

THE FOURTH AMENDMENT'S HIDDEN INTRUSION DOCTRINE

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The Fourth Amendment's concept of probable cause is the linchpin of legal standards governing law enforcement actions such as arrests, searches, and seizures. This Article challenges the assumption that the same quantum of evidence can meet the probable cause standard regardless of whether law enforcement seeks to conduct a search, to seize evidence, or to make an arrest, and regardless of the intrusiveness of such search or seizure. This Article demonstrates that the Supreme Court implicitly considers the degree of intrusion into privacy or liberty, not just the quantum or quality of evidence, when determining whether probable cause exists. In doing so, I bring to light the Supreme Court's "hidden intrusion doctrine."

By failing to explicitly state that the degree of intrusion is a factor in the probable cause analysis, the Supreme Court injects ambiguity that has many consequences. Some lower courts and law enforcement agencies already balance the quantum or quality of evidence with the severity of intrusion, even without explicit Supreme Court guidance, but others do not. The ambiguity in the doctrine therefore fosters inconsistency and expands police discretion. Moreover, as technological advancements from facial recognition to digital searches reshape investigative techniques, the need for a clear articulation of the probable cause standard is increasingly urgent.

This Article suggests both doctrinal and policy-based proposals that would bring the Supreme Court's intrusion doctrine out of the shadows

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and require deliberate consideration of the degree of intrusion in probable cause determinations. Such an approach would preserve law enforcement flexibility while safeguarding individual rights amidst evolving technological landscapes.

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INTRODUCTION

In 2022, Alonzo Sawyer was arrested after facial recognition software generated a list of potential matches to surveillance images of a man who had recently assaulted a bus driver.¹ Using the facial recognition software as the basis for probable cause, police arrested Mr. Sawyer and detained him for approximately a week with hardly any other investigation.² After all, the image and software created a nexus between Mr. Sawyer and the crime. There was no question that the person depicted in the surveillance footage was the assailant.

¹ Eyal Press, *Does A.I. Lead Police to Ignore Contradictory Evidence?*, *New Yorker* (Nov. 13, 2023), <https://www.newyorker.com/magazine/2023/11/20/does-a-i-lead-police-to-ignore-contradictory-evidence>.

² *Id.*

The problem is that Mr. Sawyer was not the person in the image. After police arrested Mr. Sawyer, officers conducted several less invasive investigatory steps: police visited the house where he had been staying to search the premises for the clothing the assailant had been wearing in the surveillance photo and found nothing.³ They interviewed his relatives, who confirmed Mr. Sawyer's alibi that he had been at home many miles away at the time of the assault.⁴ These actions were not only far less intrusive than arresting Mr. Sawyer; they also revealed that the facial recognition software had been wrong.

Mr. Sawyer's arrest turned on the definition of probable cause. Police used a match from new, relatively untested software to justify his arrest and detention for several days. Was that evidence enough to meet the probable cause standard to deprive him of his liberty, arguably the most severe intrusion implicated by the Fourth Amendment? What would have happened if police had been required to investigate further using less intrusive methods before arresting Mr. Sawyer? Could his week in jail have been avoided? Does the law require such an intermediate investigation when the only evidence is from new, untested technology?

This Article examines these questions through the lens of the Fourth Amendment's probable cause standard, challenging the predominant understanding that the same quality or quantum of evidence—the evidentiary inputs—can satisfy the standard regardless of the degree of intrusion police want to exercise. The term probable cause comes directly from the text of the Fourth Amendment, which requires that “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.”⁵ Drawing on this text, probable cause has become the standard⁶ by which law enforcement can, while investigating a crime,

³ Id.

⁴ Id. Police also showed the surveillance photograph from the assault to Mr. Sawyer's probation officer, who at first said he believed the photo was of Mr. Sawyer. Id. The probation officer, however, was told before he made the identification that Mr. Sawyer had been identified by facial recognition. Id. In addition, he had only met Mr. Sawyer wearing a COVID pandemic-era mask. Id. The probation officer later questioned his own identification and reached out to police to say that he had changed his mind—he no longer thought the surveillance image depicted Mr. Sawyer. Id.

⁵ U.S. Const. amend. IV (emphasis added).

⁶ In this Article, I focus only on the Fourth Amendment intrusions that rely on probable cause to demonstrate how that analysis also includes the degree of intrusion, even though the Supreme Court does not explicitly acknowledge it as it does in the reasonable suspicion context. There are other types of search and seizure that do not require probable cause, such

conduct three separate and distinct actions that implicate individuals' privacy or liberty interests⁷: arrest,⁸ search of a constitutionally protected area,⁹ and seizure of evidence.¹⁰

Most scholars would say that the same standard of probable cause applies¹¹ regardless of whether police wanted to get a warrant for Mr. Sawyer's phone records or arrest him. I argue that the law requires more, or stronger, evidence to justify a greater intrusion into an individual's privacy or liberty than the evidence necessary to justify a lesser intrusion. Under such an approach, for example, the facial recognition match might, alone, provide probable cause to obtain phone records, but not to arrest Mr. Sawyer and deprive him of his liberty.

In this Article I show that, contrary to widespread assumptions, the Supreme Court has implicitly acknowledged that whether probable cause exists to justify any given search or seizure depends in part on the degree

as searches incident to a lawful arrest, inventory searches, and sobriety checkpoints, which are not justified by any degree of suspicion that a specific person has committed a crime, see *infra* notes 16, 69, 104 and accompanying text, and so-called *Terry* stops, which are supported by reasonable suspicion, a lower standard than probable cause. See *infra* note 37.

⁷ Law enforcement may also collect evidence through many different types of actions that require little, if any, individualized suspicion that evidence will be found in a particular place. See, e.g., *United States v. Tuggle*, 4 F.4th 505, 510–11 (7th Cir. 2021); *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979); 18 U.S.C. § 2703(d) (allowing disclosure of certain electronic communications based on the government's representation that records are "relevant and material to an ongoing criminal investigation"). Nevertheless, as discussed elsewhere in this Article, the probable cause standard is required for many of the actions law enforcement conduct that most deeply intrude into individuals' privacy. See *infra* Section I.A.

⁸ See, e.g., *Maryland v. Pringle*, 540 U.S. 366, 368 (2003). Notably, police do not need a warrant to arrest someone in public, as long as the arrest is based on probable cause. *United States v. Watson*, 423 U.S. 411, 423–24 (1976).

⁹ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 246 (1983).

¹⁰ See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970). Probable cause is also the standard for many other iterations of these basic intrusions. See *infra* notes 20–25 and accompanying text.

¹¹ See 2 Wayne R. LaFare, Jerold H. Israel, Nancy J. King & Orin S. Kerr, *Criminal Procedure* § 3.3(a), at 118 n.8 (4th ed. 2015) ("Thus, in *Spinelli v. United States*, 393 U.S. 410 . . . (1969), where the issue was whether the challenged search warrant had been issued on probable cause, the Court found its earlier decision in *Draper v. United States*, 358 U.S. 307 . . . (1959), involving grounds to arrest, to be a 'suitable benchmark' for resolving that issue. Similarly, *Illinois v. Gates*, 462 U.S. 213 . . . (1983), which significantly altered the probable cause formula in a search warrant context, has readily been deemed applicable to arrest warrants as well. *State v. Schroeder*, 450 N.W.2d 423 (N.D. 1990)."). The treatise authors note that the question of "probable cause of what" will differ in various contexts, but the general quantum of evidence and the analysis is the same. *Id.* § 3.3(a). See also Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 Tex. L. Rev. 951, 953–54 (2003) ("[P]robable cause is widely viewed in the legal community as a fixed standard.").

of intrusion the particular search or seizure entails. For example, the Court has required more or stronger evidence to justify the search of a home or a custodial arrest than it has for the search of a car, even though “probable cause” is the standard for all three. But the assumption that the degree of intrusion does not factor into the totality of the circumstances¹² test used to evaluate probable cause is understandable because the Supreme Court has failed to say so *explicitly*. This Article identifies and defines these considerations in what I term the Fourth Amendment’s “hidden intrusion” doctrine.

The Supreme Court’s vagueness on its intrusion doctrine and the ensuing failure of lower courts and law enforcement to consistently consider the degree of intrusion in determining whether probable cause exists have injected ambiguity that has many consequences,¹³ including arrests like Mr. Sawyer’s. It allows police to proceed less cautiously, moving straight to an arrest without any intermediate investigation. It gives cover to police who arrest when they could first search to confirm their suspicions, and it allows them to conduct a more intrusive search when a less intrusive search would suffice. It insulates police decision-making from judicial review and civil liability. It sows confusion for trial courts applying the probable cause standard, for judges reviewing warrant applications, and for officers on the street trying to conduct police work that comports with the Fourth Amendment. It undermines transparency and consistency in the application of the probable cause standard. It generally expands police power.

Though some scholars have argued that balancing the quantum or quality of evidence collected by police with the degree of intrusion involved in a search or seizure *should* be part of the Fourth Amendment analysis,¹⁴ this Article is the first to argue that such balancing is already

¹² See *Gates*, 462 U.S. at 246.

¹³ See Section I.C.

¹⁴ See Christopher Slobogin, *Let’s Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 St. John’s L. Rev. 1053, 1053–54 (1998) [hereinafter Slobogin, *Let’s Not Bury Terry*] (“That framework, which I call the proportionality principle, is very simple: A search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action.”); Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 Yale L.J. 1276, 1343 (2020). Over thirty years ago, Christopher Slobogin recognized the value of incorporating the degree of intrusion into search and seizure analysis in his article imagining how the government would consider a search and seizure doctrine if the Fourth Amendment did not exist. See Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. Rev. 1, 49–50 (1991) [hereinafter Slobogin, *The World Without a Fourth Amendment*]. Slobogin argued that the “proportionality principle”

part of the jurisprudence. The common, unitary understanding of probable cause—that one should entirely ignore the degree of intrusion in deciding whether probable cause exists to justify a particular search or seizure—misapplies important nuances in Supreme Court doctrine.

In addition, I show that there is no need for the Supreme Court’s intrusion doctrine to remain hidden and that bringing it to light would increase transparency and consistency in decisions made by lower courts and law enforcement. There is in fact broad understanding among system actors that the degree of intrusion is relevant in evaluating whether a search or seizure is justified. Some courts and police are already doing such balancing on an ad hoc basis,¹⁵ requiring more evidence to justify the search of a home than a car, or to justify a search of someone’s crotch than less private parts of their body. But without guidance from the Supreme Court sanctioning such consideration, they are merely acting on the instinct that the degree of intrusion should be part of the search and seizure calculus. The result is a hodgepodge legal doctrine of probable cause that rarely discusses degree of intrusion, even if it is implicitly part of the analysis. Police and judges are left with no coherent limiting principle—some follow their instinct that more or more reliable evidence should be necessary to justify a greater intrusion into individuals’ privacy, but others do not.

An examination of how the police apply the probable cause standard in two areas of emerging technology provides useful case studies for the necessity of a clear intrusion doctrine. As untested technologies, like the facial recognition technology used in Mr. Sawyer’s case, are used to develop leads that then justify searches, seizures, and arrests, courts and police need guidance to help understand how new technologies should be used in the probable cause analysis. A clear intrusion doctrine would guide courts and policy-makers as they respond to an ever-changing technological law enforcement landscape, providing guardrails that

was not part of existing Fourth Amendment doctrine but represented the proper balance of interests between the State and the populace. *Id.* (“Put another way, because the cost to individual interests of a mistake by the police is greatest when the intrusion is greatest, and diminishes as the intrusion lessens, the tolerance for such mistakes should vary inversely with the level of intrusion. Note further that the cost to the state of a police mistake is also greatest when the intrusion is greatest, because the public is more likely to perceive unnecessary police intrusions as illegitimate when they are significant.” (emphasis omitted)). This Article argues that Slobogin’s “proportionality principle” is already being applied by the courts, even if it has never been explicitly incorporated into Fourth Amendment doctrine.

¹⁵ See *infra* Section II.A.

protect citizens from undiscovered flaws in new technology while still allowing law enforcement agencies to use new technology. An explicit understanding of how the degree of intrusion applies in the probable cause analysis would encourage police to tread carefully with untested technology. It would encourage them to search before they arrest and to minimize harm from unanticipated errors.

Likewise, bringing the Supreme Court's hidden intrusion doctrine into the light—by making clear that whether probable cause exists depends in part on the degree of intrusion of a particular search or seizure—could help solve the vexing problems around seizure and search of cell phones. As with any physical evidence they seize in an investigation, police must generally have probable cause to seize a cell phone that they believe contains evidence of a crime.¹⁶ As the Supreme Court recognized in *Riley v. California*, “[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans ‘the privacies of life.’”¹⁷ Police may have reason to believe that some particular type of evidence may be stored in a cell phone, but does that give them license to search every part of the phone? And if it does, should it? Courts authorizing search warrants have grappled with this question and have come to differing opinions on whether the same evidence to seize a phone or search part of it would justify a search of the entire phone.¹⁸ Recognition of the Fourth Amendment's hidden intrusion doctrine would help resolve this tension, requiring more evidence to justify a search of a phone than a seizure of a phone.

In a world in which emerging technologies like facial recognition technology are implemented quickly, often before any meaningful analysis of their reliability or risks, or where such technologies allow police to glean an entirely different degree of information about individuals' private lives as done through phone searches, courts and policy-makers should be willing to move more slowly. This Article argues that in light of the Supreme Court's hidden intrusion doctrine, they *must* move more slowly, and it proposes an approach that I call “graduated

¹⁶ See, e.g., *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970). There are some limited circumstances in which the seizure of physical evidence need not be based on probable cause, such as in the course of an inventory search. See, e.g., *Colorado v. Bertine*, 479 U.S. 367, 371 (1987).

¹⁷ *Riley v. California*, 573 U.S. 373, 403 (2014).

¹⁸ See *infra* notes 239–41.

probable cause.” Under this approach, to comply with the (previously hidden, now explicit) intrusion doctrine, police would have to collect more or stronger evidence to justify greater intrusions like an arrest or a search of a home. If they had less evidence, or less reliable evidence, they could conduct a lesser intrusion, such as the search of a car or seizure of a cell phone, as an intermediate step. Such a process would maintain law enforcement flexibility, but also protect individuals’ privacy and liberty interests in the face of a constantly changing technological landscape.

This Article proceeds in four Parts. In Part I, I provide an overview of probable cause, examining both how the Supreme Court has defined the standard and how previous scholars have attempted to untangle that messy doctrine, to illustrate that Supreme Court probable cause precedent already implicitly considers the degree of intrusion a particular search or seizure makes into an individual’s privacy or liberty. In Part II, I examine case law from lower federal courts and state courts to demonstrate how, despite broad statements about a unitary standard, courts have already drawn distinctions in practice about the quantum of evidence necessary to provide probable cause based on the degree of intrusion. I also demonstrate how police trainings and policies can either reinforce the idea of a unitary standard to preserve police discretion or provide a model demonstrating the workability of a probable cause analysis that does include consideration of the degree of intrusion. In Part III, I examine in depth the case studies of facial recognition software and phone searches to demonstrate the confusion created by a unitary probable cause standard and the ways in which explicit consideration of the degree of intrusion could improve probable cause analysis in a rapidly changing digital environment. In Part IV, I articulate possible doctrinal and policy solutions for rearticulating the probable cause standard based on the degree of intrusion. Acknowledging that the degree of intrusion is already implicitly part of the analysis, I argue for explicitly incorporating it into the totality of the circumstances analysis that courts already apply. In other words, the courts do not need a new framework; they just need to honestly articulate the interest balancing that already drives decisions. I also set forth policy proposals for police, based on a graduated approach to investigation already endorsed by some law enforcement agencies, that would direct police to first conduct less intrusive searches and seizures in circumstances where they are relying on less, or less reliable, evidence.

I. WHAT IS PROBABLE CAUSE?

A. How the Supreme Court and Scholars Define Probable Cause

In its history, the Supreme Court has decided nearly one hundred cases in which it considered probable cause.¹⁹ The probable cause standard is applied in many different Fourth Amendment contexts: in addition to searches, seizures, and arrests predicated on warrants, probable cause is also the standard by which police conduct warrantless searches of automobiles,²⁰ conduct searches in cases of exigent circumstances (those that require quick action),²¹ and arrest those they witness committing a crime in public.²² And it is the standard by which prosecutions are initiated, through criminal complaints²³ and grand jury indictments.²⁴ As a consequence, determinations of probable cause arise in many corners of criminal procedure.²⁵ Yet many scholars,²⁶ and the Supreme Court itself,²⁷ have noted that the Court has resisted precise definition of the term, choosing instead to emphasize flexibility in its various articulations of the standard.

¹⁹ See Crespo, *supra* note 14, at 1373–91 tbl. A1.

²⁰ See *California v. Acevedo*, 500 U.S. 565, 569–72 (1991) (summarizing cases related to the automobile exception to the warrant requirement); *Carroll v. United States*, 267 U.S. 132, 155–56, 162 (1925).

²¹ See *Warden v. Hayden*, 387 U.S. 294, 298–300 (1967); see also Cynthia Lee, *Probable Cause With Teeth*, 88 Geo. Wash. L. Rev. 269, 273–74 (2020) (collecting additional examples where probable cause is the standard justifying a Fourth Amendment intrusion).

²² *United States v. Watson*, 423 U.S. 411, 423–24 (1976).

²³ See, e.g., Fed. R. Crim. P. 4(a).

²⁴ See *Branzburg v. Hayes*, 408 U.S. 665, 686–87 (1972).

²⁵ This is a non-exhaustive list of the circumstances governed by the probable cause standard. To be sure, there are many types of intrusions into individuals' privacy or liberty that do not require probable cause. This Article does not address the line between those circumstances and the circumstances that do require probable cause, but rather theorizes within the category of circumstances that purport to apply a single standard.

²⁶ See Lee, *supra* note 21, at 278–80; Crespo, *supra* note 14, at 1279–82; Andrew E. Taslitz, *Cybersurveillance Without Restraint? The Meaning and Social Value of the Probable Cause and Reasonable Suspicion Standards in Governmental Access to Third-Party Electronic Records*, 103 J. Crim. L. & Criminology 839, 873–74 (2013); Erica Goldberg, *Getting Beyond Intuition in the Probable Cause Inquiry*, 17 Lewis & Clark L. Rev. 789, 790 (2013).

²⁷ See, e.g., *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (“Perhaps the central teaching of our decisions bearing on the probable-cause standard is that it is a ‘practical, nontechnical conception.’” (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949))); *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003); *Texas v. Brown*, 460 U.S. 730, 742 (1983) (“[P]robable cause is a flexible, common-sense standard.”).

As the Supreme Court articulated nearly seventy-five years ago, in *Brinegar v. United States*, “[p]robable cause exists where ‘the facts and circumstances within their [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.”²⁸ The *Brinegar* Court further explained the necessary balancing that underlies this standard:

These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community’s protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers’ whim or caprice.²⁹

In the decades since, the Supreme Court has consistently balanced the realities of law enforcement with individuals’ privacy interests using the *Brinegar* “practical, nontechnical conception” of probable cause.

Essentially, this conception of probable cause boils down to an understanding that the Fourth Amendment protects individuals “from government infringement on [their] privacy, property and autonomy,”³⁰ while balancing the needs of the state to investigate crime and promote public safety. As Professor Orin Kerr has described, the Fourth Amendment “give[s] government officials some powers to enforce the law and yet also restrict[s] that power to avoid government abuses” while “striking a balance between security and privacy.”³¹ Unsurprisingly, the practicalities of *how* to balance the nebulous interests articulated by the

²⁸ *Brinegar*, 338 U.S. at 175–76 (alterations in original) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

²⁹ *Id.* at 176.

³⁰ Slobogin, *Let’s Not Bury Terry*, *supra* note 14, at 1057.

³¹ Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 Harv. L. Rev. 476, 485 (2011).

Supreme Court in its probable cause doctrine have proved vexing for scholars. One frequent criticism of the Supreme Court's probable cause jurisprudence has involved the Court's resistance to quantifying probable cause.³² Others have debated whether the quantum of evidence necessary to make a showing of probable cause should vary based on the severity of the offense.³³

³² Compare, e.g., Goldberg, *supra* note 26, at 794 (“[W]hen quantifiable evidence is the primary basis for an officer’s suspicion, that evidence should be held to a minimum threshold of required certainty.”), Lee, *supra* note 21, at 310–15 (arguing that probable cause should mean at least more likely than not), Taslitz, *supra* note 26, at 883 (arguing for a preponderance of the evidence standard for probable cause), and Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 *Miss. L.J.* 279, 309 (2004) (arguing that “mathematical probabilities can supplement traditional methods of assessing probable cause”), with Paul Ohm, *Probably Probable Cause: The Diminishing Importance of Justification Standards*, 94 *Minn. L. Rev.* 1514, 1525 (2010) (arguing that the digital age has collapsed the distinction between reasonable suspicion and probable cause), and Orin Kerr, *Why Courts Should Not Quantify Probable Cause*, in *The Political Heart of Criminal Procedure: Essays on Themes of William J. Stuntz* 131, 131–33 (Michael Klarman, David Skeel & Carol Steiker eds., 2012) (arguing that quantifying probable cause would undermine judges’ abilities to assess whether information is missing from warrant affidavits).

³³ Compare Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 *Iowa L. Rev.* 1, 6 (2011) (suggesting that “as judges develop new rules to apply the Fourth Amendment in the modern era, they incorporate the severity of the crime being investigated into determinations of constitutional reasonableness”), Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in *Atwater v. City of Lago Vista**, 71 *Fordham L. Rev.* 329, 420 (2002) (noting that few scholars prior to *Atwater* considered crime-severity, or general principles of proportionality, in the Fourth Amendment reasonableness analysis and positing that such scholarship may have changed the outcome of that case), Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 *Va. L. Rev.* 1957, 1957–58 (2004) (arguing that “[c]onstitutional law shouldn’t be forced into unitary rules that underprotect rights when the government interest in preventing a crime is minor, or underprotect government power when the interest is great” and urging courts and legislators to develop workable rules that consider the seriousness of a crime), Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment “Reasonableness,”* 98 *Colum. L. Rev.* 1642, 1645 (1998) (arguing that “Supreme Court doctrine [should] recognize that an ‘unreasonable’ search in violation of the Fourth Amendment occurs whenever the intrusiveness of a search outweighs the gravity of the offense being investigated”), William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries into Premises: The Legacy of *Welsh v. Wisconsin**, 38 *U. Kan. L. Rev.* 439, 557 (1990) (arguing that investigation of some minor crimes cannot justify warrantless entries onto private premises even where other warrant exceptions might exist), and William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 *Harv. L. Rev.* 842, 843, 848–49 (2001) (proposing that courts take “differences among crimes into account when making probable cause determinations”), with, e.g., Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 *Minn. L. Rev.* 349, 393–94 (1974) (positing that introducing sliding scales into the probable cause analysis would “convert[] the [F]ourth [A]mendment into one immense Rorschach blot”), Yale Kamisar, “Comparative Reprehensibility” and the Fourth Amendment

Each of those debates relies on the premise that the same standard for probable cause exists regardless of the circumstance. This Article engages with literature questioning whether that foundational premise can effectuate the purposes of the Fourth Amendment. In doing so, I argue that the idea of a unitary probable cause standard is a fallacy. Neither courts nor police make probable cause decisions without balancing the strength of evidence police have collected with the level of intrusion.

I am not the first to consider whether the probable cause analysis *should* require more or stronger evidence to justify a greater intrusion into an individual's liberty or privacy. In particular, over thirty years ago, Professor Christopher Slobogin argued for the incorporation of what he called "proportionality principles" into search and seizure analysis in two separate articles.³⁴ In the first article, published in 1991, he attempted to imagine if we started from scratch how society would choose to regulate the relationship between the state and the governed, vis-à-vis the various liberty and privacy interests of both the government and individuals that are implicated by search and seizure law.³⁵ In the second, published in 1998, he argued for incorporating those proportionality principles into the existing Fourth Amendment doctrine, arguing that "[a] search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion associated with the police action."³⁶ Considering *Terry v. Ohio*,³⁷ in which the Supreme Court created a lower threshold of

Exclusionary Rule, 86 Mich. L. Rev. 1, 11–26 (1987) (arguing that a serious crime exception to the exclusionary rule would prejudice criminal defendants and present numerous challenges of administrability), and Kit Kinports, Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?, 163 U. Pa. L. Rev. Online 75, 81 (2014) (noting that "[t]he Court has never envisioned that judges would conduct a balancing test or apply differing definitions of probable cause and reasonable suspicion based on the severity of the crime"). See also Slobogin, *The World Without a Fourth Amendment*, supra note 14, at 51–52 ("Even assuming that the severity of past harm can be measured in a meaningful way, the seriousness of the crime . . . , by itself, should be irrelevant to the degree of certainty police must have before they act" because "the nature of the crime committed does not lessen the state's obligations to its citizens." (footnote omitted)).

³⁴ See generally Slobogin, *Let's Not Bury Terry*, supra note 14 (arguing that recognizing proportionality principles in the Fourth Amendment would provide citizens more protection than currently exists); Slobogin, *The World Without a Fourth Amendment*, supra note 14 (arguing that the proportionality principle would be critical if we reimagined search and seizure law from the start).

³⁵ Slobogin, *The World Without a Fourth Amendment*, supra note 14, at 4.

³⁶ Slobogin, *Let's Not Bury Terry*, supra note 14, at 1053–54.

³⁷ In *Terry v. Ohio*, the Supreme Court explicitly recognized the principle that some intrusions into liberty and privacy can be based on a lesser quantum of evidence than the probable cause standard articulated in the Fourth Amendment's warrant clause. 392 U.S. 1,

evidence for what it considered the lower degree of intrusion of a street stop-and-frisk, Slobogin argued that a *Terry*-like proportionality requirement was consistent with and would improve Fourth Amendment jurisprudence,³⁸ allowing courts to create standards for each degree of intrusion that would be enough “to convince an innocent person subjected to it that the police acted reasonably.”³⁹

Slobogin’s proportionality principle proposal attempted to integrate what he viewed as the primary focus of the Fourth Amendment at the Founding—individuals’ rights to be “secure” in their homes—with other Fourth Amendment jurisprudential concerns such as the need to protect individuals from government coercion and the need for the government to build trust with its citizens.⁴⁰ Slobogin then proposed four tiers of intrusion, which would be supported by an increasing quantum of evidence.⁴¹ He proposed that the most invasive searches—of homes, car interiors, or luggage—should require clear and convincing evidence, as should particularly invasive techniques such as electronic surveillance, body cavity searches, or perusal of diaries.⁴² He would require a lower threshold of certainty, consistent with existing probable cause doctrine, for extended public stops.⁴³ And he argued for even lower thresholds, akin to *Terry*’s “reasonable suspicion” standard, for both brief investigatory stops and certain less-invasive actions currently excluded from *any* Fourth Amendment protection, such as searches of open fields or garbage.⁴⁴ In doing so, he argued, a reimagined probable cause standard would protect the public more than the existing doctrine.⁴⁵

More recently, Professor Andrew Manuel Crespo grappled with the challenge of defining probable cause. Crespo, like Slobogin, accepted that

24–25 (1968). Most notably, the standard derived from *Terry* permits law enforcement officers to both initiate a limited investigatory “stop” on less than probable cause and to conduct a weapons pat down, or “frisk,” of the outside of a person’s clothes when they are “able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Id.* at 16, 21.

³⁸ Slobogin, *Let’s Not Bury Terry*, *supra* note 14, at 1054.

³⁹ *Id.* at 1084.

⁴⁰ *Id.* at 1060–62 (first citing Scott E. Sundby, “Everyman”’s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 *Colum. L. Rev.* 1751, 1777 (1994); and then citing William J. Stuntz, *Privacy’s Problem and the Law of Criminal Procedure*, 93 *Mich. L. Rev.* 1016, 1068, 1077 (1995)).

⁴¹ *Id.* at 1081–85.

⁴² *Id.* at 1082–83.

⁴³ *Id.* at 1083.

⁴⁴ *Id.* at 1073, 1083.

⁴⁵ See *id.* at 1084–85.

the existing probable cause doctrine creates a unitary standard, but critiqued that standard.⁴⁶ He observed that “a jurisprudence premised wholly on raw and unstructured ‘common sense’ will struggle to yield a predictable and consistent body of decisions . . . let alone a body of law clear enough to guide the civilians it protects or the state actors it governs.”⁴⁷ In response to this problem, Crespo created a framework for courts to evaluate the totality of the circumstances, which he calls “probable cause pluralism.”⁴⁸ The majority of Crespo’s framework provides guidance for how system actors should consider the probable cause inputs, that is, the types of evidence used to make a showing of probable cause and the reliability of the sources of that evidence, rather than consideration of the degree of intrusion.⁴⁹

To be sure, though Crespo accepted the premise that probable cause is a “unitary standard” regardless of the degree of intrusion,⁵⁰ he critiqued it. He argued for different “certainty thresholds” based on different types of government intrusion.⁵¹ But he posited that certain circumstances—like *Terry* stops, where a different threshold would apply—would be outliers, or “adjustments” to the probable cause standard, rather than part of the general framework.⁵²

This Article builds on Crespo and Slobogin’s work. I do not argue that either is wrong in their efforts to identify the problems surrounding the probable cause analysis. Instead, I argue that the Supreme Court and lower courts are *already* incorporating Slobogin’s proportionality principles and the balancing Crespo argued for in their determination of whether the probable cause standard is met in a particular case. This Article identifies the ways in which courts already require more and stronger evidence to justify greater government intrusions and argues for incorporating that into the totality of the circumstances analysis that

⁴⁶ Crespo, *supra* note 14, at 1282–83.

⁴⁷ *Id.* at 1281. Though he does not characterize it as such, Professor Andrew Crespo’s model for analyzing probable cause shares many elements with the “equilibrium adjustment theory” of the Fourth Amendment developed by Professor Orin Kerr to synthesize and explain many seemingly incoherent aspects of Fourth Amendment jurisprudence. See generally Kerr, *supra* note 31.

⁴⁸ Crespo, *supra* note 14, at 1287 tbl.1 (summarizing his proposed approach).

⁴⁹ Compare *id.* at 1288–1340 (discussing various types of evidence used to make out probable cause and the proponents of that evidence), with *id.* at 1340–56 (discussing “certainty thresholds”).

⁵⁰ *Id.* at 1343.

⁵¹ *Id.* at 1340–43.

⁵² *Id.* at 1350–54.

courts already apply. Rather than thinking of the degree of intrusion as a deviation from the typical analysis as Crespo argued, I demonstrate how consideration of the degree of intrusion has already permeated decision-making in the probable cause context. In other words, the courts do not need a new framework; they just need to honestly articulate the interest balancing that already drives decisions.

*B. The Supreme Court's Implicit Consideration
of the Level of Intrusion*

The Supreme Court has never articulated the unitary standard of probable cause that most scholars assume exists.⁵³ And taking a closer look at precedent demonstrates that in actuality, the Court assesses whether probable cause exists through the lens of the degree of governmental intrusion involved in each case.

The October 1982 Supreme Court Term was a busy one for the Fourth Amendment. The Court decided three cases in the same term that addressed the probable cause analysis: *Illinois v. Gates*, *Texas v. Brown*, and *Florida v. Royer*.⁵⁴ Because these three cases were decided in the same Term, they present a useful juxtaposition. Each involved a different degree of intrusion and a different quantum or quality of evidence. *Illinois v. Gates* involved a search of the suspects' home and automobile,⁵⁵ while *Texas v. Brown* involved the seizure of a balloon full of heroin during a car stop—a stop that all parties conceded was lawful.⁵⁶ *Florida v. Royer* first involved an investigatory stop and then the equivalent of a custodial arrest.⁵⁷

Taken together, the three cases demonstrate that the Supreme Court implicitly considered the degree of intrusion into an individual's privacy or liberty as it analyzed whether police had enough evidence to meet the probable cause standard.

⁵³ The Supreme Court has, from time to time, emphasized that the lower standard of proof sanctioned by *Terry* does not apply beyond those limited circumstances. See, e.g., *Dunaway v. New York*, 442 U.S. 200, 211–13 (1979). However, the Court has not ever stated that the same standard of proof is required for all intrusions that require probable cause.

⁵⁴ *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983); *Texas v. Brown*, 460 U.S. 730, 742–43 (1983); *Florida v. Royer*, 460 U.S. 491, 507 (1983).

⁵⁵ 462 U.S. at 216.

⁵⁶ *Brown*, 460 U.S. at 734; *id.* at 746 (Powell, J., concurring in the judgment).

⁵⁷ *Royer*, 460 U.S. at 502–03.

In *Illinois v. Gates*, the Supreme Court attempted to provide guidance on how to apply *Brinegar*'s definition of probable cause in the context of a search warrant for the defendants' home,⁵⁸ which is arguably the most significant intrusion into an individual's privacy. In *Gates*, the Court revisited the probable cause standard as applied to cases in which police relied on a tip about criminal activity from a member of the public as a basis for seeking a warrant.⁵⁹ Rejecting an earlier test, the Court in *Gates* held that law enforcement and reviewing magistrates could rely on an anonymous tip that contained enough details by which the tip's veracity could be corroborated by law enforcement surveillance and other investigatory techniques.⁶⁰ The Court therefore adopted its "totality of the circumstances" test for assessing probable cause,⁶¹ stating that "probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."⁶²

Typically, *Gates* is taught as the case that loosened the probable cause requirement, but the facts of the case, in which police had collected substantial evidence against the defendants, demonstrate why the Court used it to revisit the probable cause standard. The case involved a tip that Lance and Susan Gates were selling drugs from their home in Illinois.⁶³ The tip was detailed and contained predictive information about the scheme that police were able to confirm over the course of days of investigation.⁶⁴ In holding that the *Gates* affidavit was supported by probable cause, the Supreme Court emphasized that the anonymous tip alone would not have sufficed, but that combined with law enforcement's

⁵⁸ See *Gates*, 462 U.S. at 238–39, 241–46.

⁵⁹ *Id.* at 227–28, 241–46.

⁶⁰ *Id.* at 238, 241–46.

⁶¹ *Id.* at 230–33.

⁶² *Id.* at 232. *Gates* involved the assessment of whether the quantum of evidence outlined in an affidavit supporting a search warrant application was sufficient to meet the Fourth Amendment standard. *Id.* at 216–17. In *Gates*, the Court relied on the articulation of the "nontechnical" view of probable cause doctrine in the automobile search context and the arrest context. *Id.* at 231 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)); *id.* at 243 (citing *Draper v. United States*, 358 U.S. 307, 313 (1959)). By relying on past cases that involved different degrees of intrusion than the search and arrest warrants involved in *Gates*, the Supreme Court suggested that courts must consider the same evidentiary inputs regardless of the intrusion. It is therefore not surprising that the prevailing wisdom has been that the same standard for probable cause exists regardless of whether the case involves an arrest or a search. See *supra* note 11 and accompanying text.

⁶³ *Gates*, 462 U.S. at 225.

⁶⁴ See *id.* at 225–27.

efforts to corroborate its contents, the tip met the probable cause standard.⁶⁵ The Court highlighted the extensive police work that corroborated the anonymous tip and the predictive nature of the details in it,⁶⁶ and it distinguished the facts of *Gates* from those in *Aguilar v. Texas*, where police had not made such efforts to corroborate the tip on which the affidavit relied.⁶⁷

Texas v. Brown demonstrates that a lesser quantum of evidence can meet the probable cause standard in a circumstance involving a much lesser intrusion than the search of a home. That case involved the warrantless seizure of a balloon that turned out to be filled with heroin.⁶⁸ During the course of the traffic stop pursuant to a routine driver's license checkpoint,⁶⁹ police shone a flashlight into Mr. Brown's car and saw "an opaque, green party balloon, knotted about one-half inch from the tip" in Mr. Brown's hand.⁷⁰ Based on his previous experience having seen narcotics packaged for sale in balloons like that which Mr. Brown possessed, the officer picked up the balloon and felt a "powdery substance [inside] the tied-off portion."⁷¹ The legal question at issue was whether the officer's previous experience sufficed to make the illicit nature of the balloon "immediately apparent," such that he had probable cause to seize the balloon under the plain view doctrine, even though he could not see the drugs within it.⁷² The Court held that it did.⁷³

Finally, in *Florida v. Royer*, the Court drew additional distinctions that show how the degree of intrusion was top of mind in assessing whether

⁶⁵ Id. at 227, 243–46. In his dissenting opinion, Justice Stevens noted that the anonymous tip was not entirely accurate. See id. at 291 (Stevens, J., dissenting). Justice Stevens observed that the tip said that Sue Gates would fly back rather than drive back with her husband, which, in his estimation, cast doubt on both the accuracy of the tipster's knowledge and the suspiciousness of the Gates' behavior. Id. at 291–92. He posited that the discrepancy undermined the reliance on the tip because their road trip together made it less plausible that they had over \$100,000 of drugs inside their home that they left unattended. Id. at 291–93. He also considered it much less suspicious for one spouse to fly to Florida and drive back with the other than for each spouse to drive one leg and fly one leg alone. Id. at 292.

⁶⁶ Id. at 243–46 (majority opinion).

⁶⁷ Id. at 242.

⁶⁸ *Texas v. Brown*, 460 U.S. 730, 733–35 (1983).

⁶⁹ See id. at 733. Routine safety checkpoints are limited searches that do not require any suspicion at all when they are limited in scope and applied consistently to all who pass through them. See, e.g., *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 453–55 (1990).

⁷⁰ *Brown*, 460 U.S. at 733.

⁷¹ Id. at 734.

⁷² Id. at 742–43.

⁷³ Id. at 743.

the probable cause standard had been met. In that case, the defendant was stopped in Miami International Airport after having purchased a one-way ticket to New York City because police said he matched a “so-called ‘drug courier profile.’”⁷⁴ Police asked Mr. Royer if he “had a ‘moment’ to speak with them,” to which Mr. Royer responded “[y]es,” and then in response to their request, he provided his ticket and driver’s license.⁷⁵ Police noticed that the ticket and baggage tags displayed a different name than that on Mr. Royer’s driver’s license and then asked him “to accompany them to a room, approximately 40 feet away” that the Court noted was described in the record as a “large storage closet.”⁷⁶ They kept his ticket and driver’s license.⁷⁷ Once in the storage closet, police asked Mr. Royer “if he would consent to a search of [his] suitcases.”⁷⁸ Mr. Royer unlocked one suitcase for them and allowed police to open the other; police found drugs in both.⁷⁹

The lasting contribution of *Royer* to the criminal procedure doctrine is the Court’s articulation of the factors that would transform a stop, which requires only reasonable suspicion, into a custodial arrest, which requires probable cause.⁸⁰ The *Royer* Court considered two separate Fourth Amendment intrusions in the case. First, the Court considered the encounter in the terminal during which police approached Mr. Royer and asked to see his driver’s license and plane ticket.⁸¹ The Court ruled that the earlier part of the encounter was supported by reasonable suspicion that Mr. Royer was carrying drugs and “did not exceed the limits of an investigative detention”⁸² as justified by the “*Terry* line of cases.”⁸³ Second, the Court considered the action of moving Mr. Royer to the storage closet for questioning.⁸⁴ The Court held that once police moved Mr. Royer to the storage closet without giving him his driver’s license or plane ticket back, a separate Fourth Amendment intrusion occurred.⁸⁵ At that point, the Court reasoned, police had seized Mr. Royer’s luggage and

⁷⁴ *Florida v. Royer*, 460 U.S. 491, 493–94 (1983).

⁷⁵ *Id.* at 494.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 494–95.

⁸⁰ See, e.g., *United States v. Richardson*, 949 F.2d 851, 857 (6th Cir. 1991).

⁸¹ *Royer*, 460 U.S. at 502.

⁸² *Id.*

⁸³ *Id.* at 504.

⁸⁴ *Id.* at 501–05.

⁸⁵ *Id.* at 502–03.

maintained control over the documents he needed to board the plane, and Mr. Royer reasonably believed that he was being detained and was not free to terminate the encounter.⁸⁶ The Court held that the second part of the encounter, which infringed much more substantially on Mr. Royer's liberty, was akin to a formal arrest and therefore required probable cause, which the Court held police did not have.⁸⁷

The distinctions between the two intrusions in *Royer* illustrate the Court's hidden intrusion doctrine. All parties agreed that police did not have probable cause to justify Mr. Royer's *arrest* until after they opened his suitcases and found marijuana.⁸⁸ In other words, the evidence that police developed specifically related to him, that he had a ticket and driver's license in different names and that he appeared nervous, were not enough, even combined with the drug courier profile, to rise to the level of probable cause.⁸⁹ Further, the Court noted that the "primary interest of the officers was not in having an extended conversation with Royer but in the contents of his luggage," and the Court was therefore troubled by the intrusion into Mr. Royer's liberty.⁹⁰ In its Fourth Amendment analysis, the Court distinguished between the intrusion into *tangible property*, by seizing or using a drug-sniffing dog to investigate the luggage,⁹¹ and the intrusion into Mr. Royer's *liberty*, by detaining him, which it saw as a greater intrusion.⁹²

Together, these three cases demonstrate that the degree of intrusion was top of mind as the Supreme Court attempted to flesh out the probable cause standard. There is no question that the quantum of evidence that the officers used to establish probable cause in *Texas v. Brown* was far lower than that in *Illinois v. Gates*, but the intrusion on the defendant's liberty and privacy was also far lower.⁹³ The initial stop in *Royer* was a lesser

⁸⁶ Id. at 503.

⁸⁷ Id. at 503, 507.

⁸⁸ Id. at 496–97.

⁸⁹ Id. at 507.

⁹⁰ Id. at 505–06.

⁹¹ Id.

⁹² Id. at 504–05 (discussing that the record was devoid of any justification for moving Mr. Royer from the public areas of the airport).

⁹³ Compare *Texas v. Brown*, 460 U.S. 730, 738 (1983) ("The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." (quoting *Payton v. New York*, 445 U.S. 573, 587 (1980))), with *Illinois v. Gates*, 462 U.S. 213, 225–27, 246 (1983) (holding that corroboration of the major portions of an anonymous letter through days of police work provided probable cause to search the Gates' home and car).

intrusion still, but his later detention and questioning involved a greater intrusion than at least that in *Texas v. Brown*.⁹⁴ Would the observation of the balloon with nothing else have sufficed to support an arrest of Mr. Brown, or a full search of his car or home without any additional corroboration?⁹⁵ Given the detailed analysis the Court conducted in *Gates*, suggesting it was a close call, and the fact that the individualized suspicion police had of Mr. Royer's drug dealing did not meet the probable cause standard for an arrest,⁹⁶ it seems likely that such a small quantum of evidence would not justify those greater intrusions.

The distinction the Court drew between the two encounters in *Royer*, and the Court's reasonable suspicion jurisprudence generally,⁹⁷ further evinces the Court's concern that the quantum of evidence available to police must be sufficient to justify the intrusion on liberty or privacy, as opposed to simply reaching some static threshold of certainty that a crime occurred. The *Royer* Court leaned on the Court's earlier distinction between reasonable suspicion and probable cause in *Terry*.⁹⁸ But, the October Term 1982 cases show that the *Terry* standard is simply one point on a sliding scale of proof in which the Supreme Court requires an increasing quantum of evidence to justify increasingly severe intrusions into a person's liberty or privacy.

The Supreme Court's hidden intrusion doctrine stretches far beyond the October 1982 Term. For instance, *Camara v. Municipal Court*⁹⁹

⁹⁴ Compare *Royer*, 460 U.S. at 503 ("What had begun as a consensual inquiry in a public place had escalated into an investigatory procedure in a police interrogation room . . ."), with *Brown*, 460 U.S. at 738 ("The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." (quoting *Payton*, 445 U.S. at 587)).

⁹⁵ Andrew Crespo refers to situations like this one, where the officer's experience suggested to him that the balloon was indicative of drug possession or where "a single fact (or a very small set of interrelated facts)" is presented as the basis for a probable cause finding, as a "thin script." Crespo, *supra* note 14, at 1291 (emphasis omitted).

⁹⁶ See *Royer*, 460 U.S. at 507.

⁹⁷ Andrew Taslitz, in a comprehensive review of the individualized suspicion aspect of the probable cause analysis, explains that "fully understanding individualized suspicion requires examining both probable cause and its junior partner, reasonable suspicion. That partner is generally defined as a sort of 'probable cause light,' resting on a lower level of certainty and weaker data sources than probable cause," but otherwise involving substantially the same analysis as cases addressing probable cause. See Andrew E. Taslitz, What Is Probable Cause, and Why Should We Care?: The Costs, Benefits, and Meaning of Individualized Suspicion, 73 *Law & Contemp. Probs.* 145, 146 (2010).

⁹⁸ *Royer*, 460 U.S. at 498–99.

⁹⁹ 387 U.S. 523, 530, 538–39 (1967).

provides the clearest example of the Supreme Court permitting a lower quantum of evidence to meet the probable cause standard where it considered the degree of intrusion to be less significant. In that case, the Supreme Court ruled that housing inspectors required a warrant based on probable cause to enter an apartment to conduct a routine safety inspection.¹⁰⁰ In doing so, the Court also made its clearest pronouncement of a probable cause standard that incorporates the degree of the intrusion, stating that “a health official need [not] show the same kind of proof to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime,” but that the mere passage of time would suffice to meet the probable cause standard in the housing inspection context.¹⁰¹

The Court explicitly opined that “[t]he test of ‘probable cause’ required by the Fourth Amendment can take into account the nature of the search that is being sought.”¹⁰² In other words, the quantum of evidence that would meet the probable cause standard in the health inspection context is less than the quantum of evidence that would be necessary in a criminal investigation. Though the probable cause analysis required some articulation of facts to justify the intrusion into a home, the Court recognized that the intrusion of a routine health inspection was less than the intrusion of a search warrant based on individualized suspicion that the occupant had committed a crime because the related searches would differ in invasiveness. Thus, in balancing the “competing public and private interests” at stake, the Court held that such health inspections would be reasonable as long as inspectors obtained a warrant in advance.¹⁰³

¹⁰⁰ Id. at 534.

¹⁰¹ Id. at 538 (quoting *Frank v. Maryland*, 359 U.S. 360, 383 (1959) (Douglas, J., dissenting)).

¹⁰² Id. (quoting *Frank*, 359 U.S. at 383).

¹⁰³ Id. at 539. Many scholars have debated the relationship between the “reasonableness” clause of the Fourth Amendment and the “warrant” clause of the Fourth Amendment. A complete discussion of that tension is beyond the scope of this Article, but for a summary of the debates, see Crespo, *supra* note 14, at 1343–44, 1344 n.288. However, Christopher Slobogin recognizes that there may be a tension between a sliding scale of probable cause, as reflected in the warrant context, if probable cause has a singular definition of suspicion. Slobogin, *Let’s Not Bury Terry*, *supra* note 14, at 1092. To resolve this, he proposes a definition of probable cause derived from *Camara v. Municipal Court*, “that cause which makes probable the reasonableness of the intrusion occasioned by a given search or seizure,” which is consistent with this Article because it explicitly considers the degree of intrusion. Id. (citation omitted).

Much more recently, the Supreme Court has implicitly considered the degree of intrusion as it applies to the changing technological landscape. In 2014, the Court held unanimously in *Riley v. California* that police may not search a cell phone seized incident to a lawful arrest without a warrant.¹⁰⁴ *Riley* and its companion case, *United States v. Wurie*, illustrate the tension between probable cause to arrest the defendants and the scope of a search that comes after that arrest.

Though the Court did not squarely address whether a different probable cause analysis would apply to search Mr. Riley's or Mr. Wurie's phones rather than to arrest them, the Court's logic and concern for the intrusions into the defendants' privacy is still instructive as lower courts decide how to interpret probable cause in a rapidly changing digital landscape. Chief Justice Roberts, writing for the unanimous Court, ruled that a search of a cell phone exceeds the permissible scope of a search incident to a lawful arrest because of the breadth and depth of information contained on a modern cell phone.¹⁰⁵ There is no dispute that there was probable cause to believe each of the defendants had committed a crime—in Riley's case, firearm possession and driving on a suspended license, and in Wurie's, drug distribution—but that probable cause was not enough to justify the blanket intrusion into as private a space as a cell phone without the additional layer of protection of a warrant.¹⁰⁶

Chief Justice Roberts reasoned that a search of a cell phone is among the most intrusive searches that can be conducted—arguably more intrusive even than a search of a home, which the Court has historically held to have the greatest level of Fourth Amendment protection.¹⁰⁷ He

¹⁰⁴ *Riley v. California*, 573 U.S. 373, 401 (2014). The Fourth Amendment has an exception to the general warrant requirement for evidence seized incident to a lawful arrest. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969); *United States v. Robinson*, 414 U.S. 218, 224 (1973).

¹⁰⁵ *Riley*, 573 U.S. at 396–97.

¹⁰⁶ A search incident to a lawful arrest does not generally have to be supported by probable cause to authorize a search of a specific container—the original rule was instead justified by concerns for officer safety. See *Chimel*, 395 U.S. at 763. Nevertheless, the arrest itself must always be supported by probable cause. See *Sibron v. New York*, 392 U.S. 40, 62–63 (1968). Otherwise, the arrest itself would be unlawful and the search impermissible. *Id.*; see also *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (per curiam) (“The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. . . . [I]t does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.”).

¹⁰⁷ See, e.g., *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018); *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”); *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

wrote, “[a] phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.”¹⁰⁸ He detailed the intrusiveness of a phone search, including browser history that “could reveal an individual’s private interests or concerns,” such as medical concerns or history, and historical information about the person’s locations “down to the minute” that makes it qualitatively and quantitatively different than the information stored in a home.¹⁰⁹ He concluded that “[m]odern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life,” and therefore, the “answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.”¹¹⁰ In sum, the Supreme Court in *Riley* determined that the difference in both degree and kind of information contained in a modern cell phone from other types of items that people generally could carry around with them, or even have in their cars, in the pre-digital age justifies excluding cell phones from the search incident to a lawful arrest context.¹¹¹ The probable cause that justifies the initial arrest cannot be stretched to justify the warrantless search of the phone.¹¹²

But what if the same probable cause is then presented to a judge? Could a trial-level judge in *Riley*’s or *Wurie*’s case have approved of a wholesale search of a cell phone on the same probable cause that justified their arrests? The Court implied the answer would be no. Though the *Riley* Court nominally left the question open,¹¹³ it rejected the government’s

¹⁰⁸ *Riley*, 573 U.S. at 396–97.

¹⁰⁹ *Id.* at 395–96.

¹¹⁰ *Id.* at 403 (internal quotation marks omitted).

¹¹¹ See *id.* at 393–96, 401.

¹¹² The government had “concede[d] that the search incident to arrest exception may not be stretched to cover a search of files accessed remotely—that is, a search of files stored in the cloud.” *Id.* at 397 (citing Brief for the United States at 43–44, *United States v. Wurie*, 571 U.S. 1161 (2014) (No. 13-212)). The Court noted that “[s]uch a search would be like finding a key in a suspect’s pocket and arguing that it allowed law enforcement to unlock and search a house.” *Id.*

¹¹³ *Id.* at 398–99 (“The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee’s cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on ‘circumstances unique to the vehicle context’ to endorse a search solely for the purpose of gathering evidence. [Justice Scalia’s] *Thornton* opinion, on which *Gant* was based, explained that those unique circumstances are ‘a reduced expectation of privacy’ and ‘heightened law enforcement needs’ when it comes to motor vehicles. For reasons that we have explained, cell

argument that it should impute the logic of *Arizona v. Gant* to the cell phone context.¹¹⁴ In *Gant*, the Court had previously held that a limited warrantless search of the passenger compartment of a vehicle based on probable cause that evidence related to the crime of arrest would be found there was permissible under the Fourth Amendment, even if it exceeded the usual scope of a search incident to arrest.¹¹⁵ In *Riley*, the government sought to have the Court endorse a similar warrant exception in the cell phone context.¹¹⁶ The Court refused to extend *Gant* in that manner, explaining that the *Gant* rule was premised on the “reduced expectation of privacy” and “heightened law enforcement needs” that exist in the vehicle context.¹¹⁷ Further, the Court acknowledged that the *Gant* rule “generally protects against searches for evidence of past crimes.”¹¹⁸ Given the nature of cell phones and the information stored in them, allowing the warrantless search based on probable cause to believe there would be information of the crime of arrest in the phone “would prove no practical limit at all” on cell phone searches.¹¹⁹ Indeed, the Court noted that “[i]t would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone.”¹²⁰ Imputing the *Gant* standard to the cell phone context would therefore give “police officers unbridled discretion to rummage at will among a person’s private effects.”¹²¹

Even though the Court did not directly reach the issue, its discussion of *Gant* suggests that the same probable cause to arrest would *not* justify a wholesale search of a cell phone in the warrant context. The Court was concerned with cabining law enforcement officers’ ability to use the pretext of investigating minor crimes as justification for “rummag[ing]” in a person’s “private effects.”¹²² The Court’s decision suggests skepticism of whether probable cause to justify arrest for a minor offense

phone searches bear neither of those characteristics.” (citations omitted) (first quoting *Arizona v. Gant*, 556 U.S. 332, 343 (2009); and then quoting *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment))).

¹¹⁴ *Id.*

¹¹⁵ 556 U.S. at 343.

¹¹⁶ 573 U.S. at 398–99.

¹¹⁷ *Id.* (quoting *Thornton*, 541 U.S. at 631 (Scalia, J., concurring in the judgment)).

¹¹⁸ *Id.* at 399.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

¹²² *Id.* (quoting *Gant*, 556 U.S. at 345 (2009)).

could also justify a search of every part of a cellphone. Such statements implicitly endorse a graduated approach to the probable cause analysis, by which more evidence is necessary to justify a more substantial police intrusion into an individual's privacy or liberty.

C. The Difficulty with Ambiguity

Is the Supreme Court's failure to explicitly acknowledge that it considers the degree of intrusion in determining whether probable cause exists actually a problem? I argue yes. At base, critics of the existing doctrine argue that more clarity is necessary to effectuate the promises in the Fourth Amendment to protect individuals from unreasonable searches and seizures.¹²³ A low threshold of probable cause gives police broad discretion. Minimal judicial review may exacerbate racial disparities in arrests.¹²⁴ Deference to police autonomy also can create an environment in which officers' statements about their own training and experience can, nearly alone, justify broad intrusions into liberty and privacy.¹²⁵ Courts and scholars have also understood that, fundamentally, the Fourth Amendment was intended to protect against arbitrary intrusions by the

¹²³ See Lee, *supra* note 21, at 275 ("Clarifying and strengthening the meaning of probable cause is thus important, not only because it will help protect individuals from the harms of a custodial arrest, but also because it will help protect against unjust searches and prosecutions."); Taslitz, *supra* note 26, at 874–75.

¹²⁴ Lee, *supra* note 21, at 315 ("Justice Rehnquist's very low threshold of certainty for probable cause gives the police broad discretion to arrest individuals who may or may not be involved in criminal activity, exacerbating a pre-existing problem of racial disparity in arrests. Whether because of explicit or implicit racial bias in the persons who call the police or the arresting officers themselves, police officers often arrest black individuals in situations where they would not have arrested a white individual behaving the same way."); *id.* at 315–20 (chronicling various instances of innocent behavior being perceived as criminal and leading to arrest, likely due to racial bias); see also *id.* at 324 n.350 (collecting sources discussing racial bias in law enforcement).

¹²⁵ Taslitz, *supra* note 26, at 873–74 (discussing the dangers of deference to individual officers' experiences in the articulation of reasonable suspicion); *id.* at 874 ("The vaguer the standards articulated to guide action, the greater the sphere of role-based authority." (citing Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 *Calif. L. Rev.* 617, 645–51 (2006))).

State.¹²⁶ Yet, over time much of the Supreme Court's doctrine has expanded the State's power to infringe on individuals' liberty.¹²⁷

The proper boundaries of police discretion lie at the heart of this problem. Our popular discourse over the last several years has been replete with examples of police behaving badly and facing limited or no consequences for their behavior.¹²⁸ In this context, it is important to note that police are insulated from many of the administrative governance structures that apply to most other executive agencies.¹²⁹ Thus, the public has limited ability to determine whether policing practices are "efficacious, cost-effective, or consistent with the popular will."¹³⁰

In addition, many police departments have embraced broad discretion because it helps to insulate them from legal liability.¹³¹ Joanna Schwartz and Ingrid Eagly did a deep dive into Lexipol, the police policy clearinghouse, and its emphasis on retaining discretion in policing. They

¹²⁶ See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 556 (1999); *Wolf v. Colorado*, 338 U.S. 25, 28 (1949), *overruled on other grounds by* *Mapp v. Ohio*, 367 U.S. 643 (1961); L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 Minn. L. Rev. 2035, 2040 (2011) ("The [Fourth] Amendment is primarily concerned with protecting individual privacy against arbitrary government intrusion.").

¹²⁷ Lauryn P. Gouldin, *Redefining Reasonable Seizures*, 93 Denv. L. Rev. 53, 61 (2015). Gouldin distinguishes between the search context, which she characterizes as largely concerned with privacy interests, and the seizure context, which she characterizes as concerned with liberty interests. *Id.* at 83–84.

¹²⁸ See, e.g., *Latest: Officer Who Killed Castile Gets \$48,500 in Agreement*, AP News (July 10, 2017, 8:51 PM), <https://apnews.com/general-news-fbd24d65c1fe4bffb16c9bc7dc869e8a> [<https://perma.cc/8W2J-LNUP>] (discussing an officer's severance payment after the traffic stop he carried out led to the death of Philando Castile); Richard A. Oppel Jr., *Derrick Bryson Taylor & Nicholas Bogel-Burroughs, What to Know About Breonna Taylor's Death*, N.Y. Times (Aug. 23, 2024), <https://www.nytimes.com/article/breonna-taylor-police.html> (discussing a lack of consequences for the officers who caused Breonna Taylor's death during the execution of a no-knock warrant); Press Release, U.S. Dep't of Just., Justice Department Announces Closing of Investigation into 2014 Officer Involved Shooting in Cleveland, Ohio (Dec. 29, 2020), <https://www.justice.gov/opa/pr/justice-department-announces-closing-investigation-2014-officer-involved-shooting-cleveland> [<https://perma.cc/9MAG-E9CP>] (announcing that prosecutors found insufficient evidence to prosecute officers involved in the killing of Tamir Rice); Nicole Dungca & Jenn Abelson, *No-Knock Raids Have Led to Fatal Encounters and Small Drug Seizures*, Wash. Post (Apr. 15, 2022), <https://www.washingtonpost.com/investigations/interactive/2022/no-knock-warrants-judges/> (discussing how the expansion of no-knock warrants based "on the word of police officers" has led to multiple fatalities, including in cases where only small quantities of drugs were found).

¹²⁹ Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. Rev. 1827, 1843 (2015).

¹³⁰ *Id.*

¹³¹ Ingrid V. Eagly & Joanna C. Schwartz, *Lexipol's Fight Against Police Reform*, 97 Ind. L.J. 1, 4, 39–40 (2022).

concluded that the company systematically attempts to advocate for and create standards that give greater leeway to officer discretion based on the belief that more concrete rules or standards would “inevitably result in a situation where an officer violates [the standards articulated in] the policy,” resulting in litigation.¹³² Police who are insulated from legal liability have undermined a layer of legal protection for the public from abuse of police discretion that courts have consistently assumed exists.¹³³ If broad discretion insulates police from civil liability, it is necessary to revisit imposing additional restraints on that discretion.

Further, the doctrine of qualified immunity compounds the risks of abuse of discretion by allowing civil liability for police in only the clearest cases of abuse. Qualified immunity limits liability except where police commit nearly the exact same constitutional violation in the same circumstances where a court had previously held that the action was unconstitutional.¹³⁴

Though one can argue that nimble frameworks in the Fourth Amendment analysis are necessary to allow courts to assess newly arising factual scenarios,¹³⁵ even flexible frameworks must be sufficiently clear to provide meaningful guidance to courts, police, and prosecutors.¹³⁶ Indeed, though scholars have concluded that police discretion cannot, and to some degree should not, be eliminated,¹³⁷ many have argued that both courts and other policy-makers must create clear standards and procedures to create guardrails on the exercise of discretion and protect the rights of the people being policed.¹³⁸ The Supreme Court’s failure to

¹³² See, e.g., *id.* at 39–40 (quoting Michael Ranalli, Why PERF’s Prohibition on Shooting at Vehicles Sells Agencies Short, Lexipol (Sept. 8, 2016), <https://www.lexipol.com/resources/blog/why-perfs-prohibition-on-shooting-at-vehicles-sells-agencies-short-2/> [<https://perma.cc/9VSV-8PBH>]) (discussing Lexipol’s opposition to bright-line rules).

¹³³ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 597–98 (2006) (discussing the availability of civil litigation to address Fourth Amendment violations); *id.* at 598 (“As far as we know, civil liability is an effective deterrent here, as we have assumed it is in other contexts.”).

¹³⁴ See Joanna C. Schwartz, Qualified Immunity’s Boldest Lie, 88 U. Chi. L. Rev. 605, 615 (2021).

¹³⁵ See Matthew Tokson, Knowledge and Fourth Amendment Privacy, 111 Nw. U. L. Rev. 139, 143 (2016). Tokson considers the broad question of what government intrusions trigger Fourth Amendment protection. See *id.* at 141. This Article applies similar logic to the narrower question of what constitutes probable cause.

¹³⁶ Taslitz, *supra* note 26, at 874.

¹³⁷ See, e.g., *id.* at 901 (“Complete elimination of police or factfinder discretion is, however, neither feasible nor desirable.”).

¹³⁸ See, e.g., Eagly & Schwartz, *supra* note 131, at 7 n.24 (collecting sources).

explicitly state that the degree of intrusion should weigh into the probable cause analysis is yet another tool for expanding police discretion.

Ambiguity has other ills as well. A unitary probable cause standard pushes courts to draw inconsistent conclusions on similar facts,¹³⁹ which leads to inconsistent application of the probable cause standard as police then try to apply it later. Ambiguity allows maximum discretion for police in developing training, such that probable cause can be interpreted differently in different jurisdictions.¹⁴⁰ And ambiguity provides limited guidance to courts and law enforcement as they consider cases related to rapidly developing technology.

II. THE CONFUSION SOWN BY A UNITARY PROBABLE CAUSE STANDARD

A. Irreconcilable Outcomes in Lower Courts

The Supreme Court's failure to articulate its hidden intrusion doctrine has left lower courts to struggle. A review of lower federal courts' and state courts' efforts to apply the probable cause standard across intrusions shows that many of those courts are dissatisfied with what they understand to be a unitary probable cause standard. Yet, because the Supreme Court has not made explicit that courts may consider the degree of intrusion when evaluating the quantum or quality of evidence used to make out a probable cause finding, they are sometimes left floundering and disingenuously attempting to reconcile inconsistent outcomes in cases where the only meaningful difference in the facts is the degree of intrusion the government seeks to justify.

A comprehensive analysis of lower court decisions would be nearly impossible, and this is not only because of the sheer volume of probable cause determinations. Rather, many decisions are unpublished or made in rulings from the bench, even more probable cause determinations come without a record of a judge's decision to sign or reject a warrant application, and still others involve searches where no contraband is found and no charges are ever brought. But my review of cases from multiple jurisdictions shows that courts do sometimes require a higher quantum of evidence for a finding of probable cause when the intrusion is greater. The examples below illustrate that such distinctions are not

¹³⁹ See *infra* Section II.A.

¹⁴⁰ See *infra* Section II.B.

universal, and that is part of the problem. The Supreme Court's failure to articulate its hidden intrusion doctrine leaves room for arbitrariness.

My analysis focuses on drug cases, particularly marijuana, because of their ubiquity in criminal law and procedure over the last forty years. Across time and place, courts have grappled with how much evidence of marijuana use or possession suffices to justify a search of an automobile, an arrest of a person, or a search of a home. The cases reflect that courts are willing to permit searches of vehicles on evidence that will not support the search of a home (with or without a warrant) or a custodial arrest.

For example, the U.S. Court of Appeals for the Fourth Circuit held in 2018, in *United States v. Lyles*, that marijuana residue, stems, and three empty packs of rolling papers found in a trash bag along with mail addressed to the house outside of which the bag had been placed for trash pickup did not meet the threshold of probable cause to support a warrant to search the home.¹⁴¹ The *Lyles* court was concerned with the scope of the search that the government sought to justify using the vestiges of marijuana possession, reasoning that “it is anything but clear that a scintilla of marijuana residue or hint of marijuana use in a trash can should support a sweeping search of a residence.”¹⁴² The search conducted in *Lyles* therefore “implicate[d] the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.”¹⁴³

Yet, just five years earlier the Fourth Circuit had held that marijuana residue observed in a car established probable cause to justify a warrantless search of the car under the automobile exception to the warrant requirement.¹⁴⁴ In that case, *United States v. Ashe*, the court expressed no such qualms about using marijuana residue to justify a search of a car. There is no question that the evidence found in the trash in *Lyles* was associated with possession of marijuana and provided some evidence that an occupant of the house had committed that crime at some point.¹⁴⁵ It just did not provide *enough* evidence to justify the much

¹⁴¹ 910 F.3d 787, 790, 795–96 (4th Cir. 2018).

¹⁴² *Id.* at 792.

¹⁴³ *Id.* (quoting *Arizona v. Gant*, 556 U.S. 332, 345 (2009)).

¹⁴⁴ See *United States v. Ashe*, 521 F. App'x 97, 98 (4th Cir. 2013).

¹⁴⁵ *Lyles*, 910 F.3d at 792 (“Precisely because curbside trash is so readily accessible, trash pulls can be subject to abuse. Trash cans provide an easy way for anyone so moved to plant evidence. Guests leave their own residue which often ends up in the trash. None of this means that items pulled from trash lack evidentiary value. It is only to suggest that the open and sundry nature of trash requires that it be viewed with at least modest circumspection.”).

greater intrusion into the occupants' privacy that a "sweeping search" of the entire house, as the *Lyles* court put it, would entail.¹⁴⁶

Other courts have made similar decisions that undermine a unitary probable cause standard. In Texas, the smell of burnt marijuana coupled with an officer's statement that he recognized the scent is sufficient to make out probable cause to search a vehicle.¹⁴⁷ But, in *State v. Steelman*, an appellate court held that the smell of burnt marijuana was not sufficient to justify a warrantless arrest, even when coupled with an anonymous tip that the individual had been selling drugs.¹⁴⁸ The U.S. District Court for the Eastern District of Texas considered Texas precedents and made a further distinction, interpreting *State v. Steelman* narrowly and concluding that the recognized smell of burnt marijuana could justify a search warrant, even if it could not justify a warrantless arrest.¹⁴⁹ Implicitly, this supports the idea that the search of a vehicle is a lesser intrusion than the search of a home, which is a lesser intrusion than an arrest, and that more evidence is necessary to justify each of these greater intrusions.

In Minnesota, courts have required more evidence to establish probable cause to arrest than to search in cases in which police relied on confidential informants' tips. In *State v. Cook*, a confidential informant—who had provided reliable information on at least twelve previous occasions—contacted a police officer and provided a tip that Mr. Cook was selling cocaine at a particular YMCA in Minneapolis and had cocaine in his waistband.¹⁵⁰ The informant provided an accurate physical description of Mr. Cook, including his clothing on the day in question and

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., *Parker v. State*, 206 S.W.3d 593, 597 n.11 (Tex. Crim. App. 2006); *Moulden v. State*, 576 S.W.2d 817, 820 (Tex. Crim. App. 1978); *Jordan v. State*, 394 S.W.3d 58, 64 (Tex. App. 2012) ("[T]he odor of [marijuana] alone is sufficient to constitute probable cause to search a defendant's person, vehicle, or objects within the vehicle." (alteration in original) (emphasis omitted) (quoting *Johnson v. State*, No. 01–10–00134–CR, 2011 WL 5428969, at *9 n.10 (Tex. App. Nov. 10, 2011))).

¹⁴⁸ *State v. Steelman*, 93 S.W.3d 102, 108 (Tex. Crim. App. 2002).

¹⁴⁹ *United States v. Parker*, No. 17-cr-00025, 2017 WL 6627046, at *7 (E.D. Tex. Dec. 21, 2017) (distinguishing the smell of marijuana in justifying a search warrant as opposed to a warrantless arrest), *report and recommendation adopted*, 2017 WL 6626032 (E.D. Tex. Dec. 27, 2017); *id.* ("The strong odor of methamphetamine (corroborating the tip [the officer] received less than 20 minutes earlier) was sufficient not only to generate a reasonable suspicion of criminal activity, but also probable cause to believe that evidence of criminal activity was located on the premises." (quoting *United States v. Walters*, 529 F. Supp. 2d 628, 642 (E.D. Tex. 2007))).

¹⁵⁰ *State v. Cook*, 610 N.W.2d 664, 666 (Minn. Ct. App. 2000).

the car he was driving.¹⁵¹ Police went to the YMCA, located Mr. Cook, saw him get in the car the informant had described, and arrested him, at which point they found cocaine in his waistband.¹⁵² The Minnesota Court of Appeals held that the tip was sufficient for police to infer the informant had seen Mr. Cook on the day in question because he accurately described Mr. Cook's clothes, but the police did not independently corroborate the allegations of criminal activity, and the informant's tip did not "predict any suspicious behavior on Cook's part."¹⁵³ The court therefore held there was not probable cause to arrest Mr. Cook at the time the arrest occurred.¹⁵⁴

The Minnesota Court of Appeals explicitly articulated a unitary theory of probable cause, stating "[p]robable cause to search a vehicle is basically the same as that necessary to support an arrest, with the exception that the focus is on the vehicle, not on the person to be arrested."¹⁵⁵ Thus, the court found itself needing to distinguish Mr. Cook's case from an earlier case, *State v. Munson*, in which the Minnesota Supreme Court had held there was probable cause to search a vehicle based on a very similar confidential informant's tip.¹⁵⁶ Though the Court of Appeals in *Cook* focused on the fact that police did not connect Mr. Cook to any "suspicious behavior," the only notable distinction between the tip in *Cook* and the tip in *Munson* was that in *Munson*, the tipster predicted a particular car would arrive at a particular location and provided the names of two of the people who would be in the vehicle.¹⁵⁷ None of that was, in and of itself, "suspicious behavior," but the *Munson* court had ruled it was sufficient to establish probable cause to search the vehicle.¹⁵⁸

Several years after *Cook*, the Minnesota Court of Appeals again confronted a case in which the State asserted that a confidential informant's tip was the basis for probable cause to search a car in a drug investigation.¹⁵⁹ In that case, *State v. Ross*, the informant had again provided a description of a suspected drug dealer, the car he was driving,

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 668.

¹⁵⁴ *Id.* at 669.

¹⁵⁵ *Id.* at 668 n.2 (citing *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997)).

¹⁵⁶ *Id.* at 668–69 (citing *State v. Munson*, 594 N.W.2d 128 (Minn. 1999)).

¹⁵⁷ *Id.* (citing *Munson*, 594 N.W.2d at 128).

¹⁵⁸ See *Munson*, 594 N.W.2d at 132–33, 136–37.

¹⁵⁹ *State v. Ross*, 676 N.W.2d 301, 303 (Minn. Ct. App. 2004).

the clothes he was wearing, and an address where he would be arriving.¹⁶⁰ As in *Munson*, the court upheld the vehicle search even though police observed no inherently suspicious behavior.¹⁶¹

The *Ross* court attempted to distinguish this case from *Cook* by explaining that the informant in that case had not “predicted [any] future behavior” that would indicate he had inside information,¹⁶² but that distinction is hollow. In all three cases, an informant who had previously furnished reliable information provided a location, a description of a person, and a description of a vehicle. The fact that the defendants in *Ross* and *Munson* arrived at the stated locations while the defendant in *Cook* was already in the expected place seems less meaningful than the fact that in *Ross* and *Munson*, police searched the vehicle, found contraband, and *then* arrested the defendants, while they jumped straight to the arrest in *Cook*.

Illinois provides a last example of courts’ discomfort with a unitary probable cause standard where there are greater intrusions into individuals’ privacy or liberty. In *People v. Holliday*, the Appellate Court of Illinois held that police did not have probable cause to conduct a search of the defendant’s crotch for drugs where they observed a suspected hand-to-hand drug sale, they saw the defendant with his pants unzipped, and one of the officers testified that he had experience with drug dealers who stored cocaine in their crotch area.¹⁶³ The court definitively ruled that the search of Mr. Holliday’s crotch required probable cause as opposed to reasonable suspicion to justify a *Terry* stop.¹⁶⁴ The court held that there was no probable cause on these facts.¹⁶⁵

The court distinguished another case, *People v. Morales*, in which the officer, having witnessed a suspected hand-to-hand transaction, conducted a *Terry* pat down, and heard a “crackling sound” that “felt like a bag of cannabis,” so the officer then reached into the defendant’s pocket.¹⁶⁶ The court held that the intermediate step of the external *Terry* frisk developed probable cause, which then justified the more invasive search of reaching into Mr. Morales’s pocket.¹⁶⁷ The *Morales* court’s

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 305.

¹⁶² *Id.*

¹⁶³ 743 N.E.2d 587, 589, 592 (Ill. App. Ct. 2001).

¹⁶⁴ *Id.* at 591–92.

¹⁶⁵ *Id.* at 592.

¹⁶⁶ *Id.* (citing *People v. Morales*, 581 N.E.2d 730 (Ill. App. Ct. 1991)).

¹⁶⁷ *Id.*

ruling that the intermediate frisk was necessary to develop probable cause and the *Holliday* court's holding that no probable cause existed further supports the idea that courts often prefer a graduated investigative process.

This collection of cases shows that although judges may not specifically state that intermediate investigative steps are necessary to meet the probable cause standard for a greater intrusion, court rulings often demonstrate a preference for such a process and judges' discomfort with investigations that jump to a more intrusive search or arrest when a less intrusive option exists. In doing so, judges are implicitly requiring a graduated investigative process.

To be sure, not all cases follow this pattern. A unitary probable cause theory¹⁶⁸ arguably supports decisions that allow greater intrusions into a suspect's privacy or liberty, such as a search of the home or an arrest, using thin evidence that would support a lesser intrusion, such as the search of a person or a vehicle. And many judges embrace that framing. The cases above demonstrate, however, that courts sometimes find ways to require more evidence to justify a greater intrusion, even if ambiguity in the law might permit it.

B. Variable Police Policies

The Supreme Court's failure to articulate its hidden intrusion doctrine has also led to significant variability in police policies and trainings related to search and seizure. Some law enforcement policies incorporate the degree of intrusion into the probable cause analysis, but others do not. Some police departments also require their officers to use the least intrusive method of investigation, that is, a graduated process that requires officers to consider the degree of intrusion into their subjects' privacy and liberty as they progress through their investigations. That some agencies have chosen to create policies that consider the degree of intrusion when guiding their officers demonstrates that such consideration is feasible and does not undermine law enforcement objectives.

However, because the Supreme Court has failed to explicitly incorporate the degree of intrusion into the probable cause analysis, these

¹⁶⁸ See, e.g., *State v. Cook*, 610 N.W.2d 664, 668 n.2 (Minn Ct. App. 2000) ("Probable cause to search a vehicle is basically the same as that necessary to support an arrest, with the exception that the focus is on the vehicle, not on the person to be arrested." (citing *In re Welfare of G.M.*, 560 N.W.2d 687, 695 (Minn. 1997))).

policies remain discretionary. In addition, when policies that consider the degree of intrusion exist, they take various forms and are not necessarily connected to the probable cause analysis.

Typically, police policies do not define probable cause at all, or only provide a definition similar to the Supreme Court's definition in *Brinegar v. United States*.¹⁶⁹ The Baltimore Police Department's search and seizure warrant policy, for example, states that there is probable cause to search "[w]here facts and circumstances, known to the member and taken as a whole, would lead a reasonable member to believe that, based on their training and experience, either contraband or evidence of a crime will be found in a particular location."¹⁷⁰ Likewise, the Baltimore Police Department's arrest warrant policy defines "Probable Cause to Arrest" as where

facts and circumstances taken as a whole, known to the member at the time of the arrest, would lead a reasonable member to believe that a particular person has committed or is committing a crime. Probable Cause is based upon an objective assessment of the facts and circumstances presented to the member.¹⁷¹

The Los Angeles Police Department uses the term "probable cause" liberally in its policy manuals, but defines it only once, in the context of terrorism offenses, stating "[p]robable cause to arrest is a set of facts that would cause a person of ordinary care and prudence to entertain an honest and strong suspicion that the person to be arrested is guilty of a crime."¹⁷² None of these definitions direct police to consider the type of intrusion as part of the analytical calculus.

However, despite these definitions, both the Baltimore Police Department and the Los Angeles Police Department ("LAPD") include other provisions in their policies that direct officers to consider the degree of intrusion, or train them on how to do so in the field, even if they do not connect this concept directly to probable cause. For example, a Baltimore Police Department training on stops, arrests, and searches shows how police policies and trainings incorporate the degree of intrusion into the

¹⁶⁹ See *supra* Section I.A.

¹⁷⁰ Balt. Police Dep't, Policy 1007: Search and Seizure Warrants 2 (2021).

¹⁷¹ Balt. Police Dep't, Policy 1104: Arrest Warrants 1 (2021).

¹⁷² 4 L.A. Police Dep't, LAPD Manual: Line Procedures § 271.46 (2024) (emphasis omitted), <https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/4-67080bc-b101b5.pdf> [https://perma.cc/YZ3G-7FXE].

probable cause analysis in the search context.¹⁷³ In that document, the trainers explicitly advise police trainees on how to assess whether the quantum of evidence available meets the probable cause standard in the context of vehicle searches in a way that considers the degree of intrusion.¹⁷⁴ The training compares a case where officers observe one vial of cocaine thrown in a car (there is probable cause to justify a search of the area of the car where the vial was thrown, but no further, and only until the vial is recovered) with a case in which the police have evidence to believe there is cocaine *somewhere* in the car, not tied to a specific, observed object (there is probable cause to justify a search of anywhere in the vehicle where drugs could be concealed).¹⁷⁵ The example instructs trainees to require more evidence of wrongdoing to justify a more intrusive search.

The LAPD's policies take a different approach. The LAPD's policy manual includes an umbrella statement on the "legal justification" for "police action" that explicitly recognizes that the probable cause varies based on the degree of intrusion:

POLICE ACTION BASED ON LEGAL JUSTIFICATION. What is reasonable in terms of appropriate police action or what constitutes probable cause varies with each situation, and different facts may justify either an investigation, a detention, a search, an arrest, or no action at all. The requirement that legal justification be present imposes a limitation on an officer's action. In every case, officers must act reasonably within the limits of their authority as defined by statute and judicial interpretation, thereby ensuring that the rights of both the individual and the public are protected.¹⁷⁶

Though the Supreme Court has recognized a difference between probable cause (to search, seize evidence, and arrest) and reasonable suspicion (to conduct a *Terry* stop or frisk),¹⁷⁷ the LAPD's policy goes further than that binary distinction. It explicitly acknowledges that "what constitutes

¹⁷³ Timothy Dixon, Baltimore Police Department—Education and Training Section Lesson Plan, Module 4: Warrantless Searches 10 (2023), <https://public.powerdms.com/BALTIMOREMD/documents/1301855> [<https://perma.cc/3ALD-EKPD>].

¹⁷⁴ *Id.* at 25–26.

¹⁷⁵ *Id.*

¹⁷⁶ 1 L.A. Police Dep't, LAPD Manual: General Provisions § 508 (2024), https://lapdonlines.trgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/VOLUME_1_Q1_2024_Updates_from_5_12_23_to_12_31_23.pdf [<https://perma.cc/9ZE9-NYTX>].

¹⁷⁷ See *supra* note 37.

probable cause varies with each situation” and that different facts may justify different degrees of intrusion.¹⁷⁸

Moreover, the very next section of the LAPD policy manual, Section 512, discusses “A[lternatives] to P[hysical] A[rrest], B[ooking], [or] C[ontinued] D[etention],” or circumstances where there may be a “criminal process” initiated, but it is not appropriate to make an arrest, such as “when the offense is of a minor nature.”¹⁷⁹ The policy further states that “[a]n arrest does not dictate a booking, and a booking does not dictate continued detention.”¹⁸⁰ Section 512 demonstrates that even where there is probable cause to believe a person committed a crime, the greatest intrusions on the person’s liberty are not necessarily wise, prudent, or necessary.

The Federal Bureau of Investigation sets forth yet a third method of considering the degree of intrusion in criminal investigation. The FBI has an explicit policy directing agents to use the “least intrusive method” of investigation:

The AGG-Dom requires that the “least intrusive” means or method be considered and—if reasonable based upon the circumstances of the investigation—used to obtain intelligence or evidence in lieu of a more intrusive method. This principle is also reflected in Appendix B: Executive Order 12333, which governs the activities of the United States Intelligence Community. The concept of least intrusive method applies to the collection of all information. Regarding the collection of foreign intelligence that is not collected as part of the FBI’s traditional national security or criminal missions, the AGG-Dom further requires that open and overt collection activity must be used with UPSERs, if feasible.

By emphasizing the use of the least intrusive means to obtain information, FBI employees can effectively execute their duties while mitigating potential negative impact on the privacy and civil liberties of all people encompassed within the investigation, including targets, witnesses, and victims. This principle is not intended to discourage FBI employees from seeking relevant and necessary information, but rather is intended to encourage investigators to choose the least intrusive—but

¹⁷⁸ See 1 L.A. Police Dep’t, *supra* note 176.

¹⁷⁹ *Id.* § 512.

¹⁸⁰ *Id.*

still reasonable—means from the available options to obtain the information.

This principle is embodied in statutes and DOJ policies on a variety of topics including electronic surveillance, the use of tracking devices, the temporary detention of suspects, and forfeiture. In addition, the concept of least intrusive method can be found in case law as a factor to be considered in assessing the reasonableness of an investigative method in the face of a First Amendment or due process violation claim.¹⁸¹

The “least intrusive method” policy explicitly recognizes that a graduated investigation strategy—meaning the least intrusive method of obtaining information is employed before methods that require greater intrusions—is not only possible, but also “mitigat[es] [the] potential negative impact on the privacy and civil liberties of all people encompassed within the investigation.”¹⁸²

Notably, the FBI’s policy does not suggest that a least intrusive method approach is required by the Fourth Amendment. Indeed, the policy explicitly recognizes other constitutional concerns, such as challenges under the First Amendment and the Due Process Clause of the Fifth Amendment, but it does not mention the Fourth Amendment.¹⁸³ The FBI’s policy therefore underscores that law enforcement view any graduated approach to search, seizure, and arrest as discretionary. The law enforcement view is that a graduated approach may be the more prudent approach, but it is not constitutionally required.

Policies developed by Lexipol provide a useful counterpoint to show how the Supreme Court’s failure to clearly articulate its intrusion doctrine within the probable cause standard can lead to ambiguity. Lexipol describes itself as “the leading provider of policy, training and wellness support for first responders and government leaders.”¹⁸⁴ It is a private company that provides policies and trainings “to more than 10,000 agencies and municipalities in 50 states and Canada.”¹⁸⁵ In 2022,

¹⁸¹ Fed. Bureau of Investigation, Domestic Investigations and Operations Guide § 4.4 (2021) (first citing *Clark v. Libr. of Cong.*, 750 F.2d 89, 94–95 (D.C. Cir. 1984); and then citing *All. to End Repression v. City of Chicago*, 627 F. Supp. 1044, 1055 (N.D. Ill. 1985)).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Lexipol, LinkedIn, <https://web.archive.org/web/20240704155421/https://www.linkedin.com/company/lexipol/> (last visited July 5, 2025).

¹⁸⁵ What Is Lexipol?, Lexipol, <https://www.lexipol.com/about/> [<https://perma.cc/N9SG-Q9AQ>] (last visited June 5, 2025).

Professors Ingrid Eagly and Joanna Schwartz examined Lexipol's growing reach.¹⁸⁶ At that point, Lexipol was responsible for drafting policies and procedures for a fifth of law enforcement agencies around the United States and had 3,500 subscribers.¹⁸⁷ Today Lexipol reports having over 10,000 subscribers.¹⁸⁸ Lexipol modifies its standard policies based on differences in state law, but the bulk of its standard Police Policy Manual is the same from jurisdiction to jurisdiction.¹⁸⁹

Though the standard policies mention probable cause over forty times, the over-seven-hundred-page manual does not contain any definition of probable cause. It also does not identify the types of facts that could be used to support a finding of probable cause to justify any particular intrusion into a person's liberty or privacy interests, nor does it acknowledge that police should consider the degree of intrusion in their investigations.¹⁹⁰

The Baltimore Police Department, LAPD, and FBI examples show that consideration of the degree of intrusion is an accepted concept in policing, particularly in departments facing oversight. Both the Baltimore and Los Angeles police departments were previously, or are still, subject to federal consent decrees for their histories of unconstitutional policing.¹⁹¹ Their use of approaches to search and seizure that consider the degree of intrusion suggests that where a police department is under the type of high-level scrutiny a consent decree provides, it will articulate a different standard, or at least significantly more detailed guidance, for how to approach searches and seizures that implicate greater intrusions into an individual's privacy or liberty interests.

¹⁸⁶ See Eagly & Schwartz, *supra* note 131, at 4.

¹⁸⁷ *Id.* at 6.

¹⁸⁸ What Is Lexipol?, *supra* note 185 ("Lexipol acquire[d] online training companies CareerCert and JPMA. Lexipol's 450+ employees now provide public safety solutions to more than 10,000 agencies and municipalities in 50 states and Canada.").

¹⁸⁹ Compare Beaumont Police Dep't, Beaumont PD Policy Manual, <https://beaumontca.gov/DocumentCenter/View/37037/Beaumont-Police-Department-Policy-PDF> [<https://perma.cc/J7QT-XCSZ>] (last visited Sept. 13, 2025) (outlining the policies and procedures followed by the Beaumont Police Department), with Berkeley Police Dep't, Law Enforcement Manual, https://berkeleyca.gov/sites/default/files/2022-05/RELEASE_20220411_T083431_Berkeley_PD_Policy_Manual.pdf [<https://perma.cc/E9PU-2KZB>] (last visited Sept. 13, 2025) (outlining the largely similar policies and procedures followed by the Berkeley Police Department).

¹⁹⁰ See Beaumont Police Dep't, *supra* note 189; Berkeley Police Dep't, *supra* note 189.

¹⁹¹ City of Baltimore Consent Decree, City of Balt., <https://consentdecree.baltimorecity.gov> [<https://perma.cc/H6SN-SKZY>] (last visited Sept. 13, 2025); Federal Oversight of the L.A.P.D.: The Consent Decree, PBS Frontline <https://www.pbs.org/wgbh/pages/frontline/shows/lapd/latar/decree.html> [<https://perma.cc/LUQ6-VSJP>] (last visited Sept. 13, 2025).

The Lexipol example shows that police do not view consideration of the degree of intrusion as a constitutional imperative. And the examples from other police departments suggest they often do not consider the degree of intrusion as part of the probable cause analysis, even if they apply a least-intrusive method principle as a general element of their investigations.

III. A GRADUATED APPROACH TO PROBABLE CAUSE IN EMERGING TECHNOLOGY

The Supreme Court implicitly endorses an approach to probable cause that considers the degree of intrusion into a person's privacy or liberty. The lower courts have applied the probable cause standard differently across intrusions. And many law enforcement agencies have created their own policies that require police to consider the degree of intrusion of a particular search or seizure, even if not explicitly incorporating that concept into the probable cause analysis.

Recognition of the Supreme Court's hidden intrusion doctrine would require the type of graduated approach some police departments promote as a matter of discretion. Searches and seizures predicated on a lower quantum of evidence or a less reliable form of evidence would not alone meet the probable cause standard for the greatest intrusions, such as an arrest. Yet, because the Supreme Court has not *explicitly* incorporated the degree of intrusion into the probable cause analysis, law enforcement views any sort of graduated approach to search and seizure, where they are required to take intermediate investigatory steps when they have less, or less reliable, evidence, as discretionary. In this Section, I discuss two emerging areas of technology to show how a unitary probable cause standard has sown confusion and how the Fourth Amendment's hidden intrusion doctrine, if articulated clearly, would better protect individuals' liberty and privacy interests in a rapidly changing technological world.

A. Facial Recognition

Alonzo Sawyer is not the only person to be falsely identified by facial-recognition-software analysis of a surveillance photo.¹⁹² There is an increasing number of documented cases of misidentification using that

¹⁹² See, e.g., Khari Johnson, How Wrongful Arrests Based on AI Derailed 3 Men's Lives, *Wired* (Mar. 7, 2022, 7:00 AM), <https://www.wired.com/story/wrongful-arrests-ai-derailed-3-mens-lives/>.

technology,¹⁹³ which some argue is less accurate in identifying people of color.¹⁹⁴

A common thread between Mr. Sawyer's case and others like his is the police activity after the "match" is generated. In Mr. Sawyer's case, the police took the grainy surveillance photo to his probation officer, suggested that the photo depicted Mr. Sawyer, and asked if he believed it depicted the man he had met.¹⁹⁵ Likewise, in the case of Robert Williams, who was misidentified by facial recognition by the Detroit Police Department, the police asked someone who had not witnessed the crime and did not know Mr. Williams to identify Mr. Williams from surveillance footage¹⁹⁶ using a strategy that has been repeatedly shown to produce errors in identifications.¹⁹⁷ In that case, as in Mr. Sawyer's, the police relied solely on a confirmatory identification by a person after facial recognition software made such an identification,¹⁹⁸ even though the computer should theoretically be more accurate than a flawed human identification.¹⁹⁹ Police did not investigate using other, more accurate strategies before proceeding to arrest Mr. Williams. They did not, for

¹⁹³ See Press, *supra* note 1.

¹⁹⁴ Patrick Grother, Mei Ngan & Kayee Hanaoka, Info. Access Div., Nat'l Inst. of Standards & Tech., U.S. Dep't of Commerce, NISTIR 8280: Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects 2 (Dec. 2019), <https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf> [<https://perma.cc/TM9Q-G2KD>]; Thaddeus L. Johnson, Natasha N. Johnson, Denise McCurdy & Michael S. Olajide, Facial Recognition Systems in Policing and Racial Disparities in Arrests, Gov't Info. Q., Aug. 8, 2022, at 2, 8; P. Jonathon Phillips, Fang Jiang, Abhijit Narvekar, Julianne Ayyad & Alice J. O'Toole, An Other-Race Effect for Face Recognition Algorithms, 8 ACM Transactions on Applied Perception 14:1, at 14:10 (2011); Andrew Guthrie Ferguson, Facial Recognition and the Fourth Amendment, 105 Minn. L. Rev. 1105, 1168–72 (2021).

¹⁹⁵ Press, *supra* note 1.

¹⁹⁶ Jeremy Shur & Deborah Won, The Computer Got It Wrong: Why We're Taking the Detroit Police to Court Over a Faulty Face Recognition 'Match,' ACLU (Apr. 13, 2021), <https://www.aclu.org/news/privacy-technology/the-computer-got-it-wrong-why-were-taking-the-detroit-police-to-court-over-a-faulty-face-recognition-match> [<https://perma.cc/T37H-PQ5Z>].

¹⁹⁷ Margaret Bull Kovera & Andrew J. Evelo, The Case for Double-Blind Lineup Administration, 23 Psych. Pub. Pol'y & L. 421, 421–22 (2017) (concluding that identification procedures where the administering officer knows the identity of the suspect can lead to wrongful identifications); see also Innocence Staff, How Eyewitness Misidentification Can Send Innocent People to Prison, Innocence Project (Apr. 15, 2020), <https://innocenceproject.org/how-eyewitness-misidentification-can-send-innocent-people-to-prison/> [<https://perma.cc/GV33-W5Y4>] (recommending blind administration of identification procedures, where law enforcement conducting the procedure does not know who the suspect is).

¹⁹⁸ See Shur & Won, *supra* note 196.

¹⁹⁹ Kovera & Evelo, *supra* note 197, at 429 (discussing challenges in eyewitness identification).

example, seek his phone records to determine whether he was even in the vicinity of the store he allegedly robbed at the time the robbery occurred.²⁰⁰

Under a unitary probable cause theory, where the degree of intrusion is irrelevant to the analysis, the facial recognition match itself provided probable cause to arrest Mr. Sawyer and Mr. Williams, not just to search Mr. Williams' phone records for location data²⁰¹ or Mr. Sawyer's house for clothing that matched the surveillance footage.²⁰² Under a probable cause standard that requires consideration of the degree of intrusion, police would have to consider whether facial recognition technology, with all its possible flaws, is sufficient to arrest a suspect without conducting any further investigation. False arrests like Mr. Sawyer's and Mr. Williams's could be avoided.

Scholars have grappled with the implications of emerging technology like facial recognition software as a Fourth Amendment search, but they have not fully considered the implications of using it as an investigative tool to develop probable cause. In 2021, Professor Andrew Ferguson noted that the increasing use of facial recognition technology implicated the boundaries of the Fourth Amendment.²⁰³ Ferguson recognized that there was a risk under current Fourth Amendment doctrine that courts would not even consider facial recognition technology within the Fourth Amendment's ambit and argued for both doctrinal and legislative solutions to mitigate the technology's risks.²⁰⁴

In recent years, several states and municipalities have attempted to regulate facial recognition technology through legislation, a slow process

²⁰⁰ See Press, *supra* note 1.

²⁰¹ See Shur & Won, *supra* note 196.

²⁰² See Press, *supra* note 1. Though police in this case sought consent to search Mr. Sawyer's home rather than a warrant based on probable cause, they did not do so until after they arrested him. *Id.* They could have taken that same step prior to his arrest.

²⁰³ See, e.g., Ferguson, *supra* note 194, at 1108–09 (recognizing the significant Fourth Amendment concerns that arise with the increasing use of facial recognition technology and arguing that the current state of Fourth Amendment doctrine does not sufficiently address these constitutional concerns).

²⁰⁴ *Id.* Ferguson argued for “future-proofing” the Fourth Amendment, by extending *United States v. Carpenter*, 138 S. Ct. 2206 (2018), *United States v. Jones*, 565 U.S. 400 (2012), and *Riley v. California*, 573 U.S. 373 (2014), to a “digital is different” understanding of the Fourth Amendment. Ferguson, *supra* note 194, at 1129–34. The Supreme Court has not yet adopted such principles in any coherent way.

that has had varying degrees of success.²⁰⁵ A recent report of the National Academies of Science, Engineering, and Medicine undertook a comprehensive analysis of the current state of facial recognition technology from a technical standpoint and the legal implications of its use in various contexts.²⁰⁶ The report chronicled the various efforts that states and municipalities had undertaken as of its publication date in 2024.²⁰⁷ For the most part, states that have enacted legislation to limit use of facial recognition technology have focused on regulating private parties' collection and use of biometric identifiers, but not law enforcement use of the technology.²⁰⁸

Most have not focused on the use of facial recognition technology as a basis for a probable cause finding.²⁰⁹ Maine's law,²¹⁰ enacted in 2021, restricts the technology's use to cases in which police have probable cause to believe a suspect has committed a "serious crime" or cases where law enforcement need to identify a deceased or missing person.²¹¹ The

²⁰⁵ See Mariana Oliver & Matthew B. Kugler, *Surveying Surveillance: A National Study of Police Department Surveillance Technologies*, 54 *Ariz. St. L.J.* 103, 122 n.117 (2022) (collecting sources).

²⁰⁶ Nat'l Acads. of Scis., Eng'g & Med., *Facial Recognition Technology: Current Capabilities, Future Prospects, and Governance* 3 (2024), <https://nap.nationalacademies.org/read/27397/chapter/2#3> [<https://perma.cc/ERN3-AL6X>] (last visited Sept. 13, 2025).

²⁰⁷ *Id.* at 94–95.

²⁰⁸ *Id.* at 94.

²⁰⁹ Several other states have passed laws authorizing task forces or commissions to study facial recognition. See *Ban Facial Recognition, Fight for the Future*, <https://www.banfacialrecognition.com/map/> [<https://perma.cc/S3J7-4KNH>] (last visited Aug. 10, 2025). Some municipalities have also attempted to regulate law enforcement use of facial recognition technology. Nat'l Acads. of Scis., Eng'g & Med., *supra* note 206, at 95. See also *Ban Facial Recognition*, *supra* (showing a map of states and municipalities that have enacted regulations on facial recognition technology). The National Academies report found that as of the end of 2023, at least twenty-two local and municipal governments had passed laws or ordinances restricting the use of surveillance technologies based on a model bill promoted by the ACLU, referred to as Community Control Over Police Surveillance ("CCOPS"). Nat'l Acads. of Scis., Eng'g & Med., *supra* note 206, at 95. The ACLU bill focuses primarily on transparency in the procurement and use of various types of developing surveillance technology. See *Community Control over Police Surveillance*, ACLU, <https://www.aclu.org/community-control-over-police-surveillance> [<https://perma.cc/CDA9-EDEW>] (last visited Aug. 10, 2025). It does not address the use of such technologies as components of the probable cause analysis. *Id.*

²¹⁰ Act of Oct. 1, 2021, ch. 394, 2021 Me. Laws 795.

²¹¹ Grace Woodruff, *Maine Now Has the Toughest Facial Recognition Restrictions in the U.S.*, *Slate* (July 2, 2021, 5:50 AM), <https://slate.com/technology/2021/07/maine-facial-recognition-government-use-law.html> [<https://perma.cc/6H9E-N3T7>].

Virginia²¹² and Vermont²¹³ laws both focus on directing police to create policies and procedures for the use of facial recognition technology, thereby promoting transparency.

An exception is Virginia's law, which explicitly prohibits the use of facial recognition technology entirely in affidavits supporting applications for search and arrest warrants.²¹⁴ Virginia therefore has preempted the questions raised by this Article by dictating, as a matter of law, that facial recognition technology cannot be used to establish probable cause for *any* purpose, regardless of the level of intrusion. Though the Virginia law is an outlier, it addresses a concern raised in this Article: that new technology like facial recognition will be used to short-circuit the usual protections of the Fourth Amendment even where it has been proven to be unreliable.

Most recently, the Maryland General Assembly passed a statewide law restricting use of facial recognition technology to the investigation of certain serious crimes, restricting the use of such technology as evidence at trial, requiring that the use of facial recognition technology be disclosed to defense counsel, and restricting the types of photos that may be used as comparison photos in a facial recognition database.²¹⁵ Unlike Virginia's law, however, the bill explicitly allows use of facial recognition to establish probable cause, stating "results generated by facial recognition technology *may be considered* or introduced as evidence in connection with a criminal proceeding . . . *for the purpose of establishing probable cause.*"²¹⁶

Maryland's law attempts to balance the various interests implicated by facial recognition technology. It acknowledges that there are potential shortcomings in facial recognition technology that are relevant to the probable cause analysis by requiring that law enforcement develop "additional, independently obtained evidence establishing probable cause or a positive identification" if they use facial recognition in their investigations.²¹⁷ The bill therefore allows the use of facial recognition technology as a law enforcement tool, but it tries to create guardrails to

²¹² Act of Apr. 27, 2022, ch. 737, 2022 Va. Acts 1397 (codified as amended at Va. Code Ann. §§ 15.2-1723.2, 23.1-815.1, and adding § 52-4.5).

²¹³ Act of Oct. 7, 2020, No. 166, 2020 Vt. Acts & Resolves 951.

²¹⁴ Act of Apr. 27, 2022, ch. 737, 2022 Va. Acts 1397; Va Code Ann. § 15.2-1723.2.

²¹⁵ Act of May 16, 2024, ch. 808, 2024 Md. Laws 1 (codified as Md. Code Ann., Crim. Proc. §§ 2-501 to 2-510).

²¹⁶ Md. Code Ann., Crim. Proc. § 2-502 (2024) (emphasis added).

²¹⁷ *Id.*

restrict the use in ways ostensibly designed to eliminate or mitigate the risk of errors.

But Maryland's apparent protection may very well prove ineffective for preventing arrests based on misidentification. The law does not articulate which independent investigative strategies would suffice to meet the requirement.²¹⁸ In other words, the bill would very likely not have changed Mr. Sawyer's case since the suggestive identification procedure used with his probation officer could arguably still qualify as "independently obtained evidence."²¹⁹ The bill also does not place any limit on the type of intrusion the facial recognition technology can be used to justify—it does not distinguish between use of facial recognition for a search as opposed to an arrest.²²⁰

In addition, the process of legislating, even with the modest goals of promoting transparency or asking governments to articulate formal policies (regardless of the substance of those policies) for using new technologies, can take many years.²²¹ The fate of the ACLU's Community Control Over Police Surveillance ("CCOPS")²²² policy demonstrates a reality of legislating in a rapidly evolving technological world. The ACLU developed the CCOPS model policy in 2016.²²³ As of January 2025, nearly a decade later, it had been adopted, even in modified form, by fewer than thirty municipalities.²²⁴ In that intervening time, technologies have moved far past the issues that concerned researchers and privacy advocates in 2016.

For example, initial concerns about facial recognition technology focused on the accuracy and transparency surrounding the original facial recognition databases that law enforcement created in the mid- to late

²¹⁸ *Id.*

²¹⁹ *Id.* § 2-502(b)(2)(ii); Press, *supra* note 1.

²²⁰ Md. Code Ann., Crim. Proc. § 2-502(b)(2)(ii).

²²¹ This delay is sometimes called "legal lag" or "law lag." See, e.g., Carla L. Reyes, *Moving Beyond Bitcoin to an Endogenous Theory of Decentralized Ledger Technology Regulation: An Initial Proposal*, 61 *Vill. L. Rev.* 191, 202 (2016); Thomas R. McLean, *The Offshoring of American Medicine: Scope, Economic Issues and Legal Liabilities*, 14 *Annals Health L.* 205, 254 (2005).

²²² See Nat'l Acads. of Scis., Eng'g & Med, *supra* note 206, at 95; see also Ban Facial Recognition, *supra* note 209.

²²³ See ACLU, *supra* note 209.

²²⁴ *Id.*

2010s and the expansion of mass surveillance strategies.²²⁵ By 2019, as stories came to light about the ways in which police actually used the available technology, concerns shifted to also include regulation and oversight of specific police practices, such as using facial recognition technology to search for matches to composite sketches, digitally altered photos, or a celebrity who resembled the suspect.²²⁶ More recently, there have been attempts, like this Article, to situate the use of facial recognition technology more definitively in the legal landscapes of evidence and criminal procedure now that scholars and practitioners better understand the technology.²²⁷

A theory of probable cause that explicitly considers the degree of intrusion and requires a graduated approach to investigation could provide a protective backstop to the unknown risks associated with new technology. If police were required by the Constitution, or even by policy, to pursue an incremental approach where they needed more probative evidence to meet the probable cause standard to justify a greater intrusion, a new technology would rarely be the sole basis for an arrest, and errors could be avoided.

B. Phone Searches

The seizure and search of cell phones and other electronic devices provide another illustration of why a graduated probable cause standard is both workable and necessary in the digital age. As the Supreme Court recognized in *Riley v. California*, cell phone searches illustrate the dangers and challenges of expanding analog legal doctrines into the digital age.²²⁸ The key question related to cell phones in this Article is the one left unanswered by *Riley*: If police seize a phone based on probable

²²⁵ See, e.g., Clare Garvie, Alvaro M. Bedoya & Jonathan Frankle, The Perpetual Line-Up: Unregulated Police Face Recognition in America, *Geo. L. Ctr. on Priv. & Tech.* (Oct. 18, 2016), <https://www.perpetuallineup.org> [<https://perma.cc/8JVA-EQTZ>].

²²⁶ Clare Garvie, Garbage In, Garbage Out: Face Recognition on Flawed Data, *Geo. L. Ctr. on Priv. & Tech.* (May 16, 2019), <https://www.flawedfacedata.com/> [<https://perma.cc/5V7L-TW8H>].

²²⁷ See generally Clare Garvie, A Forensic Without the Science: Face Recognition in U.S. Criminal Investigations, *Geo. L. Ctr. on Priv. & Tech.* (Dec. 6, 2022), https://mcusercontent.com/672aa4fbde73b1a49df5cf61f/files/2c2dd6de-d325-335d-5d4e-84066159df71/Forensic_Without_the_Science_Face_Recognition_in_U.S._Criminal_Investigations.pdf [<https://perma.cc/X8EV-7E3Y>] (analyzing facial recognition software under the frameworks of the prosecution's duty to turn over exculpatory evidence and the evidentiary rules regarding expert witnesses).

²²⁸ See *supra* Section I.B.

cause to believe that the phone contains evidence of a crime, does the same probable cause to seize the phone also justify the search of the entire phone?²²⁹

Addressing that question requires some context about how cell phone searches work. Typically, police seize a device and then perform an “extraction” of the information contained on the phone using one of a number of “mobile device forensic tools,” or “MDFTs.”²³⁰ MDFTs include both software and hardware that allow law enforcement to review and search data from a cell phone.²³¹ The MDFT extraction process essentially copies the data from the phone onto a computer, where law enforcement can then analyze it.²³² When police conduct an extraction, the MDFT software allows them to choose which data on a phone to extract, using either “logical” or “file system” extraction.²³³ For example, they can choose to extract location data, text messages, email, or pictures, all separately.²³⁴ Once they have made this choice, they can limit their search to a particular date range.²³⁵ MDFTs also enables law enforcement to conduct a more complete, total extraction of data called a “physical” extraction that allows an officer to view and search the entire contents of a phone, including files that were previously deleted.²³⁶ Law enforcement officers can then search the data that has been extracted, but, importantly,

²²⁹ At a surface level, searches of cell phones would seem to implicate the particularity requirement in the Fourth Amendment. U.S. Const. amend. IV (“[N]o Warrants shall issue, but upon probable cause, . . . and particularly describing the place to be searched.” (emphasis added)). But particularity is closely intertwined with the probable cause analysis. There must be probable cause to believe both that a crime occurred and that there will be evidence of that crime in a particular place. See 2 Wayne R. LaFare, *Search and Seizure: A Treatise on the Fourth Amendment* § 4.6(a) (5th ed. 2012) (“[A]n otherwise unobjectionable description of the objects to be seized is defective if it is broader than can be justified by the probable cause upon which the warrant is based.”). Thus, the questions of whether the nature of the evidence collected meets both the probable cause and particularity requirements and whether that evidence justifies a particular intrusion can be analyzed together. In other words, a probable cause standard that considers the degree of intrusion is also relevant to whether there is enough evidence to make out probable cause to search a particular place.

²³⁰ Logan Koepke, Emma Weil, Urmila Janardan, Tinuola Dada & Harlan Yu, *Mass Extraction: The Widespread Power of U.S. Law Enforcement to Search Mobile Phones* 10 (2020).

²³¹ *Id.* at 11–12.

²³² *Id.* at 10–11.

²³³ *Id.* at 14–15.

²³⁴ *Id.* at 13 fig. 2.2.

²³⁵ *Id.* at 12.

²³⁶ *Id.* at 15 & n.28.

the existence of the “logical” extraction process means a search of a cell phone does not require copying or searching the entire phone.²³⁷

Courts and scholars alike have struggled with the scope of searches of digital evidence for precisely the reasons the Supreme Court ruled that a cell phone is different from a cigarette pack in the arrestee’s pocket, the quintessential example of the “container” that may be searched incident to arrest.²³⁸ Since *Riley*, and even before, scholars²³⁹ and judges²⁴⁰ have debated the practicality and propriety of imposing limitations²⁴¹ on digital

²³⁷ *Id.* at 13 fig. 2.2, 15.

²³⁸ *Riley v. California*, 573 U.S. 373, 383–84 (2014) (discussing *United States v. Robinson*, 414 U.S. 218, 220–24, 235 (1973)); see *supra* Section I.B.

²³⁹ See generally Adam M. Gershowitz, *The Post-Riley Search Warrant: Search Protocols and Particularity in Cell Phone Searches*, 69 Vand. L. Rev. 585 (2016) (describing courts’ approaches to cell phone search warrants in the aftermath of *Riley* and arguing for more restrictive search protocols in warrants); Orin S. Kerr, *Ex Ante Regulation of Computer Search and Seizure*, 96 Va. L. Rev. 1241, 1248–60 (2010) [hereinafter Kerr, *Ex Ante Regulation*] (discussing the practicalities of various ex ante conditions courts can require in search warrants); Orin S. Kerr, *Searches and Seizures in a Digital World*, 119 Harv. L. Rev. 531 (2005) (analyzing the differences between digital and physical searches under various frameworks for compliance with the Fourth Amendment); Paul Ohm, *Massive Hard Drives, General Warrants, and the Power of Magistrate Judges*, 97 Va. L. Rev. In Brief 1 (2011) (responding to Kerr, *Ex Ante Regulation*, *supra*).

²⁴⁰ See, e.g., *People v. Carson*, No. 355925, 2024 WL 647964, at *8–9 (Mich. Ct. App. Feb. 15, 2024) (holding that there was probable cause to seize and search a limited area of a cell phone, but not the entire phone); *State v. Mansor*, 421 P.3d 323, 343–44 (Or. 2018) (finding that probable cause to seize a computer and search it for evidence from the date of infant’s death did not justify searching the computer for evidence from before the date of the death); *State v. McLawhorn*, 636 S.W.3d 210, 240 (Tenn. Crim. App. 2020) (“The affidavit sufficiently established a nexus between the criminal activity and the thing to be searched, that is, the cell phone. Although it identified items to be seized, that is, any and all data, the affidavit was deficient in establishing a nexus between ‘any and all data,’ the cell phone, and the crime.”); *United States v. Stabile*, 633 F.3d 219, 238 (3d Cir. 2011) (quoting *United States v. Burgess*, 576 F.3d 1078, 1094 (10th Cir. 2009)); *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1167–68 (9th Cir. 2010) (citing *United States v. Tamura*, 694 F.2d 591 (9th Cir. 1982)) (distinguishing between seizure of evidence and search of evidence); *United States v. Wei Seng Phua*, 2015 WL 1281603, at *7 (D. Nev. Mar. 20, 2015); *People v. Herrera*, 357 P.3d 1227, 1230 (Colo. 2015); *In re Search of Black iPhone 4*, 27 F. Supp. 3d 74, 79 (D.D.C. 2014) (“[E]ven though the cell phones are currently seized by the government, the government must still explain to the Court what the basis for probable cause is to search for each thing it intends to seize . . .”). But see *United States v. Richards*, 659 F.3d 527, 541–42 (6th Cir. 2011) (“[The warrant] was not unconstitutionally overbroad. The scope of the warrant was restricted to a search for evidence of child pornography crimes and did not permit a free-ranging search.”); *People v. Watkins*, 994 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 2014).

²⁴¹ *In re Search of Black iPhone 4*, 27 F. Supp. 3d at 79 (“The Court is unaware of any appellate decision that requires a search protocol before a warrant may be issued. . . . ‘As we have noted, we look favorably upon the inclusion of a search protocol; but its absence is not fatal.’ . . . And many courts have expressed legitimate concerns about hamstringing a valid

searches based on the likelihood that particular information would be found in particular areas of a device. In analyzing cases decided in the year after *Riley*, Professor Adam Gershowitz proposed two possible methods of limiting cell phone search warrants so that law enforcement avoided unconstitutional “rummaging” through phones they had seized.²⁴² He proposed either requiring *ex ante* search protocols for examining phones or restricting the locations on the phones that law enforcement were permitted to search pursuant to a warrant.²⁴³

Both proposals were precipitated on a graduated approach to probable cause, even though Gershowitz did not define it as such. In many of the cases he analyzed, there was no dispute that the cell phone itself had been seized lawfully. Sometimes it was seized incident to arrest, as in *Riley*,²⁴⁴ but in other cases, it was seized because there was probable cause to believe there was *some* evidence of a crime on the phone.²⁴⁵ Gershowitz’s efforts to define guardrails for searches of those phones that were lawfully seized with probable cause acknowledge that the search of a phone is more intrusive than a seizure, and therefore the search itself must be supported by a different quantum of evidence than the seizure. In other words, the existence of probable cause to *seize* the device does not necessarily mean there is probable cause to *search* the device, especially to search the entire device as opposed to particular parts of it.²⁴⁶

Gershowitz found that “[a]fter *Riley*, judges assess whether there is probable cause to issue a warrant, but thereafter they typically do not restrict where on the cell phone police can search or how they should go about conducting the search.”²⁴⁷ In all of the cases Gershowitz examined, police had probable cause to believe that there would be some evidence of a crime on the phone they seized; however, in many cases, they sought warrants to conduct searches far broader than what they would need to conduct to locate the evidence they suspected would be on the phone

criminal investigation by binding the government to a strict search protocol *ex ante*.” (emphasis omitted) (citing *United States v. Hill*, 459 F.3d 966, 978 (9th Cir. 2006))).

²⁴² Gershowitz, *supra* note 239, at 590–92.

²⁴³ *Id.* at 591–92.

²⁴⁴ *Id.* at 607, 610.

²⁴⁵ *Id.* at 602–06.

²⁴⁶ See, e.g., *In re Search of Nextel Cellular Telephone*, No. 14-mj-08005, 2014 WL 2898262, at *13 (D. Kan. June 26, 2014) (“[P]robable cause to believe drug trafficking communication may be found in [a] phone’s . . . mail application will not support the search of the phone’s Angry Birds application.”).

²⁴⁷ Gershowitz, *supra* note 239, at 600.

when they seized it.²⁴⁸ Gershowitz noted that the cases he described are likely “the tip of the iceberg” because many search warrants never result in litigation.²⁴⁹

Ex ante search protocols or limitations on the areas of a phone to be searched that would cabin law enforcement officers’ ability to rummage through a cell phone are generally not recognized as required under the Fourth Amendment. Indeed, in one well-known example, the Ninth Circuit initially required search protocols,²⁵⁰ but then issued a revised opinion with the search protocols in the concurring opinion as “guidance.”²⁵¹ The Ninth Circuit has continued to promote such protocols as good practice, but not mandatory.²⁵² There have also been substantive objections to search protocols and arguments that they are not only not required, but not *permitted*. For example, Orin Kerr has argued they exceed a magistrate judge’s constitutional authority.²⁵³

In the intervening years since Adam Gershowitz first examined this issue, no consensus has developed about the propriety, requirement, or prohibition of search protocols in search warrants, or about any requirement that law enforcement restrict their searches to particular areas of a phone. The use of either limitation has been left to the discretion of the law enforcement officers applying for warrants or the magistrate judges reviewing those warrant applications. Some courts have rejected broad warrants that authorize law enforcement to search any area of a phone without restriction.²⁵⁴ Others, and especially federal courts, have taken the opposite position.²⁵⁵ Recognition of a graduated approach to

²⁴⁸ Id. at 602–08; see also id. at 608 (“Until appellate courts signal a more robust particularity guarantee for post-*Riley* cell phone search warrants, however, confusion and erroneous rulings are likely to continue in numerous other cases.”).

²⁴⁹ Id. at 614.

²⁵⁰ See *United States v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 1006 (9th Cir. 2009) (en banc).

²⁵¹ *United States v. Comprehensive Drug Testing, Inc.*, 621 F.3d 1162, 1178–80 (9th Cir. 2010) (en banc) (Kozinski, C.J., concurring).

²⁵² See, e.g., *United States v. Schesso*, 730 F.3d 1040, 1049–51 (9th Cir. 2013).

²⁵³ See Kerr, *Ex Ante Regulation*, *supra* note 239, at 1261–71.

²⁵⁴ See, e.g., *Richardson v. State*, 282 A.3d 98, 120–21 (Md. 2022); *State v. Bock*, 485 P.3d 931, 935–36 (Or. Ct. App. 2021); *Taylor v. State*, 260 A.3d 602, 616 (Del. 2021); *Burns v. United States*, 235 A.3d 758, 773–74 (D.C. 2020); *People v. Thompson*, 116 N.Y.S.3d 2, 3–4 (N.Y. App. Div. 2019); *People v. Carson*, No. 355925, 2024 WL 647964, at *9–10 (Mich. Ct. App. Feb. 15, 2024) (collecting cases).

²⁵⁵ *United States v. Morton*, 46 F.4th 331, 338 (5th Cir. 2022); *United States v. Cobb*, 970 F.3d 319, 328–29 (4th Cir. 2020); *United States v. Kamara*, No. 23-cr-00149, 2023 WL 8357946, at *7 (E.D. Va. Dec. 1, 2023).

probable cause that considers the degree of intrusion would cabin the discretion exercised by police and judges reviewing warrants. It would not require the particular guardrails that Adam Gershowitz proposed, but it would allow for them and signal to both police and judges that the quantum of evidence necessary to justify seizing a phone is not the same as the quantum of evidence necessary to justify a wholesale search of that phone. If police wish to search the phone after it is in their custody, they must return, as Chief Justice Roberts ruled, and get a warrant. In turn, that warrant must be limited to prevent rummaging.

IV. THE WAY FORWARD

The “totality of the circumstances” test articulated in *Illinois v. Gates* is the test for probable cause, and the one that all lower courts have applied for the last forty years. This Article demonstrates, however, that the “totality” aspect of that test has been unduly circumscribed by courts’ failure to explicitly state that the degree of intrusion is one of the circumstances that comprise the totality. Because courts fail to acknowledge that the degree of intrusion enters into the calculus of probable cause, their ex-post decisions about whether the probable cause standard has been met sow confusion for police and other judges considering search warrant applications. The solutions to this problem are two-fold: First, the Supreme Court, and other appellate courts, should make explicit that the degree of intrusion is part of the probable cause totality of the circumstances test. Second, police should incorporate this understanding of the true totality of the circumstances by adding a graduated theory of probable cause in their training materials as a matter of policy.

A. The Doctrinal Fix

One doctrinal solution to this problem is a relatively minor one. Since *Gates*, the Supreme Court has definitively applied a totality of the circumstances test to evaluate probable cause.²⁵⁶ The Court has explicitly recognized many different facts that can contribute to that totality, including but not limited to the content of an informant’s tip and his past reliability as an informant,²⁵⁷ corroboration of a civilian tip by police

²⁵⁶ See *supra* Section I.B.

²⁵⁷ *Illinois v. Gates*, 462 U.S. 213, 233 (1983).

work,²⁵⁸ an individual officer's observations in connection with his training and experience,²⁵⁹ the alert of a drug-detecting dog and any evidence a defendant brings to challenge the accuracy of such an alert,²⁶⁰ and other forensic and technological tools.²⁶¹

The Supreme Court should explicitly add the degree of intrusion to this list. But, barring that intervention, lower courts can still begin to explicitly articulate the degree of intrusion as part of the totality of the circumstances, because it is consistent with existing Supreme Court doctrine. As discussed in Sections I.A and II.A, both the Supreme Court and lower courts already implicitly consider the degree of intrusion in their totality of the circumstances analysis. Saying it explicitly would not change the analysis, but it would provide necessary guidance to police making arrests and conducting searches and to judges reviewing warrants. As discussed in Section II.A, courts' failure to discuss the degree of intrusion explicitly leads to seemingly inconsistent outcomes in which the same quantum of evidence meets the probable cause standard in one case, but then fails to meet it in another.

Articulating the degree of intrusion as a factor in the totality of the circumstances is a form of interest balancing, and there is some scholarly dispute as to whether interest balancing is appropriate in analysis of the warrant clause as opposed to the reasonableness clause of the Fourth Amendment.²⁶² But as Andrew Crespo noted, the Supreme Court has sometimes collapsed the two clauses and applied a reasonableness inquiry in the probable cause analysis.²⁶³

Crespo's framework focuses on three thresholds of probable cause (what he calls "traditional probable cause," "probable cause plus," and "probable cause minus"²⁶⁴) to get at this interest balancing. But the simpler solution of allowing courts to directly consider the degree of

²⁵⁸ Id. at 241–42.

²⁵⁹ See *Ornelas v. United States*, 517 U.S. 690, 699–700 (1996); see also *Texas v. Brown*, 460 U.S. 730, 746 (1983) (Powell, J., concurring in the judgment) (discussing "training and experience to draw inferences and make deductions that might well elude an untrained person").

²⁶⁰ *Florida v. Harris*, 568 U.S. 237, 246–47 (2013).

²⁶¹ See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001).

²⁶² See Crespo, *supra* note 14, at 1344 n.288 (first citing Ronald J. Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. Ill. L.F. 763, 763–64; and then citing Comment, *Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment*, 28 U. Chi. L. Rev. 664, 679 (1961)).

²⁶³ Id. at 1343–44.

²⁶⁴ Id. at 1342 fig. 3.

intrusion in the totality of the circumstances analysis is truer to the doctrine, which emphasizes flexibility. It also does not require a wholesale revisiting of the doctrine. Rather, the Supreme Court could simply state explicitly that the type of interest balancing it conducted in *Camara v. Municipal Court* is still expressly part of the analysis after *Gates*.

Some might argue that the totality of the circumstances test itself is fatally flawed,²⁶⁵ and that adding an interest-balancing element to it would only increase discretion and further erode Fourth Amendment protection. Similarly, others may argue that the changes proposed herein amount to “reformist reforms,” that is, tweaks to the status quo that further entrench inequity,²⁶⁶ or that they would incentivize more cautious police officers to conduct searches and seizures perceived as less intrusive on less evidence than those otherwise careful officers would conduct.

To these critiques, I point to the status quo and the little that criminal defendants or the public have to lose in this area. The government already wins more than its share of borderline Fourth Amendment challenges,²⁶⁷ and reviewing courts may already be inclined to characterize some intrusions as less serious to avoid suppressing evidence that is damning to criminal defendants or would require dismissing charges.²⁶⁸ Courts already have the ability to do this in borderline cases. It is largely left to a judge’s discretion whether to classify a street encounter as a stop-and-frisk, requiring only reasonable suspicion,²⁶⁹ or an arrest and search,

²⁶⁵ See, e.g., Kinports, *supra* note 33, at 76 (noting that the Supreme Court has relied on bright-line rules in cases where the totality of the circumstances might favor a criminal defendant); L. Song Richardson, Police Efficiency and the Fourth Amendment, 87 Ind. L.J. 1143, 1144–45, 1166–67, 1167 n.141 (2012) (citing *United States v. Sokolow*, 831 F.2d 1413, 1418 (9th Cir. 1987), *rev’d on other grounds*, 490 U.S. 1 (1989)); *Sokolow*, 831 F.2d at 1418 (criticizing the totality of the circumstances test in the context of the reasonable suspicion standard by arguing that it is not possible to objectively determine whether a person is acting suspiciously).

²⁶⁶ See Amna A. Akbar, Non-Reformist Reforms and Struggles Over Life, Death, and Democracy, 132 Yale L.J. 2497, 2518–19 (2023).

²⁶⁷ See Shima Baradaran, Rebalancing the Fourth Amendment, 102 Geo. L.J. 1, 15–16 (2013).

²⁶⁸ There is an often-cited adage that “hard cases make bad law.” See generally Sepehr Shahshahani, When Hard Cases Make Bad Law: A Theory of How Case Facts Affect Judge-Made Law, 110 Cornell L. Rev. (forthcoming 2025) (examining the idea that judges sometimes distort the law to avoid an unwanted outcome, including in the Fourth Amendment context).

²⁶⁹ Christopher Slobogin has argued that the Supreme Court’s failure to explicitly incorporate “proportionality principles” to the Fourth Amendment context has resulted in no

requiring probable cause. There are several other exceptions to the warrant requirement that allow police to search vehicles even without any suspicion of wrongdoing.²⁷⁰

But adding the degree of intrusion to the analysis would provide more protection for defendants against the most serious intrusions: custodial arrests, searches of homes and cell phones, and cavity searches, for example. It would also raise the bar for police training. Lexipol, which provides no definition of probable cause and no trainings that consider the degree of intrusion in the justification of a search or seizure, provides trainings for over 10,000 law enforcement agencies.²⁷¹ Clarifying that the degree of intrusion is part of the totality of the circumstances test would force those agencies that do not consider it to modify their policies and trainings.

Recognizing the hidden intrusion doctrine would not lead to an erosion of Fourth Amendment protection based on the severity of the crime being investigated, which has been the subject of much parallel academic debate.²⁷² As in the previous literature regarding degree of intrusion, scholars have focused on the question of whether Fourth Amendment doctrine *should* consider the severity of the crime in the probable cause analysis rather than whether it already does.

Though the two concepts might at first blush seem analogous, the Supreme Court has settled the crime-severity issue. In *Atwater v. City of Lago Vista*, the Court explicitly held that the Fourth Amendment does not prohibit a full custodial arrest for a misdemeanor offense that would only carry a fine as a penalty.²⁷³ That is, the Fourth Amendment arrest standard is the same, regardless of the severity of the crime. There is no heightened

Fourth Amendment protection for intrusions most people would agree should have some protection from government meddling. Slobogin, *Let's Not Bury Terry*, supra note 14, at 1072 (“The second abuse of *Terry* in this context (which inevitably follows from the first) is the failure to apply its proportionality principle to actions which should have been designated searches and seizures. If the Court had been willing to recognize that some relatively less invasive ‘searches’ and ‘seizures’ can take place on less than probable cause, it would have felt much more comfortable broadening the definition of those two terms.” (emphasis omitted)). While that argument is beyond the scope of this Article, it is notable that some scholars have argued that expansion of the consideration of the degree of intrusion in the Fourth Amendment context could result in greater protections for government actions that currently fall entirely outside the gambit of the Fourth Amendment.

²⁷⁰ See supra note 6.

²⁷¹ What Is Lexipol?, supra note 185.

²⁷² See supra note 33.

²⁷³ See 532 U.S. 318, 323 (2001).

standard for a less severe crime, like *Atwater*'s seatbelt violation,²⁷⁴ by logical extension, there is no lesser Fourth Amendment standard for more serious offenses.²⁷⁵ Thus, even though one might find, in an analysis similar to that included in Part II, that lower courts feel compelled to interpret the Fourth Amendment to prevent exclusion of evidence in cases involving serious crimes, that pattern would be contrary to existing doctrine rather than consistent with it.

Lastly, explicit recognition of the Supreme Court's intrusion doctrine would help provide guidance and guardrails for how police should use emerging technologies, like facial recognition, requiring courts to consider whether the technologies themselves actually provide the level of probable cause necessary to justify the greatest intrusions. There are myriad examples of new technologies that, when first implemented, have unrecognized flaws.²⁷⁶ The facial recognition software discussed in Section II.A provides just one case study. Under a probable cause regime that considers the degree of intrusion, warrant-issuing judges could consider the limitations or untested nature of such emerging technologies as part of the probable cause analysis. Under this regime, facial recognition matches might suffice to support a search, either of a home or of phone records, but not to support an arrest. If the issuing court must consider the degree of intrusion as part of the probable cause analysis, it could augur for a graduated approach to Fourth Amendment intrusions. Such an approach would also settle some of the debate over phone searches. If the degree of intrusion is something courts are required to consider, probable cause to seize a phone would not necessarily suffice as probable cause to justify a wholesale search of that device.

²⁷⁴ *Id.* at 347–48, 354.

²⁷⁵ Academic criticism of the *Atwater* decision recognizes that the decision rejected a general proportionality principle in Fourth Amendment law that would have allowed for the incorporation of crime-severity balancing. See Frase, *supra* note 33, at 329, 389–91.

²⁷⁶ See Maneka Sinha, *The Dangers of Automated Gunshot Detection*, 5 J.L. & Innovation 63, 81–84 (2023); City of Chi. Off. of Inspector Gen., *The Chicago Police Department's Use of ShotSpotter Technology*, OIG File #21-0707, at 3 (Aug. 24, 2021), <https://igchicago.org/wp-content/uploads/2023/08/Chicago-Police-Departments-Use-of-ShotSpotter-Technology.pdf> [<https://perma.cc/M735-HGB2>] (“[The Office of Inspector General] concluded from its analysis that CPD responses to ShotSpotter alerts rarely produce documented evidence of a gun-related crime”); Matthew Guariglia, *What Can Go Wrong When Police Use AI to Write Reports?*, Elec. Frontier Found. (May 8, 2024), <https://www.eff.org/deeplinks/2024/05/what-can-go-wrong-when-police-use-ai-write-reports> [<https://perma.cc/4X4F-HD28>] (discussing AI generated police reports).

To be sure, courts would not immediately, or possibly ever, all agree on a scale of intrusiveness. But other areas of doctrine where intrusiveness is already considered demonstrate that nodes of consensus would likely develop as courts explicitly discussed and considered the intrusiveness of a particular search or seizure. For example, in the context of searches and seizures that occur in schools, the Supreme Court articulated a test that asks lower courts to assess whether a given search is “reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.”²⁷⁷ In the intervening years, courts have articulated principles related to the degree of intrusion. A search of a backpack or outer clothing is less intrusive than a strip search.²⁷⁸ A search of a dorm room is more intrusive than the search of a backpack or locker.²⁷⁹ A pat-down search of the outside of a pocket is less intrusive than an officer reaching into a student’s pocket.²⁸⁰ Though the facts and circumstances of each of these cases differ, they demonstrate that courts are able to consider and discuss the degree of intrusion explicitly, allowing for doctrinal conversation to occur out of the shadows. A similar conversation would likely occur in the context of the probable cause determinations discussed in this Article.

B. The Policy Fix

The police training and policy documents discussed elsewhere in this Article reflect that there are also policy-based solutions that provide a workable improvement over the status quo. The FBI’s least-intrusive-method policy, and the policies and trainings from the Baltimore and Los Angeles police departments, demonstrate that it is possible for police to define probable cause more robustly and train officers to consider the degree of intrusion without undermining investigations. Indeed, those policies reflect that, like courts, some law enforcement agencies already accept the principle that they should consider the degree of intrusion in deciding what actions to take. Policies that explicitly incorporate the

²⁷⁷ *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985).

²⁷⁸ *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 373–76 (2009).

²⁷⁹ *State v. Rodriguez*, 521 S.W.3d 1, 16–17 (Tex. Crim. App. 2017).

²⁸⁰ *Salyer v. Hollidaysburg Area Sch. Dist.*, No. 16-cv-00057, 2018 WL 3579838, at *10 (W.D. Pa. July 25, 2018).

degree of intrusion into the probable cause analysis would standardize that intuitive principle.²⁸¹

The LAPD's policy, which acknowledges that the quantum or quality of evidence necessary to justify probable cause may differ depending on the intrusion, is the type of policy that would incorporate the principles I describe in this Article. Police can be trained to consider whether the evidence they have developed is enough to justify the search, seizure of evidence, or arrest they wish to conduct. The FBI's least-intrusive-method policy also shows such a policy is workable. A least-intrusive-method policy is not the same as a graduated approach to probable cause. It directs law enforcement to pursue the least intrusive method *regardless* of how much evidence they have. But it shows that law enforcement is capable of assessing and considering the degree of intrusion as part of their investigative decision-making. Consideration of the degree of intrusion is not too complex for police.

An additional example demonstrates that a graduated approach to investigations is possible. In cases where attorneys' files, or files from other professionals with privileged communications such as doctors or clergy, end up seized as part of a search or otherwise are relevant to an investigation, the Department of Justice directs that a search warrant should not be used unless some other "less intrusive means . . . would substantially jeopardize the availability or usefulness of the materials sought."²⁸² As Cynthia Lee noted, the particularly public example of the search of Donald Trump's former lawyer Michael Cohen's home and office reflects that a higher quantum of evidence is often practically required, even if not legally required as a matter of probable cause, for high-profile or sensitive searches, and that such protections are not afforded to the average criminal defendant, who is often a poor person of color.²⁸³

Given the concerns over discretion discussed in Section I.C, wider application of policies that require or promote a graduated approach to Fourth Amendment intrusion, by requiring a higher threshold of evidence

²⁸¹ See Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. Rev. 1173, 1208–09 (1988) (arguing that the Supreme Court should include a least intrusive method principle in its Fourth Amendment doctrine).

²⁸² U.S. Dep't of Just., Just. Manual, Title 9: Criminal § 9-19.000, 9-19.221, <https://www.justice.gov/jm/jm-9-19000-documentary-material-held-third-parties> [https://perma.cc/BM2X-8FUP] (last updated Dec. 2006).

²⁸³ Lee, *supra* note 21, at 324–26.

to meet the probable cause standard for custodial arrests or searches of homes or cell phones, has the potential to improve public trust with minimal costs to law enforcement interests.

To be sure, such policies are not a panacea. Without clarification in the legal doctrine that the degree of intrusion is a factor in determining whether there is probable cause, such policies remain discretionary. As Ingrid Eagly and Joanna Schwartz demonstrated, there are incentives to avoid such specific and structured policies.²⁸⁴ If they are perceived as optional, many police departments will likely not implement them.

In addition to police policy changes, jurisdictions that enact laws regulating emerging technologies can structure them to prohibit greater intrusions, such as the search of a home or an arrest, without truly corroborating additional investigation. Some of the laws enacted to regulate facial recognition technology²⁸⁵ begin to address this issue by requiring independent corroboration of the results of facial recognition technology before such technology can be used as part of the probable cause analysis. Laws could be structured to incorporate a least intrusive method analysis as well, requiring law enforcement to first use the least intrusive investigatory method when they wish to use facial recognition technology or other emerging technologies to establish probable cause. Such a policy could prevent police from immediately arresting someone on the basis of untested technology without first conducting additional investigation.

In the case of phone searches, legislatures or courts could promulgate rules that require the type of graduated search that some warrant-issuing courts have implemented on a case-by-case basis.²⁸⁶ As discussed above, MDFT software allows law enforcement to choose what areas of a phone to extract using logical extraction. It is entirely feasible to cabin device searches to only particular areas that police have probable cause to believe would contain evidence of a particular crime. Court rules could require that warrant applications specify the area on the phone to be searched or limit a search to data from a particular time frame.

²⁸⁴ Eagly & Schwartz, *supra* note 131, at 26.

²⁸⁵ See *supra* Section III.A.

²⁸⁶ See *supra* note 240.

MDFTs, like so many software platforms in every sphere of life, are increasingly promoting artificial intelligence-based search tools.²⁸⁷ Cellebrite, a leading MDFT, has recently promoted new features in its Analytics software that use machine learning to identify images and documents contained on a cell phone that may be relevant to a criminal investigation in a matter of minutes.²⁸⁸ But Cellebrite acknowledges that there are known tradeoffs in its machine learning models between accuracy and efficiency.²⁸⁹ A rule that requires a graduated approach to probable cause that considers the degree of intrusion would prevent police from taking the shortcuts that may lead to overbroad searches in favor of somewhat slower, but more accurate, methods.

Though critics may argue that such graduated approaches pose challenges of administrability, it is clear, from the policies of the law enforcement agencies like the LAPD and the FBI that already require a least-intrusive-method process for investigation, that a graduated approach is workable. It is possible to require a less intrusive investigatory method on less evidence and not permit greater intrusions until more or better evidence has been developed. Further, though similar administrability arguments have been raised in the context of creating crime-severity limitations to the Fourth Amendment,²⁹⁰ policy-makers have still chosen to adopt such restrictions in the context of facial recognition technology.²⁹¹ Those policies do not solve all of the problems associated with untested emerging technology, but the sky has not fallen after their passage.

CONCLUSION

Courts and law enforcement consider the degree of intrusion because doing so is logical. If the Fourth Amendment is structured to protect liberty and privacy, the type of liberty and privacy at issue should enter into the Fourth Amendment analysis. The cases and policies discussed in this Article demonstrate that there is a hunger for clarity in the doctrine

²⁸⁷ Oren Yosifon, Cellebrite, How AI and Machine Learning Are Impacting Digital Investigations 8–10, <https://www.cellebrite.com/en/how-ai-and-machine-learning-is-impacting-digital-investigations/> [<https://perma.cc/RM2X-Y8JE>] (last visited Aug. 10, 2025).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 5.

²⁹⁰ See Bellin, *supra* note 33, at 13–14 (discussing administrability concerns raised by courts and scholars).

²⁹¹ See *supra* Section III.A.

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because the point is intuitive. Courts and lawmakers can bring that needed clarity by acknowledging and adhering to the Fourth Amendment's hidden intrusion doctrine.