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# What Constitutes an Arrest within the Meaning of the Fourth Amendment

Thomas K. Clancy

# WHAT CONSTITUTES AN "ARREST" WITHIN THE MEANING OF THE FOURTH AMENDMENT?

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## I. INTRODUCTION

THE word "arrest" does not appear in the language of the Fourth Amendment.[1] Yet, the occurrence and definition of an arrest are of fundamental importance in applying Fourth Amendment principles. A primary reason the term is important is because, when a valid arrest is made, the right to search incident to that arrest is automatic.[2] It is also significant because, if an arrest is made without probable cause, subsequent seizure of evidence may be unlawful.[3] The timing of an arrest is also important in civil actions for claims of false arrest.[4] Remarkably, the Supreme Court has never defined the word "arrest" with any precision and lower court decisions conflict as to its meaning.

Several disparate legal principles that have influenced the development of the concept of an arrest add to the confusion. These influences include numerous mutations of the common law definition of an arrest, the intermingling of state law arrest requirements with the Fourth Amendment's requirements and the Supreme Court's utilization of numerous and irreconcilable concepts or visions of an arrest. The Supreme Court's development of Fourth Amendment jurisprudence has complicated the core question of what constitutes an arrest. Moreover, courts have

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1. U.S. CONST. amend. IV:

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

*Id.*

2. *See* United States v. Robinson, 414 U.S. 218, 235 (1973) ("[W]e hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under the Amendment."); *see also* Michigan v. DeFillippo, 443 U.S. 31, 35 (1979) ("the fact of a lawful arrest, standing alone, authorizes a search" of person arrested).

3. *See, e.g.*, United States v. Crews, 445 U.S. 463, 470-77 (1980) (discussing what constitutes fruit of illegal arrest); *see also* Rios v. United States, 364 U.S. 253, 262 (1960) (remanding to ascertain whether arrest occurred prior to or after discovery of narcotics).

4. *See, e.g.*, Posr v. Doherty, 944 F.2d 91, 96-100 (2d Cir. 1991) (discussing point at which arrest occurred in suit involving common law tort and § 1983 claims for false arrest); Rodarte v. City of Riverton, 552 P.2d 1245, 1250-51 (Wyo. 1976) (determining what constitutes arrest for purpose of wrongful arrest claim).

manipulated the concept of an arrest to avoid application of the search-incident-to-arrest rule.

The proper resolution of the problem is based on the proposition that there are only two types of seizures of criminal suspects under the Fourth Amendment: stops and arrests.[5] A stop is well-defined in Fourth Amendment jurisprudence; it is a brief detention of a person suspected of criminal activity. An arrest, properly understood, is any detention exceeding the scope of a permissible stop. The circumstances under which a search incident to arrest is proper raise different concerns and relate to a separate question that should not influence the definition of an arrest.

## II. THE PROBLEM STATED

### A. *Defining Arrest*

An "arrest" seems to be an intuitively simple concept. In popular culture, it often involves a police officer chasing and grabbing a known suspect, informing him of his *Miranda*[6] rights and that he is under arrest, searching him and hauling that person to the police station for booking, charging and incarceration pending a bail hearing. But that simple vision becomes obscured when some basic facts are changed or fundamental questions are asked.

At what point did the arrest occur: at the point of seizure, when the suspect was informed he was under arrest; when he was searched, when the determination was made to transport the suspect to the police station; when the suspect arrived at the police station; when the suspect was booked; or when the suspect was formally charged?

What, if anything, must the officer intend: Was there an arrest if the officer determines that she has made a mistake after grabbing the suspect and releases him, even though the officer had intended to "arrest" him when she grabbed him? What if the officer merely intended to detain the person at the scene pending an investigation and did not intend to "arrest" when the person was grabbed? What if the officer believed that a short detention was an arrest and so intended the detention? What if the officer, after a short detention, then decides to arrest? What if the officer never intends to "arrest," and after a long detention at the scene, releases

5. *See* Terry v. Ohio, 392 U.S. 1, 18 n.16 (1968) (requiring for seizure that "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen"); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 2.1(a) (3d ed. 1996) ("As for seizure of a person, this includes not only full-fledged arrest, but also investigatory detentions and any other detention of the person against his will."). There are also seizures of persons not suspected of criminal activity. *See, e.g.*, United States v. Montoya De Hernandez, 473 U.S. 531 (1985) (involving border detention); Michigan v. Summers, 452 U.S. 692, 705-06 (1981) (upholding routine detention of occupants of house during execution of search warrant for house).

6. Miranda v. Arizona, 384 U.S. 436, 442 (1966) (affirming long-held constitutional rights to assistance of counsel and protection against self-incrimination).

the suspect? What if, after a detention, the officer ascertains who the suspect is, retrieves evidence from the suspect and then releases the suspect, intending to "formally arrest" him later?

What, if anything, must the suspect know: What if the officer did not verbally inform the suspect that he was under arrest but transported the suspect to the police station? What if the suspect, although not verbally informed of the fact of arrest, reasonably believed he was under arrest when 1) grabbed; 2) transported; or 3) booked at the station? What if the officer is in plain clothes and does not announce that she is a police officer?

As will be seen, courts have reached contradictory results based on these and similar considerations.

### B. *Search Incident to Arrest*

The practice of searching persons incident to arrest developed prior to the American Revolution. Only one type of warrantless seizure may have been common at that time, the arrest of a suspected felon.[7] The law of arrest reflected the character of the times: "Those were simple times, and felons were ordinarily those who had done violence or stolen property."[8] "Whether the chase was in hot pursuit, by hue and cry, or by constable armed with an arrest warrant, the object was the person of the felon, and the weapon he had used or the goods that he had stolen."[9] Upon

7. TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 27-28 (1969) (discussing history of warrantless searches). *See generally* 2 HALE, THE HISTORY OF THE PLEAS OF THE CROWN 85-104 (1847).

8. TAYLOR, *supra* note 7, at 28.

9. *Id.* at 28; *see also* Payton v. New York, 445 U.S. 573, 598 (1980) (noting that prevailing seventeenth and eighteenth century practice was to make arrests only when in hot pursuit or when authorized by warrant); United States v. Watson, 423 U.S. 411, 418-19 (1976) (discussing "ancient" common-law rule permitting arrests without warrant for misdemeanors and felonies committed in officer's presence and for felonies not in officer's presence where there were reasonable grounds to arrest). The common-law rule permitting the warrantless arrest of a suspected felon "may have reflected an exigent circumstances rationale" based on the common-law assumption that an arrest would occur shortly after the felony was committed:

> If the felon was not immediately apprehended, a justice of the peace would issue a warrant directing a hue and cry to be raised, thereby permitting fresh pursuit of the offender from town to town by horse and on foot. Although Hale condoned this practice of issuing warrants, he observed that the law did not require a warrant 'for the felons may escape before the justice can be found.' The law did not impose conditions, Hale observed, that would make such pursuit fruitless. Of course, no evidence exists to indicate that the common law proceeded on a case-by-case basis, requiring a warrant at least when time would permit one to be obtained without risk. Nevertheless, the common-law assumption seems to have been that time was of the essence when dealing with the arrest of suspected felons.

Joseph D. Grano, *Rethinking the Fourth Amendment Warrant Requirement*, 19 AM. CRIM. L. REV. 603, 639 (1982) (footnotes omitted); *see also* JOSIAH QUINCY, JR., REPORTS OF

apprehension of the felon, the practice of searching him or her was taken for granted.[10] "Those actions were not the cause of public outcry and litigation because of the lack of warrantless searches and seizures and the fact that the usual persons searched or seized without a warrant were suspected felons."[11] In fact, there were no reported cases challenging the practice of search incident to arrest in England until the end of the nineteenth century and, when challenged, the English courts gave "the point short shrift."[12] Similarly, in this country, as one oft-cited commentator has concluded, "the practice of search incident to arrest . . . had the full approval of the bench and bar . . . when our Constitution was adopted."[13] Thus, the practice of search incident to arrest is based on a common-law rule predating the Constitution and the Court has recognized such searches as reasonable under the Fourth Amendment.[14]

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CASES, 483-84 (1865) (citing Coke's views on warrantless limitations on seizures of suspected felons).

10. TAYLOR, *supra* note 7, at 27-29 ("Neither in the reported cases nor the legal literature is there any indication that search of the person . . . was ever challenged in England until the end of the nineteenth century."); *see also* Weeks v. United States, 232 U.S. 383, 392 (1914) (acknowledging that right to search incident to arrest was "always recognized under English and American law").

11. Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures*, 25 U. MEM. L. REV. 483, 492 (1995); *see also* Grano, *supra* note 9, at 621 ("[H]istory indicates that warrantless felony arrests did not cause consternation.").

12. TAYLOR, *supra* note 7, at 29 (footnote omitted).

13. *Id.* at 29; *see also* Grano, *supra* note 9, at 617 (providing historical background):

> While the colonists did not object to warrantless searches, the reason for the absence of such objection was that such searches, except perhaps in the context of lawful arrests, simply did not exist. The power to search required authorization, and for this reason, the English created writs of assistance, which authorized searches that otherwise could not have taken place . . . . [N]o evidence has been found to suggest that searches, except in the context of an arrest, occurred in eighteenth century England or America without the authorization of some kind of warrant.

*Id.*; *cf.* United States v. Chadwick, 433 U.S. 1, 8 (1977) ("The absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America."); Chimel v. California, 395 U.S. 752, 761 (1969) (stating Fourth Amendment "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists"); *Weeks*, 232 U.S. at 392 (stating "right of the government, always recognized under English and American Law, to search the person of the accused when legally arrested").

14. United States v. Robinson, 414 U.S. 218, 233 n.3 (1973) (citing TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 44-45 (1969)); *see also* People v. Chiagles, 142 N.E. 583, 583-84 (N.Y. 1923) (tracing origins of search incident to arrest). The *Robinson* Court not only held that a search incident to arrest was an exception to the warrant requirement but, given its historical pedigree, was "reasonable" within the meaning of the Amendment, because "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,] . . . a search incident to the arrest requires no additional justification" and it thus considered "a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235; *see also* Michigan v. De Fillippo, 443 U.S. 31, 35

Searches incident to arrest were, and are, viewed as necessary to protect the safety of the officer by disarming the suspect and to prevent concealment or destruction of evidence.[15] Whether the rule was to be applied on a case-by-case basis or on a categorical basis was not resolved by the Supreme Court until *United States v. Robinson*[16] in 1973.[17] In *Robinson*, the Court adopted a "categorical" search-incident-to-arrest rule; it applied to all arrests, regardless of the factual circumstances underlying the arrest.[18] In so ruling, the Court rejected a case-by-case inquiry and any analogy to a protective frisk for weapons, which must be justified in each case by examining whether there are circumstances giving rise to the reasonable belief that the person accosted is armed and dangerous.[19] The Court's willingness to adopt this categorical rule was premised, at least in part, on a vision of an arrest that contemplated an extended exposure of the officer to the suspect, including transporting him or her to the police station:

> It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.[20]

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(1979) ("The fact of a lawful arrest, standing alone, authorizes a search."). The significance of the finding is to distinguish the search-incident-to-arrest principle from other situations where the Court has found an exception to the (now mostly mythical) warrant requirement. For searches incident to arrest, the question is one of reasonableness and is not determined by applying the exigency analysis underlying exceptions to the warrant preference rule. Moreover, upon apprehension of the felon, incarceration until bail could be secured, if it could be secured at all, was the traditional inevitable consequence of the arrest. The practice of citation in lieu of incarceration is of recent origin. *See, e.g.*, Knowles v. Iowa, 525 U.S. 113, 115 n.1 (1998) (noting that practice of issuing citation in lieu of arrest is consistent with Iowa law reform efforts); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(h) (3d ed. 1996) (discussing citation alternative to need for custody of person suspected of crime). The right or ability to obtain pretrial release after arrest was, at best, uncertain in England and the American colonies. *See generally* Donald B. Verrill, Jr., Note, *The Eighth Amendment and the Right to Bail: Historical Perspectives*, 82 COLUM. L. REV. 328 (1982) (discussing English and colonial development of right to bail).

15. *See Knowles*, 525 U.S. at 117 (discussing need for search incident to arrest); *Robinson*, 414 U.S. at 234-35 (same); *Chimel*, 395 U.S. at 762-63 (same).

16. 414 U.S. 218 (1973).

17. *See* 3 LAFAVE, *supra* note 14, at § 5.2 (a) (discussing development of Supreme Court case law dealing with search and seizure of person at scene of prior arrest).

18. 414 U.S. at 225.

19. *Id.* at 227-36.

20. *Id.* at 234-35.

The automatic application of the search-incident-to-arrest principle is one of the main consequences of an arrest. It involves a significant intrusion upon the person of the suspect, as well as the suspect's belongings within the area under the suspect's control.[21] The evidentiary results of such searches also have a significant influence on the course of any subsequent criminal proceedings. Searches incident to arrest are the most common form of searches[22] and, given the development of modern police forces and the statutory expansion of the number of crimes, they apply to large numbers of criminal suspects.[23]

## III. EVOLUTION OF THE CONCEPT OF ARREST

### A. *The Historical Insignificance of the Fourth Amendment to the Law of Arrest*

Throughout most of the history of the United States, the law of arrest, and searches incident to it, was largely unregulated by the strictures of Fourth Amendment theory. There are two primary reasons for this. First, the exclusionary rule was not adopted to regulate the activities of Federal authorities until the early part of the twentieth century;[24] only then was there a "good reason" to contest the validity of a search incident to arrest.[25] Second, law enforcement has been, and still remains, primarily a

21. Although the permissible scope of the area searched has fluctuated over the years since 1969, the Court has limited the area to include only those areas within the arrestee's immediate control at the time of the arrest. *See Robinson*, 414 U.S. at 225-26 (discussing "area beyond the person of the arrestee which . . . a search may cover"); Chimel v. California, 395 U.S. 752, 762-63 (1969) ("There is ample justification . . . for a search of the arrestee's person and the area 'within his immediate control' . . . ."); *see also* Maryland v. Buie, 494 U.S. 325, 327 (1990) (finding that incident to custodial in-house arrest, officers can look into closets and other spaces immediately adjoining place of arrest from which attack could be launched); New York v. Belton, 453 U.S. 454, 460 (1981) (finding that incident to arrest of automobile occupant, police may search entire passenger compartment of car); Vale v. Louisiana, 399 U.S. 30, 33-34 (1970) (holding that officers cannot use arrestee as "walking search warrant" by moving him into house and from room to room to conduct warrantless search of house); *cf.* Mincey v. Arizona, 437 U.S. 385, 391-92 (1978) (rejecting exception to warrant requirement for extensive search of entire residence after entering house to arrest accused on basis that, while person arrested has lessened expectation of privacy in his person, he did not have lessened expectation of privacy in entire house); *see also id.* at 406-07 (Rehnquist, J., concurring in part and dissenting in part) (finding that prior intrusion occasioned by shooting and police officers' response "may legitimize search under some exigencies that in tamer circumstances might not permit a search"). A search incident to arrest must be contemporaneous with the arrest. *See, e.g.*, Preston v. United States, 376 U.S. 364, 367 (1964) (requiring search be contemporaneous with arrest).

22. *See* 3 LAFAVE, *supra* note 14, at § 5.2(b) (referencing prevalence of search incident to arrest).

23. *See, e.g.*, Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 638 (1999) (noting "revolution" in criminal justice authority).

24. *See* Weeks v. United States, 232 U.S. 383, 398 (1914) (adopting exclusionary rule).

25. TAYLOR, *supra* note 7, at 45-46 (tracing development of exclusionary rule and litigation strategies associated with it).

state and local issue. Given that the exclusionary rule was not made applicable to state actors until 1961,[26] the Fourth Amendment's requirements did not regulate the great bulk of interactions between law enforcement officials and citizens. Accordingly, the concept of an arrest primarily developed outside the body of Fourth Amendment jurisprudence.

### B. *The Common Law Definition of Arrest*

Most of the development of the body of law on arrest occurred at common law, outside of the influence of Fourth Amendment developments. Several centuries of precedent and many commentators have produced what, at first blush, appears to be numerous irreconcilable definitions of what constituted an arrest.[27] This is because the common law definition of arrest, like many common law principles, has proved very malleable and has been engrafted with factual considerations and burdened by broad generalizations. One must look beyond each factual situation and eliminate the extraneous gloss on the definition created by some authorities. Once that is done, two essential components of the definition of an arrest by a law enforcement officer acting pursuant to real or pretended authority[28] at common law emerge: 1) the officer must obtain "custody" of the suspect; and 2) the officer must intend to obtain that custody.

The concept of "custody" at common law did not require a trip to the police station, booking or instituting formal charges to constitute an arrest. Rather, an arrest was equated with any form of intentional detention and began at the moment of the detention.[29]

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26. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (holding exclusionary rule applicable to states).

27. *See, e.g.*, Bruce v. Meijers Supermarkets, Inc., 191 N.W.2d 132, 134 (Mich. Ct. App. 1971) (observing that concept of arrest has "variety of meanings depending on the attendant circumstances and the purpose thereof"); Lawrence W. Sherman, *Defining Arrest: Practical Consequences of Agency Differences*, 16 CRIM. L. BULL. 376, 376-77 (1980) (cataloging numerous definitions of what constitutes arrest and observing that variations in arrest definitions may be substantial and widespread). Maryland is illustrative of the difficulty of stating precisely the common law meaning of arrest, to take just one example from the original colonies, which has a long tradition of relying on the common law. The Maryland courts have utilized numerous modifications of the common law definition of an arrest to reflect the factual situation before the court. *See* Barnhard v. State, 602 A.2d 701, 705-06 (Md. 1992) (reviewing common law definitions of arrest); Little v. State, 479 A.2d 903, 915-16 (Md. 1984) (same and concluding that brief stop at sobriety checkpoint was not arrest); Morton v. State, 397 A.2d 1385, 1388 (Md. 1979) (arrest occurred when there was "manual seizure" of suspect and subsequent restraint on his liberty); Bouldin v. State, 350 A.2d 130, 33-34 (Md. 1976) (citing several formulations of common law definition of arrest).

28. *See, e.g., Bouldin*, 350 A.2d at 133 (defining arrest). This Article is only concerned with arrests by law enforcement officials acting pursuant to their office. Thus, arrest by pretended authority is not further discussed in this Article.

29. *See, e.g.*, ASHER CORNELIUS, SEARCH & SEIZURE § 47 (2d ed. 1930) (defining arrest as actual or constructive seizure or detention).

For example, in *Bouldin v. State*,[30] the Maryland Court of Appeals examined the question of when an unconscious person is arrested in order to permit a search incident to arrest. While driving a stolen motorcycle, Bouldin was involved in a motor vehicle accident and taken to the hospital. After the investigating officer determined that the motorcycle was stolen, he went to the hospital with the subjective intent to arrest Bouldin, who was unconscious when the officer arrived.[31] The officer took Bouldin's clothing and a bag, which were underneath the stretcher upon which Bouldin was lying, into another room, examined them and found heroin.[32] The case turned on whether Bouldin was in custody, given that the officer's intent to arrest was manifest. The court held that, since the record did not "show the requisite police constraint or control of Bouldin's person at the time the searches were made," the searches could not be valid as incident to an arrest.[33] The court adapted the common law definition of an arrest to fit the situation of an arrest of an unconscious person:

> [T]here must be an objective manifestation of acts or words unequivocally showing that an arrest is being made, that the arrestee is being detained or restrained, and his person brought within the custody and control of the law. A ritualistic touching is hardly required in such circumstances in order to effectuate an arrest, nor is communication of the fact of arrest to an unconscious person either possible or prerequisite to a valid arrest. . . . We think that where the right to arrest an unconscious person exists, the requisite detention of his person may be effectuated without force or without any physical restraint, so long as the acts or conduct of the arrestor sufficiently demonstrate that the arrestee is within his power or control.[34]

The equation of a common law arrest with any intentional detention is consistent with most other authority. For example, the Supreme Court of Connecticut, in a recent attempt to summarize the common law of arrest, defined it as "'the apprehending or restraining of the person of another'"[35] that could be effected so long as there was "sufficient indicia . . . that the person was not free to leave."[36] Indeed, the word arrest "is de-

30. 350 A.2d 130 (Md. 1976).

31. *Id.* at 132.

32. *Id.* at 131-32.

33. *Id.* at 135.

34. *Id.* at 134.

35. State v. Oquendo, 613 A.2d 1300, 1309 (Conn. 1992) (quoting 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAW OF THE STATE OF CONNECTICUT 386 (1796)).

36. *Id.* The Connecticut court equated an arrest with "imprisonment," which it defined as "every 'detention' or 'confinement' of the person 'in any shape,' including the forcible detention of a person in the street." *Id.*

rived from the French word *arreter*, which means to stop, detain, to hinder, to obstruct."[37]

Custody occurs in one of two ways: 1) at the moment of touching; or 2) submission to a show of authority.[38] This was the Supreme Court's view in *California v. Hodari D.*,[39] where it defined a common law arrest as occurring when a law enforcement officer touches a suspect or when a suspect submits to a police officer's show of authority.[40] The Restatement of Torts, which was relied upon by the Supreme Court in *Hodari D.*, similarly equates arrest with custody.[41] Custody is "complete" when the person is actually restrained or submits to a show of authority.[42] The Restatement does not require a trip to a police station or anywhere else for the seizure

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37. 1 CHARLES ALEXANDER, THE LAW OF ARREST § 45 at 353-54 (1949) (footnote omitted). According to Alexander,

> [i]n the abstract [arrest] means "a frustration of or impediment to the free movement or locomotion of another"; in the concrete it means "a seizure or taking possession of another against his will", a "restraint, however slight, on another's liberty to come and go or remain as he wills or wishes, whether that will or wish is known to the restrainer or not", a "manifestation of governmental authority, accompanied by apparent means of exercising it, and a communicated purpose to exercise it, so that the restraint compels one to yield involuntarily to such exercise.

*Id.* "Custody" was defined as a "detention of one after his seizure, arrest or apprehension; it is really the 'imprisonment.'" *Id.* at 354. "Imprisonment" was defined, *inter alia*, as "an arrest, a detention, a confinement" and began "at the instant of the detention and arrest." *Id.*

38. A common definition of arrest states that it occurs in any one of three ways: 1) touching a person; 2) any act indicating an intention to take the person into custody, which subjects the individual to the actual control and will of the person making the arrest; or 3) consent by the person to be arrested. *See* Bouldin v. State, 350 A.2d 130, 133 (Md. 1976) (citing 5 AM. JUR. 2D *Arrest* § 1 (1962)). To satisfy the second manner in which an arrest may occur, it must be shown that the officer intended to arrest and the suspect submitted to the officer. *See id.* (detailing second manner). The third formulation of how an arrest occurs is no different than the second way: consent to arrest is merely a form of submission. *See, e.g.*, Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799, 821 (1991) (noting that "voluntary consent and submission are essentially opposing sides of the same coin"); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 233 (1973) ("[I]f under all the circumstances it has appeared that the consent was not given voluntarily—that it was coerced by threats of force, or granted only in submission to a claim of lawful authority—then we have found the consent invalid.").

39. 499 U.S. 621 (1991).

40. *Hodari D.*, 499 U.S. at 624-26 (defining common law arrest); *accord* CORNELIUS, *supra* note 29, at § 47; Rollin M. Perkins, *The Law of Arrest*, 25 IOWA L. REV. 201, 206 (1940); *see generally* Clancy, *supra* note 38 (analyzing Supreme Court's utilization of common law definition of arrest to define seizure for Fourth Amendment purposes).

41. *See* RESTATEMENT OF TORTS § 112 (1934). The comments explain that, for an arrest to occur, there must be a "confinement," which is defined in several sections. *Id.* §§ 36-41, 112, cmt. a. For confinement by asserted legal authority, the Restatement equates confinement with "custody." *Id.* § 41(2).

42. *See id.* § 41.

to be labeled an arrest.[43] Thus, an arrest at common law was complete when custody was obtained, which occurred at the moment of touching by the officer or submission by the suspect to the officer's show of authority.

Intent to arrest is the second element of the common law definition of arrest. In many cases, this aspect of the definition has not been at issue—because of officer's obvious intent to arrest—and, accordingly, there has been less discussion of the intent requirement than other aspects of what constitutes an arrest. For example, the officer's intent to arrest was manifest in *Bouldin,* where the officer explicitly testified that he went to the hospital to arrest Bouldin.[44]

An officer's act of obtaining custody must be intentional, that is, she must do the acts that would otherwise constitute an arrest with the intent to arrest the suspect.[45] For example, although an arrest may occur when an officer touches a person, every touching by the officer is not necessarily an arrest. "Thus, if the officer meets the party against whom he has process, and they shake hands, nothing being said of the process nor is it said that an arrest is intended, this would not constitute an arrest, because the officer and the party did not so intend."[46] But exactly what must the officer intend: to arrest or merely to detain? Here, the reasoning becomes somewhat circular;[47] exactly what an officer's intent must be depends on what constitutes an arrest. Thus, if an arrest requires a trip to a police station, the officer must intend to take the person to the station.[48] If, however, it is merely a detention at the scene, which is all the common law traditionally required, the intent to detain will suffice.[49]

Some definitions of arrest require manifestation of the officer's intent to arrest.[50] Accordingly, Professor Perkins in 1940 asserted: "there is a

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43. *See id.* (discussing confinement by asserted legal authority); *see also* Sadler v. District Court, 225 P. 1000, 1001-02 (Mont. 1924) (stating that one requisite of arrest is custody; arrest occurred when officer approached man, said he was under arrest and placed his arm on person's chest to impede his progress).

44. *See* Boudlin v. State, 350 A.2d 130, 132 (Md. 1976) (discussing facts).

45. *Cf.* Clancy, *supra* note 38, at 803-05 (analyzing Supreme Court's utilization of common law definition of arrest to define seizure for Fourth Amendment purposes and analyzing intent requirement for seizure to occur).

46. CORNELIUS, *supra* note 29, at § 47.

47. *Cf.* 5 AM. JUR. 2D *Arrest* § 1, 696 (1962) ("The act relied upon as constituting an arrest must be performed with the intent to effect an arrest and must have been so understood by the party arrested.").

48. *See, e.g.,* Evans v. State, 688 A.2d 28 (Md. App. 1997), *rev'd,* 723 A.2d 423 (Md. 1999) (requiring intent to take suspect to police station).

49. *See, e.g.,* United States v. Randle, 67 F. Supp. 2d 734, 738 (E.D. Mich. 1999) ("It is well-settled that to constitute an 'arrest' all that is required 'is some act by the officer which indicates his intention to detain or to take into custody, thereby subjecting that person to the actual control and will of the officer. No formal declaration of arrest is required.'").

50. *See, e.g.,* CORNELIUS, *supra* note 29, at § 47 (noting that "the officer who attempts to make an arrest must in some manner communicate his purpose to the party whose arrest is sought"); *see also* McChan v. State, 207 A.2d 632 (Md. 1966) ("Our cases make clear . . . that in ordinary circumstances 'there is a detention

common-law requirement that one about to be arrested is entitled to notice, if he does not already know of (1) the intention to take him into the custody of the law, (2) the authority for the arrest, and (3) the reason therefor."[51] Yet, Perkins acknowledged that, to satisfy this notice requirement, "[n]o special form of words" was required and conduct could take the place of words.[52] The notice requirement would be satisfied, for example, by an officer's displaying her badge or by wearing a police uniform; those circumstances, according to Perkins, disclose that "the purpose of the detention is to bring the person before some court, body, or official, or otherwise to secure the administration of the law."[53]

The Restatement of Torts, upon which Perkins relied, did not require any "particular form of words" by a law enforcement officer in making the officer's intention to arrest manifest; any words or conduct were sufficient if they apprised the person of the officer's intent to arrest.[54] Thus, the fact that the officer was in uniform or displayed her badge generally sufficed to manifest her intent to arrest.[55]

Based on these authorities, there seems to be no real requirement for notification other than the fact that the person knows that a law enforcement officer is detaining him. Yet, as *Bouldin* makes clear, notice to the person arrested is not an irreducible element of an arrest, given that an unconscious person can be arrested. This is to say that manifestation of intent to arrest, or knowledge of the person arrested of the fact of arrest, is not a necessary element of the common law definition of arrest.

Some authorities have also added inquiry into the purpose for which the person is arrested as part of their definition. For example, one mid-twentieth century commentator sought to synthesize the caselaw as follows:

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only when there is a touching by the arrestor or when the arrestee is told that he is under arrest and submits [but] [w]here there is no touching, the intention of the arrestor and the understanding of the arrestee are determinative, for in order for there to be an arrest in such case, there must always be an intent on the part of one to arrest the other and an intent on the part of such other to submit.'"). This manifestation requirement may stem in part from the common law privilege that one can resist an unlawful arrest. *See* Perkins, *supra* note 40, at 248 (discussing manifestation of purpose and authority, general requirements of notice).

51. Perkins, *supra* note 40, at 248-49; *see also* J. SHANE CREAMER, THE LAW OF ARREST, SEARCH AND SEIZURE 56 (1980) (stating that one essential element of arrest is "[a]n *understanding* by the person being seized that he is being arrested").

52. *See* Perkins, *supra* note 40, at 249.

53. *Id.*

54. *See* RESTATEMENT OF TORTS § 128 cmt. a, at 293 (1934).

55. *Id.* The Restatement specifically states, "If a peace officer makes an arrest without a warrant, the fact that he is in uniform, or so displays his badge of office as to be reasonably visible to the other, is a sufficient manifestation that he is making an arrest upon suspicion of felony or for a breach of the peace or other conduct for which by common law or by statute he is authorized to arrest the other." *See also id.* at cmt. d.

> An "arrest" is the detaining of a person, the obtaining of the actual, physical control and custody of him, and retaining it against his will and without his consent, under some real or assumed authority, for the *purpose* of (1) preventing him committing a crime, or of (2) causing him to be brought before a competent public legal tribunal to answer a charge or committing or attempting to commit a crime, or (3) as a protective measure, or of (4) otherwise aiding in the administration of justice.[56]

Similarly, the Restatement of Torts asserted that an arrest occurs when a person is subjected to custody "for the actual or purported purpose of bringing the other before a court, or otherwise securing the administration of the law."[57] Yet, the Restatement makes clear that an arrest is "usually made" to bring a person into court for trial or investigation but that "[a]n arrest may also be made for purposes other than the apprehension of a criminal."[58] Professor Perkins, in formulating a definition of arrest that relied on the Restatement, stated that its purpose was to bring the person "before a court, body or official or of otherwise securing the administration of the law."[59] Perkins added, however, that the "most common purpose of arrest" was to bring a suspected criminal into court but that other purposes could be served by an arrest.[60]

This concept of "purpose," in the final analysis, adds nothing to the common law definition and does not constitute a required element that needs to be established for an arrest to occur.[61] Purpose analysis explains why an arrest is made; it does not define what it is or when it occurs. Indeed, the purpose for which an arrest is made can be so broad as to be unworkable as an element. According to the above-cited authorities, an arrest may be made to take a person to a tribunal but it is not necessary that it occurs. Thus, for example, an arrest made in aid of the administration of justice could include any legitimate detention. Moreover, if the above formulation of the definition of an arrest were followed, an arrest made for an improper purpose would not be an arrest and, therefore, could never be the basis of a false arrest claim.

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56. ALEXANDER, *supra* note 37, at § 45 (footnote omitted; emphasis added).

57. RESTATEMENT OF TORTS § 112 (1934).

58. *Id.* § 112 cmt. c, at 245. In § 127, the Restatement added that an arrest is "not privileged" unless made for the purpose of bringing the person "before a court, body or official or otherwise securing the administration of justice." *Id.* § 127. This rule does not state that an arrest did not occur if there was some other purpose but merely that it is not privileged. *See id.* Thus, according to the Restatement, taking a person before a court is not an essential aspect of an arrest. *See id.*

59. Perkins, *supra* note 40, at 201.

60. *Id.* at 202.

61. *See* Posr v. Doherty, 944 F.2d 91, 97 (2d Cir. 1991) (discussing that while New York Court of Appeals had stated that "arrest includes the keeping under restraint of one so detained until brought before a magistrate . . . that language [sets] 'forth one of several circumstances under which there may be an arrest, but [is] not a necessary prerequisite.'").

In summary, stripped to its core meaning, the essential elements of a common law arrest are two: 1) the obtaining of custody over the suspect by a police officer; with 2) the intent by the officer to do so. Custody occurs when there is physical touching of the person or submission by the suspect to the officer's show of authority. There is no required manifestation of intent to arrest beyond the acts sufficient to obtain custody. Nor must an officer intend to do anything with the suspect beyond the intent to detain him.

Despite this definition of an arrest, the common law, and later statutory authority, long maintained an uneasy distinction between arrests and the right of a law enforcement official to detain persons temporarily for the purpose of investigating possible criminal activity.[62] Courts describing the right of the police to detain a person often referred to the encounter as an "accosting" or an "inquiry."[63] The distinction between an accosting and an arrest was not clear.[64] What is clear is that there was a certain amount of intrusion that a law enforcement officer could engage in before courts would sometimes label that intrusion an arrest, even though the actions might appear to fit within the common law definition of arrest.

### C. *Supreme Court Development of the Concept of Arrest Within the Framework of the Fourth Amendment*

#### 1. *Introduction*

The common law definition of arrest is exactly the same as the Supreme Court's current definition of a seizure within the meaning of the

62. *See, e.g.*, People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964) (giving common law definition of arrest); Kavanagh v. Stenhouse, 174 A.2d 560, 562 (R.I. 1961) (same); City of Portland v. Goodwin, 210 P.2d 577, 580 (Or. 1949) (same); State v. Hatfield, 164 S.E. 518, 520 (W. Va. 1932) (same); *see generally*, George E. Dix, *Non-Arrest Investigative Detentions in Search and Seizure Law*, 1985 DUKE L.J. 849, 861-64 (examining model and state action). The right to temporarily detain suspicious persons was long recognized. *See* Atwater v. City of Largo Vista, 532 U.S. 318, 334-35 (2001) (noting history of power to detain). For example, in England, night watchmen had the authority to detain persons walking at night. *See* Lawrence v. Hedger, 128 Eng. Rep. 6, 6-7 (1810) (granting detention authority); *see also* Minnesota v. Dickerson, 508 U.S. 366, 380-82 (1993) (Scalia, J., concurring) (recounting that common law and night-walker statutes permitted stop of suspicious persons). *But cf.* Sam B. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 318-19 (1942) (collecting and reviewing common law authorities and concluding that they were "insufficient to unequivocally establish American common-law right to question and detain suspects").

63. *See, e.g.*, People v. Jackson, 331 P.2d 63, 65 (Cal. App. 1958) (finding question to be proper); Hargus v. State, 54 P.2d 211, 214 (Okla. Crim. App. 1935) (same); Gisske v. Sanders, 98 P. 43, 44-45 (Cal. App. 1908) (same).

64. *See, e.g.*, People v. Peters, 219 N.E.2d 595, 599 (N.Y. 1966) (recognizing that "the line between detention and arrest is a thin one"), *aff'd*, Peters v. New York, 392 U.S. 40 (1968); *see also* People v. Rivera, 201 N.E.2d 32, 35 (N.Y. 1964) (noting difficulty in distinguishing arrest from detention); *Hargus*, 54 P.2d at 214 (same); Altizer v. State, 205 P. 1106, 1108-09 (Okla. Crim. App. 1922) (same).

Fourth Amendment.[65] Fourth Amendment jurisprudence, similar to the common law distinction between an accosting and an arrest, has divided the concept of a seizure into two parts: stops (which were "arrests" at common law unless the court decided to label the encounter an "accosting") and arrests (which, this Section demonstrates, have not been clearly defined). Confused? Read on.

The Supreme Court's pronouncements of what constitutes an arrest within the framework of the Fourth Amendment are numerous and irreconcilable. Since 1968, the period during which virtually all of the doctrinal development has occurred, numerous "visions" of what constitutes an arrest have been set forth, with little or no attempt to harmonize the concept set forth in one case with competing visions in other cases. The word "vision" is used here to reflect the imprecision of the concept set forth by the Court. The decisions can be roughly grouped by date and by the vision of arrest articulated during that period of time. The Supreme Court's pronouncements have served as the premises, at least in part, for a bewildering number of inconsistent positions taken by lower courts across the country.

2. *Pre-1968 Decisions—Vision #1: Consistency with the Common Law*

For the Fourth Amendment to be applicable to a police encounter with a citizen,[66] the encounter must rise to the level of a "seizure."[67] Prior to 1968, only arrests were considered seizures[68] and on only two occasions did the Supreme Court consider what constituted an arrest. Neither of those decisions is particularly enlightening. In all other cases before 1968, there had been a search pursuant to an arrest that resulted in a trip to the police station and it was unnecessary for the Court to pinpoint the moment of arrest.[69]

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65. *See* California v. Hodari D., 499 U.S. 621, 627 (1991).

66. The Supreme Court has acknowledged the infinite variety of encounters between citizens and police, which "range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." Terry v. Ohio, 392 U.S. 1, 13 (1968) (footnote omitted).

67. Florida v. Royer, 460 U.S. 491, 498 (1983) (plurality opinion) (holding that constitutional rights are infringed upon seizure).

68. *See, e.g.*, Dunaway v. New York, 442 U.S. 200, 208 (1979) (explaining that term "arrest was synonymous with those seizures governed by Fourth Amendment"); Wayne R. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REFORM 417, 418 (1984) ("At one time all such seizures were treated as virtually indistinguishable; the seemingly all-encompassing term 'arrest' was employed to describe any seizure of a person."); *see also* United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring) (finding arrest was quintessentially seizure).

69. Most of the cases dealt with the scope of a search incident to an undisputed arrest. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 769-70 (1966) (providing example of undisputed arrest); United States v. Ventresca, 380 U.S. 103, 107 n.2 (1965) (offering examples of search incident to lawful arrest); Stoner v. California, 376 U.S. 483, 487-88 (1964) (defining search incident to arrest); United

The first decision posing the question of when an arrest occurred was *Henry v. United States.*[70] In that case, federal officers were investigating the theft of a shipment of whiskey and stopped a car driven by Henry. The agents searched the car, seized some cartons and then took Henry and the passenger to their office and held them for two hours. After learning that the cartons contained stolen radios, the agents placed the men under "formal arrest."[71] It was important for the Court to ascertain whether the agents had probable cause to arrest at the point of the arrest. The prosecution, however, conceded that the arrest took place at the time the agents stopped the car. The Court agreed and simply stated: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."[72]

The Court again addressed the moment of arrest issue in *Rios v. United States,*[73]but that decision is at best confusing. Two police officers observed Rios enter a taxicab in an area known for narcotics activity and followed the cab. The police had no basis to suspect Rios of anything.[74] When the cab stopped at a traffic light, the police alighted from their vehicle and approached the cab. One of the officers identified himself as a policeman.[75] "In the next minute there occurred a rapid succession of events. The cab door was opened; [Rios] dropped a recognizable package of narcotics to the floor of the vehicle; one of the officers grabbed [Rios] as he alighted from the cab; the other officer retrieved the package; and the first officer drew his revolver."[76] The "precise chronology" of the events was unclear,[77] prompting the Court to remand the case to the district court to ascertain when the arrest occurred.[78] The Court opined, however, that, if the "arrest occurred when the officers took their positions at the doors of the taxicab, then nothing that happened thereafter could

States v. Rabinowitz, 339 U.S. 56, 65-66 (1950) (holding search lawful because it was incident to valid arrest). The same can also be said of the post-1968 cases. *See, e.g.*, New York v. Belton, 453 U.S. 454, 462-63 (1981) (same); United States v. Robinson, 414 U.S. 218, 236 (1973) (same); Vale v. Louisiana, 399 U.S. 30, 33-34 (1970) (same); Chimel v. United States, 395 U.S. 752, 768 (1969) (holding that warrantless search of house is not incident to arrest); *cf.* Evans v. State, 688 A.2d 28, 33 (Md. App. 1997) (recognizing that Supreme Court discussions on definition of arrest for applying search incident rule have been "skimpy" and that "the almost exclusive focus has been on the permitted scope of a search incident"), *rev'd*, 723 A.2d 423 (Md. 1999).

70. 361 U.S. 98 (1959).

71. *Id.* at 100.

72. *Id.* at 103. Because the agents did not have probable cause to arrest at that time, the Court reversed the convictions. Justice Clark dissented, asserting that the mere stopping of the car was not an arrest and that the search of the car and the "subsequent arrest" were lawful. *See id.* at 106 (Clark, J., dissenting).

73. 364 U.S. 253 (1960).

74. *Id.* at 256.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 260-61 (stating history of case).

make the arrest lawful, or justify a search as its incident."[79] On the other hand, the Court asserted, if the police approached for the purpose of a "routine interrogation" with "no intent to detain the petitioner beyond the momentary requirements of such a mission," and Rios thereafter voluntarily revealed the package of narcotics, a lawful arrest would have been justified.[80] The Court concluded that the validity of the search thus turned on the "narrow question of when the arrest occurred."[81]

Few firm conclusions can be drawn from *Henry* and *Rios*. Both seemed to rest on the view that an arrest, or a search incident thereto, did not require a "formal" arrest or a trip to the police station; indeed, in neither case was there any requirement that the police announce that the suspect was under arrest. *Henry* seems premised on the view, consistent with the traditional common law view, that any detention was an arrest. *Rios*, in contrast, required more than a "momentary" detention and reflects the tension at common law between an arrest and an "accosting." Also, *Rios* seems to rest in part on the subjective intent of the police.

3. *The 1968 Decisions*

a. *Terry v. Ohio*—Vision #2: an Arrest as the Initial Stage of Prosecution

Seizures in Supreme Court cases prior to 1968 invariably involved extended detentions, including a trip to the police station and booking, and were the initial step in prosecution. With the exception of *Henry* and *Rios*, there had been no occasion—or reason—to discuss what constituted an arrest. The "time-honored" police practice of stopping and frisking suspicious persons was largely ignored or avoided.[82] In 1968, however, the Supreme Court in *Terry v. Ohio*[83] expanded the scope of the Fourth Amendment's protections by including within the concept of a seizure a second category, stops, and by broadening the concept of a search to include frisks.

In *Terry*, the Court was confronted with a situation where a police officer, Detective McFadden, observed suspects pacing back and forth in front of a store for a period of time, conferring and looking into the store's windows. The officer was an experienced veteran and that experience provided meaning to the men's actions; he believed that a plan to rob the store was afoot. The officer grabbed Terry and "patted down the outside of his clothing."[84] McFadden felt a pistol in the left breast pocket of Terry's overcoat and reached in, but was unable to remove the gun. At

79. *Id.* at 261-62.

80. *Id.* at 262.

81. *Id.*

82. Wayne R. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters and Beyond*, 67 Mich. L. Rev. 40, 40-46 (1968) (explaining history of stop and frisk); *see also* Terry v. Ohio, 392 U.S. 1, 9-10 (recognizing that issue had "never before been squarely presented to this Court").

83. 392 U.S. 1 (1968).

84. *Id.* at 7.

that point, the officer ordered the three suspects into a store and, as they went in, McFadden removed Terry's coat and recovered the gun. He then proceeded to pat down the outer clothing of the other two men, Chilton and Katz. McFadden discovered a revolver in the outer pocket of the overcoat of Chilton and seized it.

The Court summarized the problem:

> On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person.
>
> On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not—and cannot be—a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest.[85]

The Court utilized a balancing test[86] and considered the competing governmental and individual interests involved in the officer's detention and search of the men for weapons during the course of his investigation of the possible criminal activity. The Court recognized that the intrusions implicated significant aspects of personal security. The "inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret

85. *Id.* at 10-11 (footnotes and citations omitted).

86. Along with *Camara v. Mun. Ct. of San Francisco*, 387 U.S. 523 (1967), *Terry* originated the use of a balancing test. *See, e.g.*, Clancy, *supra* note 11, at 544-49, 584-624 (discussing origins and utilization of balancing test by Supreme Court); LaFave, *supra* note 82, at 53-56 (discussing *Terry* Court's rejection of probable cause standard). That test has been often criticized. *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales through the Least Intrusive Means Analysis*, 63 N.Y.U. L. REV. 1173, 1184-94 (1988); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 385-86 (1988).

affairs."[87] The Court said: " 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.' "[88] The question in the case before it, the Court asserted, was whether the person's "right to personal security was violated" by the on-the-street encounter.

Resolving the issue, the Court included temporary detentions within the scope of the Fourth Amendment coverage:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.[89]

The Court contrasted an arrest to a frisk:

> An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person.[90]

*Terry* thus distinguished between two detentions to which the Amendment applied. A stop, the most minimal seizure triggering Fourth Amendment protections,[91] is a brief detention and is much less intrusive than an arrest.[92] The *Terry* Court departed from the probable cause standard to measure the propriety of a search and seizure and stated that a stop is justified by articulable suspicion of criminal activity.[93] This is different

87. *Terry*, 392 U.S. at 9.

88. *Id.* (quoting *Union Pacific R.R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)); *see also id.* at 17 (referring to stop and frisk as "serious intrusion upon the sanctity of the person").

89. *Terry*, 392 U.S. at 16.

90. *Id.* at 26.

91. *Id.* at 10; *see also* Kolender v. Lawson, 461 U.S. 352, 365-66 (1983) (Brennan, J., concurring) (explaining that police may not compel answer from detainer).

92. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 437-42 (1984) (discussing differences between stop and arrest); Adams v. Williams, 407 U.S. 143, 145-46 (1972) (describing stop as "intermediate response" to no detention and arrest).

93. *See Terry*, 392 U.S. at 27. *Terry* was principally concerned with the standards for a frisk. Subsequent cases have clarified that the articulable suspicion standard also serves to justify a stop of a person. Discussing the concept of articulable suspicion in *United States v. Sokolow*, the Court stated:

than an arrest,[94] which requires probable cause to believe that the person has committed a crime.[95]

*Terry* characterized an arrest as involving a "trip to the stationhouse and prosecution for crime" but did so without reflecting upon the question. Certainly, that had been the factual scenario in prior Supreme Court cases and arrests had *resulted* in police station trips and prosecution. However, there had been no prior occasion to define an arrest as necessarily requiring such events. Indeed, the concept of arrest in *Henry* and *Rios* did not turn on such considerations. Moreover, a "stop" under *Terry* included within its definition encounters that would have been "accostings" and "arrests" under the common law. Nevertheless, from *Terry* comes the vision that an arrest involves a seizure, a trip to a police station, and is the initial stage of prosecution of the crime.

b. *Peters v. New York*—Vision #3: Any Detention Based on Probable Cause

*Peters v. New York*,[96] a companion case to *Terry*, set forth a much different vision of what constitutes an arrest. In that case, Officer Lasky was in his apartment when he heard a noise at his door. Looking through the peephole, Lasky observed two men tiptoeing out of an alcove toward the stairway. He called the police, put on some clothes and armed himself with his service revolver. Again looking out the peephole, he observed the men tiptoeing in the hallway. Lasky did not recognize the men as residents of the building and he believed that he was observing an attempted burglary. Lasky opened his door, entered the hallway and slammed the door loudly behind him. The men fled down the stairs and Lasky pursued. He caught Peters on the stairway and dragged him by the collar while unsuccessfully pursuing the other man. Peters told Lasky that he was visiting his girlfriend but refused to reveal the woman's name because

> The officer, of course, must be able to articulate something more than suspicion or an "inchoate and particularized hunch." [*Terry v. Ohio*, 392 U.S. 1 (1968)]. The Fourth Amendment requires "some minimal level of objective justification" for making the stop. *INS v. Delgado*, 466 U.S. 210, 217 (1984). That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means "a fair probability that contraband or evidence of a crime will be found," *Illinois v. Gates*, 462 U.S. 213, 218 (1983), and the level of suspicion required for a *Terry* stop is obviously less demanding than that for probable cause, see *United States v. Montoya de Hernandez*, 473 U.S. 531, 541, 544 (1985).

United States v. Sokolow, 490 U.S. 1, 7 (1989); *see also* Ornelas v. United States, 517 U.S. 690, 695 (1996) (discussing concept of articulable suspicion).

94. *See Sokolow*, 490 U.S. at 2.

95. *See Adams*, 407 U.S. at 145-46 ("The Fourth Amendment does not require a policeman who lacks the precise level of intimidation necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape.").

96. 392 U.S. 40 (1968). *Peters* was issued as a joint opinion with *Sibron v. New York*.

she was married. Lasky patted Peters down and, upon finding a hard object, removed it. The object was a plastic envelope containing burglar tools.[97]

The Supreme Court upheld the search as incident to Peters's arrest.[98] The Court reasoned that, by the time Lasky caught up with Peters on the stairway, Lasky had probable cause to arrest him for attempted burglary.[99] The Court asserted that it was a question of fact when an arrest occurred.[100] The Court did not specify exactly when it had occurred in *Peters* but stated: "[I]t is clear that the arrest had, for purposes of constitutional justification, already taken place *before* the search commenced."[101]

In *Peters*, there was no showing that Lasky had told the suspect that he was under arrest, nor was it clear that Lasky intended to "arrest" him prior to the search. Lasky had done nothing more than detain Peters. The Court premised the authority to search based on Lasky's physical seizure of the suspect, which was supported by probable cause to believe that Peters was involved in criminal activity.[102] "At that point," the Court asserted, Lasky had authority to search incident to arrest.[103]

Justice Harlan, in a concurring opinion, viewed the Court's discussion of when the arrest occurred as a point that "may lead to future confusion."[104] He stated:

> If there is an escalating encounter between a policeman and a citizen, beginning perhaps with a friendly conversation but ending in imprisonment, and if evidence is developing during that encounter, it may be important to identify the moment of arrest, *i.e.*, the moment when the policeman was not permitted to proceed further unless he by then had probable cause. This moment-of-arrest problem is not, on the Court's premises, in any way involved in this case: the Court holds that Officer Lasky had probable cause to arrest at the moment he caught Peters, and hence probable cause clearly preceded anything that might be thought an arrest. The Court implies, however, that although there is no problem about whether the arrest of Peters occurred late enough, *i.e.*, after probable cause developed, there might be a problem about whether it occurred *early* enough, *i.e.*, before Peters was searched. This seems to me a false problem. Of course, the fruits of a search may not be used to justify an arrest

97. *Id.* at 48-49.
98. *Id.* at 66.
99. *Id.*
100. *Id.* at 67 (citing *Rios v. United States*, 364 U.S. 253, 261-62 (1960)).
101. *Id.* (Emphasis added).
102. *Id.*
103. *Id.*
104. *Id.* at 76 (Harlan, J., concurring in result).

> to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to a search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards." This fact is important because, as demonstrated by *Terry*, not every curtailment of freedom of movement is an "arrest" requiring antecedent probable cause. At the same time, an officer who does have probable cause may of course seize and search immediately. Hence while certain police actions will undoubtedly turn an encounter into an arrest requiring antecedent probable cause, the prosecution must be able to date the arrest as *early* as it chooses following the development of probable cause.[105]

There was no attempt by the *Peters* Court to reconcile that case with *Terry*, although Chief Justice Warren wrote both opinions. Yet, the two opinions had vastly different visions of an arrest. *Terry* portrayed an arrest as a trip to a police station but *Peters* seemed to require only a detention based on probable cause.[106] *Peters* seems quite consistent with the antecedent common law view of an arrest. In both *Terry* and *Peters*, however,

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105. *Id.* at 76-77 (citation omitted); *cf.* LaFave, *supra* note 68, at 444-45 (stating that *Peters* may stand for principle that, "even if it were unmistakably clear the officer at the time of the search did not consider the situation as amounting to a custodial arrest, the search may nonetheless be upheld as a search incident to arrest if a custodial arrest in fact followed and was justified by facts other than those discovered in the search" and that "broader principle" to be distilled from *Peters* is that, even if officer mistakenly underestimates his legal authority, "full search" that is "conducted should nonetheless be upheld as incident to a custodial arrest because the circumstances, viewed objectively, would have permitted a custodial arrest").

106. *See, e.g.*, Washington v. Chrisman, 455 U.S. 1, 4-5 (1982) (addressing question of authority of police officer to accompany arrestee into arrestee's residence). As in *Peters*, the Court's decision was premised on the fact that an arrest had occurred. However, as in *Peters*, there was no indication that the detention was anything more than a detention based on probable cause. *Id.* at 6-7. In *Chrisman*, a police officer observed a student, Carl Overdahl, leave a dormitory carrying a bottle of gin. *Id.* at 3. Because Washington State law prohibited possession of alcoholic beverages by persons under 21, the officer stopped him and requested identification. *Id.* Overdahl said that his identification was in his room and asked if the officer would wait while he retrieved it. *Id.* The officer answered that, under the circumstances, he would accompany Overdahl and Overdahl agreed. *Id.* The officer went to the room with Overdahl and observed marijuana and drug paraphernalia in plain view. *Id.* at 3-4. The Court established the principle that a police officer has the authority to maintain custody over an arrested person and that the officer's actions were proper in this case. *Id.* at 6-7. What is notable about the decision, for present purposes, is that there was no showing that the officer ever informed Overdahl that he was under arrest nor was there any other indicia of an arrest beyond the fact that the officer had probable cause to arrest and had detained Overdahl.

there *was* a trip to a police station, which decreased the clarity of *Peters*'s vision of what constitutes an arrest. This is also true of Justice Harlan's vision, in his concurrence, which may have been tempered by his language that the detention ultimately was "ending in imprisonment."

4. *The 1968-73 Decisions—Vision #4: A Multitude of Types of Seizures*

After *Terry*, a period of uncertainty followed during which it was unclear whether the Fourth Amendment's standards would become multiplicious.[107] Indeed, *Terry* itself created some of the uncertainty. In the course of expanding the coverage of the Amendment to include stops and frisks, the *Terry* Court asserted that, to not include such intrusions within the coverage of the Amendment would

> serve to divert attention from the central inquiry under the Fourth Amendment—the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."[108]

The Court added that "the sounder course" was to recognize that the Amendment governed "all intrusions by agents of the public upon personal security."[109]

In *Davis v. Mississippi*,[110] decided one year after *Terry*, the police picked up at least twenty-four men and transported them to police headquarters, where they were questioned briefly, fingerprinted and then released without charge. The detentions were not based on probable cause to believe that the persons detained had committed the rape the police were investigating. The Court opined that such detentions were seizures within the meaning of the Fourth Amendment but did not label the seizures beyond stating: "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"[111]

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107. *See, e.g.*, People v. De Bour, 352 N.E.2d 562, 573-74 (N.Y. 1976) (finding protected Fourth Amendment interests absent seizure); 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.3(e), at 133-36 (3d ed. 1996) (discussing *De Bour* approach); *see also* United States v. Chaidez, 919 F.2d 1193, 1197-98 (7th Cir. 1990) (analyzing Supreme Court cases and asserting that they "describe a continuum in which the necessary degree of confidence increases with the degree of intrusion" and rejecting attempt to place seizures into two categories); State v. Evans, 723 A.2d 423, 437-38 (Md. 1999) (noting period of uncertainty after *Terry*).

108. Terry v. Ohio, 392 U.S. 1, 19 (1968).

109. *Id.* at 18 n.15.

110. 394 U.S. 721 (1969).

111. *Id.* at 726-27.

In *Cupp v. Murphy*,[112] Murphy voluntarily went to a police station to answer questions surrounding the death of his wife. During the questioning, the police observed what appeared to be dried blood under his fingernails. Without his consent, the police scraped Murphy's fingernails, which turned out to contain traces of skin, blood and fabric from the victim's nightgown.[113] Prior to scraping the fingernails, the police had probable cause to arrest Murphy for murder.[114] The police, however, did not "formally 'arrest'" Murphy under Oregon law, which statutorily defined an arrest to be "'the taking of a person into custody so that he may be held to answer for a crime.'"[115] Instead, they detained him "only long enough to take the fingernail scrapings, and [Murphy] was not formally 'arrested' until approximately one month later."[116] Nevertheless, the Supreme Court affirmed the denial of Murphy's motion to suppress the evidence obtained from the fingernail scrapings based on principles applicable to a search incident to an arrest.[117] While recognizing that there had been "no formal arrest," the Court believed that the rationale of search-incident-to-arrest principles "justified the police in subjecting [Murphy] to the very limited intrusion necessary to preserve the highly evanescent evidence they found under his fingernails."[118] The Court added that a "formal arrest" provides "full warning of official suspicion," which implicated the traditional justifications for a search incident to arrest:

> Where there is no formal arrest . . . a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence on his person. Since he knows he is going to be released, he might be likely instead to be concerned with diverting attention away from himself.[119]

The language in these three decisions—*Terry*, *Davis* and *Murphy*—created new concepts and new confusion for courts and commentators. Were there more than two types of seizures? If so, how many? Were there several types of arrests: formal, informal, technical and investigatory detentions? What effect did a state's definition of an arrest have on the

112. 412 U.S. 291 (1973).

113. *Id.* at 292.

114. *Id.* at 293.

115. *Id.* at 294 & n.1 (citing OR. REV. STAT. § 133.210).

116. *Id.* at 294.

117. *See id.* at 295-96 (citing *Chimel v. California*, 395 U.S. 752 (1969)).

118. *Id.* at 296. The Court in *Murphy* did state that it was "not hold[ing] that a full *Chimel* search would have been justified in this case without a formal arrest and without a warrant." *Id.* The Court, of course, was not required to take that step given the facts of *Murphy*.

119. *Id.* Concurring in the Court's opinion, Justice Marshall, writing separately, emphasized that the detention was not an arrest. *Id.* at 299 (Marshall, J., concurring). Justice Blackmun, joined by Chief Justice Burger, also concurred that the detention did not constitute an arrest. *Id.* at 300 (Blackmun, J., concurring). Similarly, Justice Douglas and Justice Brennan separately agreed that there was no arrest in this case. *Id.* at 301 (Douglas, J., dissenting in part).

constitutional propriety to search? Is there a definition of arrest within the meaning of the Fourth Amendment at all or is the concept of arrest a matter of state law? In the aftermath of these cases, courts and commentators began to create a multitude of seizures and assigned different consequences to each type of seizure.[120]

5. *The 1973 Decisions—Vision #5: Three Types of Seizures: Stops; Arrests; and Formal or Custodial Arrests*

In 1973, only a short time after *Murphy*, the Supreme Court decided *Gustafson v. Florida*[121] and *United States v. Robinson.*[122] Both of these cases involved arrests—including a trip to the police station for booking—as a result of the officers observing traffic violations. In each case, the applicable statute permitted an arrest and not the mere issuance of a citation for the traffic violation. The issue in each case was whether a full search incident to arrest was permitted based on the traffic violation. The Court's statement of its holding in *Robinson* was that, "in the case of a lawful custodial arrest, a full search of the person" was permitted under the Fourth Amendment.[123] Similarly, in *Gustafson*, the Court stated that, for there to be a valid search incident to arrest, "[i]t is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully effectuated the arrest and placed the petitioner in custody."[124] Thus, in each opinion, the Supreme Court used the adverb "custodial" to modify the word arrest to describe the seizures.[125]

Some authorities have viewed *Robinson* and *Gustafson* as support for the view that divides the concept of a seizure into three categories: 1) stops; 2) arrests; and 3) custodial arrests.[126] According to that view, a search is permitted only when incident to a "formal arrest" or "custodial

120. *See, e.g.*, James J. Bradley, Note, *Justice Restrained or Unrestrained Justices: Warrantless Seizure—the U.S. Supreme Court or the New York Court of Appeals—Whose is More Reasonable?*, 13 N.Y.L. SCH. J. HUM. RTS. 411, 420-28 (1997) (examining search and seizure decisions of New York Court of Appeals, including *DeBour*, and criticizing former's departures from U.S. Supreme Court precedent).

121. 414 U.S. 260 (1973).

122. 414 U.S. 218 (1973).

123. *Id.* at 235.

124. *Gustafson*, 414 U.S. at 265.

125. *See Robinson*, 414 U.S. at 235 (defining "custodial arrest"); *Gustafson*, 414 U.S. at 264 (holding search incident to arrest rule applies to "custodial arrests").

126. *See, e.g.*, State v. Evans, 723 A.2d 423, 430 (Md. 1999) (characterizing intermediate appellate court's approach as creating three categories: stops, arrests and custodial arrests); State v. Crutcher, 989 S.W.2d 295, 300 (Tenn. 1999) (itemizing three categories: investigatory stops, arrests and incarceration); Linnett v. State, 647 S.W.2d 672, 674-75 (Tex. Crim. App. 1983) (interpreting Supreme Court cases to apply to only "custodial" arrests); David A. Moran, *Traffic Stops, Littering Tickets, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine*, 37 AM. CRIM. L. REV. 1143, 1150 (2000) (arguing that "suggestion that arrest might be divided into custodial and non-custodial categories" first appeared in *Robinson*); *cf.* 3 LAFAVE, *supra* note 14, at § 5.1(a) ("Courts do (and, indeed, should) take a somewhat different approach when it is the prosecution which is

arrest."[127] Clearly, the Court's opinion in *Robinson* was significantly influenced by the *Terry* opinion and, as discussed previously, premised the categorical nature of the search-incident-to-arrest principle on *Terry*'s vision of an arrest as involving "taking the person into custody and transporting him to the police station."[128]

However, the Supreme Court in *Robinson* and *Gustafson* was not called upon to define an "arrest" because, in each case, the person was formally arrested and taken to the police station.[129] Indeed, in *Robinson*, the Court noted that, since the case involved a "full-custody arrest," it would not address the question whether an officer who issued a notice of violation would be permitted to search incident to that detention.[130] Thus, other authority has rejected the notion that a "formal" or "custodial" arrest is required, reasoning that the focus of *Gustafson* and *Robinson* "was to distinguish traditional arrests and searches incident thereto from the newfound *Terry* stop and frisk rather than to introduce yet another distinction in the reasonableness of searches and seizures."[131] According to this view, there is "no constitutional distinction between an arrest and a 'formal' or 'custodial' arrest. When employed in the context of the Fourth Amendment analysis . . ., the adjectives 'formal' or 'custodial' are redundant and unnecessary for the purpose of defining an arrest."[132]

### 6. *1979-83—Vision #6: Apparent Solidification into Two Categories*

Six years after *Robinson*, in *Dunaway v. New York*,[133] the Supreme Court seemed to reject multiplication of the standards and terms that the police and courts must utilize under the Fourth Amendment. The standard of reasonableness was set at requiring probable cause for arrests and

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contending that an arrest was made at a particular time, so as to justify a search . . . .").

127. Support for the three category view can be seen in *Robinson*'s discussion of the justification for the search incident to arrest rule, with the Court stating that the need to search for weapons was appropriate in *Robinson* because "the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop." *Robinson*, 414 U.S. at 234-35.

128. *Id.* at 235.

129. *See Gustafson*, 414 U.S. at 262 (noting that officer "took petitioner into custody in order to transport him to the stationhouse for further inquiry"); *Robinson*, 414 U.S. at 220-21 (finding that officer "effected a full-custody arrest").

130. *Robinson*, 414 U.S. at 236 n.6; *see also* Zehrung v. State, 569 P.2d 189, 197 n.24 (Alaska 1977) (noting uncertainty of what constitutes arrest based on *Robinson*).

131. *Evans*, 723 A.2d at 437.

132. *Id.*

133. 442 U.S. 200 (1979).

reasonable suspicion for stops. The Court also appeared to recognize only two types of seizures: stops and arrests.[134]

The police received a tip that Dunaway was involved in a murder but did not have enough information to obtain an arrest warrant.[135] Nevertheless, the police took Dunaway into custody and brought him to the police station for questioning. He was told that he was not under arrest but would have been physically restrained if he had tried to leave.[136] The Court rejected the state's contention that the detention was reasonable, specifically viewing as "exhalt[ing] form over substance" a distinction between a "technical formal arrest" and prolonged detentions for investigatory purposes.[137] The Court concluded that forced transportation to a police station for questioning intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest.

During the course of its opinion, the Court analyzed what constituted a seizure. It noted that, prior to *Terry*,

> the Fourth Amendment's guarantee against unreasonable seizures was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause. The basic principles were relatively simple and straightforward: The term "arrest" was synonymous with those seizures governed by the Fourth Amendment.[138]

The Court emphasized that "[t]he standard of probable cause . . . represented the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment."[139] *Terry* was viewed as an exception to that requirement and was premised on the belief that a stop and frisk was "so much less severe than that involved in traditional 'arrests'" that probable cause was not required.[140] Instead, "the Court treated the stop-and-frisk situation as a *sui generis* 'rubric of police conduct'" justified by reasonable suspicion.[141] The Court concluded:

> Thus, *Terry* departed from traditional Fourth Amendment analysis in two respects. First, it defined a special category of Fourth Amendment "seizures" so substantially less intrusive than arrests

134. *See id.* at 207-16 (limiting "seizure" to kinds of intrusions associated with arrests and *Terry*-type stops).

135. *Id.* at 203.

136. *Id.*

137. *Id.* at 215-16 (stating that Dunaway's detention by police intruded "so severely on interests protected by Fourth Amendment as necessarily to trigger safeguards against illegal arrest").

138. *Id.* at 207-08.

139. *Id.* at 208.

140. *Id.* at 209.

141. *Id.*

> that the general rule requiring probable cause to make Fourth Amendment "seizures" reasonable could be replaced by a balancing test. Second, the application of this balancing test led the Court to approve this narrowly defined less intrusive seizure on grounds less rigorous than probable cause, but only for the purpose of a pat-down for weapons.[142]

Applying these principles to the facts of *Dunaway*, the Court rejected any further multiplication of the concept of a seizure and of the justification for seizures:[143]

> [T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was "free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody. The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an "arrest" under state law. The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.
>
> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when the balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the

142. *Id.* at 209-10.

143. *See* United States v. Montoya De Hernandez, 473 U.S. 531, 541 (1985) (rejecting creating third reasonableness standard for seizures).

> requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.[144]

The Court discussed *Brown v. Illinois*,[145] viewing that decision as having "more of the trappings of a technical formal arrest" than the situation in *Dunaway*.[146] In *Brown*, the officers drew their guns, informed Brown that he was under arrest and handcuffed him.[147] Nevertheless, the Court viewed the differences from *Dunaway* as being "in form," which "must not be exalted over substance."[148] The Court concluded that a "custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[149] In other words, *Dunaway* supports the proposition that there are only two types of seizures, stops and arrests, and that an arrest is "a term of art describing all seizures that include an intrusion on personal liberty greater than that conferred under the authority of a stop."[150]

Another case, *Illinois v. Lafayette*,[151] adds support for the position that there are only two types of seizures and that an arrest does not require a trip to the police station. In that case, the Supreme Court held that a warrantless police inventory search of an arrestee's personal effects at the police station, *as an incident to incarceration*, was consistent with the Fourth Amendment. In *Lafayette*, the person was arrested, transported to the police station and incarcerated. The Court did not justify the search at the station as incident to an arrest. If all arrests must be custodial in the sense of requiring a trip to the police station, then it would have been unnecessary for the Court to distinguish between searches incident to arrest and searches incident to incarceration. However, that is exactly what the Court did in *Lafayette*.

A search incident to incarceration was viewed "as part of the routine administrative procedure at a police station incident to booking and jailing the suspect."[152] To put such inventory searches "in proper perspective," the Court examined "the evolution of interests along the continuum

144. *Dunaway*, 442 U.S. at 213-14 (citations and footnotes omitted); *see also* United States v. Sharpe, 470 U.S. 675, 684 (1985) (stating that *Dunaway* was like traditional arrest due to events occurring during detention and not due to length of detention).

145. 422 U.S. 590 (1975).

146. *Dunaway*, 442 U.S. at 215.

147. *Id.* at 215 n.17.

148. *Id.* at 215.

149. *Id.* at 216; *see also* Caldwell v. Taylor, 461 U.S. 571, 572 (1983) (characterizing *Dunaway* as involving "arrest").

150. Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"*, 43 OHIO ST. L.J. 771, 804 (1982) (interpreting *Dunaway*).

151. 462 U.S. 640 (1983).

152. *Id.* at 643.

from arrest to incarceration" and stated: "We have held that immediately upon arrest an officer may lawfully search the person of an arrestee."[153] The Court quoted the traditional justification for the search incident to arrest rule as being based on the need to disarm the suspect and discover evidence.[154] The Court then added: "An arrested person is not invariably taken to the police station or confined; if an arrestee is taken to the police station, that is no more than a continuation of the custody inherent in the arrest status."[155]

Two crucial propositions seem to follow from the just-quoted material: an arrest and any search incident thereto do not require a trip to the police station; and all arrests are custodial. Based on *Dunaway* and *Lafayette*, adverbs such as "custodial" used to modify the word arrest in *Robinson* and other cases do not limit the search incident rule to only those cases involving a trip to the police station and do not define another category of seizure; instead, all arrests are custodial. *Dunaway* and *Lafayette* thus support the view that there are two—and only two—types of seizures: arrests and stops.[156] Thus, based on these cases, any seizure that exceeds the limitations placed on a stop is an arrest.

### 7. *1980-on—the Persistence of Vision #4: Formal and Informal Arrests*

*Terry* "did not elaborate upon how sharp and substantial" the distinction is between a stop and an arrest and that distinction has remained imprecise.[157] Yet, the Supreme Court, in a series of cases, has examined when a seizure exceeds the permissible bounds of a stop and must, therefore, be labeled something else.[158] Rather than simply labeling any deten-

153. *Id.* at 644.

154. *Id.* at 644-45 (citing *United States v. Robinson*, 414 U.S. 218 (1973) as support for search of arrestee's person, and *Chimel v. California*, 395 U.S. 752 (1969) as support for search of area within arrestee's immediate control).

155. *Id.* at 645. The Court in *Lafayette* then discussed the justification of a search incident to incarceration, which the Court viewed as based on factors "somewhat different from the factors justifying an immediate search at the time and place of arrest." *Id.* Factors supporting an inventory search include protecting the suspect's property, guarding against false claims of stolen property and the removal of dangerous instrumentalities. *Id.* at 646.

156. *See* Taylor v. Alabama, 457 U.S. 687, 689 (1982) (characterizing *Dunaway* as involving arrest without probable cause); United States v. Hernandez, 825 F.2d 846, 851-52 (5th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988) (finding two categories: investigatory stops and arrests); United States v. Berry, 670 F.2d 583, 591 (5th Cir. 1982) (holding that stops and arrests are the only types of seizures); Collins v. State, 854 P.2d 688, 691-93 (Wyo. 1993) (collecting cases); 4 LAFAVE, *supra* note 107, at §9.3(e) (stating that *Dunaway* rejected sliding scale or balancing test to determine whether seizure had occurred).

157. *See, e.g.*, Dix, *supra* note 62, at 850-53 (explaining that it is unclear what is stop and what is arrest); LaFave, *supra* note 68, at 427-38 (explaining *Terry*); Williamson, *supra* note 150, at 776-79 (finding distinction between formal and informal arrest unclear).

158. In *Florida v. Royer*, 460 U.S. 491 (1983), the Court asserted that a suspect is "under arrest" when the boundaries of a permissible *Terry* stop are exceeded. *Id.*

tion exceeding the bounds of a stop as an arrest, which would seem to be the logical—or at least consistent—result following *Dunaway* and *Lafayette*, the Court has used terms such as a "traditional arrest,"[159] "formal arrest"[160] and "custodial arrest"[161] to describe the detentions. None of the cases presented a factual situation that required the Court to examine whether the adverbial terms added any substantive meaning to the concept of arrest. Nevertheless, the use of the terms suggests that they do have importance. If anything is clear, it is the confusion engendered by their use.

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at 503 (plurality opinion); *see also* United States v. Sharpe, 470 U.S. 684, 684 (1985) (characterizing *Royer* as involving arrest). In *Royer*, two narcotics detectives at Miami International Airport observed Royer, who fit a drug courier profile. *Royer*, 460 U.S. at 493. After Royer purchased a one-way ticket to New York and checked two bags, the detectives approached him and he agreed to speak with them. *Id.* at 494. Complying with the officers' request, Royer handed them his airline ticket and driver's license. When the officers pointed out to Royer that the name on his ticket did not match the name on his driver's license, he became noticeably nervous. The detectives identified themselves as law enforcement officers and told Royer that they suspected he was transporting narcotics. They asked him to accompany them to a nearby room. Royer said nothing but followed the officers into the room, whereupon his bags were retrieved and brought there. One of the detectives asked Royer's permission to search the suitcases, and Royer produced a key and unlocked one of the suitcases. An officer opened the two suitcases and found marijuana in each. At that point, or about 15 minutes from the time of his initial stop, Royer was formally arrested.

In holding that Royer's Fourth Amendment rights were violated, Justice White, writing for a plurality of the Court, stated that "[i]n the name of investigating a person who is no more than suspected of criminal activity, the police may not . . . seek to verify their suspicions by means that approach the conditions of an arrest." *Id.* at 499. After reviewing the salient features of the seizure at issue, the plurality opinion concluded that, "[a]s a practical matter, Royer was under arrest." *Id.* at 503.

Justice Powell wrote separately and agreed with the plurality that, as a "practical matter," Royer was under arrest at the time he surrendered his luggage key. *Id.* at 509 (Powell, J., concurring). Justice Brennan concurred in the result but did not join the plurality opinion because, in Justice Brennan's view, the initial stop was unsupported by reasonable suspicion and hence illegal. Thus, while Justice Brennan saw no need to address whether the stop was conducted in such a manner as to constitute a *de facto* arrest, he agreed with the plurality's conclusion that the detention of the suspect "clearly exceeded the permissible bounds of a *Terry* 'investigative stop.'" *Id.* at 509 (Brennan, J., concurring). Justice Blackmun dissented. Among other things, he rejected the view that, prior to Royer's "formal arrest," which occurred after the suitcases had been opened, the "functional equivalent of an arrest had taken place." *Id.* at 515 (Blackmun, J., dissenting).

159. *See, e.g.*, INS v. Delgado, 466 U.S. 210, 215 (1984) (using term "traditional arrest"); Rawlings v. Kentucky, 448 U.S. 98, 110 n.5 (1980) (citing *Dunaway*); United States v. Mendenhall, 446 U.S. 544, 551 (1980) (opinion of Stewart, J.) (defining scope of search and seizure).

160. *See, e.g.*, Michigan v. Summers, 452 U.S. 692, 696, 700 (1981); *Rawlings*, 448 U.S. at 101, 111.

161. *See, e.g.*, New York v. Belton, 453 U.S. 454, 455, 457 (1981) (explaining definition of custodial arrest).

For example, in *Hayes v. Florida*,[162] a man considered a suspect in a serious crime was, without his consent, removed from his home and transported to the police station to be fingerprinted. The Court asserted that such detentions are "sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause."[163] After it was determined that Hayes's fingerprints matched those left at the scene of the crime, the Court said that he was "formally arrested."[164]

In *Berkemer v. McCarty*,[165] the Court contrasted "formal arrests" with stops, saying that the two are distinguished by analysis of the restraints imposed on the suspect. In that case, a police officer stopped a motorist for a traffic violation and the motorist failed a field sobriety test. After giving incriminating responses to the officer's questions, the motorist was "formally" placed under arrest.[166] The issue before the Court was whether *Miranda*[167] warnings were required prior to interrogating a suspect during a traffic stop.[168]

Prior case law had established that *Miranda* warnings were required "whenever 'a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.'"[169] Custody, for the purpose of *Miranda* warnings, has not been equated with an arrest and, indeed, the Court has used different tests to measure the concepts of custody for the purpose of *Miranda* and seizure within the meaning of the Fourth Amendment.[170] The test for custody, according to *Berkemer*, is "how a reasonable person in the suspect's position would have understood his situation."[171] The Court acknowledged that a traffic stop was a seizure within the meaning of the Fourth Amendment[172] but distinguished the concept of custody from a traffic stop on the ground that such stops are temporary and brief.[173] The Court reasoned:

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162. 470 U.S. 811 (1985).

163. *Id.* at 816; *see also* Davis v. Mississippi, 394 U.S. 721, 725-27 (1969) (rejecting distinction between "arrests" and "investigatory detentions" and concluding that forced detention at police station to obtain fingerprints and interrogate suspect required probable cause to believe he had committed crime).

164. *Hayes*, 470 U.S. at 813; *see also* United States v. Crews, 445 U.S. 463, 466-68, 472 (1980) (stating that suspect was "arrested" when taken to police station to be briefly questioned, photographed and held while his school was telephoned, even though he was never "formally arrested or charged with any offense").

165. 468 U.S. 420 (1984).

166. *Id.* at 423.

167. Miranda v. Arizona, 384 U.S. 436 (1966).

168. *See Berkemer*, 468 U.S. at 422 (noting that initial stop of Berkemer's car, without more, did not render him "in custody" for purposes of Miranda warnings).

169. *Id.* at 435 (quoting *Miranda*, 384 U.S. at 444).

170. *See generally* Richard A. Williamson, *The Virtues (and Limits) of Shared Values: The Fourth Amendment and Miranda's Concept of Custody*, 1993 U. ILL. L. REV. 379 (explaining difference between *Miranda* and other cases like *Terry*).

171. *Berkemer*, 468 U.S. at 442.

172. *See id.* at 436-37.

173. *See id.* at 437.

> A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obliged to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from stationhouse interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.[174]

The Court also distinguished traffic stops on the ground that, in the typical stop, the motorist does not feel completely at the mercy of the police.[175] Thus, the Court viewed a traffic stop as more analogous to a *Terry* stop than to a "formal arrest."[176] The Court added, however, that *Miranda* warnings would be required when a motorist's freedom of action were "curtailed to a 'degree associated with a formal arrest.'"[177] The Court concluded that the situation before it did not indicate that the motorist was subjected to any restraints comparable to those associated with a formal arrest before he was placed under arrest.[178] It reasoned:

> Only a short period of time elapsed between the stop and the arrest. At no point during that interval was respondent informed that his detention would not be temporary. Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. A policeman's unarticulated plan has no bearing on the question whether a suspect was "in custody" at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. Nor do other aspects of the interaction of Williams with respondent support the contention that respondent was exposed to "custodial interrogation" at the scene of the stop. From aught that appears in the stipulation of facts, a single police officer asked respondent a modest number of questions and requested him to perform a simple balancing test at a location visible to

174. *Id.* at 437-38.

175. *See id.* at 438.

176. *Id.* at 439.

177. *See id.* at 440 (quoting *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam)); *cf.* 3 LAFAVE, *supra* note 14, at §5.1(a) (stating that arrest occurs rather than *Terry* stop "if 'a reasonable person in the suspect's position would have understood the situation to constitute a restraint on freedom of movement of the degree which the law associates with formal arrest'").

178. *See Berkemer*, 468 U.S. at 441 (stating that respondent was not formally arrested and consequently reading of *Miranda* rights was not warranted).

> passing motorists. Treatment of this sort cannot fairly be characterized as the functional equivalent of formal arrest.[179]

In *United States v. Sharpe*,[180] the Court discussed the relationship of *Terry* stops to arrests. Reviewing its prior cases, it observed that they "may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest."[181] Nevertheless, the Court rejected any "bright line" distinction between the two types of seizures, opting instead to use "common sense and ordinary human experience" over "rigid criteria" to govern.[182] The Court did note that there was no rigid time limit for a stop, but viewed the brevity of the encounter as an important consideration.[183] It further noted that the events occurring during the detention were a primary focus of the inquiry.[184]

### 8. *1991—Vision #7: Hodari D. and the Common Law of Arrest*

From the *Terry* decision in 1968 to the 1991 decision of *California v. Hodari D.*,[185] the Supreme Court developed the principles to guide courts in assessing when a seizure occurred. There are two ways in which an officer can seize a person: by physical force or by show of authority.[186] The case law suggests that the Court had little problem determining that the application of physical force constituted a seizure. However, the Court's jurisprudence on show of authority seizures was not characterized by clarity or a workable definition.[187] In *Hodari D.*, the Court, with Justice

179. *Id.* at 442 (footnotes omitted).

180. 470 U.S. 675 (1985).

181. *Id.* at 685.

182. *Id.*

183. *See id.* (noting "the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes").

184. *See id.* at 684 (articulating that Court's focus varies from length of defendant's detention to what transpires during detention).

185. 499 U.S. 621 (1991).

186. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968) (stating that seizures occur only when officers restrain citizen's liberty).

187. *See* Clancy, *supra* note 38, at 806-16 (analyzing Supreme Court precedent and asserting that Court's definition of seizure fails to strike proper balance between competing interests of law enforcement and individual security); Thomas K. Clancy, *The Supreme Court's Search for a Definition of a Seizure: What is a "Seizure" of a Person within the Meaning of the Fourth Amendment*, 27 AM. CRIM. L. REV. 619, 653 (1990) (defining seizure as attempted acquisition of control over person). The Supreme Court's decision in *Hodari D.*, regarding when a stop occurs, has significantly undermined the right of personal security. As I argued in the above-cited articles, the proper measure of a seizure is to define it as the "attempted acquisition of control over the person by the police." *Id.* This definition, even if accepted by the Court, is different from the definition of an arrest. This measure of a seizure merely places the application of the Fourth Amendment early in the encounter, so as to implement the values that the Amendment is designed to protect, that the police have sufficient justification for their intrusion upon a person's right to be secure. The level of justification varies, depending upon whether the intru-

Scalia writing the majority opinion, comprehensively redefined the concept of a seizure. Scalia relied on the common law definition of an arrest[188] to define what constituted a seizure within the meaning of the Fourth Amendment: "To constitute an arrest, . . . the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence—the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient."[189] According to the Court, the "slightest application of physical force" resulted in a seizure.[190]

Turning to constructive seizures, that is, seizures that are effectuated not by physical contact with the suspect but by means of a show of authority by the officer indicating that the officer wants the person to stop, the Court required submission by the suspect to the officer's show of authority. Relying again on the common law of arrest for support, the Court asserted: "An arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."[191]

The Court, by using the common law definition of arrest, arguably rejected the notion that there are two levels of detention—stops and arrests—under the Fourth Amendment. Reinforcing that view is the Court's comment in *Hodari D.* that it did "not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest."[192] Indeed, the majority asserted that the Court had never done so. It viewed *Terry* not as broadening the range of encounters encompassed in the term seizure but as "expanding the acceptable *justification* for a seizure, beyond probable cause."[193] The Court flatly stated that the common law of arrest defined "the limits of a *seizure of a person.*"[194]

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sion is an arrest or a stop. Accordingly, in a situation where the police do not have probable cause to arrest, but do have articulable suspicion to justify a stop, the character of the intrusion is still an important inquiry.

188. *Hodari D.*, 499 U.S. at 626 n.2 ("We have consulted the common-law to explain the meaning of seizure . . . to expand rather than contract that meaning (since one would not normally think that the mere touching of a person would suffice).").

189. *Id.* at 624 (citing *Whitehead v. Keyes*, 85 Mass. 495, 501 (1862)). "[A]n officer effects an arrest of a person whom he has authority to arrest, by laying his hand on him for the purpose of arresting him, though he may not succeed in stopping and holding him." *Id.*

190. *But see id.* at 625 (holding that seizure does not occur where there is show of authority with respect to application of physical force).

191. *Id.* at 626 (noting that while words alone do not constitute arrest, physical touching is not required).

192. *Id.* at 627.

193. *Id.* at 627 n.3 (stating conduct in *Terry* constituted common law seizure).

194. *Id.* (stating that dissent rejected majority's view of prior caselaw, believing that *Terry* broadened word "seizure" to include stops, which were "official restraints on individual freedom that fall short of a common-law arrest"); *see also id.* at 635 (Stevens, J., dissenting). Stevens, quoting *Terry* extensively, concluded that *Terry* and *Katz v. United States*, 389 U.S. 347 (1967), "unequivocally reject the notion

*Hodari D.* raises more questions than it answers. Is there only one type of seizure—an arrest? Or is there only one seizure—as defined by the common law of arrest—but that seizure may result in two types of *detentions*—a stop and an arrest? Based on *Hodari D.*, one could argue that the distinction between an arrest and a stop is not premised on the intrusiveness of the police actions, but upon the level of justification for the actions: a stop is justified by articulable suspicion and an arrest by probable cause; however, the actions taken to effectuate the stop or arrest are the same because only an arrest constitutes a seizure within the meaning of the Fourth Amendment. Perhaps courts and commentators have been using the wrong language and one must distinguish between a seizure and a detention. The former is but a momentary act while the latter is what results from that act—a temporary detention (stop) or an extended detention (arrest).

If the above is the proper interpretation of *Hodari D.*, the Court's opinion in *Hodari D.* would be remarkable for its cavalier disregard of several decades of jurisprudence distinguishing between stops and arrests as being two types of seizures. Despite some very problematic language, the better view is that *Hodari D.* only establishes how a seizure is *accomplished*, that is, either by physical touching or submission to a show of authority. This is very different from saying, as *Hodari D.* does, that there is only one type of seizure—an arrest. *Hodari D.* should be viewed not as reducing the number of seizures to one, but instead, as establishing that a seizure, whether an arrest or a mere stop, can only be accomplished in the same manner as a common law arrest. Deciding whether the seizure is a stop or an arrest does not depend on the manner in which it occurs but on other factors. For example, a stop is temporary and relatively non-intrusive while an arrest is lengthy and intrusive.

### 9. Knowles v. Iowa: *A New or Revisited Vision?*

The most recent Supreme Court case, *Knowles v. Iowa*,[195] presented the situation where a police officer stopped Knowles for speeding and issued him a citation, although under Iowa law the officer was authorized to arrest him.[196] The officer conducted a full search of Knowles' car and

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that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment." *Id.* at 636-37.

195. 525 U.S. 113 (1998).

196. *Id.* at 114; *see* IOWA CODE ANN. § 321.485(1)(a) (West 1997) (providing that Iowa peace officers having cause to believe that person has violated any traffic or motor vehicle equipment law may arrest person and immediately take person before magistrate). Iowa law also authorizes, as the Supreme Court characterized, "the far more usual practice of issuing a citation in lieu of arrest or in lieu of continued custody after an initial arrest." *Knowles*, 525 U.S. at 116 (citing IOWA CODE ANN. § 805.1(1) (West Supp. 1997)). Section 805.1(4) of the Iowa code provides that the issuance of a citation in lieu of an arrest "does not affect the officer's authority to conduct an otherwise lawful search." The Iowa Supreme Court interpreted this provision as providing authority to officers to conduct a full search

recovered marijuana and drug paraphernalia. Knowles was then arrested and charged with violating controlled substances laws.[197] The Supreme Court of Iowa upheld the constitutionality of the search under its "search incident to citation" exception to the Fourth Amendment's warrant requirement, reasoning that so long as the arresting officer had probable cause to make an arrest, there need not be an arrest resulting in a trip to the police station.[198]

The United States Supreme Court rejected the Iowa court's view. The Court did not attempt to define an "arrest" but instead disposed of the case by reference to the "two historical rationales for the 'search incident to arrest' exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial."[199] It found neither of these rationales sufficient to justify the search in *Knowles*.[200] The Court stated that the danger to the officer from a custodial arrest stemmed from the "extended exposure that follows the taking of a suspect into custody and transporting him to the police station" and "flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." In contrast, the Court viewed a "routine traffic stop" as "a relatively brief encounter" and "is more analogous to a so-called '*Terry* stop' . . . than to a formal arrest" and accordingly viewed the threat as "a good deal less than in the case of a custodial arrest."[201] The Court also rejected the applicability of the need

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when the police elected not to make a custodial arrest and instead issued a citation. *See* State v. Meyer, 543 N.W.2d 876, 879 (Iowa 1996); State v. Becker, 458 N.W.2d 604, 607 (Iowa 1990). Iowa law also permitted the issuance of a citation in lieu of arrest for most offenses for which an accused person would be "eligible for bail." *Knowles*, 525 U.S. at 116 n.1 (citing IOWA CODE ANN. § 805.1(1) (West Supp. 1997)). In addition to traffic and motor vehicle equipment violations, this law would permit the issuance of a citation in lieu of arrest for such serious felonies as second-degree burglary and first-degree theft, both of which were bailable offenses under Iowa law. *Id.*

197. *Knowles*, 525 U.S. at 114 (noting that it should be remembered that Supreme Court, in *United States v. Robinson*, had upheld practice of search incident to arrest for traffic violation when person was custodially arrested and taken to police station for processing).

198. *See id.* at 115-16.

199. *Id.* at 116.

200. *See id.* at 117.

201. *Id.* at 118 (citations omitted). The Court acknowledged that officer safety was a concern during routine traffic stops. *Id.* Nevertheless, it catalogued the variety of permitted steps that officers may take during such stops to protect themselves:

> For example, they may order out of a vehicle both the driver and any passengers; perform a "patdown" of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous; conduct a "Terry patdown" of the passenger compartment of a vehicle upon reasonable suspicion that an occupant is dangerous and may gain immediate control of a weapon; and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest.

*Id.* at 117-18 (citations omitted).

to discover and preserve evidence as justification for the search because all the evidence necessary to prosecute the offense of speeding had been obtained.[202]

The *Knowles* decision was clearly driven by a desire to avoid the automatic application of broad searches to traffic citation detentions. Nevertheless, it serves only to confuse the analysis of what constitutes an arrest and how to apply search incident to arrest principles. The *Knowles* case implicitly rejected *Hodari D.*'s suggestion that there was only one type of Fourth Amendment seizure, an arrest. Beyond that, it is not clear whether the Court accepted the view that there were three categories of seizures—stops, arrests and custodial arrests—or only two. The Court did, however, view the officer safety rationale of search incident to arrest principles as resting on the extended exposure of taking the suspect into custody *and* transporting him to the police station. Does this mean that both custody *and* transport are necessary or is either sufficient? The Court also repeatedly referred to the concept of a "custodial arrest."[203] The Court said that Iowa law also authorized "the far more usual practice of issuing a citation in lieu of arrest or in lieu of *continued* custody after an initial arrest."[204] It is not apparent what the Court meant by this reference. The concept of "continued custody" after the initial arrest appears to rest on the view that the initial arrest is considered "custodial;" otherwise, the custody would begin, not continue. Thus, the reference to "custodial arrest" is a redundancy; all arrests are custodial. *Knowles* may simply come to stand for the proposition that traffic citations are simply not arrests; they are stops.

*Knowles* also provides little firm guidance on search incident to arrest principles. The case explicitly rejected the view that a search based on probable cause to arrest alone suffices to justify an arrest; otherwise, the probable-cause-based situation in *Knowles* would suffice. If a traffic citation is not an "arrest" for the purpose of applying search incident to arrest principles, why did the Court continue its opinion and establish that neither of the two justifications for such searches were present? Why not simply say that a traffic citation is akin to a *Terry* stop and a stop is not an arrest?

The case arguably supports the view that one of the two justifications must be demonstrably present for a search incident to an "arrest" that does not result in a trip to a police station. It is not clear whether such a demonstration should be done on a categorical basis or as a factual inquiry in each case.[205] The Court's analysis in *Knowles* can be seen as sup-

202. *Id.* at 119 (declining to extend authority to conduct search incident to arrest when there is no concern for officer safety or destruction of evidence); *see also id.* at 117 (contrasting brief encounters with routine traffic stops).

203. *Id.* at 116-19.

204. *Id.* at 115 (emphasis added).

205. *Compare* Lovelace v. State, 522 S.E.2d 856, 859 (Va. 1999) (asserting that in situations akin to traffic stops, such as when officer issues summons, *Knowles* requires factual inquiry whether traditional reasons for search incident to arrest

porting either view: traffic stops, as a category of encounters, do not justify full searches on safety grounds or on evidentiary grounds; or the actual stop in *Knowles* did not do so. Yet, *Robinson* decided that inquiry into the facts of each case was unnecessary to justify a search incident to arrest. But, of course, *Robinson* involved a trip to the police station following an arrest. *Knowles* does not answer the question of whether an "arrest" must result in a trip to the police station in order to justify an incident arrest. Nor does it clearly preclude a search incident to a citation for non-traffic offenses.[206]

### D. *The Confusion in Academia and the Lower Courts*

Given the Supreme Court's treatment of the concept of an arrest, it is no wonder that confusion reigns. Absent a definitive ruling by the Supreme Court, and left to their own devices, the lower courts and respected commentators disagree fundamentally about the meaning of the term "arrest." They further disagree as to whether, once an arrest has occurred, a police officer may search incident to that arrest absent a trip to a police station. The variety of views defies precise categorization but the views tend to mirror the various "visions" of arrest set forth in Supreme Court case law.

#### 1. *Attempts at Synthesis*

Respected authorities have long attempted to provide an overall definition of an arrest by merging common law principles with Supreme Court interpretation of Fourth Amendment principles.[207] Recent attempts at summarizing what constitutes an arrest have been even more influenced by principles derived from Supreme Court opinions interpreting the Federal Constitution.[208] The point to make is that, prior to the

are present to justify "an additional intrusion" but "not necessarily . . . a full field-type search"), *with* People v. Blackmon, 20 P.3d 1215, 1219 (Colo. Ct. App. 2000) (distinguishing *Knowles* on basis that "once a traffic citation is issued, there exits no need for a further search for evidence in support of that offense").

206. *Compare Blackmon*, 20 P.3d at 1219 (non-custodial arrest for purpose of drug paraphernalia justifies search for evidence of that crime and distinguishing *Knowles* as applying to traffic offenses), *with Lovelace*, 522 S.E.2d at 859 (articulating that arrest effected by issuance of summons is similar in nature and duration to traffic stop and therefore, pursuant to *Knowles*, full search incident to arrest is not permitted).

207. *See, e.g.*, Perkins, *supra* note 40, at 206-07 & n.47 (attempting to reconcile common law principles with *Carroll v. United States*, 267 U.S. 132 (1925), and to incorporate its holding that search of automobile was justified by probable cause to believe it contained contraband, regardless of whether driver was arrested, by asserting that there is no arrest if there was "no intent to take the other anywhere and [the] detention is a mere temporary incident to the proper exercise of some other privilege").

208. *See, e.g.*, 5 AM. JUR. 2D *Arrest* § 2 (1995):

> An arrest is the taking, seizing, or detaining of the person of another, (1) by touching or putting hands on the arrestee; (2) or by any act that indicates an intention to take the arrestee into custody and that subjects the

Supreme Court influencing common law development by injecting Fourth Amendment analysis into the definition, an arrest was *any* detention of a person. Presumably, search incident to such detentions followed as a matter of course; an extended detention—a trip to the police station—occurred when the evidence searched for was found or when there existed other probable cause to arrest. Fourth Amendment principles, as enunciated by the Supreme Court, do not follow that traditional definition. Any attempt at synthesis also must fail simply because Supreme Court case law is so internally inconsistent that it cannot be reconciled with the common law.

2. *Reliance on the Common Law*

Some courts continue to rely on the common law to ascertain whether an arrest has occurred.[209] Thus, one court has seen no "talismanic significance to the act or intention of initiating the formal booking process."[210] The court added: "The act of arrest is not some Platonic ideal whose existence can be recognized only upon its perfection. Rather, it is a simple concept more readily perceivable" and the conclusion that an arrest occurred did not change merely because the police did not initiate charges at the time of the initial detention.[211]

3. *Any Detention Based on Probable Cause to Arrest*

In *State v. Greenslit*,[212] a suspect was issued a citation for possession of marijuana "in lieu of continuing detention" of the suspect, pursuant to a

> arrestee to the actual control and will of the person making the arrest; or (3) by the consent of the person to be arrested. There can be no arrest where there is no restraint and the restraint must be under real or pretended legal authority. However, the detention of a person need not be accompanied by formal words of arrest or station house booking in order to constitute "arrest." Whether the restraint or detainment was sufficient to rise to the level of arrest will in many cases turn on the length of the detention, and the degree of restraint. The ultimate inquiry is simply whether there is a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

*Id.*

209. *See, e.g.*, State v. Evans, 723 A.2d 423, 432 (Md. 1999) (arrest occurs when officer physically restrains suspect or otherwise subjects suspect to his or her custody and control); State v. Crutcher, 989 S.W.2d 295, 302 (Tenn. 1999) (relying on caselaw definition of arrest and concluding: "If law enforcement officers intend to justify a search incident to arrest, it is incumbent upon them to take some action that would indicate to a reasonable person that he or she is under arrest. Although formal words of arrest are not required, some words or actions should be used that make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer, and not free to leave.") (citation and footnote omitted).

210. *Evans*, 723 A.2d at 432 ("Formally charging a suspect is not sine qua non to a lawful arrest.").

211. *Id.* at 432 n.15.

212. 559 A.2d 672 (Vt. 1989).

Vermont rule of procedure that permitted a person to be arrested in order to obtain non-testimonial evidence but allowed the officer to issue a citation and release the person once such evidence was obtained.[213] In upholding the search as incident to an arrest, the court stated: "The argument that defendant was not formally taken into custody and transported to the police station is of no avail, since it is the existence of probable cause for the arrest which brings the search within constitutional limits, not merely the act of taking an individual into custody."[214]

The view espoused in *Greenslit* is consistent with the position of those authorities that rely on the common law definition of an arrest to justify a search, given that any detention under the common law was usually viewed as an arrest. Accordingly, other authorities believe that the existence of probable cause and a full search serves to distinguish between a stop and an arrest.[215] According to that view, there is no distinction between the restraint and detention necessary for stops and arrests; each is a seizure and, for a valid search incident to arrest to occur, only probable cause is needed. As one judge has reasoned:

> The standard for determining whether a seizure has occurred remains the same, regardless of whether it is an "arrest," based on probable cause or an "investigatory stop," based upon reasonable suspicion. It is individualized suspicion that varies and delineates the scope of the search and the term used to describe the seizure. A lawful arrest, sufficient to support the search incident to arrest exception to the warrant requirement, is simply a Fourth Amendment "seizure" that is based upon probable cause.[216]

4. *Formal Arrests*

Some authorities assert that only a "formal" arrest justifies a search incident to arrest. For example, in *Commonwealth v. Skea*,[217] a Massachu-

213. *Id.* at 673 n.1 (following VT. R. CRIM. P. 3(c)).

214. *Id.* at 674; *see also* State v. Bauman, 586 N.W.2d 416, 420-21 (Minn. Ct. App. 1998) (existence of probable cause to arrest justified search even though officer decided not to arrest and issued citation instead).

215. *See, e.g.*, State v. Crutcher, 989 S.W.2d 295, 305 (Tenn. 1999) (Drowota, J., dissenting) (relying, *inter alia*, on *Hodari D.* to conclude that "an arrest occurs if, in view of all of the circumstances surrounding the incident, would a reasonable person would have understood that he or she was not free to leave"); *In re* J.M., 995 S.W.2d 838 (Tex. App. 1999) (unpublished) (concluding from *Hodari D.* that, "[f]or constitutional purposes, arrests are seizures"); *cf.* Moran, *supra* note 126, at 1159-62 (asserting that arrest is any detention based on probable cause and arguing that concept of non-custodial arrest be recognized where no search incident would be permitted; only arrests involving trip to police station or one in which reasonable person would believe she is about to be so transported would justify search incident to arrest).

216. *See, e.g., Crutcher*, 989 S.W.2d at 305 (Drowota, J., dissenting) (stating that difference between seizure and arrest is immaterial).

217. 470 N.E.2d 385 (Mass. App. Ct. 1984).

setts appellate court was confronted with the situation where the police had probable cause to arrest Skea for marijuana possession after Skea admitted that a marijuana cigarette the police observed in his car was his. The police searched him and found no more drugs but did find four diamonds, which they seized.[218] The police, based on an informal policy not to arrest for possession of small amounts of marijuana, decided to release Skea but retained possession of the diamonds. After further investigation determined that the diamonds were stolen, Skea was arrested several weeks later.[219] The court stated that Skea was not legally searched incident to arrest because he was released after the search.[220] The court distinguished between detentions where the suspect is "released after the police business is transacted," and "'formal', or 'custodial', arrests," where the "custodial aspect . . . serves as the theoretical justification for the incident search."[221] The court reasoned:

> The minimal detention necessary to effect a search of a person is not itself an arrest for purposes of search-incident-to-arrest analysis. If it were, there could be no involuntary search of a person without an arrest, and the concept of an arrest, which has hitherto been held to depend on certain objective criteria, would be functionally indistinguishable from limited detentions of the types sanctioned in the Terry v. Ohio line of cases.[222]

To constitute an arrest, according to the court, there must be an actual or constructive seizure or detention of the person, performed with the intent to arrest, and so understood by the person detained.[223]

Similarly, in *State v. Evans*,[224] an undercover officer was looking for his informant when Evans offered to sell him drugs; the officer made a purchase and then drove away.[225] After the drugs were field tested, other

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218. *Id.* at 388-89.

219. *Id.* at 389.

220. *Id.* at 390 (stating that search-incident-to-arrest rationale did not apply to Skea, whom police did not take into custody after they searched him).

221. *Id.* at 390-91.

222. *Id.* at 391 (footnote omitted).

223. *Id.* at 391 n.10. The court, nonetheless, upheld the search on the ground that exigent circumstances justified it, that is, the need to discover any additional contraband that Skea might have possessed, which would have become unavailable unless the police took it into their control. *Id.* at 391-97. The court rejected Skea's view that the police were obligated to arrest him in order to conduct the search:

> Doubtless that would have been the legally safer course. The suggestion is nonetheless odious, because it counsels a greater intrusion on the suspect's liberty, a formal arrest, to justify the lesser intrusion of a search, and this distorts the intended protections of the Fourth Amendment into an instrument of oppression.

*Id.* at 393 (citation and footnote omitted).

224. 371 N.E.2d 528 (N.Y. 1977).

225. *Id.* at 529.

police officers stopped and searched Evans.[226] Evans was then released to protect the undercover officer's identity.[227] The police, one month later, formally arrested Evans.[228] The New York Court of Appeals rejected the State's argument that the existence of probable cause to arrest justified the search. Instead, the court held that, in the absence of a "contemporaneous arrest," such a search violated the person's constitutional rights.[229] The court reasoned that Evans's "indefeasible right to personal security" outweighed the State's interest in conducting the exploratory search[230] and that result did not change merely because the police could have arrested Evans.[231] To hold otherwise, the court believed, "puts the cart before the horse" because "[a]n arrest is an essential requisite to a search incident."[232] To be valid as a search incident, the court asserted, the arrest and search must be "nearly simultaneous so as to constitute one event."[233]

The intermediate appellate court in Maryland has also asserted that a formal arrest is necessary for a search incident to arrest. In attempting to define what constitutes a formal arrest, the court concluded that a "degree of intrusiveness 'beyond *Terry*' is not 'necessarily' sufficient to constitute a formal arrest and that the arrest must also be 'custodial' in nature and not simply a processing at the scene of the detention."[234] The court asserted:

> We are by no means holding . . . that the definition of arrest includes "the placing of formal charges" or that "the failure to charge after a detention makes the detention an illegal arrest."

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226. *Id.* at 529-30.

227. *Id.* at 530.

228. *Id.* at 529.

229. *Id.* at 529 (holding that existence of probable cause to arrest does not justify full search). *But cf.* People v. Williams, 566 N.Y.S.2d 324, 325 (N.Y. Sup. Ct. 1991) (analyzing case in which undercover officer purchased cocaine from defendant, backup police team stopped defendant, identified him, photographed him and released him; holding that, because police had probable cause to arrest, seizure to take his photograph did not violate Fourth Amendment).

230. *Evans*, 371 N.E.2d at 530.

231. *See id.* at 531.

232. *Id.*; *accord* Timberlake v. Benton, 786 F. Supp. 676, 689 (M.D. Tenn. 1992) (noting that since defendant was not placed under arrest, full search was not permitted).

233. *Evans*, 371 N.E.2d at 531 (stating that search incident to arrest requires that arrest be lawful and noting that search be contemporaneous with arrest). *Evans* has been criticized on other grounds. *See* Commonwealth v. Skea, 470 N.E.2d 385, 397 n.18 (Mass. App. 1984) (rejecting *Evans* decision because police had probable cause to search coupled with exigent circumstance of need to find contraband); *see also* Evans v. State, 688 A.2d 28, 43-44 (Md. App. 1997) (Sonner, J., dissenting) (acknowledging that *Evans* was "on all fours," but declining to follow it because it was neither well reasoned nor reflected intelligent public policy); 3 LAFAVE, *supra* note 14, at § 5.4(b) n.14 (arguing that *Evans* could have upheld search "upon a more realistic appraisal of the exigent circumstances present at the time of the search").

234. *Evans*, 688 A.2d at 33 (defining necessary requirements of lawful arrest).

> An arrest need not end up in a "booking" procedure or an appearance before a district court commissioner. What is required . . . is that there be 1) on the part of the arresting officer an actual subjective intent to arrest the suspect and 2) some communication of that fact to the suspect. If that were done, there would, indeed, be an actual arrest, even though the police might subsequently change their minds and not follow through with any formal booking or charging procedure.[235]

5. *Custodial and Non-custodial Arrests*

Several years before *Knowles*, in *People v. Bland*,[236] the Colorado Supreme Court rejected the view that a formal arrest was always necessary in order to conduct a search. The *Bland* court was confronted with deciding the proper scope of a search incident to arrest for marijuana possession. Bland was issued a summons to appear in court, rather than an arrest involving a trip to the police station, pursuant to an emerging "modern policy" for minor offenses.[237] In response to the type of detention that occurred, the *Bland* court created two categories of arrest: non-custodial and custodial.[238] A custodial arrest was "made for the purpose of taking the arrestee to the stationhouse for booking procedures and in order to file criminal charges."[239] A non-custodial arrest involved "a temporary detention for the purpose of issuing a notice or summons to the arrestee."[240]

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235. *Id.* at 35 n.7. The highest court of Maryland reversed, rejecting the intermediate appellate court's view that a "'formal' arrest must occur for an officer to have authority to conduct a full search of the detainee." State v. Evans, 723 A.2d 423, 436-37 (Md. 1999). The court reasoned:

> Although the Supreme Court has not squarely addressed this specific issue, we do not interpret the Court's use of the phrase "formal arrest" as a limitation on the authority to search incident to arrest. The Supreme Court has elsewhere appended a descriptive adjective to the term "arrest," using such phrases as "formal arrest" and "custodial arrest," without apparent significance[.] In our view, the use of the adjectives "formal" or "custodial" does not further modify the constitutional contours of a detention. Rather, there is another, logical explanation: such modifiers have been used by the Supreme Court and others simply to emphasize the distinction between arrests and non-arrests, not to delineate different types of arrest.

*Id.*; *see also* United States v. Hernandez, 825 F.2d 846, 852 (5th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988) (rejecting any distinction between "de facto" and "formal" arrests and concluding that either form of arrest supports each incident to arrest).

236. 884 P.2d 312 (Colo. 1994).

237. *Id.* at 315; *see also* Knowles v. Iowa, 525 U.S. 113, 115 n.1 (1998) (recognizing that issuing "citation in lieu of arrest is consistent with law reform efforts").

238. *Accord* State v. Brassfield, 615 N.W.2d 628, 631 (S.D. 2000); State v. McKenna, 958 P.2d 1017, 1021 (Wash. Ct. App. 1998) ("Although an officer may search incident to a lawful custodial arrest, he or she may not search incident to a lawful non-custodial arrest.").

239. *Bland*, 884 P.2d at 316 n.6.

240. *Id.*

The court believed that a principal distinction between the two types of arrests was "the duration of the authorized detention."[241]

The *Bland* court interpreted Supreme Court precedent to apply only to "custodial arrests."[242] The Court thus believed that the permissible scope of a search incident to a non-custodial arrest was an open question. The court stated that, when a non-custodial arrest is effectuated, an officer may "search for instrumentalities or evidence of the specific crime for which the officer had probable cause to arrest."[243] That latter search contrasted to a full search incident to a custodial arrest, which was not so limited. However, the court recognized that, for non-custodial arrests for possession of marijuana, the search "may be equal in scope to a full search incident to custodial arrest" due to the nature of the evidence sought to be uncovered.[244]

6. *Custody: Intent to Release*

Some courts assert that a search incident to arrest is proper when an officer "arrests" a juvenile, although the officer intends to take the juvenile home and release him to his parents.[245] They reason that the juvenile is in custody, albeit only for transportation to his home.[246] One court, in rejecting the juvenile's position that, because the officer did not intend to book him, he established that there was no arrest for the purpose of allowing a search incident to arrest, stated:

> [T]he lawfulness of the search turns not on whether the officer intended to release the defendant after having taken him into

241. *Id.* at 318.

242. *Id.* at 316-19.

243. *Id.* at 320. *But see McKenna*, 958 P.2d at 1021 (finding no right to search incident to non-custodial arrest because officer and arrestee will only be in proximity for few minutes and arrestee has little motivation to use weapon or destroy evidence).

244. *Bland*, 884 P.2d at 322. The *Bland* majority stated that the temporary detention associated with issuing a traffic ticket would be a non-custodial arrest. *Id.* at 318. Whether or not any of the *Bland* court's analytical structure survives *Knowles* is debatable. *Compare* People v. Blackmon, 20 P.3d 1215, 1219 (Colo. App. 2000) (maintaining *Bland*'s distinction between custodial and non-custodial arrests for purpose of drug paraphernalia and distinguishing *Knowles* as applying to traffic offenses), *with* Lovelace v. State, 522 S.E.2d 856, 859-60 (Va. 1999) (arrest effected by issuing summons is similar in nature and duration to traffic stop and therefore, pursuant to *Knowles*, full search incident to arrest is not permitted). Clearly, however, *Bland*'s belief that a traffic ticket was a form of a non-custodial arrest permitting a limited search has been rejected by *Knowles*.

245. *See, e.g.*, *In re* Ian C., 104 Cal. Rptr. 2d 854, 855 (Cal. App. 2001) (detaining minors in curfew center where they are patted down and then released to parents); *In re* J.M., 995 S.W.2d 838, 841 n.8 (Tex. App. 1999) (stating that taking children into custody is considered arrest for determining validity of search); *In re* Demetrius, 256 Cal. Rptr. 717, 718-19 (Cal. App. 1989) (stating that defendant was taken into custody only for transportation to his home).

246. *See In re* J.M., 995 S.W.2d at 842; *In re* Demetrius, 256 Cal. Rptr. at 719.

custody, but on whether the officer was justified in arresting the defendant and taking him into custody in the first place.[247]

7. *Reasonable Person Test*

Some courts have imported the reasonable person test, used to ascertain whether a person is in custody for the purposes of *Miranda* warnings, to measure whether an arrest has occurred.[248] This test has been employed despite the Supreme Court's view that the concept of custody under *Miranda* and the Fourth Amendment's measurement of what constitutes an arrest are not equivalent.[249]

8. *Fact-Specific Analysis*

Finally, some courts reject any hard and fast tests and apply a totality of the circumstances test to measure when an arrest occurs. According to this view, stops and arrests are constitutionally different events. A variety of factual circumstances are used to distinguish between arrests and stops, including such considerations as whether the officer communicated his intent to arrest, whether force was used or threatened, whether the suspect was moved to another location and how long the suspect was detained.[250] Thus, as one court has stated:

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247. *In re* Demetrius, 256 Cal. Rptr. at 719; *see also In re* J.M., 995 S.W.2d at 842 (concluding that search incident to "custody" of juvenile upheld even though officer had intended to issue juvenile citation and release to custody of his parents and had no intention of taking him to juvenile facility). *But see In re* Bernard G., 679 N.Y.S.2d 104, 105 (App. Div. 1998) (articulating that non-criminal custodial arrest of suspected runaway juvenile permits only frisk and not full search).

248. *See* United States v. Acosta-Colon, 157 F.3d 9, 14 (1st Cir. 1998) ("It is often said that an investigatory stop constitutes a de facto arrest 'when a reasonable man in the suspect's position would have understood his situation, in the circumstances then obtaining, to be tantamount to being under arrest.'"); United States v. Mota, 982 F.2d 1384, 1387 (9th Cir. 1992) ("Viewed from the perspective of the Motas, a reasonable person would have undoubtedly felt that he was under arrest.").

249. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 440-44 (1983) (stating concerns of *Miranda* and Fourth Amendment analysis are distinct). Thus, for example, the reasonable perceptions of suspects are important for *Miranda* purposes, given that "suspects' perceptions are highly relevant in measuring voluntariness." Dix, *supra* note 62, at 959 n.367 ("*Miranda* is concerned . . . with the voluntariness of suspects' self-incriminating statements . . . whether *Miranda* applies should be tied as directly as possible to [suspects'] perceptions."). An arrest, in contrast, does not depend on the voluntariness of the suspect's responses. *See id.* at 926-29 (discussing inadequacies of reasonable person approach to measure types of detentions). *See generally* Williamson, *supra* note 170, at 395 (stating that "the only relevant inquiry is how a reasonable man in the suspect's position would have understood").

250. *See, e.g.*, United States v. Parr, 843 F.2d 1228, 1230 (9th Cir. 1988) (indicating that question of fact arises when arrest occurs and suggesting need for "custodial" arrest to search incident thereto); United States v. Hernandez, 825 F.2d 846, 851-52 (5th Cir. 1987), *cert. denied*, 484 U.S. 1068 (1988) (indicating that question of fact exists when arrest begins and finding search incident to arrest permissi-

> There is no "litmus-paper test" . . . to determine whether any particular mode of detention amounted to a *de facto* arrest. . . . [I]n a typical borderline case, *e.g.*, one in which the detention at issue has one or two arrest-like features but otherwise is arguably consistent with a *Terry* stop, it will not be obvious just how the detention at issue ought reasonably to have been perceived; indeed, this will be the central point of contention. Thus, in such a case—that is, where the detention is distinguishable from, yet has some features normally associated with, an arrest—the analysis must revert to an examination of whether the particular arrest-like measures implemented can nevertheless be reconciled with the limited nature of a *Terry*-type stop. This assessment requires a fact-specific inquiry into whether the measures used were reasonable in light of the circumstances that prompted the stop or that developed during its course.[251]

## IV. THE PROPER DEFINITION OF ARREST

### A. *Necessary Premises for a Definition of Arrest*

#### 1. *State Law Does Not Define What is an Arrest for the Purpose of Fourth Amendment Analysis*

Is there a definition of arrest within the meaning of the Fourth Amendment at all or is the concept of arrest a matter of state law? An unresolved but persistent theme of Fourth Amendment jurisprudence is the relationship of state law and the national guarantees embodied in the Amendment. Specifically, in this instance, the question is whether an individual state's definition of what constitutes an arrest determines the constitutional issue of whether an arrest has occurred for the purposes of the Fourth Amendment.

The Supreme Court seemed to squarely address the relationship of state law to the federal guarantee to be free of unreasonable searches and seizures in *United States v. Di Re*.[252] The Court was faced with the issue of whether federal or New York law controlled to determine the validity of an arrest by a state officer, accompanied by federal authorities, for a federal crime in New York State. The government argued that "the validity of an arrest was a matter of federal law to be determined by a uniform rule ap-

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ble when arrest is formal or *de facto*); Orozco v. County of Yolo, 814 F. Supp. 885, 892 (E.D. Cal. 1993) (discussing when detention turned into arrest); United States v. McQuagge, 787 F. Supp. 637, 644-45 (E.D. Tex. 1992) (same); Woods v. State, 970 S.W.2d 770, 775 (Tex. App. 1998) (same); LaFave, *supra* note 68, at 426-38 (same); Williamson, *supra* note 170, at 396-403 (outlining considerations that courts have used to distinguish stop from arrest).

251. *Acosta-Colon*, 157 F.3d at 14-15.

252. 332 U.S. 581 (1948). *But see* 1 LAFAVE, *supra* note 5, at § 1.5(b) (arguing that *Di Re* was based on non-constitutional grounds).

plicable in all federal courts."[253] Rejecting that view, the Court opined that:

> in absence of an applicable federal statute the law of the state where an arrest without a warrant takes place determines its validity. By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be "agreeably to the usual mode of process against offenders in such State." There is no reason to believe that state law is not an equally appropriate standard by which to test arrests without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest.[254]

After examining Acts of Congress regulating arrests by law enforcement officers and finding them "meager, inconsistent and inconclusive,"[255] the Court concluded that there was no general federal rule regulating warrantless arrests and that no statute purported to supercede state law.[256] The Court therefore looked to New York law to measure the propriety of the arrest.[257]

Other Supreme Court cases also have demonstrated reliance on state law to determine the validity of an arrest.[258] In *Cupp v. Murphy*,[259] the Court's opinion was significantly influenced by the state law definition of an arrest, resulting in a confusing discussion of the constitutional justification for the search. As previously discussed, the police detained Murphy temporarily at the police station to scrape Murphy's fingernails.[260] Oregon law statutorily defined an arrest as "'the taking of a person into custody so that he may be held to answer for a crime.'"[261] Murphy's detention did not meet that definition. Due to the absence of a "formal arrest," the Court suggested that a full search of Murphy would not have been justified.[262] Nevertheless, the Court believed that the rationale of

253. *Di Re*, 332 U.S. at 589.

254. *Id.* at 589-90.

255. *Id.* at 590.

256. *Id.* at 590-91.

257. *Id.* at 591.

258. *See* Michigan v. DeFillippo, 443 U.S. 31, 36 (1979) (noting that constitutionality of arrest preliminarily depends on state law); Miller v. United States, 357 U.S. 301, 305 (1958) (indicating that validity of warrantless arrest by local police for violation of federal law depends on state law); Johnson v. United States, 333 U.S. 10, 15 n.5 (1948) (noting that state law determines constitutionality of arrest without warrant).

259. 412 U.S. 291 (1973).

260. *See id.* at 292.

261. *See id.* at 294.

262. *See id.* at 296 (holding that full search of defendant would have been justified).

search incident to arrest principles "justified subjecting [Murphy] to the very limited intrusion necessary to preserve the highly evanescent evidence they found under his fingernails."[263]

The open-ended deference to state law as dispositive of whether there has been an arrest exhibited by the Court in *Di Re* and somewhat less so in *Murphy* is not evident in other cases. In *Ker v. California*,[264] the Court stated that the lawfulness of an arrest for a federal offense was to be determined by reference to state law "insofar as it is not violative of the Federal Constitution."[265] This statement suggests that there are some minimum requirements for the validity of an arrest guaranteed by the Federal Constitution. Thus, in *Ker*, after the Court determined that the entry of the police into a dwelling without announcing their presence complied with state law, the Court went on to "determine whether, not withstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness."[266] Moreover, in *Dunaway v. New York*,[267] the Court rejected the view that the state law definition of arrest controlled for purposes of ascertaining whether probable cause was needed to support the detention.[268] In that case, the Court concluded that a "custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against an illegal arrest."[269]

Lower court opinions have also evidenced the same lack of consistency.[270] Some lower courts look to whether the arrest is authorized by state law.[271] Others believe that the validity of an arrest turns on federal

263. *Id.* (considering limited intrusion and ready destructibility of evidence).

264. 374 U.S. 23 (1963).

265. *Id.* at 37.

266. *Id.* at 38.

267. 442 U.S. 200 (1979).

268. *Dunaway*, 442 U.S. at 213-14 (indicating that probable cause is still required despite state law that permits seizures less than full arrests); *see also* United States v. Sharpe, 470 U.S. 675, 684 (1985) (stating that *Dunaway* was like traditional arrest due to events occurring during detention and not due to length of detention).

269. *Dunaway*, 442 U.S. at 216; *see also* Caldwell v. Taylor, 461 U.S. 571, 572 (1983) (characterizing *Dunaway* as involving "arrest"); Taylor v. Alabama, 457 U.S. 687, 689 (1982) (characterizing *Dunaway* as involving arrest without probable cause).

270. *See generally* Kenneth J. Melilli, *Exclusion of Evidence in Federal Prosecutions on the Basis of State Law*, 22 GA. L. REV. 667, 713-23 (1968) (discussing varying reaction of lower federal courts to *Di Re* concerning impact on Fourth Amendment suppression of evidence based on invalidity of arrest under state law).

271. *See, e.g.*, United States v. Mota, 982 F.2d 1384, 1387 (9th Cir. 1993) ("[W]hether an officer is authorized to make an arrest will ordinarily depend in the first instance on state law."); State v. Evans, 723 A.2d 423, 433 (Md. 1999) (postulating, absent federal statute, state law as determinative of validity of arrest by state law enforcement officials). *But see* 1 LAFAVE, *supra* note 5, at § 1.5(b) (questioning soundness of *Mota*'s analysis).

law, not on state law.[272] However, in other areas of Fourth Amendment jurisprudence the Court does not defer to state law in order to ascertain whether the Fourth Amendment has been satisfied.[273] Of particular note, the development of the concept of a "stop" as a form of a seizure by *Terry* and its progeny in no way depended on state law analysis and, indeed, rejected such analysis.[274] Also, *Knowles* implicitly refused to accept the view that state-law requirements should influence the constitutional propriety of a search and seizure. In that case, although Iowa law permitted a citation in lieu of a trip to the police station, the Court rejected the propriety of the search based on Fourth Amendment principles.

Given the need for a uniform standard to implement the guarantee of security that the Fourth Amendment explicitly mandates,[275] there must be one definition of arrest for Fourth Amendment applicability. Otherwise, the guarantees of the Amendment would vary from state to state. Thus, for example, one state may define an arrest as requiring a trip to the police station for booking while another may require only an on-the-scene detention. A person who is subjected to a prolonged detention at the scene, searched, but released at the scene would be successful in suppressing evidence in one situation but not in the other. Moreover, if the detention was not supported by probable cause, the results of a civil rights action for damages would be different.

### 2. *Focusing the Inquiry: Two Questions, Not One*

The question whether an arrest has occurred typically reaches the courts in the context of a criminal prosecution and in a situation where the police have recovered evidence from the suspect at the time of his seizure. Courts and commentators often conflate two separate questions involved in this scenario: 1) what constitutes an arrest; and 2) whether a search incident to that arrest should be allowed. The inquiry, however, needs refocusing.

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272. *See* United States v. Lewis, 183 F.3d 791, 793-94 (8th Cir. 1999), *cert. denied*, 528 U.S. 1163 (2000) (stating that appropriate inquiry is whether arrests are valid under federal law, not state law); *see also* United States v. Clyburn, 24 F.3d 613, 616 (4th Cir. 1994) (noting that "the proper standard for evaluating illegal search and seizure claims in federal courts has uniformly been 'whether the actions of the state officials securing the evidence violated the Fourth Amendment'" and not whether state officer violated state law); United States v. Wright, 16 F.3d 1429, 1434-36 (6th Cir. 1994) (questioning continued validity of *Di Re* and stating that question of whether person's arrest is legal is controlled by federal standards).

273. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988) (rejecting argument that person's expectation of privacy in garbage was reasonable because its search and seizure was impermissible under state law).

274. *See* Terry v. Ohio, 392 U.S. 1, 10-11 (1968) (noting that although stop was viewed by state courts as valid tool of law enforcement and petty indignity, Supreme Court found it to be seizure within Fourth Amendment).

275. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (Fourth Amendment is applicable to states through Fourteenth Amendment).

For the purpose of *seizure* analysis, it does not matter how the seizure is labeled, so long as the police have probable cause to arrest. Under such circumstances, a prolonged detention at the scene or a trip to the police station are equally permissible. Nevertheless, absent probable cause but with the existence of articulable suspicion that the person is engaged in criminal activity, the sole relevant question is whether the detention exceeds the permissible scope of a stop. If it does, the Fourth Amendment has been violated. It does not matter whether that extended detention is labeled an arrest, a *de facto* arrest or some of other kind of detention.

For the purpose of *search* analysis, if the mere existence of probable cause to *arrest* is not enough to justify a search of a detainee, it does matter how the encounter is labeled.[276] Once a valid arrest is made, the Supreme Court has established that a search incident to that arrest is permissible as a matter of course. Under the common law definition of arrest, the search-incident-to-arrest rule would apply to the entire range of seizures, excluding only those labeled "accostings." The courts, however, have been reluctant to apply the search-incident-to-arrest rule so broadly and the various definitions of arrest reflect, in part, a desire to limit the applicability of that principle.[277] *Knowles* illustrates this reluctance. In *Knowles*, rather than modify the search-incident-to-arrest principle, the Court effectively redefined what constituted an arrest by eliminating traffic citations from the arrest category of seizures. As a result of such manipulations, the question of when an arrest occurs has been obscured.

Rather than distort the definition of an arrest to avoid application of the search-incident-to-arrest principle, there should be two separate analyses to reflect the application of two independent legal principles: whether an arrest has occurred; and whether a search incident to arrest be permitted. The second question raises the concern whether the search-incident-

276. This is distinguished from the situation where the police have probable cause to search and whether they can do so without a warrant. The debate over the role of the warrant clause has little to do with the definition of an arrest. That definition involves attempting to determine the meaning of a "seizure," one of the terms of the Reasonableness Clause. The warrant preference rule enters the analysis at the point of any search. The warrant preference rule, at least in theory, still operates to bar such searches in the absence of an applicable exception. The continued viability of that rule is beyond the scope of this Article. Clearly, the police often have probable cause to search when they have probable cause to arrest. Thus, if the mere existence of probable cause suffices to justify a search, the importance of whether a detention is an arrest or not is diminished for search analysis. Characterization of the detention remains fundamentally important, however, in the absence of probable cause to search and for many other purposes.

277. A recent attempt by a commentator also reflects that reluctance. *See* Wayne A. Logan, *An Exception Swallows the Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 426-38 (2001) (discussing application of search incident exceptions and arrest). Logan first postulates that the bright-line search-incident-to-arrest rule should not be subjected to a factual inquiry in each case to ascertain whether one of the two traditional rationales applies. *See id.* at 399 n.120. He then fashions a definition of an arrest to fit, which he asserts will "trigger[ ] search incident justification." *Id.* at 434.

to-arrest rule should have *per se* applicability once it is determined that the encounter constitutes an arrest, which is what the Court has held, or whether that principle should be modified to apply to only some arrests.[278] The applicable arrests could be based on the category of crime[279] for which the arrest is being made or based on a factual inquiry[280] to establish whether one of the two justifications for the search incident to arrest rule is actually present in each case.

For example, in *Evans*, after the Maryland Court of Appeals determined that the common law definition of arrest sufficed to constitute an arrest under Maryland law, the court addressed separately the Fourth Amendment question whether an officer is constitutionally permitted to conduct a full search.[281] The court cautiously observed that "what suffices as an arrest under the law of this State may not incorporate the necessary justifications and requirements under the Fourth Amendment for a search incident to that arrest."[282] It therefore applied the traditional justifications for the search incident to arrest rule to the facts of the case.[283]

*Evans* involved detaining and searching a person who had just sold drugs to an undercover police officer. In order to maintain the secrecy of

278. *See generally* Catherine Hancock, *State Court Activism and Search Incident to Arrest*, 68 VA. L. REV. 1085, 1109-28 (1982) (cataloguing state court responses to *Robinson*).

279. *See* State v. Paul T., 993 P.2d 74, 78-79 (N.M. 1999) (observing ambiguity as to whether search-incident-to-arrest principle as articulated in *Robinson* applied to other than "custodial" arrests and holding, under New Mexico Constitution that police could not conduct full search of juvenile who violated curfew law that provided for release to parent or guardian); Thomas v. State, 614 So. 2d 468, 471 (Fla. 1993) (finding that citation was form of arrest but rejecting permissibility of custodial arrest and "body search" for person who was riding bicycle without bell). Similarly, prior to its constitutional changes, California courts differentiated between types of crimes for which an arrest occurred when applying the search-incident-to-arrest principle. *See, e.g.*, People v. Maher, 550 P.2d 1044 (Cal. 1976) (indicating that full body search incident to arrest is impermissible when defendant is to be merely cited and released on bail); People v. Brisendine, 531 P.2d 1099 (Cal. 1975) (discussing tiers of arrest classification for purposes of warrantless search). *Knowles* could have been alternatively decided on the ground that a traffic offense does not justify a search incident to arrest. *See* Knowles v. Iowa, 525 U.S. 113, 118-19 (1998). *Robinson*, of course, ruled otherwise but *Robinson* also involved incarceration, which serves as a separate basis for a full search. *See* Illinois v. Lafayette, 462 U.S. 640, 643-46 (1983).

280. *See, e.g.*, State v. Ringer, 674 P.2d 1240, 1248 (Wash. 1983) (rejecting bright-line rule for searches incident to arrest and adopting totality of circumstances approach to determine whether in fact search was justified in each case), *overruled by*, State v. Stroud, 720 P.2d 436 (Wash. 1986). There was at least some common law authority that a search incident to arrest was not always permitted but was, instead, based on the circumstances of each case. *See, e.g.*, David E. Aaronson & Rangeley Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest*, 64 GEO. L.J. 53, 55 (1975) ("A limited right did exist at common law, but the mere occurrence of an arrest did not always create a right to search.").

281. State v. Evans, 723 A.2d 423, 434 (Md. 1999).

282. *Id.*

283. *See id.* at 435.

the police investigation, which had the goal of identifying as many drug dealers in the area over a one month period as possible and then sweeping the area of the dealers, the police did not transport Evans to the police station. He was, however, searched. He was also held a substantial period of time to verify his identification and fingerprinted and photographed.

Turning first to the officer safety justification for the search incident to arrest rule, the court recognized the "inherent danger of drug enforcement" to police officers.[284] The court stated:

> While admittedly not transporting the arrestees to the station house, the officers were nonetheless engaged in more than a routine investigatory stop. The arrest, identification, evidence procurement and recordation procedures for the undercover narcotics operations took some time to effect and consequently placed the officers at significant risk should they not have immediately and fully searched each arrested suspect. More generally, this Court has found the act of arrest itself to be fraught with danger for the police officers involved.[285]

As to the second justification, the court believed that the police would have lost valuable evidence of the crimes for which the persons were suspected, that is, the marked money and additional drugs if no search was permitted. Without recovery of those items, the court believed that the prosecution's case would have been weakened significantly.[286]

Thus, *Evans* illustrates the proper separation of the two questions regarding whether an arrest has occurred and whether a search incident to arrest is justified.[287] Indeed, *Knowles* can be viewed as employing a similar analysis, given that the Court discussed why the search incident to arrest rule was inapplicable to a traffic citation situation. Such an analysis is no less workable than frisk analysis, which requires a factual inquiry in each case to determine whether a frisk is justified.[288]

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284. *Id.* at 435.

285. *Id.* at 436.

286. *See id.*

287. *See* State v. Pallone, 613 N.W.2d 568, 580 (Wis. 2000) (ascertaining that suspect was under arrest, and "next explor[ing] whether the particular circumstances of this case gave rise to either of the two historical justifications for the search incident to arrest exception").

288. *See* Terry v. Ohio, 392 U.S. 1, 29 (1968) (noting that limitations for purposes of Fourth Amendment will rest on factual circumstances of each case). The Court in *Terry* established that the facts of each case must be examined to ascertain whether a protective search for weapons of the person detained is justified. *Id.* It must be established that the police officer has articulable suspicion that the person he is detaining is armed and dangerous. *Id.* at 30. Case law interpreting that standard has recognized that certain crimes, by their very nature, justify a frisk of the person suspected of that crime. *See* 4 LAFAVE, *supra* note 107, at § 9.5(a). A search incident to arrest is more intrusive than a frisk due to the purposes of the search and the fact that it is based on probable cause, and the scope would be unaffected;

3. *Measuring Intent*

Although some courts have sought to determine the officer's subjective intent to arrest to determine if an arrest has occurred, that mode of analysis is inconsistent with one of the main features of Fourth Amendment analysis. This feature involves the recognition that a police officer's intent is measured by examining the objective aspects of the encounter and not by inquiry into the officer's actual, subjective intent.[289] Other courts have properly adopted that objective analysis for the purpose of applying the common law definition of arrest.[290] They have done so for consistency with Fourth Amendment jurisprudence and to alleviate the need to assess the subjective intent of the police officer, thus avoiding self-serving declarations of intent.[291]

Thus, for example, merely touching a person is not enough for a seizure; there must also be an intent to seize. Illustrative is the situation presented in *INS v. Delgado*.[292] In that case, INS agents approached Francisca Labonte, an employee of a garment factory,[293] at work during a survey designed to locate illegal aliens. An agent came up to her from behind and "tapped" her on the shoulder; he asked in Spanish, "Where are your papers?"[294] Labonte, who did not wish to answer, turned and only re-

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only the method of inquiry, a factual one in each case, would be similar to frisk analysis.

289. *See generally* Whren v. United States, 517 U.S. 806, 812-13 (1996) (collecting cases and rejecting Fourth Amendment challenges based on officers' actual motivations); Brower v. County of Inyo, 489 U.S. 593, 598 (1989) (finding inquiry into subjective intent inappropriate); Michigan v. Chesternut, 486 U.S. 567, 575 n.7 (1988) ("[T]he subjective intent of the officers is relevant to an assessment of the Fourth Amendment implications of police conduct only to the extent that intent has been conveyed to the person confronted."); Maryland v. Macon, 472 U.S. 463, 470 (1985) (noting that Fourth Amendment violation is objective inquiry and does not depend on officer's state of mind); Scott v. United States, 436 U.S. 128, 138 (1978) (explaining that court would examine officers' actions and not his state of mind); United States v. Robinson, 414 U.S. 218, 236 (1973) (holding that for search incident to arrest, it does not matter that officer did not subjectively fear suspect or believe that the suspect might be armed); *see also* Berkemer v. McCarty 468 U.S. 420, 442 (1984) (rejecting inquiry into officer's subjective intent and determining whether person is "in custody" for purposes of requiring *Miranda* warnings, stating that "only relevant inquiry is how a reasonable person in suspect's position would have understood his situation"); *In re* Demetrius, 256 Cal. Rptr. 717, 719 (Cal. App. 1989) (noting that lawfulness of search incident to arrest does not depend on whether officer intended to release defendant but on whether officer was justified in arresting defendant); *Evans*, 723 A.2d at 429 n.9 (indicating that question of when arrest occurs is legal issue and "subjective thoughts of the detaining officer are not controlling").

290. *See, e.g.*, State v. Swanson, 475 N.W.2d 148, 152 (Wis. 1991) (adopting objective test to determine whether arrest had occurred).

291. *See id.* (discussing need to eliminate assessment of officer intent).

292. 466 U.S. 210 (1984).

293. *Id.* at 213 n.1.

294. *Id.* at 220.

sponded because she saw that the questioner was an INS agent.[295] She stated that she had her papers and showed them to the agents, who then left.[296] Applying the reasonable person test, the Court held that this was a "classic consensual encounter[ ] rather than [a] Fourth Amendment seizure[ ]."[297] Missing from the encounter was an intent to seize by the agent.[298] On the other hand, a seizure occurs when an officer places his hand on a suspect's shoulder and instructs the suspect to "hold it." In such a case, there is physical contact and an objective manifestation of the officer's intent to seize from his spoken words.[299]

### B. *Tools Employed to Establish the Proper Definition of Arrest*

The Supreme Court has used a variety of interpretative tools as aids in formulating principles to implement Fourth Amendment commands. Depending on the era and whether a conservative or liberal majority holds sway on the Court, different tools have been utilized.

#### 1. *The Common Law*

The Supreme Court has often relied on the common law as a guide to ascertain the meaning of Fourth Amendment principles. Exactly how this tool is used, as with other interpretative techniques, varies with who is writing the opinion.[300] Recently, driven in large part by Justice Scalia's opin-

295. *Id.* at 231 (Brennan, J., dissenting).

296. *Id.* at 220.

297. *Id.* at 221.

298. *Cf.* Martinez v. Nygaard, 831 F.2d 822, 826-27 (9th Cir. 1987) (holding that where INS agents grabbed worker by shoulder to get attention and releasing worker when worker turned to face agent is not seizure under reasonable person test); United States v. Collis, 766 F.2d 219, 219-21 (6th Cir. 1985), *cert. denied*, 474 U.S. 851 (1985) (finding no seizure when agent approached defendant from behind, lightly touched defendant on arm, identified himself and asked if he could ask some questions); State v. Reid, 276 S.E.2d 617, 621 (Ga. 1981) (citation omitted) ("Assuming the agent did tap the defendant on the shoulder at the outset to get his attention . . . , he simultaneously said excuse me or something similar; in view of all the circumstances this physical contact alone does not constitute a seizure . . . ."); State v. Neyrey, 383 So. 2d 1222, 1224 (La. 1979) (finding no seizure when officer opened car door and shook defendant because he was asleep, then asked to see identification); CORNELIUS, *supra* note 29, at § 47 ("Every touching of the party to be arrested, by the officer having process, is not necessarily an arrest. Thus, if the officer meets the party against whom he has process, and they shake hands, nothing being said of the process nor is it said that an arrest is intended, this would not constitute an arrest, because the officer and the party did not so intend.").

299. *Cf.* United States v. Santillanes, 848 F.2d 1103, 1106-07 (10th Cir. 1988) (finding seizure under reasonable person test where defendant was "physically restrained" by officer placing his hand on defendant's shoulder to stop and question him when defendant turned to walk away).

300. *See, e.g.*, Chimel v. California, 395 U.S. 752, 760-61 (1969) (interpreting Fourth Amendment in light of American colonial history); Stanford v. Texas, 379 U.S. 476, 481-85 (1965) (tracing roots of Fourth Amendment to general warrants, arbitrary searches and conflicts between King and press in colonial America); Mar-

ions,[301] the common law has been viewed as having virtually dispositive effect: "In determining whether a particular governmental action violates [the Fourth Amendment], we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed."[302] Only if the common law yields no clear answer, will the Court make additional inquiry.[303]

2. *The Framers' Intent*

The common law has also been used, however, more properly in my view, not as dispositive but as illuminating the Framers' intent.[304] Accordingly, the Court has consulted the common law rule to ascertain what the Framers must have intended when adopting the Amendment.[305] Using such a technique, the inquiry is what the Framers intended, not what the common law required. This, however, should not end the inquiry into the Framers' intent. Indeed, it is a mistake in most instances to look for such intent at a particularized level. Instead, the most important interpretive tool is a broader recognition that the Amendment was designed by the

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cus v. Search Warrants, 367 U.S. 717, 729 (1961) (discussing history of Bill of Rights); Henry v. United States, 361 U.S. 98, 100-01 (1959) (noting that Fourth Amendment's probable cause determination reflects aversion for general warrant); Harris v. United States, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting) (concluding that "[t]he provenance of the Fourth Amendment bears on its scope"), *overruled in part by* Chimel v. California, 395 U.S. 752 (1969); United States v. Lefkowitz, 285 U.S. 452, 466-67 (1932) (relying on principles of eighteenth-century precedent to interpret Fourth Amendment); Carroll v. United States, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted . . . ."); Weeks v. United States, 232 U.S. 383, 389-91 (1914) (exploring history of Fourth Amendment in eighteenth-century writs of assistance and general warrants and relying on English precedent from that period); Boyd v. United States, 116 U.S. 616, 623-30 (1886) (following English precedents and applying Fourth Amendment to protect private property); *see also* JACOB B. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 19 (1966) (noting that Fourth Amendment was "the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England"); Richard M. Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 393, 396 (1963) (noting that Fourth Amendment cases "are replete with reliance upon history").

301. *See* David A. Sklansky, *The Fourth Amendment and the Common Law*, 100 COLUM. L. REV. 1739, 1746-74 (2000) (commenting on Justice Scalia's rejection of Court's traditional mode of Fourth Amendment analysis in favor of reading Eighteenth-Century common law).

302. Wyoming v. Houghton, 526 U.S. 295, 299 (1999).

303. *Id.* at 299-300 (indicating that analysis will proceed only after initial question has been addressed).

304. *See, e.g.*, Payton v. New York, 445 U.S. 573, 591 (1980) (using common law view to shed light on Framers' intent); *see* Sklansky, *supra* note 301, at 1784-93.

305. *See* Sklansky, *supra* note 301, at 1764-66 (tracing Supreme Court treatment of common law as interpretative tool).

Framers to protect individuals from unreasonable governmental intrusion.[306] Thus, the Amendment must be interpreted in light of that goal.

3. *The Need for Flexibility*

At least somewhat inconsistent with the common law as a tool of interpretation, the Court has at times employed a non-historical analysis to interpret the commands of the Fourth Amendment. It has asserted that law enforcement practices are not "frozen" by those in place at the time the Fourth Amendment was adopted.[307] Hence, interpretation of the Amendment permits modern developments:[308] "Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper."[309] Thus, the Court has sometimes asserted that the Amendment's "prohibition against 'unreasonable searches and seizures' must be interpreted 'in light of contemporary norms and conditions.'"[310]

4. *A Workable Rule*

The necessity for a workable rule for the police officer on the street to follow has been repeatedly emphasized by the Court.[311] However, one must distinguish between a rule that is clear in its application and the substance of the rule: a clear rule is desirable but says nothing about the choice between two equally clear rules, one that furthers the individual's

306. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 635 (1886) (asserting that Fourth Amendment should be interpreted liberally in favor of security of person). The Court in *Boyd* stated: "It is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon." *Id.*; *see also* Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974) ("The Bill of Rights in general and the Fourth Amendment in particular are profoundly anti-government documents."); Morgan Cloud, *The Fourth Amendment During the Lochner Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555, 626-27 (1996) (arguing that values underlying Amendment must be reflected in its application to modern conditions, in order to protect individual rights, where scientific invention has made it possible for government agents to violate privacy rights without employing physical power).

307. *See Payton*, 445 U.S. at 591 n.33 (noting that "Court has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage").

308. Steagald v. United States, 451 U.S. 204, 217 (1981) (commenting that common law rules governing search and seizure are continually evolving); *see also* Tennessee v. Garner, 471 U.S. 1, 12-15 (1985) (changing common law rule permitting police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

309. *Steagald*, 451 U.S. at 217 n.10 (citation omitted).

310. *Id.*

311. *See, e.g.*, Illinois v. Andreas, 463 U.S. 765, 772 (1983) (emphasizing that standard for Fourth Amendment purposes must be workable for application by ordinary police officers); New York v. Belton, 453 U.S. 454 (1981) (noting that single standard is essential to guide police officers in stop and search procedures).

protections afforded by the Fourth Amendment and another that diminishes those protections.[312] Thus, any definition must have a normative basis; otherwise, it would be subject to deprecation by interpretation favoring governmental needs.[313] In drawing categories of seizures, as Professor LaFave has observed, it is desirable to employ concepts that are not artificial and correspond to real life: "the critical distinctions ought to be expressed in terms that can be understood and applied by the police under the circumstances in which they are called upon to act," and they should focus on the actual conduct of the police instead of contemporaneous or after the fact statements of the police.[314]

### C. *Applying the Tools*

#### 1. *Possible Definitions of "Arrest"*

As this Article demonstrates, there is a wide range of possible definitions of arrest, each of which has different points where it is concluded that an arrest has occurred. A "custodial"[315] arrest in more recent case law usually involves a trip to the police station, placing the point of arrest quite

312. *See* Ronald J. Bacigal, *Choosing Perspectives in Criminal Procedure*, 6 WM. & MARY BILL RTS. J. 677, 709-10 (1998) (discussing how clarity of rules is independent of substance of rules).

313. *See* Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 293-301 (1993). The need to establish normative-based principles to guide Fourth Amendment analysis is admirably demonstrated by Professor Morgan Cloud in his article. After analyzing the pragmatic basis that has come to dominate the Court's opinions in the latter part of the Twentieth Century, he concludes: "The Court's opinions demonstrate that if the Fourth Amendment is to function as a device that protects individual autonomy by limiting government power, its interpretation must rest upon a theory that emphasizes strong rules, yet is sufficiently flexible to cope with the diverse problems arising under the Fourth Amendment." *Id.* at 286. He then argues for a rule-based interpretive theory of the amendment, with the rules derived "from normative claims justified by the history and text of the amendment, but ultimately grounded in a value-based claim about the nature of the amendment." *Id.* at 294. The fundamental principle he perceives is that the Fourth Amendment exists to enhance individual liberty by containing government power. *See id.* at 295. He then claims, rightfully I believe, "Simply put, if liberty is the goal, rules are needed." *Id.* at 297. He ultimately concludes that "the fourth amendment example teaches us that without some coherent system of rules designed to limit [the power of the government], solitary individuals who claim the right to be free from government intrusions will lose, and the principle of liberty embodied in the amendment gradually will disappear." *Id.* at 302.

314. *See generally* LaFave, *supra* note 68 (discussing need for police clarity regarding proper seizure).

315. *See* People v. Bland, 884 P.2d 312, 316-17 (Colo. 1994) (describing custodial arrests as those involving escort of defendant to station house for booking). One judge has pointed out that custody in this definition is inconsistent with the common law view of custody. *See id.* at 324-35 (Rovira, J., concurring) ("A custodial arrest occurs regardless of whether a person is eventually brought to the station. All arrests are inherently custodial.").

late in the encounter.[316] Such a requirement provides a clear rule for the police to follow and equally clear notice to the detainee that she is suspected of a crime. That rule has not been used to define an arrest for all purposes nor should it. For the purpose of seizure analysis, the custodial arrest rule as defining *any* arrest would be inconsistent with the entire body of Fourth Amendment jurisprudence, which recognizes that a prolonged detention intrudes so significantly upon liberty interests that the point of arrest must cover such intrusions. Instead, the concept of a custodial arrest is used solely for the purpose of search-incident-to-arrest principles. This view thus divides seizures into three parts: stops; arrests (for which probable cause is required); and custodial arrests (which permit searches incident to arrest).

Such a definition of arrest is inconsistent with the fundamental purpose of the Fourth Amendment. To hold that the police must take the person to the police station in order for the search-incident-to-arrest principle to apply would require the police to be quite intrusive in their actions by requiring an extended detention, a trip to the police station, booking[317] and an appearance before a magistrate to determine whether the suspect will be released pending trial.[318] Indeed, the suspect may be confined, interrupting his source of income, or be subjected to "burdensome conditions" of pretrial release that affect his liberty.[319] The suspect is required to obtain counsel and "experience all the other impositions on accused persons that are well known to accompany the criminal process."[320] The mere formal charging of a crime "can deprive the accused of fundamental rights,"[321] may subject him to "'public scorn and deprive him of employment, and almost certainly will deprive him of his speech, associations, and participation in unpopular causes,' and will also subject a defendant to the 'anxiety and concern accompanying public accusa-

316. *See, e.g.*, United States v. Parr, 843 F.2d 1228, 1231 (9th Cir. 1988) ("[A] distinction between investigatory stops and arrest may be drawn at the point of transporting the defendant to the police station."); 3 LAFAVE, *supra* note 14, at § 5.2 (arguing that essential feature of custodial arrest, to justify search incident thereto, is taking of suspect to police station).

317. *See* 3 LAFAVE, *supra* note 14, at § 5.1(e) (discussing clerical tasks involved in police practice of "booking" and "whether the form or nature of the booking entry has a bearing upon the lawfulness of the preceding arrest").

318. *See* Evans v. State, 688 A.2d 28, 42-43 (Md. App. 1997) (Sonner, J., dissenting); *see also* Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 60-61 (2000) (cataloguing consequences of custodial arrest).

319. *See Evans*, 688 A.2d at 44 n.3 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 115 (1975)).

320. *Id.* at 44 (Sonner, J., dissenting).

321. *Id.* at 44 n.3 (citing *Klopfer v. State*, 386 U.S. 213, 222 (1967)).

tion.'"[322] Yet, "many arrested persons . . . are never tried at all, with the charges being dropped at some time prior to trial."[323]

Indeed, "requiring the police to [transport and] charge every person they detain and search forwards no valid public interest, much less any of the values that the Fourth Amendment's exclusionary rule is meant to protect. The violations of privacy or detention and search will already have occurred."[324] It would be "ironic . . . to mandate that police officers subject detainees to a greater intrusion, [of a custodial arrest] in order to justify the lesser intrusion of a search."[325] Thus, it is "nonsense" to assert that a search does not violate one's constitutional rights so long as the accused is transported to the police station but that "those rights are violated only when the police decide not to arrest him and . . . let him go."[326]

Rejecting the requirement of a "custodial" arrest also accommodates modern law enforcement needs and minimizes the intrusion on those ar-

322. *Id.* (quoting *United States v. Ewell*, 383 U.S. 116, 120 (1966)).

323. Baker v. McCollan, 443 U.S. 137, 154 (1979) (Stevens, J., dissenting); *see also* Brady, *supra* note 318, at 36-50 (discussing fact that many criminal arrests do not result in prosecution). One court has stated:

> From the perspective of potential defendants, requiring prosecutions to commence when probable cause is established is undesirable because it would increase the likelihood of unwarranted charges being filed, and would add to the time during which defendants stand accused but untried. These costs are by no means insubstantial since . . . a formal accusation may interfere with the defendant's liberty, . . . disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. From the perspective of law enforcement officials, a requirement of immediate prosecution upon probable cause is equally unacceptable . . . . And from the standpoint of the courts, such a requirement is unwise because it would cause scarce resources to be consumed on cases that prove to be insubstantial, or that involve only some of the responsible parties or some of the criminal acts.

State v. Evans, 723 A.2d 423, 439 (Md. 1999) (quoting *United States v. Lovasco*, 431 U.S. 783, 791-92 (1977)).

324. *Evans*, 723 A.2d at 438; *accord* State v. Bauman, 586 N.W.2d 416, 421 (Minn. Ct. App. 1998) (finding that requiring full custodial arrest subsequent to search based on probable cause is contrary to goal of Fourth Amendment).

325. *Evans*, 723 A.2d at 439; *cf.* California v. Acevedo, 500 U.S. 565, 584 (1991) (Scalia, J., concurring) (noting that it makes "no sense a priori" to have rule that permits police to arrest person and search him as incident to arrest but does not permit police to "take the less intrusive step" of stopping person on street and, on basis of probable cause, to search briefcase person is carrying); *see also* 3 LAFAVE, *supra* note 14, at § 5.2(h) (arguing that use of citations in lieu of custodial arrests is desirable but would be "impeded if it were the rule that only a *Terry*-type search could be made whenever a citation is given at the scene, for then it would never be feasible to give a citation for any minor offense where there is no need for custody of the defendant but yet a need to acquire evidence from his person").

326. Commonwealth v. Skea, 470 N.E.2d 385, 393 (Mass. App. Ct. 1984) (finding "odious" argument that police were powerless to search defendant after deciding not to arrest "because it counsels a greater intrusion on the suspect's liberty, a formal arrest, to justify the lesser intrusion of a search . . . and thus distorts the intended protections of the Fourth Amendment into an instrument of oppression"); *accord Evans*, 723 A.2d at 438-39.

rested in situations where there is no need to retain control of the person arrested. The United States is rapidly nearing the day when technology will give the police the ability to instantly identify most persons the police are detaining at the scene of the detention, thus removing the need to transport many offenders to the police station. Computer checks can now ascertain if there is any additional reason to hold the person. A summons can be issued to ensure the appearance of many offenders. For numerous crimes, there is simply no need to transport suspects to the police station. As Professor LaFave observes:

> For example, the typical "bagman" for a numbers or policy racket is a lower-echelon courier who, as one judge put it, "would not leave town if an atomic bomb were dropped on it," and thus from the standpoint of assuring appearance at subsequent proceedings there is no reason why the criminal process cannot be invoked against such a person by a citation rather than a custodial arrest. But, traditionally the full arrest on probable cause has also served to validate the search of such a person for the gambling slips and gambling funds he is delivering. The search for evidence . . . should not be deemed unlawful simply because the bagman is instead released thereafter on a citation. The need to search for evidence, as compared to the need to search for a weapon, is not related at all to the need for or fact of continued custody of the arrestee, and thus under the better view such a search is no less lawful when incident to an arrest not of a "custodial" nature.[327]

Thus, the concept of "custodial" arrest—in addition to being a redundancy—is an improper measure of an arrest for all purposes. It can never define the point of arrest for seizure purposes, given how late it occurs in the sequence of events. It also serves as a poor substitute for the separate analysis of the search question, that is, whether a search incident to arrest is justified.

Earlier in the sequence of events is a "formal" arrest, that is, an arrest not involving a trip to the police station. A formal arrest, as used here, is really a notice requirement.[328] Arguably, this could be an objective standard, requiring the police to indicate to the person detained that he has been "arrested" for a criminal offense. Under such circumstances, the individual has actual knowledge of the police claim that he has committed a crime. That informational benefit is not further enhanced by requiring the police to maintain custody by taking the citizen to the police station to be booked and hence a formal arrest differs in character from a custodial arrest.

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327. 3 LAFAVE, *supra* note 14, at § 5.2(h) (footnotes omitted).

328. See Logan, *supra* note 277, at 434 (arguing that arrest, for purpose of search incident to arrest rule to apply, requires officer to "convey by express words or action that the suspect is 'under arrest'").

A notice requirement serves to place the point of arrest in the control of the police. Unless the police inform the suspect that she is under arrest, she is not. It would permit the police to engage in intrusive, prolonged detentions so long as they do not inform the suspect that she is under arrest. On the other hand, if courts are willing to find that an arrest has occurred even in the absence of notice—and they clearly have—then a notice requirement is not an essential element of an arrest for seizure analysis. As with a custodial arrest, a formal arrest creates a third category of seizures, useful only to determine whether the police can search incident thereto. Under such circumstances, a requirement of some admonition to the suspect would also be costly: A notice requirement may result in a significant number of searches being held invalid for failure to admonish, "despite little or no doubt about how the detention was perceived by those involved. Whatever is accomplished in terms of encouraging admonitions and facilitating review may simply not be worth the loss of evidence necessitated by enforcing the requirement."[329]

Notice in other contexts has been deemed important when the citizen is called upon to give up a constitutional right.[330] However, in the context of an arrest, the individual is not called upon to do anything; the legal consequences of an arrest are in no way dependent on the knowledge and reaction of the arrestee; and the right to search is dependent upon the fact of the arrest and not upon the individual's wishes. In a situation where the police do not convey to the suspect the purpose of the detention, it may appear to the citizen that he is simply being detained and perhaps searched. He is given no reason for the search, that is, he is not told that he is being arrested. Notice in this context is important to inform the citizen that the police's actions are justified. The benefit of notice is informational and explains why the police can search.

This notice benefit is largely illusory. It presupposes a level of knowledge of Fourth Amendment principles that most people do not have; few people know that a search is valid on the basis of an arrest and that an arrest serves as an exception to the warrant requirement. There is also the difficult question regarding how much information the police must convey. Should the police have to explain to the suspect that she has been "arrested," why she has been arrested, that charging documents will follow

329. Dix, *supra* note 62, at 933.

330. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 498 (1966) (holding that warnings are required before interrogating suspect); *cf.* Dix, *supra* note 62, at 931-32 (recognizing that some statutes require admonition by police to detainee of nature of non-arrest detention and asserting that purpose of such information is "to reduce the risk of improper pressure being placed on the suspect in order to prompt incriminating admissions" and is not designed to "ease the task of characterizing the detention for judicial review purposes"); *cf.* Ohio v. Robinette, 519 U.S. 33, 40 (1996) (stating that consent to search is question of fact determined by totality of circumstances).

or that the information will be supplied to the prosecutor?[331] How much information on the mechanics of the charging process and the judicial system needs to be conveyed? Should a document be presented to the individual to provide objective evidence of the arrest? A verbal notice requirement would serve to promote swearing contests between police and citizens regarding whether the police informed the detainee of an "arrest."

A notice requirement is also inconsistent with other established principles. As previously discussed, despite some occasional views to the contrary, the common law had no notice requirement. Courts have also rejected the view that the police must inform the suspect of the specific offense being charged[332] or even accurately state the charge for which he or she is being arrested.[333] In these cases, police statements of the charge to the suspect have been viewed as "largely irrelevant."[334] The generally accepted view is that "the validity of the arrest should be judged by whether the arresting officers actually had probable cause for the arrest, rather than by whether the officers gave the arrested person the right reason for the arrest."[335]

Indeed, to have the validity of an arrest or a search incident thereto turn on notice that a specific offense is being charged is inconsistent with the accepted view that the subjective intentions of the police play no role in Fourth Amendment analysis. If the police can validly detain a person on the basis of probable cause to arrest for one reason, although the real reason is to investigate another offense, then the validity of that arrest does not turn on what the police convey to the suspect as the basis for the detention.[336] Rather than reliance on the officer's choice of the legal the-

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331. *Cf.* Evans v. State, 688 A.2d 28, 44-45 (Md. App. 1997) (Sonner, J., dissenting). The dissent stated that the concept of "arrest" should not require a trip to the police station for processing and imposition of formal charges, *inter alia*, because the law enforcement officer may not be completely sure whether the person whom he had taken into custody has violated a law. Or the police officer may not be sure just exactly what the charge should be and may wish to consult with superiors or with the State's Attorney's Office. It would be far better to establish a rule that encourages consultation rather than establish one that punishes conscientious police for their desire to do what is proper, as well as lawful. *Id.*

332. *See, e.g.*, Washington Mobilization Comm. v. Cullinane, 566 F.2d 107, 123 (D.C. Cir. 1977) (holding that officer need not immediately advise detainee of charges); Braxton v. State, 350 So. 2d 753, 755 (Ala. Crim. App. 1977) (stating that it is unnecessary for officer to state charges at time of arrest).

333. *See* 3 LAFAVE, *supra* note 14, at § 5.1(e) n.190 (collecting cases).

334. *Id.*

335. United States v. Lester, 647 F.2d 869, 873 (8th Cir. 1981); *see also* 3 LAFAVE, *supra* note 14, at § 5.1(e) n.190 (collecting cases).

336. *See, e.g.*, United States v. Bizier, 111 F.3d 214, 217-19 (1st Cir. 1997) (stating that probable cause to arrest and search incident to arrest need not be for cause eventually prosecuted; rather, probable cause for any arrest can validate search); *see also* Ralph v. Pepersack, 335 F.2d 128, 134 (4th Cir. 1964) ("To make constitutional questions turn on the term chosen by the police officers to describe their activity—officers who are accustomed to the vernacular of the police station and unschooled in the accepted constitutional vocabulary—is to engage in a futile

ory to support a detention, there is an objective analysis of the facts known to the officer to ascertain whether the detention is based on probable cause to arrest.[337]

Also, cutting against any notice argument is the established rule that permits the police to search a suspect first and then arrest the suspect rather than requiring that an arrest must precede a search.[338] If notice of arrest is the *sine qua non* of a valid search incident to arrest, then a search prior to notice of arrest would never be permissible.[339] Yet, in justifying such searches, some courts have maintained that, so long as an officer has probable cause to arrest, it serves to benefit the suspect:

> [I]f the person searched is innocent and the search convinces the officer that his reasonable belief to the contrary is erroneous, it is to the advantage of the person searched not to be arrested. On the other hand, if he is not innocent or the search does not establish his innocence, the security of his person . . . suffers no more from a search preceding his arrest than it would from the same search following it.[340]

A third possible definition, that of the common law, places the time of arrest the earliest by requiring a mere intentional detention of the suspect, albeit with the uneasy distinction between "accostings" and "arrests." If the common law were dispositive of Fourth Amendment analysis, arguably the Court would simply adopt the common law definition of arrest, which it accurately quoted and adopted in *Hodari D.* to define the limits of a seizure. The Framers, presumably, were aware of, and approved of, the common law definition of arrest and of the practice of searching all ar-

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and unwarranted exercise of semantics."); *accord* 3 LAFAVE, *supra* note 14, at § 5.1(e).

337. *See, e.g.*, Murrell v. State, 421 N.E.2d 638, 640 (Ind. 1981) (holding that probable cause to suspect of robbery justified arrest, even though officer relied on intoxication); Smith v. State, 271 N.E.2d 133, 137 (Ind. 1971) (explaining that search incident to arrest is valid so long as officer has probable cause to detain, regardless of officer's choice of legal theory); *see also* Dix, *supra* note 62, at 933 (viewing requirement of any admonition by police to suspect as to type of detention as impractical, *inter alia*, because officer may fail to perceive point at which detention occurs).

338. *See* Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) (holding that search may precede "formal arrest" so long as two events are substantially contemporaneous).

339. *Cf.* Stevens v. State, 701 N.E.2d 277, 280 (Ind. Ct. App. 1998) ("[E]ven when a police officer does not tell the defendant she is under arrest prior to a search, that fact does not invalidate a search incident to an arrest as long as there is probable cause to make an arrest.").

340. People v. Simon, 290 P.2d 531, 533 (Cal. 1955) (discussing how, if arrest is made based on probable cause, it does not matter if search is conducted before or after arrest); *accord* State v. Overby, 590 N.W.2d 703, 706 (N.D. 1999) (agreeing with rationale put forth in *Simon*); *see also* 3 LAFAVE, *supra* note 14, at § 5.4(a) (asserting that such rule "gives some added measure of protection to those reasonably but mistakenly suspected of criminal behavior").

restees.[341] They were also presumably aware of the distinction, however vague, between those accosted and those arrested by law enforcement authorities. However, given that only suspected felons were the usual targets of the arrests and searches, there is nothing in the historical record from which one can conclude that they gave any thought to the applicability of those principles to the wide variety of crimes that exist today.

The Supreme Court in *Terry* and its progeny brought within the coverage of the Amendment much of what the common law labeled "accostings" and pushed the time of arrest back, requiring a detention exceeding the dimensions of permissible stop. *Terry* significantly departed from the common law's dismissal of some intrusions as accostings by incorporating "stops" within the Amendment but roughly followed the common law, and arguably the Framers' intent, by distinguishing between minor intrusions and arrests.[342] Accepting as a settled principle *Terry*'s expansion of the Fourth Amendment to include stops within its coverage and attempting to reconcile the common law and the Framers' intent, at a level of particularity, with those principles, it should be concluded that an arrest is a detention that requires something more than an accosting, that is, something akin to a detention exceeding the bounds of a *Terry* stop.

More important, in my view, is an examination of the Framers' intent at a higher level of generality, that is, that their purpose was to protect individuals from unreasonable governmental intrusion. An essential feature of the Fourth Amendment's protections is the requirement that the police have individualized suspicion amounting to probable cause to justify an arrest.[343] Thus, the earlier in the encounter that one concludes that an arrest occurs, the sooner the police must establish probable cause to detain. If the purpose of the Amendment is to protect individuals, then an arrest should be found whenever the boundaries of a permissible stop are exceeded. The requirements of a "formal" or "custodial" arrest would not achieve that goal. The remaining interpretative tools—the need for flexibility and the need for a workable rule—both counsel that the rule proposed here is the proper one. It gives the police much more flexibility than requiring, for example, that they take each arrestee to a police station. It is also workable: any detention exceeding a stop is an arrest. Finally, as previously discussed, whether a search incident to arrest is proper should be a separate inquiry and should not influence the question

341. For further discussion of the Framers of the Fourth Amendment, see *supra* notes 304-06 and accompanying text.

342. *Terry* went amiss when it went further and characterized an arrest as an initial stage of prosecution and as involving a trip to the police station. As previously discussed, while those actions may have typically resulted from an arrest, those actions did not define the concept.

343. *See* Clancy, *supra* note 11, at 627-35 (arguing that individualized suspicion is inherent element of reasonableness based on examination of amendment's purpose (which is to protect individuals), historical context, Framers' intent and need for rule to provide guidance to courts and governmental officials to avoid unprincipled analysis, which has led to erosion of individual liberty).

whether an arrest has occurred. As discussed, neither a custodial nor a formal arrest serves as an adequate measure to determine whether a search is appropriate. Instead, there should be a case-by-case determination of whether a search incident to arrest is justified.

### D. *The Proper Definition of Arrest*

Instead of vivisecting the concept of arrest and imposing unworkable elements into the analysis, the rule that an arrest is an arrest for all purposes under the Fourth Amendment should be adopted.[344] A seizure, whether an arrest or a mere stop, can only be accomplished, according to *Hodari D.*, in the same manner as a common law arrest. The question whether the seizure is either a stop or an arrest does not depend on the manner in which it occurs but upon other objectively measurable factors: for example, a stop is temporary and relatively non-intrusive while an arrest is lengthy and intrusive. An arrest is any seizure exceeding the permissible bounds of a stop. The proper question is not whether the suspect was taken to the police station or given notice but whether or not he was arrested. Citizens are protected in such instances by the bedrock guarantee that the arrest must be based on probable cause to believe that the suspect has committed a crime. The act of arrest must be intentional but the officer must merely intend to detain. Intent is measured objectively and not by examining the subjective intent of the officer.

## V. CONCLUSION

The common law viewed any intentional detention of a person by a law enforcement official as an arrest, excepting only "accostings" from that definition. *Terry* properly recognized that such "accostings" usually rose to the level of a seizure within the meaning of the Fourth Amendment and divided seizures into two categories, stops and arrests. The Court thus created a two-tiered Fourth Amendment analysis: probable cause supports an arrest; and articulable suspicion of criminal activity justifies a stop. As with common law "accostings" and arrests, the line between the two types of Fourth Amendment seizures is not bright. Yet, what has evolved is recognition that an arrest results when the boundaries of a stop have been exceeded. That analytical framework properly applies to all seizures.

Another legal principle has significantly influenced, and distorted, Fourth Amendment seizure analysis: the bright-line rule that permits a full search incident to an arrest. In part to avoid its applicability to a host of modern statutory violations unknown to the Framers, courts have manipulated the concept of arrest, creating categories of arrests to which the principle may or may not apply.

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344. *Cf.* Robbins v. California, 453 U.S. 420, 450 (1981) (Stevens, J., dissenting) (rejecting "any difference between custodial arrests and any other kind of arrest").

The concept of an arrest should be separated from search-incident-to-arrest principles. Searches and seizures invade much different protected interests. Dissatisfaction with the scope of search principles should not influence seizure analysis. Rather, there should be a reconsideration of the scope of search incident to arrest principles in light of the types of crimes for which an arrest occurs. Indeed, *Knowles* and other cases seem to invite such a reconsideration by engaging in an analysis whether a search incident to arrest is justified based on the facts of each case or, at least, based on the type of crime for which an arrest has occurred. A similar analysis has been employed successfully for many years in regulating when a frisk is appropriate.

Once the two questions are separated, the question of when an arrest occurs should be informed by the tools the Court employs to interpret the Amendment. Certainly, the common law definition adds strong support to the view that, to implement the Framers' intent, the Fourth Amendment should be similarly construed. The common law maintained an uneasy distinction between "accostings" and "arrests" but clearly placed the point of arrest early in the encounter. More importantly is the over-arching interpretative tool that the Amendment was designed to protect individuals from unreasonable governmental intrusion. An essential feature of the Fourth Amendment's protections is the requirement that the police have individualized suspicion amounting to probable cause to justify an arrest. Thus, the earlier in the encounter that one concludes that an arrest occurs, the sooner the police must establish probable cause to detain. The remaining interpretative tools—the need for flexibility and the need for a workable rule—both counsel that the rule proposed here is the proper one. It gives the police much more flexibility than requiring, for example, that they take each arrestee to a police station. It is also workable: any detention exceeding a stop is an arrest.