Retaliatory Arrests: Seeking Compromise in a Constitutional Tug of War

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I. INTRODUCTION

The Charlottesville tragedy illustrates how the First and Fourth Amendments can collide during arrests.[1] On August 12, 2017, in Charlottesville, Virginia, white supremacists orchestrated a "Unite the Right" rally to protest the city's removal of a statue of Confederate General Robert E. Lee.[2] Anti-racist demonstrators also attended the rally to oppose the message of white supremacy.[3]

Inevitably, the two sides clashed.[4] Violence erupted between the groups, and the city declared a state of emergency at 11:28 a.m. that day.[5] At 1:42 p.m., one of the Unite the Right protestors drove his car into a group of anti-racist demonstrators, killing one person and injuring others.[6]

The media later criticized the Charlottesville police department for its perceived slow response to a rapidly-evolving emergency.[7] Such criticism forgets that law enforcement officers face a guessing game about the right moment to infringe on speech, if at all, especially during a time when violence at protests is becoming more common.[8] With competing interests at stake—life and death versus freedom of speech—police may always face criticism, either for being too heavy-handed or not heavy-handed enough.[9]

Bright-line Fourth Amendment principles grant police officers great discretion to enforce laws.[10] For example, most people, if not all, break the law at some point in their lives, even if just by jaywalking or driving 5 miles per hour

1. *See Charlottesville Attack: What, Where and Who?*, AL JAZEERA NEWS (Aug. 17, 2017), http://www.aljazeera.com/news/2017/08/charlottesville-attack-170813081045115.html (on file with *The University of the Pacific Law Review*) (describing the timeline of events during the Charlottesville tragedy).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Peter Hermann, Joe Heim & Ellie Silverman, *Police in Charlottesville Criticized for Slow Response to Violent Demonstrations*, CHI. TRIB. (Aug. 12, 2017), http://www.chicagotribune.com/news/nationworld/ct-charlottesville-police-response-20170812-story.html (on file with *The University of the Pacific Law Review*).

8. Martin Kaste, *Police Struggle to Balance Public Safety with Free Speech During Protests*, NPR (Aug. 26, 2017), http://www.npr.org/2017/08/26/546167516/police-struggle-to-balance-public-safety-with-free-speech-during-protests (on file with *The University of the Pacific Law Review*).

9. *Id.*; Hermann, Heim &Silverman, *supra* note 7.

10. Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 614 (2017).

over the speed limit.[11] Of course, officers do not make arrests every time they see violations, but they retain discretion to do so.[12] While this discretionary power is vital to effective law enforcement, it also has the potential for abuse if officers make arrests for improper reasons.[13]

One such improper reason is a First Amendment retaliatory arrest, which is a pretextual arrest to retaliate against a person's constitutionally protected speech.[14] In most retaliatory arrest cases, the underlying criminal charges are never brought or eventually dropped.[15] Thus, a civil remedy serves a dual purpose: it is an individual's only real chance at recourse, and it provides a check on government actions that might otherwise chill speech without consequence.[16]

Though the retaliatory arrest cause of action seems straightforward, a majority of courts impose a daunting threshold requirement—to bring a retaliatory arrest claim, the plaintiff must plead and prove a lack of probable cause.[17] In other words, if probable cause for *any* crime existed at the time of the arrest, a plaintiff cannot recover even if the police officer's desire to retaliate against the speaker was the true reason for the arrest.[18]

This harsh result stems from a constitutional tug of war between the First and Fourth Amendment.[19] At its core, a retaliatory arrest is a First Amendment claim because the plaintiff seeks redress for a free speech violation.[20] But the Fourth Amendment governs arrests.[21] In this unique constitutional collision, probable cause—a low, malleable, and objective standard that officers wield with significant discretion under deferential Fourth Amendment rules—can defeat fiercely-protected First Amendment rights.[22] The majority approach to the

11. David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. CRIM. L. & CRIMINOLOGY 557–58 (1997); Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 614 (2017).

12. Howard, *supra* note 10, at 614.

13. David Weisburd & Rosann Greenspan, *Police Attitudes Toward Abuse of Authority: Findings from a National Study*, NAT'L INST. OF ›JUSTICE 11 (May 2000), *available at* https://www.ncjrs.gov/pdffiles1/nij/181312.pdf (on file with *The University of the Pacific Law Review*).

14. Howard, *supra* note 10, at 611.

15. *See, e.g.*, Reichle v. Howards, 566 U.S. 658, 661 (2012) (dismissing charges against plaintiff based on a complete lack of evidence).

16. *See* Randolph A. Robinson, *Policing the Police: Protecting Civil Remedies in Cases of Retaliatory Arrest*, 89 DENV. U. L. REV. 499, 499–501 (2012) (explaining that *Bivens* and 42 U.S.C. § 1983 actions are mechanisms for imposing civil liability on a state actor who violates an individual's constitutional rights).

17. *See, e.g.*, Pegg v. Herrnberger, 845 F.3d 112, 119 (4th Cir. 2017); Abeyta v. City of New York, 588 Fed. App'x 24, 25 (2d Cir. 2014); Allen v. Cisneros, 815 F.3d 239, 244–45 (5th Cir. 2016); McCabe v. Parker, 608 F.3d 1068, 1075 (8th Cir. 2010)(imposing a no-probable-cause requirement for retaliatory arrest claims).

18. Reichle, 566 U.S. at 670–72 (Ginsburg, J., concurring) (warning that only entirely "baseless arrests" will give rise to civil liability if retaliatory arrest claims are subject to a no-probable-cause requirement).

19. Howard, *supra* note 10, at 616.

20. *Id.*

21. *Id.*

22. *See infra* Part V.

retaliatory arrest analysis ignores the First Amendment rights at stake, and instead, starts and ends with probable cause.[23]

Therefore, in the majority of jurisdictions, officers have total discretion to enforce laws that silence speech, regardless of how minor the infraction or how important the message.[24] The practical advantage of this police-friendly rule is to prevent tragedies like Charlottesville from occurring by allowing police to make on-the-spot decisions based on probable cause without fear of civil liability.[25] This Comment argues the current landscape for police civil liability does not properly balance protecting First Amendment rights and deferential Fourth Amendment rules.[26]

Ideally, courts should review claims of pretext on a case-by-case basis to root out officers' actual motivations for making arrests.[27] Courts have thus far resisted doing so, likely because "the catch is not worth the trouble of the hunt."[28] Instead, courts have accepted that people often act based on multiple, sometimes conflicting, motivations.[29] This is especially true with police officers making decisions under pressure,[30] where "realistically, a judge, forced to divine a police officer's motivations, is likely to give the officer the benefit of the doubt."[31]

Still, courts should check police power to restrain speech with a level of scrutiny that considers First Amendment concerns rather than let Fourth Amendment principles overpower.[32] Courts should not bar retaliatory arrest claims due to the mere existence of probable cause; courts should scrutinize those claims on a case-by-case basis even if the "hunt" is challenging.[33]

Retaliatory arrests present an impasse between constitutional doctrines that calls for a compromise.[34] Part II of this Comment discusses how the retaliatory arrest calculus differs from that of ordinary retaliation claims.[35] Part III explains how Fourth Amendment principles currently dominate the retaliatory arrest analysis.[36] Part IV examines why First Amendment scrutiny is absent from retaliatory arrest claims, despite those claims being rooted in the First

23. Howard, *supra* note 10, at 634.

24. Robinson, *supra* note 16, at 505 (discussing the existing circuit split).

25. Kaste, *supra* note 8 (explaining that police officers struggle to strike the right balance when arresting protestors).

26. *See infra* Part V.

27. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 38 (6th ed.).

28. *Id.* (quoting Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U L. REV. 785, 786 (1970)).

29. *Id.*

30. Graham v. Connor, 490 U.S. 386, 397 (1989).

31. DRESSLER & MICHAELS, *supra* note 27, at 38.

32. Howard, *supra* note 10, at 634, 636.

33. *Id.* at 636.

34. *Id.* at 638–39.

35. *See infra* Part II.

36. *See infra* Part III.

Amendment.[37] Part V argues that no existing test adequately protects both constitutional interests.[38] Part VI suggests a totality-of-the-circumstances compromise for retaliatory arrests that weighs the silenced speech against the probable cause that led to the arrest on a case-by-case basis.[39]

II. THE RETALIATORY FRAMEWORK

In an ordinary retaliation claim, courts use the *Mt. Healthy* burden-shifting test to root out the real motives for government action.[40] A prima facie case requires a plaintiff to prove the following elements: (1) the speech was constitutionally protected; (2) the defendant caused an injury that would chill a person of ordinary firmness from engaging in that constitutionally protected speech; and (3) plaintiff's exercise of constitutionally protected speech substantially motivated the defendant's actions.[41] Upon the plaintiff's satisfactory showing, the burden then shifts to the defendant who must rebut by proving "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[42]

Part A of this section explains how the Supreme Court veered from the *Mt. Healthy* test in retaliatory prosecutions by adding a no-probable-cause requirement.[43] Then, Part B posits whether the no-probable-cause-requirement extends to retaliatory arrests based on subsequent Supreme Court precedent and lower court interpretations.[44]

A. The No-Probable-Cause Requirement in Retaliatory Prosecutions

In *Hartman v. Moore*, the Supreme Court shifted away from the *Mt. Healthy* test by injecting probable cause as an element of retaliatory prosecution[45] A retaliatory prosecution occurs when a prosecutor allegedly brings charges to retaliate against an individual's speech.[46] In *Hartman*, for example, Moore lobbied members of Congress to force the United States Postal Service ("USPS") to adopt multiline scanners, a product built by Moore's company.[47] USPS

37. *See infra* Part IV.
38. *See infra* Part V.
39. *See infra* Part VIV.
40. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).
41. *Id.*
42. *Id.*
43. *See infra* Part II.A.
44. *See infra* Part II.B.
45. 547 U.S. 250, 252, 265–66 (2006).
46. *Id.* at 252.
47. *Id.* at 252–53.

opposed Moore's efforts because it preferred using single-line scanners.[48]

After Moore prevailed in his lobbying efforts, the USPS launched an investigation into the company, and an Assistant United States Attorney brought criminal charges against Moore for alleged kickbacks.[49] However, the district court eventually acquitted Moore based on a "complete lack of direct evidence" of any wrongdoing.[50] Moore brought a *Bivens* action, stating the prosecutor violated his First Amendment rights by bringing charges as retaliation for lobbying against the USPS.[51]

The Supreme Court rejected Moore's retaliation claim because probable cause supported the prosecution.[52] The Court was particularly wary of the causation problem in the prosecution context.[53] Prosecutors enjoy absolute immunity for charging decisions, and there is also a strong presumption of prosecutorial regularity that shields their actions from judicial inspection.[54] As a consequence, a plaintiff cannot sue the prosecutor in a retaliatory prosecution claim; instead, the defendant must be a third person with a retaliatory motive who allegedly induced the prosecutor to bring charges.[55]

The causation problem, then, is that a plaintiff must prove that someone other than the prosecutor caused the retaliatory prosecution.[56] This causal gap between the two actors—one with the intent and one who took action—is especially challenging in the presence of probable cause.[57] Probable cause gives a prosecutor legitimate grounds to bring charges, independent of third-party motives.[58] Essentially, the *Hartman* Court's solution amounted to a heightened pleading standard: a plaintiff must plead and prove a lack of probable cause at the outset because probable cause irreparably muddies the waters of causation[59]

Importantly, the *Hartman* Court understood that probable cause is not dispositive.[60] The Court knew a no-probable-cause requirement would leave some retaliatory prosecutions unchecked, but apparently the Court was willing to accept that fact.[61] It stated that while it would prefer direct evidence of retaliatory intent or inducement, such evidence would be "rare and consequently poor

48. *Id.* at 252.
49. *Id.* at 253.
50. *Id.* at 254.
51. *Id.*
52. *Id.* at 265–66.
53. *Id.* at 261.
54. *Id.* at 261–63.
55. *Id.* at 262.
56. *Id.*
57. *Id.*
58. *Id.* at 263.
59. *Id.* at 265–66.
60. *Id.* at 265.
61. *Id.*

guides in structuring a cause of action."[62] Thus, in the face of complexity, the Court chose simplicity.[63]

B. Does the No-Probable-Cause Requirement Extend to Retaliatory Arrests?

Both before and after *Hartman*, lower courts split on whether the no-probable-cause requirement applied to retaliatory arrests.[64] The majority approach currently bars retaliatory arrest claims if probable cause existed for the underlying arrest.[65] The bright-line Fourth Amendment rule that probable cause is a presumptively constitutional reason for an arrest seems to underlie this approach.[66] In contrast, only the Ninth and Tenth Circuits currently allow claims to proceed despite the existence of probable cause.[67] Those courts hold that *Hartman*'s rationale is unique to prosecutions and does not apply to arrests, primarily due to the lack of a causal gap between two actors.[68]

In 2012, the Supreme Court had an opportunity to resolve the circuit split in *Reichle v. Howards*.[69] In *Reichle*, Secret Service agents overheard the plaintiff making hostile comments about Vice President Richard Cheney's policies during a public appearance at a mall.[70] The agents then witnessed the plaintiff confront the Vice President and touch his shoulder as he walked away.[71] The agents arrested the plaintiff for harassment, though the prosecutor dismissed the charges.[72]

Later, the plaintiff alleged that the agents arrested him as a pretext to silence his speech in violation of the First Amendment.[73] The matter eventually reached the Supreme Court.[74] When the matter eventually reached the Supreme Court, rather than answer the question on certiorari, the Court instead resolved the case

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62. *Id.* at 264; The same can be said for arrests. *See* DRESSLER & MICHAELS, *supra* note 27, at 38("Even the most truthful officer may be unable to testify with certainty . . . and a dishonest officer has a strong incentive to perjure himself.").

63. Hartman, 547 U.S. at 264–66.

64. *See* John Koerner, *Between* Healthy *and* Hartman*: Probable Cause in Retaliatory Arrest Cases*, 109 COLUM. L. REV. 755, 773, 775 (2009) (explaining the Second, Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits adopted the no-probable-cause requirement; the Ninth and Tenth Circuits rejected it; and the other courts have not touched on the question).

65. *Id.* at 775.

66. *Id.* at 774; Howard, *supra* note 10, at 614–15.

67. Koerner, *supra* note 64, at 775.

68. *See* Skoog v. Cty. of Clackamas, 469 F.3d 1221, 1234 (9th Cir. 2006) (allowing retaliatory arrest claims to proceed despite the existence of probable cause).

69. Reichle, 566 U.S. at 663 (analyzing whether a First Amendment retaliatory arrest claim may lie despite the presence of probable cause to support the arrest).

70. *Id.* at 660.

71. *Id.* at 660–61.

72. *Id.* at 661.

73. *Id.* at 662.

74. *Id.* at 663.

by granting the officers qualified immunity due to its reluctance to unnecessarily decide constitutional issues.[75] The Court held that due to the circuit split and *Hartman* decision, the law on retaliatory arrests was not clearly established enough to impose liability on the agents.[76]

Within its determination, the Court mentioned similarities between arrests and prosecutions that may be relevant for deciding the constitutional issue in a future case.[77] First, the Court noted it "has never recognized a right to be free from a retaliatory arrest that is supported by probable cause."[78] Indeed, the majority of lower courts post-*Reichle* have cited this language as the Supreme Court's approval of extending *Hartman*'s rule to arrests because there is no protected right at stake.[79]

Second, the Court stated that arrests, like prosecutions, also present a "tenuous causal connection."[80] The Court admitted that the causal gap is not identical because an arresting officer, unlike a prosecutor, is not entirely immune from liability.[81] Therefore, the plaintiff can sue the officer directly, appearing to leave a simplified causal chain because the arresting officer will often be the person both harboring the retaliatory intent and initiating the arrest.[82]

As the *Reichle* Court hinted, arrests are not always simple; multiple actors may be involved in an arrest, and outside parties can induce an officer to make an arrest.[83] For example, in 2014 a man parodied the mayor of Peoria, Illinois on Twitter, insinuating that the mayor was involved in unethical, immoral, and criminal behavior.[84] Eventually, police raided the man's apartment and arrested him for "impersonating a public official."[85] The man sued the City of Peoria claiming police arrested him due to outside pressure from the mayor or his supporters to shut down his Twitter page.[86] The parties settled out of court, but it shows how third parties can feasibly induce officers to arrest disliked speakers the same way third parties might induce a prosecutor to bring charges.[87]

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75. *Id.* at 663–64.

76. *Id.* at 670.

77. *Id.* at 667.

78. *Id.* at 664–65.

79. *See, e.g.*, Pegg v. Herrnberger, 845 F.3d 112, 119 (4th Cir. 2017) (citing *Reichle* to justify applying a no-probable-cause rule to arrests).

80. Reichle, 566 U.S. at 668.

81. *Id.* at 668–69.

82. *Id.*

83. *See generally* Dawn Rhodes, *Police Raid Over Fake Twitter Account Costs Peoria $125,000*, CHI. TRIB. (Sept. 3, 2015), http://www.chicagotribune.com/news/local/breaking/ct-twitter-peoria-mayor-lawsuit-20150902-story.html (on file with *The University of the Pacific Law Review*) (discussing a situation where multiple actors, who were not law enforcement officers, contributed to an arrest).

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

The *Reichle* Court itself pointed out at least one other way an arrest can have complex causation: when an officer arrests someone based on a "wholly legitimate consideration of speech."[88] According to the Court, speech can properly trigger an arrest when it supplies probable cause or evidence of a threat.[89]

The *Reichle* Court cited *Wayte v. United States* as an example.[90] In *Wayte*, a young man failed to register with the Selective Service as the law mandated.[91] The man also wrote letters to the government expressing his intent not to register.[92] Upon his indictment, the Court used the man's own speech against him: "The letters written to Selective Service provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense."[93] Technically, police arrested the man partly because of his protected speech, yet the *Reichle* Court implied the *Wayte* arrest did not rise to the level of retaliation.[94]

The *Reichle* Court's suggestion that even arrests can have complex causation echoes the *Hartman* Court's underlying causation concern: "Some degree of bad motive does not amount to a constitutional tort if that action *would have been taken anyway*."[95] In other words, probable cause complicates causation .[96] Just as probable cause is an independently legitimate reason for a prosecutor to bring charges, probable cause is also a legitimate reason for an officer to make an arrest.[97] Therefore, under deferential Fourth Amendment principles, probable cause outweighs any alleged retaliatory motive that concurrently may have contributed to the arrest.[98]

Under the current framework, retaliatory prosecution claims have a no-probable-cause requirement after *Hartman*.[99] It is not clear whether the no-probable-cause requirement extends to retaliatory arrests because the Supreme Court left the question open in *Reichle*, but most lower courts extend the *Hartman* rule to retaliatory arrests in the absence of further guidance by the

88. Reichle, 566 U.S. at 668.

89. *Id.*

90. *Id.* (citing Wayte v. U.S., 470 U.S. 598, 612–13 (1985)).

91. Wayte, 470 U.S. at 601.

92. *Id.*

93. *Id.* at 612–13.

94. Howards, 566 U.S. at 668 (considering speech is proper when it goes to an element of a crime).

95. Hartman, 547 U.S. at 260 (emphasis added).

96. *See id.* at 263 (explaining "the distinct problem of causation" in retaliatory prosecution claims is showing that a prosecutor with legitimate grounds to bring charges did not do so for legitimate reasons).

97. *See id.* (explaining "the distinct problem of causation" in retaliatory prosecution claims is showing that a prosecutor with legitimate grounds to bring charges did not do so for legitimate reasons).

98. Howard, *supra* note 10, 616, 636.

99. *See supra* Part II.A (discussing Hartman's holding that a no-probable-cause requirement applies to retaliatory prosecution claims).

Supreme Court.[100]

III. THE OVERPOWERING INFLUENCE OF FOURTH AMENDMENT JURISPRUDENCE AND QUALIFIED IMMUNITY ON RETALIATORY ARREST CLAIMS

A retaliatory arrest may implicate First Amendment rights, but the Fourth Amendment ultimately governs arrests.[101] The Supreme Court prefers bright-line Fourth Amendment rules because case-by-case determinations risk turning "every discretionary judgment in the field . . . into an occasion for constitutional review."[102]

Part A explores how courts that impose a no-probable-cause requirement to retaliatory arrest claims rely on Fourth Amendment precedent rather than First Amendment concerns.[103] And those courts typically use a matter-of-fact approach for doing so with little explanation.[104] Further, Part B then reveals how most courts, including the Supreme Court, opt to grant officers qualified immunity instead of deciding retaliatory arrest claims on the merits, which caters to overarching Fourth Amendment principles of granting deference to law enforcement whenever possible.[105]

A. Fourth Amendment Concerns Dominate the Retaliatory Arrest Analysis

The strength of deferential Fourth Amendment rules is evident, and the Supreme Court seems to have accepted that those rules may, at times, adversely affect individual freedoms.[106] In *Atwater v. City of Lago Vista*, police officers arrested a plaintiff for a seatbelt violation.[107] The plaintiff argued that an arrest for such a minor infraction was unreasonable and violated her Fourth Amendment rights.[108] Further, she asked the Court to establish a new test that

100. The Supreme Court recently left the question open yet again. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1954 (2018) ("[W]hether in a retaliatory arrest case the *Hartman* approach should apply . . . [or] the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case."). In *Lozman*, the plaintiff alleged that the City ordered his arrest for criticizing public officials during an open city council meeting pursuant to an official retaliatory policy. *Id.* The Court noted that the plaintiff's claim was "far afield from the typical retaliatory arrest claim" and abolished the *Hartman* rule in favor of the *Mt. Healthy* test only in the narrow circumstances presented. *Id.* For the "mine run of arrests," however, the no-probable-cause debate is still unresolved. *Id.*

101. U.S. CONST. amend. IV (prohibiting unreasonable searches and seizures).

102. Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001).

103. *Infra* Part III.A.

104. *See infra* Part III.A.

105. *See infra* Part III.B.

106. Arnold H. Loewy, *Cops Cars, and Citizens: Fixing the Broken Balance*, 76 ST. JOHN'S L. REV. 535, 560 (2002) ("[T]he Arrest of Ms. Atwater, though considered individually unreasonable, was held to be constitutionally reasonable.").

107. Atwater, 532 U.S. at 324.

108. *Id.* at 325.

would forbid "custodial arrest, even upon probable cause, when conviction could not ultimately carry any jail time and when the government shows no compelling need for immediate detention."[109]

The Court rejected her argument and held that an officer can properly arrest when he has probable cause that even a minor crime has been committed in his presence.[110] The Court's rationale was that forcing officers to balance public against private interests on a case-by-case basis would be unworkable and create a "systematic disincentive to arrest."[111] The Court decided that, for Fourth Amendment cases, "[m]ultiplied many times over, the costs to society of such underenforcement could easily outweigh the costs to defendants of being needlessly arrested and booked."[112] Thus, the Court has shown that it is willing to sacrifice individual rights to give way to bright-line rules that guide officers' actions.[113] The theme of Fourth Amendment jurisprudence is often administrative efficiency.[114]

This concept also appeared in *Whren v. United States*.[115] In *Whren*, a police officer pulled over a group of African American men for multiple traffic violations.[116] The men argued that the stop was a pretext for racial discrimination, and they advocated for a "reasonable officer" standard.[117] Under the defendants' proposed standard, the test for arrests would be "whether a police officer, acting reasonably, would have made the stop for the reason given," not whether probable cause existed.[118]

The Supreme Court was not sympathetic.[119] It criticized the reasonable officer standard as a subjective test disguised as an objective test because it would ultimately turn on whether the police officer's state of mind drove him to deviate from usual police practices.[120] The Court also remarked that such a test, which aimed to "plumb the collective consciousness of law enforcement," would worsen evidentiary difficulties associated with proving intent.[121] Finally, the

109. *Id.* at 346.

110. *Id.* at 354.

111. *Id.* at 351 ("But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determination of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.").

112. *Id.*

113. *Id.*

114. *Id.* at 350 ("[The Plaintiff's] rule therefore would not only place police in an almost impossible spot but would guarantee increased litigation over many of the arrests that would occur.").

115. 517 U.S. 806 (1996).

116. *Id.* at 808.

117. *Id.* at 809.

118. *Id.* at 810.

119. *Id.* at 819 (holding the traffic stop was reasonable and affirming the convictions).

120. *Id.* at 814.

121. *Id.* at 814–15 ("While police manuals and standard procedures may sometimes provide objective assistance, ordinarily one would be reduced to speculating about the hypothetical reaction of a hypothetical constable—an exercise that might be called virtual subjectivity.").

Court also noted that police practices vary depending on the locale, and the Fourth Amendment should not apply differently between jurisdictions.[122] For all these reasons, the *Whren* Court held that, so long as there was probable cause for the stop, the arrest was lawful regardless of the officer's alleged bad motive.[123]

The defendants argued that cunning officers could inevitably conjure up probable cause for anyone because of the panoply of available laws.[124] The Court acknowledged this concern, but stated it was ill-suited to decide the merits of enforcing some laws over others.[125] Further the Court may simply not be overly concerned about pretextual stops because the issue is not litigated very often.[126]

The Supreme Court has been reluctant to burden officers with an added mental balancing test when probable cause to arrest clearly exists.[127] In *Virginia v. Moore*, officers arrested the defendant for driving with a suspended license, a misdemeanor violation that required a citation rather than an arrest under Virginia law.[128] Although the officer violated state law by making the arrest, the state law did not allow for suppression of evidence.[129] Instead, the defendant attempted to suppress evidence based on Fourth Amendment principles.[130] He argued that because state law prevented officers from arresting for minor crimes, his arrest was unreasonable under the Fourth Amendment.[131]

The Court rejected the defendant's argument, holding the state law was at odds with Fourth Amendment principles giving officers discretion to arrest for any crime, felony or misdemeanor alike.[132] In so holding, the Court reemphasized "the need for a bright-line constitutional standard" based on its concern about officers facing difficult judgment calls during arrests.[133]

In sum, the Supreme Court's steady preference for bright-line Fourth Amendment rules is illustrated by its distaste for more complicated tests.[134] It rejected *Atwater*'s attempt to draw lines between misdemeanors and felonies.[135]

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122. *Id.* at 815.

123. *Id.* at 819 ("For the run-of-the-mine case . . . there is no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure.").

124. *Id.* at 818.

125. *Id.* at 818–19.

126. *See* Atwater, 532 U.S. at 353 (stating the country is not facing an epidemic of minor offense arrests); *see also* Hartman, 547 U.S. at 258–59 (rejecting the argument that there will be a flood of litigation in retaliatory prosecution claims).

127. *See generally* Va. v. Moore, 553 U.S. 164 (2008) (concluding that the burden on officers must not be too high because of the challenges officers face in the field).

128. *Id.* at 166–67.

129. *Id.* at 167.

130. *Id.* at 168.

131. *Id.*

132. *Id.* at 178.

133. *Id.* at 175.

134. *Id.*

135. *Id.*

It rejected *Whren*'s reasonable officer standard.[136] And it rejected *Moore*'s state law-based balancing test.[137] In the retaliatory arrest context, allowing claims to proceed despite probable cause would arguably force officers to use a balancing test for arrests whenever speech is involved.[138] In that sense, the widespread acceptance of the no-probable-cause requirement is understandable because it appears most loyal to the Supreme Court's Fourth Amendment precedent.[139]

B. The Qualified Immunity Doctrine Bolsters Fourth Amendment Dominance

Qualified immunity is yet another protection for law enforcement officers.[140] It attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[141]

In *White v. Pauly*, the Court reinforced the qualified immunity doctrine.[142] In *White*, Officer White arrived late at the scene where police were ordering a suspect to exit his home.[143] Officer White heard the suspect yell, "We have guns," and then the suspect shot at officers and pointed a handgun in the direction of Officer White, who was protected by a large stone.[144] Officer White emerged from behind the stone, then shot and killed the suspect.[145]

The question before the Supreme Court was whether Officer White was entitled to qualified immunity because he used deadly force without first warning the victim.[146] The Court reversed the lower court and granted Officer White qualified immunity, holding that, to be clearly established, the law at issue must be "particularized" to the factual scenario.[147] This means officers will escape liability using the qualified immunity defense unless the court already ruled on an almost identical factual scenario in the past.[148] Thus, even though failure to warn

136. *Id.* at 172.

137. *Id.* at 176.

138. *See infra* Part VI.

139. Redd v. City of Enterprise, 14014 F.3d 1378, 1383 (11th Cir. 1998) ("When a police officer has probable cause to believe that a person is committing a particular public offense, he is justified in arresting that person, even if the offender may be speaking at the time that he is arrested.").

140. *See* Mullenix v. Luna, 136 S. Ct. 305, 308 (2015); Howards, 566 U.S. at 664 (analyzing the qualified immunity doctrine).

141. *Id.* at 308. ("While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' In other words, immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'").

142. 137 S. Ct. 548 (2017).

143. *Id.* at 550.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 552.

148. *Id.* (stating plaintiff failed to identity a case where an officer faced similar circumstances and was

before using deadly force constitutes a "run-of-the mill Fourth Amendment violation," Officer White was still entitled to qualified immunity because no previous case was factually similar enough to White's to clearly establish the law for that specific scenario.[149] The extreme particularity required to overcome qualified immunity shows how the Supreme Court continues to diligently shield officers from liability whenever possible.[150]

Reichle is an example of how qualified immunity trumps retaliatory arrest claims.[151] In *Reichle*, the Court granted Secret Service agents qualified immunity because the law about retaliatory arrests was not clearly established due to circuit splits and the confusion caused by the *Hartman* decision.[152] The *Reichle* Court's refusal to resolve the split or to clearly establish whether the no-probable-cause requirement applies to retaliatory arrests ensures the qualified immunity defense is still available in retaliatory arrest cases.[153]

Even in minority circuits that reject the no-probable-cause requirement, the trend towards qualified immunity reigns.[154] For example, in *Skoog v. County of Clamakas*, the plaintiff had a reputation in his community for videotaping and photographing police officers in the field, and he also was engaged in lawsuits against the county and police officers challenging his previous DUI arrest.[155] Officers eventually obtained a search warrant based on probable cause for filming officers without consent, and eleven officers raided the plaintiff's house, some with guns drawn.[156] The plaintiff alleged during the raid, an officer explicitly stated, "People shouldn't sue cops."[157]

The plaintiff filed a claim under 42 U.S.C. Section 1983, arguing the officers acted in retaliation for the plaintiff' exercising his constitutionally protected speech.[158] The Ninth Circuit rejected the no-probable-cause requirement, which would presumably allow the plaintiff's claim to proceed, yet the court ultimately granted the officers qualified immunity despite the officers' highly questionable conduct.[159]

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held to have violated the Fourth Amendment).

149. *Id.*

150. *Id.* at 551–52 ("In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found this necessary both because qualified immunity is important to 'society as a whole,' and because as 'an immunity from suit,' qualified immunity 'is effectively lost if a case is erroneously permitted to go to trial.'") (citing Pearson v. Callahan, 555 U.S. 223, 231 (2009)).

151. Reichle, 566 U.S. at 663.

152. *Id.* at 670.

153. *Id.* at 664.

154. *See generally* Skoog v. Cty. of Clackamas, 469 F.3d 1221 (9th Cir. 2006) (finding that qualified immunity shielded officers from liability in a retaliatory arrest case).

155. *Id.* at 1225.

156. *Id.* at 1226–27.

157. *Id.* at 1227.

158. *Id.*

159. *Id.* at 1235.

The judicial tendency to shield law enforcement officers through qualified immunity echoes the Fourth Amendment jurisprudence that has given officers significant discretion.[160] Advocating for allowing retaliatory arrest claims despite the existence of probable cause is an uphill battle because the position defies the pervasive trend of shielding police officers from liability.[161] Yet allowing Fourth Amendment principles to overpower the analysis ignores the fact that retaliatory arrests are ultimately First Amendment claims.[162]

IV. THE NONEXISTENT ROLE OF THE FIRST AMENDMENT IN RETALIATORY ARREST CLAIMS

None of the First Amendment retaliation tests use the type of scrutiny that has developed in First Amendment jurisprudence.[163] Part A suggests that this may be because retaliatory arrests blend speech and unlawful conduct or because retaliation claims are distinct from substantive constitutional claims.[164] But even if a normal First Amendment test applied, Part B explains that strict First Amendment scrutiny may be insufficient to protect speech in a retaliatory arrest claim.[165]

A. Why Retaliation Claims are Treated Differently Than Non-Retaliation First Amendment Claims

Courts do not treat First Amendment retaliatory arrest claims like other types of First Amendment claims.[166] One explanation may be the inherent difficulty of separating unlawful conduct from lawful expression.[167] The Supreme Court discussed this problem in *United States v. O'Brien*.[168] There, the defendant burned his draft card to protest the Vietnam War.[169] Despite his First Amendment right to protest, the Court held the defendant's act of burning the draft card was illegal.[170]

The Court, concerned about individuals using the First Amendment to shield otherwise unlawful action, held that unlawful conduct could be restricted, even if

160. *See supra* Part III.A (discussing the discretion officers enjoy under Fourth Amendment precedent).

161. *See e.g.*, Skoog, 469 F.3d at 1235 (finding that qualified immunity shielded officers from liability in a retaliatory arrest case).

162. Howard, *supra* note 10, at 636.

163. *Id.*

164. *See infra* Part IV.A.

165. *See infra* Part IV.B.

166. Howard, *supra* note 10, at 636.

167. *See generally* U.S. v. O'Brien, 391 U.S. 367 (1968) (analyzing the distinction between protected speech and unprotected conduct).

168. *Id.*

169. *Id.* at 369.

170. *Id.*

that meant incidental limitations on the freedom of expression.[171] Extending *O'Brien*'s reasoning suggests that retaliatory arrests might be treated differently than other speech restrictions because some objectively unlawful conduct is involved in a retaliatory arrest.[172]

Another possible reason courts do not use traditional First Amendment analysis for retaliatory arrest claims may be due to the distinction between constitutional tort claims and "direct" constitutional claims.[173] It seems the crucial difference is timing.[174] In a First Amendment context, a direct constitutional violation prevents speech from happening, while a tortious retaliatory government action punishes past speech.[175] As the Supreme Court explained, "In the standard retaliation case recognized in our precedent, the plaintiff has performed some discrete act in the past . . . [t]he plaintiff's action is over and done with, and the only question is the defendant's purpose. . . ."[176]

But a retaliatory arrest is more like a direct constitutional violation because the plaintiff's speech is not necessarily "over and done with" at the time of the arrest.[177] In *Hartman*, the prosecutor brought charges long after the plaintiff completed his lobbying efforts.[178] An officer, in contrast, could arrest a demonstrator mid-protest.[179]

For example, after Donald Trump was elected President, the Los Angeles Police Department ("LAPD") arrested 462 protestors, mostly for blocking roadways or failing to disperse.[180] A year later, records showed the LAPD only

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171. *Id.* at 376–77.

> When "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms; a government regulation is sufficiently justified if (1) it is within the constitutional power of the government, (2) it furthers an important or substantial governmental interest, (3) the governmental interest is unrelated to the suppression of free expression, and (4) the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id.

172. Howard, *supra* note 10, at 614 (explaining bright line rules preserve the ability of law enforcement to regulate unlawful conduct safely).

173. Miller v. Mitchell, 598 F.3d 139, 148 n.9 (3d Cir. 2010).

174. *Id.*

175. *Id.* ("A retaliation claim is different. It asks not whether the exercise of a right has been unconstitutionally burdened or inhibited (in other words, survives rational basis, intermediate scrutiny, or strict scrutiny review), but whether the Government is punishing the plaintiffs for exercising their rights.") In that sense, a retaliation claim does not "burden" or "inhibit" speech because the speaker was already able to get his message out.

176. Wilkie v. Robbins, 551 U.S. 537, 558 n.10 (2007).

177. *Id.*

178. Hartman, 547 U.S. at 253.

179. James Queally, *The LAPD arrested 462 people in anti-Trump protests. Only three were criminally charged, Times analysis finds*, L.A. TIMES (Nov. 2, 2017, 5:00 AM), http://www.latimes.com/local/lanow/la-me-ln-lapd-protest-charges-20171102-story.html (on file with *The University of the Pacific Law Review*).

180. *Id.*

sought charges in ten of the 462 cases, and prosecutors only filed charges in three of those ten cases.[181] Further, the Los Angeles City Council approved an ordinance that places more restrictions on the items protestors may carry, including limits on the types of signs allowed during protests.[182] This kind of ordinance could provide officers even more opportunities to silence demonstrators on-the-spot, so it may not be appropriate to deal with retaliatory arrests like other retaliation claims.[183]

B. Though Retaliatory Arrests Claims are First Amendment Claims, Strict Scrutiny May Not Be the Appropriate Test

Content- and viewpoint-based speech restrictions are typically subjected to strict judicial scrutiny because the First Amendment represents "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[184] To pass strict scrutiny, the government must prove that a regulation is necessary to achieve a compelling government interest;[185] analysts have referred to the test as "strict in theory, fatal in fact," as regulations rarely survive.[186]

A retaliatory arrest functions as a direct, immediate content- or viewpoint-based restriction of speech, yet courts do not test retaliatory arrests with strict scrutiny.[187] This presents a startling discrepancy: judges inspect content-based speech restrictions under a microscope but shut their eyes to retaliatory arrest claims so long as there is probable cause for the arrest.[188]

Although the Fourth Amendment currently overpowers the First Amendment in retaliatory arrest claims, a First Amendment takeover is not necessarily the solution.[189] As Justice Blackmun noted:

> The First Amendment, after all, is only one part of an entire Constitution . . . Each provision of the Constitution is important, and I cannot subscribe to a doctrine of unlimited absolutism for the First Amendment at the cost of downgrading other provisions. First Amendment

181. *Id.*

182. *Id.*

183. *Id.*

184. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

185. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

186. *See* Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (noting that the strict scrutiny test is "strict in theory, fatal in fact" because speech restrictions rarely survive strict scrutiny).

187. Howard, *supra* note 10, at 635.

188. *Id.* at 636.

189. N.Y. Times Co. v. U.S., 403 U.S. 713, 761 (1971) (Blackmun, J., dissenting).

absolutism has never commanded a majority of this Court.[190]

Beyond the need to balance other constitutional concerns, like the Fourth Amendment,[191] applying strict scrutiny to retaliatory arrest claims may be futile.[192] A retaliatory arrest may slip through strict scrutiny because law enforcement is a compelling interest, and arrests are a judicially-approved way of achieving that interest, whether or not speech is involved.[193] Just as the *Hartman* Court hinted, courts face difficulty separating legitimate law enforcement interests from illegitimate retaliatory motives, and strict scrutiny does not make the task any easier.[194]

V. THE INCOMPATIBILITY OF TWO CONSTITUTIONAL DOCTRINES AND LACK OF ALTERNATIVES

Probable cause permeates Fourth Amendment law.[195] In the Supreme Court's opinion, "the rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found [for] safeguard[ing] citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime [while giving] fair leeway for enforcing the law in the community's protection."[196]

Despite its critical role in Fourth Amendment law, probable cause is an incompatible threshold requirement for retaliatory arrest claims for several reasons.[197] First, a no-probable-cause requirement creates an objective threshold to an inherently subjective cause of action.[198] Retaliatory arrest claims hinge on whether the arresting officer subjectively harbored a retaliatory intent, making it absurd to bar a subjective claim based on an objective standard.[199]

Also, in contrast to strict First Amendment scrutiny, probable cause is a low standard.[200] Loosely defined as "fair probability of a crime," the Supreme Court has held that the belief that there is probable cause need not be more true than false.[201] Thus, in a retaliatory arrest case, First Amendment rights, normally

190. *Id.*

191. *See supra* Part III.A (discussing the discretion officers enjoy under Fourth Amendment precedent).

192. *See* Reed, 135 S. Ct. at 2226 (describing the contours of the strict scrutiny test).

193. *See supra* Part IV.A (discussing how strict scrutiny is unworkable for retaliatory arrest claims).

194. Hartman, 547 U.S. at 263 (describing the "factual difficulty of divining" the true source of a person's motivations).

195. *See* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 243 (1984) (noting that probable cause "lies at the heart" of the Fourth Amendment).

196. Brinegar v. U.S., 338 U.S. 160, 176 (1949).

197. Robinson, *supra* note 16, at 511, 514–15.

198. *Id.*

199. *Id.*

200. *Id.* at 514.

201. *See, e.g.*, Ill. v. Gates, 642 U.S. 213, 238 (1983); Tx. v. Brown, 460 U.S. 730, 742 (1983) (defining

protected by the strictest judicial scrutiny, can be overcome by something less than fifty percent accuracy.[202]

Finally, probable cause is malleable.[203] If the original source of probable cause turns out to be insufficient, an officer can point to some other source of probable cause that may or may not have been in his mind at the time of arrest.[204] In *Devenpeck v. Alford*, the defendant challenged a finding of probable cause after an officer arrested him for violating the Washington Privacy Act;[205] the violation did not amount to a criminal offense.[206] But regardless, the Supreme Court held that the arrest would be reasonable so long as the officer could point to some source of probable cause that existed at the time of the arrest, such as impersonating an officer or obstructing law enforcement, even if the officer did not cite those other sources as the reason for the arrest.[207] Probable cause's malleability cuts against the First Amendment concept that speech restrictions must be narrowly-tailored.[208]

Allen v. Cisneros, a case from the U.S. Court of Appeals for the Fifth Circuit, illustrates the unfairness of imposing probable cause as a threshold requirement to retaliatory arrest claims and asking the plaintiffs to shoulder the burden of pleading and proving a lack of probable cause.[209] In *Allen*, a street preacher brought a First Amendment retaliatory arrest claim against officers who arrested him while he was preaching in the street.[210] The plaintiff alleged that officers arrested him because he attempted to film the officers' treatment of him.[211] The officers argued that the plaintiff was arrested for violating a city ordinance prohibiting demonstrators from carrying objects more than three-quarters of an inch thick.[212] The preacher carried a shofar, which is a "trumpet-like instrument made from a ram's horn . . . used in Judaism to mark the holidays of Rosh Hashanah and Yom Kippur."[213]

The Fifth Circuit reversed the district court's denial of summary judgment in the officers' favor because the shofar provided probable cause for the violation of the city ordinance.[214] Indeed, the Fifth Circuit completely blocked the claim

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the probable cause standard).

202. Brown, 460 U.S. at 742.

203. *See* Devenpeck v. Alford, 543 U.S. 146, 153 (2004) (rejecting a test that would require probable cause to be closely related to the offense that motivated the officer at the time of arrest).

204. *Id.*

205. *Id.* at 150.

206. *Id.* at 152.

207. *Id.* at 153, 156.

208. Reed, 135 S. Ct. at 2226.

209. 815 F.3d 239 (5th Cir. 2016).

210. *Id.* at 241–42.

211. *Id.* at 242.

212. *Id.* at 245.

213. *Id.* at 242 n.1.

214. *Id.* at 246–47.

based on a highly technical city ordinance, despite the existence of plausible evidence pointing to retaliatory motives by the police.[215] *Allen* exemplifies the majority approach—in a collision between the First and Fourth Amendments, the Fourth Amendment prevails.[216]

The Supreme Court's bright-line Fourth Amendment rules may seem harsh, but Justice Scalia extended an olive branch in *Whren*.[217] He suggested that although probable cause forecloses a Fourth Amendment claim, an individual could bring a suit under a different constitutional amendment.[218] In *Whren*, for example, the defendants could have brought viable Equal Protection claims because they claimed that police arrested them as a pretext for racial discrimination.[219] Justice Scalia's words in *Whren* are meaningless if courts foreclose all recourse for a First Amendment violation whenever any probable cause supports an arrest, but the trouble is finding a method to litigate retaliatory arrest claims in a way that preserves both the First and Fourth Amendment.[220]

The Court has not opined on Justice Scalia's olive branch since *Whren*, and lower courts have applied the concept inconsistently.[221] Oddly, probable cause does not defeat Equal Protection-based challenges in the very same courts of appeal that allow probable cause to bar First Amendment claims.[222] For instance, the Eighth Circuit held that an Equal Protection claim "does not require proof [that the plaintiff] was stopped without probable cause."[223] Yet that same circuit imposed the opposite rule for retaliatory arrest claims.[224] It is unclear why courts treat First and Fourteenth Amendment claims differently, especially because the Supreme Court has adopted similar tests for both.[225]

The Supreme Court stated that Section 1983 "is not itself a source of substantive rights," but merely provides "a method for vindicating federal rights

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215. *Id.*

216. *Id.* at 247 n.8 (finding probable cause trumps a First Amendment claim).

217. Whren, 517 U.S. at 813.

218. *Id.*

219. *Id.*

220. *Id.*

221. *See, e.g.*, Johnson v. Crooks, 326 F.3d 995, 999–1000 (8th Cir. 2003) (allowing a section 1983 claim based on the Equal Protection clause to proceed regardless of the existence of probable cause).

222. *Id.*

223. *Id.* ("When the claim is selective enforcement of the traffic laws or a racially-motivated arrest, the plaintiff must normally prove that similarly situated individuals were not stopped or arrested in order to show the requisite discriminatory effect and purpose.").

224. *See* McCabe, 608 F.3d at 1075 ("Lack of probable cause is a necessary element of all the claims McCabe and Nelson brought arising from the allegedly unlawful arrests.").

225. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 n.21 (1977) ("Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered") (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

elsewhere conferred."[226] Extending that reasoning, Section 1983 analysis should match the framework that governs the constitutional right allegedly infringed.[227] For example, in an excessive force claim brought under Section 1983, a court would analyze the claim using the Fourth Amendment reasonableness test as a guidepost.[228]

Therefore, because a retaliatory arrest infringes on First Amendment rights, courts should judge the claims by First Amendment standards, which do not include a no-probable-cause threshold requirement.[229] Further, First Amendment scrutiny places the burden on the government, not the individual.[230] But as mentioned previously, even strict scrutiny is unworkable because the government can always cite a compelling interest in enforcing laws when there is probable cause, and the Supreme Court has already granted officers discretion to make arrests for even the most minor violations.[231]

Even the *Mt. Healthy* burden-shifting test, used for ordinary retaliation claims, does not strike the proper compromise, which may explain why courts still default to qualified immunity rather than apply *Mt. Healthy* to retaliatory arrest claims.[232] The *Mt. Healthy* test does not protect First Amendment rights sufficiently because the government can rebut by showing "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."[233] The preponderance of the evidence standard is low—it means more likely than not, even if by a minuscule margin.[234] This low standard provides an escape hatch for officers armed with probable cause.[235] Because probable cause carries such a weighty presumption, it is arguably dispositive under *Mt. Healthy* at the expense of First Amendment rights.[236]

On the other hand, even if probable cause is *not* dispositive under *Mt. Healthy*, allowing a claim to proceed despite probable cause chips away at Fourth Amendment principles of officer discretion.[237] *Mt. Healthy* does not account for an arrest scenario because it was not a case about criminal procedure; it was a

226. Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

227. *Id.*; Graham, 490 U.S. at 394.

228. *Id.*

229. Howard, *supra* note 10, at 635.

230. Howard, *supra* note 10, at 631.

231. *See supra* Part IV.B (discussing the difficulty of applying strict scrutiny because probable cause justifies an arrest).

232. *See, e.g.*, Skoog, 469 F.3d at 1235 (finding that even assuming retaliatory motives existed, officer was entitled to qualified immunity).

233. Mt. Healthy City Sch. Dist. Bd. of Educ., 429 U.S. at 287.

234. John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1573 (2015).

235. Howard, *supra* note 10, at 615.

236. *Id.*

237. *See supra* Part III.A (discussing the Supreme Court's tendency protect officer discretion).

retaliatory termination case.[238] Probable cause is not an impediment to employment claims, and thus does not consume the analysis as it does in retaliatory arrest claims.[239] For this reason, even *Mt. Healthy* does not strike the proper compromise for retaliatory arrest cases.[240]

VI. THE COMPROMISE

The Supreme Court stated, "we know of no principled basis on which to create a hierarchy of constitutional values."[241] Retaliatory arrests unavoidably implicate both the First and Fourth Amendments, and existing tests do not adequately compromise between the two competing doctrines.[242] However, a totality-of-the-circumstances test allows for fair consideration of all First and Fourth Amendment concerns.[243]

Technically, police officers are already equipped to consider the totality-of-the-circumstances in the field, shown by the fact that the probable cause test itself is a totality-of-the-circumstances test.[244] Beyond that, the Supreme Court also considers the totality-of-the circumstances when deciding whether confessions are voluntary or warrantless searches are reasonable.[245]

Although the Court has rejected balancing tests that burden officers on the scene, it has not entirely foreclosed the need for balancing[246] In *Whren*, the Supreme Court stated, "[I]n principle every Fourth Amendment case, since it turns upon a 'reasonableness' determination, involves a balancing of all relevant factors. With rare exceptions . . . the result of that balancing is not in doubt where the search or seizure is based upon probable cause."[247]

The Court continued by explaining that those "rare exceptions" which actually require a balancing test are searches or seizures "unusually harmful to an individual's privacy or even physical interests."[248]

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238. Mt. Healthy City Sch. Dist. Bd. of Educ., 429 U.S. at 276.

239. *Id.* at 287 (presenting the *Mt. Healthy* test, which does not factor in probable cause as it is a retaliatory termination case).

240. *See infra* Part VI (setting forth an alternative to the *Mt. Healthy* standard).

241. Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 484 (1982).

242. *See supra* Part V (analyzing the weaknesses inherent in the *Hartman* and *Mt. Healthy* standards).

243. Ill. v. Gates, 462 U.S. 213, 239 (1983) ("We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires . . . .").

244. *Id.* at 230, 238.

245. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973) (finding that voluntariness in the context of confessions is judged based on the totality of the circumstances); *see also* Mo. v. McNeely, 569 U.S. 141, 156 (2013) ("Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.").

246. Whren, 517 U.S. at 817.

247. *Id.*

248. *Id.* at 818 ("For example, seizure by means of deadly force, unannounced entry into a home, entry

A retaliatory arrest should qualify as one of those "rare exceptions" that is "unusually harmful" to individuals because of the First Amendment rights at stake and thus should trigger a balancing of all relevant factors.[249] In a retaliatory arrest context, a totality-of-the-circumstances test would likely include factors such as the source of probable cause, the severity of the underlying crime, and any exigencies, weighed against the degree and value of expression inhibited or affected by the arrest.[250]

In a way, a totality-of-the-circumstances test mirrors the *Mt. Healthy* test because both parties bear a distinct burden.[251] But rather than allow defendants to rebut upon a meager showing that, by a preponderance of the evidence, probable cause existed and motivated the arrest, the Court would need to weigh the defendant's evidence of probable cause against plaintiff's evidence of a retaliatory motive, with heightened skepticism when political or other core speech has been affected.[252]

Part A discusses how a totality-of-the-circumstances test would factor into First Amendment concerns[253] and Part B shows how the test would restrain, but not eliminate, the Fourth Amendment issues at play in a retaliatory arrest.[254]

A. First Amendment Concerns Enter the Equation

The Supreme Court generally has no appetite for assessing the value of speech, but has reluctantly considered the value of speech in the past when defining the scope of unprotected categories of speech.[255] For instance, the Court carved out an exception to otherwise unprotected obscenity when the expression at issue has "serious literary, artistic, political, or scientific value."[256]

Further, under the "speech integral to a crime" category of unprotected speech, not all speech is treated equally—often the determination of whether advocacy of crime is protected is based on its potential value to noncriminal listeners.[257] Commercial speech also enjoys less protection in part because of its

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into a home without a warrant, or physical penetration of the body." (internal citations omitted).).

249. *Id.*

250. Gates, 462 U.S. at 238 (stating the totality of the circumstances test considers all relevant factors).

251. *See* Mt. Healthy City Sch. Dist. Bd. of Educ., 429 U.S. at 287 (illustrating the burden-shifting aspect of the *Mt. Healthy* test).

252. *See supra* Part IV.B. (discussing strict scrutiny).

253. *See infra* Part VI.A.

254. *See infra* Part VI.B.

255. Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1002 (May 2016).

256. Miller v. Cal., 413 U.S. 15, 24 (1973) (creating an exception to obscenity when the expression has "serious literary, artistic, political, or scientific value").

257. Volokh, *supra* note 255, at 1002–03.

> We see that in the Court's libel test. We see it in the obscenity test. And we see it in the decisions under the "integral part of unlawful conduct" exception. Whether speech that is connected to

"low value."[258] Conversely, the Supreme Court decided that "speech about matters of public concern . . . is perched at the top of the hierarchy of First Amendment values, meriting special protection."[259]

Looking at the value of speech on a spectrum, the arrest of a protestor requires more judicial skepticism, and thus a greater showing of legitimate police motives, than an arrest based on obscenity or commercial speech because of the First Amendment preference for wide-open debate on public issues.[260] Despite its reluctance to place a value on speech, the Court has shown the capacity to do so when necessary and should do so in the context of retaliatory arrests.[261]

B. Tempering the Role of Probable Cause and the Fourth Amendment

Officers enjoy great discretion to make arrests.[262] Part of that discretion includes choosing not to make an arrest.[263] For example, officers may decide not to make arrests based on limited numbers of available police, prosecutors, courts, and jails.[264] Officers may also determine that the circumstances of a specific case do not warrant enforcement.[265] Indeed, police officers "virtually always have an array of options when faced with criminality."[266]

Although the Supreme Court rejected a "reasonable officer standard" in *Whren*, such a test may be necessary in a retaliatory arrest claim because the primary goal of the claim is to root out pretext.[267] Applying a reasonable officer standard to *Allen v. Cisneros* as an example, the defendant would need to show not only that a reasonable officer would have enforced the city ordinance prohibiting demonstrators from carrying objects greater than three-quarters of an inch thick, but also that the reasonable officer *would have arrested* the street

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> unlawful conduct can be punished turns on how valuable the speech is. Much advocacy of crime is protected because of its potential value to noncriminal listeners, despite its tendency to cause crime by some other listeners. Much offensive speech to the public is protected because of its potential value to willing listeners, despite its tendency to cause some offended listeners to criminally attack the speaker. And much publication of illegally created, intercepted, or leaked material is protected because of its potential value to listeners, despite its tendency to stimulate such illegality in the future.

Id.

258. Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 562 n.5 (1980).

259. Snyder v. Phelps, 562 U.S. 443, 452 (2011).

260. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

261. Volokh, *supra* note 255, at 1002.

262. *See supra* Part. III.A (delineating how Fourth Amendment precedent developed to give officers considerable discretion making arrests).

263. NEIL P. COHEN, STANLEY E. ADELMAN & LESLIE W. ABRAMSON, CRIMINAL PROCEDURE: THE POST-INVESTIGATIVE PROCESS 28 (4th ed.).

264. *Id.*

265. *Id.*

266. *Id.*

267. Howard, *supra* note 10, at 611.

preacher for carrying a shofar in violation of that ordinance.[268]

The reasonable officer standard could counterbalance the "value of speech" analysis in the totality-of-the-circumstances test.[269] Because the street preacher in *Allen* was protesting and lawfully filming police conduct, for instance, a totality-of-the-circumstances test would require a more compelling showing by the officer that his actions were reasonable.[270]

VII. CONCLUSION

Although the Supreme Court cemented the no-probable-cause requirement for retaliatory prosecution claims,[271] the Court has not ruled on whether that requirement applies to retaliatory arrests.[272] Amid the Court's silence, many lower courts follow suit by avoiding the issue,[273] but the majority of courts that choose to resolve the question have extended the no-probable-cause requirement to retaliatory arrests.[274] This trend should be reversed because requiring plaintiffs—the alleged victims—to plead and prove a lack of probable cause to bring a retaliatory arrest claim gives officers the capacity to instantly and completely silence a speaker without any judicial oversight.[275]

Neither First Amendment analysis, Fourth Amendment analysis, the *Hartman* rule, nor the *Mt. Healthy* test successfully juggle the constitutional concerns at play in a retaliatory arrest.[276] A totality-of-the-circumstances test has the dexterity to account for all relevant concerns.[277] Although courts dislike judging the value of speech on a sliding scale, just as courts dislike requiring officers to perform mental balancing tests on the scene, both tasks may be a necessary compromise to properly balance the First Amendment and Fourth Amendment issues at stake in a retaliatory arrest case.[278]

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268. *See generally* Allen, 815 F.3d 239 (describing the factual circumstances of a particular retaliatory arrest claim).

269. *See supra* Part VI.A (noting that the Supreme Court disfavors valuating speech, despite having the ability to consider the value of speech in First Amendment analysis).

270. *See supra* Part VI.A (discussing that political speech, such as a protest, has the highest value and protection in First Amendment jurisprudence).

271. *See supra* Part II.A (detailing *Hartman*'s effect of creating a no-probable-cause requirement for retaliatory prosecutions).

272. *See supra* Part II.B (analyzing the circuit split as to whether *Hartman*'s rule extends to arrests).

273. *See supra* Part II.B (noting that some courts have not addressed the issue of retaliatory arrests).

274. *See supra* Part II.B (stating the majority of courts impose a no-probable-cause requirement for retaliatory arrest claims).

275. *See supra* Part IV.B (delineating the chilling effect of First Amendment violations).

276. *See supra* Part V (discussing the deficiencies of the jurisprudence relevant to retaliatory arrests).

277. *See supra* Part VI (describing how a totality-of-the-circumstances test would function if applied to a retaliatory arrest claim).

278. *See supra* Part VI (analyzing the First and Fourth Amendment concerns at play in a retaliatory arrest claim and suggesting a way to balance those concerns).

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