

ARTICLES

PROBABLE CAUSE, CONSTITUTIONAL REASONABLENESS, AND THE UNRECOGNIZED POINT OF A “POINTLESS INDIGNITY”

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A police officer needs probable cause to make an arrest. But, almost always, he needs no more. In this way, an arrest may be constitutionally reasonable even if it is entirely unreasonable by any plausible moral or instrumental measure. Indeed, the Court has upheld even an arrest that it termed a “gratuitous humiliation” and a “pointless indignity.” In this Article, I examine what accounts for the Court’s prevailing methodological approach to Fourth Amendment reasonableness, and I evaluate whether the Court’s reasoning withstands scrutiny. Specifically, I trace the Court’s methodology back to a particular conception of the legality principle, whereby formalistic measures are crafted around suspicion of guilt and are treated as exclusive. I offer contrary reasons, however, to conclude that the legality principle’s chief purpose (as a safeguard against the arbitrary exercise of executive discretion) is better served by a two-ply constitutional test that would demand both probable cause and general reasonableness. That is, I submit that probable cause might work best as a special supplement to otherwise-relevant qualitative considerations (and not as a special substitute). To support this claim, I focus narrowly on one particular qualitative consideration that probable cause has almost completely cannibalized. That consideration is dignity. It is not my purpose, however, to see the Fourth Amendment reoriented

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around dignity. Dignity matters, but neither it nor probable cause (nor anything else) is all that matters. I rely upon dignity as a placeholder for any of the many qualitative considerations that a quantitative proxy for constitutional reasonableness has unjustifiably ignored.

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INTRODUCTION

A police officer needs probable cause to arrest a suspect.¹ But once he has it, he typically needs no more.² It does not matter that the offense in question is one that almost never results in arrest or is punishable only by a small fine (or some other nonjail penalty). Pursuant to the Fourth Amendment, if a “fair probability” exists that the suspect is technically legally guilty, then the arrest is constitutionally reasonable—full stop.³

1. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (“If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

2. If the arrest takes place in the suspect’s home, then the officer also needs an arrest warrant. *Payton v. New York*, 445 U.S. 573, 576 (1980).

3. *Illinois v. Gates*, 462 U.S. 213, 238 (1983) (defining probable cause).

The Court announced this categorical rule in *Atwater v. City of Lago Vista*, a case involving the arrest of a young mother for failing to wear a seatbelt or to secure her two small children as she drove slowly through her hometown.⁴ In affirming the lower court's dismissal of Gail Atwater's civil suit, the Court accepted her allegations that the arresting officer, Bart Turek, had berated her and frightened her kids, and that he had refused (without reason) to issue her a summons or citation in lieu of full-custodial arrest. Indeed, the Court called the arrest a "gratuitous humiliation[]" and a "pointless indignity."⁵ Nevertheless, it held the seizure constitutionally reasonable for the sole reason that Officer Turek had probable cause.⁶

Over the years, several of my criminal procedure students have puzzled over how an arrest that served "no discernible state interest" could be at once a "pointless indignity" and also constitutionally reasonable.⁷ My standard quip: the Constitution provides no protection against obdurate jerks and mean-spirited bullies. But why not? In this Article, I unpack that question and examine whether the Court's reasoning withstands scrutiny. In doing so, I intend to do much more than comment on a case. Instead, I use the *Atwater* decision as a starting point to examine the Court's prevailing Fourth Amendment methodology in law enforcement cases and to reveal the types of considerations that its methodology does and does not take into account. Specifically, when it comes to arrests, the Court has relied exclusively upon probable cause—a "quantitative standard of confidence"—to stand in for a "qualitative . . . balancing of interests."⁸ In this way, the Court has adopted a measure of technical legal guilt as a hard proxy for constitutional reasonableness. All else is read out.

In the pages that follow, I focus on one particular qualitative consideration that the Court's quantitative approach to constitutional reasonableness has missed almost completely. That consideration is dignity. Here, I recognize that I am about to wade into turbulent, hot waters. Dignity is no facile concept. To the contrary, moral philosophers, jurisprudes, theologians, and medical ethicists have devoted careers to the question of dignity's meaning.⁹ The term is taken to

4. *Atwater*, 532 U.S. at 323-24.

5. *Id.* at 346-47.

6. *Id.* at 354.

7. *See id.* at 360 (O'Connor, J., dissenting) (internal quotation marks omitted).

8. Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1644, 1656 (1998) (comparing qualitative and quantitative approaches to the Fourth Amendment); *see also* Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1471 (1985).

9. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 172 (2011) ("Dignity's increasing popularity . . . does not signal agreement about what the term means."); *see, e.g.*, HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS (2008); Y. Michael Barilan, *From Imago Dei in the Jewish-Christian Traditions to Human Dignity in Contemporary Jewish Law*, 19 KENNEDY INST. ETHICS J. 231 (2009); Aurel Kolnai, *Dignity*, 51 PHILOSOPHY 251 (1976); Christopher

be intuitive or structured, foundational or devoid of content.¹⁰ Indeed, it is not even clear whether and how other concepts—like decency, indignity, or degradation—correlate with dignity.¹¹ Nor is it obvious whether dignity constitutes a value, principle, right, or something else entirely.¹²

All the same, a sophisticated definition of dignity may not even matter to the analysis. As Oscar Schachter observed, we need not fully theorize dignity to realize when it is offended: “[I]t has been generally assumed that a violation of human dignity can be recognized even if the abstract term cannot be defined. ‘I know it when I see it even if I cannot tell you what it is.’”¹³ More to the point, the *Atwater* Court *knew it when it saw it*: the Court labeled the arrest at issue a “pointless indignity” and a “gratuitous humiliation” (which I understand to mean a humiliation unsupported by nonarbitrary reasons). With respect to dignity, then, we can take the Court *at its word*. In any event, even the narrowest substantive conception of dignity is necessarily offended by *some* conduct. That is, for any positive or negative definition, there exists a transgression. But, after *Atwater*, that transgression—whatever it may be (and no matter how egregious)—almost certainly is unregulated by the Fourth Amendment.

McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L L. 655, 656-64 (2008).

10. See Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & William A. Parent eds., 1992) (describing dignity as “the premier value underlying the last two centuries of moral and political thought”); Suzy Killmister, *Dignity: Not Such a Useless Concept*, 36 J. MED. ETHICS 160, 160 (2010) (describing “the usefulness of dignity as a guiding principle in medical ethics”); Ruth Macklin, *Dignity Is a Useless Concept*, 327 BMJ 1419, 1419 (2003) (“[A]ppeals to dignity are either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding of the topic.”); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT’L L. 848, 849 (1983) (“[Dignity’s] intrinsic meaning has been left to intuitive understanding, conditioned in large measure by cultural factors.”); Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200, 201 (2012) (“[D]ignity may not necessarily be a load-bearing idea. . . . [But what I mean by the term] is a sort of *status*-concept.”); Gloria Zúñiga, *An Ontology of Dignity*, 5 METAPHYSICA, no. 2, 2004, at 115, 115 (“The idea that dignity is inherent to the human person resonates as intuitively true, yet we have been unable to adequately articulate a common-sense definition of dignity that is simple and clear.”).

11. Peter Allmark, *Death with Dignity*, 28 J. MED. ETHICS 255, 255 (2002) (“‘Dignity’ appears to have two words that function as opposites, ‘undignified’ and ‘indignity’ . . . , neither of which seem to function as a pure antonym . . .”).

12. For my part, I employ different labels whether I am talking about, on the one hand, dignity as a general idea or a moral value, or, on the other, dignity as a principle that is (or ought to be) expressed, implicitly or explicitly, in positive law.

13. Schachter, *supra* note 10, at 849 (footnote omitted); see also Henry, *supra* note 9, at 188 (“Dignity is not a fixed category, but rather a series of meanings that share a Wittgensteinian family resemblance.”); Jeremy Waldron, *Cruel, Inhuman, and Degrading Treatment: The Words Themselves* 9-10 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 08-36, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1278604 (“Just because a word or phrase is evaluative and hence contestable does not mean that we might not gain from reflecting upon its meaning.”).

It is not my claim, however, that dignity is or ought to serve as a foundational or exclusive Fourth Amendment principle. I maintain only that dignity ought constitutionally to *count for something*.¹⁴ And, if dignity counts constitutionally for something, then a *gratuitous* humiliation, by its very nature, cannot pass Fourth Amendment muster because *nothing remains to count against it*. On this reading, dignity matters to a Fourth Amendment balance, but neither it nor probable cause (nor anything else) is *all* that matters. In this way, dignity is just a placeholder for any of many qualitative considerations of principle (think, for instance, proportionality, fairness, autonomy, and much more) or policy (think, for instance, public safety, order, and welfare, and much more) that a quantitative and legalistic conception of constitutional reasonableness has unjustifiably ignored.¹⁵

But why do I focus on dignity as opposed to another emblematic consideration? First, I focus on dignity because, normatively, I am committed to a conception of the Fourth Amendment that makes room for the value, and I wish to defend that position. Second, I focus on dignity because, descriptively, dignity is the value that *Atwater's* facts implicated squarely; and, as an expositional matter, the *Atwater* decision reveals (more so than most any other) just how constitutionally meaningless the Court has made any and all considerations beyond technical guilt accuracy. That is, if a gratuitously humiliating arrest is deemed reasonable with probable cause, then almost any arrest will be deemed reasonable with probable cause. Third, I focus on dignity because, positively, there emerges in the case law something of a fascinating juxtaposition between the Court's prevailing approach to (or disregard for) dignity and those small corners of Fourth Amendment doctrine where the value has continued to find traction. Specifically, in Fourth Amendment cases that are *not* about "crime-solving," the Court has endorsed an open-textured reasonableness balance and, more to the point, has recognized dignity as a principle relevant to that balance.¹⁶

14. In this way, I only subscribe partially to proposals to reconstruct constitutional doctrine around a dignity principle. See, e.g., Jeremy M. Miller, *Dignity as a New Framework, Replacing the Right to Privacy*, 30 T. JEFFERSON L. REV. 1, 11-12, 30 (2007); Jonathan Simon, *The Second Coming of Dignity 1* (Apr. 5, 2013) (unpublished manuscript) (on file with author) ("I would like to suggest that we . . . should replace [legality] (or rather supplement it) with another [principle] . . . which can be called the dignity principle."); cf. Criminal Procedure (Enforcement Powers—Arrests) Law, 5756-1996, § 1(b) (Isr.) ("The arrest and detention of a person will be in a manner that ensures maximum protection of his human dignity and rights.")

15. Here, I use the terms "principle" and "policy" in the Dworkinian sense. See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1067 (1975) ("Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal.")

16. *Maryland v. King*, 133 S. Ct. 1958, 1982 (2013) (Scalia, J., dissenting); see *infra* notes 146-53 and accompanying text (comparing *Atwater* with *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009)).

In sum, my contribution is, first, to reveal why—in the crime-solving (or, as I call it, law enforcement) context—the Court has dispensed with dignity specifically and reasonableness balancing more generally; and, second, to detail why the Court was at least somewhat wrong to do so. Of course, I am not blind to the advantages of rules (and likewise of structured standards). Indeed, it is because I recognize that the legality principle occupies a special place within the criminal law that I endorse probable cause as a necessary but not sufficient rule-like threshold.¹⁷ But, in the law enforcement context, the advantage of *stand-alone* dependence on probable cause is simply oversold. The Court’s prevailing approach has not successfully eradicated unregulated sovereign choice. To the contrary, the Court has just moved sovereign choice indoors—into a defined legal box.¹⁸ Within that box, the arresting officer remains almost free to pick and choose between probabilistic offenders and conventional enforcement means.¹⁹ That is, the Court has traded context not for consistency but for a safe harbor, within which equitably and legally alike offenders may be treated unlike.²⁰ In such circumstances, fair notice and other rule-of-law values are turned on their respective heads: police have notice of what they *may* do, but the public has little notice of what police *will* do or *won’t* do (or why). It is for this reason that the *Atwater* dissent warned that “[t]he per se rule that

17. John Jeffries offered a seminal description of the legality principle as it relates to criminal law and enforcement:

In the context of the penal law, it means that the agencies of official coercion should, to the extent feasible, be guided by rules—that is, by openly acknowledged, relatively stable, and generally applicable statements of proscribed conduct. The evils to be retarded are caprice and whim . . . and the unacknowledged reliance on illegitimate criteria of selection. The goals to be advanced are regularity and evenhandedness in the administration of justice and accountability in the use of government power.

John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 212 (1985).

18. Ronald F. Wright & Marc L. Miller, *Subjective and Objective Discretion of Prosecutors*, in CRIMINAL LAW CONVERSATIONS 673, 673 (Paul H. Robinson et al. eds., 2009) (“The law sets outer boundaries, but any administrative choice that falls within those boundaries is something distinct from law—call it discretion—because there is no law to apply.”); Austin Sarat & Conor Clarke, *Beyond Discretion: Prosecution, the Logic of Sovereignty, and the Limits of Law*, 33 LAW & SOC. INQUIRY 387, 389, 413 (2008) (“[T]he rule of law is replete with . . . places where law runs up against sovereign prerogative. In those places, law runs out, . . . law authorizes the exercise of a power that it does not regulate.”).

19. This claim is qualified, most notably, by the guarantee of equal protection and the prohibition against excessive force, both of which I discuss below in notes 58-60, 66-67, 100-04 and accompanying text.

20. In a separate project, I intend to focus less on the discretionary space *within* discrete legal boxes and more on the ability of police and prosecutors occasionally to operate outside of these legal boxes altogether (or, relatedly, to use one legal box as proxy for another) and thereby to extract a measure of rough justice. Josh Bowers, *Legality’s Limits* (Dec. 31, 2013) (unpublished manuscript) (on file with author); see also *infra* note 97 (discussing work in progress).

the Court creates has potentially serious consequences for the everyday lives of Americans.”²¹

The *Atwater* majority was comparatively sanguine. It took it on faith that there is no “epidemic of unnecessary minor-offense arrests.”²² But the dissent had it right. In the age of order-maintenance policing, arrests for nonjailable offenses are, in fact, quite common.²³ In New York City, for example, the New York City Police Department (NYPD) has processed hundreds of thousands of full-custody marijuana arrests, often on noncriminal charges that, upon conviction, prescribed only penalties “akin to . . . traffic ticket[s].”²⁴ Personally, I have represented hundreds of people for hopping turnstiles, possessing small amounts of marijuana, and stealing food to eat—charges that rarely result in jail time. I have represented individuals for the unlicensed sale of socks and t-shirts. I have represented sixteen-year-old girls for selling themselves. It is not my position that police officers should have declined all or most (or even many) of these arrests—only that arrests for such petty crimes depend on value judgments in ways that arrests for serious crimes do not.²⁵ And with such a

21. *Atwater v. City of Lago Vista*, 532 U.S. 318, 371 (2001) (O’Connor, J., dissenting) (emphasis omitted).

22. *Id.* at 321 (majority opinion) (noting the “dearth of [*Atwater*-like] horrors demanding redress”).

23. A number of scholars have devoted considerable attention to the millions of petty crime arrests that the *Atwater* Court largely ignored. See, e.g., Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117 (2008); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 101 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

24. Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORD. URB. L.J. 1043, 1064 (2013) (describing practice of “making a full custodial arrest for marijuana possession”); see also HARRY G. LEVINE & DEBORAH PETERSON SMALL, N.Y. CIVIL LIBERTIES UNION, *MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997-2007* (2008), available at http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf; Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race, and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 591 (2010) (“Although possession of small quantities of marijuana has been decriminalized in New York State since the late 1970s, arrests for marijuana possession in New York City have increased more than tenfold since the mid-1990s, and remain high more than 10 years later.”). Recently, changes in NYPD enforcement of marijuana law have led to a twenty-two percent decrease in low-level marijuana arrests, and the city has announced a new policy that those arrested for possessing small amounts of marijuana will not be held in custody overnight. In the words of Mayor Michael Bloomberg: “Right now, those arrested for possessing small amounts of marijuana are often held in custody overnight. We’re changing that.” *Bloomberg: Marijuana Arrests in NYC Will Mean a Desk Appearance Ticket, Not a Night in Jail*, HUFFPOST N.Y. (Feb. 14, 2013, 1:58 PM EST), http://www.huffingtonpost.com/2013/02/14/bloomberg-marijuana-arrest-nyc-ticket-not-jail_n_2687954.html; *High to Low: Marijuana Arrests Down 22 Percent*, NJ.COM (Feb. 16, 2013, 1:17 PM), http://www.nj.com/news/index.ssf/2013/02/from_high_to_low_nyc_marijuana.html. But, critically, such policy changes are executive prerogative. After *Atwater*, there is no constitutional limitation on arrest authority based on the severity of offense.

25. Cf. Cynthia Godsoe, *Punishing to Protect: The Pitfalls of Punitive Paternalism I* (Nov. 13, 2013) (unpublished manuscript) (on file with author) (“[There is] a puzzle in the

large sample size—and under prevailing institutional conditions that favor arrest (in certain neighborhoods more than others)—it is inevitable that some not-insignificant number of low-level, full-custodial arrests reflects very bad choices (or worse).²⁶ Ultimately, then, the most extraordinary aspect of *Atwater* may be only that the arrestee was not the “usual suspect” but rather was a soccer mom who hailed from an affluent bedroom community in the suburbs of Austin, Texas.²⁷

A final qualification before I dispense with the preliminaries: I am agnostic about the degree to which Fourth Amendment doctrine even has the capacity to shape arrest practices. Police behavior probably responds more directly to state law, internal policy, institutional culture, and, of course, individual whim. I do not realistically hope, therefore, to offer some top-down reform designed to eliminate or even significantly reduce state-imposed gratuitous humiliations. I intend only to call out the Court for uncritically tolerating such indignities—for categorically accepting as reasonable an arrest unsupported by good reason (or any reason). In this vein, my project is perhaps more polemic than prescription. I am motivated by the deeply held belief that a categorical approach to constitutional reasonableness (which focuses exclusively on a quantitative measure of guilt accuracy) inevitably operates to drain the human context from a domain where an understanding of the complete story is particularly important—that is, in the coercive and stigmatic domain of the criminal law. Boiled down, my claim is that guilt is not everything—that there may be arbitrariness beyond the suspicionless (or suspicion-lite) arrest.

The Fourth Amendment may be incapable, independently, of providing an effective bulwark against what Justice Douglas called “the casual arrogance of those who have the untrammelled power . . . to seize one’s person.”²⁸ But the Amendment is made most impotent when it is stuck on the sidelines, left pow-

criminal law: why are girls the victims of statutory rape when they have sex below the age of consent, but are the offenders under prostitution laws if they are paid for the act?” (italics omitted)). I have argued elsewhere that police officers and prosecutors have no special claim to superior competency when it comes to making value judgments based on qualitative considerations (which I have labeled the exercise of equitable discretion). See *infra* notes 214-20 and accompanying text; see also Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655 (2010). To the contrary, there are sound reasons to conclude that legal professionals—by virtue of their positions—are particularly bad at equitable discretion (especially in petty misdemeanor cases where moral considerations tend to predominate over legal considerations and where, concurrently, police officers are driven to arrest reflexively). See generally *id.* at 1688-720.

26. See *infra* notes 68-72 and accompanying text; *infra* Part V.B; see also Josh Bowers, *Grassroots Plea Bargaining*, 91 MARQ. L. REV. 85, 97-98 (2007) (discussing localized order-maintenance policing); Bowers, *supra* note 25, at 1693-96 (discussing arrest incentives); Katla McGlynn, *The 9 Most Ridiculous Reasons Kids Have Been Arrested*, HUFFPOST COMEDY (Mar. 26, 2012, 2:11 PM), http://www.huffingtonpost.com/2010/02/10/the-9-most-ridiculous-rea_n_455434.html.

27. See Bowers, *supra* note 23, at 1124-32 (discussing usual-suspects policing).

28. *Mapp v. Ohio*, 367 U.S. 643, 671 (1961) (Douglas, J., concurring).

erless to do or say anything legally meaningful about an officer who acts concurrently with probable cause and “casual arrogance.” In any event, there is expressive value to even a purely aspirational declaration that a constitutional order does not abide pointless indignities and gratuitous humiliations. Thus, I do come to offer a cautious prescription of sorts. To wit, I sketch a hybridized—or two-ply—reasonableness test, whereby an arrest must be supported by *both* probable cause *and* general reasonableness (with a fair, but not full, measure of deference to the arresting officer). Beyond that, I leave the details to organic development. The common law method may be messy, but the fact that it is messy is no sufficient reason to adopt a defective proxy.

In Part I, I detail the Court’s prevailing methodological approach to the regulation of law enforcement discretion—an approach that is animated by the Court’s particular conception of the legality principle. In Part II, I explore the remaining (and few) doctrinal pockets where the Court has retained a qualitative approach to Fourth Amendment reasonableness, and I describe the reasons for the Court’s willingness to endorse a balance in only these contexts. In Part III, I explain what I mean by dignity as a protection against gratuitously humiliating state action, and I briefly examine the positive role dignity has played in public and private law. In Part IV, I imagine a reasonableness test that would use legalistic measures, like probable cause, only as *supplements to*, rather than *substitutes for*, qualitative evaluation. In Part V, I offer reasons to conclude that my two-ply reasonableness test remains consistent with the rule of law, even as it accommodates dignity and other relevant qualitative considerations of policy and principle. In doing so, I rehearse persuasive insights and arguments familiar to the overcriminalization literature that conventional criminal justice—particularly in the context of petty crime enforcement—has produced expansive safe harbors for the relatively unfettered exercise of “sovereign prerogative.”²⁹ Finally, in Part VI, I respond to anticipated objections that the prevailing doctrinal approach has accommodated dignity sufficiently already.

I. QUANTITATIVE CONSTITUTIONAL REASONABLENESS

By the *Atwater* Court’s reasoning, legal guilt cannibalizes dignity (and almost all else). Here is the critical text:

There is no dispute that Officer Turek had probable cause to believe that Atwater had committed a crime in his presence. She admits that neither she nor her children were wearing seatbelts Turek was accordingly authorized (not required, but authorized) to make a custodial arrest *without balancing costs and benefits*³⁰

29. Sarat & Clarke, *supra* note 18, at 391, 395.

30. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (emphasis added). Recently, in *Virginia v. Moore*, the Court reaffirmed the rule: “[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence, *the balancing of*

This is not to say that the Court was wholly unwilling to balance the interests, but only that it refused to do so in a constitutionally meaningful way. It offered rhetoric to the effect that Atwater's "confinement clearly outweigh[ed] anything the City [could] raise against it specific to her case."³¹ But it concluded that this moral "claim to live free of pointless indignity" was simply not a legal claim.³² The Court thought it unfortunate that Officer Turek had behaved badly, but held that Gail Atwater suffered no constitutional injury thereby.³³ In other words, the Court *desired* measured discretion but did not *require* it.

Judge Jerome Frank once called such judicial handwringing "a ritualistic verbal spanking," as the court offers "deprecatory words . . . [that] are purely ceremonial" with "an attitude of helpless piety."³⁴ In *Atwater*, however, it is not so obvious that the Court's rhetoric was entirely ceremonial. To the contrary, the opinion sent a message loud and clear: qualitative considerations are constitutionally immaterial, and moral judgments are beside the constitutional point. In this Part, I examine what accounts, descriptively, for the *Atwater* Court's methodological perspective.

A. *Criminal Law Exceptionalism*

"The law of crime is special."³⁵ The stigma and hard treatment that flow from criminal culpability are unmatched by even the most serious forms of civil liability.³⁶ No other body of law has the power to declare an otherwise-free person a convict and thereafter deprive him of his liberty (and even his life). Such solemn legal consequences are appropriately thought to command an "especial need for certainty"³⁷—that is, to demand "that the agencies of official

private and public interests is not in doubt. The arrest is constitutionally reasonable." 553 U.S. 164, 171 (2008) (emphasis added).

31. *Atwater*, 532 U.S. at 347.

32. *Id.*

33. *Id.* at 346-47 (finding also that Officer Turek "exercis[ed] extremely poor judgment").

34. *United States v. Antonelli Fireworks Co.*, 155 F.2d 631, 661 (2d Cir. 1946) (internal quotation mark omitted), *quoted in* *Darden v. Wainwright*, 477 U.S. 168, 206 (1986) (Blackmun, J., dissenting).

35. Louis Michael Seidman, *Points of Intersection: Discontinuities at the Junction of Criminal Law and the Regulatory State*, 7 J. CONTEMP. LEGAL ISSUES 97, 97 (1996); see Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOC. REV. 699, 700 (1967) ("[C]rime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality . . .").

36. See Seidman, *supra* note 35, at 97-100; see also JOEL FEINBERG, *The Expressive Function of Punishment*, in *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95, 98 (1970) ("[B]oth the 'hard treatment' aspect of punishment and its reprobative function must be part of the *definition* of legal punishment.").

37. Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215, 256 (1987) (internal quotation mark omitted); see also H.L.A. HART,

coercion should, to the extent feasible, be guided by rules” as a means to promote “regularity and evenhandedness in the administration of justice and accountability in the use of government power.”³⁸

In the twentieth century, the result of this perspective was that—even as the rest of law witnessed a “revolt against formalism”³⁹—the law of crime became *more* rule-bound. Within this singular domain, an “‘old fashioned’ . . . formalist world view” won out against “realism’s lessons.”⁴⁰ It is not my intention to argue that this still-dominant “old fashioned” fidelity to formalism is anachronistic. The question is knotty. Later in the Article, I just begin to touch on it.⁴¹ My immediate point is descriptive: that the criminal law *is* exceptional, and that the Court’s comparatively formalistic approach to the regulation of law enforcement discretion is a product of that understanding. That is, the Court has endorsed formalism as a special criminal law principle—the *legality principle* (which Herbert Packer once called “‘the first principle’ of the criminal law”).⁴²

At a minimum, the legality principle is taken to require that legislators codify offenses *ex ante*, and that police and prosecutors confine their collective attention to the “catalogue of what has already been defined as criminal.”⁴³ In this way, the legality principle is designed to operate as “an important prophylaxis against the arbitrary and abusive exercise of discretion in the enforcement of the penal law.”⁴⁴ *This is the chief purpose of the legality principle* (and

Legal Responsibility and Excuses, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28, 44-47 (2d ed. 2008); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CALIF. L. REV. 1, 39 (1974) (discussing law’s long tradition of “strict adherence to rules”).

38. Jeffries, *supra* note 17, at 212.

39. MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11, 15-18 (5th prt. 1964).

40. Seidman, *supra* note 35, at 98, 103 (“[A]lthough realism’s lessons for criminal law seem obvious, formalism continues to dominate criminal jurisprudence.”).

41. See *infra* Parts IV.B, V.A. Specifically, I do not address squarely the value of formalism, but I do argue that—consistent with the rule of law—a criminal justice system appropriately may honor formal constraints on executive discretion as *supplements to* (rather than *substitutes for*) qualitative constraints.

42. Jeffries, *supra* note 17, at 190 (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968)); see also Bittner, *supra* note 35, at 700 (“[C]rime belongs wholly to the law, and its treatment is exhaustively based on considerations of legality . . .”).

43. PACKER, *supra* note 42, at 90; see also Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 186-89 (1937).

44. RICHARD J. BONNIE ET AL., CRIMINAL LAW 81 (3d ed. 2010); see also PACKER, *supra* note 42, at 88-90; William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2038 (2008) (noting that the premise of a legality doctrine like vagueness doctrine is to protect defendants and constrain the state); *infra* notes 97, 103, 168-77, 244, 277, 313 and accompanying text (discussing the legality principle and its purposes); cf. Frederick Schauer, *The Miranda Warning*, 88 WASH. L. REV. 155, 165 (2013) (explaining that a “slippery standard” may be insufficiently protective of defendants in criminal cases).

recognition of that purpose is critical to comprehending the shortcomings of the Court's prevailing Fourth Amendment approach).

In constitutional terms, the most obvious expression of the legality principle is the due process requirement that the legislature define substantive criminal law with precision sufficient to provide notice to the public and enforcement criteria to authorities.⁴⁵ If the state has failed to legislate with adequate clarity, then the statute in question is vague and invalid (at least as applied).⁴⁶ Of course, the constitutional test for vagueness is a standard and not a rule (just as probable cause is a standard and not a rule), but it is a standard with far more structure than the historical common law practice (practically, a norm) of measuring criminal culpability "not by any quirks of law" but by reference only to shared abstract notions of general moral blameworthiness.⁴⁷ This, then, is what Mark Kelman had in mind when he observed that the "void-for-vagueness . . . doctrine[] . . . resonate[s] in the rule-respecting liberal tradition."⁴⁸

B. *Legality, Guilt Accuracy, and Positional Authority*

But what does all of this have to do with probable cause? The Fourth Amendment's probable cause requirement resonates in the very same rule-respecting tradition. More directly, it operates in tandem with other legality doctrines, like the aforementioned prohibition on vague statutes. Together, these two constitutional requirements delineate the formal bounds of when and whether the state can act (and when, conversely, it must stand down). Vagueness doctrine is designed to establish the parameters of legal guilt, and

45. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[A] penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

46. See *id.*

47. William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 MICH. L. REV. 893, 910 (1978) (quoting GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 297 (1969)); see *id.* (explaining that eighteenth-century juries were considered to be "good judges of the common law of the land" and were instructed "to do justice between the parties not by any quirks of the law . . . but by common sense as between man and man" (alteration in original) (quoting Letter from James Sullivan to Elbridge Gerry (Dec. 25, 1779) (on file with the Massachusetts Historical Society); WOOD, *supra*, at 297) (internal quotation marks omitted)); Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 994 (1932) (observing that, historically, the measure of culpability was "general moral blameworthiness"); see also Josh Bowers, *Mandatory Life and the Death of Equitable Discretion*, in *LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY?* 25, 27-28 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

48. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 18, at 207, 212.

probable cause is designed to ensure that the state can establish sufficiently the *empirical fact* of legal guilt.

Consider the following uncomplicated hypothetical (to which I later return): a police officer wishes to use the criminal law to ban camera-equipped cell phones from public restrooms. First, the officer must rely upon a sufficiently precise criminal statute that proscribes such conduct. Second, before the officer may make an arrest, he must have probable cause to believe that a particular suspect has violated the statute in question. The first inquiry necessarily entails some (but not any particular degree of) consideration of the second: legality's liberal promise would ring hollow if legislatures had only to shape criminal culpability, but police thereafter could act without much evidence of it. Together, the doctrines serve to define legal guilt and to promote its accurate application.⁴⁹

Simply, both doctrines are legality doctrines—a form of formalism with technical guilt accuracy at its center. According to this perspective, contextual inquiries are considered incompatible with (and generally must cede to) more structured inquiries.⁵⁰ In practical terms, this translates into a hard doctrinal commitment to suspicion of guilt whenever and wherever this quantitative measure is plausible. That is, suspicion of guilt is made not just a *core* constitutional measure; it is made *the complete* constitutional measure. This, then, explains how the *Atwater* Court could have concluded coherently that the arrest was a “gratuitous humiliation” and a “pointless indignity” but also that it was constitutionally reasonable.

And, significantly, *Atwater* is hardly unique. To the contrary, rule-like Fourth Amendment proxies (often anchored to probable cause) are so common that one prominent commentator even diagnosed the Court with “bright line fever.”⁵¹ By way of example, as long as a police officer has probable cause to

49. For another discussion of this hypothetical, compare Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, a Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 150-54 (2012), with Dan Markel, *Making Punishment Safe for Democracy: A Reply to Professors Bowers, Cahill & Duff*, 1 VA. J. CRIM. L. 205, 207-21 (2012).

50. See RONALD JAY ALLEN ET AL., COMPREHENSIVE CRIMINAL PROCEDURE 90 (3d ed. 2011) (noting a jurisprudential trend toward legal accuracy as a principal constitutional value and discussing applicable cases); Josh Bowers, *Fundamental Fairness and the Path from Santobello to Padilla: A Response to Professor Bibas*, 2 CALIF. L. REV. CIRCUIT 52, 56 (2011), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1044&context=clrcircuit> (“When it comes to contemporary constitutional *trial* procedure, accuracy is the prevailing coin of the realm; fundamental fairness is an afterthought.”). Justice Scalia is a particular champion of this perspective. See, e.g., Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 589 (1990) [hereinafter Scalia, *Assorted Canards*] (arguing that evaluative considerations “must [be] subordinate[d] . . . to the law”). See generally Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) [hereinafter Scalia, *The Rule of Law*].

51. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 260 (1984); see, e.g., *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (“In determin-

support an arrest, he is categorically authorized to search the arrestee's entire person (above or below clothing), even if the officer has no reason to believe evidence of that crime (or any other) will be found on the person—indeed, even if the officer's only reason for the search is to humiliate or degrade the arrestee.⁵² Likewise, as long as an officer has “probable cause to believe contraband or evidence is contained” within a vehicle, he is categorically authorized to search all of its component parts.⁵³ Finally, probable cause for arrest may also trigger routine jailhouse body-cavity searches and the collection of DNA samples.⁵⁴

There are of course sound justifications for these searches and seizures (just as there are sound justifications for criminal arrests)—to wit, public and officer safety, evidence gathering and preservation, and, more generally, the efficient administration of criminal law and justice. To be sure, nothing I say in the pages that follow is intended to call into question the many good reasons for almost any type of law enforcement search or seizure. I ask only whether probable cause ought to be considered a sufficient trigger or proxy—that is, whether probable cause *is reason enough*. The Court's methodology suggests that it is. The Court has made probable cause the touchstone and not some set of qualitative considerations. Accordingly, when the Court uses terms such as “humiliation” and “indignity,” it expresses moral disapproval only.

ing what is reasonable under the Fourth Amendment, we have given great weight to . . . the need for a bright-line constitutional standard.”); *see also* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 888 (2009) (“Fourth Amendment doctrine is replete with rule-like *presumptions of reasonableness* for generically defined fact patterns . . .”).

52. *See* United States v. Robinson, 414 U.S. 218, 235 (1973).

53. *California v. Acevedo*, 500 U.S. 565, 580 (1991).

54. *Maryland v. King*, 133 S. Ct. 1958, 1980 (2013) (holding that DNA collection is a “legitimate police booking procedure” when police arrest a suspect based on probable cause that the suspect committed a “serious offense”); *Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510, 1520-21, 1523 (2012) (holding body-cavity searches of even misdemeanor detainees constitutional); *see also King*, 133 S. Ct. at 1989 (Scalia, J., dissenting) (“Make no mistake about it: As an entirely predictable consequence of today's decision, your DNA can be taken and entered into a national DNA database if you are ever arrested, rightly or wrongly, and for whatever reason.”).

Probable cause likewise defines the scope of a prosecutor's charging and bargaining authority. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”); *see also Brady v. United States*, 397 U.S. 742, 749-51 (1970) (holding that a capital charge, “authorized by law,” did not affect the voluntariness of a guilty plea); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 258 (2011) (discussing *Bordenkircher* and noting that “[t]he fairness of the charge was irrelevant” and “[t]he only question . . . was its formal legality”); *infra* notes 60, 279 and accompanying text (discussing prosecutorial charging authority). Indeed, the Court has even held that the existence of probable cause forecloses a suit for malicious prosecution. *Hartman v. Moore*, 547 U.S. 250, 265-66 (2006).

Put differently, we may say that the Court has regulated discretion “positionally” and not morally.⁵⁵ In *Atwater*, this meant that Officer Turek had the power to perform all acts within the scope of his *position* even if the act in question deviated—by any folk or theoretic measure—from a plausible claim to moral authority.⁵⁶ That is, Turek acted reasonably as long as he acted *like a police officer*. This logic underlies the *Atwater* Court’s somewhat curious emphasis on the conventional nature of the act of arrest. Specifically, the Court distinguished *exceptional* police practices—such as the use of excessive force—from *conventional* police practices: “[T]he question [is] whether a search or seizure is ‘extraordinary’ *Atwater*’s arrest was . . . no more ‘harmful to . . . privacy or . . . physical interests’ than the normal custodial arrest.”⁵⁷

But the problem in *Atwater* was not that there was anything *unusual* about *the act* of arrest itself. To the contrary, the problem was that there was something unusual about *this act* of arrest—an arrest for a fine-only seatbelt offense. The Court sidestepped that question entirely by asking only about the action and not also about the broader objective context (or the officer’s subjective impulse). By comparison, consider the only police practices that the Court has subjected to Fourth Amendment regulation even in the presence of probable cause (and a warrant or applicable warrant exception). Specifically, the Court has prohibited excessive force and (typically) unannounced forced entries into homes to execute warrants.⁵⁸ Additionally, in an isolated case, the Court barred a prosecutorial effort to compel surgery to recover evidence.⁵⁹ As compared to *Atwater*, each of these contexts involved *extraordinary* acts and practices—or, at least, ordinary acts and practices carried out by extraordinary means (and not just for extraordinary reasons).

Simply, extraordinary acts and practices—not ordinary arrests—exceed positional authority. And, consequently, for Fourth Amendment purposes, an officer does his job well enough as long as he does only that which falls within his job description (whatever his motivation or perspective). He may have no good reason for his actions. Indeed, he may have only bad reasons. But probable cause means never having to give a reason.⁶⁰ This jurisprudential fact flows

55. See A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 13-14, 16-18 (1979); Bowers, *supra* note 49, at 141 (discussing positional duty and obligation).

56. Cf. Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 *WAKE FOREST L. REV.* 211, 223-27 (2012) (discussing social science studies about lay perceptions of reasonable police conduct).

57. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (fourth and fifth alterations in original).

58. *Wilson v. Arkansas*, 514 U.S. 927, 929-30 (1995) (addressing unannounced entries); *Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (addressing excessive force).

59. *Winston v. Lee*, 470 U.S. 753, 755 (1985).

60. See ALLEN ET AL., *supra* note 50, at 580 (“[T]he legality of a search or seizure does not depend on why the officer carried it out.”). Significantly, prosecutors enjoy the same

naturally from the well-established (and, I would argue, misguided) rule that subjective intent is immaterial to Fourth Amendment analysis.⁶¹ But it reflects something more beyond that. Specifically, the *Atwater* Court refused even to ask whether an objectively reasonable officer would have acted likewise. Again, it was the *act* that mattered to the Court and not the *actor* or his *motivation*. The Court made the act the exclusive object of analysis.

And, on this score too, *Atwater* is not unique. Consider *Whren v. United States*.⁶² In that case, the Court not only refused to take into account the subjective motivation of narcotics officers (who had used a traffic infraction as a pretext to stop suspected drug traffickers); it also refused to consider that an objectively reasonable officer, “acting reasonably,” would *not* have made the stop “for the reason given.”⁶³ Here, then, we discover that the expression “acting reasonably” means two different things to the Court: that is, an officer may act unreasonably (in a nonconstitutional sense) in reference to his problematic reasons for acting; but, contemporaneously, he may act reasonably (in a constitutional sense) in reference to the act itself (as long as that act is supported by probable cause).⁶⁴ And a traffic stop is an undeniably ordinary police act. Hence, the pretextual stop was an unquestionably constitutional seizure.

Analyzed together, *Whren* and *Atwater* announce a unified rule that runs the seizure gamut. *Whren* involved a police decision to escalate a nonseizure into a traffic stop; *Atwater* involved a police decision to escalate a traffic stop into a full-custodial arrest. In tandem, the decisions authorize an officer with probable cause to initiate a seizure *and* to pick and choose between conventional types of seizure.⁶⁵

deference. See *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (“[T]he accused is not ‘entitled to judicial oversight or review of the decision to prosecute.’” (quoting *Gerstein v. Pugh*, 420 U.S. 103, 119 (1975))); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (describing probable cause as the measure of prosecutorial authority); see also *supra* note 54 and accompanying text (discussing prosecutorial charging authority); *infra* note 279 and accompanying text (same).

61. See *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (“An action is ‘reasonable’ under the Fourth Amendment, regardless of the individual officer’s state of mind, ‘as long as the circumstances, viewed *objectively*, justify [the] action.’” (alteration in original) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))); *Whren v. United States*, 517 U.S. 806, 814 (1996) (“[T]he Fourth Amendment’s concern with ‘reasonableness’ allows certain actions to be taken in certain circumstances, *whatever* the subjective intent.”).

62. 517 U.S. 806.

63. *Id.* at 810.

64. See *id.* at 817 (determining that the constitutionality of an officer’s actions is “not in doubt where the search or seizure is based upon probable cause”).

65. Significantly, for a traffic stop, reasonable suspicion would have been sufficient as well. See *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (noting that the reasonable suspicion standard applies to “brief investigatory stops of persons or vehicles that fall short of traditional arrest”); see also *infra* notes 98-99 and accompanying text (discussing reasonable suspicion).

Of course, subjective motivation is not always immaterial. Equal protection dictates that even facially neutral state action is unconstitutional if it is intended to discriminate against a protected class.⁶⁶ But this constitutional rule only underscores the descriptive point: equal protection is designed to regulate out of existence certain *always*-bad moral reasons. When it comes to *sometimes*-bad reasons (like the decision to arrest for morally neutral petty crime), a criminal justice system faces a choice between regulating with particularity and regulating not at all. The Court has opted to regulate not at all.⁶⁷

Return, then, to the officer who wishes to keep public restrooms free of camera-equipped cell phones. Imagine that he discovers a sufficiently precise statute on point. Now come two patrons: a young mother, waiting to field an urgent call from her child's doctor; and a shifty lurker, waiting to snap a picture. We all know whom the officer should pursue and whom he should let pass. Both individuals are technically guilty in the legal sense, but we nevertheless hope and expect that the officer will have the wisdom to arrest the lurker and disregard the mother. The consensus is that such exercises of equitable discretion are appropriate and even desirable.⁶⁸ When it comes to frequently violated petty crimes, police and prosecutors are expected to decline some number of legally well-supported arrests and charges, because not all legal breaches are normatively appropriate occasions for criminal enforcement.⁶⁹ Indeed, the failure to appropriately exercise such discretion is often considered a lack of humility or at least bad craft.⁷⁰ But, again, there is no constitutional remedy for even obvious hubris or humiliation. In the presence of probable cause, it is a

66. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Except, of course, in the very few cases in which strict scrutiny is satisfied. See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944).

67. See *Whren*, 517 U.S. at 813 (“[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”); *STUNTZ*, *supra* note 54, at 121 (“As long as their decisions are not racially motivated . . . police officers . . . have unreviewable discretion to decline to arrest or prosecute offenders.”).

68. See MORTIMER R. KADISH & SANFORD H. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 75 (1973) (arguing that executive exercises of particularistic discretion are “widely regarded by responsible sources as both inevitable and desirable”); Bittner, *supra* note 35, at 702 (“[D]ecisions not to make arrests often are based on compelling reasons.”); Bowers, *supra* note 25, at 1663-64; *infra* note 272 and accompanying text.

69. See Bittner, *supra* note 35, at 710 (“[I]t is the rare exception that the law is invoked merely because the specifications of the law are met.”); Bowers, *supra* note 25, at 1662-66; cf. KADISH & KADISH, *supra* note 68, at 82 (“[I]t is widely accepted that a vital part of the prosecutor’s official role is to ‘determine what offenses, and whom, to prosecute,’ even among provably guilty offenders . . .” (internal quotation marks omitted)).

70. See Bittner, *supra* note 35, at 711 (“[T]o arrest someone *merely* because he committed some minor offense, is perceived as containing elements of injustice.”).

matter of sovereign choice whether the normatively innocent mother will be subjected to the “moral injury” of pointless arrest.⁷¹

Now, there may be more to the story. There may be some reason why the arresting officer would turn his attention to the mother and not the lurker. But, again, probable cause precludes reason giving. In the final analysis, an officer with probable cause is a reason unto himself.

II. QUALITATIVE CONSTITUTIONAL REASONABLENESS

But does my descriptive claim prove too much? That is, does accuracy really matter above all else? For instance, what should we make of the exclusionary rule (the conventional criminal law remedy for a Fourth Amendment violation), which is said to be “truth-impairing” and is therefore necessarily oriented in a direction opposed to accuracy?⁷² To a degree, this critique holds—but only as far as it goes. A remedy is just a remedy, and, accordingly, fairness is no more than a second-order principle that is implicated only after a court has passed on the first-order (accuracy-oriented and legality-driven) determination of constitutionality.⁷³

The seemingly better objection is that there remain some Fourth Amendment contexts where open-textured balancing applies even to the first-order determination of constitutional reasonableness. Thus, I turn to those contexts in this Part.

A. *Peacekeeping Particularism*

The best positive example of an alternative Fourth Amendment model is the Court’s methodological approach to special needs or non-law-enforcement

71. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1662, 1666 (1992) (emphasis omitted); see also *supra* notes 19-21, 29-33; *supra* Part I.B; *infra* Part V.A. Significantly, Jean Hampton defined a “moral injury” as an “affront to the victim’s value or dignity.” Hampton, *supra*, at 1666 (emphasis omitted).

72. See, e.g., Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369, 1370-71 (1991) (internal quotation marks omitted).

73. Moreover, it may not even be correct to describe the exclusionary rule as oriented principally around fairness. To the contrary, the contemporary Court has recognized deterrence as the “sole purpose” of the exclusionary rule, whereas it previously had emphasized the manner by which the rule promoted also the integrity of the criminal justice system. Compare *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) (“The rule’s sole purpose . . . is to deter future Fourth Amendment violations.”), with *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (noting that “the imperative of judicial integrity” is another consideration of the exclusionary rule (internal quotation mark omitted)). It is possible to discern in this jurisprudential turn a methodological preference—even in the context of the exclusionary rule—for instrumental considerations (of which accuracy is one) over deontic values, such as integrity or fairness.

searches and seizures. What do I mean by special needs or non-law-enforcement searches and seizures? As Justice Thomas once observed: “Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats—importantly, they have long been vested with the responsibility for preserving the public peace.”⁷⁴ Indeed, contrary to the mistaken impression that “the main function of the police is the control of crime” and that the principal mechanism to achieve this objective is to arrest and process for criminal charge, officers probably devote more energy to other tasks.⁷⁵ To name but a few, officers keep public order and promote social welfare and quality of life by managing crowds, mediating disputes, and aiding the sick and injured.⁷⁶

Significantly, police perform these tasks without uniform purpose or objective. Some are mechanisms of “regulatory” social control;⁷⁷ others of “community caretaking.”⁷⁸ Nevertheless, I use the broad label “peacekeeping” to describe all special needs or non-law-enforcement practices, but I recognize that the term is something of an abstraction—an oversimplified stand-in “supposed to encompass all occupational routines not directly related to making arrests.”⁷⁹ Still, it is, for present purposes, a useful abstraction that helps to concentrate the analysis and avoid undue distraction.⁸⁰ If nothing else, the many and diverse activities of the peacekeeper ought to be analyzed as a unit, because the Court has treated them as a unit: when these activities implicate the Fourth Amend-

74. *City of Chi. v. Morales*, 527 U.S. 41, 106 (1999) (Thomas, J., dissenting).

75. See Bittner, *supra* note 35, at 700; see also SAMUEL WALKER, *THE POLICE IN AMERICA: AN INTRODUCTION* 112 (2d ed. 1992) (“Most police work involves noncriminal events. Order maintenance or peacekeeping activities comprise an estimated two-thirds of all calls to the police.” (emphasis omitted)).

76. See *Brigham City v. Stuart*, 547 U.S. 398, 406 (2006) (“The role of a peace officer includes preventing violence and restoring order”); Bittner, *supra* note 35, at 703 (“[I]t is commonly assumed that officers will be available to arbitrate quarrels, to pacify the unruly, and to help in keeping order. They are supposed also to aid people in trouble”); Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 271 (“[M]unicipal police have multiple responsibilities in society, only one of which is the enforcement of criminal laws.”).

77. See Seidman, *supra* note 35, at 97-98; cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (noting “the government’s need for effective methods to deal with breaches of public order”); Renée Paradis, Note, *Carpe Demonstratores: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316, 334 (2003) (describing the “public-order function” of police officers who “are not primarily concerned with making arrests”).

78. See Livingston, *supra* note 76, at 261.

79. See Bittner, *supra* note 35, at 700 (dividing the “two relatively independent domains of police activity” into the categories of peacekeeping and law enforcement).

80. Cf. *id.* (calling peacekeeping “a residual term”); Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 WASH. & LEE L. REV. 1485, 1488 (2009) (analyzing collectively “all [police] activity [undertaken] for purposes other than law enforcement”).

ment's prohibition on unreasonable searches and seizures, the Court has subjected them all to the same open-textured approach—a kind of *peacekeeping particularism*. That is to say, the Court has asked only whether the peacekeeping search or seizure is generally reasonable.⁸¹

The standard of general reasonableness may be more or less protective than the quantitative measure of probable cause. Conceptually, governmental need may be said to outweigh individual interests even in the absence of probable cause; conversely, individual interests may be said to outweigh even proof positive that the individual is up to no good. In the peacekeeping context, the Court's perspective is that the constitutional question of reasonableness *depends upon the circumstances*. And that is just the point: the standard of general reasonableness accommodates the circumstances—all the relevant circumstances. The inquiry is decidedly open ended.⁸² Peacekeeping demands a “highly contextual” balancing of individual liberty and privacy (and other) interests against police and public need.⁸³ Thus, the Court has rejected hard rules designed to define the constitutional scope of peacekeeping reasonableness *ex ante* and has opted, instead, for a post hoc evaluation that “hinges on the ‘peculiar facts and circumstances’ of each case” and that “is rooted in social values and societal norms regarding the limits of police initiative.”⁸⁴ And, remarkably, reasons now matter to the analysis: a relevant question is whether the peacekeeper had “sufficient reason to act,” all things considered.⁸⁵

What accounts for the Court's contextual approach to reasonableness in peacekeeping cases? First, as a general matter, fixed legal tests typically cannot accommodate peacekeeping efforts that are too varied to categorize adequate-

81. See *Brigham City*, 547 U.S. at 404 (“An action is ‘reasonable’ under the Fourth Amendment regardless of the individual officer’s state of mind ‘as long as the circumstances, viewed *objectively*, justify [the] action.’” (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978))); see also *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967) (“[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”); *Livingston*, *supra* note 76, at 263 (“The Court has recently turn[ed] . . . toward a test of general reasonableness, at least in contexts not involving criminal investigation.” (alteration in original) (internal quotation marks omitted)); Silas J. Wasserstrom, *The Court’s Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119, 129 (1989) (“The Court’s turn away from the specific commands of the warrant clause and toward a balancing test of general reasonableness is now evident.”).

82. *Colb*, *supra* note 8, at 1686.

83. See *Livingston*, *supra* note 76, at 264; see also *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (calling the inquiry “context-specific”); *Seidman*, *supra* note 35, at 153 (“Instead of insisting on fixed formal rules regarding warrants and probable cause, the Court [has] seemed to permit an ad hoc balance between individual privacy and government need.”).

84. See *Livingston*, *supra* note 76, at 312 (quoting H. Richard Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 47 (1989)).

85. *Id.* at 275.

ly.⁸⁶ The determination of peacekeeping reasonableness must remain flexible to respond appropriately to conditions on the ground. That is, “common sense and ordinary human experience must govern over rigid criteria.”⁸⁷ Second, guilt accuracy—specifically, probable cause—is inapposite to many (if not most) peacekeeping searches and seizures.⁸⁸ For instance, suspicion of guilt has nothing to do with the question of whether a first responder should enter (and thereby search) a burning building.⁸⁹

Within the peacekeeping context, the formal law of crime—that embodiment of the legality principle—has simply run out. According to Louis Michael Seidman: “[There is a] strong intuition that when the police are engaged in core criminal investigation, it is important to maintain the integrity of *formal* Fourth Amendment protections. In contrast, when they are doing something else . . . rather than searching for evidence—*formalism gives way*.”⁹⁰ Or, as Justice Scalia explained much more recently: “It is only when a governmental purpose aside from crime-solving is at stake that we engage in the free-form ‘reasonableness’ inquiry”⁹¹

86. See Bittner, *supra* note 35, at 714-15 (noting possibility that peacekeeping operations cannot be “systemically generalized,” and that “[t]he procedures employed in keeping the peace are . . . responses to certain demand conditions”). According to Bittner: “[T]here is scarcely a human predicament imaginable for which police aid has not been solicited and obtained at one time or another.” *Id.* at 703.

87. *United States v. Sharpe*, 470 U.S. 675, 685 (1985); see also *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967) (“[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails.”). Notably, such an unstructured approach may be consistent with historical practice. See Jessica K. Lowe, *A Separate Peace? The Politics of Localized Law in the Post-Revolutionary Era*, 36 LAW & SOC. INQUIRY 788, 793 (2011) (discussing, but not endorsing, the historical perspective that “keeping the peace . . . [at common law] was not about applying a particular set of rules”).

88. See *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (indicating that peacekeeping is “totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute”); *Livingston*, *supra* note 76, at 265 (indicating that peacekeeping practices “implicate a different set of social practices than traditional law enforcement and are sufficiently unlike law enforcement intrusions so as to justify a distinct Fourth Amendment approach”).

89. See *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (“[I]t would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze.”).

90. Seidman, *supra* note 35, at 155 (emphasis added).

91. *Maryland v. King*, 133 S. Ct. 1958, 1981-82 (2013) (Scalia, J., dissenting) (observing that application of a qualitative reasonableness standard “must be justified, *always*, by concerns ‘other than crime detection’” (quoting *Chandler v. Miller*, 520 U.S. 305, 313-14 (1997))); see also Seidman, *supra* note 35, at 158 (indicating that legal tests “are no longer fixed” when “the government’s interests do not relate to law enforcement”).

B. *Particularism at the Peripheries*

There are, however, general-reasonableness doctrines that seemingly operate much closer to the core of criminal investigation and adjudication. But these doctrines still fit within the prevailing paradigm, because they are (at best) only peripherally and superficially law enforcement doctrines. That is, they do not squarely implicate the bottom-line question of suspicion of criminal guilt.

First, consider the *Terry* doctrine, which permits officers—without probable cause—to briefly stop suspects and frisk them for weapons.⁹² According to the *Terry* Court, the practice of stop and frisk “must be tested by the Fourth Amendment’s general proscription against unreasonable searches and seizures” and not against a hard requirement of probable cause.⁹³ But, critically, *Terry* was—in its initial formulation—largely a peacekeeping case. Specifically, the Court only authorized the frisk as a reasonable mechanism to ensure officer and public safety (that is, to *keep the peace*) and not also as a reasonable mechanism to promote “effective crime prevention and detection.”⁹⁴ Indeed, the Court reasoned expressly that a different measure ought to apply precisely because “[e]ncounters are initiated by the police for a *wide variety of purposes*, some of which are *wholly unrelated to a desire to prosecute for crime*.”⁹⁵

Of course, anyone familiar with contemporary order-maintenance policing is well aware that the practice of stop and frisk has come to operate principally as a law enforcement expedient.⁹⁶ But this merely underscores the degree to which the Court—by refusing to consider an officer’s subjective reasons for action—has failed to draw a line between peacekeeping and law enforcement objectives when an officer’s motives are mixed. That is, police officers may exploit their peacekeeping authority to build criminal cases—a phenomenon that I intend to explore in a separate project.⁹⁷ In any event, it is noteworthy that the

92. *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968).

93. *Id.* at 20.

94. *Id.* at 10, 22; *see also* Seidman, *supra* note 35, at 154 (“[T]he commentators have missed a significant aspect of *Terry* that has not expanded at all: For almost thirty years, the Court has steadfastly refused to permit *Terry* frisks designed to uncover evidence of crime. Instead, the frisk is permissible only to protect the officer from the threat of violence.”).

95. *Terry*, 392 U.S. at 13, 15 (emphasis added) (observing that “[s]treet encounters between citizens and police officers are incredibly rich in diversity” and, therefore, “[n]o judicial opinion can comprehend the protean variety of the street encounter”).

96. *See, e.g.*, Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 *FORDHAM URB. L.J.* 457, 457 (2000); Tracey Maclin, *Terry v. Ohio’s Fourth Amendment Legacy: Black Men and Police Discretion*, 72 *ST. JOHN’S L. REV.* 1271, 1277-79 (1998).

97. Bowers, *supra* note 20. Briefly, the premise of my work in progress is that, over the past several decades, the legality principle has begun to lose purchase asymmetrically—and in the wrong direction. The principle is still terrifically influential, as I have argued in the preceding pages. But it successfully describes only the categorical scope of *legalistic* discretion; it no longer sufficiently constrains exercises of *non-legalistic* discretion. In this way,

Court has transitioned toward the more obviously quantitative test of “reasonable suspicion” just as the practice of stop and frisk has developed into more of a crime-solving device.⁹⁸ By way of comparison, the *Terry* decision itself never used the term “reasonable suspicion.” To the contrary, it spoke only in terms of general reasonableness.⁹⁹

Second, consider the doctrines of excessive force and knock and announce. In both contexts, the Court has likewise endorsed a general reasonableness approach.¹⁰⁰ And, again, the doctrines implicate law enforcement tangentially only. In the first instance, neither doctrine has the capacity to influence the outcome of a criminal case, because the exclusionary rule is not an available remedy for a violation.¹⁰¹ Thus, the Court has uncoupled each doctrine from the investigation and adjudication of the criminal case. More to the point, neither doctrine is even related to criminal culpability.¹⁰² Police brutality is principally about social control and rough justice.¹⁰³ And the prohibition against

the legality principle has come to underserve its central purpose (which is to operate as a bulwark against capricious exercises of state power). *Supra* note 44 and accompanying text (examining the purpose of the legality principle). That is to say, the legality principle’s unidirectional bright lines are licenses more than limits. In the Fourth Amendment context, this translates into a sometimes-recognized qualitative conception of reasonableness that works to *shield* the officer who has failed to comply with a purported legalistic command such as probable cause. Conversely, a suspect or defendant enjoys no qualitative conception of *un*-reasonableness—no *sword* with which to challenge a search or seizure that falls within a legalistic safe harbor. Simply, in the law enforcement context, a qualitative conception of reasonableness runs—if at all—to the benefit of the state alone.

98. *See, e.g.*, *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002) (discussing contours of reasonable suspicion).

99. *See, e.g., Terry*, 392 U.S. at 21 (stating that reasonableness is assessed “by balancing the need to search [or seize] against the invasion which the search [or seizure] entails” (alterations in original) (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-537 (1967)) (internal quotation mark omitted)).

100. *See, e.g., Hudson v. Michigan*, 547 U.S. 586, 590 (2006); *Graham v. Connor*, 490 U.S. 386, 395 (1989).

101. *Hudson*, 547 U.S. at 594.

102. *See, e.g., id.* at 593-94 (noting that the “interests protected by the knock-and-announce requirement are quite different” from the interests protected by the exclusionary rule for warrantless searches, and stating that “the knock-and-announce rule has never protected . . . one’s interest in preventing the government from seeing or taking evidence described in a warrant”).

103. ALLEN ET AL., *supra* note 50, at 351 (“[W]hen the police behave violently, when they strike or shoot suspects, they are typically not searching for evidence.”). Indeed, most victims of police violence are technically guilty offenders. *See, e.g., Koon v. United States*, 518 U.S. 81, 85-87 (1996) (describing the infamous police beating of an indisputably speeding motorist, Rodney King). Consider, by contrast, what would happen if probable cause or some other quantitative measure of suspicion were to operate as a bar to excessive force claims: police could short-circuit criminal justice simply by subjecting arrestees to harsh treatment. In this narrow context, then, a qualitative conception of reasonableness may actually promote a primary purpose of accuracy-oriented legality, which is to provide an antidote

forced police entries is about protecting “life and limb, . . . property . . . [and] those elements of privacy and dignity that can be destroyed by a sudden entrance.”¹⁰⁴ As with *Terry*, these doctrines have more to do with peacekeeping than casemaking. In this way, the doctrines align with our more general rule of thumb: the Court is willing to qualitatively evaluate only with respect to those questions that do not provoke suspicion of legal guilt.

III. DIGNITY AS A VALUE AND A LEGAL PRINCIPLE

In this Part, I turn briefly from the Fourth Amendment to a discussion of my conception of dignity, and I explain how Officer Turek’s conduct dishonored that conception by gratuitously dishonoring Gail Atwater. I then transition back to positive doctrine and demonstrate that this conception of dignity is, in fact, not so foreign to private and public law. Occasionally, it has even appeared in Fourth Amendment doctrine—principally, in peacekeeping cases.

A. *One Conception of Dignity (as Applied to Atwater)*

It is, ultimately, beyond the scope of the immediate project to offer and defend a sophisticated definition of dignity and related terms. In any event, as indicated, we can take the Court at its word and evaluate threats to dignity as it has characterized them.¹⁰⁵ All the same, I do not intend to leave my conception of dignity wholly undeveloped. Specifically, I take dignity to entail, inter alia, a protection against gratuitous humiliation. And, here, I use the term “gratuitous humiliation” in the same manner that the Court used that term in *Atwater*: to describe an arrest unsupported by nonarbitrary reasons.

This conception of dignity is shared by a number of contemporary legal and moral theorists. Jeremy Waldron, for instance, has described “instrumentalization” as one kind of “outrage to dignity.”¹⁰⁶ According to Waldron, a person makes an instrument of others when he uses them as “objects to be manipulated”—as “mere means”—“in a way that is not sufficiently respectful of humanity as an end in itself.”¹⁰⁷ Thus, it may be said that all people possess dignity “in equal measure” by virtue of their personhood.¹⁰⁸ Avishai Margalit may have put it best: “The trait by virtue of which humans

to the historical exercise of rough justice before criminal adjudication. *See supra* notes 44, 97 and accompanying text.

104. *Hudson*, 547 U.S. at 594.

105. *Supra* notes 5-7 and accompanying text.

106. Waldron, *supra* note 13, at 37-40 (examining “four kinds [of] outrage to dignity, four species of degradation”).

107. *Id.* at 38.

108. AVISHAI MARGALIT, *THE DECENT SOCIETY* 1, 10-11, 42-43, 262 (Naomi Goldblum trans., 1996); *see also* Waldron, *supra* note 10, at 203 (explaining that dignity is a quality rooted in a “sense of the special worth or sacredness of human life”).

deserve moral respect is the trait of being human, nothing more and nothing less.”¹⁰⁹

This is an aspirational conception of dignity, because it does not depend upon a particular person retaining his rational nature.¹¹⁰ A person does not lack or lose dignity merely because he lacks or loses the capacity to exercise practical or any other type of human reasoning. Nor does a person waive his dignity or any attendant moral or legal protection by engaging in humiliating or disgraceful acts.¹¹¹ In this way, dignity is an intrinsic quality, as even the Court has sometimes recognized.¹¹² Consider, for instance, Justice Jackson’s concurrence in *Skinner v. Oklahoma*: “There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority—even those who have been guilty of what the majority define as crimes.”¹¹³

Justice Jackson understood that a person’s dignity is not obliterated by his conviction for a crime. On this score, consider also the Court’s recent rulings in *Brown v. Plata* and *Hope v. Pelzer*—cases in which the Court invoked the principle of dignity to hold unconstitutional substandard conditions of prison con-

109. Avishai Margalit, *Human Dignity Between Kitsch and Deification*, HEDGEHOG REV., Fall 2007, at 7, 17; see also SAMUEL PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 61 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673) (“In the very name of man a certain dignity is felt to lie . . . Human nature therefore belongs equally to all . . .”); Henry, *supra* note 9, at 202 (“In this view, all people equally possess dignity because they are representatives of humanity. . . Human existence . . . confers dignity.”).

110. Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES 209, 219 (Suzan Young ed., 2010), available at http://tannerlectures.utah.edu/_documents/a-to-z/w/Waldron_09.pdf (quoting Immanuel Kant as saying that “no human being can be without any dignity, since he at least has the dignity of a citizen”); Waldron, *supra* note 10, at 213 (“The idea is that the modern notion of human dignity . . . involves an upwards equalisation of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility.”).

111. Cf. Christopher Q. Cutler, *Nothing Less than the Dignity of Man: Evolving Standards, Botched Executions and Utah’s Controversial Use of the Firing Squad*, 50 CLEV. ST. L. REV. 335, 418 (2002-2003) (“The inherent dignity of man can remain intact, even when suffering personal humiliation . . .”).

112. *Infra* Part III.B-C (discussing dignity as a positive legal principle); see also McCrudden, *supra* note 9, at 679 (recognizing a “minimum core” of dignity attributable to fact that “every human being possesses an intrinsic worth”); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 221 (2011) (“Many accounts of human dignity in human rights and constitutional law begin with the intrinsic or inherent dignity of all individuals.”).

113. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942) (Jackson, J., concurring) (emphasis added); see also Waldron, *supra* note 110, at 247-48 (“[W]e deploy modes of punishment that do not destroy the dignity of those on whom it is being administered. . . . One ought to be able to do one’s time, take one’s licks, while remaining upright and self-possessed.”).

finement.¹¹⁴ The Court reasoned that convicted inmates retained an innate dignity. Their dignity attached “because of what they are and not because of what they have done.”¹¹⁵

This conception of dignity is inconsistent with humiliation. To the contrary, it recognizes that “self-respect and non-humiliation” are “necessary conditions of a life worthy of human dignity.”¹¹⁶ As Margalit explained: “A society is decent if its institutions do not act in ways that give the people under their authority sound reasons to consider themselves humiliated.”¹¹⁷ This, then, is how Officer Turek’s conduct dishonored Gail Atwater’s dignity. He did not respect her self-worth. To the contrary, he made her an instrument of his will. Worse still, his will was “pointless” (and perhaps even pathological).¹¹⁸ In other words, the arrest was problematic for two reasons: (i) it constituted an outrage to dignity (ii) that was premised on no good reason (and that thereby served no good purpose).

Thus, we discover that reasons and purposes are important to adequately honoring dignity. To be sure, the state arguably implicates human dignity whenever it disregards its citizens’ autonomy and uses them, instead, as means to promote some set of instrumental objectives. This kind of instrumentalization may be regrettable, but it is tolerable because it is premised on good reason and carried out for good purpose. In any event, such instrumentalization is almost inevitable. (It happens, for instance, whenever law enforcers pursue a purpose of punishment beyond retribution.)¹¹⁹ As Oliver

114. *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (observing that while “prisoners may be deprived of rights that are fundamental to liberty,” they “retain the essence of human dignity inherent in all persons . . . [that] animates the Eighth Amendment prohibition against cruel and unusual punishment”); *Hope v. Pelzer*, 536 U.S. 730, 738 (2002).

115. MARGALIT, *supra* note 108, at 42; *see also* Waldron, *supra* note 110, at 253 (“[E]veryone’s maltreatment—maltreatment of the lowliest criminal, abuse of the most despised of terror suspects—can be regarded as a sacrilege, a violation of human dignity . . .”).

116. Martha Nussbaum, *Human Dignity and Political Entitlements*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS*, *supra* note 9, at 351, 351, 378.

117. MARGALIT, *supra* note 108, at 10-11.

118. *Supra* notes 5-7 and accompanying text.

119. Theorists, such as Stephen Morse, have defended retributivism based on this same notion of respect for the person qua person: “[It is] respectful to the actor to hold the actor responsible. . . . [S]uch a view treats all persons as autonomous and capable of that most human capacity, the power to choose. To treat persons otherwise is to treat them as less than human.” Stephen J. Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247, 1253-54, 1268 (1976); *see also* Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 295-96 (1993) (“For a Kantian, the central idea of criminal punishment is the dignity and autonomy—we might say the secular sanctity—of the human being endowed with the capacity to reason. A richly retributive system of justice recognizes that all people are intrinsically, objectively and equally valuable.” (internal quotation marks omitted)); *cf.* David Luban, *What’s Pragmatic About Legal Pragmatism?*, 18 CARDOZO L. REV. 43, 63 (1996) (“[T]he most plausible justification of retribu-

Wendell Holmes famously observed: “No society has ever admitted that it could not sacrifice individual welfare to its own existence. If conscripts are necessary for its army, it seizes them, and marches them, with bayonets in their rear, to death.”¹²⁰

It is not my position, then, that a state acts unreasonably whenever it humiliates or degrades a citizen. There is nothing magical about humiliation or degradation. Every arrest is humiliating to some degree (and, of course, most arrests are reasonable).¹²¹ But, critically, even Holmes recognized that “no civilized government sacrifices the citizen more than it can help.”¹²² And *that* is the significance of the *gratuitous* nature—the *pointlessness*—of the arrest at issue in *Atwater*: Officer Turek humiliated Gail Atwater for no nonarbitrary reason and for no nonarbitrary purpose (indeed, for no apparent reason or purpose at all).¹²³

B. *The Jurisprudential Point of a Pointless Indignity*

As the *Plata* and *Hope* decisions reveal, the Court is not always (and has not always been) hostile to constitutional consideration of dignity. Indeed, Justice Brennan believed that the Constitution’s “ideal of human dignity” grounds much of American law and, particularly, the Bill of Rights, which he took to be a “bold commitment by a people to the ideal of dignity protected through

tive punishment is that it reaffirms the dignity of those who were victimized by wrongdoing.”).

120. O.W. HOLMES, JR., *THE COMMON LAW* 41 (Belknap Press 2009) (1881).

121. William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 798-800 (1993) (“A custodial arrest is an especially ‘awesome and frightening’ experience. . . . The arrestee may suffer emotional distress and public humiliation” (footnotes omitted)); cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 671-72 (1984) (“[T]he entire enterprise [of coercive criminal justice in pursuit of deterrence] . . . is at odds with human dignity”). We might draw a distinction, however, between the *act* of humiliating someone and the *feeling* of being humiliated. Thus, a child molester might feel humiliated by his arrest, but we might not say that the state had humiliated him. Analogously, I might say that you humiliate another when you chastise her for stepping on your shoe. But I would probably not say that you humiliate the bully when you berate him for his bad behavior. That is to say, the *imposition* of humiliation (as opposed to its *sensation*) may require some degree of procedural unfairness or substantive disproportionality—both of which are implicated by a *pointless* indignity.

122. HOLMES, *supra* note 120, at 43.

123. A question remains, of course, over how to test an officer’s reason or purpose, and this is a question that I take up in Part IV. With respect to *Atwater*, however, we need not contemplate the question because, as I have emphasized, the Court readily acknowledged that Officer Turek’s conduct was pointless. *Supra* notes 5-7 and accompanying text.

law.”¹²⁴ For example, in *Lawrence v. Texas*, the Court referred to individuals’ “dignity as free persons” to direct the course of “their own private lives” as a basis to invalidate a state statute that criminalized consensual adult sodomy.¹²⁵ And, more recently, in *United States v. Windsor*, the Court relied in part upon “the equal dignity of same-sex marriages” to invalidate the Defense of Marriage Act.¹²⁶ More generally, several legal scholars—including Jeremy Waldron and Ronald Dworkin—have identified dignity as a prevailing constitutional principle.¹²⁷ And a number of others—including Robert Post—have linked dignity to distinct private-law doctrines, for instance, in contract and tort law.¹²⁸

124. Henry, *supra* note 9, at 171 (quoting William J. Brennan, Jr., *My Life on the Court*, in REASON AND PASSION: JUSTICE BRENNAN’S ENDURING INFLUENCE 17, 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997)) (internal quotation marks omitted).

125. 539 U.S. 558, 567, 578-79 (2003).

126. 133 S. Ct. 2675, 2692-93 (2013) (indicating that a “right to marry” confers upon a people “a dignity and status of immense import”). Justice Kennedy seems particularly amenable to a reading of the Constitution that incorporates dignity as a pervasive constitutional principle. In addition to authoring both *Lawrence* and *Windsor*, he indicated at his confirmation hearing that a constitutional conception of liberty must include, inter alia, “the essentials of the right to human dignity,” as well as the ability of a person “to manifest his or her own personality, . . . to obtain his or her own self-fulfillment, . . . to reach his or her own potential.” Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, NPR (June 28, 2013, 2:42 PM), <http://www.npr.org/blogs/thetwo-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor> (internal quotation mark omitted).

127. Dworkin, *supra* note 15, at 1106 (discussing a “right to dignity” that is shaped by “how the concept is used by those to whom it is important”); Ronald Dworkin, *Three Questions for America*, 53 N.Y. REV. BOOKS 24, 26 (2006) (“[T]he principles of human dignity . . . are embodied in the Constitution and are now common ground in America.” (internal quotation mark omitted)); Waldron, *supra* note 110, at 209-10 (“Dignity seems at home in law. . . . Dignity is intimately connected with the idea of rights”); see also William A. Parent, *Constitutional Values and Human Dignity*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 10, at 47, 71 (describing dignity as one of “those very great political values that define our constitutional morality”).

128. RESTATEMENT (SECOND) OF TORTS § 19 (1965) (“A bodily contact is offensive if it offends a reasonable sense of personal dignity.”); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 9, at 41 (5th ed. 1984) (“The element of personal indignity involved always has been given considerable weight.”); Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 22 (1999) (“Actions that would humiliate, torment, threaten, intimidate, pressure, demean, frighten, outrage, or injure a reasonable person are actions that can be said to injure an individual’s dignitary interests and, if sufficiently severe, can give rise to causes of action in tort.” (footnote omitted)); Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957, 968 (1989) (identifying a “civility” principle in tort doctrine); cf. Amy J. Schmitz, *Embracing Unconscionability’s Safety Net Function*, 58 ALA. L. REV. 73, 117 (2006) (arguing that “public virtues and values should guide contract determinations” and that “judges’ humanity and membership in the social community equips them to make these decisions”).

For the moment, however, I would like to examine the question at a somewhat higher level of abstraction. Henry Hart and Albert Sacks have observed that “all official power can properly be thought of as limited by a general prohibition against arbitrariness in its exercise,” and that, even if the judiciary “has sometimes shown itself obtuse to the range of this principle . . . it is too deeply rooted not to carry the day.”¹²⁹ I recognize, of course, that there may be some space between Hart and Sacks’s legal principle that the state must not act arbitrarily and a legal principle that the state must reasonably respect the dignity of its citizens. But I would submit that there is not much space. Gratuitous outrages to dignity merely constitute a particular—and particularly egregious—breed of arbitrary state action. That is, a state that would gratuitously humiliate one of its citizens makes arbitrary use of the individual and thereby treats him as less than human (for no good reason).¹³⁰ In this way, the state has failed to abide by a core foundational principle of the liberal state, which is a right to “equal concern and respect” possessed by all individuals in equal measure.¹³¹ The takeaway is that dignity is—explicitly and implicitly—a somewhat pervasive legal principle, even if it is honored only inconsistently.¹³² Thus, Waldron identified a systemic “commitment to dignity” that “may be thought of as *immanently* present even though we sometimes fall short of it.”¹³³

C. *Dignity as a Fourth Amendment Principle*

But is the Fourth Amendment also compatible with a consideration of dignity? The standard view is that the Fourth Amendment functions to protect lib-

129. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 155 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

130. IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 45 (Thomas Kingsmill Abbott trans., Wilder Publ’ns 2008) (1785) (arguing that every person is “an end in himself, not merely . . . a means to be arbitrarily used by this or that will”). This may generate something of a paradox: to gratuitously humiliate someone is to objectify them and treat them as less than human; however, to some degree, only a human may be humiliated. It is almost nonsensical, after all, to speak of the humiliation of, say, a shark or a dog. Thanks to Doug Husak for drawing my attention to this point.

131. RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 330 (2011) (“A political community has no moral power to create and enforce obligations against its members unless it treats them with equal concern and respect . . .”); *see also* Dworkin, *supra* note 15, at 1075 (discussing “the principle that each member of a community has a right . . . [to] the minimal respect due a fellow human being”); Ehrenreich, *supra* note 128, at 22 (indicating that a “core assumption[]” of the common law is that “all individuals . . . are entitled to be treated with respect”).

132. Waldron, *supra* note 110, at 250 (“Law may credibly promise a respect for dignity, yet betray that promise in various respects.”).

133. *Id.* at 249.

erty and privacy.¹³⁴ And it does so. But it also may promote state respect for human dignity.¹³⁵ Indeed, in particular corners of the doctrine, the Court has acknowledged this purpose expressly. Consider, for example, *Schmerber v. California*,¹³⁶ a decades-old decision that predated most of the seminal decisions that characterize the Court's legality revolution.¹³⁷ The *Schmerber* Court held that the Fourth Amendment authorized arresting officers to extract blood from a drunk driving suspect, because the suspect's "interests in human dignity" were not seriously implicated by such "minor intrusions . . . under stringently limited conditions."¹³⁸ And, critically, to reach this ruling, the Court reasoned contextually, not categorically. That is, the Court refused to focus on suspicion of guilt exclusively, notwithstanding the quantitative fact that "there was plainly probable cause."¹³⁹ Rather, the Court balanced "the individual's dignitary interests in personal privacy and bodily integrity" against "the community's interest in fairly and accurately determining guilt or innocence."¹⁴⁰

But, as we have seen, dignity is almost no part of the contemporary Fourth Amendment approach to law enforcement cases.¹⁴¹ Nevertheless, we do find the principle at play in peacekeeping and related contexts. For instance, in the context of knock-and-announce doctrine (which, as discussed, is animated by objectives beyond crime solving), the Court has shown itself to be particularly attentive to the "dignity that can be destroyed by a sudden entrance."¹⁴² And, recently, in the *Terry* context, at least one trial court signaled that it would be receptive to arguments that "dignity . . . trumps whatever modicum of added

134. See *Oliver v. United States*, 466 U.S. 170, 187 (1984) (Marshall, J., dissenting) ("The liberty shielded by the Fourth Amendment . . . is freedom from unreasonable government intrusions . . ." (internal quotation marks omitted)); *Rakas v. Illinois*, 439 U.S. 128, 159-60 (1978) (White, J., dissenting) ("Though the [Fourth] Amendment protects one's liberty and property interests against unreasonable seizures of self and effects, the primary object of the Fourth Amendment [is] . . . the protection of privacy." (second and third alterations in original) (footnotes omitted) (internal quotation marks omitted)).

135. See John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655, 694 (arguing that the Fourth Amendment should be "understood to assume that humans have dignity that can be offended by the unreasonable use of government power . . ." (punctuation altered)).

136. 384 U.S. 757 (1966).

137. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1, 162, 171 (1972) (holding void for vagueness an ordinance that criminalized, inter alia, "[r]ogues and vagabonds, . . . wanton and lascivious persons, . . . habitual loafers, [and] disorderly persons").

138. *Schmerber*, 384 U.S. at 769-70, 772.

139. *Id.* at 768, 772 (noting that, even in the presence of probable cause, the Fourth Amendment might be violated by "more substantial intrusions . . . under other conditions").

140. *Winston v. Lee*, 470 U.S. 753, 761-62 (1985) (describing the Court's methodology in *Schmerber*); accord *Schmerber*, 384 U.S. at 767 (discussing the suspect's "dignity [interest] against unwarranted intrusion by the State").

141. See *supra* notes 31-34, 51-72 and accompanying text.

142. *Hudson v. Michigan*, 547 U.S. 586, 594 (2006).

safety might theoretically be gained” by the use of stop and frisk.¹⁴³ Likewise, several Justices—progressive and conservative—have taken dignity into consideration in determining the constitutionality of mandatory employee drug testing (which are peacekeeping searches and seizures designed to promote workplace safety). Specifically, Justice Marshall indicated that such tests are “experienced as extremely distressing, as detracting from one’s dignity and self esteem.”¹⁴⁴ And Justice Scalia—who, in conventional law enforcement contexts, is a particularly strong proponent of formalism and categorical rules—declared such testing to be “an immolation of privacy and human dignity.”¹⁴⁵ The legal principle of dignity thereby straddles conventional ideological divides. The relevant jurisprudential question is only whether the principle rubs up against the Court’s guilt-accuracy conception of the legality principle. It is only there that the dignity principle loses traction.

No pairing of decisions better illustrates this point than *Atwater* and *Safford Unified School District #1 v. Redding*. Justice Souter authored *Safford*, just as he authored *Atwater*.¹⁴⁶ But that is where the similarities end. *Safford* involved a schoolhouse strip search of a thirteen-year-old student for suspected possession of prescription-strength ibuprofen—a paradigmatic peacekeeping search designed to promote a “proper educational environment.”¹⁴⁷ Accordingly, the Court asked no dispositive quantitative question about technical legal guilt, but instead skipped right to the question of whether the search was generally reasonable. And, significantly, it held that the search was not—that it violated the Fourth Amendment—because the “embarrassing, frightening, and

143. *Ligon v. City of N.Y.*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013); see also *Terry v. Ohio*, 392 U.S. 1, 17 (1968) (observing that the practice of stop and frisk “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment”); Akhil Reed Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN’S L. REV. 1097, 1098 (1998) (discussing *Terry* doctrine and concluding that “[r]easonableness must focus not only on privacy and secrecy but also on *bodily integrity and personal dignity*”); Ekow N. Yankah, *Policing Ourselves: A Republican Theory of Citizenship, Dignity and Policing—A Comment on Fagan*, FORDHAM URB. L.J. (forthcoming) (manuscript at 4) (on file with author) (discussing the intersection between dignity and stop and frisk). In *Ligon*, Judge Scheindlin ultimately ruled that the NYPD’s use of stop and frisk constituted violations of the Fourth Amendment and the Equal Protection Clause. *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) (observing that a stop and frisk is “a demeaning and humiliating experience”).

144. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 646 (1989) (Marshall, J., dissenting) (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

145. *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 680-81 (1989) (Scalia, J., dissenting); see also Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121-22 (2011) (noting examples of Justice Scalia’s formalist approach); *supra* note 50 and accompanying text.

146. *Safford Unified School District #1 v. Redding*, 557 U.S. 364, 367 (2009); *Atwater v. City of Lago Vista*, 532 U.S. 318, 322 (2001).

147. *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

humiliating” nature of the search outweighed the trivial degree to which it served any legitimate state interest.¹⁴⁸

Here, then, the Court discovered a constitutional injury in humiliation. Indeed, it is not even wholly obvious that the girl’s humiliation was a *gratuitous* humiliation as opposed to a merely *outweighed* humiliation. That is, the Court concluded that the balance might have tipped the other way if the search at issue had been a different search in a different educational setting: “The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness”¹⁴⁹ Moreover, the Court parsed the search into its component parts, holding that school safety agents were authorized to intrude into the girl’s backpack and her outer clothing but not into her brassiere.¹⁵⁰ In all of these ways, the *Safford* Court relied upon the particulars and not upon proxies. And it recognized that one relevant particular (among potentially many) was the manner by which the search amounted to an outrage to the student’s dignity.¹⁵¹ This is what it means to contextualize. This is what it means to view the Fourth Amendment as a protection from, in the Court’s words, “arbitrary and invasive acts by officers of the Government” against the “dignity . . . of persons.”¹⁵²

IV. LEGALITY AS A SUPPLEMENT AND NOT A SUBSTITUTE

To recap, the term “unreasonable,” as used in the Fourth Amendment, is shape shifting.¹⁵³ It describes not one, but two distinct legal standards: a qualitative all-things-considered standard, and a quantitative rule-like standard.¹⁵⁴ In the law enforcement context, the Court has opted for the latter standard over the former. And, in the peacekeeping context, the Court has opted for the former

148. *Safford*, 557 U.S. at 374-75; see also *id.* at 380 (Stevens, J., concurring in part and dissenting in part) (calling the search “clearly outrageous conduct”); *id.* at 384 (Thomas, J., concurring in the judgment in part and dissenting in part) (indicating one such legitimate state interest is the “close supervision of schoolchildren” (internal quotation mark omitted)); cf. *Mary Beth G. v. City of Chi.*, 723 F.2d 1263, 1272 (7th Cir. 1984) (observing that school strip searches are “demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, [and] repulsive, signifying degradation and submission” (internal quotation mark omitted)).

149. *Safford*, 557 U.S. at 375.

150. *Id.* at 373-74. By comparison, police may search a suspect’s entire person incident to a lawful arrest. See *United States v. Robinson*, 414 U.S. 218, 236 (1973).

151. See *Safford*, 557 U.S. at 375.

152. *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 613-14 (1989).

153. U.S. CONST. amend. IV.

154. See *Bradley*, *supra* note 8, at 1471 (comparing “no lines” and “bright line” approaches to the Fourth Amendment (internal quotation marks omitted)); Kahan et al., *supra* note 51, at 889 (comparing settings in which the Court “has insisted on the importance of ‘bright line’ rules” as proxies for reasonableness with settings in which it has stressed “the need for flexible standards that can accommodate the fact sensitivity of Fourth Amendment reasonableness determinations”); *supra* Parts I-II.

standard over the latter. My prescription is for the Court to opt, instead, *for both*—to subject law enforcement searches and seizures to legalistic and particularistic constraints on discretion. Specifically, in this Part, I defend a Fourth Amendment test that would treat probable cause as only a *threshold* to constitutional arrest. Thereafter, a court would turn to the qualitative question of whether a reasonable officer in the same circumstances would have made the arrest for the reasons given (with some measure of deference granted to the officer’s reasons). In this way, the court appropriately could honor the legality principle without unduly sacrificing to it other considerations of policy and principle, like dignity.

A. *Two Conceptions of Accuracy*

To some degree, the difference between the two prevailing reasonableness standards boils down to a contest between ostensibly competing conceptions of accuracy. In the law enforcement context, the Court has equated accuracy with satisfied measures of technical legal guilt. In the peacekeeping context, the Court has made accuracy decidedly more evaluative. That is, the Court has recast the accuracy question in terms of whether the state has promoted practical policies and liberal principles well enough—whether its challenged search or seizure was a (but not necessarily the) right thing to do.¹⁵⁵ This amounts to a looser, deeper, and admittedly fuzzier measure of accuracy—one that demands not only a finding “of what happened or is happening in a particular situation,” but also “a qualitative appraisal of those happenings in terms of their probable consequences, moral justification, or other aspect of general human experience.”¹⁵⁶

On its own, legality is incompetent to capture this deeper, looser, and fuzzier measure of accuracy.¹⁵⁷ But it does not translate that the measure cannot be

155. See Livingston, *supra* note 76, at 304 (observing that, in peacekeeping cases, courts engage in a “necessarily contextual . . . post hoc reasonableness inquiry [that] simply permits courts to consider whether an intrusion was appropriate”); Silas J. Wasserstrom & Louis Michael Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 44-45 (1988) (“Instead of forcing fact patterns into fixed preconceived categories, these [peacekeeping] decisions weigh all the circumstances in an effort to reach the ‘right’ outcome. . . . [T]his approach attempts to balance all of the competing interests to determine what is reasonable under the circumstances.”).

156. See HART & SACKS, *supra* note 129, at 140 (discussing this qualitative aspect of standards).

157. As Holmes famously observed: “The life of the law has not been logic: it has been experience.” HOLMES, *supra* note 120, at 1; see also *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (“General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *Swift & Co. v. United States*, 196 U.S. 375, 398 (1905) (Holmes, J.) (endorsing not a “technical legal con-

captured. Indeed, a qualitative measure of accuracy is common to tort doctrine and even certain contract doctrines.¹⁵⁸ In tort law, for instance, accuracy entails an evaluation of whether the burdens have been allocated appropriately as between the parties.¹⁵⁹ This is, of course, no easy determination,¹⁶⁰ and that is precisely the point: there can be no ready mechanical test to resolve when and whether a party that caused harm should be considered also a tortfeasor.¹⁶¹ In this way, there is no crisp “law of negligence.”¹⁶² As Roscoe Pound once observed, all efforts to “reduce negligence to rules” have invariably failed: “The law cannot tell us exactly what is an unreasonable risk of injury. *It is unreasonable to define the reasonable.* The reasonable depends on circumstances, and times and places”¹⁶³

Likewise, accuracy (and, by extension, reasonableness) in the peacekeeping search and seizure context “depends on circumstances, and times and places.”¹⁶⁴ It demands an evaluation of whether the burdens have been allocated appropriately as between the individual and the state, taking into consideration the individual’s interests in (among other principles) liberty, privacy, proportionality, autonomy, equality, and dignity as compared to the state’s interests in

ception” of the Commerce Clause but a “practical one”). The point is captured well by the following exchange, taken from the acclaimed Iranian film, *A Separation*:

Termeh: If you knew she was pregnant, why did you hit her?

Nader: Look, I did know she was pregnant, but in that moment I didn’t

Termeh: Well . . . go tell these exact things to them.

Nader: My dear, the law doesn’t understand such things. It says either you knew or you didn’t.

A SEPARATION (Sony Pictures Classics 2011); *A Separation (2011): Quotes*, IMDB, http://www.imdb.com/title/tt1832382/quotes?ref_=tt_ql_3 (last visited Apr. 24, 2014) (quoting the scene).

158. See Bradley, *supra* note 8, at 1471 (indicating that a general reasonableness approach to the Fourth Amendment uses tort law as a guide); Schmitz, *supra* note 128, at 73 (“[U]nconscionability is necessarily flexible and contextual in order to serve its historical and philosophical function of protecting core human values.” (italics omitted)).

159. See Roscoe Pound, *Survey of the Conference Problems*, 14 U. CIN. L. REV. 324, 331-32 (1940) (discussing tort doctrine and concluding that the liability determination “can only be made in relation to the circumstances under which the conduct it appraises took place”).

160. See *id.* at 331-33.

161. See *id.*; LEON GREEN, JUDGE AND JURY 184 (1930) (“[T]here is no method of ascertaining in advance whether conduct is negligent or non-negligent. . . . As an element of legal responsibility it is at large, and defies the efforts of legal scientists to bring it under more definite control.”).

162. GREEN, *supra* note 161, at 185 (internal quotation marks omitted) (“[W]e may have a process for passing judgment in negligence cases, but practically no ‘law of negligence’ beyond the process itself.”).

163. Pound, *supra* note 159, at 331-32 (emphasis added).

164. *Cf. id.*

(among other policies) optimal public safety, order, and good.¹⁶⁵ In a sense, this deeper qualitative conception of accuracy is a vestige of a historical (protolegalistic) model in which lay watchmen were trusted to keep the peace, based on their “particular conception of the good” more than by predesigned legal form.¹⁶⁶

In the next Subpart, I examine what it would take for the Court to pursue not only a hard legalistic measure of accuracy for law enforcement searches and seizures, but also this deeper, looser, and fuzzier measure of accuracy for law enforcement searches and seizures—that is, what it would take for the Court to respond to the kind of inaccuracy and attendant arbitrariness (read: unreasonableness) that may be generated by a state-imposed gratuitous humiliation.¹⁶⁷ Specifically, it would take a hybridized—or two-ply—test.

B. *Two-Ply Reasonableness in Theory*

The Court’s prevailing law enforcement approach to constitutional reasonableness is somewhat paradoxical: the Court has determined that it should take a formalistic, accuracy-oriented approach to the principle of legality because criminal law is so coercive.¹⁶⁸ However, the coercive nature of criminal law concurrently makes other demands—like respect for dignity—all the more pressing.¹⁶⁹ In this way, the Court’s conception of legality is unduly cramped precisely because its conception of accuracy is unduly cramped. That is, inaccuracy as to legal guilt is not all that threatens criminal justice under the rule of law. And, by accommodating dignity and other considerations, the system does not undermine legality; rather, it *lends a hand* to legality’s core project, which

165. See *supra* Part II.

166. Seidman, *supra* note 35, at 104 (emphasis omitted) (noting the conflict between formal models of criminal law and the historical model); see also Livingston, *supra* note 76, at 275 (observing that peacekeepers are “performing an historically-anchored ‘watchman’s’ role”).

167. See Castiglione, *supra* note 135, at 695 (“Searches or seizures that demean, degrade, or humiliate the suspect (or otherwise offend notions of the dignity of the person), and which cannot be justified given the law-enforcement interest at stake, are unreasonable” (footnote omitted)).

168. See *supra* Part I.A.

169. See Sanford H. Kadish, *Francis A. Allen—An Appreciation*, 85 MICH. L. REV. 401, 403 (1986) (noting the idea that “standards of decency and dignity . . . should apply whenever the law brings coercive measures to bear upon the individual”); Waldron, *supra* note 10, at 217 (citing LON L. FULLER, *THE MORALITY OF LAW* 108 (rev. ed. 1969)) (observing that the criminal justice system’s “inherent commitment to dignity is so momentous” because “its currency is ultimately life and death, prosperity and ruin, freedom and imprisonment”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1726 (2005) (“If law is forceful or coercive, it gets its way by nonbrutal methods which respect rather than mutilate the dignity and agency of those who are its subjects.”).

is to construct a bulwark against illiberalism.¹⁷⁰ Comparatively, by disregarding dignity, the system carves a zone of authorized humiliation and thereby *invites* morally arbitrary treatment, which may be just as destructive to liberalism as other kinds of arbitrary treatment.¹⁷¹

How, then, might a criminal justice system better accommodate the legality principle together with the qualitative considerations of principle and policy that also service it? In her *Atwater* dissent, Justice O'Connor insisted that the Fourth Amendment demanded a "realistic assessment of the interests."¹⁷² She understood that the arbitrariness against which the Fourth Amendment protects is a concept capacious enough to account not only for the *legal* arbitrariness of the *technically inaccurate* search and seizure, but also for the *moral or instrumental* arbitrariness of the *indefensible* search and seizure. In other words, Justice O'Connor thought of general reasonableness as a kind of backstop against which quantitative reasonableness was set. On this reading, general reasonableness is intrinsic to the Fourth Amendment as a general prohibition against any and all arbitrary exercises of state power.¹⁷³

Of course, the legality principle is not at all insignificant. To the contrary, I hope I have demonstrated its terrific importance already.¹⁷⁴ But the legality principle is best conceptualized as an auxiliary guarantee that is *exceptionally* applicable within the special domain of criminal law. It is only there that—due to the stigma and the stakes—formal protections *must be added* in order to guard effectively against state overreach. The right approach, then, is to ask the quantitative question *and* the qualitative question (one after the other)—that is, to treat legalistic requirements as *necessary but not sufficient*.¹⁷⁵ In this way, a

170. Jeffrie G. Murphy, *Reply*, in CRIMINAL LAW CONVERSATIONS, *supra* note 18, at 203, 204 (“[I]t is not at all clear that the liberal state should be in the business of degrading and dehumanizing any of its citizens.”); *cf.* Jerry L. Mashaw, *Administrative Due Process: The Quest for a Dignitary Theory*, 61 B.U. L. REV. 885, 907 (1981) (observing that liberalism “has at its core the notion that individuals are the basic unit of moral and political value”).

171. *See* Castiglione, *supra* note 135, at 708 (“When courts fail to consider the dignitary impact of the method in which a particular search or seizure was effectuated, or of the dignitary impact of a particular police procedure generally, a crucial individual interest is ignored.”).

172. *Atwater v. City of Lago Vista*, 532 U.S. 318, 363 (2001) (O'Connor, J., dissenting).

173. *See* HART & SACKS, *supra* note 129, at 155. In turn, the dignity principle—as captured by a “right to equal concern and respect”—can be read as just one manifestation (among potentially many) of this more general principle that the state ought generally to treat its citizens reasonably. *See supra* notes 129-33 and accompanying text.

174. *Supra* Part I.A.

175. *Atwater*, 532 U.S. at 362-63 (O'Connor, J., dissenting) (arguing that probable cause is not always “sufficient” for reasonableness and that the rule announced by the majority “runs contrary to the principles that lie at the core of the Fourth Amendment”). In this respect, my position is distinct from proponents of a pure general-reasonableness test who would make legalistic lines *neither* necessary nor sufficient. *See, e.g.*, TELFORD TAYLOR,

two-ply reasonableness test does not abandon probable cause as a rule-like proxy. Rather, the test retains the legalistic proxy as a threshold requirement and then proceeds to the qualitative. The result is, as Martha Nussbaum described in a related context, “a process of loving conversation between rules and concrete responses, general conceptions and unique cases, in which the general articulates the particular and is in turn further articulated by it.”¹⁷⁶ On this reading, the legality principle works best when it operates as a special formalist *supplement* to otherwise relevant realist considerations and not as a special *substitute*. Concretely, liberal criminal justice demands more than technical guilt accuracy.¹⁷⁷ Guilt accuracy is a starting point, not a finish line.

This is not to say that an alternative measure of constitutional reasonableness is necessarily easy to implement. The promise and peril of a two-ply test is that a court may be left with two opportunities to invalidate a search or seizure. To put a finer point on it: The promise is that a court successfully may correct for the qualitative errors endemic to any rule-like test.¹⁷⁸ The peril is that the court may *overcorrect*, and the costs of such errors may be measured in crimes unpunished (and, by extension, some greater amount of harm caused to property and persons or even lives lost).¹⁷⁹ But this is only to say that the qualitative question must be asked and answered carefully—with some amount of restraint—not that it should never be asked at all. And the qualitative question may be asked and answered carefully, because the qualitative dimension of a two-ply reasonableness test need not be freeform. As scholars have recognized, evaluative tests work best when they are not only “openly acknowledged” but

TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 23-50 (1969); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 811 (1994).

176. MARTHA C. NUSSBAUM, *The Discernment of Perception: An Aristotelian Conception of Private and Public Rationality*, in LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE 54, 95 (1990) (discussing the appropriate role of perception in the relationship between general moral rules and their application to specific situations).

177. This last point resonates with the *aretic* claim that *complete justice* requires both the hard legal justice that arises from the application of legal rules and the softer simple justice that arises from fair and virtuous treatment. See ARISTOTLE, THE NICOMACHEAN ETHICS bk. V, at 140-41 (J.A.K. Thomson trans., Penguin Books 2004) (c. 384 B.C.E.); NUSSBAUM, *supra* note 176, at 98 (observing that the justice that Aristotle envisioned is one that “elevates concrete perceptions above rule-following and makes public policy a matter of creative improvisation”); Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 109 (1993) (arguing that complete justice requires legal justice tempered by equity).

178. See Schauer, *supra* note 44, at 161 (“As with most rule-based approaches to more broadly defined problems, the concern here is with mistakes in applying the broadly phrased rule.”); see also Kelman, *supra* note 48, at 212 (noting that context-friendly standards may compliment generally applicable rules to keep the latter from becoming too over- or underinclusive); *infra* notes 224, 273 and accompanying text.

179. See *infra* notes 223-33, 243-44, 273-82, 295-302 and accompanying text (discussing the respective advantages of standards and rules).

also somewhat (but not overly) “structured and controlled.”¹⁸⁰ Thus, a qualitative test may exclude certain considerations, include only specified others, and even weight relevant considerations according to established criteria.¹⁸¹ Indeed, a number of lower courts already have established such semistructured tests for peacekeeping searches and seizures.¹⁸² And, notably, the very fact that courts traditionally have applied general reasonableness to peacekeeping cases without much fuss indicates that the common law method has operated to constrain judicial second-guessing at least passably well.¹⁸³

Thus, the crux of my prescription is not a call for dyed-in-the-wool particularism but for trust in the common law method—a method that, in its “elaboration of a standard,” allows for a healthy degree of “movement from general evaluative ideas to more specific but still evaluative ideas.”¹⁸⁴ Of course, the common law method also produces “a certain diminution in law’s certainty,” as law becomes “a matter of argument.”¹⁸⁵ But Waldron thought the price worth it, and I agree.¹⁸⁶ For it is only through the elaboration of a standard that the law may adequately protect dignity and other qualitative values.¹⁸⁷ In any event, there is expressive value to a jurisprudence that would allow the litigant to make his qualitative case.¹⁸⁸ What is required, then, is “an act of faith” in the human capacity of the adjudicator “to apply general moral predicates” regarding “what is reasonable and what is not—not just in their recognition of a rule and its mechanical application.”¹⁸⁹ By comparison, a hard commitment to a rule-like proxy—what Waldron called a “subsidiary rule[]”—may “detract

180. MICHAEL R. GOTTFREDSON & DON M. GOTTFREDSON, *DECISION MAKING IN CRIMINAL JUSTICE: TOWARD THE RATIONAL EXERCISE OF DISCRETION* 51 (2d ed. 1988) (punctuation altered) (quoting HERMAN GOLDSTEIN, *POLICING A FREE SOCIETY* 94 (1977)).

181. As Dworkin observed, “[O]ne principle might have to yield to another” and even to “an urgent policy with which it competes on particular facts.” Dworkin, *supra* note 15, at 1069; *see also* Mashaw, *supra* note 170, at 922-25 (observing that dignitary claims may be “defeated by the recognition that the challenged process is explicable as a trade-off among competing values”).

182. *See, e.g.*, *Wilson v. State*, 932 A.2d 739, 744-46 (Md. Ct. Spec. App. 2007) (applying a three-prong test to peacekeeping seizures).

183. *See supra* Part II.A.

184. Waldron, *supra* note 13, at 10, 23, 41.

185. Waldron, *supra* note 10, at 211-12.

186. *Id.*

187. *See id.* at 208 (arguing that a standard “evinces faith in individuals’ abilities to think about and proceed with the application . . . without any assurance that any two applications to similar circumstances will yield exactly the same result”); *cf.* Alschuler, *supra* note 51, at 227 (“When the best rules that our powers can devise produce injustice often enough, we do well to abandon them even at the price of lawlessness.”).

188. *See infra* notes 195, 258, 262-67 and accompanying text.

189. Waldron, *supra* note 10, at 212. As Kenneth Culp Davis explained in his brilliant examination of “discretionary justice,” it is “case-to-case consideration” where “the human mind is often at its best.” KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 20 (1969).

from the sort of thoughtfulness that [a] standard initially seemed to invite.”¹⁹⁰ Ultimately, the Fourth Amendment may be thought of as “grown” order, which may develop sensibly, even without central coordination, through “cautious, incremental change, . . . as the common law demonstrates so well.”¹⁹¹

This discussion, of course, sounds squarely within the rules-standards debate.¹⁹² For present purposes, however, I largely abandon the terms of that debate because, in the end, both general reasonableness and probable cause are standards and not rules.¹⁹³ But they are different species of standards. In this Part, I have focused principally on the advantages of standards. I am not blind, however, to the respective advantages of rules; I discuss them in the next Part (and offer reasons to conclude that, at least in the Fourth Amendment context, the advantages are overplayed).¹⁹⁴ For now, I submit only that legality demands something more than blind (and stand-alone) allegiance to rule-like proxies; it demands legal space for the exercise of “practical reason”—for the notion that systemic stakeholders are “active intelligence[s]” that are “capable of explaining themselves.”¹⁹⁵

C. *Two-Ply Reasonableness in Practice*

Enough theory. Let’s proceed to brass tacks. As indicated, I am inclined to leave a workable two-ply reasonableness test to organic development precisely because the qualitative ply entails “too many variables to yield its essence to logical analysis designed to generate decision algorithms.”¹⁹⁶ Nevertheless, I am prepared to sketch one functional formulation.

In the first ply, a court would confront the conventional question of probable cause for arrest. In the second ply, the court would balance the respective interests, by inquiring whether a reasonable officer in the same circumstances would have made the arrest for the reasons given. This is, of course, almost identical to the question that the Court refused to ask in *Whren v. United*

190. Waldron, *supra* note 13, at 8.

191. Ronald J. Allen & Ross M. Rosenberg, *The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge*, 72 ST. JOHN’S L. REV. 1149, 1197-1200 (1998).

192. See generally FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

193. See *supra* notes 3, 81-91 and accompanying text; *infra* notes 229-30, 303-07 and accompanying text.

194. See *infra* notes 223-33, 241-44, 273-82, 295-302 and accompanying text.

195. Waldron, *supra* note 10, at 210, 212; see also *infra* note 206 and accompanying text.

196. Allen & Rosenberg, *supra* note 191, at 1198.

States.¹⁹⁷ Specifically, the *Whren* Court thought it impractical “to plumb the collective consciousness of law enforcement in order to determine whether a ‘reasonable officer’ would have been moved to act.”¹⁹⁸ But, notably, the Court has not always taken such a hard line. To the contrary, it has evaluated reasonableness “from the perspective of a reasonable officer on the scene” in a whole host of Fourth Amendment contexts¹⁹⁹: to determine (i) whether exigent circumstances existed,²⁰⁰ (ii) whether an officer made a good-faith Fourth Amendment error (which is an exception from the exclusionary rule),²⁰¹ (iii) whether an officer secured consent to search from an individual with apparent authority to consent,²⁰² (iv) whether an officer used excessive force as compared to reasonable force,²⁰³ and (v) more generally, whether an officer acted as a reasonable peacekeeper.²⁰⁴

But, just because a court tenably may evaluate the reasonable officer’s perspective, it does not follow that judges should be authorized to do so freely. To the contrary, a certain amount of deference is certainly warranted. There is, after all, a basic principle of sound institutional design that responsibility ought to be allocated to actors according to respective competency.²⁰⁵ The virtue of a

197. 517 U.S. 806, 810, 814, 819 (1996) (rejecting the proposed test of whether “a reasonable officer in the same circumstances would not have made the stop for the reasons given”).

198. *Id.* at 815.

199. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

200. *Ryburn v. Huff*, 132 S. Ct. 987, 992 (2012) (measuring the constitutionality of a warrantless entry, premised on the exigency of officer safety, based upon “the perspective of a reasonable [police] officer on the scene” (quoting *Graham*, 490 U.S. at 396-97)).

201. *Davis v. United States*, 131 S. Ct. 2419, 2423-24, 2429 (2011) (refusing to apply the exclusionary rule where the officer exercised “objectively reasonable [but erroneous] reliance on binding appellate precedent”); *cf.* *Hill v. California*, 401 U.S. 797, 803-04 (1971) (“The upshot was that the officers in good faith believed Miller was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But . . . on the record before us the officers’ mistake was understandable and the arrest a reasonable response to the situation facing them at the time.”).

202. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990) (“The Constitution is no more violated when officers enter without a warrant because they reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises, than it is violated when they enter without a warrant because they reasonably (though erroneously) believe they are in pursuit of a violent felon who is about to escape.”).

203. *Graham*, 490 U.S. at 388, 396.

204. *See supra* Part II.A; *cf.* *Davis v. United States*, 512 U.S. 452, 459 (1994) (holding that the invocation of *Miranda* rights must be made “sufficiently clearly [such] that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney”).

205. William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HART & SACKS, *supra* note 129, at li, lx (“In a government seeking to advance the public interest, each organ has a special competence or expertise, and the key to good gov-

two-ply test, however, is that it has the capacity to navigate the space between sufficient deference and appropriate oversight. It is compatible with a rough (but not complete) measure of deference to the quick-thinking and fast-acting beat cop. Simply, deference is not an all or nothing proposition.²⁰⁶

Here, administrative law offers an instructive point of comparison. To master the tough task of calibrating deference to the circumstances in which it is most deserved, administrative law has honored a reason-giving requirement that is generally considered noncontroversial. Specifically, the Court has recognized that (as with criminal law) “the central concern of administrative law is the unchecked exercise of discretion,” but (contrary to criminal law) the Court has not only insisted that administrative agencies “operate within legally defined boundaries” but also that they “give explanations for their actions.”²⁰⁷ This reason-giving requirement provides the requisite window for both regulation and deference. As Kevin Stack explained it: “[R]eason-giving is a precondition to, and the object of, deference.”²⁰⁸ In this way, the Court has managed to regulate *inside and outside* of the legal boxes of administrative law. It has adopted relatively crisp statutory lines to define the legalistic contours of agency authority, but it has concurrently relied upon a reason-giving requirement to regulate the discretionary space within.

In the peacekeeping context and in related Fourth Amendment contexts, reason giving already does some of the same work. Thus, as indicated, the Court has used general reasonableness (measured from a reasonable-officer perspective) to regulate police officers’ use of force even as it has acknowl-

ernment is not just figuring out what is the best policy, but figuring out which institutions should be making which decisions and how all the institutions should interrelate.”).

206. See *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (holding New York City’s stop-and-frisk policy unconstitutional, even after providing deference to officers’ “split-second decisions in situations that may pose a danger to themselves or others”); see also Douglas A. Berman, *Mercy’s Disguise, Prosecutorial Power, and Equality’s Modern Construction*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 18, at 675, 676 (observing that executive “expertise” need not translate to “discretion . . . free from any judicial scrutiny”).

207. Rachel E. Barkow, *Mercy’s Decline and Administrative Law’s Ascendance*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 18, at 663, 663, 665 (noting that “agencies must provide the reasons behind their decisions” to give courts the ability “to check against arbitrary and capricious decision-making”); see also Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 25 (2001); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 *DUKE L.J.* 1811, 1813 (2012) (“Reason giving is central to U.S. administrative law and practice.”); Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 *YALE L.J.* 952, 952 (2007) (observing that the “settled rule . . . requires the agency exercising the delegated authority to state the grounds for its invocation of power”).

208. Kevin M. Stack, *Interpreting Regulations*, 111 *MICH. L. REV.* 355, 398 (2012); see also MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION* 48-50 (1988) (exploring the interplay between deference and reason giving); cf. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

edged that the “calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving.”²⁰⁹ Likewise, the *Terry* Court managed to subject stops and frisks to constitutional oversight even as it recognized that officers deserve deference as they confront “rapidly unfolding and often dangerous situations on city streets.”²¹⁰

The Court could put reason giving and deference to the same work in the law enforcement context. For our purposes, the precise qualitative question would be *whether a reasonable officer in the same circumstances would have made the arrest for the reasons given*. Thus, the proposed two-ply test would require the state to provide not only sufficient quantitative proof of legal guilt but also satisfactory qualitative reasons for the police action taken. But what are satisfactory enough qualitative reasons? This is, of course, the tricky question. And, in a vacuum, it is hard to determine how much deference is too much deference and how much is not enough.

What follows are some rough-and-ready suggestions. It stands to reason that—because police officers must make split-second decisions—they demand more deference than typical administrative agents. And, as I have indicated, the law of peacekeeping is probably the best positive place to look to determine deserved deference.²¹¹ A fair reading of that doctrine is that the state must offer, at a minimum, a nonarbitrary reason for the peacekeeper’s action. Admittedly, as applied to the law enforcement context, such a minimal requirement runs the risk of translating into something analogous to rational basis review. But, significantly, the state sometimes fails to satisfy even that low level of scrutiny.²¹² More to the point, *Atwater* was just such a *pointless* case (by the Court’s own estimation).²¹³

To be sure, I believe the qualitative bar for nonarbitrariness appropriately may be set substantially higher. As I have argued elsewhere, the case for law enforcement expertise has been overplayed terrifically. To the contrary, prevailing doctrine reflects highly problematic assumptions about the respective competency of police and prosecutors—assumptions that are undefended, underanalyzed, undertheorized, and probably the “product of unplanned evolu-

209. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

210. *Terry v. Ohio*, 392 U.S. 1, 10, 15 (1968).

211. I should add, however, that in a separate work in progress, I examine the problem of what I term “spillover deference” whereby police officers are allowed to use their peacekeeping authority as a means to enforce the criminal law in circumstances where they otherwise could not do so without violating the Fourth Amendment. *See supra* notes 20, 97.

212. *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Romer v. Evans*, 517 U.S. 620, 631-32 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 448 (1985).

213. *See supra* notes 5-7 and accompanying text.

tion.”²¹⁴ Specifically, police and prosecutors have no monopoly on the moral insight that undergirds the exercise of equitable discretion.²¹⁵ That is, there is no good reason to conclude that law enforcement agents are particularly adept at evaluating the “moral predicates” for qualitatively reasonable state action.²¹⁶ In fact, police and prosecutors may be considerably worse than laypeople at moral reasoning and decisionmaking.²¹⁷ Precisely, they are prone to underutilize equitable discretion because they operate under countervailing institutional incentives and biases that systematically skew in the direction of reflexive arrest and charge—at least in the petty order-maintenance cases that tend to most frequently produce gratuitously humiliating or otherwise highly troubling state action.²¹⁸ Worse still, many of the prevailing institutional pressures are more self-serving than public regarding.²¹⁹ Simply put, there are arrests and charges that are not quite gratuitous but that are useful for only the wrong reasons. Thus, even after the system takes deference into proper consideration, there remains some need for a modicum of judicial attention to police reasons. Here, the claim is not that judges are somehow more public spirited—just that they are less interested.²²⁰

214. DAVIS, *supra* note 189, at 188-89, 191 (noting that “no one has done any systematic thinking to produce the assumptions” about prosecutorial power); *see also* Bowers, *supra* note 25, at 1687-88.

215. *See* Bowers, *supra* note 25, at 1688-720; *see also* Barkow, *supra* note 207, at 672 (“[T]he question of what constitutes justice in a particular case is one on which the entire polity has the relevant expertise.”).

216. *See* Waldron, *supra* note 10, at 212.

217. Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319, 330-35 (2012) (arguing that laypeople may be comparatively better at moral reasoning because they exercise practical wisdom free of institutional incentives and biases); *cf.* McDonald v. City of Chi., 130 S. Ct. 3020, 3058 (2010) (Scalia, J., concurring) (observing that legal elites have no “comparative . . . advantage” with regard to “resolving moral disputes” (alteration in original) (internal quotation marks omitted)).

218. Bowers, *supra* note 25, at 1693-99 (offering reasons for the systematic skew and concluding that “the resultant pool of petty crime arrestees is somewhat larger than the pool of normatively guilty offenders, even in the eyes of the officers who made the arrests”); *see infra* Part V.B.

219. For instance, in some jurisdictions, officer compensation is pegged to arrest numbers. *See, e.g.*, Brown v. Edwards, 721 F.2d 1442, 1452-53 (5th Cir. 1984) (noting that “the Mississippi fee statute is not [unconstitutional] . . . where the arrest is otherwise validly made without a warrant and on probable cause” and that “an arrest which is valid . . . is not rendered unconstitutional . . . simply on account of the officer’s motives in making the arrest”); LEVINE & SMALL, *supra* note 24, at 20 (describing so-called “collars-for-dollars” phenomenon whereby officers make order-maintenance arrests to generate overtime pay); *cf.* Sarah Stillman, *Taken*, NEW YORKER, Aug. 12, 2013, at 49, 49-50 (discussing police incentives to enforce criminal laws that trigger civil forfeiture laws, thereby generating profits for departments).

220. In a recent article, Eric Posner and Adrian Vermeule observed that legal scholarship has tended incompatibly to feature “deeply pessimistic accounts of the motivations of relevant actors in the legal system” and also “optimistic proposal[s] that the same actors

V. TWO-PLY REASONABLENESS AND THE RULE OF LAW

The kind of reason-giving requirement that I have in mind would not be lawless. To the contrary, a two-ply reasonableness test would be more *law-bound* than the Court's prevailing approach.²²¹ Specifically, the obligation to give a reason would provide a check on the discretionary authority of police officers who, currently, are left to act according to their own preferences and predilections (which is, by conventional measure, a particularly lawless state of affairs).²²²

The competing position, however, is that the rule of law and the principle of legality depend upon consistency and guidance to best protect against state overreach, and, more to the point, that consistency and guidance are best served by "clear and crisp instructions to the primary actors whose constitutional compliance is essential to a constitutional system."²²³ Ultimately, it is an open empirical question whether the advantages of guidance and (purported) consistency outweigh the potential moral and instrumental disadvantages of under- and

should supply public-spirited solutions." Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1743 (2013) (italics omitted). They termed this incoherent move "the inside/outside fallacy." *Id.* (italics omitted). The immediate proposal is not, however, an example of that problematic move. To the contrary, my perspective remains at all times consistent: I have no great faith in any institutional actor, but I have a particular lack of faith in the most interested actors. See Charles L. Barzun, *Getting Substantive: A Response to Posner and Vermeule*, 80 U. CHI. L. REV. DIALOGUE 267, 275 (2013), https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/Dialogue/Barzun_Online.pdf ("[T]he Authors succeed in identifying an 'inconsistency' only by turning a blind eye to obvious and relevant institutional distinctions that might justify treating judges differently from other political officials.").

221. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 658 (1995); see also *supra* notes 194-95 and accompanying text; *infra* notes 241-44, 273-82 and accompanying text. There is, of course, a rich literature on reason giving. My position may be said to build upon—but, ultimately, differ from—the conventional wisdom. Specifically, Fred Schauer has argued that reason giving becomes "decontextualiz[ed]" "rule-based decisionmaking," because "giving a reason puts th[e] case into a larger category including other cases" and thus "pull[s] away from the particular and toward the general." Schauer, *supra*, at 658. It is true that a reason-giving requirement makes the regulated party more rule-bound, but it concurrently confers upon the reviewing body additional authority to particularize and contextualize.

222. Waldron, *supra* note 10, at 206 (describing as lawless the callous command to await "coercive intervention from the state"); see also Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1333-35 (2008) ("[O]ur legal culture has come to view unreviewable discretion to decide individual cases as the very definition of lawlessness."); Margareth Etienne, *In Need of a Theory of Mitigation*, in CRIMINAL LAW CONVERSATIONS, *supra* note 18, at 630, 631 ("[T]o leave these hard [particularistic] questions in the hands of any one institutional actor—the judge, jury (or commonly, the prosecutor)—is to leave that group susceptible to accusations of caprice and lawlessness."); Jeffries, *supra* note 17, at 212, 215 (observing that "the wholesale delegation of discretion naturally invites its abuse").

223. Schauer, *supra* note 44, at 170.

overinclusive rule-based reasoning.²²⁴ In this Part, I offer several reasons to conclude that—from a rule-of-law perspective (and in the narrow context of criminal law enforcement)—exclusive reliance on a rule-like approach is far from self-evidently superior and may well be inferior, even if (or especially because) it provides “detailed guidance” to police officers.²²⁵

A. *Legalistic Constraints as Safe Harbors*

The Court has subscribed to the conventional wisdom that a “bright-line constitutional standard” for reasonableness best serves the states’ “essential interest in readily administrable rules.”²²⁶ Such rules are thought to encourage not only efficient enforcement but also bedrock rule-of-law values, such as consistency, transparency, predictability, and prospectivity.²²⁷ This much is obvious. But it is not obviously right. The answer depends to some degree upon the context in which such readily administrable rules operate.

Before we proceed, let me define my terms. We may think of the quantitative standard of probable cause as a legalistic constraint on discretion and the qualitative standard of general reasonableness as a particularistic constraint. Here, I use the terms *particularistic* and *legalistic* to describe only a spectrum between a hypothetical constraint on discretion that is wholly prospective, precedential, and uniformly applicable; and a hypothetical constraint on discretion that is wholly retrospective, contextual, and internal to the criminal case. As we have seen already, probable cause is comparatively rule-like and therefore much more legalistic; general reasonableness is comparatively formless and therefore much more particularistic.²²⁸ This is not to say that general reasonableness wholly lacks structure—just that it falls closer to one endpoint and probable cause falls closer to the other.

In our criminal justice system, legalistic constraints on executive discretion—to the extent they are required at all—are typically no more than thresholds to permissive state action. That is, they do not *mandate* state action; they

224. *See id.* at 169 (framing the question as whether “the advantages of rule-based decision-making and rule-based guidance . . . outweigh the principal disadvantage of under- and over-inclusion vis-à-vis the rule’s background justification”); *supra* note 178 and accompanying text; *infra* note 273 and accompanying text.

225. *See id.* at 168.

226. *Virginia v. Moore*, 553 U.S. 164, 175 (2008) (quoting *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001)) (internal quotation marks omitted).

227. *See* Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 1-2 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 10-73, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491; *see also* Scalia, *Assorted Canards*, *supra* note 50, at 588 (“Consistency is the very foundation of the rule of law.”). *See generally* BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004); Joseph Raz, *The Rule of Law and Its Virtue*, 93 L.Q. REV. 195, 195-202 (1997).

228. *Supra* notes 3, 81-91 and accompanying text.

authorize it. With probable cause, a police officer *may* arrest, but *he need not do so unless he wishes to do so*. Thus, the term “constraint” is something of a misnomer—or, at least, it is incomplete. Probable cause does not so much constrain as it empowers. It is a safe harbor. Look no further than the language of *Atwater*: Officer Turek was “authorized (*not required, but authorized*) to make a custodial arrest.”²²⁹

In this way, probable cause successfully provides “detailed guidance” to the officers who work under the rule-like standard,²³⁰ but it delivers much less guidance to the people who live under the officers. To the contrary, officers with probable cause retain terrific discretion to choose when, whether, and how to act. And, on this score, we discover—yet again—that probable cause and conventional legality doctrines are complimentary. Vagueness doctrine is intended to constrain executive discretion, and, in one respect, it achieves that objective by limiting police and prosecutors to a set catalogue of crimes.²³¹ But, in another respect, vagueness doctrine—like probable cause—also empowers. Specifically, if courts permitted legislatures to make criminal statutes less precise, then an arresting officer would be less certain about when and whether he had probable cause as to a given crime, because (like the public) he would be less certain about *what exactly the given crime was*. With well-defined criminal laws, by contrast, the officer is comparatively more certain about when and whether (and as to what) he has probable cause. Vagueness doctrine and probable cause thereby harmonize to produce an identifiable domain of choice within which a law enforcer may “define the law” that he wishes to enforce.²³² Put differently, these two legalistic constraints—the prohibition against vague stat-

229. *Atwater*, 532 U.S. at 354 (emphasis added).

230. Schauer, *supra* note 44, at 168.

231. *Supra* notes 45-48 and accompanying text.

232. See STUNTZ, *supra* note 54, at 3-4 (“Law enforcers . . . define the laws they enforce.”). Of course, it would be naive to think that the application of probable cause, vagueness doctrine, or any other legalistic constraint is merely mechanistic. See Jeffries, *supra* note 17, at 196 (describing vagueness as an “evaluative” standard); *infra* Part VI.C (examining the degree to which probable cause may operate as an evaluative standard and exploring the implications). As Jeffries identified, the vagueness determination often turns less on an objective textual reading of a given statute than on a determination of whether the statute provides so-called “common social duty” notice or whether its “uncertain reach implicates protected freedoms” or a protected class. See Jeffries, *supra* note 17, at 196, 231 (internal quotation marks omitted). But vagueness doctrine results nonetheless in a legalistic constraint on discretion for the simple reason that, eventually, a line must be drawn somewhere. The evaluating court must rule one way or another, and, going forward, that determination—even if fuzzy—defines the subsequent legal shape of the statute. Thereafter, the parameters of discretion are rule-like: police and prosecutors may not enforce conduct that falls beyond those parameters, but they may freely enforce conduct that falls within it.

utes and the requirement of probable cause—describe “a means of insulating officials” from legal challenges to searches and seizures.²³³

This is the dark side of prevailing legalistic constraints on law enforcement discretion: they are typically “power-directing” more than “power-curtailing.”²³⁴ A critical question, then, is just how easy it is for an officer to enter into (and work within) applicable safe harbors. The question is two-dimensional: along the evidentiary dimension, the domain of choice is triggered by probable cause; along the substantive dimension, it is triggered by crime definition and broadened by code growth. The Court’s failure to adequately check discretion along one dimension may undermine its legalistic constraints along the other. Thus, if a code were made broad enough, police could pick and choose between many prospective offenders under even the most rigid plausible definition of probable cause. Conversely, if probable cause were defined as a mere possibility or a hunch, police could pick and choose between many prospective offenders under even the narrowest plausible criminal code.

Part of the problem, then, is not the inadequacy of probable cause but the overbreadth of prevailing criminal codes. That is, “[t]oo much law amounts to no law at all.”²³⁵ It operates, instead, as a “menu of options” that police officers and prosecutors may “use as they see fit.”²³⁶ And, significantly, the Court has imposed almost no substantive limits on breadth, as it revealed in *Whren v. United States*: “[W]e are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement.”²³⁷

In the absence of an aggressive, substantive constitutional check, legislatures may criminalize a good deal of “marginal middle-class” misbehavior (and, indeed, are motivated politically and institutionally to do so).²³⁸ This is

233. *California v. Acevedo*, 500 U.S. 565, 581 (1991) (Scalia, J., concurring in the judgment) (discussing the purpose of the warrant, which is another legalistic constraint on discretion).

234. Eric J. Miller, *Are There Two Types of Decision Rules?*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 18, at 20, 21 (distinguishing between “power-directing” and “excuse-based” decision rules (the latter of which “contract[]” “judicial power”) (emphasis omitted)).

235. STUNTZ, *supra* note 54, at 3.

236. *Id.* at 4; Stephanos Bibas, *Essay, Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 932-33 (2006) (“[C]riminal laws do not create binding obligations but rather a menu of options for [professional] insiders.”).

237. 517 U.S. 806, 818 (1996). Really, the only substantive limits are the conduct requirement and prohibitions on the criminalization of fundamental freedoms. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *Roe v. Wade*, 410 U.S. 113, 164 (1973); *Robinson v. California*, 370 U.S. 660, 667 (1962).

238. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 524 (2001).

no novel insight. To the contrary, there is a rich literature on overcriminalization.²³⁹ As Justice Jackson explained over seventy years ago:

With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books . . . to pin some offense on him.²⁴⁰

In such circumstances, formal law is a veneer for often-informal practice, and equitable treatment is thereby made a matter of sovereign grace, not individual right.²⁴¹ To my thinking, this is a principal reason—along with others discussed below—why proponents of “the rule of law as a law of rules” have potentially overplayed empirical assumptions about the relative advantages of detailed guidance.²⁴² The prevailing baseline against which constitutional reform is measured is simply not a recipe for consistent enforcement. It is a baseline that authorizes officers to pursue their own whims within legal boxes.²⁴³ In Richard McAdams’s words: “[T]he system fails on rule of law grounds,” because “such power . . . stands on its head the distinctive criminal law idea of the principle of legality.”²⁴⁴

239. See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* (2008).

240. Robert H. Jackson, *The Federal Prosecutor*, 24 J. AM. JUDICATURE SOC’Y 18, 19 (1940). Naturally, this reasoning applies to police officers as well as prosecutors.

241. See Sarat & Clarke, *supra* note 18, at 391, 395 (describing equitable discretion as beyond “law’s limit”).

242. Scalia, *The Rule of Law*, *supra* note 50, at 1175 (capitalization altered); cf. Waldron, *supra* note 10, at 208 (“It is tempting to say that law can guide conduct only if it is determinate, i.e. only if it is cast in the form of clear rules. But it is remarkable that law often presents itself in the form of *standards* . . .”).

243. Bowers, *supra* note 25, at 1697 (“[T]he significant number and breadth of public order offenses—like disorderly conduct—make for a multiplicity of relatively big boxes.”); see also ALLEN ET AL., *supra* note 50, at 609, 621 (“[P]olice may employ commonly violated but relatively clear laws to pick and choose among the violators they will stop.”); Colb, *supra* note 8, at 1660 (“[T]he legislature can oblige the officer by expanding the scope of the criminal law until the point at which such probable cause (to believe that *some* crime has been committed) easily exists.”); William J. Stuntz, Commentary, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 853-54 (2001) (explaining that, with broad codes, officers retain “the same kind of authority . . . that old-style vagrancy and loitering laws used to give them . . . : they can stop anyone, anytime, for any reason”).

244. Richard H. McAdams, *The Pessimists’ View*, in *CRIMINAL LAW CONVERSATIONS*, *supra* note 18, at 517, 521; see also Stuntz, *supra* note 238, at 509, 521 (“Broad criminal codes ensure *inconsistency*. Broad codes cannot be enforced as written; thus, the definition of the law-on-the-street necessarily differs, and may differ a lot, from the law-on-the-books.”).

Against the prevailing baseline, constitutional reform should not be condemned simply for transparently apportioning moral authority (and inevitable moral decisionmaking and action) among institutional actors.²⁴⁵ To the contrary, it should be celebrated on that score. According to Martha Nussbaum and Dan Kahan:

It's when the law falsely denies its evaluative underpinnings that it is most likely to be incoherent and inconsistent; it is when the law refuses to take responsibility for its most contentious choices that its decisionmakers are spared the need to be principled, and the public the opportunity to see correctable injustice.²⁴⁶

Nussbaum and Kahan were pushing for more than just judicial sincerity.²⁴⁷ They understood that an overly mechanistic legal test might serve “to disguise contentious moral issues” and “drive those assessments underground”—a state of affairs that, in turn, might promote autocratic decisionmaking and, by extension, arbitrariness and caprice.²⁴⁸

B. *Misdemeanor Enforcement as a Domain of Choice*

Let's talk about a particularly problematic context. Significantly, the benefits and costs of legalistic constraints do not remain constant across cases. For more serious crimes, there is simply less room for moral and/or instrumental disagreement, because right-minded people agree that police—to the extent legally feasible—should almost always arrest individuals who rob, maim, rape, and kill.²⁴⁹ But the normative force of the law is less powerful (and more often

245. Dan M. Kahan, Essay, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 153 (1997) (“Stealthy moralizing is in fact endemic to criminal law.”).

246. Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 373-74 (1996); see also M. Glenn Abernathy, *Police Discretion and Equal Protection*, 14 S.C. L.Q. 472, 486 (1962) (explaining that constraints on discretion “would work more effectively if the facts of police discretion were recognized openly rather than being hidden beneath the myth of a mandate of full enforcement”); Eskridge & Frickey, *supra* note 205, at lviii (describing the realist view that “[l]aw would actually be more predictable and just if judges candidly articulated the theretofore submerged policy assumptions of their decisions”); Kahan, *supra* note 245, at 154 (“The moralizing that occurs with . . . criminal law doctrines . . . [is] on balance a good thing, and [is] probably inevitable in any event, but [it] ought at least to be made openly.”).

247. See, e.g., Micah Schwartzman, Essay, *Judicial Sincerity*, 94 VA. L. REV. 987, 988 (2008) (“Since it is usually wrong to deceive others, judges should be truthful about the reasons for their decisions.”).

248. Kahan & Nussbaum, *supra* note 246, at 274, 363; see also Stuntz, *supra* note 238, at 509, 521; *supra* note 222 and accompanying text.

249. See Bowers, *supra* note 25, at 1667-68; Paul H. Robinson, *Why Does the Criminal Law Care What the Layperson Thinks Is Just? Coercive Versus Normative Crime Control*, 86 VA. L. REV. 1839, 1865 n.84 (2000) (“[A]s a matter of common sense, the law’s moral credibility is not needed to tell a person that murder, rape, or robbery is wrong.”).

counterbalanced) when it comes to decisions over how (and whether) to handle petty crime perpetrators, such as graffiti artists, prostitutes, drug possessors, turnstile hoppers, and public urinators. Moreover, it is the latter and not the former population that is grist for the modern criminal justice mill. That is, the most common criminal cases are misdemeanor cases, and many of these cases (perhaps the overwhelming majority in many jurisdictions) are order-maintenance cases.²⁵⁰ These are the cases for which it is least suitable for courts to rely exclusively on legalistic constraints on law enforcement discretion.

First, not all instances of public-order crime are normatively appropriate occasions for arrest and prosecution.²⁵¹ As indicated, the statutes at issue typically proscribe morally neutral (or only nominally blameworthy) conduct. Thus, police officers and prosecutors are expected to decline some number of technically legally viable arrests and charges.²⁵² More importantly, in order-maintenance cases, legal viability tends not to be in much doubt. The reason is simple: public order arrests and charges often arise out of police observations, and police officers believe what they see.²⁵³ Thereafter, they proceed immediately to the normative determination of whether the *right* response is full-custodial arrest, some lesser kind of seizure, or something else altogether. And, of course, this determination of *qualitative accuracy* turns on extralegal factors (over only some of which police officers may fairly claim expertise).²⁵⁴

Second, low-level charges are typically resolved with summary pleas and not with substantive hearings and trials.²⁵⁵ And, because arresting officers are well aware of this fact, they may be even less inclined to get moral questions right (and more inclined to arrest reflexively).²⁵⁶ Simply, public-order offenses “invite manipulation” because “the individualized adjudication of guilt is an

250. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 40-41 tbl.2.1 (1979) (observing that fifty-eight percent of studied cases were “[c]rimes against public morality” or “[c]rimes against public order”); Bowers, *supra* note 23, at 1119; Bowers, *supra* note 217, at 319-20.

251. Bowers, *supra* note 25, at 1664-73; *supra* notes 22-27, 33, 67-71, 245-48 and accompanying text.

252. *Supra* note 68 and accompanying text; *infra* note 272 and accompanying text.

253. Bowers, *supra* note 25, at 1700-02 (“[O]rder maintenance cases appear fungible because no consistent or clear signal exists to separate the legally or equitably weak or strong cases.”); *see also* Bowers, *supra* note 26, at 97-98.

254. *Supra* notes 155-66, 205-06, 214-20 and accompanying text (discussing institutional competency and the qualitative conception of accuracy).

255. Bowers, *supra* note 25, at 1705 (“[D]uring the short adjudicatory life of the petty case, it is subject to practically no substantive scrutiny or formal process on the question of *legal* guilt.”); Bowers, *supra* note 23, at 1122-23, 1134-35.

256. Bowers, *supra* note 25, at 1699 (“[P]olice are motivated not to exercise *equitable* discretion to forego arrest in normatively borderline cases”); *supra* notes 26, 214-20 and accompanying text (discussing cognitive and institutional biases that militate in favor of reflexive arrest).

unusually inadequate check on police and prosecutorial action.”²⁵⁷ Admittedly, no Fourth Amendment reform is capable of altering this unfortunate fact about misdemeanor practice and adjudication (or about officers’ awareness of it). But a two-ply reasonableness test could compel an arresting officer to check his worst instincts at the door (even if he knows those instincts rarely are put to the test). In any event, there is expressive value—independent of practical effect—to a jurisprudence of reasonableness that would allow an arrestee to challenge patently objectionable normative enforcement decisions and actions. By contrast, as David Luban explained, when a procedural system “gag[s] a litigant and refuse[s] even to consider her version of the case,” it is, “in effect, treating her story as if it did not exist, and treating her point of view as if it were literally beneath contempt.”²⁵⁸

Third, the concern is not only that the statutes in question are frequently flouted and seldom enforced, but also that they tend to be enforced principally in certain places and against certain groups. That is, arresting officers may do worse than gratuitously humiliate suspects; they also may enforce the law disparately along lines of race, class, ethnicity, religion, gender identity, sexual orientation, political viewpoint, or some other arbitrary classification. Of course, purposeful discrimination against protected classes is almost always constitutionally prohibited, but plenty of room for mischief (unconscious or otherwise) remains between the limits of the Fourth Amendment and equal protection—between the requirement that an arresting officer possess probable cause and the requirement that an arrest have a nondiscriminatory purpose.²⁵⁹

257. Jeffries, *supra* note 17, at 197.

258. David Luban, *Lawyers as Upholders of Human Dignity (When They Aren’t Busy Assaulting It)*, 2005 U. ILL. L. REV. 815, 819; *see also supra* note 195 and accompanying text.

259. *See McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *see also Chavez v. Ill. State Police*, 251 F.3d 612, 645, 648 (7th Cir. 2001) (finding no discriminatory purpose despite a statistical showing of racial disparities in traffic stops); *Bill Moyers Journal: Bryan Stevenson and Michelle Alexander* (PBS television broadcast Apr. 2, 2010), available at <http://www.pbs.org/moyers/journal/04022010/watch.html> (“*McCleskey v. Kemp* has immunized the criminal justice system from judicial scrutiny for racial bias. It has made it virtually impossible to challenge . . . racial bias in the absence of proof of intentional discrimination . . . [which] is almost impossible to come by in the absence of some kind of admission.”). Significantly, poverty is not even a protected class. Nor is it clear whether and to what degree sexual orientation and gender identity are protected. *See United States v. Windsor*, 133 S. Ct. 2675 (2013). In a similar vein, Akhil Amar envisions a qualitative conception of constitutional reasonableness as a supplement to insufficiently robust constitutional guarantees. Amar, *supra* note 175, at 790 (“[I]t is far more sensible to try to read the Fourth in light of other norms that do embody our overall constitutional structure today—free speech, free press, privacy, equal protection, due process, and just compensation.”); *cf.* Ekow Yankah, Op-Ed., *The Truth About Trayvon*, N.Y. TIMES (Jul. 15, 2013), <http://www.nytimes.com/2013/07/16/opinion/the-truth-about-trayvon.html> (advocating “an honest [constitutional] jurisprudence that is brave enough to tackle the way race infuses our criminal law, . . . a jurisprudence that at least begins to [consider] racial disparities”).

In any event, order-maintenance enforcement is often localized even when law enforcers harbor no bias, because disorder correlates with urban poverty, and urban poverty correlates with race.²⁶⁰ Borderline (and over-the-line) arrests thereby pool in economically distressed and historically disadvantaged communities.²⁶¹

Fourth, there is the matter of perception. That is, checkerboard enforcement patterns or humiliating arrests may appear gratuitous or otherwise arbitrary even when they are not. Put differently, laypeople may come to believe (albeit perhaps incorrectly) that offending officers intend to disregard the rule of law and denigrate liberal values, such as liberty, equality, fairness, proportionality, and dignity.²⁶² The result may be disaffection at best, backlash at worst.²⁶³ Unsurprisingly, then, a number of social-norms scholars—including,

260. See Bowers, *supra* note 26, at 97-98; see also Jeffrey Fagan, *Race, Legitimacy, and Criminal Law*, SOULS, Winter 2002, at 69, 70 (explaining that order-maintenance policing is “disproportionately aimed at nonwhite citizens, far outpacing their actual involvement in crime”); Jeffrey Rosen, *Excessive Force*, NEW REPUBLIC, Apr. 10, 2000, at 24 (discussing localized order-maintenance enforcement).

261. See Bowers, *supra* note 25, at 1699 (“[T]he most persuasive explanation for why authorities target poor and minority communities for order maintenance policing is that disorder is disproportionately found there, and resources being finite, enforcement dollars are best spent on geographically targeted policing . . . (even if public order crime is, to some degree, everywhere.)”); William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1820-22 (1998) (“Looking in poor neighborhoods tends to be both successful and cheap. . . . Street stops can go forward with little or no advance investigation. . . . [T]he stops themselves consume little time, so the police have no strong incentive to ration them carefully.”). Police have another reason to focus on the politically and economically powerless: it is the path of least resistance. LEVINE & SMALL, *supra* note 24, at 23 (indicating that the police may find it prudent to focus on those who lack “the political and social connections that might make the arrests troublesome or embarrassing for the arresting officers and their commanders”); Stillman, *supra* note 219, at 59 (discussing police use of “forfeiture actions [that] tend to affect people who cannot easily fight back” because of poverty or immigration status). And, of course, as any political-process theorist would attest, political disempowerment provides a basis for more aggressive judicial review of the political branches. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

262. See Fagan & Davies, *supra* note 96, at 462 (“[W]hat was constructed as ‘order-maintenance policing’ . . . was widely perceived among minority citizens as racial policing, or racial profiling.”); Stuntz, *supra* note 261, at 1800 (“[T]he message becomes: The behavior is bad when people in that class and neighborhood do it. That is not a message likely to have normative force for those who are its targets.”).

263. George Akerlof & Janet L. Yellen, *Gang Behavior, Law Enforcement, and Community Values*, in VALUES AND PUBLIC POLICY 173, 196 (Henry J. Aaron et al. eds., 1994) (noting “the possibility that the traditional tools for crime control . . . wrongly applied, will be counterproductive because they undermine community norms for cooperation with the police”); Lawrence D. Bobo & Victor Thompson, *Unfair by Design: The War on Drugs, Race, and the Legitimacy of the Criminal Justice System*, 73 SOC. RES. 445, 447 (2006) (“[D]isillusionment is contributing to a crises of legitimacy, a crisis that will . . . undermine a readiness for positive engagement with the police and with the court system.”); Bowers, *supra* note 26, at 109-11; Tracey L. Meares, *It’s a Question of Connections*, 31 VAL. U. L.

most prominently, Tom Tyler—have focused on the instrumental importance of fostering perceptions of evenhanded and respectful treatment.²⁶⁴ But, even if officers fail to act fairly and equitably, there may be value to a constitutional test that would obligate them to give reasons for those failures and that would check whether those reasons withstand scrutiny. Otherwise, there is the risk that perceptions of illegitimacy may metastasize—that they may spread from law enforcers to adjudicators.²⁶⁵ That is, laypeople may believe that constitutional reasonableness means something more muscular than a merely quantitative analysis of legal guilt.²⁶⁶ And they may grow disenchanted with judges that reach contrary conclusions and that thereby refuse even to entertain competing claims.²⁶⁷

C. *The Limits of Legalistic Reform*

But the reader may be puzzled. If the root of the problem is that police have too much discretion, then the solution would seem to be some legalistic (read: categorical) reform. For instance, the criminal justice system might abandon or bar order-maintenance enforcement or otherwise radically overhaul expansive criminal codes. Alternatively, the criminal justice system might (try to) make mandatory all legally viable arrests and charges.

Such legalistic reform proposals are fairly commonplace. Specifically, some critics of overcriminalization have called for the decriminalization of at least regulatory offenses.²⁶⁸ And some critics of equitable discretion have

REV. 579, 590 (1997) (“The mutual distrust between African Americans and law enforcement officers makes it less likely that African Americans will report crimes to the police, assist the police in criminal investigations, and participate in community policing programs that lead to greater social control of neighborhoods.”).

264. See Bowers & Robinson, *supra* note 56, at 211. See generally Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC’Y REV. 513 (2003); Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231 (2008).

265. See generally Tom R. Tyler, *Procedural Justice and the Courts*, 44 CT. REV. 26 (2007-2008).

266. Cf. Waldron, *supra* note 13, at 42 (indicating that normative concepts such as reasonableness entail “some shared sense of positive morality, some ‘common conscience’ we already share . . . [about] how one person responds as a human to another human”).

267. Bowers & Robinson, *supra* note 56, at 226-27 (“To the extent judicial intuitions deviate from the lay perspective, courts risk undermining perceptions of legitimacy both by misapplying the relevant standard and by empowering police conduct that the public may find normatively problematic.”).

268. Paul H. Robinson, *Moral Credibility and Crime*, ATLANTIC MONTHLY, Mar. 1995, at 72, 77 (“[C]riminal law is increasingly used against purely regulatory offenses But the use of criminal conviction in the absence of serious criminal harm that deserves moral condemnation weakens th[e] very force [of the criminal law.]”); see also Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 79-80 (1933).

called for its *pro tanto* elimination.²⁶⁹ I am on the record in favor of the first reform and against the second.²⁷⁰ Ultimately, however, even a warranted legalistic fix is no more than a half measure. That is, a criminal justice system that adopted an optimally narrow and shallow code (in its liability and punishment provisions, respectively) still would make inevitable equitable errors.²⁷¹ And it would make many more such mistakes if it were to abandon discretion in favor of “ordered but intolerable,” legally formalistic equal treatment.²⁷² The double-edged dilemma is that narrower and shallower substantive statutes and codes run the risk of missing conduct that ought to be punished, whereas mandatory arrest and prosecution run the risk of punishing conduct that ought to be missed.

Inevitably, the facts of life outstrip any *ex ante* attempt to regulate human behavior through a categorical legal approach, and, therefore, any legalistic constraint (even if it comes only in the form of a structured standard and not a rule) is bound to be over- and underinclusive.²⁷³ As Aristotle famously put it:

269. *E.g.*, Thurman W. Arnold, *Law Enforcement—An Attempt at Social Dissection*, 42 YALE L.J. 1, 18 (1932) (“It is the duty of the prosecuting attorney to enforce all criminal laws regardless of his own judgment of public convenience or safety.”); Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 586 (1960) (“[P]olice should not be delegated discretion not to invoke the criminal law.”); Markel, *supra* note 49, at 208, 217-21 (explaining that law enforcement has a “*pro tanto* dut[y]” to enforce permissible laws).

270. *See* Bowers, *supra* note 25, at 1662-73 (noting that discretion is “necessary and desirable” and that “substantive overcriminalization” increases the need for discretion); Bowers & Robinson, *supra* note 56, at 279 (arguing that we should “reconsider the degree to which we rely on the criminal law to achieve regulatory ends”).

271. *See* FRED SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES 44 (2003) (“[L]ife would not be long enough to reckon all the possibilities. If then no exact definition is possible, but legislation is necessary, one must have recourse to general terms.” (quoting ARISTOTLE, THE “ART” OF RHETORIC bk. I, at 11-14 (John Henry Freese trans., 1947) (c. 460 B.C.E.))); Lawrence B. Solum, *Virtue Jurisprudence: Towards an Aretaic Theory of Law*, in ARISTOTLE AND THE PHILOSOPHY OF LAW: THEORY, PRACTICE, AND JUSTICE 1, 30 (Liesbeth Huppes-Cluysenaer & Nuno M.M.S. Coelho eds., 2013) (“The solution is not to attempt to write the ultimate code, with particular provisions to handle every possible factual variation. No matter how long and how detailed, no matter how many exceptions, . . . the code could not be long enough. . . . [N]o set of rules can do justice in every case.”).

272. Charles D. Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 427 (1960) (“If every policeman, every prosecutor, every court, and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable.”); *see also* FEELEY, *supra* note 250, at 23-24 (“Decisions made under a strict application of rules often lead to outcomes that few find palatable.”); Bowers, *supra* note 25, at 1664-65.

273. Heidi M. Hurd & Michael S. Moore, *Punishing Hatred and Prejudice*, 56 STAN. L. REV. 1081, 1086 (2004) (“Proxies are almost always both over- and underinclusive of the phenomena for which they are proxies.”); *supra* notes 178, 224 and accompanying text. I do not attempt to discern what constitutes an *optimally* narrow and shallow criminal code, but I can offer a few rough-and-ready thoughts. A broader and deeper criminal code or statute is likelier to produce qualitative type I errors (by, say, punishing normative innocence), where-

[T]here are some things about which it is not possible to pronounce rightly in general terms; . . . in this way errors are made. . . . [But] the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind.²⁷⁴

A justice system demands both broad enough statutes and particularistic enough discretion to account for the peculiarities of discrete incidents and particular offenders.²⁷⁵ But a legalistic approach is competent to regulate only *ex ante* questions, such as the size and scope of statutes and codes. Yes, these are *essential* questions, but they are not the *only* questions. There are also *ex post* questions of when, whether, and how discretion should be regulated within legalistic boxes.²⁷⁶ As such, legality is but a “first step” in the systemic effort to promote “regularity and evenhandedness in the administration of justice” and to minimize “caprice and whim.”²⁷⁷ The dilemma is where to go from there.

In the main, courts and commentators have disregarded the possibilities of a particularistic next step, relying instead on the assumption that it is necessarily lawless (or at least impractical) to take any such step.²⁷⁸ Of course, courts

as a narrower and shallower code or statute is likelier to produce qualitative type II errors (by, say, leaving normative guilt unpunished). The optimal cut point is the product of a number of competing pressures. On the one hand, narrower and shallower codes are better because they are consistent with certain bedrock liberal principles: the state ought to criminalize no more conduct than necessary to promote crime control, public safety, and retributive goals; and, as Blackstone’s maxim prescribes, the state ought to take extra precautions to avoid unwarranted punishment. *See* Bowers, *supra* note 47, at 31-32 (offering constitutional, systemic, and normative reasons to prefer equitable type II errors over type I errors); *cf.* Peter Westen, *The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences*, 78 MICH. L. REV. 1001, 1006-07, 1018 (1980) (observing that constitutional rules on the finality of acquittals (but not convictions) “reflect[] the judgment that it is ultimately better to err in favor of nullification than against it”). On the other hand, broader and deeper codes are better because narrow and shallow codes are inelastic. Again, *they are what they are*. Police and prosecutors may not reach beyond the scope of the code, no matter how blameworthy or socially disruptive the conduct in question was. Broad and deep codes, by contrast, can be made narrower and shallower by application.

274. ARISTOTLE, *supra* note 177, bk. V, at 140; *see also* NUSSBAUM, *supra* note 176, at 93 (“[T]he law must speak in general terms, and therefore must err.”); Solum, *supra* note 271, at 30 (“[T]he problem is that the infinite variety and complexity of particular fact situations outruns our capacity to formulate general rules.”).

275. In this vein, the Court has observed repeatedly that the vagueness doctrine does not demand “impossible standards.” *See, e.g.,* United States v. Petrillo, 332 U.S. 1, 7-8 (1947).

276. *Cf.* PACKER, *supra* note 42, at 89-90 (observing that there is a need for the criminal justice system to implement “devices . . . in the nature of post-audits on the decisions taken by the police and prosecutors”).

277. Jeffries, *supra* note 17, at 212, 215; *see also supra* notes 17, 187, 221-22, 248 and accompanying text (discussing lawlessness of unfettered discretion).

278. An exception is Bill Stuntz, who offered a counterintuitive reform: making statutes *more* vague so that juries might screen police and prosecutorial choice. Stuntz, *supra* note 44, at 1974, 2038-39 (noting that “[t]he criminal law . . . is filled with bright lines” and arguing that governments should “define criminal prohibitions more vaguely—so jurors can exercise judgment instead of rubber-stamping prosecutors’ charging decisions”). But

and commentators are not blind to the kinds of normative and instrumental questions that a particularistic constraint would address. To the contrary, courts have long recognized the need for particularistic discretion—above and beyond questions of law and policy.²⁷⁹ Likewise, they have recognized the need to provide oversight to foreclose arbitrariness and caprice.²⁸⁰ Yet, when it comes to particularistic discretion, courts only *recommend* its sensible exercise; they do not command it (nor do they regulate it). Thus, the Court may sound off on the dangers of unchecked discretion: “The awful instruments of the criminal law cannot be entrusted to a single functionary.”²⁸¹ But it has refused to back up such rhetoric with meaningful particularistic control, subscribing instead to the somewhat fictive proposition that, within legalistic zones, professionals will look past the problematic and endemic incentives that define “the competitive enterprise” of crime fighting and nevertheless act professionally even without oversight.²⁸²

Particularistic discretion occupies a domain beyond the rough cuts of legalistic constraints, but it does not follow that the law must tolerate unchecked sovereign prerogative within legalistic bounds.²⁸³ There is more work to be done—fine-grained work.²⁸⁴ In the Fourth Amendment context, a viable next step is two-ply reasonableness—that is, the grafting of a probable cause requirement atop the particularistic constraint of general reasonableness. Such an approach would not empower executive agents by creating a safe harbor for the authorized exercise of discretion; rather, it would empower *other* agents (and

Stuntz’s proposal proves too much. He would abandon legalistic constraints for particularistic constraints. A two-ply conception of reasonableness is premised on the notion that a system may keep both.

279. Most of the cases on point deal with the prosecutor’s exercise of charging discretion, which the Fourth Amendment also subjects to only a probable cause requirement. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *Pugach v. Klein*, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (noting that “exercise[s] of judgment” are necessary in the application of law because “problems are not solved by the strict application of an inflexible formula”); *see also supra* notes 54, 60 (discussing prosecutorial charging authority).

280. *Supra* notes 44-45, 129-30, 152, 172-73, 207 and accompanying text.

281. *McNabb v. United States*, 318 U.S. 332, 343 (1943).

282. *Gerstein*, 420 U.S. at 113, 119 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14 (1948)) (declining to hold that defendants are “entitled to judicial oversight or review of the decision to prosecute”).

283. *See* DAVIS, *supra* note 189, at 21 (“[T]he conception of equity that discretion is needed as an escape from rigid rules [is] a far cry from the proposition that where law ends tyranny begins.”); Bruce Hay, *An Enforcement Policy Perspective on Entrapment*, in CRIMINAL LAW CONVERSATIONS, *supra* note 18, at 507, 508 (“[T]he executive is not the obvious entity to have the last word on [normative and policy questions] . . . with no judicial input.”).

284. *Cf. Waldron, supra* note 10, at 212 (explaining that the effect of an exclusive attention to “the clarity and determinacy of rules . . . is to slice in half, to truncate, what law and legality rest upon”).

even promote consistency) by eliminating such safe harbors.²⁸⁵ Put simply, it would be a device for the outsourcing of particularistic discretion—or, more precisely, for the shared exercise of particularistic discretion between the law enforcement agency that would make the initial qualitative decision to proceed and the reviewing entity that would evaluate for reasonableness the law enforcement agent's actions and reasons.²⁸⁶

A two-ply reasonableness test could thereby compliment extant legalistic constraints on discretion, such as vagueness doctrine and probable cause. Moreover, it could compliment sensible legalistic reforms, such as a program of substantive decriminalization intended to produce optimally (but not overly) narrow criminal codes. Such a test would leave space for legalistic constraints to do their work without leaving the rest of the work undone. And, in that way, the test would reflect the sound understanding that *legal limits have their limits*, but that (within those limits) particularistic constraints may temper the hard edges of formal law.

VI. OBJECTIONS

It is fair to respond, however, that, my entire line of analysis is premised upon an artificiality: a presumed clean distinction between the quantitative and the qualitative, the legalistic and the particularistic—as if there were no possibility that one might be subsumed or intermingled with the other. Concretely, the objection is that probable cause is neither wholly objective nor empirical—that it has its subjective and evaluative dimensions (or at least intersections). And, as such, one might claim that probable cause already (and sufficiently) has accommodated dignity and other relevant qualitative considerations of principle and policy.

I anticipate three versions of this objection. First, one might argue that, in measuring reasonableness, the Court has not abandoned a balancing of the interests. Probable cause just constitutes a consideration that is powerful enough typically to swamp all others. Second, one might argue that probable cause expresses dignity and other qualitative considerations in the aggregate—that is, as a matter of rule utility. Put differently, probable cause is such a good proxy for qualitative considerations that, in the main, it should be treated *as if* it captured those considerations. Third, one might argue that probable cause is, itself, malleable enough to accommodate considerations beyond suspicion for crime.

285. See Stuntz, *supra* note 44, at 2039 (“[G]iving other decisionmakers discretion promotes consistency, not arbitrariness. *Discretion limits discretion*; institutional competition curbs excess and abuse.” (emphasis added)).

286. *Cf.* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (endorsing a conception of separation of powers that features “separateness but interdependence, autonomy but reciprocity” as a means to achieve a “diffus[ing of] power the better to secure liberty”).

A. *Probable Cause as a Balancing Factor?*

The first objection reflects a position that the Court itself has sometimes half-heartedly espoused. Specifically, in *Whren v. United States*, the Court noted that “every Fourth Amendment case, since it turns upon a ‘reasonableness’ determination, involves a balancing of all relevant factors,” but that “[w]ith rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause.”²⁸⁷ Put simply, the *Whren* Court reasoned that it was not *failing* to balance, but rather that, in the arrest context, probable cause tipped the balance almost categorically to the state. Extending this line of reasoning to *Atwater*, the argument would be that the Court *did* consider dignity but that, in the presence of probable cause, an indignity is never “pointless” and a humiliation is never “gratuitous” (notwithstanding the Court’s express language to the contrary).²⁸⁸ To my thinking, the claim is empirical, wholly untested, largely untestable, and somewhat implausible.²⁸⁹

First, it is not at all obvious why probable cause deserves so much weight in the balance, especially in the petty crime context where probable cause comes cheap and moral reasons against arrest are comparatively powerful.²⁹⁰ Again, this is not to say that probable cause would be irrelevant to my proposed two-ply test. To the contrary, it would be a threshold requirement. And, more than that, it could be a thumb on the scale even as to the second step—the qualitative balancing step. The common law method may weigh certain considerations above others without conveying a categorical message that other considerations—such as complaints about gratuitous humiliation—will not be taken seriously or given legal meaning.²⁹¹ It is one thing to consider an argument and then reject it on balance; it is quite another to shut it out entirely.

Second, the Court cannot lightly dismiss other considerations of principle and policy as comparatively trivial without implicitly making the claim that police officers *tend to get these considerations right* and therefore require little oversight. As indicated, I do not dispute that a measure of deference may be owed to the “expert judgment” of legal professionals.²⁹² But, again, law en-

287. 517 U.S. 806, 817 (1996).

288. See *supra* notes 5-7, 30-33, 60-72 and accompanying text; cf. Mashaw, *supra* note 207, at 31 (observing that the Court sometimes has relied upon “objective proxy criteria” that “substitute for the real questions of interest,” and that, in such contexts, “[r]easonable” general rules are legally valid even though their application may lead to erroneous judgments in particular cases”).

289. Cf. ALLEN ET AL., *supra* note 50, at 421 (“The probable cause standard presupposes that the government *can* invade one’s privacy—as long as it has a good enough reason. Strangely, there is no developed body of literature defending the proposition that probable cause *is* a good enough reason.”).

290. See *supra* notes 25, 218, 249-57 and accompanying text (discussing the manner by which moral questions tend to predominate over legal questions in petty cases).

291. See *supra* notes 179-91 and accompanying text.

292. See *supra* notes 205-20 and accompanying text.

forcement professionals are not particularly competent when it comes to equitable discretion (to wit, moral decisionmaking and action). To the contrary, they are experts only with respect to practical and legal discretion (to wit, administrative and evidentiary decisionmaking and action).²⁹³ And, remarkably, it is only this last strand of discretion that a probable cause requirement effectively reaches. To the extent that a system cares about respective competencies, this seems to get matters almost backwards: the Court has regulated police and prosecutors only in a context where they already exhibit a fair degree of expertise (the legal determination of suspicion of guilt) and not at all in the very context where they exhibit the least expertise (the moral determination of what ought to be done).²⁹⁴

B. *Probable Cause as a Sufficient Proxy?*

The second objection is that a hard commitment to a quantitative measure, like probable cause, is the best mechanism to promote dignity and other relevant particularistic considerations of principle and policy in the aggregate—that is, as a matter of rule utility. Again, the claim is empirical, wholly untested, largely untestable, and somewhat implausible. First, there is no obvious nexus between degree of suspicion and the most troubling aspects of a state-imposed humiliation.²⁹⁵ In this way, probable cause is not only a rule-like proxy but also a particularly inadequate rule-like proxy.²⁹⁶ As Fred Schauer observed: “Typically, rules use statistically reliable instantiations of their background justifications as their operative triggers”²⁹⁷ But probable cause is at best “a coarse and clumsy instantiation” of qualitative considerations such as dignity.²⁹⁸ More often, in the Fourth Amendment context (particularly as it pertains to petty crime enforcement), the quantitative and the qualitative are almost wholly independent.²⁹⁹ This was, of course, the case in *Atwater*: the Court drew no connection between probable cause and dignified treatment; indeed, it distinguished between the two ideas, because, at bottom, *there was no connection* between the two ideas.

Second, probable cause is necessarily a poor proxy for dignity for the simple reason that there can be no adequate proxy for a value such as dignity,

293. See *supra* notes 214-20, 254 and accompanying text; see also Bowers, *supra* note 25, at 1656-58 (examining three strands of discretion—legal, administrative, and equitable—and explaining that law enforcement professionals are particularly bad at equitable discretion); Bowers, *supra* note 217, at 331-32.

294. Bowers, *supra* note 217, at 331-32.

295. See *supra* notes 5-7, 30-33, 60-72, 249-57 and accompanying text.

296. See Schauer, *supra* note 44, at 164 (discussing the imperfections of such proxies).

297. *Id.*

298. Cf. *id.* at 166 (observing such clumsiness in the *Miranda* context, but arguing, generally, that such instantiations may be worthwhile nonetheless).

299. See *supra* notes 5-7, 30-33, 60-72, 249-57 and accompanying text.

which is, by its very nature, particularistic. That is, dignity is irreducible to and incompatible with aggregate measures (or rule utility more generally). Indeed, this very feature of dignity—that it is context driven—is what critics have mistaken for incoherent legal principle.³⁰⁰ But dignity is not incoherent; it is just inconsistent with rough cuts. Dignity demands that “human persons are not to be traded off against each other.”³⁰¹ Thus, it must be honored and measured “person by person.”³⁰²

C. *Probable Cause as a Qualitative Measure?*

The third objection is that the purported quantitative measure of probable cause admits qualitative evaluation already. To a degree, I cannot deny that. It would be naive to think that courts mechanically apply legalistic constraints on executive discretion. To the contrary, even the most rigid rule or quantitative standard may permit some amount of qualitative valuation, particularly where the facts on the ground normatively command deviation.³⁰³

The standard of probable cause is no different. On the surface of things, it is offered as a mechanical proxy for the reasonableness of an arrest or charge, but the underlying determination remains comparatively malleable. And even the Court has come to acknowledge that the determination is not “hypertechnical” but rather consists of a “flexible, common-sense standard.”³⁰⁴ Indeed, the Court has affixed no numerical threshold to the standard and has resisted defining the term with more precision than the unhelpful and almost tautological observation that probable cause amounts to “a fair probability.”³⁰⁵

On this reading, probable cause is just a “quantitative veil,” as opposed to a thoroughgoing substitute, for all-things-considered reasonableness.³⁰⁶ The

300. See Henry, *supra* note 9, at 189 (“By jettisoning universal notions of dignity in favor of particularized types, we can speak about dignity more clearly.”); see also Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 12 (2009) (endorsing “a context-specific dignity inquiry,” whereby “courts must examine the dignity expectations that an individual may reasonably hold in a particular institutional context”); cf. FEELEY, *supra* note 250, at 285 (“By its very nature individualized justice makes the distinctive and unusual terribly important, which in turn makes the process appear arbitrary.”).

301. Waldron, *supra* note 110, at 221.

302. DWORKIN, *supra* note 131, at 2, 330.

303. See *Truax v. Corrigan*, 257 U.S. 312, 342 (1921) (Holmes, J., dissenting) (“Delusive exactness is a source of fallacy throughout the law.”); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 465 (1897) (“But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to . . . relative worth and importance . . . , often an inarticulate and unconscious judgment . . .”).

304. *Illinois v. Gates*, 462 U.S. 213, 236, 239 (1983) (quoting *United States v. Ventresca*, 380 U.S. 102, 109 (1965)).

305. *Id.* at 246.

306. Colb, *supra* note 8, at 1673.

Court has adopted a legalistic constraint to resolve the question of whether an arrest is constitutionally reasonable but a pliable, commonsense measure to determine whether there was probable cause in the first instance. Thus, even though the *existence* of probable cause may trigger a formal rule of reasonableness (and a corresponding safe harbor for the exercise of arrest discretion), the determination about whether probable cause exists in the first instance is blurrier and may admit qualitative balancing.³⁰⁷

In Part III, I explored dignity's role as a moral imperative and a recognized principle of positive law, but we also may think of respect for dignity as something of a sociological fact: judges are human, and humans search for ways to circumvent intolerable results.³⁰⁸ As Henry Hart once characterized a legally inscrutable decision: “[S]ometimes you just have to do the right thing.”³⁰⁹ The difficulty, however, is that such *sub rosa* work often is done in only a disingenuous and apparently offhand fashion.³¹⁰ And the result may be even less clarity, consistency, and candor in the enforcement of the criminal law. Pithily, because probable cause has a soft underbelly, what lies beneath the Court's quantitative approach occasionally may be little more than *lies*.³¹¹

In any event, a court can equitably achieve only so much by exploiting the qualitative edges of probable cause. Look no further than *Atwater*. Ms. Atwater's factual guilt was so abundantly clear—indeed, undisputed—that the lower courts were left with precious little room to maneuver around probable cause (and its attendant safe harbor).³¹² That is to say, Ms. Atwater was sunk because

307. See *supra* Part I.B; cf. *supra* note 232 and accompanying text (discussing the evaluative aspects of vagueness doctrine).

308. See N.J. Schweitzer et al., *Rule Violations and the Rule of Law: A Factorial Survey of Public Attitudes*, 56 DEPAUL L. REV. 615, 633-36 (2007) (“People are apparently attentive to particularized circumstances and respect the pursuit of the ‘right’ outcome.”). Analogously, criminal justice systems have tried repeatedly (and failed miserably) to implement consistently mandatory sentencing statutes that fail to honor any sound principle of proportionality. Bowers, *supra* note 47, at 27-29 (exploring circumvention of ostensibly mandatory historical capital sentencing statutes); Joshua E. Bowers, “*The Integrity of the Game is Everything*”: *The Problem of Geographic Disparity in Three Strikes*, 76 N.Y.U. L. REV. 1164, 1172-80 (2001) (exploring circumvention of ostensibly mandatory habitual-offender statutes); see also MICHAEL TONRY, SENTENCING MATTERS 135, 147 (1996) (noting that “mandatory penalty laws . . . meet with widespread circumvention . . . and too often result in imposition of penalties that everyone involved believes to be unduly harsh,” and concluding that “[s]entencing policy can only be as mandatory as police, prosecutors, and judges choose to make it”); Josh Bowers, *Contraindicated Drug Courts*, 55 UCLA L. REV. 783, 796-97 (2008) (exploring the use of drug courts as a tool to circumvent mandatory drug statutes).

309. Eskridge & Frickey, *supra* note 205, at cxiii (internal quotation mark omitted) (discussing *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964)).

310. See Kahan & Nussbaum, *supra* note 246, at 359-60 (describing such efforts as “clumsy”).

311. See *supra* notes 245-48 and accompanying text (discussing problems of nontransparent moralizing in criminal law).

312. See *supra* notes 4-7, 30-33 and accompanying text.

there was no other remotely plausible determination but that she was technically legally guilty.

CONCLUSION

Exclusive attention to probable cause generates an odd sort of legality. It invites executive agents to pick and choose between any of many offenders, not all of whom can or should be pursued. And it invites judges to engage in subterfuge by, for example, manipulating the meaning of probable cause. In responding to these invitations, the criminal justice professional may undermine the very rule-of-law values—such as consistency and predictability—that the legality principle was intended to promote. Concurrently, the system has come, counterintuitively, to constitutionally safeguard state-sponsored outrages to dignity *less* aggressively in the domain of law enforcement than in the domains of peacekeeping, civil tort, and even contract.³¹³

Perhaps we ought not to be so surprised by this state of affairs. The Court's tendency to make probable cause an exclusive Fourth Amendment measure reflects a particular bias common to lawyers. As I have explored elsewhere, the lawyer is—by training, experience, and culture—more inclined to categorize and less inclined to contextualize.³¹⁴ To think like a lawyer means to give one's self over to a “mythology of formalism . . . driven by the internal and ineluctable logic of the law.”³¹⁵ It means “pretend[ing] that . . . decisions are strictly rule-governed,” whether they are or not.³¹⁶

Lawyers understand and know how to perform prospective formal legal analysis. As Thomas Reed Powell once remarked: “If you think you can think about something which is attached to something else without thinking about

313. See *supra* notes 128, 158-63 and accompanying text (discussing tort doctrine); see also HENRY MATHER, *CONTRACT LAW AND MORALITY* 45-46 (1999) (proposing a moral approach to contract law based on Aristotle's notion of corrective justice, and concluding that a “major purpose of contract law” should be “to rectify injury caused by morally wrongful conduct in a private transaction”); Schmitz, *supra* note 128, at 73 (“Unconscionability is not frivolous gloss on classical contract law. Instead, it provides a flexible safety net for catching contractual unfairness that slips by formulaic contract defenses.” (italics omitted)).

314. Bowers, *supra* note 25, at 1688-92; see also Frederick Schauer, *When and How (if at All) Does Law Constrain Official Action?*, 44 GA. L. REV. 769, 791 n.105 (“[I]t is possible that lawyers performing legal tasks internalize the law qua law even if other[] officials do not, or internalize the norm of legality more than do other officials.”).

315. See Gerald J. Postema, *Legal Philosophy in the Twentieth Century: The Common Law World*, in 11 A TREATISE OF LEGAL PHILOSOPHY AND GENERAL JURISPRUDENCE 1, 43 (Enrico Pattaro ed., 2011) (discussing judicial decisionmaking); see also *Hamilton v. People*, 29 Mich. 173, 190 (1874) (explaining that juries will not fall into the lawyerly trap of “forcing cases into rigid forms and arbitrary classes”); *State v. Williams*, 47 N.C. (2 Jones) 257, 269 (1855) (explaining that the legal professional “generalises, and reduces every thing to an artificial system, formed by study”).

316. See Postema, *supra* note 315, at 43 (discussing judicial decisionmaking).

what it is attached to, then you have what is called a legal mind.”³¹⁷ It is the art of the lawyer to take a commonsense term and make of it a legal term of art.³¹⁸ And it is the predilection of the lawyer to look for answers most often in the very places where the law fits most comfortably. In this way, legal tests come to track the “inner turn of mind that favors, empowers, and enables [the] profession.”³¹⁹ It is natural, then, that judges (lawyers all) would seek out mechanical answers to questions of technical guilt accuracy over qualitative evaluation of external moral and instrumental considerations.³²⁰

But lawyers are too timid.³²¹ And the Court is too timid. It has mistaken particulars for arbitrary facts.³²² Of course, it is only “in the specific” that a police officer makes and acts upon the decision to arrest.³²³ But it is likewise only “in the specific” that another institutional actor effectively may complete the job of regulating that particular executive decision effectively.³²⁴ For too long, the Court has ignored the specifics and focused, instead, on the aggregate—especially in the petty cases where, by the Court’s own admission, most defendants “are numbers on dockets, faceless ones to be processed and sent on

317. Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (quoting Thomas Reed Powell in an unpublished manuscript) (internal quotation marks omitted).

318. DAVID LUBAN, *A Communicative Conception of Torture*, in TORTURE, POWER, AND LAW (forthcoming Sept. 2014) (manuscript at 10-11) (on file with author) (“The fundamental trick is . . . [to] pretend[] that legal language is so complicated, and so different from commonsense language, that outsiders shouldn’t worry our pretty little heads about it. We should leave it to the experts.”).

319. Dennis Jacobs, Lecture, *The Secret Life of Judges*, 75 FORDHAM L. REV. 2855, 2856-59 (2007) (“[J]udges have a bias in favor of legalism and the legal profession It is a matter of like calling unto like.”); see also Eskridge & Frickey, *supra* note 205, at cxxi (“[T]he lawyer’s art . . . has a structure of its own, conditioned by the cultural presuppositions which define, within a legal system, the criteria of relevant legal argument.” (quoting Roberto Mangabeira Unger, *The Legal Process: A Critique of Some Presuppositions* (unpublished manuscript))).

320. Jacobs, *supra* note 319, at 2856-59 (“In our courts, judges are lawyers The result is the incremental preference for the lawyered solution, . . . and the confidence and faith that these things produce the best results.”); Simon Stern, *The Analytical Turn in Nineteenth-Century Legal Thought 1* (May 31, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1856146> (“[O]ne of the traits most often associated with legal inquiry involves its concern with precision.”).

321. See Amar, *supra* note 175, at 801 (observing that “on those occasions when common sense breaks through” into the Fourth Amendment decisions “it often comes wrapped in a sheepish, apologetic tone”); Kahan, *supra* note 245, at 153 (“[T]he criminal law is intensely moralistic. . . . But . . . the law is ambivalent—indeed, almost embarrassed—about exactly this kind of moralizing.”).

322. FEELEY, *supra* note 250, at 285.

323. See Alschuler, *supra* note 51, at 227 (internal quotation marks omitted).

324. See *id.* at 227-28 (internal quotation marks omitted).

their way.”³²⁵ The Court is enamored with aggregation and corresponding rule-like proxies. It is part of what Albert Alschuler has called “the bottom-line collectivist empirical mentality” of the contemporary criminal justice system.³²⁶ But even Justice Scalia has recognized that a bright-line rule should not be adopted for its own sake.³²⁷ The rule must be a *good enough* referent to its objective.

Discretion is endemic in any human and humane system of justice. Thus, a choice inevitably must be made between a system that apportions that discretion between institutional players and a system that takes it on faith (and against reason) that one professional, acting alone and almost unchecked, can resist sufficiently and consistently the kinds of institutional and cognitive pressures and biases that cut against sound exercises of discretion.³²⁸ Optimal institutional design demands a balance of power—a balance of discretionary authority. And a system has likely failed to strike the right balance when it reviews meaningfully only technical questions of guilt accuracy.

What I have in mind, then, is a mix of constraints on discretion—a mix that reflects dissatisfaction with hollow conceptions of transparency and evenhandedness that encourage, on the one hand, subterranean exceptions from ostensibly generally applicable legal rules; and, on the other, the formalistic equal treatment of legally alike cases (even as they are quite obviously qualitatively unlike).³²⁹ Textually and historically, the Fourth Amendment is uniquely well suited to accommodate such a dynamic reading—to achieve, concurrently, a quantitative and a qualitative conception of accuracy.³³⁰ The building blocks are in place. The biggest stumbling block is the Court’s worldview. What is required is to soften that worldview.

325. *Argersinger v. Hamlin*, 407 U.S. 25, 35 (1972) (“[F]or most defendants in the criminal process, there is scant regard for them as individuals.”).

326. Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 904 (1991) (“Increased aggregation seems characteristic of current legal and social thought . . .”).

327. *Thornton v. United States*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring in the judgment) (noting the argument that “the benefits of a bright-line rule” attach only if the rule “generally, even if not inevitably,” promotes the justification for the rule).

328. See generally *Bowers*, *supra* note 25, at 1686-720.

329. *Id.* at 1673-78 (offering a more robust conception of what it means to treat alike cases alike).

330. Amar, *supra* note 175, at 811.