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Arrests: Legal and Illegal

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ABSTRACT

The Fourth Amendment prohibits unreasonable searches and seizures. An arrest—manifesting a police intention to transport a suspect to the stationhouse for booking, fingerprinting, and photographing—is a mode of seizure. Because arrests are so intrusive, they require roughly a fifty percent chance that an arrestable offense has occurred. Because nonarrest seizures (aka Terry *stops), though no "petty indignity," are less intrusive than arrests, they require roughly just a twenty-five percent chance that crime is afoot.*

Any arrest not supported by probable cause is illegal. It would therefore seem to follow that any arrest supported by probable cause is legal. But it does not always follow, at least not in the Supreme Court. Instead, the Court has ruled some arrests illegal despite the presence of probable cause, the Court's concern there being with where the arrest took place. Specifically, the Court has ruled repeatedly that an otherwise legal arrest is illegal when performed in a residence that police illegally have entered.

While not about what can count as probable cause, or count as an arrest, this Essay is about their relation. My intention is to demonstrate first that all arrests supported by probable cause are legal, regardless

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of where they occur or when the probable cause originates; and second that the legality of an arrest is an issue separate from the admissibility of evidence derived from an arrest. To that end, this Essay analyzes an undisturbed line of Supreme Court cases from 1980 to 1990—United States v. Crews*,* Payton & Riddick v. New York*,* Welsh v. Wisconsin*,* Minnesota v. Olson*, and* New York v. Harris—*which when read together can make only misleading sense. By exposing the Court's penchant for mischaracterizing legal arrests—including those performed with excessive force—as illegal, this Essay concludes that highlighting the proper function of probable cause within the law of arrests can reconcile a currently irreconcilable line of cases.*

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INTRODUCTION

The Fourth Amendment prohibits unreasonable searches and seizures.[1] An arrest—manifesting a police intention to transport a suspect to the stationhouse for booking, fingerprinting, and photographing—is a mode of seizure.[2] Because arrests are so intrusive, they require roughly a fifty percent chance that an arrestable offense has occurred.[3] Because nonarrest seizures (aka *Terry* stops),[4] though no "petty indignity," are less intrusive than arrests, they require roughly just a twenty-five percent chance that crime is afoot.[5]

Any arrest not supported by probable cause is illegal.[6] It would therefore seem to follow that any arrest supported by probable cause is legal.[7] But it does not always follow, at least not in the Supreme Court. Instead, the Court has ruled some arrests illegal despite the presence of probable cause, the Court**'**s concern there being with *where* the arrest took place.[8] Specifically, the Court has ruled

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

2. Payton v. New York, 445 U.S. 573, 585 (1980) ("[T]he warrantless arrest of a person is a species of seizure required by the [Fourth] Amendment to be reasonable.").

3. *See* Andrew Guthrie Ferguson, *Facial Recognition and the Fourth Amendment*, 105 MINN. L. REV. 1105, 1177–78 (2021); Ric Simmons, *Quantifying Criminal Procedure: How to Unlock the Potential of Big Data in Our Criminal Justice System*, 2016 MICH. ST. L. REV. 947, 1005 (2016).

4. *See generally* Terry v. Ohio, 392 U.S. 1 (1968).

5. *See id.* at 10–11, 16–17; William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1023 (1995); *see also* Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1083 (1998) (twenty percent to thirty percent). Unlike arrests, *Terry* stops are prophylactic—to prevent imminent crime rather than investigate what has already been done. There are always exceptions. *See* United States v. Hensley, 469 U.S. 221, 229 (1985).

6. Ruehman v. Sheahan, 34 F.3d 525, 527 (7th Cir. 1994) ("An arrest without benefit of probable cause is illegal . . . .").

7. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 111 (1975) ("The standard for arrest is probable cause . . . ."); *see id.* at 112 (requiring that the existence of probable cause be decided in order "[t]o implement the Fourth Amendment's protection against unfounded invasions of liberty and privacy").

8. *See* Kirk v. Louisiana, 536 U.S. 635, 636–38 (2002); *see also* Payton v. New York, 445 U.S. 573, 590 (1980) ("[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

repeatedly that an otherwise legal arrest is illegal when performed in a residence that police have entered illegally.[9]

Although not about what can count as probable cause,[10] or what can count as an arrest,[11] this Essay *is* about the relation between the two. My intention is to demonstrate first that, despite what the Court has to say, all arrests supported by probable cause are legal, *regardless* of where they occur or when the probable cause originates, and second, that the legality of an arrest is an issue separate from the admissibility of evidence derived from an arrest.[12] To that end, this Essay analyzes an undisturbed line of Supreme Court cases from 1980 to 1990—*United States v. Crews*, *Payton* & *Riddick v. New York*, *Welsh v. Wisconsin*, *Minnesota v. Olson*, and *New York v. Harris*—which when read together can make only misleading sense. Part I reads *Crews* as establishing that any arrest supported by probable cause, whatever the source, is legal.[13] Part II posits that, starting less than a month after *Crews* came down, an "iron triangle"[14] of *Payton*, *Welsh*, and *Olson* would come to cut itself off from *Crews*, thereby demoting probable cause as a Fourth Amendment value.[15] Part III is an unconventional critique of *Harris* (decided the same day as *Olson*), which, in an attempt to revive *Crews*, fell short.[16] Part IV finds additional support

9. *See* cases cited *supra* note 8.

10. *See generally* Ronald J. Bacigal, *Making the Right Gamble: The Odds on Probable Cause*, 74 MISS. L.J. 279 (2004); Andrew Manuel Crespo, *Probable Cause Pluralism*, 129 YALE L.J. 1276 (2020); Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OHIO ST. J. CRIM. L. 649 (2009); Cynthia Lee, *Probable Cause with Teeth*, 88 GEO. WASH. L. REV. 269 (2020).

11. *See generally* Thomas K. Clancy, *What Constitutes an Arrest Within the Meaning of the Fourth Amendment*, 48 VILL. L. REV. 129 (2003); 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.1(a) (6th ed. 2021); Wayne R. LaFave, *"Seizures" Typology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 MICH. J.L. REFORM 417, 426–38 (1984).

12. *See infra* Part I–Part II.

13. *See infra* Part I.

14. *Cf.* Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 393 (2004) ("The Iron Triangle" of *Belton*, *Whren*, and *Atwater* "means in practice that the police have general search power over anyone traveling by automobile."). Dripps's Iron Triangle "has been ameliorated somewhat" by Arizona v. Gant, 556 U.S. 332 (2009). *See* 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 1.4(f) (6th ed. 2022).

15. *See infra* Part II.

16. *See infra* Part III.

in excessive force cases for the dispositive function of probable cause in the law of arrests.[17] By exposing the Court's penchant for mischaracterizing legal arrests as illegal, this Essay concludes that highlighting the proper function of probable cause within the law of arrests can reconcile a currently irreconcilable line of cases.[18]

I. *ANY* ARREST BASED ON PROBABLE CAUSE IS LEGAL: *UNITED STATES V. CREWS*

It is axiomatic that probable cause, however acquired, gives police authority over the body of the arrestee. The axiom comes from the 1980 case *United States v. Crews*.[19] *Crews* begins on January 3, 1974, when a woman was robbed in a public restroom near the Washington Monument.[20] Two other women were robbed in like manner in the same bathroom three days later.[21] On January 9, with reasonable suspicion that sixteen-year-old Keith Crews was the culprit, Park Police lawfully *Terry*-stopped him to take his Polaroid to show the victims, but overcast skies ruined the plan.[22] Park Police arrested Crews anyway, took his picture at the stationhouse, then released him within an hour.[23] On January 10, a victim identified Crews from a photo array; on January 13, a second victim did the same.[24] On that basis, Park Police rearrested Crews, whom those two victims again identified in lineups on January 21, 1974.[25]

Indicted the next month for robbery, Crews successfully moved to suppress the photo and lineup identifications as tainted by his first

17. *See infra* Part IV.
18. *See infra* Conclusion.
19. 445 U.S. 463 (1980).
20. *Id.* at 465.
21. *Id.*
22. *Id.* at 466–67.
23. *Id.* at 467.
24. *Id.*
25. *Crews*, 445 U.S. at 467.

arrest, which was based on less than probable cause.[26] The trial court admitted all three victims' *in-court* identifications, however.[27] Based on the first victim's in-court identification, Crews was convicted of one count of robbery.[28]

On his petition from a three-judge panel's ruling affirming the trial court, the D.C. Court of Appeals reversed en banc, suppressing *all* identifications, in and out of court, in what it adjudged "a wholly conventional application of the . . . 'fruit of the poisonous tree doctrine.'"[29] That century-old doctrine holds that all evidence (the fruit) sufficiently connected to unconstitutional police action (the tree) is inadmissible at the aggrieved party's criminal trial.[30] After granting the prosecution's petition for certiorari, the Supreme Court reversed as to Crews's in-court identification, which the Court ruled bore no causal relation to his unlawful arrest.[31] Three factors led the Court to find the in-court identification causally independent of Crews's unlawful arrest.[32]

First, because the cooperative victim promptly reported the crime, described her assailant in detail, and returned the next day to view around 100 photos (none of Crews), *her* identity was certainly not made known to police by the unlawful arrest.[33]

Second, Crews's unlawful arrest made no contribution to the victim's memory of the crime, which left in her mind a "mnemonic representation" of her assailant, whose appearance at trial she compared to that representation.[34] The victim's memory of the crime

26. *Id.* at 467–68.
27. *Id.* at 468.
28. *Id.*
29. *Id.* at 468–69 (citing Crews v. United States, 389 A.2d 277 (D.C. 1978) (en banc)).
30. *See* 3 WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, CRIMINAL PROCEDURE § 9.3(a) (4th ed. 2021) ("[T]he 'poisonous tree' can be an illegal arrest or search, illegal interrogation procedures or illegal identification practices.").
31. *Crews*, 445 U.S. at 477.
32. *Id.* at 470–74.
33. *Id.* at 471.
34. *Id.* at 472.

predated Crews's unlawful arrest, which neither caused her to be in court nor caused her to identify him once there.[35] The Court did acknowledge that pretrial photo and lineup identifications *could* taint a witness's ability to recall at trial the (more remote) crime rather than the (more recent) pretrial identification procedure.[36] But that was not the case here for a victim who: (1) viewed Crews in the bathroom for up to ten minutes in "excellent lighting," (2) accurately described him "immediately" after the crime, and (3) never identified anyone else, yet (4) twice picked him out without hesitation in nonsuggestive procedures within a week of the crime.[37] In other words, Crews's initial, unlawful arrest in no way affected that victim's capacity to reconstruct the assault from memory.

Third, and most important for our purposes, the Court ruled that Crews could not suppress himself as a fruit (like one would a gun found by police under a sofa cushion in an illegal search),[38] even though "his own presence at trial" was brought about by his unlawful arrest.[39] To begin with, the Court's precedents seem to reject such an argument; as long as prosecutors have probable cause—tainted or not—a defendant's *presence in court* is lawful, even if brought about by a police-sponsored kidnapping, be it local, interstate, or international.[40] When an arrest falls short of probable cause, the defendant's trial is constitutional if probable cause emerges by the time of trial,[41] even if the probable cause to support the arrest and charges

35. *Id.*

36. *Id.*

37. *Crews*, 445 U.S. at 473 n.18.

38. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268, 276 (1978) ("Witnesses are not like guns or documents which remain hidden from view until one turns over a sofa or opens a filing cabinet.").

39. *Crews*, 445 U.S. at 474.

40. *See id.*; *id.* at 477–79 (White, J., concurring in result); *id.* at 477 (Powell, J., concurring in part).

41. The probable-cause standard for an arrest is no different from the probable-cause standard for charges to support a trial. But the considerations in *whether* to arrest as opposed to charge/try may differ:

> Some kinds of evidence that may support a legal arrest—for example, hearsay—will be

results from police illegality.[42] The remedy at trial in such a case is to exclude evidence *derived from* police wrongdoing, but the defendant's body itself is no such evidence.[43]

Unfortunately, the Court's go-to precedents on point do not state the matter quite so clearly. Missing from these precedents are specific references to the function of probable cause. In their place are assertions that an illegal arrest will not: (1) deprive a criminal court of jurisdiction;[44] (2) "abate" judicial proceedings;[45] or (3) "void a subsequent conviction,"[46] provided the defendant has "been fairly apprized of the charges against him."[47] Much harder to find are any cases that come right out and say it: probable cause from whatever source and whatever time legitimizes holding a criminal trial.[48] This shortage is best explained by the fact that once probable cause is conceded, it is suppression of evidence, not release from custody, that

> disregarded by the prosecutor in deciding whether he can obtain a conviction. In addition, an arresting officer may have properly resolved doubts in favor of arrest because of the need to prevent flight or the destruction of evidence, factors that are irrelevant to the prosecutor's decision. Thus many more people are arrested than charged; questioning at this stage serves a "screening" function, enabling the prosecutor or in many cases the police themselves to order the release of some suspects.

Developments in the Law: Confessions, 79 HARV. L. REV. 935, 945–46 (1966).

42. *See, e.g.*, Huerta-Cabrera v. Immigr. & Naturalization Serv., 466 F.2d 759, 761 n.5 (7th Cir. 1972) (per curiam) ("Even if the arrest were illegal, the mere fact that the authorities got the 'body' of Huerta-Cabrera illegally does not make the proceeding prosecuting him . . . the fruit of the poisoned tree.").

43. *Crews*, 445 U.S. at 474.

44. Mahon v. Justice, 127 U.S. 700, 708 (1888); Ker v. Illinois, 119 U.S. 436, 444 (1886).

45. Stone v. Powell, 428 U.S. 465, 485 (1976); *see also* United States v. Alvarez-Machain, 504 U.S. 655, 669 (1992) (stating that extradition—which did *not* occur there—is predicated on probable cause).

46. Gerstein v. Pugh, 420 U.S. 103, 119 (1975).

47. Frisbie v. Collins, 342 U.S. 519, 522 (1952).

48. In "the contentious treason accusations by the Jefferson Administration against former Vice President Aaron Burr, following Burr's exploits in Louisiana Territory and the western frontier," see Roger Roots, *The Originalist Case for the Fourth Amendment Exclusionary Rule*, 45 GONZ. L. REV. 1, 25 (2010), Attorney General Caesar Rodney argued that "none of the evidence now offered would be competent on the trial; nor even if it appeared in a proper shape, would it be sufficient to convict the prisoners. But the question is whether, in this incipient stage of the prosecution, it is not sufficient to show probable cause." *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 115 (1807).

defendants seek.[49] Once the goal of suppression is reached, release from custody often, but not necessarily, follows.[50] As a result, occasions for the Court to confirm the State's authority to try a defendant despite tainted probable cause are rare; the case of Crews—who fancied "his corpus . . . itself a species of 'evidence'"[51]—being an exception.[52]

Now we can make explicit an implicit aspect of the case: Crews's re-arrest by Park Police—following his identification by two victims in two photo arrays—was legal. To be sure, when Crews was first taken to the police station on less than probable cause, his presence there was the product of his illegal arrest. But after police took his photo there, released him, and showed it to his victims, his re-arrest was based on probable cause, which renders that arrest lawful, regardless of the origin of that probable cause. Without the original illegal arrest, however, the victims would not have picked Crews out from photographs and in lineups, which is why those identifications were suppressible fruits at his trial. The fact that the probable cause for his re-arrest owed not to the prior unsupported arrest but to the victims' *ex ante* recollections and cooperation with police goes not to whether his trial could take place (yes, it could), but to whether a victim could identify him at trial without somehow exploiting the illegal arrest like the out-of-court identifications had (yes, she could).

It bears repeating that *Crews* involved two arrests: the first, based on less than probable cause, was for that reason illegal;[53] the second, based on probable cause, was for that reason legal.[54] But because that

49. *Gerstein*, 420 U.S. at 107 n.6 ("Respondents did not ask for release from state custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination. This was also the only relief that the District Court ordered . . . .").

50. *See, e.g.*, State v. Couch, No. 17520, 1999 WL 961264, at *5 (Ohio Ct. App. June 25, 1999) ("While the State may have a tougher row to hoe without the availability of the suppressed evidence, it does not necessarily follow that, as a matter of law, the defendant is entitled to dismissal of the charge.").

51. *See* United States v. Crews, 445 U.S. 463, 474 (1980).

52. *Id.* at 474 n.20 (quoting United States v. Blue, 384 U.S. 251, 255 (1966)).

53. *Id.* at 467–68.

54. *Id.* at 475.

second arrest was derived in part from the photo identifications conducted in the throes of the first arrest, no out-of-court identifications (whether conducted after the first or second arrest) were admissible because of the causal relationship between those identifications and the first illegal arrest. Crews's victims' in-court identifications of him, however, were ruled independent of, that is, not proximately caused or tainted by, the original illegal arrest.

II. "A SLEEP AND A FORGETTING":[55] THE DECADE OF MISCHARACTERIZING LEGAL ARRESTS AS ILLEGAL

The distinction between an illegal arrest (lacking probable cause) and a legal arrest (supported by probable cause, tainted or untainted) that this Essay is rehearsing promptly left the Court's consciousness after *Crews*. And it has yet to return to this day. This section of the Essay tracks that departure through its three stages.

A. The Beginning: Payton v. New York *and* Riddick v. New York

Crews was decided on March 25, 1980.[56] On April 15 of that same year, the Court decided *Payton v. New York* and *Riddick v. New York*,[57] companion cases consolidated into one litigation. Both cases involved warrantless, nonconsensual, nonemergency (read: illegal) searches of the homes of suspects whom police had probable cause to believe had committed murder and robbery, respectively.[58] After every level of New York court found the New York Police Department (NYPD) did

55. WILLIAM WORDSWORTH, ODE: INTIMATIONS OF IMMORTALITY FROM RECOLLECTIONS OF EARLY CHILDHOOD 23 (1807).

56. *Crews*, 445 U.S. at 463.

57. Payton v. New York, 445 U.S. 573 (1980). As noted, the Court of Appeals of New York consolidated *Payton* and *Riddick* into one decision due to their similarities. People v. Payton, 380 N.E.2d 224, 227–28 (N.Y. 1978). Because the distinct facts of each case are especially at issue in this Essay, I will refer to them individually where needed.

58. *See Payton*, 445 U.S. at 583 ("We also note that in neither case is it argued that the police lacked probable cause to believe that the suspect was at home when they entered.").

nothing wrong in either case, the Supreme Court reversed, thereby preventing the introduction of evidence found in the in-house searches.[59]

Although suppression of evidence was the correct ruling, the *Payton* Court got off to a bad start by characterizing the issue in the two cases as whether, absent "special circumstances" not present there, "warrantless arrests in the home are unconstitutional."[60] It is a peculiar framing of the issue, which the Court would answer in Payton's favor.[61] The issue was peculiar in that there was no in-house arrest to characterize as constitutional *or* unconstitutional because Payton was absent during the search that constituted the police illegality.[62]

The Court correctly added in a footnote: "The issue is not whether a defendant must stand trial, because he must do so even if the arrest is illegal" (provided, that is, that there is probable cause by the time of trial).[63] The *Payton* Court acknowledged that *Crews* makes that much true.[64] Instead, Payton's case turned on whether the NYPD's January 15, 1970 discovery of telltale Winchester rifle shell casings in his Bronx apartment was proximately caused by the NYPD's illegal forcible entry and search thereof.[65] The Court ruled it was; the casings admitted at Payton's murder trial therefore should have been excluded.[66]

Contrary to Payton, Riddick *was* arrested while inside his Queens house that two NYPD detectives and a parole officer had illegally

59. *Id.* at 573, 603.

60. *Id.* at 575.

61. *Id.* at 588–89 ("To be arrested in the home . . . is simply too substantial an invasion to allow without a warrant, at least in the absence of exigent circumstances, even when . . . probable cause is clearly present.").

62. *Id.* at 576–77.

63. *Id.* at 592 n.34 (citing United States v. Crews, 445 U.S. 463, 474 (1980)).

64. *See Payton*, 445 U.S. at 592 n.34 (citing United States v. Crews, 445 U.S. 463, 474 (1980)).

65. *See id.* at 576–77; People v. Payton, 380 N.E.2d 224, 226 (N.Y. 1978).

66. Excluded from Payton's murder trial was "a shotgun with ammunition in a closet and a sales receipt for a Winchester rifle and photographs of defendant with a ski mask in a dresser drawer." *Payton*, 380 N.E.2d at 226. Admitted in error at the trial was "a .30 caliber shell casing in plain view on top of a stereo set." *Id.*

entered on March 14, 1974.[67] There too the issue was the admissibility of evidence—not of Riddick's two robberies that were the object of the raid—but of the heroin and syringe that a detective stumbled upon in a dresser in Riddick's bedroom.[68] The Supreme Court properly suppressed those items in Riddick's trial for criminal possession of drugs and paraphernalia as fruit of the illegal in-house search.[69]

Lower courts had no choice but to take the Supreme Court's ruling as establishing the unconstitutionality not just of Riddick's in-house search, but also of his arrest (for being executed in the illegally searched house), though it was based on untainted probable cause.[70] In fact, the Supreme Court itself would soon after cite *Payton* for the proposition that "warrantless felony arrests in the home are prohibited by the Fourth Amendment, absent probable cause and exigent circumstances."[71] What is prohibited, however, is the police presence in the home, not the arrest; just as, by analogy, excessive force by police is prohibited, though a probable-cause-based arrest that provides the occasion for the excessive force is *not* prohibited.[72]

B. The Middle: Welsh v. Wisconsin

On the night of April 24, 1978, Edward Welsh drove his car off a Madison, Wisconsin road into a muddy field.[73] Suspecting that Welsh

67. *Id.* at 227.

68. *Id.*

69. *Payton*, 445 U.S. at 578, 603.

70. *E.g.*, Thompson v. State, 285 S.E.2d 685, 685 (Ga. 1981); LaLonde v. County of Riverside, 204 F.3d 947, 955 (9th Cir. 2000) ("The illegal search of Payton's home and the illegal arrest of Riddick did not occur until the police had entered the suspect[s'] homes." (quoting United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980))); State v. White, 838 P.2d 605, 611 (Or. Ct. App. 1992) (same); Quintero v. City of Escondido, No. 15-cv-2638-BTM-BLM, 2017 WL 4005345, at *6 (S.D. Cal. Sept. 11, 2017) (quoting United States v. Johnson, 626 F.2d 753, 757 (9th Cir. 1980)) (same).

71. Welsh v. Wisconsin, 466 U.S. 740, 749 (1984) (citing *Payton*, 445 U.S. at 583–90).

72. *See, e.g.*, Evans v. Poskon, 603 F.3d 362, 364 (7th Cir. 2010) ("The exclusionary rule is used in only a subset of all constitutional violations—and excessive force in making an arrest or seizure is not a basis for the exclusion of evidence.").

73. *Welsh*, 466 U.S. at 742; Joint Appendix at *2–3, Welsh v. Wisconsin, 1983 U.S. S. Ct. Lexis 1581 (1983) (No. 82-5466).

was drunk, a university rowing coach following behind got a passerby to alert Madison police, who, after figuring out that Welsh lived walking distance from the field, made a warrantless, nonconsensual, nonemergency (read: illegal) entry to his home, where they found him upstairs in bed, drunk.[74] After being arrested for drunk driving, Welsh's refusal to take a breathalyzer was the basis of his sixty-day license revocation,[75] which he took to the U.S. Supreme Court; the Court reversed, finding the at-home "arrest . . . clearly prohibited by . . . the Fourth Amendment."[76]

The Court's basis for reversing Welsh's license revocation—that his "arrest was . . . invalid"[77]—is misleading.[78] As in *Riddick*, it was the *search* of Welsh's home that was illegal; his *arrest* was perfectly legal.[79] As it turned out, not a single item of evidence obtained in Welsh's home played any role in his revocation case, including: (1) the condition in which police found him (muddy clothes, slurred speech, falling down);[80] (2) his stepdaughter's reference to his having just "stumbled in"; and (3) his wife's utterance to arresting Officer Daley (who had arrested Welsh for an "alcohol-related disturbance" just two weeks earlier) that "[s]omething has to be done" about Welsh's drinking.[81] Apart from giving Welsh a soft civil-rights suit for

74. *Welsh*, 466 U.S. at 743; Joint Appendix at *73, Welsh v. Wisconsin, 1983 U.S. S. Ct. Lexis 1581 (1983) (No. 82-5466).

75. *Welsh*, 466 U.S. at 757. Apart from his license revocation, Welsh was also convicted of driving while intoxicated, the appeal of which was stayed in state court, pending the U.S. Supreme Court's ruling. *See id.* at 748 n.9.

76. *Id.* at 754; *see also id.* at 755 n.15 (leaving open on remand whether police entered Welsh's home on the valid consent of his stepdaughter).

77. *Id.* at 754–55.

78. *See id.*

79. *Id.* at 754.

80. Joint Appendix at *13, *23, Welsh v. Wisconsin, 1983 U.S. S. Ct. Lexis 1581 (1983) (No. 82-5466).

81. *Id.* at *62, *76–77; *Welsh*, 466 U.S. at 758 (White, J., dissenting) ("Although Welsh argues vigorously that the State violated his federal constitutional rights, he at no point relied on the exclusionary rule, and he does not contend that the Federal Constitution or federal law provides the remedy he seeks.").

their illegal search of his home,[82] police did nothing, in or out of his home, that violated the Fourth Amendment. As with *Riddick*, lower courts have had no choice but to follow *Welsh*'s misleading proclamation that Madison police illegally arrested Welsh in his house.[83]

C. The End: Minnesota v. Olson

In *Riddick* and *Welsh*, the Supreme Court's mischaracterization of legal arrests as illegal did not amount to much in terms of Fourth Amendment law, because the courts did not suppress evidence that should not have been suppressed. *Minnesota v. Olson*,[84] however—one of two similar cases decided on April 18, 1990—is a different story. There, the Supreme Court suppressed Rob Olson's stationhouse confession as fruit of his illegal arrest in his temporary residence, despite untainted probable cause that he had participated in a murder.[85]

In the early morning of July 18, 1987, the nineteen-year-old Olson, accomplice to a fresh felony murder of a gas station manager, escaped from behind the wheel of his getaway car during the capture of principal murderer Joseph Ecker.[86] Searches by warrant of the car and Ecker's home connected Olson to both the car and the murder.[87] On a tip the next morning, Minneapolis police went to 2406 Fillmore, a northside duplex where the downstairs occupant, Helen (mother and

82. The case would not survive a motion for summary judgment by the defense, because it was not then "clearly established" that the entry constituted an illegal search. *See* Stanton v. Sims, 571 U.S. 3, 5 (2013) (per curiam).

83. *See, e.g.*, Roberts v. State, 333 S.E.2d 189, 191–92 (Ga. Ct. App. 1985).

84. 495 U.S. 91 (1990).

85. *Id.* at 95 n.2, 101.

86. *See* Brief for Petitioner, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1989 WL 429006, at *2.

87. *See* Brief for Respondent, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1988 WL 1025794, at *3–4. The Minnesota Supreme Court "left for the trial court on remand [Olson]'s claims that other evidence—statements by persons present at 2406 Fillmore at the time of the arrest and a statement by Ecker obtained after the police showed him [Olson]'s statement—should also have been suppressed as fruit of the illegal arrest." *See Olson*, 495 U.S. at 95 n.3. Like the Minnesota Supreme Court, the U.S. Supreme Court ruled on the admissibility only of the stationhouse confession.

grandmother to upstairs occupants Louanne and Julie, respectively), promised to alert police when Olson returned.[88] When Helen called police at 2:45 p.m., they called the upstairs unit, where Julie, at Olson's urging, falsely reported him absent.[89] Police then made a warrantless, nonconsensual, nonemergency (read: illegal) entry of the upstairs unit,[90] where they found Olson "hiding behind furniture and toys in the back of a small closet on the third floor attic of the building."[91] Olson was then taken to the Minneapolis Police Department Homicide office where, "within an hour of his illegal arrest,"[92] he gave Sergeant Steven Sawyer an inculpatory statement admitting to his role as an "innocent dupe" in Ecker's crime.[93]

Although the Minnesota high court had "doubts" about the trial court's finding of probable cause that Olson was accomplice to murder,[94] the U.S. Supreme Court "judge[d] the case on the assumption that there was probable cause."[95] But that had no effect on how the Court saw the act of arrest: "The police in this case made a warrantless, nonconsensual entry into a house where . . . Olson was an overnight guest and arrested him. The issue is whether the *arrest* violated Olson's Fourth Amendment rights. We hold that it did."[96]

Once we accept that Olson's arrest was illegal, it follows that his confession, given so soon after police had illegally entered the house

88. *Olson*, 495 U.S. at 93–94.

89. *See id.* at 94.

90. *See* Brief for Petitioner, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1989 WL 429006, at *4 n.4 ("Louann Bergstrom opened the door in response to the officers' knock, and the police entered with guns drawn.").

91. *See id.* at *4–5.

92. State v. Olson, 436 N.W.2d 92, 98 (Minn. 1989); *Olson*, 495 U.S. at 94.

93. *See* Brief for Respondent at 6, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1988 WL 1025794, at *6.

94. *Olson*, 436 N.W.2d at 95. Minnesota convictions of first-degree murder bypass the intermediate court of appeals and are filed as of right in the Minnesota Supreme Court. MINN. R. CRIM. P. 29.03(1).

95. *Olson*, 495 U.S. at 94 n.1.

96. *Id.* at 93 (emphasis added); *see also id.* at 94 n.1 ("[T]he absence of a warrant made respondent's arrest illegal . . . ."); *id.* at 95 ("It was held in *Payton v. New York* . . . that a suspect should not be arrested in his house without an arrest warrant, even though there is probable cause to arrest him.").

where he was staying,[97] would be inadmissible. In fact, the connection between Olson's arrest and confession is tighter than in the Court's canonical 1963 case, *Wong Sun v. United States*, which found that events after an illegal arrest *can* decouple evidence from the police illegality that initially uncovered the evidence, which can then come in at trial.[98] There, federal narcotics agents unjustifiably searched Wong Sun's San Francisco residence, found nothing, arrested him on less than probable cause anyway, then promptly arraigned and released him.[99] A few days later, Sun voluntarily dropped in at the Narcotics Bureau, where he confessed on his own accord, rendering his confession admissible as "attenuated" (the Court's word) from the illegal search and seizure Sun had suffered at home.[100] To state this in terms lifted from tort law, to which the Court's attenuation analysis is "akin,"[101] Sun's illegal arrest was the but-for, but not proximate cause of his confession.[102]

Twelve years after *Wong Sun*, the Court made clear in *Brown v. Illinois* that *Miranda* warnings are not a cure-all for illegal arrests. Nor, without more, is the fact that a confession is voluntary, as in, free from coercion beyond that inherent in a legal arrest.[103] According to *Wong Sun* and *Brown*, it takes more than voluntariness to attenuate a confession from an illegal arrest. For proper attenuation, the effects of an illegal arrest must be eclipsed by *subsequent* "intervening" events

97. *See* Brief for Petitioner, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1989 WL 429006, at *5. While police arrested Olson at 2:45 p.m., the People adjudged that he confessed "shortly after 3:00 p.m.," much earlier than an hour after the arrest. *Id.*

98. 371 U.S. 471, 491 (1963).

99. *Id.* at 473–75.

100. *Id.* at 491.

101. *See* Eric A. Johnson, *Causal Relevance in the Law of Search and Seizure*, 88 B.U. L. REV. 113, 115 (2008).

102. *See Wong Sun*, 371 U.S. at 492–93.

103. Brown v. Illinois, 422 U.S. 590, 603–04 (1975).

(such as Wong Sun's decision to confess several days after being liberated from illegal police custody).[104]

Considering the Court's rules on the admissibility of confessions derived from illegal arrests, it makes sense that neither of the published *Olson* opinions nor any of the attorneys' filings mention whether Sergeant Sawyer Mirandized or even interrogated Olson. Complying or dispensing with *Miranda* would have made no difference to the outcome; an inculpatory statement promptly received from an illegally arrested person is an inadmissible fruit of the arrest, with or without *Miranda* warnings, with or without interrogation.[105] The causal relation between tree (the arrest) and fruit (the statement) is just too direct to attenuate by any plausible standard or method. As a result, the prosecution came at the case from the angle that Olson either had no standing to complain about a search of someone else's home—where he had slept just one night to avoid arrest—or, even if Olson was aggrieved by the search, the search was necessarily warrantless, an emergency entry to prevent his escape.[106] When those prosecution arguments failed, Olson's stationhouse confession—crucial to the case against him—was excluded by both the Minnesota Supreme Court and the U.S. Supreme Court, the former explicitly relying on *Wong Sun*.[107]

Because *Riddick* and *Welsh* characterized suspects' nonemergency, in-house arrests on untainted probable cause as illegal due to the illegal

104. *Cf.* Utah v. Strieff, 579 U.S. 232, 235–36 (2016) (explaining that during an unjustifiable *Terry* stop, police learned of a valid, unrelated, unexecuted arrest warrant, on which they then relied to arrest and search the suspect, who was carrying methamphetamine, which the Court ruled admissible as attenuated from the illegal initial seizure).

105. The promptness of a post-arrest confession is said to matter because the more time that passes between the illegality and the confession, the more attenuated the one becomes from the other. For example, Wong Sun's confession was separated by several days from his arrest. *See Wong Sun*, 371 U.S. at 491. Notably, Wong Sun was out of custody when he confessed. *Id.* Because pressure on an in-custody suspect *increases*, not decreases, over time, whether the time gap between the illegality and the confession is brief or lengthy cannot benefit the prosecution in an attenuation analysis without a break in the suspect's custody. *See* Dunaway v. New York, 442 U.S. 200, 220 (1979) (Stevens, J., concurring) ("If there are no relevant intervening circumstances, a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one.").

106. *See* State v. Olson, 436 N.W.2d 92, 96–97 (Minn. 1989).

107. *Id.* at 98 (citing *Wong Sun*, 371 U.S. at 488); Minnesota v. Olson, 495 U.S. 91, 95 (1990).

entry, Hennepin County prosecutors and Minnesota Attorney General Hubert Humphrey III justifiably "had not argued that, if the arrest was illegal, respondent's statement was nevertheless not tainted by the illegality."[108] Likewise, neither Attorneys General for some eighteen other states[109] nor Solicitor General Ken Starr for the United States proffered any such argument.[110] At oral argument before the U.S. Supreme Court, the State "disavowed any claim that the statement was not a fruit of the arrest."[111] And why wouldn't the State disavow, given that the law was settled both as to what counts as an illegal in-house arrest and as to its consequences? An unsatisfying answer was imminent.

III. THE COURT'S MISLEADING FIX: *NEW YORK V. HARRIS*

Part I of this Essay has demonstrated that *Crews* established the lawfulness of any arrest supported by probable cause.[112] Part II of this Essay (*Payton*, *Welsh*, & *Olson*) demonstrated how the teaching of Part I (*Crews*) promptly left the Court's consciousness.[113] Part III will demonstrate that the Court's attempt to reclaim the teaching of *Crews* ultimately misfires.

The very same day that *Olson* was decided, the Court decided the strikingly similar *New York v. Harris*.[114] *Harris* would seem to

108. *Olson*, 495 U.S. at 95 n.2 (citing *Olson*, 436 N.W.2d at 98); *see also Olson*, 436 N.W.2d at 98 ("While the state has not argued that Olson's statement was untainted, it does argue that admission of Olson's statement at trial was harmless beyond a reasonable doubt.").

109. *See* Brief of the States of Connecticut, Delaware, Indiana, Kansas, Kentucky, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, North Carolina, South Carolina, South Dakota, Utah, Vermont, Virginia and Wyoming, National District Attorneys Association, Inc., International Association of Chiefs of Police, Inc., National Sheriffs Association, Inc., and Minnesota County Attorneys Association as Amici Curiae Supporting Petitioner, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1989 WL 1127139, at *3–4.

110. *See* Brief for the United States as Amicus Curiae Supporting Petitioner, Minnesota v. Olson, 495 U.S. 91 (1990) (No. 88-1916), 1989 WL 1127134, at *7–8.

111. *Olson*, 495 U.S. at 95 n.2.

112. *See supra* Part I.

113. *See supra* Part II.

114. *Olson*, 495 U.S. at 95 n.2 (citing New York v. Harris, 495 U.S. 14 (1990)).

repudiate *Olson* if not for a footnote in *Olson* chalking up the incompatible holdings to prosecutors' failure to anticipate *Harris*, a failure the Court pledged not to correct *sua sponte*.[115] *Harris*'s "minutiae" are well worth "hounding down,"[116] given critics' failure to engage what the majority really did wrong, which was to set up a mismatch between the holding (which is correct) and its justification (which is not). Although the Supreme Court often divides on the *outcome* of doctrine application,[117] the Justices in *Harris* divided on *which* doctrine to apply, with majority and dissenters coming at the problem from right angles. Yet, contrary to the position taken by Fourth Amendment guru Wayne LaFave, that division stems not from differing sensibilities about optimal deterrence of police illegality,[118] but from all nine Justices mischaracterizing Harris's arrest as illegal.

There was never any doubt that Bernard Harris murdered Thelma Staton on January 11, 1984.[119] The rub was that two NYPD detectives and a patrolman entered Harris's Bronx apartment five days later under circumstances that were warrantless, nonconsensual, and nonemergency (illegally, just as police had in *Payton*, *Welsh*, and *Olson*).[120] While there, after giving Detective Rivers a Mirandized confession to slitting Staton's throat with a knife, Harris was more formally arrested, taken to the stationhouse, and re-Mirandized before giving Detective Rivers a second, more detailed confession to Staton's murder.[121]

115. *See id.*

116. *See* J.L. AUSTIN, *A Plea for Excuses*, *in* PHILOSOPHICAL PAPERS 175 (James Opie Urmson & Geoffrey James Warnock eds., 3d ed. 1979).

117. *See, e.g.*, Utah v. Strieff, 579 U.S. 232 (2016) (splitting the vote 5-3 as the deceased Justice Scalia's seat was left vacant at the time of this case).

118. *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(b) & nn. 292–93 (6th ed. 2022) ("Because fruit-of-the-poisonous-tree doctrine *is* largely a matter of determining how much exclusion is necessary effectively to deter constitutional violations, it is not surprising that the *Harris* majority and dissent are miles apart on the fundamental question of what the need for deterrence actually is in this context.").

119. *See* People v. Harris, 532 N.E.2d 1229, 1230 (N.Y. 1988).

120. *Id.*

121. *Id.* at 1230, 1237.

After all three levels of New York's courts found Harris's arrest illegal,[122] Justice White's opinion for the 5–4 Supreme Court followed suit, referring to *Payton* unambiguously as "the rule that made Harris' in-house arrest illegal."[123] The dissenters too, through Justice Marshall, lapsed into the same loose usage, five times referring to Harris's arrest as illegal.[124] Even the Bronx County District Attorney conceded the illegality of Harris's arrest at its inception.[125] All of this occurred despite untainted probable cause that Harris murdered Staton.

Harris took as given the inadmissibility of Harris's first confession, which he made in his illegally searched apartment.[126] Harris's second confession, however, which he made at the stationhouse, the Court ruled admissible.[127] To justify that ruling, the Court cited *Crews* for the proposition that Harris's illegal arrest would not require his release or immunize him from prosecution, thanks to untainted probable cause that predated the illegal search of Harris's apartment.[128] But being forced to stand trial is a question separate from what evidence would be admissible at trial. So, to justify letting in the stationhouse confession, the Court constructed a ticklish distinction between an

122. *See id.* at 1231 ("Under the rule of *Payton*, this arrest was clearly illegal, as the courts below found . . . .").

123. New York v. Harris, 495 U.S. 14, 20 (1990); *see also id.* at 17 ("It is . . . evident, in light of *Payton,* that arresting Harris in his home without an arrest warrant violated the Fourth Amendment.").

124. *See id.* at 21 (Marshall, J., dissenting) ("An arrest in such circumstances violates the Fourth Amendment."); *id.* at 23 ("When faced with a statement obtained after an illegal arrest . . . ."); *id.* at 24 ("About an hour elapsed between the illegal arrest and Harris's confession . . . ."); *id.* at 25 ("[T]he officers were aware that the Fourth Amendment prohibited them from arresting Harris in his home without a warrant."); *id.* at 29 ("In each case presenting issues similar to those here, we have asked . . . whether the invasion of privacy occasioned by the illegal *arrest* taints a statement made after the violation has ended . . . .").

125. Brief for Petitioner, People v. Harris, 495 U.S. 14 (1990) (No. 88-1000), 1989 WL 1127462, at *14–15 ("[O]nce respondent left the confines of his home, his detention by the police was not unreasonable, since a police officer possessed of probable cause may make a warrantless seizure of a suspect *anywhere outside the home*." (emphasis added)).

126. *Harris*, 495 U.S. at 16.

127. The trial court's suppression of both the in-house, Mirandized confession, and a third confession, taken at the stationhouse by a prosecutor who failed to scrupulously honor Harris's attempt to recant his waiver, went unchallenged by the People. *See id.*; *Harris*, 532 N.E.2d at 1230–31.

128. *See Harris*, 495 U.S. at 18.

illegal, in-house arrest (which the Court says Harris suffered) and an "unlawful continued custody" (which the Court says ended when Harris was removed from his apartment).[129] That ticklish distinction was as far as the Court would go toward characterizing Harris's in-house arrest as legal; it was not far enough.[130]

Although not entirely empty, the term "unlawful continued custody" cannot make an illegal, in-house arrest legal simply by removing the suspect from the home. Two plausible senses of "unlawful continued custody" come to mind. The first might describe the detention of a suspect arrested on *less than* probable cause. Without releasing the suspect, only the development of probable cause could end the unlawful continued custody. Alternatively, "unlawful continued custody" might describe the detention of a suspect who, arrested without a warrant, receives a tardy, post-arrest, judicial finding of probable cause, i.e., after more than forty-eight hours in custody.[131] (The two-day time limit is how, the next year, the Court would solve "what amounted to a separation of powers question":[132] "*if* there is no probable-cause finding by a neutral magistrate *before* an arrest, there must be one *after* the arrest.")[133] In such a case, the suspect could be said to be in "unlawful continued custody" after two days but then

129. *Id.* ("Nothing in . . . [*Payton*] suggests that an arrest in a home without a warrant but with probable cause somehow renders unlawful continued custody of the suspect once he is removed from the house.").

130. *Id.*

131. "The common law obliged an arresting officer to bring his prisoner before a magistrate as soon as he reasonably could." Corley v. United States, 556 U.S. 303, 306 (2009). In 1975, the Court constitutionalized that obligation in Gerstein v. Pugh, 420 U.S. 103, 105 (1975). Without an *ex ante* judicial determination of probable cause by arrest warrant or grand-jury indictment, an arrest approved only by executive-branch agents is valid only if "promptly" ratified by a judicial officer. *See Gerstein*, 420 U.S. at 120, 125. *Gerstein* identified neither what "prompt" means nor a remedy for tardy probable-cause determinations. *Id.* at 106–07 & n.6. The Court eventually clarified "prompt," ruling that warrantless arrests not reviewed for probable cause by judicial officers within forty-eight hours become unreasonable Fourth-Amendment seizures. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). Again, the Court did not take up what the remedy would be for such a violation. *See* Powell v. Nevada, 511 U.S. 79, 84 (1994) (elaborating that "the appropriate remedy for a delay in determining probable cause" is "an issue not resolved by *McLaughlin*").

132. *See* Michael Kagan, Chevron*'s Liberty Exception*, 104 IOWA L. REV. 491, 533 (2019).

133. Manuel v. City of Joliet, 580 U.S. 357, 384 (2017) (Alito, J., dissenting).

would revert to lawful custody once a court ratifies the arresting officer's warrantless probable cause determination.[134]

Yet even that is contestable. On the one hand, "it is an 'unreasonable seizure' within the meaning of the Fourth Amendment for the police, having arrested a suspect without a warrant, to delay a determination of probable cause for the arrest."[135] On the other hand, the Court has "never suggested that lawful custody becomes unlawful due to a failure to obtain a prompt judicial finding of probable cause—that is, probable cause does not disappear if not judicially determined within 48 hours."[136] It would be peculiar to say that an arrestee who received two correct findings of probable cause—the first by the arresting police officer and the second by a judicial officer three days after his arrest—was "illegally arrested" when his third day of detention began. In a similar vein, in ruling on the remedy for a tardy determination of bail, the Court cited the then one-month-old *Harris* for the proposition that "where probable cause exists . . . a person does not become immune from detention because of a timing violation."[137] The term "unlawful continued custody" would consequently not quite be apt for tardy probable cause determinations.

Regardless, *Harris*'s reference to the *termination* of Harris's "unlawful continued custody" has no specific application, in *or* out of his apartment. If the Court is correct to call Harris's in-house arrest illegal, then his continued custody would remain illegal, *even* outside

134. *Cf.* Roger D. Groot, *Arrests in Private Dwellings*, 67 VA. L. REV. 275, 278 n.16 (1981). Four decades ago, Groot posed questions whose answers remain up in the air even today:

> How must the magistrate rule at a postarrest hearing if it appears that police made a home arrest without a warrant but with probable cause? *Payton* invalidates the arrest, but *Gerstein* seemingly permits continued custody if there is probable cause to believe the arrestee committed a crime. If *Payton* requires immediate release, does United States v. Watson authorize police to rearrest the suspect on the street outside the jail? It is notable that an arrestee must submit to the judicial process in spite of the illegality of his arrest.

Id. (citations omitted).

135. *McLaughlin*, 500 U.S. at 70 (Scalia, J., dissenting).

136. *Powell*, 511 U.S. at 91 (Thomas, J., dissenting).

137. United States v. Montalvo-Murillo, 495 U.S. 711, 722 (1990) (citing New York v. Harris, 495 U.S. 14 (1990)).

the apartment. Only if his in-house arrest were legal would his continued custody elsewhere be legal.

By designating Harris's arrest as illegal, the majority undermines admitting his stationhouse confession at his murder trial. The Court would have been better off acknowledging Harris's in-house arrest as legal, due to the untainted probable cause that police had before illegally searching his apartment. Because that probable cause is independent of the illegality, whereas evidence obtained inside the apartment is dependent on the illegality, any evidence, oral or tangible, obtained in Harris's apartment would be inadmissible fruits of that search.[138] Evidence obtained from a legally arrested person outside the illegally searched apartment, however, would be admissible.

By positing the illegality of Harris's arrest, the Court opened the door to the claim that if Harris's arrest was in fact illegal, then that illegality was likewise responsible for his stationhouse confession—a suppressible fruit.[139] After all, Detective Rivers took Harris's stationhouse confession only an hour after arresting him in his apartment,[140] far too soon to causally cut off the confession from the arrest. No plausible reading of *Wong Sun* and *Brown* or their progeny could on those facts attenuate the one from the other.

The *Harris* Court, however, did not want to compare *Harris* to *Wong Sun* and *Brown*, but to *Crews*.[141] While *Wong Sun* and *Brown* ask whether police illegality is not just the but-for cause of the

138. *See* Wong Sun v. United States, 371 U.S. 471, 485 (1963). If tangible evidence had been found in Harris's grab area in a search incident to his in-house arrest, it would be admissible only if an inventory search of his belongings was inevitably going to occur as part of his booking process at the lockup. *See* Nix v. Williams, 467 U.S. 431, 431 (1984).

139. *Cf.* Bond v. United States, 529 U.S. 334, 334 (2000) (reversing lower courts' rulings denying a motion to suppress methamphetamine and subsequent Mirandized confession as fruits of unjustified search of backpack).

140. *See Harris*, 495 U.S. at 21, 24, 31 (Marshall, J., dissenting); People v. Harris, 532 N.E.2d 1229, 1229 (N.Y. 1988).

141. *See Harris*, 495 U.S. at 18–19.

discovery of evidence but also the proximate cause,[142] *Crews* asks whether the evidence is utterly causally independent from police illegality, owing instead to a source already in place (like the memory of a victim who testifies at trial) *before* the act of police illegality.[143] *Crews* seems apt enough as precedent to support admission of Harris's stationhouse confession. Recall that there, tainted probable cause legally landed Crews in court to defend charges initiated by victims whose presence and testimony were unrelated to his initial, illegal arrest that made the victims' out-of-court identifications of him inadmissible.[144]

On closer examination, however, *Crews* only *seems* apt, in that *Harris* reads *Crews* to somehow convert an illegal arrest to legal by moving the illegally arrested suspect from the home to, say, the public sidewalk, where the arrestee's "continued custody" becomes legal. But how does that nullify the consequences of the illegal arrest? If the arrest itself is illegal, then in what sense can *either* of Harris's confessions be other than inadmissible fruit, the second coming only after he "has once let the cat out of the bag by confessing"?[145] Rather

142. *See* Hudson v. Michigan, 547 U.S. 586, 592 (2006); Powell v. Nevada, 511 U.S. 79, 89 (1994) (Thomas, J., dissenting); Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311, 319–20 (2012); Merry C. Johnson, *Discovering Arrest Warrants During Illegal Traffic Stops: The Lower Courts' Wrong Turn in the Exclusionary Rule Attenuation Analysis*, 85 MISS. L.J. 225, 234–35 (2016).

143. *Harris*, 495 U.S. at 19 (citing United States v. Crews, 445 U.S. 463, 471 (1980)). *Wong Sun* and *Brown*, like *Crews*, address the relation between two events that Eric Johnson aptly calls "coincidental," the events being police illegality and the discovery of evidence. As coincidences go, some come from out of nowhere and cut off official responsibility for the outcome. There we call the evidence independent of (*Crews*) or attenuated from (*Wong Sun* and *Brown*) police illegality. In contrast, Johnson goes on, other coincidences are predictably within the scope of the wrongful action and as such keep officials on the hook for the coincidence, resulting in suppression of evidence. *See* Eric A. Johnson, *Two Kinds of Coincidence: Why Courts Distinguish Dependent from Independent Intervening Causes*, 25 GEO. MASON L. REV. 77, 94–101 (2017).

144. *See supra* Part II.

145. United States v. Bayer, 331 U.S. 532, 540 (1947). The Supreme Court "has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the

than confront this question head-on, the Court insisted that for Fourth Amendment purposes, the legal issue is the same as it would be had the police arrested Harris on his doorstep, illegally entered his home to search for evidence, and later interrogated Harris at the station house. "Similarly, if the police had made a warrantless entry into Harris'[s] home, not found him there, but arrested him on the street when he returned, a later statement made by him after proper warnings would no doubt be admissible."[146]

As it was, Harris was arrested inside his "castle," not outside it as posited in the Court's hypotheticals above.[147] The difficulty in decoupling an illegal, in-house arrest from evidence promptly derived from it somewhere else functions as the dominant theme of Justice Marshall's dissent (not to mention the state high court's majority).[148] Once we accept that Harris was illegally arrested—a position held by every opinion at every court level of the litigation—Marshall's dissent, as a reading of *Wong Sun* and *Brown*, becomes hard to oppose.

But that position is misleading. Properly understood, Harris's in-house arrest was *not* illegal, but based on probable cause, which entitles police to arrest him *anywhere*, even in the apartment they had entered illegally. As in *Payton*, *Riddick*, *Welsh*, and *Olson*, in *Harris* it was the search that violated the Fourth Amendment, not the arrest.[149] Any evidence, tangible or oral (with or without a *Miranda* waiver),

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confessor from making a usable one after those conditions have been removed." *Id.* at 540–41. Perpetually, no. But in the short run, sometimes. Specifically, when Richard Brown, arrested on less than probable cause, made two voluntary, Mirandized statements, the first at 8:45 p.m. and the second at 2:00 a.m. the next morning, the Court ruled that "the second statement was clearly the result and the fruit of the first." Brown v. Illinois, 422 U.S. 590, 594–95, 605 (1975). The Court noted:

> The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers in the search for [the principal shooter], with his anticipation of leniency, bolstered the pressures for him to give the second, or at least vitiated any incentive on his part to avoid self-incrimination.

Id. at 605 n.12.

146. *Harris*, 495 U.S. at 18.

147. *Id.* at 15–16, 18.

148. *Id.* at 22, 25 (Marshall, J., dissenting).

149. *Compare* Payton v. New York, 445 U.S. 573, 582–83 (1980), Welsh v. Wisconsin, 466 U.S. 740, 754 (1984), *and* Minnesota v. Olson, 495 U.S. 91, 93 (1990), *with Harris*, 495 U.S. at 18.

obtained in the illegally searched apartment would be inadmissible against Harris, even though the arrest was legal. The reason being that any evidence discovered in the apartment would stem from the illegal search of Harris's apartment, in which police had no right to be. But once removed from the situs of the illegality, the probable cause supporting the legal arrest would allow him to be processed like any other lawfully arrested person: handcuffed, searched, driven to the stationhouse, fingerprinted, booked, photographed, thoroughly searched (again), and interrogated (with his permission), regardless of what had happened in his apartment.

It would have been a different matter if police had entered Harris's apartment and arrested him on less than probable cause. In such case, due to the illegal search *and* arrest, *Wong Sun* and *Brown* would deem the stationhouse confession an inadmissible fruit. That much the *Harris* Court acknowledges.[150]

But suppose, lacking probable cause that Harris murdered Staton, NYPD illegally entered and searched his house anyway to verify a weak hunch of Harris's involvement. That weak hunch would then elevate to probable cause by NYPD's discovery of Staton's corpse therein. Harris's arrest on these facts would remain *legal* (yes, legal), given that probable cause justifies all arrests, regardless of whether the probable cause is tainted (as in this hypothetical) or untainted (as in the real *Harris*). The authority for that proposition? *Crews*.[151] That much the *Harris* Court fails to acknowledge. Nor does the *Harris* Court acknowledge, as I do here, that an implication of *Crews* and *Harris* is that the function of arrest warrants is not to *authorize* arrests—that is the job of probable cause. Instead, the function of arrest warrants is to authorize searches of private places, particularly those owned or leased by third parties, to *effect* arrests.[152]

150. *Harris*, 495 U.S. at 18–19.

151. United States v. Crews, 445 U.S. 463, 469, 477 (1980).

152. This I take to be the teaching of another 1980s Supreme Court ruling, Steagald v. United States, 451 U.S. 204 (1981).

That the arrest in that hypothetical would be legal says nothing about the admissibility of evidence derived from the illegal search of Harris's apartment. Although his arrest in that hypothetical—based on the discovery of Staton's corpse—would be legal (since supported by probable cause), the illegal search, not the legal arrest, would be the proximate cause of any evidence gotten in both the apartment and the stationhouse, with or without Harris's *Miranda* waiver. Another way of saying this is that Harris's arrest, though lawful, is on those hypothetical facts based on tainted probable cause, the origin of which is the discovery of Staton's corpse in the unlawfully searched apartment.[153] Harris's body itself, once charges on that same (tainted) probable cause are filed, can still be produced for trial without offending due process or any other constitutional principle. Although the prosecution would have use only of evidence that was *not* derived from the illegal search of Harris's apartment, the trial could still take place.[154] This point, with which LaFave agrees,[155] describes just a hypothetical, not the controversy that the Supreme Court confronted in the real *Harris*, which featured an arrest based on *untainted* probable cause.

In the real *Harris*, like in *Riddick*, *Welsh*, and *Olson*, the Court declared illegal an arrest on untainted probable cause performed in

153. Staton's corpse would as a result be an inadmissible fruit of that search, provided that none of the three extant "exceptions to the exclusionary rule—the 'independent source,' 'inevitable discovery,' or 'attenuation' doctrines,'" which either deny or negate any causal connection between police wrongdoing and evidence, apply. *Crews*, 445 U.S. at 469–70 & n.11 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)). For additional doctrinal boxes pertinent to the exclusionary rule, see Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1099 (2011).

154. *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(e) (5th ed. 2020) ("If the police conduct an illegal search and as a consequence discover evidence providing probable cause that a particular person has committed a crime, an arrest of that person based upon this information is unquestionably tainted . . . .").

155. A trial court's dismissal of a case after granting a defendant's motion to suppress, *see* United States v. Williams, 227 F.2d 149, 151 (4th Cir. 1955), as often happens in New York, *see, e.g.*, People v. David L., 81 A.D.2d 893, 894 (N.Y. App. Div. 1981), would be a discretionary act. *See supra* notes 38–43 and accompanying text.

warrantless, nonconsensual, nonemergency entries to residences.[156] That mischaracterization accounts for the mismatch between *Harris*'s admissibility rulings (which are correct) and justifications (which are not), a contradiction that may explain why *Harris*, now in its fourth decade, is cited by commentators much less frequently than more recent cases on point.[157] For example, of the seven articles written for *Ohio State Journal of Criminal Law*'s 2013 symposium on the exclusionary rule, *Harris* is cited just once, in a single footnote.[158] Having provoked only three student-written notes,[159] *Harris*, in the few instances it is engaged by academia, is understandably read as a "dubious" exercise in causation,[160] not as a reflection on the grammar of arrests.[161]

156. *Compare* New York v. Harris, 495 U.S. 14, 15–16 (1990), *with* Payton v. New York, 445 U.S. 573, 582–83 (1980), Welsh v. Wisconsin, 466 U.S. 740, 740, 752 (1984), *and* Minnesota v. Olson, 495 U.S. 91, 93 (1990).

157. *Compare* Utah v. Strieff, 579 U.S. 232 (2016) (appearing in 357 law review articles in seven years), Davis v. United States, 564 U.S. 229 (2011) (appearing in 433 law review articles in twelve years), Herring v. United States, 555 U.S. 135 (2009) (appearing in 715 law review articles in fourteen years), *and* Hudson v. Michigan, 547 U.S. 586 (2006) (appearing in 848 law review articles in seventeen years), *with Harris*, 495 U.S. 14 (1990) (appearing in 227 law review articles in thirty-three years).

158. *See* Christopher Slobogin, *The Exclusionary Rule: Is It on Its Way Out? Should It Be?*, 10 OHIO ST. J. CRIM. L. 341, 347 n.58 (2013).

159. *See generally* Alan C. Yarcusko, Note, Brown *to* Payton *to* Harris*: A Fourth Amendment Double Play by the Supreme Court*, 43 CASE W. RESERVE L. REV. 253 (1992); Kathleen Chapman Kozlowski, Note, *Constitutional Law—4th Amendment—When Police Have Probable Cause to Arrest a Suspect, the Exclusionary Rule Does Not Bar the State's Use of a Statement Made Outside of a Suspect's Home Even Though the Arrest Is Made in the Home Without a Warrant*, 68 U. DET. L. REV. 287 (1991); Loletta L. Darden, *Constitutional Law—Comment, Admissibility of Confession Made Following an Illegal Warrantless Arrest*, 25 SUFFOLK U. L. REV. 1233 (1991).

160. Albert W. Alschuler, *The Exclusionary Rule and Causation:* Hudson v. Michigan *and Its Ancestors*, 93 IOWA L. REV. 1741, 1790 (2008); *see* Sharon L. Davies, *Some Reflections on the Implications of* Hudson v. Michigan *for the Law of Confessions*, 39 TEX. TECH. L. REV. 1207, 1221–26 (2007); James J. Tomkovicz, Hudson v. Michigan *and the Future of Fourth Amendment Exclusion*, 93 IOWA L. REV. 1819, 1854–55, 1861–62 (2008).

161. *But cf.* Johnson, *supra* note 101, at 151 ("Wittingly or unwittingly, Justice Thomas drew attention to the dramatic implications of *Harris* for the law of search and seizure.").

Lower courts dutifully cite *Harris* for the proposition that an illegal in-house arrest does not preclude a confession elsewhere.[162] Not only do lower courts cite *Harris* much less frequently than they do much more recent Supreme Court cases,[163] but when they do cite *Harris*, it is often subversively. Specifically, lower courts often avoid *Harris* on state constitutional grounds,[164] including the high court of New York in *Harris* itself, which dodged the U.S. Supreme Court's holding on remand through an adventurous reading of New York's right-to-counsel, not search-and-seizure, rules.[165] Such treatment of *Harris* on the part of lower courts expresses a justifiable skepticism about its reasoning.

IV. LEGAL ARRESTS EXECUTED IMPROPERLY: LESSONS FROM EXCESSIVE FORCE

To have argued here that probable cause renders any arrest *anywhere* legal is not to ignore what the Court takes to be a limit on the arrest power. For the Court, the limit that remains is that the reasonableness of any seizure depends not only on the presence of probable cause, but also on "how it is carried out."[166] (*Why* an arrest is

162. *E.g.*, United States v. Crawford, 372 F.3d 1048, 1095 (9th Cir. 2004) (Fletcher, J., dissenting); Anderson v. Calderon, 232 F.3d 1053, 1071 (9th Cir. 2000); United States v. Howard, No. CR. 02-249 (PAM/RLE), 2003 WL 60563, at *1 (D. Minn. Jan. 3, 2003); State v. Eserjose, 259 P.3d 172, 175–76 (Wash. 2011) (en banc); State v. Felix, 811 N.W.2d 775, 777 (Wis. 2012); Timmons v. State, 723 N.E.2d 916, 921 (Ind. Ct. App. 2000); State v. Couch, No. 17520, 1999 WL 961264, at *9 (Ohio Ct. App. June 25, 1999); State v. Thierbach, 635 N.E.2d 1276, 1278 (Ohio Ct. App. 1993); State v. Jenkins, 81 S.W.3d 252, 264 (Tenn. Crim. App. 2002); State v. Malone, No. W2009-02047-CCA-R3-CD, 2011 WL 1005487, at *9–10 (Tenn. Crim. App. Mar. 22, 2011).

163. *Compare* Utah v. Strieff, 579 U.S. 232 (2016) (appearing in 759 court opinions in seven years), Davis v. United States, 564 U.S. 229 (2011) (appearing in 2,253 court opinions in twelve years), Herring v. United States, 555 U.S. 135 (2009) (appearing in 2,245 court opinions in fourteen years), *and* Hudson v. Michigan, 547 U.S. 586 (2006) (appearing in 1,633 court opinions in seventeen years), *with* New York v. Harris, 495 U.S. 14 (1990) (appearing in 755 court opinions in thirty-three years).

164. *E.g.*, State v. Luurtsema, 811 A.2d 223, 233 (Conn. 2002); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(b) n.292 (6th ed. 2022).

165. *See* People v. Harris, 570 N.E.2d 1051, 1054–55 (N.Y. 1991) (remanding for a new, confession-free trial).

166. Tennessee v. Garner, 471 U.S. 1, 8 (1985).

carried out, on the other hand, is largely irrelevant.)[167] How arrests are carried out is not so much a matter of the length of the seizure as it is the force,[168] which includes such gestures as the application of handcuffs.[169] Specifically, some arrests are more closely regulated because they are "conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests."[170]

Accordingly, though it is a basic principle that "[t]he right to make a lawful arrest carries with it the right to use reasonable force to effectuate that arrest,"[171] unreasonable force is another matter. Since the 1980s, the Court has insisted that "claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard."[172] The argument runs that it would be an unreasonable seizure—despite probable cause—to, for example, shoot a fleeing jaywalker in the back (with or without an adequate warning),[173] just as

167. *See* Whren v. United States, 517 U.S. 806, 809 (1996). The Court explained:

> We of course agree . . . that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

Id. at 813.

168. That *nonarrest* seizures (aka *Terry* stops) do not last too long *is* an element of their lawfulness. *See, e.g.*, Rodriguez v. United States, 575 U.S. 348, 354 (2015). The Court does not similarly regulate the duration of arrests, however. Once a judge has found probable cause (as many as forty-eight hours after a warrantless arrest), the constitutional right to a speedy trial places only weak pressure on the prosecution to charge and try an arrestee, even one who remains in custody. *See* United States v. Loud Hawk, 474 U.S. 302, 312–17 (1986).

169. *See* Muehler v. Mena, 544 U.S. 93, 103 (2005) (Kennedy, J., concurring) ("The use of handcuffs is the use of force . . . ." (citations omitted)).

170. *Whren*, 517 U.S. at 818 (citing police use of deadly force in effecting an arrest as an example).

171. Lin v. County of Monroe, 66 F. Supp. 3d 341, 358 (W.D.N.Y. 2014).

172. Graham v. Connor, 490 U.S. 386, 395 (1989); *see* Tennessee v. Garner, 471 U.S. 1, 7–8 (1985); Scott v. Harris, 550 U.S. 372, 381 (2007); Plumhoff v. Rickard, 572 U.S. 765, 774 (2014).

173. *Scott*, 550 U.S. at 382–83 (quoting *Garner*, 471 U.S. at 4, 21) (ruling it "unreasonable to kill a 'young, slight, and unarmed' burglary suspect by shooting him 'in the back of the head' while he was running away on foot and when the officer 'could not reasonably have believed that [the suspect] . . . posed any threat,' and 'never attempted to justify his actions on any basis other than the need to prevent an escape'" (citations omitted)).

it would to tase a cooperative motorist stopped for an illegal left-hand turn.[174] Once we get past the difficulty of accepting that an arrest occurs when police shoot or tase a person[175]—a peculiar way to manifest what LaFave calls "the decision to take a suspect into custody"[176] (or what Justice Gorsuch calls "the act 'by which a man becomes a prisoner'")[177]—there is another difficulty in finding excessive force to violate the Fourth Amendment.

The difficulty is that the normal consequence of a Fourth Amendment violation is exclusion of evidence derived from the violation.[178] Exclusion of ill-gotten gains makes good sense as a rule, given that it is only mildly cynical to say that the whole point of arresting anyone for anything is to search the arrestee's grab-area for evidence.[179] But the remedy of exclusion seems to have no logical connection or application to a probable-cause-based seizure later adjudged to be illegal because police used excessive force.[180]

On four different occasions the Court has "severed" unconstitutional phases of police actions from constitutional phases of those same actions; the upshot being to admit evidence based on the legal phase of the action, rather than exclude evidence based on the illegal phase

174. *Graham*, 490 U.S. at 394 ("In *Garner*, we addressed a claim that the use of deadly force to apprehend a fleeing suspect who did not appear to be armed or otherwise dangerous violated the suspect's constitutional rights, notwithstanding the existence of probable cause to arrest.").

175. *See* Torres v. Madrid, 141 S. Ct. 989, 997 (2021). The Court explained:

> Neither the parties nor the United States as *amicus curiae* suggests that the officers' use of bullets to restrain Torres alters the analysis in any way. And we are aware of no common law authority addressing an arrest under such circumstances, or indeed any case involving an application of force from a distance.

Id.

176. WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 166 (Frank J. Remington ed. 1965).

177. *Torres*, 141 S. Ct. at 1008–09 (Gorsuch, J., dissenting).

178. *See* United States v. Crews, 445 U.S. 463, 470–71 (1980).

179. *Cf.* Dripps, *supra* note 14 (demonstrating how three Supreme Court rulings converge to incentivize police to perform traffic stops to search motorists and their passenger compartments).

180. *See, e.g.*, United States v. Collins, 714 F.3d 540, 543–44 (7th Cir. 2013) (collecting cases ruling the exclusionary rule inapplicable to Fourth Amendment claims based on excessive force).

of the action.[181] *Harris*, which severed the illegal search of Harris's home and what the Court took to be his illegal arrest therein from his legal confession elsewhere, is one of those four occasions.[182] Although none of the four cases feature arrests marked by excessive force, the Supreme Court has never indicated that exclusion of evidence would be a remedy for excessive force in the context of a probable-cause-based arrest. Instead, the criminal conviction underlying the arrest remains intact; the excessive force claim is relegated to a civil-damages suit under 42 U.S.C. § 1983, which is "better calibrated to the actual harm" than exclusion, a matter "collateral" to the otherwise legal arrest.[183]

Indeed, "recent case law . . . questions whether a civil rights claim for excessive force following resistance and arrest necessarily renders an arrest unlawful and thereby invalidates an underlying conviction for resisting arrest . . . ."[184] Recent case law also supports that an officer may be justified in the use of force to effect an arrest even when the arrest itself is invalidated for lack of probable cause, so long as the forced deployed is proportionate to what a probable-cause-based search would have allowed.[185] The idea here, in its most boiled-down form, is that "excessive force claims are 'separate and distinct from' unlawful arrest claims."[186] The reason? Probable cause without more is definitory of legal arrests.

181. Tomkovicz, *supra* note 160, at 1849–55; Wilson v. Layne, 526 U.S. 603, 614 & n.2 (1999); United States v. Ramirez, 523 U.S. 65, 71–72 & n.3 (1998); New York v. Harris, 495 U.S. 14, 21 (1990).

182. *Harris*, 495 U.S. at 17.

183. United States v. Watson, 558 F.3d 702, 705 (7th Cir. 2009).

184. *See, e.g.*, Hayward v. Cleveland Clinic Found., 759 F.3d 601, 612 (6th Cir. 2014).

185. *See* Suttles v. Butler, 564 F. Supp. 3d 1317, 1328 n.5 (N.D. Ga. 2021); Graddy v. City of Tampa, 996 F. Supp. 2d 1193, 1206 n.16 (M.D. Fla. 2014); Freeman v. Gore, 483 F.3d 404, 416–17 (5th Cir. 2007); Bodine v. Warwick, 72 F.3d 393, 400 n.10 (3d Cir. 1995).

186. Bailey v. Ramos, No. SA-20-CV-00466-XR, 2023 WL 2147700, at *15 (W.D. Tex. Feb. 17, 2023).

CONCLUSION

It is rare for a court or commentator to acknowledge that Bernard Harris's arrest was legal.[187] Rare, even though it is hard to read *Crews* any other way, despite what the Court would come to say in *Payton, Riddick*, *Welsh*, *Olson*, and *Harris* itself: that nonemergency, in-house arrests on untainted probable cause are illegal.[188] In those rare instances, the acknowledgment is off-hand.[189] To follow through would be first to record that *Crews* renders the in-house arrests of Riddick, Welsh, Olson, and Harris legal; and second, to ditch the Court's ticklish distinction which holds that, while "arresting Harris in his home without an arrest warrant violated the Fourth Amendment,"[190] probable cause made his "continued custody" elsewhere legal.[191] That misleading basis for adjudging Harris's stationhouse confession independent of the illegal search of his apartment explains *Harris*'s current role as a difficult-to-defend fruits case, rather than its potential role as a central precedent within the Court's regulation of arrests. In closing, I hope here to have neither

187. Only four court opinions have acknowledged that Harris's arrest was legal, all from Tennessee, and only one of them published. *See* Taylor v. Myers, 345 F. Supp. 2d 855, 870 (W.D. Tenn. 2003); State v. Womack, No. M2013-02743-CCA-R3-CD, 2014 WL 7185404, at *10 (Tenn. Crim. App. Dec. 5, 2014); State v. Hurst, No. 03C01-9804-CR-00127, 1999 WL 595404, at *5 (Tenn. Crim. App. Aug. 10, 1999); State v. Taylor, No. 02C01-9501-CR-00029, 1996 WL 580997, at *13 (Tenn. Crim. App. Oct. 10, 1996).

188. *See* Payton v. New York, 445 U.S. 573, 582 (1980); Welsh v. Wisconsin, 466 U.S. 740, 749, 754 (1984); Minnesota v. Olson, 495 U.S. 91, 94–95 (1990); New York v. Harris, 495 U.S. 14, 21 (1990).

189. *See* People v. Marquez, 822 P.2d 418, 426 (Cal. 1992) ("[T]he lack of an arrest warrant does not invalidate defendant's arrest or require suppression of statements he made at the police station."); Hornedo v. Artus, No. 04-CV-3201, 2008 WL 346360, at *9 (E.D.N.Y. Feb. 6, 2008) ("[W]here police arrest a suspect in his home without a warrant but with probable cause, the entry into the home violates the Fourth Amendment but does not render the arrest illegal . . . ."); Daniel J. Capra, *Prisoners of Their Own Jurisprudence: Fourth and Fifth Amendment Cases in the Supreme Court*, 36 VILL. L. REV. 1267, 1309–10 (1991) ("[T]he violation of *Payton* constitutes an illegal *search* of the home, but not an illegal arrest . . . ."); Johnson, *supra* note 101, at 142 (analyzing that *Harris* "fail[ed] to distinguish the *entry*, which was unlawful, from the *arrest itself*, which was lawful apart from the fact that it was 'tainted' by the entry").

190. *Harris*, 495 U.S. at 17.

191. *Id.* at 18.

overread *Crews*, nor to have underestimated the extent to which "a man's house is his castle."[192] And if I have not, then perhaps I have suggested a way for the Court—by abiding by the axiom that any arrest based on probable cause is legal—to come out of its post-*Crews* "sleep and forgetting"[193] for the purpose of reconciling this otherwise irreconcilable line of cases of the 1980–1990 epoch.

192. *See*, *e.g.*, Lange v. California, 141 S. Ct. 2011, 2018 (2021) (quoting *Payton*, 445 U.S. at 596–97 & nn. 44–45). The endurance of this adage may be withering. As privacy goes, a phone "contains a broad array of private information never found in a home in any form—unless the phone is." Riley v. California, 573 U.S. 373, 396–97 (2014).

193. WORDSWORTH, *supra* note 55.