate for an incident search and instead requiring mere probable cause to arrest, so long as an arrest (even one based on the fruits of the search) ultimately follows. A large percentage of police encounters involve minor “arrestable” offenses that are resolved short of a custodial arrest (through a warning, citation, citation,

1. WAYNE R. LAFAYE, SEARCH AND SEIZURE § 5.2(b) (5th ed. 2016) (“While the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency.”).
or no reprisal).Absent an arrest, there should be no incident search. But courts nonetheless permit them, allowing subsequent arrests based upon fruits of the search to bootstrap the search itself into constitutional compliance.

Some version of the following fact pattern has reached appellate courts with surging frequency in recent years: A person is stopped for a minor infraction. Officers conduct a search of the offender and the surrounding area. If the search uncovers evidence of more serious wrongdoing, usually guns or drugs, the suspect is arrested and—according to a substantial majority of courts—that arrest retroactively transforms what was incontrovertibly a once-illegal pre-arrest search into a constitutional search incident to arrest. A few recent cases, discussed throughout this Article, exemplify the trend:

1. Jose was drinking alcohol on the landing of a stairwell inside his apartment building. An officer noticed the alcohol and approached Jose with the intention of issuing him a citation for possession of an open container of alcohol in public. While the open container offense was arrestable under state law, the officer had issued around fifty citations for the violation, but had never made an arrest. Before issuing a citation, she searched Jose and found a gun. Jose was arrested for unlawful possession of a firearm, but not for the open container violation. The search was upheld as incident to his arrest.6

2. Paul was biking down a road when officers observed him ride through a stop sign without coming to a complete stop. That offense was criminal but not arrestable under state law, and officers stopped Paul. Before releasing Paul with an anticipated warning for the biking infraction, they searched Paul and recovered a cell phone containing sexually explicit images of minors. Paul was arrested; he was never charged or cited for his biking infraction. The searches of Paul and his phone were upheld by the trial and intermediate appellate court as incident to his arrest.7

5. See generally Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (holding that arrests are constitutionally permitted for any criminal offense, no matter how minor); CHRISTINE EITH & MATTHEW R. DUROSE, CONTACTS BETWEEN THE POLICE AND THE PUBLIC, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE 1, 8 (Oct. 2011), http://www.bjs.gov/content/pub/pdf/cpp08.pdf [https://perma.cc/MLQ6-TSXX] (majority of police citizen encounters are traffic stops in which 55.4 percent of stopped drivers received a citation, 26.7 percent received a warning, 15.3 percent received no form of reprimand, and only 2.6 percent were arrested).


7. People v. Macabeo, 229 Cal. App. 4th 486 (2014) (affirming the California trial court’s ruling upholding the search and denying suppression). However, the California Supreme Court reversed, finding the search unconstitutional. People v. Macabeo, 384 P.3d 1189 (Cal. 2016). As discussed further below, California joined the handful of state courts reaching the correct result when confronting this issue, though it did not offer any response to the common objection that its rule impermissibly requires inquiry into officer intent. For those curious, the search occurred pre-Riley, and therefore the scope of
3. Brittney was riding in the passenger seat of a car as her friend David was pulled over for driving with a broken headlight. Officers noticed an open bottle of tequila in the car’s center console that Brittney admitted was hers; they also learned that David had a suspended license and arrested him for that offense and secured him in the back of a police cruiser. Officers anticipated releasing Brittney from the scene, but before doing so, searched the car to ensure that it was free of further contraband. Upon discovering a gun, officers searched Brittney and found marijuana on her. Brittney was arrested and charged with possession of an open container and possession of marijuana, and David with illegally carrying the firearm. The search of the car was upheld as incident to Brittney’s arrest.  

The federal circuit courts number 9–1 in support of the rule that a warrantless search may be justified as incident to a subsequent arrest, and the split is roughly 20–9 in the same direction in the state courts. Yet upholding the searches in these cases makes little sense. Only a custodial arrest confers a right to conduct a search incident to arrest, and in each of the cases outlined above, searches were conducted before any such arrest was under way or even decided upon. That an arrest followed the fruitful search should be irrelevant to the search’s constitutionality under prevailing Supreme Court case law. It is a bedrock Fourth Amendment principle that searches are judged at their inception, because Fourth Amendment rules are meant to guide officer conduct (and it is impossible to tailor one’s conduct to unexpected future outcomes). It would be anomalous if a once-unconstitutional search could be transformed into a constitutional search through the additional intrusion of an arrest; the arrest, based on evidence obtained through an unreasonable search, compounds rather than alleviates the constitutional violation. Fidelity to existing doctrine, as well as conformity with principles animating the exception for incident searches, requires that an arrest be under way prior to any incident search.

This Article argues that a custodial arrest must be under way at the time of an incident search, and that contrary holdings have improperly dispensed with the inviolable maxim that Fourth Amendment intrusions must be judged at their inception. It further argues that it is a mistake to ignore an officer’s decision the cell phone search was subject to a good faith analysis in light of pre-Riley precedents. See Riley v. California, 134 S. Ct. 2473, 2482 (2014).

8. United States v. Lewis, 147 A.3d 236 (D.C. 2016) (en banc). The search of the vehicle and of Brittney’s person could not have been justified as incident to David’s arrest because he was already secured in the back of the police car at the time of those searches, and there was no reason to think more evidence of driving on a suspended license would have been uncovered in a search. See Arizona v. Gant, 556 U.S. 332, 343 (2009). The Court did not resolve whether the search might be justified under the “automobile exception.” United States v. Nash, 100 A.3d 157, 166 n.4 (D.C. 2014).

9. The cases comprising this split are detailed infra Part I.D.

about whether or not to arrest when determining whether this condition is met. There are two distinct questions relevant to whether an incident search is valid: (1) “Is there probable cause to arrest?”\textsuperscript{11} and (2) “Is there a custodial arrest (or at least the inception of an arrest)?” That the Supreme Court forsweares officer intentions as irrelevant to the first question\textsuperscript{12} says nothing about whether officer intentions are relevant to the second. To the contrary, the Supreme Court held in \textit{Whren v. United States} that officer intentions may matter when the validity of a search depends not merely upon probable cause, but upon some other fact that gives rise to an exception to the warrant requirement,\textsuperscript{13} and the initiation of a custodial arrest is one such fact.

Both sides of the present debate are getting this wrong. Most courts have disposed of the requirement that an arrest precede the search altogether. The minority of courts that do require some pre-search arrest, and the commentators defending them, mistakenly retreat to unworkable and unprincipled objective rules for ascertaining when a custodial arrest has occurred. That approach concedes the central theoretical point that officer intentions do not matter to the Fourth Amendment, but it is wrong to make this concession. The relevance of officer intentions depends on the particular Fourth Amendment question, and analyzing an incident search is one of the several contexts in which officer intentions do matter.

Part I provides doctrinal background and articulates the principles animating the search incident to arrest exception to the Fourth Amendment’s warrant requirement. This Part explains how courts have gone astray by misinterpreting two cases—\textit{Rawlings v. Kentucky}\textsuperscript{14} and \textit{Whren}—as precluding any subjective inquiry into whether a custodial arrest was under way at the time of the search. This Section also details the deep and lopsided split (trending heavily in the wrong direction) on the issue of whether an arrest must be under way before a search may be justified as incident to arrest.

Part II dives into the Article’s core argument that a custodial arrest must be under way at the time of a search for it to be a valid search incident to arrest. This Part pinpoints confusion about one principle and neglect of another as the culprits for having led courts to approve pre-arrest incident searches. First is the bedrock principle that courts have neglected to consult: intrusions must be judged at their inception. With one exception, courts approving pre-arrest incident searches have ignored this maxim without comment. Yet if this principle

\textsuperscript{11} While it should make no practical difference, it may make more conceptual sense to say that the only thing that matters to an incident search is whether there is a custodial arrest, and that the existence of probable cause to arrest does not directly affect the propriety of the search per se, but only the arrest itself. If the arrest is illegal, then the fruits of any incident search may be suppressed as stemming from that illegality.

\textsuperscript{12} \textit{See Whren v. United States}, 517 U.S. 806 (1996).

\textsuperscript{13} \textit{Id.} at 811–12 (endorsing subjective intent as pertinent when “addressing the validity of a search conducted in the absence of probable cause.”).

is taken seriously, as it should be, it compels the conclusion that pre-arrest incident searches are invalid, and that post-search arrests can do nothing to salvage them.

The second mistake courts make is discerning an evidentiary principle from *Whren* where none exists. Namely, they read *Whren* as rendering officer intentions irrelevant to Fourth Amendment inquiries generally, but that is wrong. While objective tests are preferred when addressing certain Fourth Amendment questions, the reasons for that preference are not evidentiary—i.e., they are not based in any difficulties in ascertaining officer intentions—and are inapplicable to the question of when a custodial arrest is under way and an incident search is thus justified. That is because while the existence of “probable cause” or “reasonable suspicion” is an objective matter independent of officer intent, a custodial arrest is by its nature a discretionary decision.\(^\text{15}\)

These two errors have led courts astray and driven them to focus upon whether a custodial arrest *ultimately* occurs as the critical fact in justifying an incident search, even where the search preceded the arrest. To hinge the reasonableness of a search upon some subsequent happenstance is a fatal flaw for any Fourth Amendment rule, as it leads to constitutional double binds—discussed below—where an officer, due to circumstances beyond his control or foresight, will be caught between two unconstitutional choices.

Part II also carves out new ground by rejecting the arguments of a handful of commentators and jurists who have rightly demanded an arrest precede an incident search but have advanced objective rules for determining when a custodial arrest is under way. These proposed objective tests are unworkable and conceptually unsound, as they seek to accommodate a perceived evidentiary concern that is, in fact, nonexistent; if an intention to arrest matters, there is no reason to constrain that inquiry to on-scene “objective” manifestations of that intent, as the proponents of this minority rule have urged. Such objective tests are poorly calibrated with the justifications animating the search incident to arrest exception and thus provide easy-to-debunk fodder for proponents of the prevailing approach.

Part II also addresses a more nuanced point about whether vehicle searches under *Arizona v. Gant*\(^\text{16}\) deserve separate treatment. It acknowledges that the calculus in assessing pre-arrest incident searches is a bit different in the *Gant* context, owing to the distinct animating principles of vehicle searches, but ultimately reaches the conclusion that a pre-arrest search without a warrant is unconstitutional in this context as well.

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\(^{15}\) The qualifier “custodial” is important. There are all manner of “arrests” in the Fourth Amendment, and most of them are tied to objective inquiries (e.g., whether a reasonable person would feel free to leave). This Article argues that a custodial arrest is different in kind from other arrests, such that it would be artificial to impose an objective test in determining whether a custodial arrest has occurred or was occurring. See *infra* Part II.B–C.

Part III discusses applications of the rule advanced here. First, it explains why this rule provides better guidance to law enforcement than the predominant view. Second, it shows why the rule is no harder for courts to apply. And third, it roots out the perversions of the prevailing approach. One such perversion is that the prevailing view leaves the constitutionality of a pre-arrest search in limbo until after an arrest decision has been made and seen through to completion. By temporally separating the search from its justification, the rule invites constitutional double binds. For instance, when, in the course of a search conducted in furtherance of an ongoing arrest, probable cause to arrest dissipates, the officer is left with two unconstitutional choices under the prevailing view: to unconstitutionally make an arrest sans probable cause in order to validate the search, or to render her prior search unconstitutional by abandoning the arrest. Such problems do not arise under the rule advocated here where the constitutionality of a search depends solely on factors existent at the moment of the search’s inception.\(^{17}\)

Part III also addresses the concern that, in application, a rule accounting for officer intentions will simply lead to self-serving officer testimony (“Of course I was making an arrest before I searched”). It is wrong to think that an officer’s testimony about her intentions is somehow dispositive evidence of those intentions;\(^ {18}\) it is perfectly common to question and discredit a person’s stated intentions when they do not align with her actions, or for any number of other reasons. Indeed, the rule advocated here would see subjective and objective factors weighed alike when ascertaining the inception of a custodial arrest. Furthermore, this concern about officers misrepresenting critical facts is not unique or even particularly acute as compared with other Fourth Amendment contexts, and there are numerous routes to exposing a falsely claimed intent to arrest.

Part IV details the practical advantages of this rule and disposes of an oft-claimed disadvantage: that under such a rule, officers will simply make more arrests to preserve their right to search. That purported concern ignores the realities of the resource and political constraints on making routine arrests for minor crimes. It takes little time and few resources to search every petty offender, whereas the typical arrest takes hours to complete. Police departments are quick to acknowledge that they lack the resources and political will to make a full

\(^{17}\) Of course, post-search facts might provide evidence of pre-search factors relevant to the analysis. To illustrate, if an officer searches a suspect and uncovers no incriminating evidence, then proceeds to arrest him, that is some (albeit not conclusive) evidence that the officer was effectuating an arrest at the time of the search, since there is little reason to think the fruitless search changed the officer’s calculus.

\(^{18}\) See, e.g., Wayne A. Logan, An Exception Swallows a Rule: Police Authority to Search Incident to Arrest, 19 YALE L. & POL’Y REV. 381, 432 (2001).
custodial arrest of every petty offender because, unlike searches, arrests drain a significant amount of resources.\textsuperscript{19}

Part IV then examines the structural advantages of this rule compared with the prevailing view, including that this rule would reduce “fishing expeditions” and mitigate the disparate treatment of poor and racial minorities that the prevailing view exacerbates. Moreover, because arrests are invariably accompanied by paperwork, whereas unfruitful searches rarely are, any discriminatory arrest practices that arise under the rule proposed here could be more readily detected than the discriminatory search practices invited by the prevailing view.

In short, the search incident to arrest exception is best calibrated to its justifications and purposes by requiring an arrest at the time of a search. That requirement is also necessary to comport with the bedrock principle that the constitutionality of a search is judged at its inception. Given the pervasive and entrenched split on this issue of enormous constitutional and practical import, Supreme Court review is likely on the horizon. This Article supplies a new and much-needed framework for analyzing this issue in advance of such review.

I. DOCTRINAL UNDERPINNINGS

It is necessary at the outset to define what this Article refers to as a pre-arrest search. While the word “arrest” takes on various meanings in different Fourth (and Fifth) Amendment contexts—it is sometimes used when referring to mere seizures, investigative detentions, or \textit{Miranda} custody\textsuperscript{20}—only a “custodial arrest,” i.e., “taking of a suspect into custody and transporting him to the police station” for booking on charges, justifies an incident search.\textsuperscript{21} Not every seizure or “arrest” is a custodial arrest permitting an incident search. Even when a

\textsuperscript{19} As former Chief of the District of Columbia’s Metropolitan Police Department commented, a policy of “zero tolerance [policing] . . . is not one that I think works very well here . . . [T]hey’re getting the person who is out front with an open container of alcohol, taking her to jail . . . The perception over in Anacostia is . . . [T]hey’re locking up my grandmother for having an open container of alcohol and then all your cops are up at the station processing the arrest. And the criminals take over our neighborhoods.” Q&A by C-SPAN with Cathy Lanier (Jan. 16, 2013), transcript available at https://www.c-span.org/video/transcript/?id=8366 [https://perma.cc/GY4M-UTC6].

\textsuperscript{20} Mere seizures are sometimes referred to as arrests, though they are importantly distinct from custodial arrests permitting incident searches; otherwise, every valid \textit{Terry} stop would authorize a full incident search as opposed to a mere pat-down under certain conditions. \textit{Terry} v. Ohio, 392 U.S. 1, 17–18 (1968). Whether a person is in \textit{Miranda} custody is also sometimes posited as “whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest,” though \textit{Miranda} custody is also distinct from custodial arrest, as an in-custody interrogation does not authorize officers to conduct an incident search of the interviewee. New York v. Quarles, 467 U.S. 649, 655 (1984) (quoting California v. Beheler, 463 U.S. 1121, 1125 (1983) (per curiam)).

suspect is seized and handcuffed, there is no custodial arrest unless and until he is transported for booking.\(^{22}\)

This Article uses “pre-arrest search” to refer to those searches that precede the inception of an arrest, which at a minimum requires a decision to arrest accompanied by some step to effectuate it.\(^{23}\) This Article takes no issue with the mine-run of incident searches that precede the later steps in the custodial arrest process. Indeed, the justifications for incident searches are strongest at the beginning of an arrest and the justifications for a search largely dissipate by the time a suspect has been booked at the stationhouse.

Three intersecting strands of cases are important to understanding why (and how) the majority of courts are validating pre-arrest incident searches. First are the groundwork cases articulating the justifications and animating principles behind incident searches, anchored by Chimel v. California, United States v. Robinson, and Arizona v. Gant. The second strand of cases specifically address the timing of incident searches in relation to when probable cause arises and when the arrest takes place. The two key cases here are Rawlings v. Kentucky and Knowles v. Iowa. Lastly, a third strand of cases—Whren, Devenpeck v. Alford, and Virginia v. Moore—hold that officer intent is often irrelevant to the reasonableness of a stop, search, or arrest. These three categories of cases are discussed in turn.

\(A. \text{ Animating Principles: Chimel, Robinson, and Gant}\)

The Fourth Amendment embodies a baseline prohibition against law enforcement officers conducting warrantless searches.\(^{24}\) The two exceptions that account for the majority of warrantless police searches are consent searches\(^ {25}\).

\(^{22}\) See Muehler v. Mena, 544 U.S. 93, 100 (2005) (holding the use of handcuffs did not transform investigative detention into an arrest requiring probable cause, much less a custodial arrest). Of course, since a suspect could be apprehended at the stationhouse itself—obviating the need for transport—booking on criminal charges is perhaps the true hallmark of a custodial arrest.

\(^{23}\) Custodial arrests usually begin by handcuffing the suspect and proclaiming that he is under arrest, see infra Part III.B.g, but there is no universal identifier.

\(^{24}\) Coolidge v. New Hampshire, 403 U.S. 443, 454–55 (1971) (“Thus the most basic constitutional rule in this area is that ‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)). But see Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757 (1994) (arguing that the Fourth Amendment does not embody a prohibition, or even a presumption, against warrantless searches); id. at 761 (“The words of the Fourth Amendment really do mean what they say. They do not require warrants, even presumptively, for searches and seizures.”). In Amar’s view, the Fourth Amendment only bars unreasonable searches and seizures, and the Warrant Clause limits the issuance of warrants to those supported by probable cause and the subjects of the search and seizure particularly described (i.e., it prohibits only general warrants, not warrantless searches). Id.

\(^{25}\) Arguably, consent is better viewed as a waiver of Fourth Amendment rights than as an exception to the warrant requirement, though it is clear that any waiver need not rise to the level of the “knowing and intelligent” waiver usually required for the waiver of constitutional rights. See Schneckloth v. Bustamonte, 412 U.S. 218, 235–46 (1973). It is also difficult to square the doctrine of
and the search incident to arrest. The search incident to arrest is by far the most frequently invoked justification for unconsented-to searches, far outnumbering searches conducted with a warrant.26

There has been a protracted debate about the justifications animating the search incident to arrest exception, but every purported justification stems from the fact of a full custodial arrest, rather than mere probable cause to arrest or the issuance of a citation in lieu of arrest. The Supreme Court has unanimously held that incident searches are invalid absent a custodial arrest, even when the search was preceded by probable cause to arrest and a citation.27 It is nonetheless necessary to understand the justifications animating incident searches before exploring the bounds of the exception.

1. Chimel’s Rationales

The right to search incident to arrest has been recognized in English and American common law since at least the early half of the nineteenth century.28 The earliest cases concerned the limited right to search the arrestee’s person (but not the surrounding area), and treated that right as a given, addressing only the further right to seize the items uncovered.29 Later cases addressed the propriety of the search itself, and limited the rationale underlying the earliest cases to searches of an arrestee’s person, for reasons captured in then-Judge Cardozo’s opinion in People v. Chiagles:30

[A] murderer’s garments, stained with his blood in the course of the affray [may be seized and retained]. Garments thus bespattered are typical examples of the things that precedent and practice permit the government to keep.31 The basic principle is this: Search of the person

permitting third parties to consent to searches within existing frameworks for the waiver of constitutional rights. Id. at 245.

26. LAFAVE, supra note 1, at § 5.2(b)
29. See Spalding, 21 Vt. at 15; Frost, 9 Car. & P. at 131–34; Kinsey, 7 Car. & P. 447; O’Donnell, 173 Eng. Rep. at 61; Barnett, 3 Car. & P. at 601; see also TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 57–58 (1969). Taylor argued that the lack of pre-nineteenth-century cases addressing the right to search beyond an arrestee’s person indicated that the right to search was so well established that it was rarely if ever challenged. Id. at 28–29 (stating that “[t]here is little reason to doubt that search of an arrestee’s person and premises is as old as the institution of arrest itself” and that “[n]either in the reported cases nor the legal literature is there any indication that search of the person of an arrestee, or the premises in which he was taken, was ever challenged in England until the end of the nineteenth century”).
30. People v. Chiagles, 142 N.E. 583, 584 (1923).
is unlawful when the seizure of the body is a trespass, and the purpose
of the search is to discover grounds as yet unknown for arrest or
accusation.\textsuperscript{32} Search of the person becomes lawful when grounds for
arrest and accusation have been discovered, and the law is in the act of
subjecting the body of the accused to its physical dominion.\textsuperscript{33}

These cases treated a search of an arrestee’s person as part and parcel of an
arrest; by exercising “physical dominion” over the arrestee’s person while taking
him into custody, a search of that person was no additional intrusion or trespass
at all (as the officer had physical control over the person and items in his physical
possession via the arrest).\textsuperscript{34}

The exception grew to permit not only searches of the arrestee’s person, but
areas within her immediate “control,”\textsuperscript{35} loosely defined as “the area from within
which he might gain possession of a weapon or destructible evidence.”\textsuperscript{36} The
notion that any such trespass was complete upon the arrest no longer sufficed to
justify these broader searches beyond the person, and the justifications for
extending incident searches beyond the arrestee’s person were somewhat murky
in the Supreme Court’s early attempts to address that topic.\textsuperscript{37}

After decades of debating the issue with contradictory results,\textsuperscript{38} the
Supreme Court settled on two bases for permitting incident searches in \textit{Chimel}.\textsuperscript{39}
The first is an “officer safety” rationale, grounded in the need “to remove any
weapons that [the arrestee] might seek to use in order to resist arrest or effect his
escape.”\textsuperscript{40} The \textit{Chimel} Court recognized this justification as applying beyond the
arrestee’s person, to the “area into which an arrestee might reach in order to grab
a weapon.”\textsuperscript{41} \textit{Chimel} reasoned that even absent any particularized suspicion
about an arrestee’s dangerousness, officers are permitted to search incident to
arrest because the protracted arrest process, including transport, leaves officers

\begin{itemize}
\item \textsuperscript{32} Entick v. Carrington, 19 Howell’s St. Tr. 1029 (C.P. 1765).
\item \textsuperscript{33} \textit{Chiagles}, 142 N.E. at 584 (internal citations omitted).
\item \textsuperscript{34} \textit{Id.}
\item \textsuperscript{35} See Marron v. United States, 275 U.S. 192, 199 (1927) (while ledger discovered in search
of closet after arrest “was not on [the arrestee’s] person at the time of his arrest, it was in his immediate
possession and control”).
\item \textsuperscript{36} \textit{Chimel} v. California, 395 U.S. 752, 763 (1969).
\item \textsuperscript{37} See generally Thornton v. United States, 541 U.S. 615, 629–31 (2004) (Scalia, J.,
concurring) (detailing back-and-forth history of the justifications underlying the search incident to
arrest exception).
\item \textsuperscript{38} From 1927 until \textit{Chimel} was decided more than 40 years later, the Supreme Court went back
and forth on whether areas outside of an arrestee’s immediate control could be searched under the search
incident to arrest exception. See Arizona v. Gant, 556 U.S. 332, 350 (2008) (recounting this “checkered
history” (citing Marron v. United States, 275 U.S. 192 (1927), Go-Bart Importing Co. v. United States,
282 U.S. 344 (1931), United States v. Lefkowitz, 285 U.S. 452 (1932), Harris v. United States, 331 U.S.
145 (1947), Trupiano v. United States, 334 U.S. 699, 708 (1948), and United States v. Rabinowitz, 339
U.S. 56 (1950))).
\item \textsuperscript{39} \textit{Chimel}, 395 U.S. at 763.
\item \textsuperscript{40} \textit{Id.}
\item \textsuperscript{41} \textit{Id.}
\end{itemize}
more vulnerable to attack and thus justifies a search to ensure arrestees are not armed and dangerous.

The second rationale for incident searches articulated in Chimel is the need to preserve “any evidence on the arrestee’s person in order to prevent its concealment or destruction.” Like the officer safety justification, this rationale extends to “the area from within which he might gain possession of a weapon or destructible evidence.”42 If the area is beyond the arrestee’s grasp then there is no exigency permitting an incident search; the suspect ought to be arrested and authorities can seek a warrant to search any remaining areas. Because the search in Chimel itself extended beyond the arrestee’s reach or control to the entirety of the arrestee’s house, the Court held the search unconstitutional in its scope.

Of course, both of these rationales apply to some extent to any on-the-street encounter between officers and a mere suspect; like arrestees, suspects have an incentive to destroy evidence or harm officers to effectuate an escape. But Terry v. Ohio43—decided the term before Chimel—governs police encounters with mere suspects, and requires that officers must have a reasonable articulable suspicion to believe a suspect may be armed and dangerous before conducting a limited pat-down search for weapons. The search incident to arrest exception is a more sweeping rule, permitting searches whenever there is an arrest, regardless of any particularized suspicion that the suspect may be armed or is likely to possess evidence, and allowing a more probing search beyond the mere frisk for weapons permitted by Terry.

Why the vastly different treatment of arrestees and suspects, despite the presence of officer safety and evidence preservation concerns in both types of encounters? The primary reason is that an incident search of an arrestee may be viewed as a lesser intrusion accompanying the greater intrusion of arrest; independent of the incident search, an arrestee is already subjected to a protracted deprivation of liberty and can expect that it will be accompanied by a thorough inventory search of her person (and vehicle, when applicable) at the police station. A second reason is that an arrestee’s incentives to escape or destroy evidence are more acute than the incentives of a mere suspect, who could reasonably expect to walk away from any police encounter without resorting to those measures, should she play her cards right.45 A third reason is that a search incident to arrest exception can be cabin to a narrow set of police-citizen encounters (those involving an arrest) and does not threaten to obliterate the

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42. Id.
43. Terry v. Ohio, 392 U.S. 1, 16 (1968) (discussing the frisk of a person for weapons); see also Michigan v. Long, 463 U.S. 1032, 1051 (1983) (applying Terry to protective sweeps of vehicles).
44. Riley v. California, 134 S. Ct. 2473, 2488 (incident searches “are justified in part by ‘reduced expectations of privacy caused by [an] arrest’”) (citing United States v. Chadwick, 433 U.S. 1, 16 (1977)).
45. See Cupp v. Murphy, 412 U.S. 291, 296 (1973) (“Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence . . . .”).
baseline rule prohibiting warrantless searches in the way that a similar rule for searches of mere suspects would. Officers face the risk of being attacked, or of evidence being destroyed, whenever they confront a person; by limiting their right to search to arrest situations, this exception constrains officers by requiring that they undertake the time-consuming and resource-draining steps that accompany an arrest if they wish to conduct a search.

2. Robinson’s Bright Line

Four years after Chimel, the Supreme Court held in Robinson that the right to search incident to arrest is not dependent upon case-by-case exigencies, but is instead a bright-line rule that permits incident searches upon any arrest, regardless of whether or not the arrestee is likely to grab a weapon or destroy evidence. As the Court explained in Robinson and has repeated in many cases since, “[i]t is the fact of the lawful arrest which establishes the authority to search,” and “a search incident to the arrest requires no additional justification.” A natural follow-up question then arises: if it is the fact of an arrest that justifies an incident search, what exactly constitutes an arrest?

In the search incident to arrest context, Robinson instructs that it is “the fact of custodial arrest”—sometimes referred to as a “full-custody” arrest—“which gives rise to the authority to search.” Of course, the phrase “custodial arrest” is not particularly clear on its face either; the term has no importance in any other constitutional context, and the Court has never set forth a comprehensive definition of what a custodial arrest entails.

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47. See generally infra Part IV.B (discarding arguments that restricting incident searches as advocated for in this Article will lead to more arrests).


52. Id. at 236 (emphasis added).

53. The question of what constitutes “custody” matters a great deal in the Miranda context, where a suspect is only entitled to Miranda warnings if she is both “in custody” and subjected to interrogation. See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (“By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way.”). But Miranda custody can exist independent of an arrest; indeed, the test for determining whether a person is in custody for Miranda purposes is whether “there is a ‘formal arrest or restraint on [her] freedom of movement’ of the degree associated with a formal arrest.” California v. Beheler, 463 U.S. 1121, 1125 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495 (1977)).
In *Knowles*, however, the Court set forth a minimum requirement, which is that a custodial arrest requires “taking of a suspect into custody and transporting him to the police station” (as opposed to an on-scene criminal citation sometimes referred to as an “arrest and release”). The reason for this requirement is that, as explained in *Robinson*, it is “the extended exposure which follows the taking of a suspect into custody and transporting him to the police station” that animates the incident search’s “officer safety” rationale in the first place. Because this extended exposure accompanies every custodial arrest, *Robinson* instituted a bright-line rule permitting incident searches accompanying any such arrest.

Another reason the Court favored a bright-line rule was the ease with which officers could comply with such a rule. The Court explained that a “police officer’s determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step of the search.”

3. *Gant* Dims the Bright Line

The Court’s penchant for bright-line rules in this area led it eventually to extend incident searches beyond the area within an arrestee’s grasp (as *Chimel* permitted), to the entire interior of an automobile whenever one of its “recent” occupants has been or is being arrested. That bright-line rule applied regardless of whether the arrestee was within reach of the vehicle at the time of the search, and even if the arrestee was beyond the reach of the vehicle when officers first confronted him. After nearly three decades on the books, however, the Court dispatched its bright-line approach in *Arizona v. Gant* as it reassessed the animating principles underlying incident searches in the context of a vehicular search.

*Gant* held that the officer safety and evidence preservation rationales articulated in *Chimel* could not justify a vehicular incident search once an

54. *Knowles v. Iowa*, 525 U.S. 113, 117 (1998); see also *Robinson*, 414 U.S. at 235, 221 n.2 (describing as a “full custody arrest” those instances “where an officer ‘would arrest a subject and subsequently transport him to a police facility for booking’”) (quoting testimony of Metropolitan Police Department Training Division instructor Sergeant Dennis C. Donaldson). But even custody and transport are not enough, as police officers routinely transport suspects who are not under arrest to police stations, for purposes of questioning, for example.

55. *Robinson*, 414 U.S. at 234–35. This Article does not seek to define the term beyond custody and transport to the station, but the components that tend to comprise a custodial arrest are the pronouncement of arrest (“You are under arrest”), handcuffing, searching, placing in a police vehicle, transport to the police station, booking, and formal charging.

56. *Id.* at 235.


58. *Id.*


arrestee had been secured away from the vehicle.61 Once a suspect is secured (invariably in handcuffs in the back of a police vehicle), there is no appreciable risk that he will escape and retrieve a weapon or destroy evidence within the car he once occupied.62 Thus, where an arrestee is secured prior to any search, which is “virtually always” the case,63 there is no automatic right to search the vehicle. But Gant did not preclude all vehicular incident searches once an arrestee is secured away from the vehicle; the Court held that “circumstances unique to the automobile context” permit a vehicle search, even where the suspect is secured away from the vehicle, if “it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”64

Gant thus adopted a new rationale for incident searches, albeit one limited to vehicular searches. The Court endorsed the approach advocated by Justice Scalia’s concurring opinion in Thornton,65 in which he argued that a “general evidence-gathering search” of a vehicle is permitted incident to arrest whenever it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”66 This is a not a bright-line rule, as it requires a case-by-case analysis of whether one would expect to find evidence of the “crime of arrest” in the vehicle.67 For instance, when a person is pulled over for offenses such as reckless driving or driving on a suspended license, it is exceedingly unlikely that any evidence of that offense will be uncovered in the car. But if the arrest is for a narcotics offense, it is much more reasonable to think that evidence of the offense (more drugs or drug paraphernalia) will be uncovered in a search.

Whether it is a Chimel search for officer safety and evidence preservation, or a Gant search for evidence of the crime of arrest, one recurring principle throughout the incident search cases is that it is the “fact of prior lawful arrest” that justifies the search in the first place.68 The arrest is what distinguishes the arrestee from society at large, and it is what reduces the arrestee’s privacy
interests, because he is already undergoing the enormous deprivation that an arrest entails. The protracted process of arrest and transport is what heightens officer safety concerns, and at least in the Gant context, the “offense of arrest” informs the permissibility and scope of any search.

B. Timing the Search

1. Rawlings’ Indifference to Arrest Sequencing

Rawlings is best known for its Fourth Amendment standing discussion; it held that a man who stashed illegal narcotics in a friend’s purse did not have standing to challenge the search of that purse because he had no reasonable expectation of privacy in it.69 It is probably a surprise to most readers that Rawlings had anything at all to say about the timing of incident searches, as it dedicated just a few sentences to that issue.

In Rawlings, six police officers arrived at a house occupied by Rawlings and four others to execute an arrest warrant for an absent resident on charges of drug distribution.70 While there, the officers smelled and saw evidence of marijuana use. Two officers left to obtain a search warrant for the premises, while the other four officers “detained the occupants of the house in the living room” for forty-five minutes until the two officers returned with a warrant permitting a search of the premises and read the occupants their Miranda rights.71 The officers then ordered a female occupant to empty the contents of her purse, which she did, revealing “1,800 tablets of LSD” along with “vials containing benzphetamine, methamphetamine, methyprylan, and pentobarbital,” all controlled substances.72 Rawlings “immediately claimed ownership” of the drugs, and the officers then conducted an incident search of his person, uncovering $4,500 in cash and a knife before placing him “under formal arrest.”73

Rawlings never argued that this incident search was illegal as preceding his arrest. To the contrary, Rawlings argued, in addition to several other Fourth Amendment claims, that his forty-five-minute pre-search detention was

69. Rawlings v. Kentucky, 448 U.S. 98, 104–06 (1980). Rawlings was decided on the same day as United States v. Salvucci, 448 U.S. 83 (1980), in which the Court overruled prior precedent holding that a defendant charged with a crime of possession automatically has standing to challenge the validity of a search and seizure. The now defunct “automatic standing” doctrine was premised on avoiding a clash between a defendant’s Fourth and Fifth Amendment rights: if a defendant is required to show a possessory interest in an area or article in order to substantiate a Fourth Amendment claim, he may often be compelled to abandon his Fifth Amendment right to remain silent in order to substantiate his Fourth Amendment interests.

70. Rawlings, 448 U.S. at 100.

71. Id.

72. Id. at 101, 111.

73. Id. at 101.
“indistinguishable from traditional arrest,” rendering the fruits of the subsequent purse search inadmissible. The Supreme Court disposed of this claim when it held that even if the extended detention was an illegal seizure, Rawlings’ statements admitting ownership of the drugs were acts of free will too attenuated from that illegality to warrant suppression.

It was thus strange that the Court further opined in dicta on the timing of the incident search. What Rawlings said on that issue was flippant, but it has had extraordinary influence: “Where the formal arrest followed quickly on the heels of the challenged search of petitioner’s person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.” At face value, this is quite a damning statement if the thesis of this Article is to be squared with existing doctrine. Indeed, many courts have treated this lone sentence as an across-the-board endorsement of pre-arrest incident searches, provided that an arrest ultimately follows the search.

Neither the facts, the language, nor the posture of Rawlings support that reading, however. On its facts, it was inconceivable that officers were doing anything but arresting Rawlings when they began their search; they were at the home specifically to execute an arrest warrant for narcotics distribution, and when Rawlings confessed to ownership of a mountain of drugs—worth many thousands of dollars—his arrest was a fait accompli. Indeed, nothing subsequent to the search provided reason to doubt that an arrest was under way when the search began. It is inconceivable that the discovery of the completely legal cash and a knife, rather than the massive quantities of illicit drugs Rawlings claimed ownership of prior to his search, prompted his arrest.

75. Id. at 82–84.
76. Rawlings, 448 U.S. at 110.
77. In United States v. Lewis—apparently the first time a litigant made the point that Rawlings offers only dicta, because this issue was not even before the Court—the D.C. Court of Appeals acknowledged that there is no on-point holding in Rawlings but nonetheless reasoned that “the Supreme Court’s statement in Rawlings is now deeply entrenched in the law.” 147 A.3d 236, 242 (D.C. 2016). Nonbinding dicta does not become a holding once entrenched in lower court opinions; no matter how many lower courts have misinterpreted Rawlings, it remains misinterpreted. The Petitioner in Macabeo followed suit and made this same point about Rawlings, and the California Supreme Court commendably gave Rawlings the short shrift it deserves. People v. Macabeo, 384 P.3d 1189, 1195 (Cal. 2016) (“The People read far too much into the Rawlings comment . . . .”).
78. Rawlings, 448 U.S. at 111.
79. To put Rawlings’s 1,800 tabs of LSD in perspective, in 2008, police confiscated about six hundred tabs of LSD destined for the Bonnaroo music festival, and they estimated the value of those tabs—a third of what Rawlings had in LSD alone, to say nothing of the other vials—at approximately $11,000. Mark Bell, Seized LSD Bonnaroo Bound?, DAILY NEWS J. (June 13, 2008), 2008 WLNR 27629810. While the LSD market has surely changed in the past forty years, 1,800 tabs is an enormous quantity under any calculation.
80. The Supreme Court of Kentucky noted that the knife was not even admitted into evidence against Rawlings. Rawlings v. Commonwealth, 581 S.W.2d 348, 350 (Ky. 1979).
Moreover, the Court’s repeated use of the qualifying word “formal” when describing the arrest denotes its recognition that an arrest was well under way prior to the search, and it was only the more overt formalities of a custodial arrest that followed the search. The Court was painstaking in repeatedly describing what followed the search of Rawlings’s person as the “formal arrest,” noting that “the formal arrest followed quickly on the heels of the challenged search.” 81 Rawlings’s recognition that a search may precede various formalities attendant to an arrest does not suggest that it may precede the very onset of an arrest. That formalities of an arrest followed an incident search is not fatal to a search’s validity, but contrary to what many courts have found, it is also not sufficient for that validity.

In short, all Rawlings stands for is that the Fourth Amendment does not prescribe any ritualized order in which an incident search and other aspects of a custodial arrest need to proceed. So far as it goes, that is a perfectly sensible rule. The animating principles underlying Chimel are officer safety and evidence preservation. Permitting officers to search before conducting the more formal steps in the custodial arrest process would tend to further those interests. Perhaps there is room for debate about whether it ever maximizes officer safety to search a suspect before handcuffing them,82 but the Court seemed rightly agnostic on the matter and reticent to micromanage such discretionary police judgments.

In the decades since Rawlings was decided, the Supreme Court has never relied upon or tried to further explain its fleeting dicta. Lower courts have nonetheless given it canonical effect,83 repeatedly citing Rawlings for the proposition that incident searches are permissible so long as some roughly contemporaneous arrest eventually occurs. It is difficult to diagnose why so many courts have for so long incorrectly held that Rawlings’s dicta sweeps so broadly. It is surely some combination of factors: (1) it is pithy and quotable on the point, and superficially permits incident searches “[w]here the formal arrest follow[s] quickly on the heels of the challenged search”;84 (2) by the time defendants routinely challenged such a reading, largely post-Knowles and post-Atwater,85 the dicta was entrenched in so many lower court holdings that judges

81. Rawlings, 448 U.S. at 111; id. at 101 (after search, officer “then placed petitioner under formal arrest”); id. at 111 (“upholding this search as incident to petitioner’s formal arrest”).
84. Rawlings, 448 U.S. at 111.
85. See infra Part I.D (explaining why Atwater v. City of Lago Vista’s approval of custodial arrests for even the most minor of criminal infractions substantially elevates the importance of this issue).
were no doubt reticent to defy the prevailing view; and (3) there is a somewhat difficult line-drawing problem in determining the inception of an arrest, so that Rawlings is appealing at least insofar as it provides a clear rule.

Yet not only does the prevailing view rely on a reading of Rawlings that is untenable on that case’s own terms. It is also irreconcilable with Knowles.

4. Knowles and the Prerequisite of Arrest

Nearly two decades after Rawlings, the Supreme Court decided Knowles v. Iowa, which directly assessed an incident search conducted in the absence of (but quickly followed by) an arrest. The facts are straightforward: Patrick Knowles was pulled over for speeding, an arrestable offense in Iowa. Rather than arresting him for that offense, the officer issued him a citation for speeding, and then proceeded to conduct a full search of his car, uncovering “a bag of marijuana and a ‘pot pipe.’” That search was permitted by an Iowa statute, which expressly allowed incident searches whenever there was probable cause to arrest a person for a traffic offense, even when the officer took the far more usual course of issuing a citation in lieu of arrest. After discovering drugs, the officer placed Knowles under arrest for narcotics offenses.

The Iowa Supreme Court upheld the search, “reasoning that so long as the arresting officer had probable cause to make a custodial arrest,” the vehicle search was a valid search incident to probable cause to arrest. It explained that, in its view, the legality of an incident search was “dependent on facts that provide a legal basis for making a custodial arrest rather than the act of arrest itself.” In reaching that conclusion, the Iowa Supreme Court endorsed the view espoused by Justice Harlan in a lone concurrence decades earlier, that “[i]f the prosecution shows probable cause to arrest prior to a search of a man’s person, it has met its total burden.” In its briefs defending the Iowa Supreme Court’s ruling, Iowa likewise argued that Justice Harlan’s Sibron concurrence and Rawlings announced the rule that “so long as there is probable cause to arrest at the time of the search,” an incident search is justified.

86. As explained supra note 77, the Lewis court acknowledged that there is no on-point holding in Rawlings but nonetheless reasoned that its dicta “is now deeply entrenched in the law.” United States v. Lewis, 147 A.3d 236, 242 (D.C. 2016).
88. Id. at 114 (“[U]nder Iowa law [the officer] might have arrested him.”).
89. Id.
90. Id. at 115.
91. Id. at 115–16.
93. Doran, 563 N.W.2d at 622 (quoting Sibron v. New York, 392 U.S. 40, 77 (1967) (Harlan, J., concurring)).
The Supreme Court unanimously disagreed with that position and found the search unconstitutional, despite the fact that probable cause to arrest preceded the search and an arrest quickly followed it. The Court reiterated that the “underlying rationales for the search incident to arrest exception . . . flow[] from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest.”\textsuperscript{93} In the absence of an arrest, the Court reasoned, the justifications permitting an incident search do not exist.\textsuperscript{96} The Court also stressed that officers have other tools at their disposal to safely effectuate non-arrest encounters: for instance, officers may “order[] a driver and passengers out of the car” during a traffic stop,\textsuperscript{97} and they may further conduct a pat-down search for weapons if they have reason to believe the vehicle’s occupants are armed and dangerous.\textsuperscript{98} But the right to search incident to arrest is a separate grant of authority, and that power flows from the predicate fact of an arrest itself. In short, \textit{Knowles} squarely rejected the errant reading of \textit{Rawlings} that pre-search probable cause, coupled with a post-search arrest, suffices to validate an incident search.\textsuperscript{99} Yet that errant reading persists.

5. \textit{Evading Reconciliation of Rawlings and Knowles}

\textit{Knowles} has won some converts in rejecting the majority view, but the majority of courts persist in misreading \textit{Rawlings}. What is striking, and concerning, is how few courts confront the tension in these cases: all but a few courts that have approved pre-arrest incident searches have not so much as

\begin{footnotes}
\item[95] \textit{Knowles}, 525 U.S. at 117 (quoting United States v. Robinson, 414 U.S. 218, 234 n.5).
\item[96] \textit{Knowles}, 525 U.S. at 117.
\item[97] \textit{Id.}
\item[98] \textit{Id.} (citing Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977)) (per curiam); \textit{see also} Terry v. Ohio, 392 U.S. 1 (1968). Additionally, in the absence of an arrest, a warrantless vehicle search may be justified if there is probable cause to believe the vehicle contains evidence of criminal wrongdoing. Pennsylvania v. Labron, 518 U.S. 938, 940 (1996). A protective sweep of a car for weapons can be conducted if officers “possess an articulable and objectively reasonable belief” that its occupants are dangerous. Michigan v. Long, 463 U.S. 1032, 1051 (1983).
\item[99] There is a potential narrower reading of \textit{Knowles}, which is that the Court simply rejected an Iowa statute that permitted incident searches any time there is probable cause to arrest without regard to whether an arrest ultimately takes place, and under this reading, there is still room for the argument that a post-search arrest will serve to validate a pre-arrest incident search. But the Court made quite clear that it was not addressing a facial challenge to the Iowa statute, but an as-applied challenge on the facts of the case, \textit{Knowles}, 525 U.S. at 116, which is fatal to that reading.
\end{footnotes}
mentioned Knowles,\textsuperscript{100} while courts invalidating pre-arrest incident searches are likewise sometimes guilty of ignoring Rawlings altogether.\textsuperscript{101}

More concerning still is that the courts that attempt to address Knowles while approving of pre-arrest incident searches have frequently done so by blatantly misstating the core facts of that case. For instance, in one case police had a bare suspicion that a man was dealing in narcotics and, after he ignored their commands to stop and remove his hands from his pockets, the police searched him, uncovered drugs, and arrested him.\textsuperscript{102} The Court of Appeals of Kansas, in that case, upheld the search as incident to arrest because the suspect was ultimately arrested and because prior to his search there was probable cause to arrest him for obstruction of justice, though he was never arrested for that offense.\textsuperscript{103} The case is on all fours with Knowles—pre-search probable cause + pre-arrest search + ultimate arrest for an offense unrelated to the pre-search probable cause—but the court reasoned otherwise. It distinguished Knowles on the grounds that “[t]he Iowa driver [in Knowles] did nothing that would have amounted to probable cause to arrest him for any criminal offense” prior to the search,\textsuperscript{104} and that the driver in Knowles was never arrested.\textsuperscript{105} Each of these attempted distinctions is blatantly false: Knowles made clear both that “under Iowa law [the officer] might have arrested” the driver for speeding prior to the search,\textsuperscript{106} and that the driver ultimately was arrested.\textsuperscript{107}

Such clear errors are not confined to the state courts. The D.C. Circuit sitting en banc committed a similar error. In its leading case on this topic, the en banc D.C. Circuit distinguished Knowles by asserting—relying on a similarly inaccurate panel opinion before it—that “[t]he key point in Knowles . . . was not that the officer had a lawful ground for arrest upon which he did not rely, but

\begin{itemize}
  \item 100. See, e.g., United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014) (relying on Rawlings without mentioning Knowles); see also United States v. Smith, 389 F.3d 944, 951–52 (9th Cir. 2006) (same); United States v. Goddard, 312 F.3d 1360, 1364 (11th Cir. 2002) (same); State v. Surtain, 31 So. 3d 1037, 1046 (La. 2010) (same); Jenkins v. State, 978 So.2d 116, 120 (Fla. 2008) (same); En Banc Brief for Appellee at 42–43, United States v. Lewis, 147 A.3d 236 (D.C. 2016), (No. 13-CO-1456) (responding to a seventeen-case string-cite from the government in support of pre-arrest incident searches by noting that only one even mentions Knowles, which was Beltran, discussed immediately below in regard to its factually incorrect recounting of Knowles).
  \item 101. See, e.g., Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003) (relying on Knowles without mentioning Rawlings).
  \item 103. Id. at 105–12.
  \item 104. Id. at 111.
  \item 105. Id. (“Knowles [is] inapplicable [here] precisely because [in this case] a law enforcement officer made an arrest . . . .”); see also In re Jesus T., 2016 WL 879188 (Cal. Ct. App. 2016) (distinguishing Knowles as a case holding that “the search incident to arrest doctrine does not apply if the officer does not in fact arrest the offender”).
  \item 107. Knowles, 525 U.S. at 114 (“Knowles was then arrested.”).
\end{itemize}
that he did not arrest the defendant at all.”108 Again, that is false. Immediately after the search of Knowles’s vehicle uncovered drugs, he was arrested.

There is one possible way to distinguish Knowles from the three cases described in the Introduction of this Article, which is that the driver in Knowles was cited for the speeding offense before the search occurred; the three searches described in the Introduction likewise occurred in the absence of an arrest, but there was no pre-search citation already disposing of the arrestable offense. But resting on this distinction would render Knowles an empty formalism, instructing officers that they can always search incident to citation—contrary to everything Knowles said disapproving of that practice—provided they hold off on issuing the citation until after an incident search.109

The failings of this restrictive reading of Knowles are not limited to undue formalism. Such a reading also makes no sense. A pre-search citation could only matter insofar as it manifests the officer’s intention not to arrest the suspect prior to the search; indeed, there is no reason to think the officer could not change their mind and tear up the citation in favor of an arrest for that offense.110 If that is the import of the pre-search citation in Knowles, then there is no reason for courts to ignore other manifestations of the officer’s intent not to arrest, such as direct testimony to that effect or a state law prohibiting such an arrest.111

In other words, if an officer’s decision not to arrest prior to a search matters, then it ought to matter regardless of the form of proof evidencing that decision. The question thus becomes to what extent officer intent matters, if it matters at all. Though many courts believe that Whren and its progeny foreclose any reliance on officer intent in the Fourth Amendment context, this is a mistake.


109. This reading of Knowles has been embraced by one leading treatise. See 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(h), at 134 (4th ed. 2004) (“[T]he ‘problem’ in [Knowles] may be perceived to be the fact that the officer tipped his hand on the citation versus arrest question before the search.”); see also United States v. Nash, 100 A.3d 157, 167 (D.C. 2014) (limiting Knowles to cases where “officers had communicated to [the suspect] that they did not intend to arrest her,” e.g., through a pre-search citation).

110. One other possibility is that the citation not only evinces the officer’s subjective intentions, but communicates that intention to the suspect. In her Powell dissent, Judge Rogers made the argument that the critical question is what is communicated to the suspect prior to his search. 483 F.3d at 847 (Rogers, J., dissenting); see also Logan, supra note 18, at 432 (“The actions of police, as opposed to any subjective views they might harbor that a custodial arrest was made, thus logically should serve as benchmarks of the custodial arrest analysis.”). That is not a sensible rule, as discussed further infra Part II.C.

111. There was no argument or suggestion in Knowles that it was the post-citation extension of the stop that violated the Fourth Amendment’s proscription of unreasonable seizures. See generally Rodriguez v. United States, 135 S. Ct. 1609 (2015) (Fourth Amendment violation to extend completed traffic stop, post-warning citation, to await the arrival of a drug-sniffing dog).
C. When Officer Motivations are Irrelevant

*Whren* held that where officers have probable cause to make a traffic stop, the fact that the stop was pretextual, i.e., that it was motivated by reasons unrelated to the traffic offense, does not affect the stop’s legality. Whren’s basic facts were as follows: officers patrolling a high-crime area witnessed an SUV occupied by several young black men commit several traffic infractions. Officers then stopped the vehicle with probable cause of traffic offenses and observed narcotics when they approached the driver’s window. The defendants challenged the stop as pretextual, arguing that they were stopped not in order to enforce traffic laws, but to investigate drug offenses for which there was no probable cause or reasonable articulable suspicion, and on account of their race. The Supreme Court rejected their challenges to the stop. The Court reasoned that because there was probable cause for the stop, and probable cause is sufficient to make such a stop reasonable, the officer’s motivations for making the stop were irrelevant to the Fourth Amendment analysis.

The Court took pains to distinguish instances where an officer’s purposes in searching are relevant to the reasonableness of the search. Specifically, the Court recognized that the constitutionality of at least two types of warrantless searches—inventory searches and administrative searches—do depend on whether the search was actually for the purpose of taking an inventory or enforcing an administrative regulation, as opposed to mere rummaging for evidence. But it cabined those cases, explaining that “the exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.” In other words, those two exceptions to the warrant requirement are predicated on facts beyond mere probable cause to which officer intentions matter, whereas the stop in *Whren* was predicated on probable cause alone, to which officer intentions do not matter.

*Devenpeck v. Alford* extended *Whren*’s analysis and held that when officers have probable cause to arrest a suspect for an offense, their arrest of the suspect will not be rendered unconstitutional because they identified the wrong offense when making the arrest. In *Devenpeck*, officers stopped the defendant on

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113. *Id.* at 808.
114. *Id.* at 808–09.
115. *Id.* at 810. In fact, probable cause is more than is required. See *Navarette v. California*, 134 S. Ct. 1683, 1687 (2015) (traffic stops require only “reasonable suspicion” of criminal activity).
116. *See Whren*, 517 U.S. at 813 (“The constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.”).
117. *Id.* at 811.
suspicion that he was impersonating a police officer, but ultimately arrested him for making an audio recording of the traffic stop, which (unbeknownst to the officers) was not a crime. The Court held that because there was probable cause to arrest for impersonating a police officer, the legality of the arrest was not affected by the officers’ failure to identify that offense as the reason for arrest. In so holding, the Court relied upon Whren in concluding “that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.” As it had said in Whren, the Court noted that “[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, whatever the subjective intent.”

The bottom line of Whren and Devenpeck is that whenever there is adequate justification for a Fourth Amendment search or seizure, that search or seizure is reasonable regardless of the individual officer’s mindset. In Whren, because there was probable cause for the stop—and probable cause alone suffices for a traffic stop—the stop would not be rendered unconstitutional based on the officer’s reasons for making a stop. Likewise in Devenpeck, where there was probable cause to arrest the suspect—and probable cause is all that is required for an arrest—the arrest was reasonable regardless of the grounds for arrest articulated by the arresting officer. The Court has echoed this same point in other contexts.

D. The Modern Trend and Divide

With that backdrop comes the question posed by the three cases described in the Introduction: how to treat pre-arrest incident searches that are promptly followed by a custodial arrest. The substantial majority of courts have condoned them as compliant with the Fourth Amendment, though it is only recently that the issue has taken on increased importance (and been subjected to more serious judicial scrutiny) in response to two Supreme Court rulings. In 2001, the Supreme Court ruled in Atwater v. City of Lago Vista that police could make warrantless arrests for even the most minor of misdemeanors, including those “punishable only by a fine.” Then in 2008, the Court held in Moore that an
arrest prohibited by state law is nonetheless constitutional so long as it is for some nominally criminal offense.\textsuperscript{126} For example, a state law may dictate that a particular traffic offense warrants a citation but not an arrest; under \textit{Moore} however, a person arrested for that traffic violation in contravention of state law would have no constitutional remedy. The result of these two cases is that any arrest is constitutional if probable cause for some offense, however minor, exists prior to the arrest. That is true even if the probable cause was for an offense that was not arrestable under state law and even if the officer did not purport to arrest (or even cite) the suspect for the offense for which probable cause existed.

These recent cases have had a profound impact on the prevalence of pre-arrest incident searches. Prior to \textit{Atwater} and \textit{Moore}, pre-arrest incident searches might have been invalidated on the ground that an arrest was not permitted for so petty an offense—the pre-search offense in these cases is almost always petty, because otherwise officers tend not to wait to arrest\textsuperscript{127}—or that the petty pre-search offense was not identified as one of the grounds for the ultimate arrest. Both of those routes are now foreclosed.

The current split among federal circuit courts is 9–1 in favor of upholding pre-arrest incident searches,\textsuperscript{128} with only the Seventh Circuit voicing support for the view that an arrest must precede the search,\textsuperscript{129} though providing next to no

\textsuperscript{126} Virginia v. Moore, 553 U.S. 164, 178 (2008) (“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest, and to search the suspect in order to safeguard evidence and ensure their own safety.”).

\textsuperscript{127} See, e.g., United States v. Davis, 111 F. Supp. 3d 323, 334–36 (E.D.N.Y. 2015) (police uncovered a gun in a pre-arrest search of a man and a federal court upheld the search after noting that the suspect was observed littering prior to his search).

\textsuperscript{128} See United States v. Chartier, 772 F.3d 539, 546 (8th Cir. 2014); United States v. Powell, 483 F.3d 836, 840–41 (D.C. Cir. 2006); United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004); United States v. Goddard, 312 F.3d 1360, 1364 (11th Cir. 2002); United States v. Lugo, 170 F.3d 996, 1003 (10th Cir. 1999); United States v. Bizier, 111 F.3d 214, 217, 220 (1st Cir. 1997); United States v. Miller, 925 F.2d 695, 698 (4th Cir. 1991); United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987); United States v. Ricard, 563 F.2d 45, 48–49 (2d Cir. 1977).

\textsuperscript{129} See Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003). \textit{Ochana} did not acknowledge \textit{Rawlings} or the litany of authority conflicting with its conclusion, but simply issued a series of assertions, concluding that there was “insufficient evidence that Ochana was under custodial arrest at the time of the search” because “a reasonable person in [Ochana’s] position would [not] have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest.” \textit{Id.} \textit{Ochana} was right to require that an arrest be under way prior to an incident search, though it was wrong to invoke an objective standard—focusing on the circumstances from the suspect’s perspective—as the gauge for whether that condition was met. See infra Part II.C.
analysis in support of that conclusion.\textsuperscript{130} The state courts—where the issue arises with far greater frequency—have fared slightly better, with nine states rejecting the practice,\textsuperscript{131} but more than double that number approving it.\textsuperscript{132} In total, the split across the states is 20–9 in favor of the predominant view—with a fair amount of wiggle room in how one tallies the numbers—with the remaining states either agnostic or unclear on the issue.

II. INTENTIONS AND INCEPTIONS (STILL) MATTER

The Supreme Court case law discussed above has left lower courts with at least two potential rules for assessing when an incident search is valid. Because \textit{Rawlings} holds that an incident search can precede other formalities of the arrest process, and \textit{Knowles} holds that mere probable cause to arrest is insufficient to justify an incident search, courts have tracked one of two courses: (1) an incident search is valid whenever there is probable cause to arrest at the time of the search and a custodial arrest ultimately follows shortly thereafter (the majority rule), or (2) an incident search is valid whenever there is probable cause to arrest plus the

\begin{itemize}
  \item \textsuperscript{130} The Sixth Circuit is difficult to pin down. \textit{Compare United States v. Montgomery}, 377 F.3d 582, 586 (6th Cir. 2004) (“[T]he search-incident-to-a-lawful-arrest rule also permits an officer to conduct a full search of an arrestee’s person before he is placed under lawful custodial arrest,” as long as formal arrest follows quickly and the officer has probable cause to arrest independent of the search) (citing \textit{Rawlings} v. Kentucky, 448 U.S. 156, 167 & n.6 (1980)), \textit{with United States v. Williams}, 170 Fed. App’x 399, 404–05 (6th Cir. 2006) (discussing how “[a]rguably, under the literal language of \textit{Rawlings}, an officer could search a suspect’s vehicle during a routine traffic stop, arrest the suspect after finding contraband, and then validate the search by testifying that he arrested the suspect for the misdemeanor traffic offense,” but they “do not believe that to be the holding of \textit{Rawlings}, nor the law of the Fourth Amendment” as “[t]he reasonableness of a search depends on what the officers actually did, not what they had the authority to do”). The Third Circuit has not ruled on the issue.


\end{itemize}
inception of a custodial arrest at the time of the search (the minority rule). These two rules yield opposite results in frequently-arising cases where officers conduct searches prior to undertaking an arrest, such as the three examples provided in the Introduction. Because probable cause to arrest preceded those searches and an arrest ultimately followed, they satisfy the majority rule. However, they run afoul of the minority rule because there was no arrest under way at the time of the search.

This Section rejects the majority rule and reorients the minority rule. To date, every court and commentator advocating for the minority rule has demanded some objective standard—disavowing officer intentions—for determining whether there was a custodial arrest prior to a search. But not only is there no reason for that retreat to an objective test, such objective tests are unworkable in this context—which is no doubt part of the reason the majority of courts have rejected this approach.

With that important caveat and correction, however, this Section argues that the minority rule is far better in its fidelity to existing doctrine as well as in its conformity with principles animating the exception for incident searches. The rule advocated here is that a custodial arrest must be under way before a search takes place if the search is to be justified as incident to arrest. More pointedly, the officer must have made a decision to effectuate an arrest and taken some action to carry out that decision (though that action may be the incident search itself). Prior to a decision to arrest, there is little reason to think the officer will face protracted exposure to a person with a lowered expectation of privacy and a heightened incentive to escape or destroy evidence, all factors that flow from the fact of arrest itself. If no arrest would have occurred but for the fruits of the search, it is circular to say that the search was necessitated by an arrest that occurred only because of the search itself.

The majority rule’s requirement that an arrest ultimately follow the search does not cure its fatal flaw. A post-search arrest ought to be irrelevant where Fourth Amendment intrusions are to be judged at their inception, as discussed immediately below in Part II.A.1. Diagnosing the reasons why courts forget or fail to apply this maxim is the topic of Part II.A.2.

Despite this fatal flaw, courts espousing the majority view insist that the minority rule has its own fatal flaw, as it invites inquiry into officer intentions,

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133. See infra Part II.C (summarizing the objective approaches taken by proponents of the minority rule).
134. See infra Part II.B–C.
135. The officer need not characterize his actions as a custodial arrest, of course. An officer who decides that he is going to transport a suspect to a police station and book him on charges, but believes he is doing something other than making a custodial arrest, is just mistaken about the legal concept; he is still making a custodial arrest.
136. One of the few courts to get this right put it succinctly in People v. Reid, 26 N.E.3d 237, 239 (N.Y. 2014): “[A]s [the officer] testified, but for the search there would have been no arrest at all. Where that is true, to say that the search was incident to arrest does not make sense.”
contrary to the commands of *Whren* and its progeny. That is a misplaced concern, as discussed in Part II.B. Part II.C lays some blame at the feet of proponents of the minority rule, who thus far have offered only objective approaches to discerning the onset of an arrest, approaches which lead to absurd results and make a needless theoretical concession by abandoning officer intentions as pertinent to the analysis. Part II.D further extends this analysis to argue that *Gant* vehicle searches, in particular, should not be permitted prior to an arrest.

### A. Intrusions and Their Inceptions

#### 1. Judging Searches at Their Inception

It is axiomatic that the constitutionality of a Fourth Amendment search or seizure must be judged at its inception. It is an oft-repeated maxim and a bedrock principle dating back to some of the Court’s earliest Fourth Amendment cases. The principle’s foundation should be obvious: Fourth Amendment rules are meant to guide and gauge the reasonableness of the conduct of officers who cannot prophesize future developments but are instead limited in their knowledge to the circumstances presented at the time of their actions. Indeed, the principle is so ingrained in Fourth Amendment jurisprudence that it is rarely a point of contention and thus seldom functions to resolve doctrinal disputes.

And yet if applied faithfully, this maxim should settle the issue of pre-arrest incident searches. The majority view plainly contravenes this maxim, as it puts critical reliance on the fact of a post-search arrest as a necessary justification for the earlier search. In other words, the majority rule offers no answers to the question of whether a search is valid as incident to arrest when the search begins, instead instructing to “wait and see what happens after the search.” This fatal defect inherent in the majority rule has, with one exception, gone ignored in the many cases discussing pre-arrest incident searches.

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137. See, e.g., *Terry* v. Ohio, 392 U.S. 1, 19–20 (“[I]n determining whether the seizure and search were 'unreasonable' our inquiry is a dual one—whether the officer’s action was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”); *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (“Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception . . . .'”) (quoting *Terry*, 392 U.S. at 20); *United States v. Robinson*, 414 U.S. 218, 249 (1972) (Marshall, J., dissenting) (evaluating search “at its inception”); *United States v. Balsys*, 524 U.S. 666, 692 (1998) (“[W]e know as well from Fourth Amendment law as from a layman's common sense that breaches of privacy are complete at the moment of illicit intrusion . . . . ”).  


139. See *Devenpeck* v. *Alford*, 543 U.S. 146, 152 (2004) (stating that reasonableness of Fourth Amendment seizure depends upon “the facts known to the arresting officer at the time of the arrest”).
The lone exception is *Lewis*, where the en banc D.C. Court of Appeals claimed compliance with the maxim in a two-step argument: first, it pointed out that some searches, valid at their inception, may nonetheless have their fruits suppressed when officers “flagrantly exceed the scope” of a permitted search.\(^{140}\) It then couched incident searches in that mold, arguing that they are valid at their inception if premised on probable cause to arrest, but that a failure to arrest (like flagrantly exceeding the permitted scope of a search) may invalidate the once-valid search.\(^{141}\) That argument does not withstand scrutiny. Its first step is dubious, and its second is illogical.

The first step of that argument is partly correct: a Fourth Amendment intrusion, valid at its inception, will not permanently immunize subsequent intrusions that exceed the scope of the permitted search or seizure.\(^{142}\) That is just to say that additional intrusions merit scrutiny and intrusions must pass constitutional muster at every step. As to the court’s further point (still in this first step of the argument) that the fruits from the initial and valid portion of the search may ultimately be suppressed where a later part of the search is “flagrantly” unconstitutional, that is less clear.\(^{143}\) The normal remedy for a search that exceeds its permitted scope is to admit lawfully seized items and suppress only those items stemming from the illegal portion of the search.\(^{144}\) But if it makes sense to suppress the fruits of the initial and valid part of the search because of some particularly flagrant and subsequent violation, it is not because that subsequent violation retroactively renders the earlier part of the search unconstitutional. It is because, as a remedial and prophylactic measure, the fruits of the entire search—even the valid portion of it—should be suppressed as a deterrent against deliberate abuses.\(^{145}\)

\(^{140}\) United States v. Lewis, 147 A.3d 236, 245–46 (D.C. 2016) (citing *In re 650 Fifth Ave. & Related Props.*, 830 F.3d 66, 101 n.32 (2d Cir. 2006)).

\(^{141}\) Id.

\(^{142}\) See *Terry*, 392 U.S. at 20 (search must be constitutional “at its inception” and “in scope”); see also *T.L.O.*, 469 U.S. at 341–42.

\(^{143}\) *Lewis* provided no examples of any court applying that rule, and its cf. citation to two lower court opinions is not compelling, as neither applies the purported rule (both hold that the searches were not flagrantly excessive). See *Lewis*, 147 A.3d at 245–46 (citing *In re 650 Fifth Ave.*, 830 F.3d at 101 n.32; *State v. Rindfleisch*, 857 N.W.2d 456, 465 (Wis. Ct. App. 2014)). That a “flagrant disregard” for the scope of a search warrant might compel suppression of constitutional portions of the search is not a settled rule; it stems back to a footnote from *Waller v. Georgia*, 467 U.S. 39 (1984), which articulated the proposition before seeming to reject it, noting that where “all items that were unlawfully seized were suppressed . . . there is certainly no requirement that lawfully seized evidence be suppressed as well.” *Id.* at 44 n.3. I have no position on the matter, save for the conceptual one that any such rule is a remedial one, and not one that could retroactively turn a valid search into an invalid one.

\(^{144}\) *Waller*, 467 U.S. at 44 n.3.

The second part of the argument fares worse. The suggestion that a failure to arrest—that is, no additional intrusion at all—may act to invalidate a prior constitutional intrusion makes no sense.\textsuperscript{146} Under that view, a defendant who is searched and never arrested would be left to complain not that the search was unconstitutional, but that his lack of arrest was unconstitutional, and indeed so flagrantly unconstitutional that it even invalidates the prior valid search. But of course nobody has a constitutional right to be arrested, and the lack of a Fourth Amendment intrusion does not give rise to any constitutional complaint. Assuming arguendo that a Fourth Amendment intrusion valid at its inception can be rendered invalid by a subsequent unconstitutional intrusion—as posited in step one of Lewis’s argument—the lack of any intrusion could not logically have that effect.\textsuperscript{147}

The Lewis majority’s attempt to square pre-arrest incident searches with the core tenet that searches are judged at their inception is fatally flawed: the two notions are incompatible. To accept the majority view, a court in effect must do away with the principle altogether. Courts that wish to reconcile pre-arrest incident searches with this maxim are boxed in: if they are not willing to say an arrest (at some stage) must precede the search, then they are left to argue either that pre-search probable cause to arrest suffices to validate the search (contra Knowles), or else to posit that the subsequent act of not arresting is itself a constitutional violation that invalidates the previously constitutional search. Since these two routes are untenable, the conclusion is inescapable that the arrest’s inception must precede the search.

2. Distinguishing Right from Remedy, and Evidence from Canon

The principle that searches must be judged at their inception is rarely invoked, despite its ability to singlehandedly resolve this vexing issue and reconcile Rawlings and Knowles. The principle is perhaps perceived to be diluted by the fact that post-intrusion facts often matter when adjudicating Fourth Amendment issues in at least two distinct senses. First, there are doctrines that look to post-intrusion facts as bearing on the need for suppression even when a Fourth Amendment violation occurs.\textsuperscript{148} But these doctrines do not undermine the maxim that intrusions must be viewed at their inception, as they merely go to the appropriate remedy for a Fourth Amendment violation, not to the question of

\textsuperscript{146}. See Lewis, 147 A.3d at 245–46.

\textsuperscript{147}. There is of course the separate question of whether the exclusionary rule ought to apply—and there are doctrines that would preclude evidence uncovered through unconstitutional searches from being excluded, such as the inevitable discovery rule and the independent source doctrine—but here we are concerned solely with whether the search is constitutional and not with the secondary question of whether suppression is warranted.

\textsuperscript{148}. For instance, as discussed further below, the inevitable discovery and independent source doctrines frequently rely on post-intrusion facts to determine whether an unconstitutional intrusion merits suppression.
whether a violation occurred. Second, post-intrusion facts are often relevant as an evidentiary matter to determining the facts as they existed at the time of the intrusion. Again, this does not dilute the force of the maxim; the inquiry remains homed in on the facts as they were at the moment of intrusion.

The distinction between the constitutionality of Fourth Amendment intrusions and the admissibility of their fruits is critical here. To say that a search or seizure must be judged at its inception is distinct from the (incorrect) claim that post-search facts cannot affect whether the exclusionary rule applies. There are of course canons, like the inevitable discovery and independent source doctrines,150 that make use of post-search facts in determining whether a Fourth Amendment violation merits suppression. Both doctrines permit the admission of evidence from an illegal search where that evidence would have been (or was) uncovered apart from the illegality. But these are mere exceptions to the exclusionary rule, and they address a question separate from the predicate question of whether a constitutional violation occurred. They are doctrines that speak to the remedy for a Fourth Amendment violation, but not to whether a violation occurred.

Similarly, post-intrusion facts undoubtedly have evidentiary value in determining whether a search was valid at its inception, but only to the extent they are pertinent to conditions at the time of the intrusion’s inception. To illustrate, whether an officer has probable cause to arrest depends upon “the facts known to the arresting officer at the time of the arrest.”151 If an officer testifies that she saw a suspect brandishing a gun prior to arresting him, post-arrest evidence may be critical to establishing whether she accurately testified to her pre-arrest knowledge; for instance, if she promptly reported that she saw the suspect brandishing a gun, or failed to mention that in her police report, those facts have evidentiary value in determining the credibility of her claimed pre-arrest knowledge. But, just like the officer’s testimony itself, those facts are mere evidence of the fact of doctrinal import: what the officer knew at the intrusion’s inception. They do not themselves carry any such import.

Neither of these uses of post-intrusion facts undermines the principle that a search must be judged by the facts existent at its inception, without exception. Adopting the majority rule is tantamount to throwing the maxim out the window.

150. See Nix v. Williams, 467 U.S. 431, 444 (1984) (adopting “the ultimate or inevitable discovery exception to the exclusionary rule”); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (recognizing the “independent source” exception to the exclusionary rule); see also Wong Sun v. United States, 371 U.S. 471, 487 (1963).
B. The Continuing Relevance of Officer Intentions to Arrest

1. Whren’s Limits

Once we properly focus on the moment of a search’s inception, the possible justifications for an incident search are narrowed, as we can disregard post-search facts as unimportant to the analysis (except as mere evidence). Knowles foreclosed the argument that probable cause to arrest alone justifies the inception of an incident search, holding such a conclusion to be inconsistent with the purposes of the incident search exception. Meanwhile, Rawlings precludes any assertion that a completed custodial arrest is required before beginning the search. That leaves just one viable option, which is to identify the onset of an arrest—or, conceivably, some point along the continuum of the arrest process—as the triggering justification for an incident search.

Yet courts resist this conclusion, stymied by the defensive point that identifying the onset of an arrest requires delving into officer intentions, a supposedly verboten inquiry under Whren and its progeny. Indeed, the few commentators and jurists who have denounced pre-arrest incident searches have conceded defeat on this point and sought shelter in some (always flawed) objective standard for what constitutes the inception of an arrest.

But they misread Whren. Its prohibition is not so broad. Whren held that an officer’s subjective intentions have no bearing on the mine-run of searches and seizures that are justified upon mere probable cause or reasonable articulable suspicion. The Court stated that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,” that subjective intentions cannot “invalidate police conduct that is justifiable on the basis of probable cause,” and that “[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional.” In other words, Whren held that the existence of probable cause is an objective fact, unaffected by any particular officer’s mindset.

But it is well established that mere probable cause does not justify an incident search. While the existence of probable cause is a pure objective inquiry, an incident search requires a further predicate: the fact of a custodial

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152. See, e.g., United States v. Lewis, 147 A.3d 236, 243 (D.C. 2016) (“[A]n inquiry into officers’ subjective intent is foreclosed by controlling decisions of the Supreme Court.”); United States v. Diaz, 122 F. Supp. 3d 165, 179 (S.D.N.Y. 2015) (requiring a pre-search arrest “is in considerable tension, if not conflict, with the well-established principle ‘that an arresting officer’s subjective intent, however determined, offers no basis for negating an objectively valid arrest’”) (quoting People v. Reid, 26 N.E.3d 237, 240 (N.Y. 2014) (Read, J., dissenting)).
153. See infra Part II.C.
154. Whren v. United States, 517 U.S. 806, 813 (1996) (emphasis added); see also id. at 814 (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, whatever the subjective intent.”).
155. Id. at 811 (emphasis added).
156. Id. at 813 (alteration in original) (quoting Scott v. United States, 436 U.S. 128, 138 (1978)).
arrest.\textsuperscript{158} Whren has nothing to say about whether officer intentions bear on that fact. Indeed, Whren acknowledges that officer intentions are relevant to other Fourth Amendment exceptions where the intrusions are not justified upon mere probable cause or reasonable suspicion.\textsuperscript{159} This is key. The reasons Whren offers for discounting officer intentions as irrelevant to the probable cause inquiry do not apply to the separate inquiry of whether and when an arrest is under way.

Unlike probable cause, a custodial arrest inherently depends upon a subjective decision. No suspect has ever been transported to the stationhouse and booked on charges without an officer intending that result. Also, while Whren spoke of intentions and motivations interchangeably, that case (like Devenpeck and Ashcroft v. Al-Kidd) is about motivations as distinct from intentions. This is not a pedantic point: however you label the two mindsets, there is an important difference between inquiring about what a person is seeking to do (going to their intentions), and asking about why they are doing it (going to their motivations).\textsuperscript{160} In Whren, the police action at issue was an intentional stop; in Devenpeck and Al-Kidd, the arrests were intentional arrests. In each of these cases, the challenges were to the officers’ improper motivations, or purposes, in effectuating the seizures, and had nothing to do with the officers’ intended acts as distinct from their motivations.\textsuperscript{161} When setting rules of conduct, it is perfectly ordinary to care about what a person is doing but not why they are doing it,\textsuperscript{162} which tends to be a far thornier inquiry.\textsuperscript{163}

2. Why Intent (Still) Matters: An Illustration

An analogy may help illustrate the above points. Consider a mom who tells her teenage son: “You are not allowed to take the car without my advance permission, unless there is a medical emergency and you are going to the hospital.” The first part of this pronouncement, like the warrant requirement, sets out the general rule: you may not take the car without advance permission. The

\begin{itemize}
\item \textsuperscript{158} United States v. Robinson, 414 U.S. 218, 236 (1973).
\item \textsuperscript{159} Whren, 517 U.S. at 811 (discussing inventory and administrative searches).
\item \textsuperscript{160} See Daniel B. Yeager, The Stubbornness of Pretexts, 40 SAN DIEGO L. REV. 611, 628 (2003); Logan, supra note 18, at 432.
\item \textsuperscript{161} Yeager, supra note 160, at 628–29.
\item \textsuperscript{162} Rules are frequently tailored toward future intentions while remaining agnostic about motivations. Consider: “Don’t drink if you’re going to drive” (whether it be out of a desire to live or a desire to avoid a DUI).
\item \textsuperscript{163} Our immediate intentions are usually quite easy to identify, while our motivations are harder to pin down. For example, if I am walking out the front door and somebody asks me what I’m doing, I might accurately report “going outside for a walk.” There is likely a morass of motives underlying that intention: perhaps I am stressed about work, or just want some fresh air, or I need a break from my family, or I know that Friedrich Nietzsche and Immanuel Kant ritualistically took daily walks and I am subconsciously trying to emulate them. Even the actor themselves may be poorly equipped to identify all their motivations. That no doubt has some role in Whren’s analysis: whether officers made a particular traffic stop for a legitimate reason, or rather because of some motivation rooted in racism and stereotypes, is a tough nut to crack. But whether officers intend through some actions to make a stop, or a custodial arrest, is not so fraught.
\end{itemize}
second part states the two-factor exception: (1) there must be a medical emergency (like probable cause), and (2) you must be going to the hospital (like making a custodial arrest). If the mom views the existence of an emergency as an objective question unaffected by her son’s subjective views or motivations (like Whren), there is no reason to interpret that to mean the mom has no regard for whether her son is in fact going to the hospital when he opts to take the car.

We can build out the analogy further and layer the pertinent case law into it by imagining a series of past disciplinary “rulings” by the mom:

1. The son’s friend is seriously mauled by a stray dog, and the son calls 911 for an ambulance, and then takes the car to a party. Mom chastises her son, and reiterates that he may only use the car if there is a medical emergency and he is going to the hospital; the mere fact of an emergency does not grant the son carte blanche to take the car. Rule violated: Knowles.

2. The son’s friend fractures his skull after getting run over by a taxi. The taxi driver offers to give him a ride to the hospital, but the son decides to drive the friend himself. Mom finds that her son complied with her rule, despite there being no necessity for him taking the car, because she wants to keep a clear two-part rule that does not force her son to gauge transit options in an emergency. Rule satisfied: Robinson.

3. The son’s friend falls off the roof and breaks his shoulder. The son is not concerned for his friend’s wellbeing, but sensing an opportunity to take the car out for a spin, rushes his friend to the hospital. When the son confides in his mom that his true motivation was to drive the car rather than help his friend, she is indifferent; he used the car as needed in a medical emergency, and she does not care about his motivations. Rule satisfied: Whren.

4. The son observes his friend faint and hit his head on the pavement, rendering him unconscious. Believing that fainting presents a genuine medical emergency, the son rushes his friend to the hospital. Mom does not think fainting qualifies as a genuine medical emergency, but that head trauma does; despite her son’s failure to identify the correct predicate emergency, she approves his taking the car. Rule satisfied: Devenpeck.

Our analogy now has the same foundations as the modern doctrine governing incident searches, allowing us to judge the sensibility of the competing majority and minority rules advanced by lower courts as they would apply to two further situations:

A. The son’s friend has a seizure, which the son rightly judges to be an emergency. The son takes the car intending to go to the hospital. En route, the friend recovers and indicates that he has the necessary medication with him to address the seizure, and
that no hospital visit is necessary. The son turns around and drives home having never reached the hospital.

B. The son’s friend has a seizure, rightly judged as an emergency. Desperate to go to a party, the son loads his friend in the car and speeds toward the party. En route to the party, they get in a serious accident and are transported to the hospital via ambulance.

If mom is acting rationally—and nothing in her first four rulings suggests otherwise—she is likely to approve of the son’s use of the car in example A and disapprove of it in example B. Yet the majority rule and its focus on the end result—akin to whether a hospital visit ultimately occurred—would yield the opposite results, approving the car’s usage in example B but disapproving it in example A. Whatever might be said in defense of those results, there is nothing in rulings 3 and 4 (approximating Whren and Devenpeck) that compels or even suggests them. Rulings 3 and 4 evinced the mother’s indifference to her son’s underlying motivations for taking trips to the hospital, but they did not show an indifference to whether he was in fact going to the hospital at all.

The uses of the car mom is likely to approve of should be particularly evident if we make use of the maxim that the son’s use of the car, like a Fourth Amendment intrusion, must be judged from its inception. With that gloss, mom will assess her son’s conduct of taking the car in light of things known to him at that point in time, regardless of subsequent developments. If she adheres to that rule, we can omit the last sentences of examples A and B as irrelevant to the analysis, and it becomes clear that the son adhered to the baseline rule in example A but not in example B. While the son did not end up at the hospital in example A, he took the car intending to go there; indeed, his decision to turn the car around upon dissipation of the emergency seems the most faithful application of his mom’s command not to use the car absent an emergency. While the son ended up in the hospital in example B, it was because of some intervening circumstance—a car accident—which should not factor into the reasonableness of his decision to take the car in the first place.

One might respond that parents, like courts, sometimes rely on heuristic devices and might use the ultimate fact of a hospital visit as an administrable bright-line evidentiary test of the son’s intentions. After all, it is usually true that a person intending to go to the hospital makes it there, and people tend not to end up at a hospital without intending to go there. But whatever value looking to the end result has as a heuristic evidentiary device in general, you would need a very good reason (which no court or commentator has articulated) to disregard

164. Like the search incident to arrest, which is animated by the prospect of a full-custody arrest rather than its completion, it would make no sense to require the son’s journey to the hospital be completed prior to permitting him to take the car. The whole point of allowing him to take the car is to enable his trip to the hospital, as the point of incident searches is largely animated by concerns that precede the completion of a custodial arrest.
evidence that shows that the device is wrong in a particular instance. Whren’s disavowal of officers’ subjective intentions as irrelevant to the probable cause inquiry was not based in any such evidentiary concern. It stemmed from the view that, even when an officer’s mindset is easily discerned, it is irrelevant to the question of probable cause (which, unlike in this context, was all that was required for the Fourth Amendment intrusion in that case).

If (a) a search must be justified at its inception, (b) mere probable cause to arrest does not justify an incident search, and (c) a custodial arrest need not be completed in order to justify an incident search—all principles firmly established in the case law—then the inception of a custodial arrest is the only viable candidate left to justify an incident search. When an officer has decided to make an arrest and taken some step to effectuate it, all of the factors animating incident searches are present: (1) the arrestee has a diminished expectation of privacy, (2) there is increased danger to officers accompanying the anticipated prolonged exposure to the arrestee in the forthcoming transport and booking process, and (3) there is a heightened need to preserve evidence for prosecution. An intention is just “an action in prospect,” and it is the firm prospect of a custodial arrest, rather than a completed one, that triggers these heightened concerns.

3. Whren Is Not Evidentiary-Based

As pointed out above, Whren and its progeny are not based in evidentiary concerns at all. An extension of this point is that the existence of hard cases—by which I mean cases where it is difficult for a court to determine if an arrest was under way at the time of a purported incident search—are not a serious detriment to the rule endorsed in this Article, even though such hard cases will be rare, as explained infra Part III.B.

The point is worth spelling out a bit more. There are at least two distinct reasons why we might disregard officer intentions in conducting Fourth Amendment analyses. One is a relevance concern: that at least in some circumstances, officer intentions do not inform the question of whether a Fourth Amendment search is reasonable. Another is an evidentiary concern: that while officer intentions are relevant, courts are not well equipped to reliably discern them, and therefore we ought to disregard them entirely or lean heavily on a bright-line heuristic (or maybe a presumption) approximating them.

Whren, on its own terms and to the extent it is persuasive, voiced only the first, relevance-based concern. That is, Whren held that when there is probable cause to arrest, an arrest is reasonable under the Fourth Amendment, no matter

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165. See infra Part II.B.3. Whren explained that its predecessors’ disavowal of subjective intentions was not based on “the evidentiary difficulty of establishing subjective intent,” at least not “principally upon that.” Whren v. United States, 517 U.S. 806, 814 (1996).


167. Supra Part II.B.1–2.
what the officer’s intentions (or pretextual motivations) may be.\textsuperscript{168} \textit{Whren} explained that its predecessors’ disavowal of subjective intentions was not based on “the evidentiary difficulty of establishing subjective intent,” at least not “principally upon that.”\textsuperscript{169} Indeed, that final caveat suggesting that there was any evidentiary concern voiced in the prior cases gives too much credit to the point. There is not a whiff of an evidentiary concern or argument in the cases that \textit{Whren} relies upon.\textsuperscript{170}

But the majority view mistakenly treats \textit{Whren} as sounding in the second, evidentiary-based concern, demanding objective evidentiary rules to approximate officer intentions. In fact, the majority view seems to acknowledge the import of officer intentions, as it demands not only probable cause before a search but also a nearly contemporaneous arrest following the search.\textsuperscript{171} This second requirement can be viewed only as a conclusive evidentiary presumption:\textsuperscript{172} there is no reason for requiring an arrest to quickly follow a search except as a shorthand device for ascertaining if an arrest was under way at the search’s inception. But if discerning officer intent is in fact the underlying purpose of the majority view’s “nearly contemporaneous arrest” requirement, then it raises the question of why courts should limit themselves to one piece of evidence of an officer’s pre-search intentions rather than consulting the whole universe of evidence.

Indeed, \textit{Whren} rejected such an artifice of objectivity, where the petitioners in that case argued that it was not a particular officer’s pretexts for a stop that mattered, but the objective indicators of pretext:

Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind. Why one would frame a test designed to combat pretext in such fashion that the court cannot take into account \textit{actual and admitted pretext} is a curiosity that can only be explained by the fact that our cases have foreclosed the more sensible option.\textsuperscript{173}

The same reasoning applies here: if an intent to arrest at the time of the search matters—and the majority rule concedes that it does to the extent that the “nearly

\begin{itemize}
  \item \textsuperscript{168} \textit{Whren}, 517 U.S. at 813.  
  \item \textsuperscript{169} \textit{Id.} at 814.  
  \item \textsuperscript{171} \textit{See}, e.g., United States v. Lewis, 147 A.3d 236, 251 (D.C. 2016).  
  \item \textsuperscript{172} \textit{See supra} Part II.A.1, rejecting one conceivable alternative (that the lack of an arrest might act to invalidate a previously constitutional search).  
  \item \textsuperscript{173} \textit{Whren}, 517 U.S. at 814. As explained above, “the more sensible option” of taking admitted pretext into account is only foreclosed when the Fourth Amendment intrusion is justified on grounds such as the mere existence of probable cause or reasonable articulable suspicion, which is not true of incident searches.
\end{itemize}
contemporaneous arrest” requirement is a heuristic to gauge that question—then there is no good reason to disavow the actual and admitted intentions of an officer in favor of the shorthand device. If the problem with inquiring into officer intentions sounds in evidentiary concerns, then those same concerns should apply across the board no matter what the Fourth Amendment question is. That is not the case, as Whren acknowledges, because some Fourth Amendment questions do turn on an officer’s intentions and purposes, such as whether a given search constitutes an inventory or administrative search.

Justice Scalia, Whren’s author, provided a further example of when officer intentions matter to Fourth Amendment questions in his 2013 opinion for the Court in Florida v. Jardines. There, a police officer brought a drug-sniffing dog to the front porch of a house of a suspected drug dealer, and the Court held that this conduct amounted to a warrantless search. Florida had argued otherwise, pointing out that an officer who happened to knock on a door with a drug-sniffing dog in tow, but did not bring the dog for an investigative purpose, would not be so engaged in a search; it argued that Whren required disregarding the officer’s intentions. Justice Scalia disagreed. He explained that Whren and its progeny: merely hold that a stop or search that is objectively reasonable is not vitiated by the fact that the officer’s real reason for making the stop or search has nothing to do with the validating reason. . . . Here, however, the question before the court is precisely whether the officer’s conduct was an objectively reasonable search. . . . [and that] depends upon the purpose for which they entered.

An officer’s subjective intentions cannot invalidate an otherwise proper incident search, but where such a search takes place in the absence of a completed custodial arrest, the officer’s intention to arrest is the only basis upon which the search might be deemed reasonable. Absent that intention, there is nothing to justify a search, save for mere probable cause to arrest, which the Court has made abundantly clear is not enough.

174. If there is some other reason for demanding a nearly contemporaneous arrest, other than as a heuristic device, no court or commentator has articulated it. Conceivably, one could argue that the fact of an ultimate arrest minimizes the intrusion of the prior search, as a mere lesser-included intrusion of the arrest, but that does not make any sense if the arrest only occurred as a result of the preceding search (compounding, rather than mitigating, the search’s harm).

175. Whren, 517 U.S. at 811–12 (“[T]he exemption from the need for probable cause (and warrant), which is accorded to searches made for the purpose of inventory or administrative regulation, is not accorded to searches that are not made for those purposes.”).


4. The Majority View’s Subjectivity Concession

One glaring problem with the majority view, rarely confronted by its proponents, is that there was pre-search probable cause and an ultimate arrest in Knowles, yet the Supreme Court unanimously invalidated that purported incident search. It is more than a small defect in the majority rule that it is in direct contravention of an on-point Supreme Court case.

One possible caveat to the majority rule to bring it out of direct conflict with Knowles would be that the post-search arrest must be for the conduct that gave rise to pre-search probable cause, as was the United States’s position in Lewis, ultimately echoed by the en banc Court. In Knowles, the suspect was cited for speeding, but arrested only for the drug offenses that the pre-arrest search uncovered evidence of. Putting dispositive weight on that fact would invalidate the searches from examples 1 (Diaz) and 2 (Macabeo) in the Introduction—in which, like Knowles, arrests were made only for conduct uncovered by the search—but it would validate the search in example 3 (Lewis), where Brittney was eventually arrested for the possession of an open container of alcohol offense for which probable cause preceded the search.

This nuance is perplexing because it again cedes the central conceit of the majority rule, which is that officer intentions are irrelevant. Hinging the constitutionality of an arrest on the requirement that it be for the original offense for which there was probable cause means that officer intent becomes integral to the equation. The stated “offense of arrest,” of course, is entirely dependent upon an officer’s subjective choice of what to list in the arrest paperwork as the

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180. See supra Part I.B.3. Lewis distinguished Knowles on two bases: first, that a citation had been issued before the search, a point that—as discussed above—would unjustifiably reduce Knowles from a constitutional rule to a procedural nicety that instructs officers to simply hold back on issuing a citation until after the search. Second, it points to Knowles’ statement that “no further evidence of excessive speed was going to be found either on the person of the offender or in the offender’s car.” United States v. Lewis, 147 A.3d 236, 244 (D.C. 2016) (quoting Knowles v. Iowa, 525 U.S. 113, 118 (1998)). This statement was an interesting foreshadowing of Gant—decided more than a decade later—but Knowles was operating with pre-Gant case law where incident searches did not depend on such case-specific considerations, so this is better viewed as a throwaway line than anything of importance. In any event, as explained in Part II.D, infra, the evidence-gathering interest partially animating the Gant rule does not work as a standalone justification for a search. A critical driver of that rule remains that an arrestee—unlike somebody who is merely handed a citation—has severely diminished privacy interests.

181. The Knowles Court was addressing an as-applied challenge on the facts of the case, not a broader facial challenge to Iowa’s statutory scheme permitting searches incident to citation in all cases. See Knowles, 525 U.S. at 116.

182. See En Banc Brief for Appellant at 26, United States v. Lewis, 147 A.3d 236 (D.C. 2016) (No. 13-CO-1456), 2015 WL 12732799 (“[requiring] the subsequent arrest be consonant with the [pre-search] probable cause”); Lewis, 147 A.3d at 251 (stressing that “the suspect’s formal arrest for the [pre-search] offense” followed the search).

183. Knowles, 525 U.S. at 114.

184. As discussed above, the majority rule’s “near contemporaneous arrest” requirement seems to be a gauge of officer intentions, and the concern with the “offense of arrest” is likewise concerned with officer intentions. While the majority rule purports to be unconcerned with officer intentions, the contours of the rule belie that purported agnosticism.
pertinent offenses. To be sure, it provides a bright-line rule for discerning officer intent and thus gets around any evidentiary difficulty in discerning it, but the arrest paperwork is nonetheless just one particular manifestation of those intentions.185

This approach thus still violates the maxim that an intrusion must be judged at its inception—a maxim that would instruct courts to disregard subsequent arrest paperwork as irrelevant—and then embraces the very flaw that it argues compels rejection of the minority rule. If officer intentions matter, then there is no reason to divorce those intentions, in time, from the moment of the search’s inception, and there is certainly no good reason to give dispositive effect to one particular manifestation of those intentions (charging documents) while disregarding all others.

Moreover, giving definitive weight to an officer’s post-arrest statement of charges is not only constitutionally unsound, it will sometimes be perverse in application. This proposed test would be overinclusive in sometimes validating searches even where no arrest was under way at the time of the search, as well as underinclusive in invalidating, because of subsequent paperwork omissions, searches that were constitutional at their inception.

To illustrate the latter point, consider a case where officers see a person carrying a firearm and initiate an arrest with probable cause to believe he is carrying it illegally. In the course of an incident search, officers uncover evidence implicating the arrestee as the prime suspect in a series of murders—an ID matching that of the prime suspect and photos of each victim—and then finalize the arrest, but fail to declare the illegal firearm as an offense of arrest, either because the firearm turned out to be legally held or because officers simply lost sight of the relatively minor firearms charge when confronted with multiple murders. Properly viewed, the search is judged from its inception, and because it was part of a lawful and ongoing arrest for an unregistered firearm, it is constitutional regardless of whether probable cause for that charge ultimately dissipates or if the officers ignore it when subsequently listing the offenses of arrest. Under this more nuanced view of the majority rule, however, the search is invalid because the suspect was not “arrested for” the firearms charge.

Courts upholding pre-arrest incident searches are thus effectively left to pick their poison: the baseline majority rule conflicts with Knowles, but this nuanced attempt to craft a rule compliant with Knowles only sows bigger problems and ultimately breaks down into a test dependent on officer intentions, the purportedly fatal flaw it attributes to the minority rule.

C. Flawed Objective Approaches to the Minority Rule

While there are proponents of an “ongoing arrest” requirement prior to an incident search, those proponents have retreated to objective tests to determine when an arrest is under way. This retreat seeks to accommodate proponents of the majority view who claim that any inquiry into the onset of an arrest requires accounting for officer intentions (forbidden in Fourth Amendment analysis, the argument goes). Not so, say the proponents of the minority view, who insist that the minority rule can be confined to objective standards as well.186

But it cannot be so confined in any principled or workable manner, and it does not need to be. If officer intent to arrest matters, there is no reason to artificially constrain the inquiry to objective or “on-scene manifestations” of that intent.187 Proponents of the minority rule have unnecessarily sought to accommodate Whren by retreating to objective tests restricted to on-scene manifestations as approximations of an officer’s intent to arrest.188 This retreat misperceives Whren as based in an evidentiary concern that is not actually

186. See, e.g., United States v. Powell, 483 F.3d 836, 848 (D.C. Cir. 2007) (Rogers, J., dissenting) (“[F]or the warrant exception to apply, the police must have unambiguously taken prior action such that a reasonable person in the suspect’s position would understand that he was in police custody and that formal arrest would follow shortly.”); Ochana v. Flores, 347 F.3d 266, 270 (7th Cir. 2003) (“[S]earches incident to a custodial arrest . . . turn on the objective belief of a reasonable person in the suspect’s position.”); Logan, supra note 18, at 432 (“It is what officers signal at the time of the purported ‘moment of arrest,’ by words or conduct, that should be of critical importance to the arrest question: objective manifestations of purpose that contribute to how a reasonable suspect would likely respond, in accord with the search incident justifications.”); Marissa Perry, Note, Search Incident to Probable Cause?: The Intersection of Rawlings and Knowles, 115 Mich. L. Rev. 109, 127 (2016) (“[I]n order for a search incident to arrest that occurs prior to the arrest to be valid, the officer must intend to make an arrest before commencing the search. This requisite intent should be inferred from the objective circumstances of the interaction between the officer and the arrestee.”).

187. This Article is the first to develop the argument that objective approaches to identifying an arrest are irredeemably flawed, though a version of the argument was made in my briefing in Lewis, and Judge Beckwith’s dissenting opinion persuasively improved upon those points. 147 A.3d at 264–65 (distinguishing Whren because “there is a difference between a defendant’s delving into an officer’s subjective intent to invalidate a search that is clearly otherwise legal under objective, existing warrant exceptions and a defendant’s insisting that . . . [the government] should do so only where that subjective intent aligns with the rationales underlying such existing exceptions”). It is wrong to insist upon objective on-scene manifestations of an intent to arrest, because as explained further in this Section and in Part III.B, such an approach would artificially disregard other common evidence that indicates whether an officer was making an arrest prior to the search.

188. See, e.g., Powell, 483 F.3d at 848 (Rogers, J., dissenting) (focusing on what is “communicated” to suspect before search); Ochana, 347 F.3d at 270 (same); Logan, supra note 18, at 432 (limiting inquiry to “objective manifestations of purpose that contribute to how a reasonable suspect would likely respond”); Perry, supra note 186, at 127 (“This requisite intent should be inferred from the objective circumstances of the interaction between the officer and the arrestee.”). Reid may be an exception; it sought to reconcile Whren with the view that an officer’s intent to arrest mattered, though it did not venture into whether some objective or on-scene indicia of an intent to arrest mattered. People v. Reid, 26 N.Y.3d 237, 240 (N.Y. 2014) (finding error in extending Whren’s disavowal of officer intentions to this context because “the ‘search incident to arrest’ doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur.” If no arrest has yet taken place “the officer must have intended to make one if the ‘search incident’ exception is to be applied.”).
articulated in *Whren*, except to say that it is an issue of little or no concern.\(^{189}\)

*Whren* in fact mockingly disparaged artificial objective rules constructed to target subjective intentions.\(^{190}\)

There are two variants of the attempt to shoehorn the minority rule into an objective test. The first stresses whether an arrest has been signaled to the suspect, asking whether there was “direct communication by the police that a suspect was not free to leave and would be arrested.”\(^{191}\) That test, minus the last four words, is akin to the test for whether a Fourth Amendment seizure has occurred: whether, “in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.”\(^{192}\) That is a sensible test when evaluating whether a person’s liberty interests have been intruded upon by a seizure, but it is poorly calibrated with the quite different concern of whether the custodial arrest process, implicating the concerns animating incident searches, is afoot.

Focusing on whether the fact of a custodial arrest has been signaled to a suspect does violence to *Chimel*’s rationales. Perhaps signaling an arrest to a suspect gives rise to heightened concerns that the suspect might attack the officer or attempt to destroy evidence,\(^{193}\) but there is no reason to demand the suspect be given a jump on those nefarious ends. When possible, where an arrest has been decided upon, officers may rightly preempt these heightened dangers by conducting the search as an initial step in the arrest process rather than first alerting the suspect that he is being arrested.\(^{194}\) If it makes sense to permit officers to protect themselves from danger, preclude escape, and secure evidence that might otherwise be destroyed once an arrest is under way, then they ought to be able to take those steps once the danger is tangible and inevitable, rather than requiring officers to give the suspect a head start.

\(^{189}\). *See Whren v. United States*, 517 U.S. 806, 814 (1996); *supra* Part II.B.3.

\(^{190}\). *See Whren*, 517 U.S. at 814.

\(^{191}\). *Powell*, 483 F.3d at 848 (Rogers, J., dissenting); *see also Oehara*, 347 F.3d at 270 (custodial arrest is under way only “when a reasonable person in the suspect’s position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest . . .”) (quoting United States v. Ienco, 182 F.3d 517, 523 (7th Cir. 1999) (articulating test for a seizure, not custodial arrest); *Logan, supra* note 18, at 432.


\(^{194}\). *See Powell*, 483 F.3d at 841 (“In this case the presence of another person in the searched vehicle illustrates the need for police who have probable cause to make an arrest in some circumstances, in the interest of safety, to conduct a search before making the arrest.”). I might quibble with *Powell*’s terminology, as the better view is that the officers in that case did not search before making an arrest at all; their search was merely the first step in effectuating a pre-determined arrest, if that was in fact the case. *See id.* at 837 (officer indicating, pre-search, it had been determined that the arrestees “were going to be placed under arrest”).
This objective rule thus leads to absurd results. Consider a case where officers arrive at a home to execute an arrest warrant (sans search warrant) for distributing narcotics and find the arrestee sleeping in their bed.\textsuperscript{195} There is no question that they are in the midst of an arrest as they enter their bedroom—again, they are executing an arrest warrant—but that fact has not been signaled to the sleeping subject. To avoid alerting them to the fact of their imminent arrest and provoking a potentially dangerous situation or a race to some contraband, they choose to first search the nightstands within their reach and (gently) pat their pockets and waistline, and only thereafter arrest them. This permutation of an objective test would invalidate such a search—as it counts only objective factors of arrest that are communicated to the arrestee—even though every rationale animating \textit{Chimel} instructs that it is a valid search and arguably ideal to conduct the search in a manner that preempts the dangers \textit{Chimel} sought to protect against.

A slightly more palatable objective test is one that does not artificially constrain the analysis to what is communicated to a suspect, but takes a more holistic view of all the objective on-scene circumstances that indicate whether or not an arrest is under way.\textsuperscript{196} But it suffers from the same artifice: if a decision to arrest matters in justifying an incident search, why constrain the intent inquiry to objective on-scene manifestations of that intention?

This more inclusive objective test is still incapable of yielding good answers. Consider \textit{Diaz}, example 1 from the Introduction, in which an officer witnessed an open container of alcohol violation and conducted first a search and then an arrest of the suspect.\textsuperscript{197} There are certainly some indications that no arrest was under way at the time of the search—the pettiness of the pre-search offense, the officer’s decision to search before securing the suspect, etc.—but those factors are certainly not inconsistent with a pre-search arrest. How is a court to decide the critical question of whether an arrest was under way when the objective on-scene factors paint only part of the picture? The officer’s later testimony that they were not arresting prior to the search coupled with the fact that they had never arrested a person for a mere possession of an open container of alcohol offense makes it an easy case. Yet a purely objective test makes it a vexing one, and thus leaves courts in relative darkness when attempting to answer the critical question.

Whatever is manifested on-scene prior to the search, a litany of off-scene facts may be highly probative for determining whether an arrest was under way at the time of a search. For instance, if the offense supplying pre-search probable cause was not even arrestable under state law, as in \textit{Macabeo}, that is some

\textsuperscript{196} See, e.g., Perry, supra note 186, at 127.
evidence that no arrest was under way at the time of the search. The same is true if the searching officer had a long and uniform history of disposing of the particular offense with a citation rather than an arrest, as in Diaz, or if the searching officers affirmatively testify at a later hearing that they were not making an arrest at the time of the search and only arrested as a result of what the search uncovered, as in Macabeo, Diaz, Lewis, Reid, and Taylor, to name just a handful of cases featuring that recurring fact. None of those facts is manifested on-scene, but they may prove critical—perhaps dispositive—in determining whether the search was part of an ongoing arrest.

As discussed above, it is wrong to treat Whren as an across-the-board prohibition on consulting officer intentions where the inquiry focuses on something other than probable cause. And it makes little sense to try to accommodate Whren by taking shelter in an objective test, the purpose of which would be to get around evidentiary concerns in evaluating officer testimony (or other, off-scene indicators of arrest) about their intentions. That dives headfirst into the very pitfall that Whren ascribed to the petitioners’ view while ignoring the driving force of Whren’s analysis, which is not an evidentiary one at all, but stems from the principle that officer intentions—however they are measured—are irrelevant to probable cause.

The core point for proponents of the minority rule must be that officer intent matters when determining the onset of an arrest in a way that it simply does not matter to determining the existence of probable cause. Whren itself provides the framework for that argument, in holding that “subjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional,” because an incident search is not “otherwise lawful” absent an arrest, a point that pervades the Supreme Court’s cases. In other words, under the rule advanced here, an officer’s subjective intentions would never serve to invalidate an otherwise lawful search; those intentions may only validate a search that is

200. Diaz, 122 F. Supp. 3d at 169 (“As she explicitly testified, she had no intention of arresting him.”); People v. Reid, 26 N.E.3d 237, 239 (N.Y. 2014) (“[A]s [Officer] Merino testified, but for the search there would have been no arrest at all.”); United States v. Lewis, 147 A.3d 236, 252 (D.C. 2016) (Beckwith, J., dissenting) (“[A]s Officer Brown testified, Ms. Gibbs wasn’t under arrest and the car wasn’t impounded, so she could have driven away with contraband in the car.”) (internal quotation marks omitted); State v. Taylor, 808 P.2d 324, 324 (Ariz. Ct. App. 1990) (“Had that hashish not been found [in a pre-arrest search], both officers agree, defendant would have been free to leave.”); Appellant’s Opening Brief on the Merits at 4, People v. Macabeo, 384 P.3d 1189 (Cal. 2015) (No. S221852) (officer testified “that he intended to give Mr. Macabeo either a verbal warning or a citation for biking offense).
201. See Whren v. United States, 517 U.S. 806 (1996); supra Part II.B.3.
202. See supra Part II.B.
203. Whren, 517 U.S. at 813.
otherwise unlawful for lack of a custodial arrest. This validation is critical because a vast majority of incident searches occur before a custodial arrest’s completion.204

Where there is no custodial arrest, there are no grounds for an incident search; and because a completed arrest is not required under Rawlings, the only remaining option—if the search is judged at its inception—is whether an arrest has commenced, and that is a question to which officer intentions matter.

D. The Requirement of an Arrest Before a Gant Search

One question that no court or jurist has yet addressed, but which one court has flirted with,205 is whether so-called Gant searches of vehicles call for a separate rule governing whether or not an arrest must precede them. Recall that Gant, in addressing the permissibility and scope of incident searches of vehicles outside an arrestee’s reach, rejected Chimel’s two primary rationales for permitting incident searches: officer safety and preventing the destruction of evidence.206 The Court reasoned that those rationales were inapplicable to a vehicle search when the arrestee is not “within reaching distance of the vehicle.”207

It did not preclude vehicular incident searches under those circumstances,208 however, adopting Justice Scalia’s reasoning from his Thornton concurrence. In that concurring opinion, Justice Scalia relied on a trio of factors as permitting a tailored209 search for evidence of the “offense of arrest”: (1) the diminished expectation of privacy that flows from the fact of

204. See Lewis, 147 A.3d at 265 (Beckwith, J., dissenting).
205. See Lewis, 147 A.3d at 243 (majority opinion) (purporting to limit its holding to “Gant evidence search[es]” preceding an arrest, without inquiring whether other incident searches merited distinct treatment).
208. If there were probable cause to believe the vehicle contained evidence of a crime, then there is no need to resort to the search incident to arrest exception at all because, in that case, a search would be justified under the automobile exception. See id. at 347 (citing United States v. Ross, 456 U.S. 798, 820–21 (1982)). Gant justifies vehicle searches incident to arrest upon something that is apparently less than probable cause to believe the car contains evidence of a crime: mere “reason[ ] to believe” that is the case. Gant, 556 U.S. at 335; see United States v. Edwards, 769 F.3d 509, 514 (7th Cir. 2014) (“The Court in Gant did not elaborate on the precise relationship between the ‘reasonable to believe’ standard and probable cause, but the Court’s choice of phrasing suggests that the former may be a less demanding standard.”); United States v. Rodgers, 656 F.3d 1023, 1028 n.5 (9th Cir. 2011) (noting that “reasonable to believe” standard “appears to require a level of suspicion less than probable cause”); United States v. Vinton, 594 F.3d 14, 25 (D.C. Cir. 2010) (“[T]he ‘reasonable to believe’ standard probably is akin to the ‘reasonable suspicion’ standard required to justify a Terry search.”).
209. While Gant searches are narrower in scope than other types of incident searches (which permit an unbounded search of areas within an arrestee’s grasp), they rely upon a broader justification, i.e., the “broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested,” as opposed to the “narrower interest in frustrating concealment or destruction of evidence.” Thornton v. United States, 541 U.S. 615, 630 (2004) (Scalia, J., concurring).
being arrested.\textsuperscript{210} (2) a “general interest in gathering evidence relevant to the crime for which the suspect had been arrested,”\textsuperscript{211} and (3) the limited scope of the search “for evidence of [the suspect’s] crime,” thereby distinguishing the search “from general rummaging.”\textsuperscript{212}

The second and third of these three justifications exist, at least to some extent, any time a prosecution is instituted, regardless of whether it is by means of an arrest or via citation. So there is an argument for treating Gant searches differently from the more standard Chimel searches: whereas Chimel searches are responsive to dangers unique to the custodial arrest process, two of Gant’s broader justifications apply more globally to any situation that results in criminal charges, including prosecutions instituted through a citation.

The argument for disposing of the arrest requirement in the Gant context is ultimately unconvincing, however, because the first factor permitting Gant searches is a critical driving force of the analysis. As with Chimel searches, an indispensable factor for permitting Gant searches at all is “[t]he fact of prior lawful arrest” as a way of distinguishing “the arrestee from society at large.”\textsuperscript{213} That is at the foundation of the search incident to arrest exception as articulated in its historical precedents: that the right to search flows as a lesser-included intrusion incident to the arresting seizure.\textsuperscript{214} Far from suggesting a departure from that foundational principle, Justice Scalia’s Thornton concurrence stressed its centrality in pressing the rule ultimately adopted in Gant.\textsuperscript{215} The other two factors animating Gant searches, standing alone, are insufficient to permit an incident search absent this first one. Officers always have a general interest in gathering evidence, even of crimes for which they have only the barest suspicion; if that interest alone were sufficient to justify a search, the Fourth Amendment would lose all its force.

If anything, the requirement of a pre-search arrest ought to be especially rigid in the Gant context. The reason Rawlings permitted a search prior to the more formal markings of a custodial arrest (e.g., proclamation of arrest and handcuffing) do not exist in the Gant context because there is no need for spur-of-the-moment decision making at all.\textsuperscript{216} Gant governs only where the suspect is

\begin{footnotesize}
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\item \textsuperscript{210} Id.
\item \textsuperscript{211} Id. at 629.
\item \textsuperscript{212} Id. at 630.
\item \textsuperscript{213} Id.
\item \textsuperscript{214} See People v. Chiagles, 142 N.E. 583, 584 (N.Y. 1923) (“[T]he law is in the act of subjecting the body of the accused to its physical dominion.”).
\item \textsuperscript{215} Thornton, 541 U.S. at 630 (Scalia, J., concurring).
\item \textsuperscript{216} See United States v. Lewis, 147 A.3d 236, 260 (D.C. 2016) (Beckwith, J., dissenting). Here: It may make sense not to stand on formalities when an arrest is already under way and there is a real danger that the suspect might gain access to a weapon or destroy evidence, but the same beat-him-to-the-draw logic does not apply so clearly to searches of vehicles for evidence relevant to a crime of arrest. The majority’s only direct response to this point—that other courts have applied Rawlings to Gant evidence searches—is less than compelling.
\end{itemize}
\end{footnotesize}
secured beyond the reach of the vehicle, so that there are no exigent circumstances justifying an immediate search (as there are when searching areas within the arrestee’s reach). Indeed, in the Gant context, there is little reason not to require officers to obtain a search warrant before searching, save for the fact that the arrestee’s expectations are so heavily reduced by the fact of the arrest itself.\footnote{Moreover, whatever might be said for permitting Gant searches upon a mere citation, that is no grounds for courts to permit incident searches in the absence of any decision to even so much as issue a citation (as occurred in Lewis and as approved by the intermediate appellate court in Macabeo). Where no further prosecution is envisioned—not even instituted by citation—then there is no heightened need to gather evidence for prosecution, and there is nothing that distinguishes the search for evidence of “the offense of arrest” from a “general rummaging.” Thornton, 541 U.S. at 630 (Scalia, J., concurring).}

Nothing in Gant suggests a departure from the rule that an arrest is an indispensable predicate for an incident search. Indeed, because Gant concerns searches beyond the exigencies of a volatile arrest with an unsecured suspect, there is all the more reason to demand a particularly clear showing that an arrest was under way at the time of the search.

III. APPLICATION OF THE RULE BY OFFICERS & COURTS

Many courts, in adopting the majority approach, have engaged in hand-wringing about how vexing it can be to pinpoint the inception of an arrest. But the conundrum is mostly a theoretical one. While courts have bemoaned the lack of a bright-line rule marking the inception of an arrest as a justification for adopting the majority rule, few to none of those courts had any difficulty in discerning whether officers were engaged in an arrest at the time of the searches at bar.\footnote{Powell was perhaps difficult on its facts, though the Court itself seemed to have no difficulty in finding that there was an incipient arrest prior to the time of the search. United States v. Powell, 483 F.3d 836, 837 (D.C. Cir. 2007) (“Officer Jones directed the passenger to get out of the car with the intention of arresting him for possession of an open container of alcohol in a vehicle upon a public way.”).} It is usually obvious.

Moreover, it is odd to give much weight to an evidentiary concern in this context. If the existence of hard evidentiary cases is a failing at all, it is not an acute failing here. The Fourth Amendment is replete with questions that require difficult judgment calls, such as the existence of probable cause or reasonable articulable suspicion. And identifying the onset of an arrest is a task that should be relatively easy in the sophisticated universe of Fourth Amendment jurisprudence. And while bright-line rules can be useful when they improve the odds of correct results, using the fact of an ultimate arrest as a bright-line rule does not accomplish that. The fact of an ultimate arrest is not particularly probative of a pre-search intent to arrest in the only cases where this issue arises, where the search uncovered evidence of an offense more serious than the pre-search conduct. This bright-line rule thus subverts correct results by elevating a
barely-probative evidentiary fact to one of dispositive import, at the expense of a litany of other facts that directly bear on the matter.

The majority rule’s bright line can also lead to perverse results, whereas the rule advocated here does not suffer from the perversions or binds discussed in Part III.A. As discussed below, if a search properly follows the onset of an arrest that is not seen through to completion, it is untenable to invalidate such a search, precisely because it was valid at its inception. The majority rule’s refusal to judge the search from its inception puts officers in constitutional binds where a once-valid search might dissipate the probable cause needed to make an arrest, so that an officer is left with two unconstitutional choices: forego an arrest and invalidate the search, or make an unconstitutional arrest to legitimize the search. The minority rule thus not only cabins unconstitutional searches, but has the added benefit of sanctioning perfectly constitutional searches that the majority rule would invalidate and also avoids the constitutional binds created by the majority rule.

A. Applying the Rule: Officers

While some worry that courts would struggle to implement the minority rule, a critique I will return to, it is important to note that the greater need for administrability lies with the officers who must comply with Fourth Amendment rules.219 Fourth Amendment rules “ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged,” not “qualified by all sorts of ifs, ands, and buts.”220 The driving force behind Fourth Amendment bright lines is, almost invariably, providing clear and direct guidance to officers rather than yielding easy answers for courts.221

The test proposed here provides a model of clarity for officers to implement: if they have made or are making a custodial arrest—i.e., if they are intent on transporting an arrestee to the stationhouse for booking or have done so—then they may search incident to that arrest. If they are not making a custodial arrest or have not yet determined whether to do so, they may not. The rule can be reduced to a one-step flow-chart:

219. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (“[T]he object of implementing [the Fourth Amendment’s] command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing . . . .”).
220. Id. (citation omitted).
221. See id.; United States v. Robinson, 414 U.S. 218, 235 (1973) (creating bright-line rule permitting incident searches whenever there is an arrest because “officer’s determination as to how and where to search . . . is necessarily a quick ad hoc judgment . . . .”).
Search Incident to Arrest Flow Chart

There are no gray areas or conundrums in the rule. Officers confront many murky Fourth Amendment questions in the field—e.g., “Is there probable cause?”—but one thing they are never confused about is whether or not they are making a custodial arrest.222

But police officers will find no such guidance in the majority rule. The majority rule permits incident searches whenever (1) there is probable cause to arrest before the search and (2) an arrest ultimately follows. Assuming condition (1) is met, the permissibility of a search hinges on condition (2), but that is an unknown to the officer when determining whether to search. Officers might have very strong expectations about the matter, which should align with whether or not they intend to arrest, but probable cause to arrest might dissipate during the search. Alternatively, the suspect could escape, making the ultimate fact of arrest an unknown any time a search precedes the final steps in the custodial arrest process.

Police departments implementing the majority rule are most likely to instruct officers to search whenever there is probable cause to arrest, contra Knowles, knowing that there probably will be no suppression issue if no arrest follows the search because no criminal case will have been initiated.223 In those...
cases any Fourth Amendment violations owing to the lack of an ultimate arrest could thus be addressed only through civil remedies that will be extremely ineffectual in this context (more so than usual). Indeed, in the wake of the California Court of Appeal’s decision endorsing the majority rule in *Macabeo*— example 2 from the Introduction—that is precisely how officers were instructed to comply with that ruling. For example, in a police training video, an instructor stated:

[Probable cause] to arrest for an infraction justifies a search incident to arrest, under the Fourth Amendment. If the search yields evidence of a bookable offense, the suspect can be arrested for both the infraction and the bookable offense . . . [i]f nothing is found during the search, the suspect could be released from arrest, either on citation, or with . . . no further action . . .

The training video further emphasizes that what an incident “search yields will determine whether you book [the suspect] or release him on citation or with no further action.” While that is contrary to black-letter law and endorses searches that are unconstitutional under any view (whenever an arrest does not result), the majority rule encourages such blatant disregard of the Fourth Amendment.

By placing dispositive importance on whether a custodial arrest is ultimately seen through to completion, the predominant rule is both under- and over-inclusive. As has already been argued extensively, this rule is over-inclusive because it validates incident searches that were unconstitutional at their inception, like the three case examples summarized in the Introduction. But the rule is also under-inclusive, as it would treat perfectly reasonable incident searches conducted as part of an ongoing arrest as unconstitutional when the arrest is later abandoned or thwarted.

This sets up officers for constitutional binds wherein any action they take will be unconstitutional. Consider an officer who, after receiving a complaint of an in-progress burglary at a residence, arrives on the scene and finds a suspect attempting to pick the lock of the front door to an apartment. With probable cause to arrest, the officer restrains the suspect, declares “you’re under arrest,”

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224. See infra Part IV.A.
226. *Id.* at 5:59–6:06.
228. The facts here are modeled after *People v. Quarles*, 410 N.E.2d 497, 499 (Ill. App. Ct. 1980) (when police were informed by landlord that defendant lived in apartment, they should have ceased arresting him since they no longer had probable cause to believe that defendant had committed an attempted burglary).
and then searches him, uncovering something incriminating. Before he can proceed further, the landlord approaches and explains that the suspect is the rightful resident, and the suspect explains he had merely locked herself out. The officer is now in a constitutional bind under the majority rule: either continue with an arrest for which probable cause has dissipated in violation of the Constitution, or abandon the arrest and render the prior search unconstitutional for lack of an ultimate arrest. However he proceeds, the circumstances have evolved so as to commit the officer to a constitutional violation despite his having complied with constitutional commands at every step. Proponents of the majority rule cannot condone the search if the arrest is abandoned, as the subsequent arrest is the linchpin of their test; abandoning it here forces them to concede that the intention to arrest is what really matters.

Likewise, an escape from an arrest-in-progress will render a previously justified incident search unlawful under the majority rule if it is applied faithfully. Where an officer has probable cause to arrest a suspected killer and uncovers the murder weapon in the course of an incident search, but is then overpowered in an ensuing struggle during which the suspect escapes, there is no ultimate arrest. The search is invalid under the majority rule, but compliant with the rule advanced in this Article. The majority rule can take no shelter in the fact that the officer’s intention was to make a custodial arrest prior to the suspect’s escape, because the rule’s disavowal of officer intentions is the rule’s very raison d’être.

In short, the best the majority rule could hope for is to instruct officers exactly as the minority rule would instruct them: search only if there is probable cause to arrest and you have decided to make an arrest. But unlike with the minority rule, faithfully following that command will still commit officers to constitutional violations beyond their control.

229. See id.; see also United States v. Lopez, 482 F.3d 1067, 1073 (9th Cir. 2007) (discussing how in some instances “there may initially be probable cause justifying an arrest, but additional information obtained at the scene may indicate that there is less than a fair probability that the defendant has committed or is committing a crime. In such cases, execution of the arrest or continuation of the arrest is illegal.”); Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988) (“As a corollary . . . of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.”); BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986) (“The continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause.”).

230. While there will likely be no criminal case and thus no evidence subject to suppression in the example posited, the officer remains exposed to a civil suit for his violation under 42 U.S.C. § 1983. And regardless of the remedy, it is damning enough that the majority rule would commit this officer to a constitutional violation despite his faithful adherence to constitutional principles at every step.

231. It is very unlikely that the majority rule would be faithfully applied in circumstances like this, but that is so much the worse for the rule that it would break under the weight of its own consequences.
B. Applying the Rule: Courts

The rule advocated here offers superior guidance to officers, and it poses no special difficulties for courts. Yet, courts espousing the majority view have fretted: what does it mean, exactly, for an arrest to be under way, and how will courts know, precisely, when an officer intends to arrest? It is an unfounded concern. A custodial arrest is under way whenever an officer decides to make a custodial arrest and takes some step toward that end. That baseline rule is easy to grasp. Courts can determine whether an arrest was under way from the universe of evidence available to them. Perhaps there will be hard cases, but they will be few and far between and will result from conflicting evidence on the issue, rather than some abstraction in the rule.

1. Ease of Administration for Courts

Whether an officer was making an arrest at the time of an incident search is typically an easy post-hoc determination for courts. In fact, there is only a narrow set of cases in which the issue is likely to be disputed—capturing every case in which the issue has arisen to date—namely, cases where the pre-search probable cause was for an offense minor enough to cast doubt upon whether it would have led to an arrest on its own, but where a search turned up evidence of a more serious crime.

If the pre-search offense is sufficiently serious, like the distribution of a sizable quantity of illicit narcotics as in Rawlings, then—absent some admission by an officer that they were not making an arrest—it would be exceedingly difficult to doubt that an arrest was under way or was at least inevitable at the time of the search. Conversely, even if the pre-search offense is minor, if the search itself does not turn up evidence of a more serious offense but an arrest results anyway, it is quite likely that an arrest was under way or inevitable at the time of the search, owing to the lack of changed circumstances.

Note the distinction between an arrest being under way and being inevitable, though it is of little consequence: If an arrest was under way prior to the search, the search is proper as incident to arrest and its fruits may be admitted; if an arrest was not under way but was inevitable at the time of the search, then the search was not a proper search incident to arrest but the inevitable discovery doctrine should nonetheless function to admit the fruits of the search, albeit through a different mode of analysis.

232. See, e.g., Lewis, 147 A.3d 236, 246 (D.C. 2016) (“It is unclear when an arrest should be viewed as under way or what it would mean to require that the officers intend to arrest the suspect . . . .”).

233. A caveat: when pre-search probable cause is slim and the search uncovers evidence that firms it up, that would pose a change in circumstances that should prompt a court to consult other evidence regarding whether an arrest was under way at the time of the search.

234. For instance, if the officer has no intention of making an arrest at the time of their search but discovers an arrest warrant for the suspect during a routine post-search warrant check, then the arrest could be seen as inevitable though not ongoing at the time of the search. Cf. Nix v. Williams, 467 U.S. 431, 444 (1984) (“If the prosecution can establish by a preponderance of the evidence that the
That leaves a small universe of contestable cases, in which the circumstances provide cause to believe no arrest was under way at the time of the search, owing to the triviality of the pre-search offense and the relative severity of the offense uncovered through the search. In these cases, a handful of factors are likely to be key in determining whether an arrest was under way at the time of the search. While this is not an exhaustive list, one could expect a handful of factors to routinely play a prominent role in settling the matter: (a) officer testimony, (b) legality of the arrest, (c) compliance with local orders, (d) history of citations versus arrests for the offense, (e) history of carrying out arrests in general, (f) handcuffing, and (g) other on-scene manifestations of an intent to arrest. The three examples provided in the Introduction are helpful in considering these factors.

a. Officer Testimony

An officer’s testimony about whether they were intent on arresting or mid-arrest at the time of the search is a critical factor. It is likely to be of dispositive significance where the officer testifies that they were not making an arrest at the time of their search, as occurred in examples 1–3 from the Introduction (Macabeo, Diaz, Lewis) as well as in Reid and Taylor. But where the officer testifies that he was making an arrest at the time of the search, such testimony is so obviously self-serving that it ought to be viewed skeptically, at least until the other factors below are considered. While one commentator has worried that any rule inquiring about an officer’s subjective intentions runs “the risk of making dispositive the likely self-serving representations of police, who risk losing a ‘good bust’ if the evidence . . . is barred,” that concern is overblown.

First, there is at least some critical mass of officers who would not offer false sworn testimony simply for the sake of preserving a “good bust.” But more importantly, and for anybody who doubts that first point, courts are typically not so naïve as to credit officer testimony without regard to its self-serving nature, and officers are typically not so unabashed as to claim they were making an arrest when all the circumstances suggest otherwise and they are liable to be exposed through cross-examination. To the extent people disagree with either point, their qualms lie not with this particular rule, but with the universe of Fourth Amendment litigation. An officer can just as easily fabricate, and a court can just as easily credit, testimony that the suspect consented to the search, or testimony about what was in plain view prior to his search. The entire enterprise of Fourth Amendment litigation depends heavily on officer testimony and on courts and litigants identifying truths and falsehoods therein.

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235. See supra note 200.
236. Logan, supra note 18, at 432.
The rejoinder might be that an intent to arrest, unlike consent to search or items in plain view, is a purely internal mindset that is not capable of being contradicted by other evidence (like video or audio evidence from the scene that might contradict whether consent to search was given, for example). That is wrong. Skilled defense counsel have a litany of weapons to expose an officer who dishonestly claims that he was intent on making an arrest at the time of his search, as detailed in the next subsections.

Finally, it is no detriment to the rule advocated here that there will be times where an officer falsely claims he was making an arrest at the time of the search and that falsity cannot be exposed through cross-examination or contrary evidence. In those instances, the rule advocated here fares no worse than the majority rule which renders irrelevant whether an arrest was under way at the time of the search. In short, determining whether an arrest was under way at the time of a search is not an acutely vexing question in the universe of Fourth Amendment issues. And while there will be some errors, that is far better than the majority rule which commits itself to getting it wrong in every case by rendering the lack of an arrest at the time of the search an utter irrelevancy.

b. **Legality of the Arrest**

Many minor criminal offenses are not arrestable under state law, as was the case in *Macabeo*, outlined in the Introduction’s example 2. While an arrest and incident search for such an offense may nonetheless be constitutional, per *Moore*, the illegality of an arrest under state law is strong evidence that an officer was not intent on making an illegal arrest for such an offense. Likewise, many state laws mandate arrest for certain offenses; while such a law may not be dispositive as to whether an officer was making an arrest, it provides fairly strong evidence on the point. In short, where state law dictates whether or not an arrest be made for a particular offense, officers can at least be presumed to be abiding by those mandates.

Whatever interests an officer has in seeing evidence admitted and seeing her arrests result in successful prosecutions, she has at least as strong an interest in not having made an illegal arrest, which could subject her to professional repercussions, disciplinary actions, and impeachment in the particular case as well as future cases.

c. **Compliance with Local Orders**

Similar to state laws proscribing arrests for certain minor offenses are local police orders and trainings prohibiting, discouraging, encouraging, or mandating such arrests. For example, the District of Columbia’s local police force issues general orders or “standard operating procedures” providing officers and the

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238. Mandatory arrest statutes are most popular in the domestic abuse setting. *See, e.g.*, OR. REV. STAT. § 133.310(3) (2016) (mandating arrest for violation of certain classes of protective orders, usually involving domestic abuse).
public with an exhaustive list of offenses that may be disposed of using an on-scene citation as opposed to a custodial arrest.\textsuperscript{239} Such orders are often non-binding so that they may be flouted with little legal consequence, but they still supply various inferences (that officers were not making an arrest where a citation is encouraged, or that they were making an arrest where a citation is discouraged or barred altogether).

d. History of Citations Versus Arrests for the Offense

Another probative factor of whether the officer was intent on arresting for the pre-search offense is her history in dealing with like offenses. Consider \textit{Diaz}, outlined in the Introduction’s example 1, where the officer had issued approximately fifty citations for the possession of an open container of alcohol offense, but had never made an arrest for that offense alone. With that backdrop, it would have been near impossible to credit her testimony if she had claimed intent to make an arrest prior to her search.

e. History of Carrying Out Arrests in General

Aside from the officer’s history in dealing with the particular pre-search offense at issue, her historical practices in carrying out arrests might carry considerable weight. As explained in the next subsection, it is most officers’ general practice to handcuff a suspect prior to conducting an incident search; likewise, it is some officers’ general practice to make a proclamation of arrest prior to conducting an incident search. Where a particular officer has shown an adherence to one of these practices in the past—which might be gleaned through cross-examination or vetting her arrest reports—then the fact that a search preceded such formal indicators of arrest may be strong evidence that it was a pre-arrest search, rather than one incident to arrest.

This factor, far more than the four previously discussed, will often be impractical to bring to bear on the Fourth Amendment question. It is no easy task for defense counsel to compile or review any particular officer’s past arrest reports in advance of a suppression hearing, and it is a severe understatement to say it would be an uphill battle to have the court compel such records as informing the suppression issue. But I include this factor here because defense counsel can at least inquire of the officer at a suppression hearing about her practices, and a reasonably prudent officer would likely worry about being impeached with past reports if she is not forthright.

Note that each of the five factors discussed thus far, which can act as strong and sometimes dispositive evidence of the critical question, will not be accounted for under the purely objective approaches advanced to date by proponents of the minority rule. The arresting officer’s testimony, the legality of the arrest, and the officer’s past arrest practices are not going to be manifested

\begin{footnotesize}
239. See \textsc{Metro Police Dep’t, Standard Operating Procedures: PD Form 61D (Violation Citation)} (2005), \url{https://go.mpdconline.com/GO/SOP_05_02.pdf} [\url{https://perma.cc/HT98-BX8F}] (listing approximately 200 violations resolvable through on-scene citation, many of them criminal).
\end{footnotesize}
through on-scene indicators. The objective approach suffers greatly from its exclusion of these important factors when determining when an arrest is under way. There are, however, plenty of indicators of an ongoing arrest that are manifested on-scene, as provided below.

\[ \text{f. Handcuffing} \]

It is a near-universal practice to handcuff an arrestee prior to conducting an incident search of him or his vehicle. The leading empirical study on this point, which surveyed police department training materials and practices, found that there was “[n]ot one regulation, training bulletin, or other piece of information [that] indicated that officers were directed or advised to . . . allow the arrestee to stand unrestrained where he was when arrested while officers conduct a search of the area around him.”\(^{240}\) The reasons are obvious enough: in virtually every conceivable circumstance it will be in the officers’ best interests, and the interests of safety, to secure and handcuff a suspect prior to searching her or her surroundings.\(^{241}\)

There may be situations, such as when there is reason to worry that the suspect is armed, where it makes sense to conduct a frisk or pat-down before handcuffing, as permitted by the separate Fourth Amendment exception for Terry frisks. But as for a probing incident search of a suspect, their surroundings, and possibly their vehicle, the advisability of handcuffing and securing the suspect before such a search is evident. In fact, officers are consistently trained that “[a]ll occupants should be removed from a vehicle before searching it” and that suspects “should not be permitted to stand near the vehicle while it is being searched.”\(^{242}\) Justice Scalia made this same point in his Gant concurrence, writing that the means of conducting an incident search (at least of a vehicle) “that is virtually always employed” is “ordering the arrestee away from the vehicle, patting him down in the open, handcuffing him, and placing him in the squad car” before searching.\(^ {243}\)

\textit{Lewis}, outlined in the Introduction’s example 3, illustrates the point. In that case, officers testified that they were not intent on arresting Brittney until they found a gun in the course of a vehicle search. But sans that testimony, the fact that she was not being arrested at the time of the search was evident from the fact that Brittney was left unsearched, “unrestrained and standing outside the car” as an officer searched it.\(^ {244}\) Had the officers testified that they were intent on

\begin{footnotesize}
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\item \(^{241}\) Such instances surely exist: I posited one, \textit{supra} page 143, regarding the sleeping arrestee, and the Court in \textit{Powell} suggested it confronted another (though I doubt it) set of “circumstances [where], in the interest of safety, [police need] to conduct a search before making the arrest,” \textit{United States v. Powell}, 483 F.3d 836, 841 (D.C. Cir. 2007). But as a general rule it is hard to see any benefit in leaving an arrestee unrestrained while he and his surroundings are searched.
\item \(^{242}\) Moskovitz, \textit{supra} note 240, at 675.
\item \(^{243}\) \textit{Arizona v. Gant}, 556 U.S. 332, 351–52 (2008). Recall that a mere pat-down for weapons may be a valid Terry frisk.
\item \(^{244}\) \textit{United States v. Lewis}, 147 A.3d 236, 252 (D.C. 2016) (Beckwith, J., dissenting) (internal quotation marks omitted).
\end{enumerate}
\end{footnotesize}
arresting Brittney prior to their search, they would have been skewered on cross-examination, as there is no conceivable reason why they would have left her unrestrained in proximity to the vehicle if that had been their intent.\(^{245}\)

g. Other On-Scene Manifestations of an Intent to Arrest

While handcuffing is the most obvious and frequently employed pre-search indication of arrest, there are others. The proclamation of arrest—“you are under arrest”—commonly marks the inception of an arrest.\(^{246}\) It is also a common practice in many jurisdictions to call for backup before placing a suspect under arrest.\(^{247}\) The absence of these markers will often provide strong reason to doubt an officer’s bare testimony that he was making an arrest absent some corroborating evidence. Further on-scene indicators of a custodial arrest include: whether the suspect was secured in a police car, how long the suspect was detained, and whether officers drew their weapons.

This list is not meant to be exhaustive by any means; it surely omits some important indicators of arrest. It is meant only to rebut the notion that courts will be left to simply take an officer’s word for it when he claims (or disclaims) an intent to arrest preceding a search. It is further meant, with subparts (a) through (e), to rebut the notion that courts should be limited to consideration of objective on-scene manifestations of an arrest when making this critical determination.

2. When Multiple Officers Have Divergent Intentions

While the above Section argues that it is not especially difficult to know when an officer is engaged in an arrest, and that there are a litany of factors that inform that question, it has been suggested that, in at least one circumstance, an officer’s intentions do not perfectly align with reality. In *Lewis*, the majority commented that “it is unclear how [the minority rule] would be applied if different officers on scene had different intents.”\(^{248}\)

That concern is minor. If an officer is engaged in a custodial arrest and searches incident to it, the search is proper regardless of some other officer’s intentions. If an officer is not engaged in a custodial arrest and nonetheless searches, that search is not a proper incident search even if some other officer on the scene is intent on arresting (unless they have taken some step to effectuate the arrest, such as handcuffing the suspect, proclaiming arrest, calling for backup, or conducting a search of their own, provided the court determines such steps were in fact in furtherance of an ongoing arrest). In short, if the arrest

\(^{245}\) Importantly, while the vast majority of proper incident searches will be preceded by handcuffing, not all searches preceded by handcuffing will be incident searches, as handcuffs may be used to secure a subject in mere investigative stops. *See* Muehler v. Mena, 544 U.S. 93, 100 (2005).

\(^{246}\) Moskovitz, *supra* note 240, at 665 (recounting the US Park Police General Orders regarding arrests, indicating handcuffs and proclamation of arrest should precede any search).

\(^{247}\) *See, e.g.*, Best v. Berard, 837 F. Supp. 2d 933, 940 (N.D. Ill. 2011) (“Naperville police policy strongly encourages the presence of two officers for any arrest, and Best has offered no basis upon which a reasonable jury could find it unreasonable for Boogerd to call for backup.”).

\(^{248}\) *Lewis*, 147 A.3d at 246.
process is under way, then an incident search is proper; if not, then not, regardless of the non-searching officer’s intentions.

It also bears mentioning that at least two independent doctrines may be useful when resolving issues that arise from multiple on-scene officers with divergent intentions. One, discussed briefly above, is the inevitable discovery doctrine, which would permit the government to argue that even if the searching officer was not engaged in an arrest at the time of a search, some other officer with overriding authority was intent on making an arrest so that a lawful incident search would have taken place absent the unconstitutional one that did take place.\(^\text{249}\)

The “collective knowledge” doctrine may also come into play when officers are coordinating an arrest process.\(^\text{250}\) Without getting into the intricacies or breadth of this doctrine, suffice it to say that when one officer acts upon another officer’s directive (e.g., “Search that suspect and their vehicle”), the factual basis for that directive may be imputed from the directing officer to the responding officer. In other words, if Officer A is intent on making an arrest and directs Officer B to conduct a search, then we can say either (a) that Officer A has begun the arrest process through Officer B, or (b) Officer B began the arrest process because we can impute Officer A’s intention to arrest to Officer B. Either analytical route leads to the conclusion that an arrest was under way and the incident search was proper.\(^\text{251}\)

Moreover, even if the rule proposed here could conceivably lead to difficult questions for courts, that should not be a significant detriment. The majority rule’s ease of application for courts might be a trivial point in its favor, but it cannot make up for the fact that it consistently yields poor results misaligned with the justifications of the search incident to arrest exception.

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\(^\text{249}\) Where two officers have divergent intentions, they could always testify as to whose intentions were likely to win out (perhaps the higher-ranking officer, or maybe just the more determined one). Where it is unclear whose intentions would have borne out, then the government will have fallen short of its burden of proving inevitable discovery.

\(^\text{250}\) See United States v. Hensley, 469 U.S. 221, 232 (1985) (finding that a local police department’s investigatory stop of a vehicle was reasonable because the police relied on a “wanted flyer,” which a neighboring police department issued to surrounding departments and which was based on articulable facts supporting a reasonable suspicion that the person committed an offense); Whiteley v. Warden, 401 U.S. 560, 568–69 (1971) (holding that an officer, who acted on a radio bulletin that an out-of-county sheriff disseminated, made an unlawful investigatory stop because the basis of the warrant that formed the content of the radio bulletin was faulty).

\(^\text{251}\) One other passing critique of the minority rule made by the Lewis majority was that “it is unclear” under the minority rule whether an incident “search would be lawful if the police plan to transport the suspect to the station to then be released on citation,” rather than booked on charges. Lewis, 147 A.3d at 246. That is a bizarre critique because it can be lobbed just as easily at the majority rule: if an ultimate custodial arrest is required to satisfy the majority rule, does transfer to the police station for release on citation satisfy that condition? I doubt it—the Chimel and Gant concerns are minimal in that circumstance—but regardless of how one answers that open question, it remains open under both the majority and minority rules (and whatever answer one might supply for one rule should apply to the other).
IV.
THE POLICY IMPLICATIONS OF THE COMPETING RULES

As explained in Part III.A, one foreseeable (and actual) result of the majority rule is that jurisdictions adopting it will train officers that they may conduct a search whenever there is probable cause to arrest, be it for speeding, jaywalking, littering, or some other petty offense. They may add some further caveat: “Have a good hunch that the search might turn up something criminal,” or “Don’t search if the person appears to have the means to seek redress through litigation.” Part IV.A details how the majority rule is a glaring invitation for fishing expeditions and discriminatory policing.

Proponents of the majority rule often fire back that it is the minority rule, by demanding an arrest as a pre-requisite to search, that is more invidious, as officers will simply make more arrests to facilitate more searches. The point has intuitive appeal, but ignores the realities of resource constraints and thus does not withstand scrutiny, as explored in Part IV.B.

A. The Majority Rule Invites Fishing Expeditions and Discriminatory Policing

The majority rule instructs officers that whenever they have probable cause to arrest, they can search first, and decide whether to arrest later, depending on the fruits of the search. The practical import of that rule is enormous: if the only burden to conducting an incident search is probable cause to arrest, then officers will have little difficulty satisfying that precondition whenever they have a suspect who they would like to search.

Criminal codes abound with offenses so minor that, with minimal patience, officers should be able to articulate probable cause for some offense whenever the urge to search arises. Violations such as jaywalking, loitering, obstructing a sidewalk, littering, failing to obey a lawful order, walking a dog without a leash, riding a bicycle without a bell, speeding, and failing to wear a seatbelt are all arrestable offenses (at least in some jurisdictions), and the list of petty criminal offenses could go on for pages. Such minor infractions rarely result in

252. See, e.g., California Commission on Peace Officer Standards and Training, supra note 225 (probable cause “to arrest for an infraction justifies a search incident to arrest”).

253. In the District of Columbia, it is a criminal offense to stand on a sidewalk or public thoroughfare if it inconveniences or “incommodes” a passerby, D.C. Code § 22-1307 (2013), as actress Rosario Dawson recently discovered when she was arrested during a political protest last April. See Jayne O’Donnell, More Than 900 ‘Democracy Spring’ Protesters Arrested in D.C.—So Far, USA TODAY (Apr. 18, 2016), https://www.usatoday.com/story/news/politics/2016/04/16/hundreds-democracy-spring-protesters-arrested-dc/83123326/ [https://perma.cc/GP38-FZWK] (arrested for “crowding, obstructing, or incommoding”). It is also a crime to walk a dog without a leash or with a leash greater than four feet in length, 24 D.C. MUN. REGS. tit. 24, § 900.3–4 (2018).

254. See Atwater v. City of Lago Vista, 532 U.S. 318, 353 n.24 (2001) (referencing arrests for “riding a bicycle without a bell or gong” and “walking as to create a hazard”).
a custodial arrest. But if mere probable cause for such an offense justifies a search, then searches will be easy to come by.

Some officers report that "the average driver cannot go three blocks without violating some traffic regulation," and others recount that "[y]ou don’t have to follow a driver very long before he will move to the other side of the yellow line and then you can arrest and search him for driving on the wrong side of the highway." An industrious officer could thus identify scores of offenses during any given shift and take the time to search every single offender, under the majority rule. By casting such a wide net, and strategically picking targets—i.e., profiling—the officer may turn up evidence of a number of serious crimes through targeted fishing expeditions. The incentives under the majority rule are to search everybody who could be arrested, or at least everybody who fits a profile that gives the officer a hunch that evidence of more serious criminal wrongdoing might be uncovered by a search.

The majority rule thus invites investigatory searches upon a bare suspicion that they might turn up something—anything—provided there is pre-search probable cause for any offense. "That kind of fishing expedition for evidence of unidentified criminal activity . . . was the very evil the Fourth Amendment was intended to prevent." It also invites law enforcement to prey on the poorest, most disadvantaged members of society. Of course, such profiling will occur under either the majority or minority rule, but the majority rule enables much more of it.

It is difficult to pinpoint a precise number, but a substantial majority of police encounters involve minor “arrestable” offenses that are resolved short of a custodial arrest (through a warning, citation, or no reprisal). And in each of those circumstances, permitting a search-first and (possibly) arrest-later approach gives the officer a choice: is searching this person worth a brief amount of my time and the minimal potential for backlash if they seek redress? Given how little time it takes to conduct a search, the answer to that question will lie in


256. See Joel Samaha, CRIMINAL PROCEDURE 254 (10th ed. 2018) (collecting additional officer remarks to same effect).


258. See generally Papachristou v. City of Jacksonville, 405 U.S. 156, 168, 170 (1972) (putting “unfettered discretion . . . in the hands of the . . . police” to conduct warrantless searches “permits and encourages an arbitrary and discriminatory enforcement of the law”).

259. While a majority of police-citizen encounters arise from traffic violations, it is not so easy to identify what percentage of those traffic violations are criminal under pertinent state codes; indeed, it is sometimes quite difficult to parse out criminal from civil infractions at all, as the Supreme Court learned during the oral argument of Ricci v. Arlington Heights, discussed supra note 125, a case the Court dismissed as improvidently granted when it discovered that the “operating a business without having first obtained a license” violation was likely civil and not criminal in nature. See id. at 63–64.

260. See generally EITH & DUROSE, supra note 5, at 1, 8 (majority of police citizen encounters are traffic stops of which only 2.6 percent end in arrest); see also Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (arrests constitutionally permitted for any criminal offense, no matter how minor).
the officer’s estimation of how likely he is to uncover evidence of a more serious crime and, if he does not, how likely his target is to seek recourse. That calculus invites racial profiling and encourages law enforcement to prey on the poorest, most disadvantaged members of society, who are least likely to seek vindication of their rights if briefly intruded upon.

The civil remedies available for unconstitutional searches are minimal. Because the intrusion of a search is fleeting in nature and unlikely to cause injuries or other serious harm, monetary damages for unlawful searches—in the rare event there are any—are typically nominal and not worth the time and cost of bringing a suit. Further, punitive damages that might otherwise accompany deliberate violations of constitutional rights are a non-starter in a majority regime, because an officer can always (truthfully) assert that he did not deliberately violate the Constitution when he searched, as he expected an arrest might follow, depending upon the results of the search.

Even some of the most invasive searches imaginable, such as strip searches and body-cavity searches, have routinely been deemed worthy of nothing more than nominal damages when conducted illegally.261 Barring a class action,262 few people are willing to undertake the time, energy, and expense of a civil suit that results in little to no damages, and those select few willing to bring suits to vindicate a principle tend to have greater monetary resources.

B. The Misplaced Concern of Routine Arrests to Justify Searches

Proponents of the majority rule largely do not deny the above policy implications of their rule, but instead offer a counterpunch. They argue that the minority rule, by insisting upon an arrest as a prerequisite to search, creates a perverse incentive for officers to simply make more arrests in order to justify their searches.263 The most frequently repeated version of this argument came from Justice Traynor more than sixty years ago:

[1] [I]f the officer is entitled to make an arrest on the basis of information available to him before he searches, and as an incident to that arrest is entitled to make a reasonable search of the person arrested and the place where he is arrested, there is nothing unreasonable in his conduct if he makes the search before instead of after the arrest. [2] In

261. See In re Nassau Cty. Strip Search Cases, 742 F. Supp. 2d 304, 326–31 (E.D.N.Y. 2010) (reviewing cases involving illegal strip searches, virtually all of which involved awards for compensatory or nominal damages, and concluding that $500 was the appropriate remedy for an illegal strip search).

262. See, e.g., Bennett v. City of Eastpointe, 410 F.3d 810, 824 (6th Cir. 2005) (twenty-two African American plaintiffs collectively challenged routine police searches of cyclists “riding double,” or two to a bike, without making arrests, and court held that “[f]or an officer to conduct a search incident to arrest, there must be an actual arrest.”); Menottie v. City of Seattle, 409 F.3d 1113, 1153 (9th Cir. 2005) (class action suit on behalf of protesters at the 1999 World Trade Organization conference: “We decline to extend the doctrine of ‘search incident to arrest’ to give protection for a warrantless search or seizure when no arrest is made.”).

fact, if the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. [3] On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person, house, papers, or effects suffers no more from a search preceding his arrest than it would from the same search following it.  

Justice Harlan’s *Sibron* concurrence drew a similar point: “There is no case in which a defendant may validly say, ‘Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.’”  

The most fundamental problem with these arguments, embodied in Justice Traynor’s first and third sentences above as well as in Justice Harlan’s assertion, is their unstated assumption that officers always (or even typically) arrest whenever they have probable cause to do so. However well-founded that assumption was when Justice Traynor made his argument six decades ago, it is far from true today. As discussed above, police-citizen encounters most frequently involve petty criminal offenses for which an arrest would be an aberration. There are serious resource constraints that preclude making a full custodial arrest of every minor offender, though no such constraints preclude officers from conducting routine searches. Custodial arrests are time- and resource-consuming, with an average arrest requiring several hours of an officer’s time and, by some estimates, as many as 13.5 hours. Compare that to the average warrantless search, which takes mere minutes.  

Whatever perverse incentive the minority rule might create to arrest in order to enable a search is vastly outweighed by serious practical constraints precluding routine arrests for petty offenses. It is simply not an option to divert scarce resources from preventing and detecting serious crimes toward arresting every minor offender in the hopes that a few will be found with contraband. Indeed, prosecutorial authorities are quick to make this very point.  

As the United States noted in *Diaz*, “Officers also will not simply arrest everyone who otherwise would be issued a citation in order to enable searches incident to those arrests. Resources are too limited.” And as Virginia pointed out in *Moore*, “it is in the interest of police to limit petty-offense arrests, which

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266. Rachel A. Harmon, *Why Arrest?*, 115 Mich. L. Rev. 307, 319 (2016) (“[A]n arrest averages several hours of officer time, by some estimates as little as four, but by others as much as 13.5 hours.”).
carry costs that are simply too great to incur without good reason.\textsuperscript{269} Similarly, a survey of New York Police Department patrol officers noted the strong disincentives to making full custodial arrests, pointing out that officers engage in “arrest-avoidance to escape the ordeal of arrest processing.”\textsuperscript{270} The survey concluded that a majority of patrol officers had made one or fewer arrests in the preceding month, and just one-fifth of them had made three or more arrests in that timeframe.\textsuperscript{271}

Aside from resource constraints, serious political constraints weigh against making custodial arrests for petty offenses. Police departments and individual officers rely, to a great extent, on the goodwill of the communities they police to effectively investigate crimes. Such goodwill dissipates when arrests are made for petty offenses. As one police chief summed it up while denouncing so-called “zero-tolerance” policing, arrests for petty offenses create a perception that officers are “locking up my grandmother for having an open container of alcohol, and then all your cops are at the station processing the arrest, and the criminals take over our neighborhood.”\textsuperscript{272} At bottom, requiring officers to make an arrest as a prerequisite to a search forces them to weigh their interests in conducting a search versus the weighty resource and political constraints that accompany full custodial arrests; permitting searches upon mere probable cause to arrest removes any serious constraint on such searches.

The slightly different point made in sentence two of Justice Traynor’s argument, that a pre-arrest search may inure to an arrestee’s benefit because it may dissipate probable cause to arrest, is both fanciful and no advantage of the majority rule.\textsuperscript{273} Where pre-search probable cause exists, it is the aberrant case where a search dissipates probable cause. The best-case scenario for a suspect tends to be that a search comes up empty, which more usually leaves the probable cause calculus unaffected rather than dissipated.\textsuperscript{274}

\textsuperscript{269} See Brief of the Petitioner at 45, Virginia v. Moore, 553 U.S. 164 (No. 06-1082), 2007 WL 3276495 (quoting \textit{Atwater}, 532 U.S. at 352).

\textsuperscript{270} EDITH LINN, ARREST PROCESSING IN THE NYPD: A STUDY OF TECHNICAL & MANAGERIAL DYSFUNCTION 7 (2009), http://www.theiacp.org/portals/0/pdfs/Arrest-Processing-in-the-NYPD.pdf [https://perma.cc/HEJ7-TDF6].

\textsuperscript{271} \textit{Id. at 9.}

\textsuperscript{272} Q&A by C-SPAN with Cathy Lanier, supra note 19, at 37:53–39:27.

\textsuperscript{273} See People v. Simon, 290 P.2d 531, 533 (Cal. 1955) (“[I]f the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested.”). I do not mean to attribute some failing to Justice Traynor’s argument on this point, as he was speaking generally, not with regard to the majority rule whose proponents have since co-opted his argument. See, e.g., Conboy v. State, 843 A.2d 216, 224 (Md. Ct. Spec. App. 2004) (quoting Justice Traynor’s second sentence above).

\textsuperscript{274} I do not mean to overstate the point, as there are cases in which a fruitless search should act to dissipate probable cause. But such cases are rare, particularly from an officer’s perspective, which is what matters to Justice Traynor’s point. For example, consider an officer who sees what he reasonably believes to be a hand-to-hand drug transaction, so he searches the suspect and finds nothing of interest (no money or drugs); there is certainly a viable argument that probable cause existed pre-search but not post-search, as the fruitless search affects the probable cause calculus by revealing a lack of evidence where one would expect to find it if, in fact, the suspect had just engaged in a hand-to-hand drug
Moreover, there is no advantage of the majority regime if probable cause dissipates during a search. Requiring an arrest to be under way prior to conducting an incident search does not commit an officer to following through with the arrest if there is a genuine change in circumstances, i.e., if probable cause to arrest dissipates. So long as she was truly engaged in an arrest prior to the search, nothing in the minority rule commits her to seeing an illegal arrest through to completion. Rather, it is the majority rule that commits an officer to an unconstitutional arrest (or an unconstitutional search) if probable cause dissipates in the course of a pre-arrest search, putting them in the constitutional bind discussed in Part III.A.

One potential response to the points above is that, under the minority rule, officers might simply feign a custodial arrest, search, and then if the search comes up empty, backtrack on the arrest and release the suspect. That would, seemingly, avoid the resource and political constraints of an arrest while still permitting routine searches. But such a subterfuge could be easily exposed. As detailed in Part III.B, there are all manner of evidentiary facts from which a judge can discern whether an arrest was, in fact, under way at the time of the search, including the arresting officer’s past practices. If an officer feigns arrests for petty crimes—e.g., handcuffs the suspect and proclaims an arrest—but frequently abandons such arrests whenever an incident search fails to uncover evidence of a more serious offense, that can be exposed through defense investigation and cross-examination. Moreover, that some especially enterprising officer could conceivably circumvent the rule is no reason to abolish it and thereby give broad license for all others to do so.

transaction. An officer in the field is unlikely to see it that way, however—even putting confirmation biases aside—as such transactions are often done piecemeal: money is exchanged with one individual who then picks up his drugs from another (who carries only the amount to be exchanged while leaving the remainder in a hidden stash). She is likely to think that the pre-search probable cause persists, so that the supposed advantage articulated in Justice Traynor’s second sentence above is superficial.

275. There are many reasons an officer might abandon an arrest in progress, ranging from dissipation of probable cause to receiving a radio run calling her to a more serious emergency. So long as the evidence backs up her account—i.e., she can point to a genuine and significant change in circumstances leading to the change of heart—then any incident search conducted as part of an arrest-in-progress, though later abandoned, would be valid. It will no doubt be a tough task for an officer to claim that a search absent a subsequent arrest was in fact part of an arrest in progress. The lack of arrest would tend to speak for itself. But just because any such claims should be viewed skeptically and require strong proof that there was in fact a course reversal from arrest to non-arrest, that does not mean such a showing could never be made in the extraordinary case.

276. See, e.g., David Moran, The New Fourth Amendment Vehicle Doctrine: Stop and Search Any Car at Any Time, 47 VILL. L. REV. 815, 823 (2001) (“[N]othing in Knowles would prevent an officer from arresting a minor traffic violator, searching her car, and then, if the search turned out to be unproductive, giving her a ‘break’ by letting her go with a citation or a warning.”).

277. Police departments would be remiss to affirmatively train their officers to engage in such an unconstitutional subterfuge lest the municipalities themselves be held liable. See generally Monell v. Dep’t of Soc. Servs., 436 U.S. 658, 694 (1978) (finding that municipalities could be sued when a government’s policy causes a constitutional violation). Note that this is only an unconstitutional subterfuge in jurisdictions following the minority rule. Under the majority rule, the legality of the search is an unknown at the time it is made, so that departments could in good faith train officers to search upon
CONCLUSION

This Article has focused on one of the most important live issues in Fourth Amendment jurisprudence: the propriety of pre-arrest incident searches and how courts should be evaluating them. It discredits two doctrinal errors that have resulted in an overwhelming and misguided split favoring the majority rule.

First, this Article reinvigorates the principle that Fourth Amendment intrusions must be judged at their inception in all instances and shows how that principle can resolve this persistent dispute. The principle is well established and non-controversial, but it has been neglected and ignored in this context. The principle has lost its force, likely because post-intrusion facts often matter in Fourth Amendment litigation. But it is critical to restrict post-intrusion facts to their proper usage, relevant only to remedies or as mere evidence of pre-intrusion facts. Those uses do not undermine the inviolability of the principle that the legal inquiry must be focused on an intrusion’s inception.

Second, the Article discredits the view that Whren and its progeny were based in some evidentiary concern. Whren and its progeny were not based in evidentiary concerns at all. Rather, they reject officer intentions as irrelevant only to the probable cause inquiry, not to separate Fourth Amendment questions unrelated to probable cause such as the decision to make a custodial arrest. Once the first principle is revitalized and the second exposed as a misconception, the issue of pre-arrest incident searches becomes straightforward: look to the moment of the search, and judge, based on all available evidence, whether an arrest was under way. If there was an ongoing arrest, an incident search was proper; but if there was no arrest under way, then any purported incident search was improper.

This Article also assigns a fair share of blame to the proponents of the minority rule who, to date, have consistently retreated to objective tests that are both unworkable, and who concede the central theoretical point that officer intentions do not matter to the Fourth Amendment. That has become a broad and popular refrain for jurists and commentators in all manner of Fourth Amendment litigation, but it is an oversimplification. The relevance of officer intentions depends on the particular question, and officer intentions do matter to the Fourth Amendment in various contexts. Searches incident to arrest are one such context.

mere probable cause, with the constitutionality of such a search dependent upon some later arrest decision. See, e.g., California Commission on Peace Officer Standards and Training, supra note 225 (probable cause “to arrest for an infraction justifies a search incident to arrest”).
I have sought to clarify these principles also because they are crucial to many Fourth Amendment inquiries beyond pre-arrest incident searches. The oft-overlooked principle that intrusions must be judged at their inception can be used to resolve all manner of Fourth Amendment disputes. Likewise, it has become a reflex for commentators and jurists to disavow inquiry into officer intentions when resolving Fourth Amendment questions, despite the relevance of these intentions to a host of Fourth Amendment issues.

For these reasons, courts should permit pre-arrest incident searches only where a custodial arrest has at least been initiated at the time of the search.