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ARTICLES

ON REASONABLENESS: THE MANY MEANINGS OF LAW'S MOST UBIQUITOUS CONCEPT

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> "The term 'unreasonable' is no doubt difficult to define. That said, it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning."
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> *Sandra Day O'Connor, Associate Justice*
> *United States Supreme Court*[1]

> "What is reasonableness? What are its components? There is no consensus on this matter."
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> *Aharon Barak, President*
> *Supreme Court of Israel*[2]

* Senior Judge, United States Court of Appeals for the Second Circuit. This article has benefitted from the questions and comments offered by students in seminars on "The Concept of Reasonableness" that I conducted at the law schools of the University of Connecticut and the University of Hawai'i.

1. Taylor v. Williams, 529 U.S. 362, 410 (2000).

2. AHARON BARACK, PROPORTIONALITY–CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 373 (2012).

The idea of exploring the concept of reasonableness first occurred to me during my years as a District Judge. I noticed that in a wide variety of cases, when I reached the critical portion of a jury charge, I frequently told the jurors that the applicable standard was "reasonableness" or its antonym "unreasonableness." In criminal cases, I told them that conviction required proof beyond a reasonable doubt. In antitrust cases, I told them that agreements in restraint of trade were unlawful if they were unreasonable. In civil rights cases seeking damages for police searches, I told them to apply the standard twice: the homeowner had to prove that the police officer's search was unreasonable, but, even if it was, the officer had a qualified immunity defense if the officer had a reasonable belief that the action taken was lawful.

The more I spoke the word "reasonable," the more I wondered why the jurors never came back and asked, "Judge, could you explain exactly what you mean by 'reasonable'?" Fortunately, they never asked.

In many cases, appellate courts also invoke the concept of reasonableness without explaining it, but in some cases, they have tried to give meaning to "reasonableness," the law's most ubiquitous concept. Four different approaches can be identified, three of which employ what generously can be called an analysis, and a fourth, if it can be called an approach at all, that seems to lack any analysis. This article will consider each of these four approaches in three contexts in the hope that the resulting twelve sections will promote some understanding of what courts are not just saying, but actually doing in cases where "reasonableness" is the applicable standard.

Before discussing "reasonable" in different legal contexts, I first consider the word in ordinary, nonlegal speech and writing as illustrated by the various definitions in a leading dictionary. Some of these definitions use value-laden words without fixed meaning. One definition, for example, is "being in agreement with right thinking or right judgment"[3] and "possessing good sound

3. *Reasonable*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).

judgment."[4] Other definitions suggest a result just short of some outer limit—for example, "not extreme" and "not excessive."[5] Others suggest a result near but well within some outer limit—for example, "moderate."[6] That dictionary also offers "reasonable" as a synonym for "rational," and defines "rational" as being "intelligent."[7] These nonlegal uses of the term, which might be termed "colloquial," are significant in their lack of consistent meaning.

Moving from colloquial speech to court interpretations, I start by briefly identifying the four approaches that some courts take with respect to the concept of "reasonableness": (I) viewing reasonableness as a continuum, (II) balancing or weighing interests and effects, with a balance in favor of positive interests or effects considered reasonable and a balance in favor of negative interests or effects considered unreasonable, (III) articulating a standard, factor, or factors relevant to determining reasonableness and providing some guidance as to how that standard or those factors are to be applied, and (IV) determining reasonableness without identifying any method of analysis or any standard or factor. I illustrate these four approaches by exploring each in three contexts in which they are applied.

I. REASONABLENESS AS A CONTINUUM

The first approach considers the concept as a continuum along which unreasonableness is reached at some point, although that point is not clearly marked, nor are criteria identified for determining where that point is located. This approach appears to be inherent in the following contexts: (1) a continuum of certainty implicitly guides the determination of whether guilt is proven beyond a reasonable doubt, (2) a continuum of severity

4. *Id.*
5. *Id.*
6. *Id.*
7. *Rational*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986).

implicitly guides the determination of whether a federal court sentence is unreasonable, and (3) a continuum unrelated to an identified characteristic implicitly guides the determination of whether an interval of time is reasonable.

A. Reasonable Doubt[8]

The most familiar context in which the concept of reasonableness can be thought of as a point along a continuum is the traditional phrase of a jury charge instructing that conviction in a criminal case requires proof "beyond a reasonable doubt."[9] A curious aspect of the concept in this context is the view, expressed by many courts, that trial judges should not try to explain to juries what the phrase means.[10] How odd that courts are fearful of giving jurors some guidance as to what they mean by proof "beyond a reasonable doubt."

Nevertheless, some attempts at elaboration have been made. A widely respected treatise on jury

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8. This section is adapted from my article, *Taking "Beyond a Reasonable Doubt" Seriously*, 103 JUDICATURE 54 (2019).

9. Understood today as a protection for those accused of crime, the standard of proof beyond a reasonable doubt has been said to have originated in the Middle Ages as a protection for jurors in England who feared that they would be committing a mortal sin if they found guilty a defendant who was in fact innocent. *See* JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 3 (2008). Judge Richard A. Posner has challenged Whitman's historical contention. Posner points out that the theological concern about convicting an innocent person and thereby subjecting jurors and judges to damnation for error, though prevalent in the Middle Ages, was not a significant factor centuries later when the reasonable doubt standard came into use. *See* Richard A. Posner, *Convictions*, NEW REPUBLIC (Feb. 27, 2008), https://newrepublic.com/article/62036/convictions.

10. *See*, *e.g.*, United States v. Hall, 854 F.2d 1036, 1037–39 (7th Cir. 1988) ("[W]e have decried the use of instructions which attempt to define reasonable doubt."); Murphy v. Holland, 776 F.2d 470, 478–79 (4th Cir. 1985), *vacated on other grounds*, 475 U.S. 1138 (1986); United States v. Davis, 328 F.2d 864, 867–68 (2d Cir. 1964); *see also* Holland v. United States, 348 U.S. 121, 140 (1954) ("'[A]ttempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury.'" (quoting Miles v. United States, 103 U.S. 304, 312 (1880)). *See generally* Henry A. Diamond, Note, *Defining Reasonable Doubt: To Define, or Not to Define*, 90 COLUM. L. REV. 1716, 1718–21 (1990).

instructions provides a model charge that includes this language: a reasonable doubt is "a doubt which would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life."[11] The "hesitate to act" formulation probably originated in *Posey v. State*,[12] was first cited by a federal court in *Bishop v. United States*,[13] and entered Supreme Court jurisprudence in *Holland v. United States*.[14]

I disapprove of this elaboration because I have learned, from asking several people, that it is subject to different interpretations. Some people think it means that if they, as potential jurors, were to think that the evidence leaves them with a doubt comparable to the doubt that would cause them to hesitate before deciding some important matter, then they should vote "not guilty." That understanding seems to be what the instruction literally requires them to do. Other people, however, reject this literal understanding because they almost always hesitate before making important decisions, and they do not think a judge would be telling them to find nearly every defendant "not guilty." For these people, the instruction suggests caution: if they conclude that the evidence has created a doubt comparable to the doubt that would cause them to hesitate before making an important personal decision, they should take a careful look at all the evidence and vote to find the defendant guilty only if they are then quite sure that he is guilty. In other words, for one group, reaching the point of hesitation ends the process of deliberation; for the other group, reaching that point permits the process to continue but with caution.[15] However juries understand

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11. Leonard B. Sand *et al.*, *Instruction 4-2 Reasonable Doubt*, MODERN FEDERAL JURY INSTRUCTIONS 4.01, (1993).

12. 93 So. 272, 273 (Ala. Ct. App. 1922).

13. 107 F.2d 297, 303 (D.C. Cir. 1939).

14. 348 U.S. 121, 140 (1954).

15. In approving the "hesitate to act" formulation, the Supreme Court criticized the trial judge's instruction, which had defined reasonable doubt as "'the kind of doubt . . . which you folks in the more serious and important affairs of your own lives might be willing to act upon,'" *Holland*, 348 U.S. at 138 (quoting

this elaboration, the fact that this common "explanation" is ambiguous ought to cast doubt on its utility.[16]

Another elaboration tells juries that a reasonable doubt is "a doubt based on reason."[17] This elaboration has three defects. First, it runs counter to the idea that a juror should be entitled to vote "not guilty" based only on a gut feeling, without any particular rationale.[18] Second, it can create ambiguity as to whether the juror has a doubt for which a reason can be thought of in the juror's mind or a doubt that the juror can articulate to other jurors. Third, it might mislead a jury to look to the defendant for an explanation.[19] The "based on reason" formulation has encountered some criticism, mostly in an earlier time.[20] In *Jackson v. Virginia*, the Supreme Court said that "[a] 'reasonable doubt,' *at a minimum*, is one based on 'reason.'"[21]

Still a third approach to explaining reasonable doubt urges a numerical standard. Judge Jack B. Weinstein has suggested that burdens of proof can be expressed as percentages of probabilities, with 50 percent for "preponderance," 70 percent for "clear and convincing," 80 percent for "clear, unequivocal, and convincing,"[22] and 95

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trial judge), and said that "the charge should have been in terms of the kind of doubt that would make a person hesitate to act." *Id.*

16. The "hesitate to act" formulation has been criticized as "risking trivialization of the constitutional standard." United States v. Noone, 913 F.2d 20, 28–29 (1st Cir. 1990).

17. *See*, *e.g.*, United States v. Johnson, 343 F.2d 5, 6 n.1 (2d Cir. 1965) (cited with approval in Johnson v. Louisiana, 406 U.S. 356, 360 (1972)); Sand *et al.*, *supra* note 11 at 4-2.

18. *See* Chalmers v. Mitchell, 73 F.3d 1262, 1274 (2d Cir. 1996) (Newman, then C.J., dissenting) ("A juror is entitled simply to have a gut feeling that, after consideration of all the evidence, a reasonable doubt remains in the juror's mind.").

19. *See id.* at 1268.

20. *See id.*; United States v. Fatina, 184 F.2d 18, 23–24 (2d Cir. 1950) (Frank, J., dissenting); Pettine v. Territory of New Mexico, 201 F. 489, 495–97 (8th Cir. 1912); Owens v. United States, 130 F. 279, 283 (9th Cir. 1904).

21. Jackson v. Virginia, 443 U.S. 307, 317 (1979) (emphasis added).

22. *See* United States v. Fatico, 458 F. Supp. 388, 405–06 (E.D.N.Y. 1978), *aff'd without consideration of this point*, 603 F.2d 1053 (2d Cir. 1979).

percent for "beyond a reasonable doubt."[23] Judge Weinstein wrote about percentages of "probabilities," but the concept of probabilities, at least in a technical sense, is inappropriate. Probabilities generally have to do with the likelihood that a particular outcome will occur in the future.[24] For example, if a coin is flipped, the probability that it will come up heads is 50 percent, there being only two equally likely outcomes. What the probability of 50 percent really means is that if the coin is flipped 100 times, it will likely come up heads fifty times. I say "likely" because the number of times the predicted result will occur in a sequence of results depends on standard deviation analysis. The more times the coin is flipped, the more likely it will be that the percentage of times heads will come up will really be fifty.

Probability analysis, in this technical sense, is not applicable to the standard of proof beyond a reasonable doubt, unless those urging a 95 percent probability for proof beyond a reasonable doubt want a juror to find guilt only when persuaded that if 100 people were tried with the same evidence presented in the defendant's case, at least ninety-five of those defendants would in fact be guilty.[25] It is unlikely that a juror told that beyond a reasonable doubt means a 95 percent probability of guilt would understand the approach just described.

The Supreme Court pointed toward the most appropriate way to think about reasonableness in the context of the standard of proof for conviction of crime in *In re Winship*,[26] the decision establishing the "beyond a

23. United States v. Schipani, 289 F. Supp. 43, 57 (E.D.N.Y. 1968), *aff'd*, 414 F.2d 1262 (2d Cir. 1969).

24. In some contexts, a probability is expressed as to a past event. For example, a doctor might say that there is a 50 percent probability that the cause of a death was a heart attack. In a sense, this is a probability applied to a past event, but it can also be viewed as the doctor saying that if, before the death, he knew the facts he then knew, he would have predicted that there is a 50 percent probability that the cause of death will be a heart attack.

25. For other possible interpretations (or misinterpretations) of what a 95 percent probability for guilt beyond a reasonable doubt might mean, *see* Jon O. Newman, *Quantifying the Standard of Proof Beyond a Reasonable Doubt: A Comment on Three Comments*, 5 LAW, PROBABILITY & RISK 267 (2006).

26. 397 U.S. 358 (1970).

reasonable doubt" standard as a requirement of due process of law. The Court stated, "[T]he reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.'"[27] The Court repeated the "certitude" language of *Winship* in *Jackson v. Virginia*, modifying the language to "near certitude."[28] As the Court explained in *Jackson*, "[B]y impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard [of proof beyond a reasonable doubt] symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself."[29] Precisely. The standard is met when the jurors have reached "a subjective state of near certitude" concerning the defendant's guilt.

In 1987, a subcommittee of the Committee on the Operation of the Jury System of the United States Judicial Conference proposed a model jury charge that included these words: "Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt."[30] Justice Ginsburg endorsed this charge language, stating, "This Model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly."[31]

If certitude (or certainty) is thought of as a continuum, "beyond a reasonable doubt" means that the probative force of the evidence of guilt has reached a point very far along a continuum of certainty. If the continuum were to be expressed in numerical terms with the scale of certainty running from zero to 100, the "near certainty" that *Winship* and *Jackson* require for proof

27. *Id.* at 364 (quoting Dorsen & Rezneck, *In re Gault and the Future of Juvenile Law*, 1 FAM. L. Q. No. 4, 1, 26 (1967)).

28. 443 U.S. at 315. *Jackson* incorrectly cited to Justice Harlan's concurring opinion in *Winship*, 397 U.S. at 372, *see Jackson*, 443 U.S. at 315, when in fact the "near certitude" language appeared in Justice Brennan's opinion for the Court, *Winship*, 397 U.S. at 364.

29. 443 U.S. at 315.

30. FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS 17–18, Instruction 21 (1987).

31. Victor v. Nebraska, 511 U.S. 1, 23, 27 (1994) (Ginsburg, J., concurring).

beyond a reasonable doubt would probably be reached at least above ninety, perhaps around ninety-five. I do not expect any court to include a numerical measure of certainty in a jury charge on what it means to prove guilt beyond a reasonable doubt, but a numerical measure would make clear what "near certainty" means. In the absence of a numerical measure, it would help to tell jurors that a finding of guilty requires a very high degree of certainty. Unfortunately, standard practice is not to speak of near certainty, but instead, either to offer no explanation at all or to amplify briefly with the ambiguous "hesitate to act" or the ill-advised "doubt based on reason" formulations.

Having usefully explained in *Jackson* the concept of reasonable doubt in terms of near certitude (repeated from *Winship*), the Supreme Court then substantially weakened the rigor of the concept when, later in *Jackson*, it considered the task of an appellate court adjudicating a claim that the evidence was insufficient to permit a jury to find guilt beyond a reasonable doubt.[32] The most frequently cited appellate review standard from *Jackson* states, "The relevant question is whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[33] By requiring only that one out of many rational juries could have found guilt beyond a reasonable doubt (and gratuitously emphasizing the point by italicizing "any"), this statement diminished the rigor of appellate review. Earlier in *Jackson*, the Court stated the appellate review standard far more appropriately: "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."[34] Unfortunately, appellate courts far more

32. *See Jackson*, 443 U.S. at 319.

33. *Id.* (emphasis in original).

34. *Id.* at 318.

frequently quote the "*any* rational trier" formulation.[35] Instead, they should ask "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt."[36]

The Court's formulations of the appellate-review task also suffer from the use of the word "rational." The Court had it right when it first said that the appellate task is "to determine whether the record evidence could *reasonably* support a finding of guilt beyond a reasonable doubt."[37] By stating the task to be whether a "rational trier of fact" could find guilt beyond a reasonable doubt,[38] the Court risked requiring only a finding by a jury that was not irrational, *i.e.*, acting without any basis in fact.

Across the Atlantic, the idea of near certainty is captured in various phrasings. English judges sometimes simply tell a jury that they may not convict unless they "are sure" of guilt.[39] The French Code of Criminal Procedure instructs the *Cours d'Assise* to read to a mixed panel of three judges and nine lay jurors a charge that includes the following: "The law asks [judges] only the single question, which encompasses the full measure of their duties: 'Are you thoroughly convinced?'"[40]

So what can be said about the concept of reasonableness in the context of proof beyond a reasonable doubt? First, the concept can have several meanings, some of which are undesirable. Second, the concept can also have a fairly precise and useful meaning if it is thought of as a point very far along a continuum of certainty, which could be expressed in numerical terms. Viewed this way, the concept has nothing to do with the reasonableness of

35. A Westlaw search conducted in 2018 revealed that the "*any* rational trier of fact" formulation had been used in federal appellate opinions 9,080 times and the "could reasonably support a finding of guilt" formulation had been used 92 times. *See* Posner, *supra* note 9, at 38.

36. *Jackson*, 443 U.S. at 318.

37. *Id.* (emphasis added).

38. *Id.* at 317, 319.

39. *See*, *e.g.*, Ferguson v. The Queen, [1979] 1 W.L.R. 94, 98, 1 All E.R. 877 (1978).

40. CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] [CRIMINAL PROCEDURE CODE] art. 353 (Gerald L. Kock & Richard S. Frase, trans., 1988).

the doubt in a juror's mind, and, in my view, that is a good thing. Instead of inviting jurors to consider whether any doubt they might have about the defendant's guilt is reasonable, trial judges would do well to retain in a jury charge the verbal formulation of "beyond a reasonable doubt," which is both familiar and constitutionally required, and then explain that what this instruction really means is that a finding of guilt requires a very high degree of certainty, not absolute certainty, but something close to it.

B. Unreasonable Severity of Federal Court Sentences

A second context in which reasonableness (or unreasonableness) can be thought of as a point along a continuum is federal court review of the severity of non-capital criminal sentences.

Whether the length of a sentence is reasonable or unreasonable is a relatively new issue for federal appellate courts, arising for the first time in 1987 when the appellate-review provision of the Sentencing Reform Act of 1984[41] became effective.[42] Before then, defendants challenging the length of a sentence had only the limited claim that their punishments were "cruel and unusual" in violation of the Eighth Amendment.[43] However, some

41. 18 U.S.C. § 3742.

42. Sentencing Reform Act of 1984 § 3742.

43. U.S. CONST. amend. VIII. Most Supreme Court decisions applying the Eighth Amendment do not assess the length of a sentence. Instead, they consider such things as the means of carrying out a punishment, *see, e.g.,* Wilkerson v. Utah, 99 U.S. 130, 134–35 (1878) (allowing execution by shooting); the quality of a prisoner's treatment, *see, e.g., In re* Kemmler, 136 U.S. 436, 447 (1890) ("Punishments are cruel when they involve torture or a lingering death."); Trezza v. Brush, 142 U.S. 160, 160 (1891) (solitary confinement); the age of the defendant, *see, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012) (life sentence without parole for defendant under 18 at time of offense violates Eighth Amendment); Roper v. Simmons, 543 U.S. 551, 575 (2005) (death sentence for defendant age 17 at time of crime (murder) violates Eighth Amendment); and the nature of the offense, *see, e.g.,* Robinson v. California, 370 U.S. 660, 667 (1962) (punishment for offense of being addicted to the use of narcotic violates Eighth Amendment); Ingraham v. Wright, 430 U.S. 651, 667 (1977) (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such."). Even the Court's most quoted sentence on the Eighth Amendment—

of the Supreme Court's Eighth Amendment decisions merit consideration because they use the concept of sentence "proportionality," which is somewhat analogous to sentence "reasonableness."

In the first Supreme Court case to rule a sentence in violation of the Eighth Amendment, the Court said, "it is a precept of justice that punishment for crime should be graduated and *proportioned* to offense."[44] Many years later, the Court ruled that "a sentence of death is grossly *disproportionate* and excessive punishment for the crime of rape."[45] In *Solem v. Helm*,[46] the Court invalidated as disproportionate a sentence of life imprisonment without the possibility of parole for uttering a bad check, the defendant's seventh nonviolent felony.[47] *Solem* refined the

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"The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion of Warren, C.J.)—was written in an opinion invalidating the punishment of loss of citizenship because of its nature and consequences, not its length.

44. Weems v. United States, 217 U.S. 349, 367 (1910) (emphasis added). The sentence in *Weems*, imposed by a court in the Philippines under a local system called *cadena temporal* (temporary chains), was 15 years at hard labor and in irons plus lifetime civil disabilities for the offense of falsifying a public account.

45. Coker v. Georgia, 433 U.S. 584, 592 (1970) (emphasis added). In *Pulley v. Harris*, 465 U.S. 37 (1984), the Court made it clear that a death sentence in one case need not be proportional to death sentences in other cases.

46. 463 U.S. 277 (1983). In *Rummel v. Estelle,* the Court had said, "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative." 445 U.S. 263, 274 (1980). In *Solem*, the Court quoted this sentence with the words "One could argue" in italics, adding that the Court in *Rummel* had "merely recognized that the argument was possible." 463 U.S. at 288 n.14.

47. In a later decision upholding a life sentence subject to parole for minor crimes under a recidivist statute, the Court made clear that the sentence in *Solem* was invalid not simply because of its length but because of the unavailability of parole. *See* Ewing v. California, 538 U.S. 11, 22 (2003) ("[I]n *Solem*, we struck down the defendant's sentence of life without parole. We specifically noted the contrast between that sentence and the sentence in *Rummel* [*v. Estelle*, 445 U.S. 263 (1980)], pursuant to which the defendant was eligible for parole."). Moreover, after *Solem*, even a life sentence without parole for possessing 672 grams of cocaine was upheld against an Eighth Amendment challenge because the crime was considered "far more grave than the crime at issue in *Solem*." Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., with whom O'Connor and Souter, JJ., join, concurring in part).

proportionality principle to prohibit punishments that are "grossly disproportionate" to the crime,[48] a standard several Justices have endorsed.[49]

Solem also endeavored to identify criteria for applying a proportionality standard: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions,"[50] although no Supreme Court decision since *Solem* has used the last two criteria.

Throughout the emergence of a proportionality principle in the Court's Eighth Amendment jurisprudence, there was no mention of unreasonableness as a standard for assessing the validity of sentences. That changed in 1984. The Sentencing Reform Act provided that, under the system of mandatory sentencing guidelines then in place, a court of appeals could vacate a sentence if it departed from an applicable guidelines range "to an unreasonable degree."[51]

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48. 463 U.S. at 288.

49. *See* Montgomery v. Louisiana, 136 S. Ct. 718, 732 (2016) ("Protection against disproportionate punishment is the central substantive guarantee of the Eight Amendment.") (Kennedy, J., with whom Stevens, Ginsburg, Breyer, Sotomayor, and Kagan, JJ., join); Graham v. Florida, 560 U.S. 48, 59 (2010) ("The concept of proportionality is central to the Eighth Amendment.") (Kennedy, J., with whom Stevens, Ginsburg, Breyer, and Sotomayor, JJ., join); *Harmelin*, 501 U.S. at 1001 (The Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime.") (Kennedy, J., with whom, O'Connor and Souter, JJ., join, concurring in part and concurring in the judgment) (citing *Solem*, 463 U.S. at 288)); *id.* at 1009 ("[I]t would not be unreasonable to conclude that it would be both cruel and unusual . . . to impose any punishment that is grossly disproportionate to the offense for which the defendant has been convicted.") (White, J., with whom Blackmun and Stevens, JJ., join, and with which Marshall, J., agreed, dissenting). The Court's opinion in *Harmelin*, written by Justice Kennedy, said, "Though our decisions recognize a proportionality principle, its precise contours are unclear." 501 U.S. at 998.

50. 463 U.S. at 292.

51. 18 U.S.C. § 3742(e)(3)(C). A sentence could also be rejected if it were imposed for an offense for which there is no applicable guideline and is "plainly unreasonable." *Id.* § 3742(f)(2).

Then, in 2005, when the Supreme Court ruled in *United States v. Booker*[52] that the Federal Sentencing Guidelines ("Guidelines") were no longer mandatory, the Court announced that "[t]he courts of appeals review sentencing decisions for unreasonableness."[53] Through some mysterious alchemy, the standard of unreasonableness, which the Sentencing Reform Act had established for assessing departures from mandatory Guidelines,[54] became the standard for reviewing all federal sentences under the advisory Guidelines regime.

"Reasonableness," as a standard for reviewing federal sentences, has two components: procedural reasonableness and substantive reasonableness.[55] "Procedural reasonableness," which might better be called "procedural correctness," concerns such matters as whether the sentencing judge (1) identified the correct Guidelines range, either for a Guidelines sentence or as a starting point for a non-Guidelines sentence; (2) treated the Guidelines as advisory; and (3) considered the statutory sentencing factors outlined in 18 U.S.C. § 3553(a).[56] "Substantive reasonableness" concerns the length of the sentence, usually its severity when challenged by the defendant but occasionally its leniency when challenged by the prosecution.[57] My concern focuses on substantive reasonableness on review of sentences claimed to be too severe.

As with "grossly disproportionate" in Eighth Amendment jurisprudence, the Supreme Court has given little guidance as to the meaning of "unreasonableness" under both the mandatory and the advisory guidelines regimes. No decision of the Court had considered the language of subsection 3742(e)(3)(C) under the mandatory

52. 543 U.S. 220 (2005).

53. *Id.* at 224.

54. "Upon review of the record, the court of appeals shall determine whether the sentence . . . (3) is outside the applicable guideline range, and . . . (C) the sentence departs to an unreasonable degree from the applicable guidelines range." 18 U.S.C. § 3742(e)(3)(C).

55. *See* United States v. Crosby, 397 F.3d 103, 113–15 (2d Cir. 2005).

56. *See* United States v. Rattoballi, 452 F.3d 127, 131–32 (2d Cir. 2006).

57. *See*, *e.g.*, *id.* at 135–37.

Guidelines regime. Under the advisory Guidelines regime, the Court has said that "appellate 'reasonableness' review merely asks whether the trial court abused its discretion,"[58] but later added in *Gall v. United States*[59] an apparent refinement by referring to "a deferential abuse-of-discretion standard."[60] It is possible that this phrasing was intended only to describe the abuse-of-discretion standard as deferential, but subsequent language in *Gall* indicates that the Court meant a deferential *version* of the abuse-of-discretion standard. The Court noted that "[t]he sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the [Sentencing] Commission or the appeals court" and that "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more guidelines cases than appellate courts do."[61]

However, the Court has not yet encountered a case where it has considered a post-*Booker* sentence unreasonable, although it has twice reversed a Court of Appeals that had ruled a sentence unreasonable.[62] In a separate opinion in *Rita*, Justice Scalia offered, as an example of unreasonableness, a sentence imposed for no other reason than that the sentencing judge thought the offense merited seven times the applicable guideline range.[63]

The Supreme Court has made one observation about reasonableness in the context of sentences, but it sheds little, if any, light on what the concept means. In *Rita*,

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58. Rita v. United States, 551 U.S. 338, 351 (2007).

59. 552 U.S. 38 (2007).

60. *Id.* at 41.

61. *Id.* at 51–52 (internal quotation marks omitted). The Second Circuit has understood the *Gall* phrasing to mean that the "unreasonableness" standard in sentencing review "is a particularly deferential form of abuse-of-discretion review." United States v. Cavera, 550 F.3d 180, 188 n.5 (2008) (en banc).

62. Kimbrough v. United States, 552 U.S. 85, 110–11 (2007) (sentence not unreasonably low), *rev'g* United States v. Kimbrough, 174 F. App'x 988 (4th Cir. 2006); *Gall*, 552 U.S. at 56–60 (same) *rev'g* Gall v. United States, 446 F.3d 884 (8th Cir. 2006)).

63. *Rita*, 551 U.S. at 372 (Scalia J., with whom Thomas, J., joins, concurring in part and concurring in the judgment).

the Court ruled that a sentence within an applicable Guidelines sentencing range is entitled to a presumption of reasonableness.[64] However, the Court did not explain what effect this presumption has on appellate review, explaining only what the effect is not and why the presumption applies. The presumption "does not, like a trial-related evidentiary presumption, insist that one side, or the other, shoulder a particular burden of persuasion or proof lest they lose their case."[65] "Rather, the presumption reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one."[66] So a sentence within the applicable Guidelines range has a higher likelihood of being reasonable than one outside that range, but the task of determining whether it is reasonable remains.

The Court undertook that task in *Rita*. The defendant had argued that three circumstances made his within-Guidelines sentence unreasonable: his health, his fear of retaliation in prison because he was formerly a law enforcement officer, and his military record.[67] The Court responded that the sentencing judge had sought assurance from the Bureau of Prisons that (1) the defendant would receive appropriate treatment, (2) nothing indicated that the threat of retaliation was more significant than that faced by any former law enforcement officer, and (3) the defendant did not claim that military service should ordinarily lead to a below-Guidelines range.[68] In short, the defendant's claimed special circumstances were not "special enough."[69] The arguable

64. *Id.* at 347.
65. *Id.*
66. *Id.* (emphases in original).
67. *See id.* at 359–60.
68. *See id.*
69. *Id.* at 360.

inference is that very special circumstances might make a within-Guidelines sentence unreasonable.

The Courts of Appeal have struggled to give meaning to "unreasonable" in the sentencing context. One interesting effort is the Second Circuit's opinion in *United States v. Rigas*.[70] First, the court deemed the "unreasonableness" standard in sentencing analogous to the "manifest injustice" standard used in considering a motion for a new trial in a criminal case after a jury verdict[71] and the "shocks-the-conscience" standard used in considering claims of intentional torts by state actors.[72] Second, the court considered factors common to all three standards:

> The manifest-injustice, shocks-the-conscience, and substantive unreasonableness standard in appellate review share several common factors. First, they are deferential to district courts and provide relief only in the proverbial "rare case." Second, they are highly contextual and do not permit easy repetition in successive cases. Third, they are dependent on the informed intuition of the appellate panel that applies these standards. In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.[73]

On this last sentence the opinion added a useful footnote:

> To say that a sentence is "substantively unreasonable" is not to say that "no reasonable person" would have imposed such a sentence. We may generally assume that federal judges are "reasonable" people in the commonsense definition of the term. Nonetheless, even reasonable individuals can make unreasonable decisions on occasion. The Supreme Court recognizes this and has charged the Courts of

70. 583 F.3d 108 (2d Cir. 2009).

71. *Id.* at 122 (citing United States v. Josephberg, 562 F.3d 478, 488 (2d Cir. 2009)).

72. *Id.* (citing O'Connor v. Pierson, 426 F.3d 187, 203 (2d Cir. 2005)).

73. *Id.* at 123.

> Appeals with reviewing the substance of sentences for reasonableness, and we cannot employ a definition of "substantive unreasonableness" that would render the required review a dead letter.[74]

The Eighth Circuit in *United States v. Gall*[75] attempted to quantify sentencing unreasonableness by requiring that a sentence outside of the Guidelines range must be supported by a justification that "is proportional to the extent of the difference between the advisory range and the sentence imposed."[76] Of course, the "difference" between an advisory range and a sentence outside the range is a number of months, and a justification for a non-Guidelines sentence has no mathematical counterpart. What the Eighth Circuit presumably meant was that the greater the difference between the advisory range and the sentence imposed, the more persuasive must be the justification for the sentence.

In *Gall v. United States*,[77] the Supreme Court rejected the Eighth Circuit's approach and that Circuit's ruling that a below-Guidelines sentence was unreasonable. The Court pointed out that "deviations from the Guidelines range will always appear more extreme—in percentage terms—when the range itself is low, and a sentence of probation will always be a 100% departure regardless of whether the Guidelines range is 1 month or 100 years."[78]

The Eighth Circuit has also tried to explain unreasonableness by enlisting the weighing metaphor (considered in section II *infra*). In *United States v. Miner*,[79] the Court of Appeals said that a sentencing court abuses its discretion, *i.e.*, imposes an unreasonable sentence, when it "considers the appropriate factors but commits a clear error of judgment in weighing those factors."[80] This use

74. *Id.* at 123 n.5.
75. 446 F.3d 884 (8th Cir. 2006).
76. *Id.* at 889.
77. 552 U.S. 38 (2007).
78. *Id.* at 47–48.
79. 544 F.3d 930 (8th Cir. 2008).
80. *Id.* at 932.

of the weighing metaphor, as usual, provides the illusion, rather than the substance, of analysis. In *Miner*, the Eight Circuit also said that a district court abuses its discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors.[81]

Although no Supreme Court opinion has ever compared the "unreasonableness" standard applicable to review of post-*Booker* federal sentences to the "grossly disproportionate" standard applicable to review of sentences challenged under the Eighth Amendment, it seems likely that the two standards are similar. A sentence grossly disproportionate to the offense would likely be deemed unreasonable. Conceptually, a post-*Booker* sentence might be said to reach the outer limit of reasonableness before it was so grossly disproportionate as to reach the limit beyond which a sentence would be cruel and unusual, but the limits, if different, are surely not very far apart.

In the sentencing context, "unreasonable" apparently means only that in very unusual circumstances a reviewing court concludes that a sentence is way too high along a continuum of sentence severity. Appellate courts might consider enlisting the proportionality analysis that the Supreme Court developed in its Eighth Amendment jurisprudence.

C. Reasonable Time

A third context where reasonableness (or unreasonableness) can be thought of as a point along a continuum concerns an assessment of an interval of time. Courts frequently determine whether an interval of time is reasonable. Although many statutes, rules, and contracts prescribe precise intervals of time for some action to be taken, some do not. Sometimes a statute or rule requires

81. *See id.*

only that an event occur within a "reasonable time." Examples are making a motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure within a reasonable time[82] and granting a motion for summary judgment after a nonmovant has had a reasonable time to respond.[83] Where a contract does not specify a time for some required action, courts usually imply a "reasonable time" requirement.[84]

An objection to "reasonable time" as too vague was rejected by the Supreme Court in *Walker v. Martin*,[85] considering California's use of the standard for invoking state court habeas corpus remedies. "Indeterminate language is typical of discretionary rules," the Court noted, adding, "application of those rules in particular circumstances, however, can supply the requisite clarity."[86]

Determining whether a time interval is reasonable occurs in a variety of contexts. A familiar one is a continuance of a trial date.[87] Here are some examples from other contexts:

- A witness cited for civil contempt must be allowed a reasonable time to prepare for the contempt hearing.[88]

82. FED. R. CIV. P. 60(c).

83. FED. R. CIV. P. 56(f).

84. *See*, *e.g.*, Galvin v. U.S. Bank, 852 F.3d 146, 164 (1st Cir. 2017) ("When a contract does not specify a time for performance, the law implies a contract term providing for performance in a reasonable period of time."); RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981) ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.").

85. *See* Walker v. Martin, 562 U.S. 307, 317 (2011).

86. *Id.*

87. *See*, *e.g.*, United States v. Mark, 460 F. App'x 103, 106–07 (3d Cir. 2012) (approving grant of continuance for 42 days and denial of continuance for 90 days); United States v. Hoenig, 79 F. App'x 8, 9 (5th Cir. 2003) (approving denial of continuance and holding trial 12 days after granting motion to proceed *pro se*); Napoli v. United States, 341 F.2d 916, 916 (5th Cir. 1965) (approving denial of continuance and holding trial 12 days after arraignment).

88. *See In re* Smothers, 322 F.3d 438, 442 (6th Cir. 2003).

- A parole revocation hearing must be held within a reasonable time after the parolee is taken into custody.[89]
- Police officers must wait a reasonable time after knocking and announcing their presence before a forced entry.[90]
- The remainder interest in a trust must be disclaimed within a reasonable time after learning of the transfer that created the trust to avoid gift tax liability.[91]
- A claim for failure to deliver goods must be made within six months after a reasonable time for delivery has elapsed.[92]
- A contract made by a minor must be disclaimed within a reasonable time after attaining majority.[93]

As would be expected, determining whether a particular interval of time is reasonable depends on the context in which the issue arises and the precise circumstances of the case. Some examples:

- Fifteen to twenty seconds was a reasonable time for officers to wait after knocking and announcing their presence before a forced entry where there was a risk that suspect would dispose of cocaine.[94]
- Six days was not a reasonable time for defendants to obtain trial counsel.[95]
- Eight days was reasonable and twenty days was not a reasonable time for a seller to deliver goods.[96]

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89. *See* Morrissey v. Brewer, 408 U.S. 471, 488 (1972).

90. *See* United States v. Banks, 540 U.S. 31, 37–40 (2003).

91. S*ee* United States v. Irvine, 511 U.S. 224, 226 (1994).

92. S*ee* Chesapeake & O. Ry. v. Martin, 283 U.S. 209, 213 (1931).

93. S*ee* Hegler v. Faulkner, 153 U.S. 109, 119–20 (1894) (construing a Nebraska statute).

94. *See Banks*, 540 U.S. at 37–40.

95. *See* Powell v. Alabama, 287 U.S. 45, 53–61 (1932) (the so-called "Scottsboro boys" case).

96. *See Chesapeake & O. Ry.*, 283 U.S. at 216.

- Two months after acquiring a remainder interest was a reasonable time for an heir to disclaim the interest to avoid gift tax liability.[97]
- "[O]ne year or so" after attaining majority would be reasonable time for a minor to disclaim a contract.[98]
- Forty-seven years was not a reasonable time for a beneficiary to disclaim a remainder interest in a trust.[99]

Reasonable time for a contempt hearing depends on the nature of the contempt proceeding.[100] In some circumstances, a hearing on the day the contempt occurs is timely.[101] In other cases, forty-eight hours might be sufficient.[102] If the defendant intends to raise complex legal issues or if an evidentiary hearing may be required, a five-day notice of the hearing is preferable.[103]

Courts typically provide little, if any, explanation as to why a particular time interval is reasonable or unreasonable. There is no claim of weighing competing considerations. The standard of review is abuse of discretion,[104] and the trial judge is rarely deemed to have exceeded allowable discretion. There is a continuum of time with no signposts for guidance. Determining reasonableness along a continuum of time is simply a judgment call that depends on the context.

II. THE WEIGHING METAPHOR

A second approach articulates a process of weighing various interests or effects, with a balance in favor of

97. *See* Cottrell v. C.I.R., 628 F.2d 1127, 1129 (8th Cir. 1980).
98. *See Hegler*, 153 U.S. at 119–20.
99. *See* United States v. Irvine, 511 U.S. 224, 235 (1994).
100. *See* United States v. O'Day, 667 F.2d 430, 434 (4th Cir. 1981).
101. *See id.*
102. *See* United States v. Martinez, 686 F.2d 334, 339 (5th Cir. 2013).
103. *See* United States v. Alter, 482 F.2d 1016, 1023 (9th Cir. 2015).
104. *See*, *e.g.*, First RepublicBank Fort Worth v. Norglass, Inc., 958 F.2d 117, 119 (5th Cir. 1992).

positive interests considered reasonable and a balance in favor of negative interests considered unreasonable. Although courts identify such interests and effects, they provide little, if any, guidance as to how they are valuing interests individually or balancing them in the aggregate. The weighing of interests and effects is the articulated process in these contexts: (1) antitrust, (2) search and seizure, and (3) use of excessive force. Before considering each context separately, I first discuss the metaphor itself.

Courts have frequently instructed juries, and appellate courts have frequently instructed trial judges, that determining whether something is reasonable (or unreasonable) requires a process of "weighing" or "balancing" interests or effects. To take a familiar example, when considering whether a restraint of trade is unreasonable in violation of the Sherman Antitrust Act,[105] a fact-finder is to determine "whether [the restraint's] anti-competitive effects outweigh its pro-competitive effects."[106]

Appellate courts have instructed trial courts, even on questions of law, to weigh or balance relevant factors in other contexts. Examples include *Bivens v. Six Unknown Named Agents*,[107] "weighing of the arguments both for and against the creation of [an implied cause of action] under the Fourth Amendment";[108] *Hamdi v. Rumsfeld*,[109] determining the process that is due by "weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater

105. 15 U.S.C. § 1 prohibits "[e]very contract . . . in restraint of trade," but the Supreme Court long ago made it clear that the statute prohibits only an "*unreasonable*" restraint of trade. Standard Oil Co. v. United States, 221 U.S. 1, 87 (1911) (emphasis in original).

106. Columbia Broad. Sys., Inc. v. ASCAP, 620 F.2d 930, 934 (2d Cir. 1980).

107. 403 U.S. 388 (1999).

108. *Id.* at 429 (Black, J., dissenting). The Supreme Court later significantly restricted the creation of causes of action deemed implied by the Constitution. *See* Bush v. Lucas, 462 U.S. 367, 373–74 (1983).

109. 542 U.S. 507 (2004).

process";[110] and *Sattazahn v. Pennsylvania*,[111] deciding whether reprosecution is permissible after a mistrial by "balanc[ing] 'the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him against the public interest in insuring that justice is meted out to offenders.'"[112]

The weighing metaphor is more frequently invoked than analyzed with rigor. A typically vague description of the weighing process is the following description expressed in *In re Insurance Antitrust Litigation*[113] by the Ninth Circuit:

> We were to "weigh" and to "balance" the various considerations—the two metaphors indicated that a court should examine each relevant factor, assign its relative importance, and come to a conclusion by comparing the relative importance of the elements involved.[114]

However, the Ninth Circuit did not identify the relevant factors, much less "assign" them "relative importance" or "compare" their "relative importance."

One shortcoming of this metaphor, occasionally pointed out, is the illusion of precision.[115] As Judge Jerome N. Frank wrote in 1950 in *Ford Motor Co. v. Ryan*,[116] with respect to weighing or balancing factors relevant to a change of venue decision under 28 U.S.C. § 1404(a):

> "Weighing" and "balancing" are words embodying metaphors which, if one is not careful, tend to induce a fatuous belief that some sort of scales or weighing

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110. *Id.* at 529 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

111. 537 U.S. 101 (2003).

112. *Id.* at 120–21 (Ginsburg, J., dissenting) (quoting United States v. Scott, 437 U.S. 82, 92 (1978)).

113. 938 F.2d 919 (9th Cir. 1991).

114. *Id.* at 932.

115. However imprecise the process of weighing, it is at least a substantial improvement over the medieval process of favoring the side that produced the greater number of consistent witnesses. *See* 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 302–03 (3d ed. 1922). That system had precision but no other merit.

116. 182 F.2d 329 (2d Cir. 1950).

> machinery is available. Of course it is not. At best, the judge must guess, and we should accept his guess unless it is too wild.[117]

In *McEvoy v. Spencer*,[118] a case presenting the issue of whether "the harmful effects of [an employee's] expression to the public workspace outweigh its benefits to the speaker-employee,"[119] I wrote:

> The "weighing" metaphor conveys the appearance of precise quantification of competing interests, while tolerating in practice rather subjective qualitative consideration of the importance of the values at stake.[120]

The Ninth Circuit, endeavoring to "weigh" the significance of a disability plan administrator's conflict of interest, as instructed by the Supreme Court in *Metropolitan Life Insurance Co. v. Glenn*,[121] commented in *Salomaa v. Honda Long Term Disability Plan*:[122]

> "Weighing" is a metaphor. Real weighing is done with a scale. . . . [I]t is a comforting metaphor for judicial work. . . . Nor is it easy to decide how many metaphorical grams should go on the metaphorical scale when we pretend to weigh conflicts of interest. The misleading precision of the metaphor is indeed a serious concern.[123]

Justice Scalia once said of balancing: "It is more like judging whether a particular line is longer than a particular rock is heavy."[124]

Despite its lack of analytical rigor and the defect of creating the illusion of precision, the weighing metaphor continues to be invoked, recently in a major Supreme Court decision. Ruling against the constitutionality of a Louisiana statute requiring a doctor performing an

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117. *Id.* at 331–32.

118. 124 F.3d 92 (2d Cir. 1997).

119. *Id.* at 98.

120. *Id.* at 98 n.3.

121. 554 U.S. 105, 115 (2008).

122. 642 F.3d 666 (9th Cir. 2011).

123. *Id.* at 675.

124. Bendix Autolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment).

abortion to have admitting privileges at a nearby hospital,[125] the Court noted that the district court had correctly "'weighed the asserted benefits' of the law 'against the burdens' it imposed on abortion access."[126]

Since weighing is not a process of comparing factors or effects that can be quantified, what are courts expecting will be done when they require relevant factors to be "weighed?" I think courts mean that the *importance* or *significance* of relevant factors or effects is to be compared. That requires two quite different judgments, which are usually not distinguished. The first is determination of the importance or significance of each factor in the abstract. The second is determination of the extent to which the factor has importance or significance in the circumstances of a particular case.

With *related* effects, such as the pro- and anticompetitive effects that flow from the same cause—for example, a restraint of trade—and affect the same subject—for example, competition—the first determination is easy. Everyone would agree that procompetitive effects are more important for an efficient market than anticompetitive effects. The difficult determination is how much of a procompetitive and an anticompetitive effect does a restraint have, or are likely to have, in the particular circumstances in which it functions.

By "how much" I do not contemplate any measurement in precise numerical terms. The assessment of effects necessarily requires a judgment about the degree of the effect, expressed (or at least thought of) in verbal terms of approximation. Is the effect minimal, small, medium, large, or very large?[127] Once that judgment has been made, the extent of one effect must be compared to the extent of a competing effect. If the effects have different verbally described values, the comparison is easy. If

125. LA. STAT. ANN. § 40:1061.10(A)(2)(a) (2020).

126. June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2120 (2020) (quoting Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016)).

127. Professor Areeda suggested "significant in magnitude" as a verbal way of expressing a very large effect. *See* PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES 3 (Federal Judicial Center 1981).

the values of the effects are similar, a difficult judgment must be made. In practice, courts purporting to "weigh" competing effects or interests, rarely find the value of the effects to be similar.

With *unrelated* effects, however, even the first determination, assessment in the abstract, is not easy. For example, with respect to the validity of a public employer's restriction of an employee's speech, a court is to "balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[128] Comparing the importance or significance of such unrelated interests in the abstract requires a judgment that one interest is usually, perhaps always, more important than the other. That is often not an easy task. Assessing the importance or significance of these interests in particular circumstances is also not easy but can be done in a more nuanced way than assessing their importance in the abstract. For example, an employee's comment could have great public significance if it concerns the reasons to prefer a candidate for President but not as much public significance if it concerns a referendum on trash removal. And workplace efficiency could have great significance if the comment is likely to create a serious disturbance on the factory floor but not much significance if it will only precipitate a heated conversation at the water cooler.

However effects or interests are assessed and then compared, the significant point is that judgments, essentially value judgments, must be made in determining the relative importance of the interests involved, both in the abstract and in the particular circumstances of a case.

Sometimes the weighing metaphor is phrased as a cost-benefit analysis. One example is the Supreme Court's decision in *Montejo v. Louisiana.*[129] Justice Scalia wrote, "When this Court creates a prophylactic

128. City of San Diego v. Roe, 543 U.S. 77, 82 (2004) (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)).

129. 556 U.S. 778 (2009).

rule in order to protect a constitutional right, the relevant 'reasoning' is the weighing of the rule's benefits against its costs."[130] The quotation marks around "reasoning" apparently reveal his skepticism that a true process of reasoning was involved. He might also have put the marks around "weighing." The issue in *Montejo* was whether the Court should reject the rule announced in *Michigan v. Jackson*,[131] "forbidding police to initiate interrogation of a criminal defendants once he has requested counsel at an arraignment or similar proceeding."[132] The Court set forth the benefits and costs of the rule and concluded that the costs outweighed the benefits.[133] Of course, what the Court really did was express its judgment that the costs were more important than the benefits.

Courts invoking the weighing metaphor would be well advised to acknowledge, at least to themselves, if not the readers of their opinions, how subjective and nonquantitative the process is, and to identify the judgments they are making in assigning even approximate verbal measures of importance to the interests or effects they are purporting to compare. They might even avoid the pretense of "weighing" and more candidly speak of comparing the importance of relevant interests or effects.

A. Antitrust: Unreasonable Restraint of Trade

Of the contexts in which the weighing metaphor is enlisted to determine reasonableness, the most familiar is antitrust law. Despite the seemingly absolute language of section one of the Sherman Antitrust Act—"Every contract . . . in restraint of trade . . . is hereby declared to be illegal"[134]—the Supreme Court long ago made clear in *Standard Oil Co. v. United States*[135] that

130. *Id.* at 793.
131. 475 U.S. 625, 631 (1986).
132. *Montejo*, 556 U.S. at 780–81.
133. *See id.* at 793–97.
134. 15 U.S.C. § 1.
135. 221 U.S. 1, 66 (1911).

"the rule of reason becomes the guide" in applying the statute, although, as the Court explained in *Northern Pacific Ry. Co. v. United States*,[136] "there are certain agreements or practices which because of their pernicious effect on competition and lack of redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Price-fixing is the classic example of the so-called *per se* violations that do not require inquiry under the rule of reason.[137]

Apart from restraints that are *per se* unreasonable, the reasonableness of a restraint is to be determined by weighing its procompetitive effects against its anticompetitive effects.[138] The Supreme Court derived the weighing concept for antitrust claims from an early English case, *Mitchel v. Reynolds.*[139] *Mitchel* concerned a promise by the seller of a bakery that he would not compete with the purchaser of his business.[140] The Supreme Court noted in *Professional Engineers* that the English court had deemed this covenant not to compete reasonable because "[t]he long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—*outweighed* the temporary and limited loss of competition."[141]

Since the weighing metaphor entered federal antitrust jurisprudence in *Professional Engineers*, it has been expressed in various similar formulations: "A restraint violates the rule of reason if the restraint's harm to competition outweighs its procompetitive effects,"[142] "[T]he factfinder must analyze the anti-competitive effects along with any pro-competitive effects to determine

136. 356 U.S. 1, 5 (1958).

137. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 216 (1940).

138. *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 689 (1978).

139. 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

140. *See id.* at 347.

141. 435 U.S. at 689 (emphasis added).

142. Tanaka v. Univ. of Southern California, 252 F.3d 1059, 1063 (9th Cir. 2001).

whether the practice is unreasonable on balance,"[143] and "A rule of reason analysis requires a determination of whether [the restraint's] anti-competitive effects outweigh its pro-competitive effects."[144] Sometimes the factors to be weighed are stated in the reverse order: "In the absence of a procompetitive justification that outweighs the likelihood of substantial anticompetitive effects" the agreement violates the Sherman Act.[145]

The weighing of pro- and anticompetitive effects not only yields an answer for appellate courts applying law, it is also the task given to juries assessing facts. At either level of decision-making, the task is an elusive one. Although it is easy to determine that procompetitive effects are more beneficial than anticompetitive effects in the abstract, it is far more difficult to determine how much of a procompetitive effect a restraint has (or is likely to have) in the particular circumstances in which it functions versus how much anticompetitive effect it has (or is likely to have). The assessment necessarily first requires a judgment about what the effects the challenged restraint are or are likely to be. To make that judgment, Justice Brandeis advised consideration of

> the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.[146]

It is one thing to identify these factors. It is quite another to assess their importance, especially their relative importance. Only rarely does an appellate decision explain why the balance in Rule of Reason cases tips in favor of either pro- or anticompetitive effects.[147] In some

143. Bhan v. NME Hospitals, Inc., 929 F.2d 1404, 1413 (9th Cir. 1991).

144. Columbia Broad. Sys., 620 F.2d at 934.

145. California *ex rel.* Brown v. Safeway, Inc., 615 F.3d 1171, 1193 (9th Cir. 2010).

146. Board of Trade v. United States, 246 U.S. 231, 238 (1918).

147. *See* decisions cited *infra*, notes 152–55.

cases, courts purport to apply a balancing approach to pro- and anticompetitive factors, but in reality emphasize only one set or the other. For example, in *Akanthose Capital Management, LLC v. Atlanticus Holdings Corp.*,[148] the Eleventh Circuit declared that "the [Sherman] Act does not curtail activity that is procompetitive."[149] In *Hennessey v. NCAA*,[150] the Fifth Circuit, considering an NCAA bylaw limiting the number of assistant football and basketball coaches a college could employ, compared the procompetitive and anticompetitive effects in these words:

> The court is . . . of the view admittedly bordering on speculation that the Bylaw will be of value in achieving the ends sought by the association and will have in time lesser, not greater, adverse effect upon assistant coaches than that already experienced.[151]

The court was candid, but there was not even an attempt to quantify, even in generalized verbal terms, the extent or importance of the pro- and anticompetitive effects thought likely to occur.

Occasionally, courts using the weighing metaphor in antitrust cases identify the relevant factors. In *Law v. NCAA*,[152] the Tenth Circuit, considering a limitation on coaches' salaries, identified and discussed three allegedly procompetitive factors before concluding that the evidence was insufficient to make a triable issue of any of them.[153] In *California Dental Ass'n v. F.T.C.*,[154] the Ninth Circuit, considering a dentists' association's limitation on advertising, identified four procompetitive effects and concluded, rather summarily, that they outweighed an alleged, but unsupported, anticompetitive effect.[155]

148. 734 F.3d 1269 (11th Cir. 2013).
149. *Id.* at 1277.
150. 564 F.2d 1136 (5th Cir. 1977).
151. *Id.* at 1153.
152. 134 F.3d 1010 (10th Cir. 1998).
153. *See id.* at 1021–24.
154. 224 F.3d 942 (9th Cir. 2000).
155. *Id.* at 957–59.

Some have viewed with despair what passes for Rule of Reason analysis. Professor Turner has commented that The Rule of Reason approach "suffers from several problems—vagueness, unpredictability, high costs of litigation, and difficulties in obtaining facts."[156] Judge Easterbrook has written, "When everything is relevant, nothing is dispositive . . . . Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason."[157]

So a weighing of pro- and anticompetitive effects is supposed to determine whether a restraint of trade is unreasonable and therefore an antitrust violation, but in practice appellate courts say very little as to how that weighing is to be done, and trial courts submit the task to a jury with little, if any, guidance. The reasonableness of the restraint is easily determined if there are only procompetitive effects or only anticompetitive effects, but where both are present, the "weighing" process is never explained to a jury, and when appellate courts perform the task, their explanation is limited at best. For them, an unreasonable restraint seems to be one that they considered undesirable as a matter of economics. In the antitrust context, the weighing metaphor gives reasonableness and unreasonableness the illusion of meaningful analysis.

Rather than claim that anticompetitive effects have determinable values whose aggregate can be compared to the aggregate of the determinable values of procompetitive effects, courts should candidly explain *why* one or more anticompetitive effects either are or are not more harmful to competition than the procompetitive effects of the challenged restraint.

156. Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 800 (1987).

157. Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984).

B. Unreasonable Searches and Seizures

A second context in which the weighing metaphor is invoked to determine reasonableness is searches and seizures. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[158]

These words present a host of interpretation issues. Among them are whether warrants are required for all or only some searches and seizures, whether probable cause is required for searches and seizures for which warrants are not required, whether a public official is liable for damages for violating the Amendment, whether such an official has immunity from damages for actions taken with a good faith belief in lawfulness, and whether the official's employer is liable for such a violation. Professor Amar has analyzed whether the Amendment does or should provide answers to these issues.[159] My focus here is more limited. I propose to explore only the Amendment's use of the word "unreasonable."

Furthermore, I am not concerned with what the Amendment meant by "unreasonable" when it was adopted. Professor Davies has argued, persuasively in my view, that the drafters of the Amendment understood "searches and seizures" to be "unreasonable" when they were carried out pursuant to a general warrant.[160] Whether or not the Supreme Court should have moved away from this original understanding and shifted to using "unreasonable" as a general concept for evaluating the lawfulness of searches and seizures, it has been doing

158. U.S. Const. amend. IV.

159. *See* Akil Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994).

160. *See* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 551 (1999).

so for decades, indeed, calling "reasonableness" "[t]he general touchstone" that "governs Fourth Amendment analysis."[161] My concern is what the term means in its modern application to all searches and seizures.

The Supreme Court has acknowledged that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[162] The Court has often said that whether a search or a seizure of a person is reasonable depends on an evaluation of "all the circumstances."[163] That observation, however, provides no guidance as to what analysis is to be made of the relevant circumstances to determine reasonableness.

Professor Clancy has noted five different modes of analysis that the Court has used to determining whether a search is reasonable:

> [T]he reasonableness analysis employed by the Supreme Court has repeatedly changed and each new case seems to modify the Court's view of what constitutes a reasonable search or seizure. The Court chooses from at least five principal models to measure reasonableness: the warrant preference model, the individualized suspicion model, the totality of the circumstances test, the balancing test, and a hybrid model that gives dispositive weight to the common law. Because the Court has done little to establish a meaningful hierarchy among the models, in any situation the Court may choose whichever model it sees fit to apply.[164]

For purposes of my inquiry, two models of what purports to be "analysis" of "reasonableness" are worth

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161. United States v. Ramirez, 523 U.S. 65, 71 (1998); United States v. Rabinowitz, 339 U.S. 56, 66 (1950) ("The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable.").

162. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

163. *See*, *e.g.*, United States v. Knights, 534 U.S. 112, 113 (2001); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985); United States v. Chadwick, 433 U.S. 1, 9 (1977).

164. Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 978 (2004).

considering: weighing interests and developing special rules.

As the Supreme Court has said, "The test of reasonableness under the Fourth Amendment . . . requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."[165] In slightly different words, the Court has said that reasonableness of a search "is determined by weighing 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'"[166] Thus, the weighing metaphor is now firmly part of any determination of whether a search is reasonable.

However, unlike the weighing of pro- and anticompetitive effects that determines whether restraints of trade are reasonable, the factors weighed to determine whether a search is reasonable—government need and privacy rights—bear no relation to each other. Nevertheless, they can be assessed in verbal terms, though not quantified precisely. On the government side, the need for a search can be considered along a continuum from slight to vital. The need to locate a stolen check is surely slight compared to the need to locate a gun, which is less vital than the need to locate a ticking bomb. And invasion of privacy rights can also be considered along a continuum from minor to serious. Searching a lunchbox, unlikely to have highly personal materials, is a minor invasion of privacy rights compared to searching a filing cabinet, likely to have private papers, which is a less serious invasion of privacy than searching a person's body cavities. Wherever on these continuums one would place the public and private interests involved in a particular search, the issue on which the Supreme Court has given no guidance is how interests on these separate continuums are to be weighed against each other.

Sometimes the Supreme Court explicitly states that it has weighed (or balanced) state and privacy interests

165. *Bell*, 441 U.S. at 559; Terry v. Ohio, 392 U.S. 1, 21 (1968).

166. Maryland v. King, 569 U.S. 435, 436 (2013) (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

in determining the reasonableness of a search. In *Winston v. Lee*,[167] the Court ruled unreasonable a proposed operation on a suspect under a general anesthetic to remove a bullet, stating that it was applying a "balancing test."[168] The intrusion on privacy interests was deemed "severe."[169]

Michigan v. Summers[170] provides an example of the Supreme Court explicitly identifying the factors to be weighed but then only implicitly comparing them. *Summers* involved the seizure of a person on the steps of a residence for which officers had a search warrant.[171] Reducing the seriousness of the intrusion were the facts that the police already had a warrant authorizing the major intrusion of searching the home, homeowners were likely to want to remain on the premises while the search was being conducted, and the detention was unlikely to increase the stigma beyond that resulting from a police search itself.[172] The public interests identified were preventing flight, minimizing danger to the police officers, avoiding destruction of evidence, and having the homeowner present to unlock doors and containers.[173] The Court did not explicitly state that the public interests outweighed the privacy intrusion, but upholding the temporary seizure of the occupant implied its reasonableness, and the Court described prior, somewhat similar, cases as examples where law enforcement interests "justified" a limited intrusion on privacy.[174] Perhaps "justified" is another way of saying "outweighed."

In *Cupp v. Murphy*,[175] the police, without a warrant, scraped the fingernails of a suspect lawfully detained for questioning.[176] The Supreme Court noted that the

167. 470 U.S. 753 (1985).
168. *Id.* at 763.
169. *Id.* at 766.
170. 452 U.S. 692 (1981).
171. *See id.* at 693.
172. *See id.* at 701–02.
173. *See id.* at 702.
174. *See id.* at 699–701.
175. 412 U.S. 291 (1973).
176. *See id.* at 292.

intrusion of privacy was "very limited," the state had an interest (not characterized as to degree) in avoiding the destruction of evidence, and probable cause to arrest existed, although no arrest had been made.[177] The last factor does not appear to be a state interest, but was nonetheless thought to be relevant to an assessment of reasonableness.

In somewhat similar fashion, in *Schmerber v. California*,[178] the Court upheld the taking of a blood sample from a person lawfully arrested for drunk driving.[179] The obvious state interest was avoiding the alcohol content of the blood diminishing in the time needed to obtain a warrant.[180] The privacy invasion was not characterized as to degree, although the Court noted that the quantity of blood extracted was "minimal" and that for most people the procedure, performed in a hospital, involves "virtually no risk, trauma, or pain."[181] The Court did not explicitly state that the state interest outweighed the privacy interest, but later characterized *Schmerber* as a case where the competing interests were "[w]eighed."[182]

Although the Fourth Amendment's text requires probable cause for the issuance of a search warrant and for most limited searches permitted without a warrant,[183] the Supreme Court has acknowledged that the weighing process can sometimes ignore probable cause: "Where a careful balancing of government and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard."[184] A familiar example is the so-called *Terry* stop—briefly detaining a person on the street when a police office can "point to specific and

177. *See id.* at 296.
178. 384 U.S. 757 (1966).
179. *See id.* at 758–59.
180. *See id.* at 770–71.
181. *Id.* at 771.
182. Winston v. Lee, 470 U.S. 753, 762 (1985).
183. *See*, *e.g.*, United States v. Santana, 427 U.S. 38, 42 (1976).
184. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985).

articulable facts" that "*reasonably* warrant that intrusion."[185] The circularity of determining that a stop is "reasonable" when it is "reasonably" warranted apparently escaped the Court's attention. The same circularity is evident when the Court considered the reasonableness of a search incident to a *Terry* stop: "Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a *reasonable* search for weapons for the protection of the police officer."[186]

Perhaps implicitly recognizing that the weighing metaphor often just *reflects* a result, rather than *yields* one, the Supreme Court has formulated rules, applicable in particular types of cases, that bring some certainty to the determination of whether a search is reasonable.[187] "*Except in certain carefully defined classes of cases*, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."[188] It is beyond the scope of this inquiry to canvass all the rules the Court has developed for determining the reasonable of searches, but a few examples are worth noting.

One rule is that "searches and seizures inside a home without a warrant are presumptively unreasonable."[189] Another is that a search without a warrant is reasonable under exigent circumstances. Examples are hot pursuit of a fleeing felon,[190] anticipated destruction of evidence,[191] and emergencies, such as an ongoing fire.[192] Also, a warrantless search of a lawfully arrested person and the area within his immediate control is

185. Terry v. Ohio, 392, U.S. 1, 21 (1968) (emphasis added).

186. *Id.* at 27 (emphasis added).

187. To the extent that the Court has formulated these rules, it has shifted the analysis of reasonableness in the context of search and seizure away from the use of the weighing metaphor and into the approach of using one or more specific factors, discussed in III, *infra.*

188. Camara v. Municipal Court, 87 U.S. 523, 528–29 (1967) (emphasis added).

189. Payton v. New York, 445 U.S. 573, 586 (1980).

190. *See* United States v. Santana, 427 U.S. 38, 42–43 (1976).

191. *See* Schmerber v. California, 384 U.S. 757, 770–71 (1966).

192. *See* Michigan v. Tyler, 436 U.S. 499, 511 (1978).

reasonable.[193] Equally familiar is the rule that a seizure of items in plain view is reasonable if their incriminating nature is immediately apparent and the officers have lawful access to the premises.[194]

The location of the seized item may sometimes make a search for it and its seizure reasonable; the most familiar example is the so-called "automobile exception" to the warrant requirement as long as probable cause exists to believe the vehicle contains the item.[195]

The Supreme Court has also deemed a search reasonable simply because it occurs near an international border: "That searches made at the border, pursuant to the long-standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration."[196]

What can be concluded about "reasonableness" in the context of searches and seizures? First, the concept is frequently invoked, which is not surprising since it appears in the text of the Fourth Amendment. Second, the weighing process is often invoked, the interests on both sides of the "scale" are sometimes identified, but the process by which the Supreme Court determines whether one set of interests outweighs the other is unexplained, being apparently a matter of a value judgment. Third, the weighing process is supplemented, and in some contexts entirely replaced, by specific rules that determine reasonableness in certain classes of cases.

C. Use of Unreasonable Force in Making Arrests

A third context in which the weighing metaphor is enlisted to determine reasonableness is assessing claims

193. *See* Arizona v. Gant, 556 U.S. 332, 335 (2009); Chimel v. California, 395 U.S. 752, 763 (1969).

194. *See* Horton v. California, 496 U.S. 128 (1990).

195. *See* California v. Acevedo, 500 U.S. 565, 569–70 (1991); Carroll v. United States, 267 U.S. 132, 149 (1925).

196. United States v. Ramsey, 431 U.S. 606, 616 (1977).

that a government officer used excessive force during an arrest or an investigatory stop. The Supreme Court has ruled that such actions are "seizures" of the person within the meaning of the Fourth Amendment and as such are "properly analyzed under the Fourth Amendment's 'objective reasonableness' standard."[197] In *Graham*, the Court rejected the contention that excessive force claims in the law enforcement context should be analyzed under the more amorphous substantive due process standard of the Fourteenth Amendment.[198]

Instead, applying the reasonableness standard of the Fourth Amendment to the claim that excessive force had been used in the course of making an investigatory stop, the Court invoked its Fourth Amendment jurisprudence, stating that it had to "balanc[e] . . . 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake."[199] This balancing, the

197. Graham v. Connor, 490 U.S. 386, 388 (1989).

198. *See id.* In the context of harm inflicted on prisoners, the Supreme Court has ruled that claims of excessive force are to be analyzed under the Eighth Amendment's prohibition of cruel and unusual punishments. *See* Whitley v. Albers, 475 U.S. 312, 318–26 (1986). Unlike the context of force used to initiate the law enforcement process by an arrest, "the subjective motivations of the individual officers are of central importance in deciding whether force used against a convicted prisoner violates the Eighth Amendment," *Graham*, 490 U.S. at 398, a proposition previously announced in *Whitley*, 475 U.S. at 320–21.

The substantive due process standard is still available for excessive force claims that do not involve either initiation of the criminal process or punishment of sentenced prisoners. Examples are force used against a pretrial detainee, *see* Butera v. Cottey, 285 F.3d 601, 605 (7th Cir. 2002), an inmate awaiting sentencing, *see* Lewis v. Downey, 581 F.3d 467, 473 (7th Cir. 2009), or a student, *see* Golden *ex rel.* Balch v. Anders, 324 F.3d 650, 652 (8th Cir. 2003).

199. *Graham*, 490 U.S. at 396 (quoting Terry v. Ohio, 392 U.S. 1, 8 (1968), which quoted United States v. Place, 462 U.S. 696, 703 (1983)). When the Court later described the government interests to be balanced in *Tennessee v. Garner*, 471 U.S. 1 (1964), it abandoned the phrase "the countervailing governmental interests at stake," which it had used in *Graham*, 490 U.S. at 396, and used the phrase "the importance of the governmental interests alleged to justify the intrusion," which it quoted from *United States v. Place*, 462 U.S. 696, 703 (1983). *See Garner*, 471 U.S. at 8. Focusing on the *importance* of the governmental interests was useful. *Graham* itself shed no light on how the balancing process would yield an answer to the reasonableness inquiry on the facts of that case because the Court remanded to permit the Court of Appeals to reconsider its decision without regard to the officer's motivation. *See Graham*, 490 U.S. at 398-

Court noted, "requires careful attention to the facts and circumstances of each particular case."[200] The Court identified three factors in particular: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[201] And, the Court added, "[T]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation."[202] The Court also made clear that the standard is one of objective reasonableness, and the officer's state of mind, whether evil or benign, is not relevant.[203] Then, as often happens when courts try to explain a standard of reasonableness, the Court circularly explained, "The 'reasonableness' of" the amount of force used "must be judged from the perspective of a reasonable officer."[204]

The one case in which the Supreme Court purported to apply balancing to a claim of excessive force in a law enforcement context is *Garner v. Tennessee*.[205] Police, endeavoring to stop an unarmed suspect feeling from a

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99. That court had directed a verdict for the officers, erroneously relying in part on the fact that they had not acted with malice. *See* Graham v. City of Charlotte, 827 F.2d 945, 948–49 (4th Cir. 1987).

200. *Graham*, 490 U.S. at 396.

201. *Id.*

202. *Id.* at 396–97. The Court subsequently amplified this point, noting that "[i]f an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Saucier v. Katz, 533 U.S. 194, 205 (2001).

203. *See Graham*, 490 U.S. at 397. Previously, in *County of Sacramento v. Lewis*, 523 U.S. 833, 836 (1998), the Court had ruled that officers must have an intent to harm before a seizure (through a high-speed chase) is an unreasonable seizure.

204. *Graham*, 490 U.S. at 396.

205. 471 U.S. 1, 7–8 (1985). The Court's recent decisions on excessive force in the context of the qualified immunity defense, did not purport to "weigh" or "balance" competing interests. *See* Kisela v. Hughes, 138 S. Ct. 1148 (2018); White v. Pauly, 137 S. Ct. 548 (2018); Mullenix v. Luna, 577 U.S. 7 (2015). *See* text at pp. 47–57, *infra*.

burglary, shot and killed him.[206] As with Fourth Amendment balancing in search cases, the Court articulated individual and government interests, but appeared to "balance" them, not by comparing their "weight" or importance but essentially by simply making value judgments.[207]

The Court began by noting that "the suspect's fundamental interest in his own life need not be elaborated upon."[208] Although that individual interest was plainly very important, the Court did not indicate how important would be the interest in not suffering a serious non-fatal injury inflicted, for example, by a bullet. The governmental interest identified was "effective law enforcement,"[209] which included the goals of reducing violence by encouraging peaceful submission of subjects who know they may be shot if they flee and making arrests to start law enforcement process.[210] The Court also identified an interest on both sides of the balance: the use of deadly force was said to "frustrate the interest of the individual, and of society, in judicial determination of guilt and punishment."[211]

Having identified these interests, the Court then said only that it was "not convinced that the use of deadly force is a sufficiently productive means of accomplishing [them] to justify the killing of nonviolent suspects."[212] The Court relied on data showing that a majority of police departments forbid use of deadly force against nonviolent suspects.[213] Ultimately, the Court simply concluded that the parties favoring use of deadly force "have not persuaded us that shooting nondangerous fleeing

206. *Garner*, 471 U.S. at 3–4.
207. *Id.* at 9.
208. *Id.*
209. *Id.*
210. *See id.* at 9–10.
211. *Id.* at 9.
212. *Id.* at 10.
213. *See id.* at 10–11.

suspects is so vital as to outweigh the suspect's interest in his own life."[214]

Use of force that inflicts injury in the law enforcement context thus appears to be unreasonable when the Supreme Court deems the alleged government interest not sufficiently important to justify the individual's injury.

The Courts of Appeals have had to apply the balancing process in the more typical context of police efforts to subdue a suspect being arrested, rather than to stop the suspect's flight. These cases involve a claim of police brutality. The suspect's interest remains avoiding injury. The government interest is obviously to bring the suspect into custody. How are these interests weighed?

Not surprisingly, the Courts of Appeals, although having been instructed to invoke the weighing metaphor in police brutality cases, have not really weighed or even compared the competing interests. One court understood its assignment in these words:

> In order to establish that the use of force to effect an arrest was unreasonable and therefore a violation of the Fourth Amendment, plaintiffs must establish that the government interests at stake were outweighed by "the nature and quality of the intrusion on [plaintiffs'] Fourth Amendment interests." *Graham v. Connor,* 490 U.S. 386, 396 (1989). In other words, the factfinder must determine whether, in light of the totality of the circumstances faced by the arresting officer, the amount of force used was objectively reasonable at the time.[215]

The court replaced the weighing of relevant interests with a tautological inquiry into "objective[] reasonable[ness]."

In reality, it does not make sense to talk about weighing the interests of the suspect and the government. The suspect always has an interest in not being injured. The government always has an interest in

214. *Id.* at 11.

215. Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 123 (2d Cir. 2004) (citation abbreviated).

bringing the suspect into custody. What should matter is the amount of force needed to accomplish that objective. Thus the issue of unreasonable or excessive force in subduing a suspect should turn on the straightforward question: whenever the suspect has suffered an injury, could some lesser amount of force have been used to bring the suspect into custody, with some allowance for the fact that the officer must decide on the spot how much force is needed to subdue the suspect? If less force would have sufficed, the force used was excessive and therefore unreasonable in violation of the Fourth Amendment.

III. REASONABLENESS ANALYSIS GUIDED BY ONE STANDARD OR ONE OR MORE FACTORS

In a third approach, courts articulate one standard, or one or more factors, that are relevant to the determination of reasonableness and provide some guidance as to how the standard or factors are to be applied. One standard has been identified to determine reasonableness with respect to (1) effective assistance of counsel, one factor has been identified to determine reasonableness with respect to (2) qualified immunity, and several factors have been identified as relevant to reasonableness in the determination of (3) personal jurisdiction over out-of-state defendants.

A. Reasonably Effective Assistance of Counsel

In the category of approaches where courts identify one standard, or one or more factors, to determine reasonableness, I turn first to the context of effective assistance of counsel.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[216] And this right means "the right to the *effective* assistance of counsel."[217] In two ways, reasonableness is embedded in determining when counsel's performance renders a conviction unconstitutional. The first concerns whether counsel's performance was not constitutionally "effective." The Supreme Court has explained that "the proper standard for attorney performance is that of *reasonably* effective assistance."[218] The second concerns the prejudice necessary to render ineffective assistance of counsel a basis for invalidating a conviction. Except in those

216. U.S. CONST. amend. VI.

217. Strickland v. Washington, 466 U.S. 668, 686 (1984) (emphasis added); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

218. *Strickland*, 466 U.S. at 687 (emphasis added).

situations where prejudice is presumed,[219] the Court has explained that "[t]he defendant must show that there is a *reasonable* probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[220]

With respect to whether counsel's performance was reasonably effective, the Court has provided considerable meaning to "reasonableness": "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms,"[221] and "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides."[222]

The Court has provided a framework for making the determination of reasonable attorney performance:

> A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.[223]

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219. Examples of presumed prejudice are "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance," *Id.* at 692 (citing United States v. Cronic, 466 U.S. 648, 659 & n.25 (1984)), and "when counsel is burdened by an actual conflict of interest," *id.* (citing Cuyler v. Sullivan, 446 U.S. 335, 345–50 (2003)).

220. *Strickland*, 466 U.S. at 694 (emphasis added).

221. *Id.* at 688.

222. *Id.*

223. *Id.* at 690. Illustrating a deficient performance, the Court has said, "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential

With respect to a showing of prejudice, however, the Court's explanation is not especially helpful: "A reasonable probability [that the outcome would have been different] is a probability sufficient to undermine confidence in the outcome."[224]

As in some other contexts, it is possible that the meaning of "reasonable" with respect to effective assistance of counsel implicitly reflects a balance of interests—in this instance, between the interest of government in the finality of convictions and the interest of a defendant in enjoying a right to counsel—but the Supreme Court has not explicitly referred to such a balance and has given no indication of implicitly "weighing" competing interests. Effective assistance of counsel is a context where a single standard—"prevailing professional norms"—helpfully provides some meaning to the reasonableness inquiry.

B. Qualified Immunity: Reasonable Belief in Lawfulness of Action

A second context in which courts have identified one standard or factor to determine reasonableness is qualified immunity.

The defense of qualified immunity is available to a public official sued for damages for violation of a person's constitutional rights. The defense initially turned primarily on the concept of reasonableness. In some contexts, as discussed *infra*, the defense involved the concept of reasonableness twice, arguably with two different meanings. The suit is authorized by 42 U.S.C. § 1983, which provides that a state (or local) official is liable for "the deprivation of any rights, privileges, or immunities secured by the Constitution." The words of the statute contain no special defense. Under its terms, the sole

example of unreasonable performance under *Strickland*." Hinton v. Alabama, 571 U.S. 263, 274 (2014).

224. *Id.* at 694.

issue is whether the officer denied a person a constitutional right.

Nevertheless, the Supreme Court long ago ruled that public officers had two kinds of defenses—absolute or qualified immunity—depending on the type of office they hold. In 1871, the Court ruled in *Bradley v. Fisher*[225] that judges had absolute immunity, relying on the practice "in all countries where there is any well-ordered system of jurisprudence" and "the settled doctrine of the English courts for many centuries."[226] *Bradley* rejected dictum in *Randall v. Brigham*,[227] which had suggested that a judge might be liable for actions taken maliciously.[228] Absolute immunity was later accorded to legislators in *Tenney v. Brandhove*,[229] and to prosecutors in *Imbler v. Pachtman*.[230]

For officials not deemed entitled to absolute immunity, such as police officers, the Supreme Court read into section 1983 the defense of qualified immunity.[231] The Court first used the phrase "qualified immunity" in *Scheuer v. Rhodes*[232] in 1974, a rather late development considering that section 1983 was enacted in 1871.[233] *Scheuer* was a suit seeking damages from a governor and other state officials for the 1970 shooting deaths at Kent

225. 80 U.S. 335 (13 Wall.) (1871) (W.H. & O.H. Morrison 1872). I include the publisher and date of publication of all cases in the nominative reports because of stylistic variations among the versions of different publishers. *See generally* Jon O. Newman, *Citators Beware: Stylistic Variations in Different Publishers' Versions of Early Supreme Court Opinions*, 26 J. SUP. CT. HIST., No. 1 (July 2001).

226. *Bradley*, 80 U.S. at 347.

227. 74 U.S. (7 Wall.) 523, 526 (1868) (W.H. & O. H. Morrison 1870).

228. *See Bradley*, 80 U.S. at 351.

229. 341 U.S. 367, 377–79 (1951).

230. 424 U.S. 409, 421–28 (1976). To whatever extent *Spalding v. Vilas*, 161 U.S. 483, 498–99 (1896), could be read to extend absolute immunity to heads of federal executive departments, that arguable implication was rejected in *Butz v. Economou*, 438 U.S. 478, 492–94 (1978).

231. Scheuer v. Rhodes, 416 U.S. 232, 247.

232. *Id.* at 248.

233. *See* Act of April 20, 1871, c. 22, §§ 1, 2, 17 Stat. 13. I should point out that only in 1961 did the Supreme Court first rule that public officers were not insulated from liability under section 1983 just because state law rendered their actions unlawful. *See* Monroe v. Pape, 365 U.S. 167, 187 (1961).

State University.[234] Interestingly, the Court articulated the defense, not to give the defendants protection, but to make sure they were *not* insulated from liability by the absolute immunity available to judges and legislators.[235] Section 1983 "would be drained of meaning were we to hold that the acts of a governor or other high executive officer have the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the United States."[236]

The Supreme Court's first decision providing police officers with the defense that it had called "qualified immunity" in *Scheuer* was *Pierson v. Ray*.[237] The Court relied on the availability of the defense at common law in actions for false arrest, together with the statement in *Monroe v. Pape*[238] that section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[239] Although *Monroe* had drawn from the common law a basis to *impose* liability on a public official, *Pierson* drew from the common law a *defense* to liability. In *Pierson*, the Court, following the common law, said that the defense to a section 1983 claim would be available where a police office had probable cause for an arrest and acted in good faith.[240]

Pierson was the first case to introduce into the qualified immunity defense the concept of the officer's *reasonable* belief in the lawfulness of his action.[241] The Court ruled that an officer should be "excus[ed] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its

234. *Scheuer*, 416 U.S. at 234.
235. *See id.* at 248.
236. *Id.* (internal quotation marks omitted).
237. 386 U.S. 547, 557 (1967).
238. 365 U.S. 167 (1961).
239. *Id.* at 187.
240. 386 U.S. at 557.
241. *See id.* at 555.

face or as applied."[242] Later, in *Malley v. Briggs*,[243] the Court said that the officer's belief that his actions were lawful would be reasonable if "officers of reasonable competence could disagree" on the legality of the action at issue in its particular factual context.[244] *Pierson* also introduced into the defense the officer's good faith. The Court accorded qualified immunity "if the jury found that the officers reasonably believed in good faith that the arrest was constitutional."[245] The Court again made good faith an element of the qualified immunity defense in *Wood v. Strickland.*[246]

When the Court endeavored to describe the content of a qualified immunity defense, it provided a refinement to what it had said in *Pierson*. In that case the Court had said that the police officers were entitled to immunity if they reasonably believed the statute they were enforcing was constitutional.[247] In *Scheuer*, the Court generalized this thought beyond the context of a reasonable belief concerning the constitutional validity of the applicable *statute* to a reasonable belief in the constitutional validity of the officers' *action*.[248]

Where a police officer is sued for an alleged violation of the right not to be subjected to an unreasonable search or seizure, making the qualified immunity defense turn on an objectively reasonable belief in the lawfulness of the challenged action creates a doctrine of apparent circularity. The apparent circularity arises from the fact that reasonableness is a component of both the lawfulness of the challenged action and the defense to the claim of unlawful action. An arrest is unlawful if the officer lacked probable cause, *i.e.*, an objectively reasonable officer would not believe that the suspect had committed a crime. But, even without such a belief, the officer has a

242. *Id.*
243. 475 U.S. 335 (1986).
244. *Id.* at 341.
245. 386 U.S. at 557.
246. 420 U.S. 308, 318 (1975).
247. 386 U.S. at 557.
248. 416 U.S. at 247–48.

qualified immunity defense if he reasonably believed his action was lawful. It is not readily apparent how an officer can have an objectively reasonable belief that an arrest is lawful where an objectively reasonable officer would not believe that probable cause existed.

Shortly after *Pierson* introduced the concept of reasonableness as the principal component of the qualified immunity defense, Judge Lumbard endeavored to dispel the apparent circularity of the defense as applied to claims of unlawful arrests or searches.[249] The case concerned claims against federal officers for allegedly unlawful actions.[250] Although these claims were based directly on provisions of the Constitution (so-called *Bivens* claims), the Second Circuit ruled that the qualified immunity defense, available to state officers, would be available to federal officers.[251]

Concurring in that ruling, Judge Lumbard wrote that "there are two standards to be considered" in applying the qualified immunity defense to conduct alleged to constitute an unlawful arrest or search:

> The first is what constitutes reasonableness for purposes of defining probable cause under the fourth amendment for the protection of citizens against governmental overreaching. The other standard is the less stringent reasonable man standard of the tort action against government agents. This second and lesser standard is appropriate because, in many cases, federal officers cannot be expected to predict what federal judges frequently have considerable difficulty in deciding and about which they frequently differ among themselves. It would be contrary to the public interest if federal officers were held to a probable cause standard as in many cases they would fail to act for fear of guessing wrong. Consequently the law ought to, and does, protect government agents if they act in good faith and with a

249. *See* Bivens v. Six Unknown Fed. Narcotics Agents, 456 F.2d 1339, 1348 (2d Cir. 1972) (Lumbard, J., concurring), *on remand from the Supreme Court*, 403 U.S. 388 (1971).

250. *See id.* at 1342.

251. *See id.* at 1347.

> reasonable belief in the validity of the arrest and search.[252]

I have argued elsewhere that "it is unrealistic to suppose that . . . juries . . . will possibly grasp the distinction" between the two standards Judge Lumbard identified.[253] After presiding at the trial of a large number of police misconduct cases as a district judge, I concluded that jurors, hearing two standards of reasonableness, would focus only on the officer's good faith, a concept they can readily understand, in deciding whether to uphold the defense of qualified immunity.[254] Indeed, a study of responses to a questionnaire I authorized to be sent to jurors who had served in a number of police misconduct cases revealed that they had little, if any, understanding of the qualified immunity defense at all.[255] I have found no decision explicitly considering Judge Lumbard's second reasonableness inquiry as to whether, under "a less stringent standard" of tort law, the officer was objectively reasonable in thinking that his actions were lawful.

The 1975 decision in *Wood v. Strickland*, although continuing a reference to an officer's reasonable belief in good faith that the action taken was lawful, added what would become an increasingly important, and ultimately critical, element of the qualified immunity defense by stating that an officer would have qualified immunity for unlawful action unless the right allegedly violated has been "clearly established" prior to his action: "A compensatory award will be appropriate only if the [official] has acted . . . with such disregard of the [plaintiff's] *clearly established* constitutional rights that his action cannot reasonably be characterized as being in good faith."[256]

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252. *Id.* at 1348–49.

253. Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Action*, 87 YALE L.J. 447, 461 (1978).

254. *See id.*

255. *See generally* Note, *Suing the Police in Federal Court*, 88 YALE L. J. 781 (1979).

256. Wood v. Strickland, 420 U.S. 308, 322 ((1975) emphasis added).

Later, in *Harlow v. Fitzgerald*,[257] the Court appeared to diminish, if not eliminate, the significance of the accused official's subjective good faith, which it had introduced in *Pierson.*[258] Fearing that "[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery" that would be "disruptive of effective government,"[259] the Court ruled instead, echoing *Wood*, that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[260] Thus, the prior reference in *Wood* to "clearly established" rights became in *Harlow* the key determinant of whether the defense of qualified immunity was available.

Harlow not only emphasized the importance of the concept of clearly established rights for the qualified immunity defense but also began a progression of decisions broadening the defense by making more rigorous the tests for determining whether the right claimed to have been violated was clearly established. The progression developed along two dimensions: *who* had to be aware that the right was clearly established and *how similar* the facts of a case had to be to those in previously decided cases.

With respect to *who* had the requisite awareness, *Harlow* in 1982 referred to clearly established rights of which *a* reasonable person would have known.[261] In *Anderson v. Creighton*[262] in 1987, the Court also referred to "*a* reasonable officer"[263] and seems to have made the

257. 457 U.S. 800 (1982).

258. 386 U.S. at 557.

259. *Harlow*, 457 U.S. at 817.

260. *Id.* at 818.

261. *Id.* (emphasis added).

262. 483 U.S. 635, 641 (1987) (emphasis added).

263. *Id.* at 641 (emphasis added). The year before, the Court had said the question was "whether a reasonably well-trained officer in petitioner's position *would have* known that his affidavit failed to establish probable cause." *Malley v. Biggs*, 475 U.S. 335, 345 (1986) (emphasis added). Although Justice Scalia's opinion in *Anderson* cited *Malley* at page 344–45 for the "could have" formulation,

quality immunity defense somewhat easier to establish by saying that the question was "whether a reasonable officer *could have* believed [the officer's] warrantless search comported with the Fourth Amendment."[264] *Anderson* also made clear that the test of whether a reasonable person would have believed his action was lawful, *i.e.*, did not violate a clearly established right of which a reasonable person was aware, was an objective one: "Anderson's subjective beliefs about the search are irrelevant."[265]

Then, in 2011 in *Ashcroft v. al-Kidd,*[266] the Court made the defense even easier for police officers to establish by stating, "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that *every* reasonable official would have understood that what he is doing violates that right."[267] Similarly, in 2014 in *Plumhoff v. Rickard*,[268] the Court referred to the understanding of "*any* reasonable official in the defendant's shoes."[269]

With respect to how similar the facts of the case have to be compared to those of a previous case, the Court has explained that determining whether the right allegedly violated has been clearly established depends on what the Court has called the "level of generality" at which the

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Anderson, 483 U.S. at 638–39, those words appear only in the separate opinion of Justice Powell, *Malley*, 475 U.S. at 350 (Powell, J., with whom Rehnquist, J., joins, concurring in part and dissenting in part).

264. *Anderson*, 483 U.S. at 641 (emphasis added). Although *Anderson* seems to have made the qualified immunity defense slightly easier to establish by changing the words "would have known," used in *Harlow*, 437 U.S. at 818, to the words "could have believed," used in *Anderson*, 483 U.S. at 637, the Court later reverted to the words "would have understood" in *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), and *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). It is not clear whether changing from "would" to "could" and back to "would" was deliberate.

265. *Anderson*, 483 U.S. at 637.

266. 563 U.S. 731 (2011) (emphasis added) (brackets in original) (internal quotation marks omitted). In *al-Kidd*, the Court also said that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 741.

267. *Id.*

268. 572 U.S. 765 (2014).

269. *Id.* at 779 (emphasis added).

right is described,[270] a phrase first used in the context of the qualified immunity defense in *Anderson*.[271] Applying the phrase, the Court said in *al-Kidd*, "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established."[272]

As to how "particular" the conduct had to be compared to previous cases, in *Anderson*, the Court first disclaimed precluding the qualified immunity defense "unless the very action in question has previously been held unlawful."[273] And in *Hope v. Pelzer*,[274] the Court, reversing a Court of Appeals that had rejected a qualified immunity defense, again made it clear that it was not precluding the defense "unless the very action in question has previously been held unlawful."[275] Similarly, the Court later said in *al-Kidd*, "We do not require a case directly on point."[276] However, in an indication of what was to come, the Court added, "At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."[277]

Then, in *Mullenix v. Luna*,[278] the Court said that "the correct inquiry" was "whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the 'situation [she] confronted.'"[279]

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270. The Supreme Court first used the phrase "level of generality" in 1961 to distinguish abstract advocacy of revolution from more narrowly described advocacy of violent overthrow of government for purposes of a Smith Act violation, 18 U.S.C. § 2385. *See* United States v. Scales, 367 U.S. 203, 237 (1961). The phrase was next used to distinguish among market conditions for purposes of an antitrust violation. *See* Illinois Brick v. Illinois, 431 U.S. 720, 745 (1977).

271. 483 U.S. at 639.

272. 563 U.S. 731, 742 (2011).

273. 483 U.S. at 640.

274. 536 U.S. 730 (2002).

275. *Id.* at 738.

276. 563 U.S. at 741.

277. *Id.*

278. 577 U.S. 7 (2015).

279. *Id.* at 13 (quoting Brosseau v. Haugen, 534 U.S. 194, 199 (2004)).

Even more exacting, in *District of Columbia v. Wesby*,[280] the Court said, "The 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in *the particular circumstances* before him."[281] Although having said in *al-Kidd* that the Court was not requiring "a case directly on point,"[282] the Court reversed a grant of qualified immunity in *White v. Pauly*,[283] because the Court of Appeals "failed to identify *a case* where an officer acting under similar circumstances as [the defendant officer] was held to have violated the Fourth Amendment."[284] And in *Kisela v. Hughes*,[285] the Court said, "[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue."[286]

The Court's altering of the "clearly established" standard from not requiring "a case directly on point" in *al-Kidd*[287] to requiring precedent that "squarely governs the specific facts at issue" in *Kisela*,[288] elicited a dissent specifically critical of this progression:

> The majority's decision, no matter how much it says otherwise, ultimately rests on a faulty premise: that those cases [relied on by the Court of Appeals] are not identical to this one. But that is not the law, for our cases have never required a factually identical case to satisfy the "clearly established" standard.[289]

The Court's expansion of the qualified immunity defense is best captured by the Court's repeated statement

280. 138 S. Ct. 577 (2018).

281. *Id.* at 590 (emphasis added).

282. 563 U.S. at 741.

283. 137 S. Ct. 548 (2018).

284. *Id.* at 552 (emphasis added). The Court has noted how often it has reversed a grant of qualified immunity by a Court of Appeals. *See* City of San Francisco v. Sheehan, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases).

285. 138 S. Ct. 1148 (2018).

286. *Id.* at 1153 (quoting *Mullenix*, 577 U.S. at 13).

287. 563 U.S. at 741.

288. 138 S. Ct. at 1153.

289. *Id.* at 1161 (Sotomayor, J., with whom Ginsburg, J., joins, dissenting).

that the "immunity protects all but the plainly incompetent or those who knowingly violate the law."[290]

Reasonableness in the context of a qualified immunity defense now turns out to be primarily, if not entirely, concerned with a single factor: whether the law concerning the unlawfulness of an officer's conduct was clearly established. As stated in *Kisela*, "'Reasonableness is judged against the backdrop of the law at the time of the conduct.'"[291] Although the objective reasonableness of a defendant's belief in the lawfulness of the challenged action is sometimes said to be relevant, that factor rarely receives explicit analysis.[292]

C. Personal Jurisdiction: Unreasonable Burden

290. *Id.* at 1152; *Wesby*, 138 S. Ct. at 589 (same); *White*, 137 S. Ct. at 551 (same); *Mullenix*, 577 U.S. at 13 (same); *Sheehan*, 135 S. Ct. at 1774 (same). In the one case, the Court invoked the "plainly incompetent" standard: "[T]he question is whether, in light of precedent existing at the time, [the defendant officer] was 'plainly incompetent' in entering [the plaintiff's] yard to pursue the fleeing [suspect]." Stanton v. Sims, 571 U.S. 3, 5 (2013). The Court concluded that he was not. *Id.* at 11.

291. 138 S. Ct. at 1152 (quoting *Brosseau*, 543 U.S. at 198). Determining reasonableness for purposes of qualified immunity could involve a weighing or balancing process, and the Court has occasionally invoked the weighing or balancing metaphor in this context. "Requiring the alleged violation of law to be 'clearly established' 'balances . . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" Wood v. Moss, 572 U.S. 744, 758 (2014) (quoting Pearson v. Callahan, 555 U.S. 223, 231 (2009)); "This 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" Reichle v. Howards, 566 U.S. 658, 664 (2012) (quoting *Anderson*, 483 U.S. at 639) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984))."

292. More than forty years ago, I advocated abolition of the qualified immunity defense, believing that a person injured by a police officer's constitutional violation should be compensated, preferably by the officer's city or state employer (as with all over torts committed in the course of a public officer's employment), simply because of the violation, regardless of whether the officer believed the conduct was lawful or whether the unlawfulness of the conduct had been clearly established. *See* Newman, *supra*, note 253, at 458–62. Abolishing the defense was recently supported by the U.S. House of Representatives. *See* H.R. 7120, 116th Cong., 2d Sess. (2020).

to Defend in Out-of-State Forum

A context in which courts determine reasonableness by identifying several relevant factors is assertion of personal jurisdiction over an out-of-state defendant.

The antecedent of this multi-factor context is the Supreme Court's decision in *Pennoyer v. Neff*,[293] interpreting the Due Process Clause of the Fourteenth Amendment to limit a state's assertion of jurisdiction over a nonresident.[294] *Pennoyer* established only that service of process was required.[295] Then, in *Green v. Chicago, B & Q R Co.*,[296] the Court moved beyond *Pennoyer* and began to determine what contacts of a defendant with the forum state sufficed to satisfy the constitutional due process requirement. Solicitation of orders was not enough.[297] Much later, in *International Shoe Co. v. State of Washington*,[298] the Court refined the Due Process Clause requirement to mean that, to be subject to the judicial process of a state, a defendant must have "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[299] Further explicating "the demands of due process,"[300] the Court said, "Those demands may be met by such contacts of the [defendant] corporation with the state of the forum as to make it *reasonable*, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there."[301] Thus was "reasonable[ness]" introduced into due process limits on assertion

293. 95 U.S. 714 (1877).

294. *See id.* at 733–34.

295. *See id.* at 733–34.

296. 205 U.S. 530 (1907).

297. *See id.* at 533–34.

298. 326 U.S. 310 (1945).

299. *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 465 (1941)). "Fair play" as a standard for due process in the context of asserting jurisdiction over an out-of-state defendant was first enunciated in *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

300. *International Shoe,* 326 U.S. at 317.

301. *Id.* (emphasis added).

of personal jurisdiction, along with the context of "our federal system of government."

Continuing its elucidation of due process limits, the Court said,

> [I]t has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and *unreasonable* a burden on the corporation to comport with due process.[302]

Then, detailing the defendant's activities within the forum state, the Court concluded:

> It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it *reasonable* and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which [the defendant-]appellant has incurred there. Hence we cannot say that the maintenance of the present suit in the State of Washington involves an *unreasonable* or undue procedure.[303]

Although *International Shoe* is usually cited for enunciating a requirement of "minimum contacts" with the forum state,[304] it is also significant for using "reasonableness" as the standard for determining when those contacts suffice to satisfy due process requirements.

Most significantly, in *World-Wide Volkswagen Corp. v. Woodson*,[305] the Court provided content to the concept of reasonableness in the context of personal jurisdiction:

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302. *Id.* (emphasis added) (citations omitted).

303. *Id.* at 320. (emphases added).

304. *See, e.g.*, Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 923 (2011).

305. 444 U.S. 286 (1980).

> Implicit in this emphasis on reasonableness is the understanding that [1] the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including [2] the forum State's interest in adjudicating the dispute; [3] the plaintiff's interest in obtaining convenient and effective relief . . .; [4] the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and [5] the shared interest of the several States in furthering fundamental substantive social policies.[306]

The second factor was cited to *McGee v. International Life Ins. Co.*;[307] the third and fifth factors were cited to *Kulko v. California Superior Court*.[308] However, the Court gave no indication of how the five factors were to be evaluated individually, much less in combination, because the Court concluded that the record showed "a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction."[309]

Seven years later, in *Asahi Metal Industry Co. v. Superior Court*,[310] the Court undertook to apply the five factors identified in *World-Wide Volkswagen*. Starting with the burden on the defendant, the Court characterized it as "severe."[311] The defendant had to "traverse the distance" between its corporate headquarters in Japan to California and "submit its dispute . . . to a foreign nation's judicial system."[312] Turning to the second and third factors, the Court characterized the interests of the plaintiff and the forum (California) as "slight."[313] The only claim left in the litigation was that of an indemnitee

306. *Id.* at 292 (citations omitted) (bracketed numbers added).

307. 355 U.S. 220, 223 (1957).

308. 436 U.S. 84, 92, 93 (1978). *Kulko* had also produced another reference to "reasonableness," the Court seeing "no basis on which it can be said that appellant could reasonably have anticipated being" sued in a California court. 436 U.S. at 97–98.

309. *World-Wide Volkswagen*, 444 U.S. at 295.

310. 480 U.S. 102 (1987).

311. *Id.* at 114.

312. *Id.*

313. *Id.*

from Taiwan, and the transaction on which its claim was based took place in Taiwan.[314] California's interest was deemed diminished by the fact that the plaintiff was not a California resident, the state's alleged safety concern was not implicated by an indemnification claim, and it was not even clear that California law would apply.[315]

With respect to the fourth and fifth factors, the Court said:

> *World-Wide Volkswagen* also admonished courts to take into consideration the interests of the several States, in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies. In the present case, this advice calls for a court to consider the procedural and substantive policies of other *nations* whose interests are affected by the assertion of jurisdiction by the California court. The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the Federal interest in Government's foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.[316]

This paragraph provides little guidance as to how courts are to evaluate the fourth and fifth factors—"the interstate judicial system's interest in obtaining the most efficient resolution of controversies" and "the shared interest of the several States in furthering fundamental substantive social policies." The analysis is hardly advanced by the advice that these interests "will be best served by a careful inquiry into the

314. *See id.*

315. *See id.* at 115.

316. *Id.* (internal quotation marks omitted).

reasonableness of the assertion of jurisdiction in the particular case."[317] Beyond this tautological way of determining whether the assertion of jurisdiction is reasonable, the Court could only re-invoke the first three factors by advising courts to be unwilling "to find the serious burdens on an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State" and then to exercise "[g]reat care and reserve" "when extending our notions of personal jurisdiction into the international field."[318]

Nevertheless, personal jurisdiction remains one of the few fields in which the Supreme Court has at least identified factors that bear on whether the disputed action—assertion of jurisdiction over an out-of-state defendant—is reasonable. The first three of the identified five factors are obviously relevant and not difficult to assess. It is far from clear what the Court means by the fourth and fifth factors, and its "application" of them in *Asahi* reveals its own inability to say anything helpful about them. Finally, it is worth noting that, as with many multi-factor standards in the law, the Court has said nothing about how the five factors are to be assessed in the aggregate, especially in the close cases where the factors tilt in opposite directions. Substantial room for clarification remains.

IV. REASONABLENESS WITHOUT GUIDANCE

In a fourth approach, reasonableness appears to be determined without identification of any method of analysis or identification of even a single relevant factor. Examples of this approach are (1) tort law, where unreasonableness of conduct is primarily left for determination by a jury without identification of any relevant factors, (2) habeas corpus, where federal courts determine whether a state court made an unreasonable application of

317. *Id.* (emphasis added).
318. *Id.*

constitutional requirements, and (3) *Chevron* deference,[319] where federal courts determine whether an administrative agency made a reasonable construction of an ambiguous statute.

A. The Reasonable Person of Tort Law

One example of this fourth approach is tort law, where the issue of reasonableness is primarily left to the jury without guidance, other than general advice to determine what is reasonable under all the circumstances.

Liability for causing injury through negligence is generally said to arise when a defendant who owes a duty of care to a plaintiff fails to act as a reasonable person would have acted under the circumstances of the case.[320] However, Justice Holmes observed that "most juries approach their task by asking how a reasonable person *should* behave rather than how an average or ordinary person would behave."[321]

Despite Holmes's observation, juries are regularly instructed to decide what a reasonable person *would* have done, *i.e.*, what degree of care he or she would have observed to avoid liability.[322] How is that to be determined? In *Conway v. O'Brien*,[323] Judge Learned Hand answered that question in these words:

> The degree of care demanded of a person by an occasion is the resultant of three factors: the likelihood that his conduct will injure others, taken with the seriousness of the injury if it happens, and balanced

319. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

320. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."); RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 3 (2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

321. OLIVER WENDELL HOLMES, JR., THE COMMON LAW, 123–24 (1881) (emphasis added).

322. *See*, *e.g.*, NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 2:10 ("Negligence is lack of ordinary care. It is a failure to use that degree of care that a reasonably prudent person would have used under the same circumstances.").

323. 111 F.2d 611 (2d Cir. 1940).

> against the interest which he must sacrifice to avoid the risk.[324]

Seven years later, Judge Hand put these factors into a formula in *United States v. Carroll Towing Co.*,[325] which considered the liability of the owner of a barge that had broken loose from its moorings.[326] Judge Hand famously wrote:

> [T]he owner's duty, as in other similar situations, to provide against resulting injuries is a function of three variables: (1) The probability that [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions. Possibly it serves to bring this notion into relief to state it in algebraic terms: if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.[327]

In *Conway*, Judge Hand had acknowledged that the three factors he had identified "are practically not susceptible of any quantitative estimate, and the second two are generally not so, even theoretically."[328] "For this reason," he continued:

> a solution always involves some preference, or choice between . . .[329] incommensurables, and it is co[n]signed to a jury because their decision is

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324. *Id.* at 612. Without commenting on Judge Hand's formulation, the Supreme Court reversed his decision, believing the applicable Vermont law required submission of the case to a jury. *See* Conway v. O'Brien, 312 U.S. 492 (1941).

325. 159 F.2d 169 (2d Cir. 1947).

326. *See id.* at 170.

327. *Id.* at 173. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 3 (2010) ("Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensure, and the burden of precautions to eliminate or reduce the risk of harm.").

328. 111 F.2d 112 (2d Cir. 1940).

329. This ellipsis replaces "a," which appears to be a typographical error, like the omission of "n" in "consigned."

> thought most likely to accord with commonly accepted standards, real or fancied.[330]

Echoing and developing Judge Hand's point, Judge Posner has written:

> Ordinarily . . . the parties do not give the jury the information required to quantify the variables that the Hand Formula picks out as relevant. That is why the formula has greater analytics than operational significance . . . . For many years to come juries may be forced to make rough judgments of reasonableness, intuiting rather than measuring the factors in the Hand Formula; and so long as their judgment is reasonable, the trial judge has no right to set it aside, let alone substitute his own judgment.[331]

From these observations, we gain some general understanding of what "reasonable" means in the standard of "reasonable care," against which the conduct of tort law's "reasonable person" is measured. "Reasonable care" is the care the jurors determine would (or should) have been exercised in the circumstances of the case, applying their collective sense of what society has a right to expect. Of course, as with all jury determinations in civil cases, courts retain power to police the outer limits of a range of permissible jury decisions. A court may not simply impose its sense of whether reasonable care has been observed but may reject a finding of liability or nonliability when the court is satisfied that the jury has simply gone too far in either direction. Within these outer limits, however, no explicit factors guide the determination of what a reasonable person would (or should) have done under the circumstances.

B. Habeas Corpus: Unreasonable State Court Application of Federal Law

A second context in which the determination of reasonableness appears to be made without identification of

330. *Conway*, 111 F.2d at 112.

331. McCarty v. Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987).

a method of analysis or even a single relevant factor is habeas corpus, where federal courts determine whether a state court conviction rests on an unreasonable application of federal law, essentially constitutional law.

In 1996, Congress limited the circumstances under which a federal court could use the writ of habeas corpus to vacate a state court conviction because a constitutional right of a defendant had been violated.[332] One of those circumstances, codified at amended 28 U.S.C. § 2254(d)(1), is where a state court has made "an unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States."[333] The other two circumstances are where a state court decision was "contrary to" such clearly established Federal law,[334] or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."[335]

My concern is only with the "unreasonable application" formulation of subsection 2254(d)(1).[336] That

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332. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 100 Stat. 1214, 1219 (1996).

333. The amendment to section 2254(d)(1) was section 104 of the Anti-Terrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, 1219 (1996).

334. 28 U.S.C. § 2254(d)(1).

335. 28 U.S.C. § 2254(d)(2).

336. With respect to the "contrary to" established law formulation of section 2254(d)(1), the Supreme Court, in *Williams v. Taylor,* 529 U.S. 362 (2000), approved the Fourth Circuit's interpretation:

> [T]he Fourth Circuit held in *Green* [*v. French*, 143 F.3d 865 (4th Cir. 1999)] that a state-court decision can be contrary to this Court's clearly established precedent in two ways. First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours. *See* 143 F.3d, at 869–870.
>
> The word "contrary" is commonly understood to mean "diametrically different," "opposite in character," or "mutually opposed." Webster's Third New International Dictionary 495 (1976). The text of § 2254(d)(1) therefore suggests that the state court's decision must be substantially different from the relevant precedent of this Court. The Fourth Circuit's interpretation of the "contrary to" clause accurately reflects this textual meaning. A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that

formulation made two changes in the authority of a federal court. First, a federal habeas court's authority to rule that a state court had violated constitutional protections as determined by federal courts in general was replaced by a more limited authority to rule that a state court had violated only those constitutional protections identified by the Supreme Court.[337] Second, a federal habeas court's authority to vacate a state court conviction whenever a state court had violated a defendant's constitutional rights was replaced with authority to vacate a conviction only if the state court had made an *unreasonable application* of constitutional law. The state court might have violated the defendant's constitutional rights, but the federal habeas court could not vacate the conviction as long as the state court had made a reasonable, even if incorrect, application of constitutional law.

The more understandable component of the new formulation is the requirement that what the state court unreasonably applied is "clearly established Federal law, as determined by the Supreme Court of the United States."[338] Far more problematic is the meaning of "unreasonably applied." The Supreme Court endeavored to interpret this phrase in *Williams v. Taylor*,[339] the Court's initial encounter with amended subsection 2254(d)(1).

> contradicts the governing law set forth in our cases. . . . A state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.

Williams, 529 U.S. at 405 (O'Connor, J., concurring but writing for the Court on the proper interpretation of section 2254(d)(1)).

The Supreme Court has not yet had occasion to interpret the "based on an unreasonable determination of the facts" formulation of section 2254(d)(2).

337. Amended subsection 2254(d)(1) speaks of an unreasonable application of "federal law," not just constitutional law, thereby creating the possibility that the writ could issue if a conviction violated some federal statutory right recognized by the Supreme Court. Such cases will arise so infrequently that the following discussion will consider only violations of constitutional law.

338. 28 U.S.C. § 2254(d)(1). Of course, even determining whether law has been "clearly established" poses its own problems, as the discussion of qualified immunity reveals. *See* text at pp. 47–57, *supra*.

339. 529 U.S. 362 (2000).

In *Williams*, a state court defendant sought habeas corpus relief to challenge his death sentence on the ground that his lawyer had been ineffective, in violation of the Sixth Amendment guarantee of a right to counsel, at the penalty phase of the state court proceedings.[340] The Supreme Court agreed that the Virginia Supreme Court decision's denying relief had been contrary to and an unreasonable application of federal law as previously determined by the Supreme Court in *Strickland v. Washington.*[341] The Supreme Court issued two opinions, one by Justice Stevens and one by Justice O'Connor.[342] A portion of each opinion interpreted subsection 2254(d)(1).[343] Since the portion of Justice O'Connor's opinion that interpreted subsection 2254(b)(1) garnered five votes compared to the four votes that supported Justice Stevens's interpretation, her opinion represents the Court's position interpreting subsection 2254(d)(1).[344]

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340. *See id.* at 363.

341. *See id.* at 362.

342. *See id.* at 362, 367.

343. *See id.* at 364–65, 373–74.

344. To understand the 5–4 vote in favor of Justice O'Connor's interpretation, I must resort to what I have elsewhere called "nose-count jurisprudence." *See In re* Application of Herald Co., 734 F.2d 93, 98 n.3 (2d Cir. 1984).

Justice Stevens's opinion comprises five parts. Part I sets forth the facts of Williams's offense, the facts concerning his claim of ineffective assistance of counsel, and the procedural steps of his state court direct review and his federal court collateral review. Part II provides his interpretation of subsection 2254(d)(1). Part III explains that the right to effective assistance of counsel in a criminal trial had been clearly established as federal constitutional law by the Supreme Court in the phrases "contrary to" established federal law and "an unreasonable application" of federal law. Part IV explains why the decision of the Virginia Supreme Court upholding Williams's death sentence incorrectly applied the *Strickland* standard for determining whether a lawyer's ineffective representation prejudiced a defendant. Part V concludes that Williams is entitled to habeas corpus relief and that the decision of the Virginia Supreme Court must be reversed.

Justice O'Connor's opinion comprises three parts. Part I canvasses the state of habeas corpus law prior to the 1996 amendment of section 2254. Part II provides her interpretation of subsection 2254(d)(1). Part III agreed with Justice Stevens that the Virginia Supreme Court's decision upholding Williams's death sentence incorrectly applied the *Strickland* standard for determining whether a lawyer's ineffective representation prejudiced a defendant.

Justices Souter, Ginsburg, and Breyer joined all five parts of Justice Stevens's opinion. See *Williams*, 529 U.S. at 367 n.*. Justices O'Connor and

From that opinion we learn two things about the meaning of "unreasonable application," but gain no precise understanding of the phrase. First, Justice O'Connor makes clear that the two phrases of subsection 2254(d)(1), "contrary to" established federal law and "an unreasonable application" of federal law, set forth different tests for habeas corpus relief, and both are more restrictive than prior law.[345] This view contrasted with Justice Stevens's contention that the two phrases mean virtually the same thing and that neither phrase limits the circumstances under which federal courts could grant habeas corpus relief.[346] Second, and more significant, Justice O'Connor explained that an unreasonable application of federal law involves something beyond a decision that is erroneous or incorrect:

> Under § 2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.[347]

In *Lockyer v. Andrade*,[348] the Court further explained that even clear error in a state law decision does not render that decision unreasonable for purposes of subsection 2254(d)(1):

Kennedy joined Parts I, III, and IV of Justice Stevens's opinion. *See id.* Justice Kennedy joined all three parts of Justice O'Connor's opinion. *See id.* at 399 n.*. Chief Justice Rehnquist and Justice Thomas joined Part II of Justice O'Connor's opinion. *See id.* Justice Scalia joined Part II of Justice O'Connor's opinion, except for her footnote *, 529 U.S. at 408, which discussed the legislative history of section 2544(d)(1), *see* 529 U.S. at 399 n.* Chief Justice Rehnquist wrote a separate opinion, which Justices Scalia and Thomas joined, concurring in part and dissenting in part. *See id.* at 418. Their partial dissent concluded that the Virginia Supreme Court had correctly applied *Strickland*.

Thus, on the crucial issue of interpreting subsection 2254(d)(1), five Justices (Chief Justice Rehnquist and Justices Scalia, O'Connor, Kennedy, and Thomas) endorsed Justice O'Connor's interpretation, and four Justices (Stevens, Souter, Ginsburg, and Breyer) endorsed Justice Stevens's interpretation.

345. *See Williams*, 529 U.S. at 402–05.

346. *See id.* at 375–90.

347. *Id.* at 411.

348. 538 U.S. 63 (2003).

> [T]he Ninth Circuit defined "objectively unreasonable" to mean "clear error." These two standards, however, are not the same. The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.[349]

"[C]onflating error (even clear error) with unreasonableness" is improper because "[t]he gloss of clear error fails to give proper deference to state courts."[350] In *Schriro v. Landrigan*,[351] the Court called the standard of "unreasonable" in this context "a substantially higher threshold" than mere error.[352]

A narrowing of the standard for determining whether state courts have erred on issues of constitutional law that started (before subsection 2254(d)(1)) with determining whether a state court's interpretation of the Constitution was correct, then (after subsection 2254(d)(1)) changed to determining whether the determination was "error,"[353] then progressed to "clear error,"[354] and continued on to "unreasonable,"[355] seems alien to a traditional view of the judicial role. When appellate courts review trial court decisions or when the Supreme Court reviews appellate court decisions, the reviewing court usually determines whether the decision under review was correct, *i.e.,* free from error. Of course, the identification of error does not automatically result in reversal; the error may not have caused prejudice or otherwise been serious enough to warrant setting aside the decision being appealed. But until subsection 2254(d)(1), federal courts had not been obliged to apply a standard of state court mistake more wrong than "error," much less more wrong than "clear error." Apparently coming close, which used to count only for hand grenades and horseshoes,

349. *Id.* at 75.
350. *Id.*
351. 550 U.S. 465 (2007).
352. *Id.* at 473.
353. *Lockyear*, 538 U.S. at 75.
354. *Id.*
355. *Schriro*, 550 U.S. at 473.

now counts for constitutional law, at least when a state court interpretation of the Constitution, challenged in a federal court habeas corpus proceeding, is close to correct.

The idea that a legal remedy was unavailable as long as there had been at least a reasonable, though not a correct, understanding of a constitutional right had previously entered federal jurisprudence via the doctrine of qualified immunity. In *Pierson v. Ray*,[356] the Supreme Court ruled that the defense of qualified immunity insulated a government official, for example, a police officer, when sued for damages under 42 U.S.C. § 1983, for violating a person's constitutional right as long as the official reasonably believed that he was not violating a constitutional right, even though he really had done so. The Court relied on the common law protection from damages liability for a police officer who reasonably believed that a suspect had committed a crime, even though the suspect had not done so.[357] But qualified immunity, as previously discussed,[358] precludes liability to pay damages, whereas the "unreasonable application of constitutional law" formulation in subsection 2254(d)(1) can leave a defendant convicted of a crime even though the conviction was obtained in violation of the constitution.[359]

The "unreasonable application" formulation in subsection 2254(d)(1) derives from the Supreme Court's decision in *Teague v. Lane*.[360] The Supreme Court there held that, with limited exceptions, a "new rule," *i.e.*, a new interpretation of the Constitution that benefits a

356. 386 U.S. 547, 554–58 (1967).

357. *See id.* at 555 (citing RESTATEMENT (SECOND) TORTS § 121 (1965); 1 HARPER & JAMES, THE LAW OF TORTS § 3.18, at 277–78 (1956)).

358. *See* text at pp. 47–57, *supra*.

359. If a state court conviction is obtained in violation of a constitutional right, it remains theoretically possible for the Supreme Court to vacate the conviction upon direct review, but the Court exercises its discretion to grant a petition for a writ of certiorari to review a state court conviction so infrequently that federal district and appellate court review on collateral attack via a petition for a writ of habeas corpus, now subject to the "unreasonable application" formulation, is almost always the only realistic opportunity to challenge a state court conviction on constitutional grounds.

360. 489 U.S. 288 (1989).

defendant, announced after a conviction become final, may not be applied retroactively by a federal habeas court.[361] One year after *Teague*, the Supreme Court explained in *Butler v. McKellar*[362] that "[t]he 'new rule' principle therefore validates reasonable good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions."[363] The Court has repeated this explanation several times.[364] Building on the notion of an unreasonable interpretation of law in the context of retroactivity, Congress, in subsection 2254(d)(1), made all state court decisions affirming convictions immune from habeas corpus relief unless those decisions were "unreasonable applications" of established federal law.[365]

How are federal habeas courts to determine when a state court decision is not merely erroneous but also an unreasonable application of federal law? In *Williams*, Justice O'Connor said very little. Initially, she identified two circumstances where an unreasonable application can occur:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.[366]

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361. *Id.* at 307.

362. 494 U.S. 407 (1990).

363. *Id.* at 414.

364. *See, e.g.,* Caspari v. Bohlen, 510 U.S. 383, 393–96 (1994); Gilmore v. Taylor, 508 U.S. 333, 340 (1993); Graham v. Collins, 506 U.S. 461, 467 (1993); Wright v. West, 505 U.S. 277, 291 n.8 (1992); Stringer v. Black, 503 U.S. 222, 227 (1992).

365. 28 U.S.C. § 2254(d)(1).

366. *Williams*, 529 U.S. at 407 (O'Connor, J., concurring).

But since the word "unreasonably" is used to describe both of these circumstances, their identification sheds very little light on what "unreasonably" means in this context, as Justice O'Connor recognized when she wrote, "There remains the task of defining exactly what qualifies as an 'unreasonable application' of law under § 2254(d)(1)."[367]

Then, acknowledging that "[t]he term 'unreasonable' is no doubt difficult to define,"[368] she offered the comforting assurance that "it is a common term in the legal world, and, accordingly, federal judges are familiar with its meaning."[369]

From her opinion we learn that an "unreasonable application" is not limited, as the Fourth Circuit had thought, to a circumstance where "the state court has applied federal law 'in a manner that reasonable jurists would all agree is unreasonable.'"[370] That test, she explained, "would transform the inquiry into a subjective one,"[371] whereas "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."[372] The Supreme Court subsequently repeated the phrase "objectively unreasonable" in the context of subsection 2254(d)(1).[373]

What we do not learn from Justice O'Connor's opinion is what would make a state court's view of established federal law objectively unreasonable or how an "unreasonable" application differs from an "incorrect" one.

When Justice O'Connor applies her interpretation of an "unreasonable application" of federal law to the Virginia Supreme Court's ruling that the ineffectiveness of

367. *See id.* at 409.

368. *Id.* at 410.

369. *Id.*

370. *Id.* at 409 (quoting Green v. French, 143 F.3d 865, 870 (4th Cir. 1998)).

371. *Id.* at 410.

372. *Id.* at 409.

373. *See* Yarborough v. Gentry, 540 U.S. 1, 5 (2004); Wiggins v. Smith, 539 U.S. 510, 520–21 (2003).

Williams's counsel had not caused sufficient prejudice to establish a constitutional violation under *Strickland*, she simply described the prejudice without any explanation of why the state court's view of insufficient prejudice was more egregious than mere error.[374] I set forth her entire analysis is set forth in a footnote.[375]

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374. A curious aspect of *Williams* is that although Justice O'Connor's interpretation of subsection 2254(d)(1) prevailed by a 5–4 vote, her opinion does not state whether she was applying her view of that subsection. It is unlikely that she was applying Justice Stevens's view.

375. From *Williams*:

> I also agree with the Court that, to the extent the Virginia Supreme Court did apply *Strickland*, its application was unreasonable. As the Court correctly recounts, Williams' trial counsel failed to conduct an investigation that would have uncovered substantial amounts of mitigation evidence. For example, speaking only of that evidence concerning Williams' "nightmarish childhood," the mitigation evidence that trial counsel failed to present to the jury showed that "Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody." The consequence of counsel's failure to conduct the requisite, diligent investigation into his client's troubling background and unique personal circumstances manifested itself during his generic, unapologetic closing argument, which provided the jury with no reasons to spare petitioner's life. More generally, the Virginia Circuit Court found that Williams' trial counsel failed to present evidence showing that Williams "had a deprived and abused upbringing; that he may have been a neglected and mistreated child; that he came from an alcoholic family; . . . that he was borderline mentally retarded;" and that "[his] conduct had been good in certain structured settings in his life (such as when he was incarcerated)." In addition, the Circuit Court noted the existence of "friends, neighbors and family of [Williams] who would have testified that he had redeeming qualities." Based on its consideration of all of this evidence, the same trial judge that originally found Williams' death sentence "justified and warranted," concluded that trial counsel's deficient performance prejudiced Williams, and accordingly recommended that Williams be granted a new sentencing hearing. The Virginia Supreme Court's decision reveals an obvious failure to consider the totality of the omitted mitigation evidence. *See* 254 Va., at 26, 487 S.E.2d, at 200 ("At most, this evidence would have shown that numerous people, mostly relatives, thought that [Williams] was nonviolent and could cope very well in a structured environment"). For that reason, and the remaining factors discussed in the Court's opinion, I believe that the Virginia Supreme Court's decision "involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 415–16 (most internal citations omitted).

In *Yarborough v. Alvarado*,[376] the Court, considering whether a state court had reasonably determined that a suspect was not in custody for purposes of requiring *Miranda* warnings, restricted the meaning of "unreasonable application" in two ways. First, the Court introduced the construct of "fairminded jurists," stating that the state court had reasonably applied constitutional law because "it can be said that fairminded jurists could disagree over whether [the suspect] was in custody."[377] Considering whether "fairminded jurists" could disagree about the constitutional issue seems to harken back to the Fourth Circuit's view that Justice O'Connor rejected in *Williams*. The Fourth Circuit, she noted, had said that an unreasonable application is a circumstance where "the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable."[378] So the Fourth Circuit would have let the state court decision stand unless all reasonable jurists would think it unreasonable, and the Supreme Court would let it stand as long as fairminded jurists could disagree as to whether it was unreasonable. Disagreement among fairminded jurists that the state court decision was reasonable leaves the state court decision standing under either test.

The second restriction introduced by *Yarborough* was that the meaning of "unreasonable application" varies depending on the legal rule at issue:

> [T]he range of reasonable judgment can depend in part on the nature of the relevant rule. If a legal rule is specific, the range may be narrow. Applications of the rule may be plainly correct or incorrect. Other rules are more general, and their meaning must be emerge in application over the course of time. Applying a general standard to a specific case can demand a substantial element of judgment. As a result, evaluating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in

376. 541 U.S. 652 (2004).

377. *Id.* at 664.

378. *Williams*, 529 U.S. at 409.

> reaching outcomes in case-by-case determinations.[379]

The Supreme Court stated that because "the custody test is general," the state court's application of federal law need only "fit[] within the matrix of [the Supreme] Court's prior decisions."[380] Apparently that "matrix" covers a wide swath.

The Court applied this sliding scale approach in *Knowles v. Mirzayance*:[381] "[B]ecause the *Strickland* standard is a general standard, a state court has even more latitude to reasonably determine that a defendant has not satisfied the standard."[382]

In 2011, the Court narrowed the "disagreement-among-fairminded-jurists" standard to require more deference to a state court decision challenged as an unreasonable application of constitutional law. In *Harrington v. Richter*,[383] the Supreme Court initially described the task of a habeas court in these words:

> [A] habeas court must determine what arguments or theories supported or, as here, could have supported, the state court's decision; and then it must ask *whether it is possible* fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court.[384]

A few sentences later the Court said:

> As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*.[385]

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379. *Yarborough*, 541 U.S. at 664.
380. *Id.* at 665.
381. 556 U.S. 111 (2009).
382. *Id.* at 123.
383. 562 U.S. 86 (2011).
384. *Id.* at 102 (emphasis added).
385. *Id.* at 103 (emphasis added).

Thus, in *Alvarado*, a state court's application of constitutional law was reasonable if it can be said that fairminded jurists *could* disagree that such law was violated, then in *Harrington* if it is *possible* that such jurists could disagree that such law was violated, and then, later in the *Harrington* opinion, unless there was an error *beyond any possibility* for fairminded jurists' disagreement.

Since *Harrington*, Courts of Appeals have endeavored to use the "fairminded jurists" standard but have quoted each of these three wording variations. The Sixth Circuit said in *Blackston v. Rapelje*[386] that a "state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision."[387] The Eleventh Circuit said in *Tanzi v. Secretary, Florida Dept. of Corrections*[388] that the habeas court asks "whether it is possible fairminded jurists could disagree" with argument against the validity of a state court decision.[389] The Ninth Circuit said in *Sessions v. Grounds*[390] that "We may only grant habeas relief where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme Court's] precedents."[391]

Other than the slightly varied wordings of the "fairminded jurists" standard, the Supreme Court has provided no further guidance on how a federal habeas court is to determine whether a state court's application of federal law was unreasonable.[392] In several decisions where

386. 769 F.3d 411 (6th Cir. 2014).

387. *Id.* at 424 (internal quotation marks omitted).

388. 772 F.3d 644 (11th Cir. 2014).

389. *Id.* at 652 (internal quotation marks omitted).

390. 768 F.3d 882 (9th Cir. 2014).

391. *Id.* at 901–02 (Murguia, J., dissenting) (internal quotation marks omitted).

392. I must admit that my own attempt to interpret "unreasonably applied," in a decision just four months after *Williams*, was far from enlightening. In *Francis S. v. Stone*, 221 F.3d 100 (2d Cir. 2000), acknowledging that the state court decision must be more incorrect than merely erroneous, I wrote, "The increment [of incorrectness beyond error] need not be great; otherwise, habeas relief would be limited to state court decisions so far off the mark as to suggest judicial incompetence." *Id.* at 111.

the Court has ruled that a state court's application of constitutional law was unreasonable, it has simply set forth the relevant facts and then asserted the conclusion of unreasonable application, without explanation.[393] At issue when the Court has most frequently ruled that a state court unreasonably applied constitutional law has been a claim of constitutionally ineffective assistance of counsel.[394]

It is arguable that the meaning of "unreasonable" in the context of federal habeas court consideration of state court convictions reflects a weighing of interests, similar to the process in the antitrust context previously considered.[395] It could be said that the interest of state courts in the finality of their criminal judgments is being weighed against the interest of a defendant in the observance of his constitutional rights. However, no decision of the Supreme Court expounding on the phrase "unreasonable application" of "clearly established Federal law" has invoked the weighing metaphor. A weighing of interests may well have motivated the Court as it narrowed the meaning of "unreasonable" and broadened deference to state court decisions, but the Court has not explicitly weighed interests in this context.

By adopting a standard of unreasonableness that exists only if no fairminded jurist could agree that a state court's decision was consistent with settled constitutional law, the Supreme Court has chosen to give a restrictive interpretation to a fairly generalized statutory limitation on the authority of a federal habeas court. Once the Supreme Court recognized that Congress did not want a federal habeas court to vacate a state court conviction just because the federal court considered the state court to have committed a prejudicial error, the Court could have stayed with the statutory phrase "unreasonable application" and simply obliged the judge of

393. *See, e.g.,* Porter v. McCollum, 558 U.S. 30, 42 (2009); Wiggins v. Smith, 539 U.S. 510, 534 (2003).

394. *See, e.g., Porter*, 558 U.S. at 42; Rompilla v. Beard, 545 U.S. 374, 389, 390 (2005); *Wiggins*, 539 U.S. at 534; *Williams*, 529 U.S. at 399.

395. *See* text at pp. 47–57, *supra.*

the habeas court (and appellate judges reviewing the decision of that judge) to determine whether they considered the state court to have made an unreasonable application of constitutional law. Of course, that would have left the usual ambiguity as to the meaning of "unreasonable."

Instead, the Court first framed the standard in terms of what fairminded jurists (presumably, jurists as fairminded as the habeas judge or those reviewing the decision of that judge) would think of the state court's decision and then precluded habeas relief as long as fairminded jurists would agree that the state court had not unreasonably applied constitutional law, even escalating the limitation to preclude relief unless there was no possibility that fair minded jurists would agree that the state court had unreasonably applied constitutional law. The result is clearly a highly restrictive standard, but with little, if any, guidance for determining when the standard has been met.

C. Chevron Deference: Agency's Reasonable Construction of Federal Statute

A third context in which the determination of reasonableness appears to be made without the identification of any method of analysis or even a single relevant factor is *Chevron* deference.

In *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*,[396] the Supreme Court considered the deference due an administrative agency's construction of a federal statute that is either ambiguous or silent on the relevant issue.[397] Deference is due when the agency has made "a reasonable construction" of the relevant statutory language.[398]

As happens in other contexts, the Court's attempt to explain what would make an agency's construction "reasonable" could not avoid the word "reasonable." For example, the Court said that where the agency's construction "involved reconciling conflicting policies,"[399] the agency's decision would not be disturbed if it "represents a reasonable accommodation of conflicting policies committed to the agency's care by the statute."[400] Ultimately the Court concluded in *Chevron* that it did not have to decide whether the agency's construction was reasonable because "[w]hen a challenge to an agency's construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[401]

In a recent reference to *Chevron* in *Michigan v. EPA*,[402] the Court still could not avoid tautological guidance. "*Chevron* directs courts to accept an agency's

396. 467 U.S. 837 (1984).

397. *Id.* at 843.

398. *Id.* at 840.

399. *Id.* at 844.

400. *Id.* at 845 (quoting United States v. Shimer, 367 U.S. 374, 382, 383 (1961)).

401. *Id.* at 866.

402. 576 U.S. 743 (2015).

reasonable resolution of an ambiguity in a statute that the agency administers. . . . [H]owever, 'agencies must operate within the bounds of reasonable interpretation.'"[403] Interpreting the statutory requirement to regulate power plants only where "appropriate and necessary,"[404] the Court said that the phrase "[r]ead naturally . . . requires at least some attention to cost."[405] The agency's failure to consider cost was apparently unreasonable because compliance with the regulation imposed costs.

Chevron deference is more likely to be given where an agency has maintained a consistent interpretation,[406] although a new interpretation may be given deference if the agency supplies reasons for the change.[407] In *Mellouli v. Lynch*,[408] the Court deemed an interpretation by the Board of Immigration Appeals not entitled to *Chevron* deference because it "makes scant sense."[409] The agency had considered possession of a sock containing narcotics but not the narcotic itself to warrant removal. Another recent example where *Chevron* deference was not warranted is *Perez v. Mortgage Bankers Ass'n*,[410] where the Court stated that deference does not apply when the agency's interpretation is "'plainly erroneous'" or "'does not reflect the agency's fair and considered judgment.'"[411] In *Whitman v. United States*,[412] Justice Scalia said that *Chevron* deference is not warranted to an

403. *Id.* at 751 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 321 (2014)).

404. 42 U.S.C. § 7412(n)(1)(A).

405. *Michigan*, 576 U.S. at 752.

406. *See*, *e.g.*, United States v. Graham Mortg. Corp., 740 F.2d 414 (6th Cir. 1984).

407. *See, e.g.*, Nat. Fed'n of Fed. Emps., Local 1309 v. Dep't of Interior, 526 U.S. 86 (1999).

408. 135 S. Ct. 1980 (2015).

409. *Id.* at 1982.

410. 575 U.S. 92 (2015).

411. *Id.* at 104 n.4 (quoting Christopher v. SmithKline Beecham Corp., 567 U.S. 142, 155 (2012)).

412. 135 S. Ct. 352 (2014).

agency's interpretation of a statute "to which criminal prohibitions are attached."[413]

A leading treatise has identified the following words courts have used when they accord *Chevron* deference to an agency's interpretation of a statute: "complies with the actual language of the regulation," "reasonable," "rational," "plainly consistent" with the relevant regulation, "does not conflict with the statute's plain meaning," "supported by substantial, competent evidence," "cogent," and "consistent with and reasonable necessary to implement" a statute.[414] The same treatise has identified the following words courts use when *Chevron* deference is denied: "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[415]

The Court stated in *United States v. Mead Corp.*[416] that one requirement for *Chevron* deference, unrelated to the meaning of the word "reasonable," is that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[417] Consistent with that requirement, the Court said in *Christensen v. Harris County*,[418] that *Chevron* deference is not accorded to an interpretation contained in "an opinion letter . . . policy statements, agency manuals, and enforcement guidelines."[419] Such informal interpretations are not given *Chevron* deference but only the less deferential *Skidmore*[420] deference, which the Supreme Court has explained means "respect, but only to the extent that those interpretations have the power to persuade."[421]

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413. *Id.* at 353 (statement of Scalia, J., dissenting from denial of writ of certiorari).

414. 2B SUTHERLAND STATUTORY CONSTRUCTION § 49:4 (7th ed. database updated 2015) (footnotes omitted).

415. *Id.* (footnotes omitted).

416. 533 U.S. 218 (2001).

417. *Id.* at 226–27.

418. 529 U.S. 576 (2000).

419. *Id.* at 587.

420. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

421. *Christensen*, 529 U.S. at 577.

It is difficult to know how the Supreme Court or other federal courts determine whether an agency's interpretation of an ambiguous statute is "reasonable." No weighing process appears to be involved. It would probably be too cynical to suggest that the courts are just accepting agency interpretations with which they agree and rejecting those they disfavor, but in some cases that almost seems to be what is happening. Clearly there is no one meaning of "reasonable" in the context of *Chevron* deference. Perhaps this is simply a context where there is a narrow range of acceptable agency interpretations, on either side of the disputed issue, that courts are willing to uphold, but they are ready to assert the power to reject others that, for stated, or more often unstated, reasons, they deem beyond an amorphous notion of "reasonable."

V. CONCLUSION

What might courts do to give the concept of reasonableness more meaning than it usually receives? First, courts should recognize that the concept has different meanings in different contexts. Second, they should try to elucidate the meaning of "reasonable" with as much guidance as the context warrants. For example, when courts explain to a jury that guilt requires proof beyond a reasonable doubt, they should point out that this standard means that the jurors must be convinced of guilt to a very high degree of certainty. Third, in some contexts, courts should recognize in their opinions, and, when appropriate, explain to a jury, that the term implies a weighing of different interests, identify those interests, and candidly acknowledge that the weighing process is not the precise one that is achieved with weights on a balance scale. Instead, "weighing" means a comparison of the importance of competing interests and the exercise of judgment, based on all the relevant facts, as to which interests have been shown to be more important. Fourth, in some contexts, courts should recognize in their opinions, and, where appropriate, explain to a jury, that the

word "reasonable" is used in its everyday colloquial sense to mean that either of two or more outcomes are within legal bounds, and that the outcome to be reached is the one that would seem fair to a cross-section of the public.

However courts elucidate the concept of reasonableness, it will remain imprecise in most contexts. Perhaps that is the ultimate virtue of law's most ubiquitous term: providing needed flexibility in the resolution of disputes while sometimes creating the illusion and occasionally the reality of analysis.