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Constitutional Amnesia: Judicial Validation of Probable Cause for Arresting the Wrong Person on a Facially Valid Warrant

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CONSTITUTIONAL AMNESIA[1]: JUDICIAL VALIDATION OF PROBABLE CAUSE FOR ARRESTING THE WRONG PERSON ON A FACIALLY VALID WARRANT

I. INTRODUCTION

Modern construction of the Fourth Amendment represents a sharp division from the individual liberties envisioned by the Framers[2] of the Constitution and guaranteed in the Amendment's language.[3] The judicial system has legitimized the expansion of government intrusion by validating law enforcement errors at the expense of individual civil liberties.[4] As a result, the tension between the need for effective law

1. Justice Stevens used this phrase to express his frustration with the Court's view that it is "presumptively reasonable to rely on a defective warrant." United States v. Leon, 468 U.S. 897, 972 (1984) (Stevens, J., concurring in part and dissenting in part).

2. One commentator's study of the history surrounding the drafting of the Fourth Amendment reveals that the modern notion of the "right to be secure," guaranteed by the Fourth Amendment, *see infra* note 3, is far too attenuated from that right as envisioned by the Framers. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 749 (1999) ("The authentic history shows that framing-era doctrine provided a much stronger notion of a 'right to be secure' in person and house than does modern doctrine."). *See also* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 1 (1997) ("The Fourth Amendment today is an embarrassment."); Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 238 [hereinafter Maclin, *Central Meaning*] (arguing that today's Court treats the Fourth Amendment as a "second-class right" by applying a rational basis test rather than the strict scrutiny standard used to test other Constitutional violations).

3. 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.

U.S. CONST. amend. IV.

4. *See* Davies, *supra* note 2, at 559-60 (asserting that the focus of modern search and seizure doctrine on "reasonableness" as a postprocedural evaluation of Fourth Amendment violations favors aggressive law enforcement while discounting the value of a warrant).

The broadened scope of law enforcement power is, in part, due to courts negating the idea that both arrest and search warrants are conditions precedent to arrests and searches respectively. Arguably, however, warrants are not, nor were they ever, "required" by the Fourth Amendment in every situation. *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE, A TREATISE ON THE FOURTH AMENDMENT § 5.1(b) (3d ed. 1996). Since the days of common law, courts have permitted warrantless arrests under certain circumstances. *Id.* A peace officer was authorized to make a felony arrest without a warrant so long as he had "reasonable grounds to believe" that a felony had been committed and that the person to be arrested had committed it. *Id.* (citations omitted). Likewise, peace officers had authority to make warrantless misdemeanor arrests so long as the arresting officer witnessed the offense being committed. *Id.* Professor LaFave argues that the common law's sanctioning of a felony arrest, when an officer had "reasonable grounds to believe" the person to be arrested had committed a

enforcement and individual liberties continues to mount.[5]

One way in which this tension manifests itself is through the Warrant Clause of the Fourth Amendment.[6] Courts have historically read the Warrant Clause to prohibit arrests without probable cause.[7] Law enforcement's use of computerized record systems and other technological advancements[8] has resulted in the ever-increasing execution of arrest

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felony, is based on the same threshold evidence required by the probable cause standard for the issuance of an arrest warrant. *Id.* Therefore, a warrant is not necessarily required. *Id.* A warrant then, is merely "preferred" in order to legitimize the administration of criminal justice by ensuring the protection of liberty in the eyes of the citizenry. *See* United States v. Lefkowitz, 285 U.S. 452, 464 (1932) ("Security against unlawful searches is more likely to be attained by resort to search warrants [issued by a neutral and detached judicial officer] than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime."); Davies, *supra* note 2, at 559 ("The warrant-preference construction is favored by advocates of civil liberties because it enhances the potential for judicial supervision of police conduct."); Jacob W. Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453, 462 (1976) (arguing in favor of the warrant because it "places the magistrate as a buffer between the police and the citizenry, so as to prevent the police from acting as judges in their own cause."). In fact, the Supreme Court declined to "transform this judicial preference [for warrants] into a constitutional rule," based on the nation's long history of allowing warrantless arrests so long as there was probable cause. United States v. Watson, 423 U.S. 411, 423-24 (1976).

5. The Supreme Court, itself, articulated the "tension between the sometimes competing goals of . . . deterring official misconduct and removing inducements to unreasonable invasions of privacy" by upholding the civil liberties of criminal defendants. United States v. Leon, 468 U.S. 897, 900 (1984). *See also* MELVYN ZARR, THE BILL OF RIGHTS AND THE POLICE 1 (2d ed. 1980). The Framers intended to resolve this tension between the need for effective law enforcement and the fear of becoming a police state through the principles embodied in the Bill of Rights. *Id.* The desire to ensure the protection of individual liberties was a reaction to the aggressive "law and order" of 18th Century England, whereby the use of general warrants gave the police arbitrary power. *Id. See also* Davies, *supra* note 2, at 619-61; Maclin, *Central Meaning*, *supra* note 2, at 213 (stating that the Fourth Amendment "undoubtedly opposed [law enforcement tools such as] general warrants used in England and writs of assistance utilized by colonial customs officers").

6. *See* U.S. CONST. amend. IV. ("[N]o Warrants shall issue, but upon probable cause . . . .").

7. Berg v. County of Allegheny, 219 F.3d 261, 269 (3d Cir. 2000) (citations omitted). *See also* sources cited *supra* note 4 and accompanying text. For a discussion of the requirements for probable cause for the issuance of a valid arrest warrant, see *infra* note 9 and Part II.A.

8. In *Arizona v. Evans*, Justices Stevens and Ginsburg resounded stern warnings of the dangers that advancing computer technology imposes on citizens' privacy. 514 U.S. 1, 18-34 (1995) (Stevens & Ginsburg, JJ., dissenting). Justice Ginsburg, quoting the Arizona Supreme Court, stated that "[i]t is repugnant to the principles of a free society that a person should ever be taken into police custody because of a computer error precipitated by government carelessness. As automation increasingly invades modern life, the potential for Orwellian mischief grows." *Id.* at 25 (quoting State v. Evans, 866 P.2d 869, 872 (Ariz. 1994)). Moreover, "[t]he computerized data bases of the Federal Bureau of Investigation's National Crime Information Center (NCIC) . . . contain over twenty-three million records, identifying, among other things, persons and vehicles sought by law enforcement agencies nationwide." *Id.* at 26-27 (citing *Hearings Before the Subcomm. on the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 102d Cong., 2d Sess., pt. 2B, 467 (1992)). Thus, any mistake in the system is magnified by the system's accessibility to roughly 71,000 federal, state and local agencies. *Id.* at 27 (citing *Hearings Before the Subcomm. on the Dep'ts of Commerce, Justice, and State, the Judiciary, and Related Agencies of the House Comm. on Appropriations*, 103d Cong., 1st Sess., pt. 2A, 489 (1993)). *See also* 40 AM. JUR.

warrants that appear to be valid,[9] but actually contain some latent defect.[10]

PROOF OF FACTS 3D *Government Liability* § 1 (1997).

> With the advancement of technology and large computer systems, improper government intrusions are increasingly likely to be caused by the presence of inaccurate information in agency records, or by the miscommunication of information among agencies or officers . . . That the officers involved may have been acting in good faith does not lessen the ordeal for the person whose home or person has been violated.

Id.

As the substantial number of constitutional tort cases demonstrates, there is no shortage of false arrests based on erroneous computer information. *See, e.g.*, *Evans*, 514 U.S. at 4 (officer arrested defendant when a computer check on his license during an ordinary traffic stop incorrectly disclosed an outstanding arrest warrant); Ruehman v. Sheahan, 34 F.3d 525, 526 (7th Cir. 1994) (plaintiffs sued sheriff for false arrest when past warrants were not purged from the computer system); United States v. Towne, 870 F.2d 880, 882 (2d Cir. 1989) (defendant was arrested when an indictment was mistakenly left in the "active" computer files); Wise v. City of Philadelphia, No. CIV.A.97-2651, 1998 WL 464918, at *1 (E.D. Pa. July 31, 1998) (plaintiff was arrested pursuant to a computer printout of a previously satisfied bench warrant); Ott v. Maryland, 600 A.2d 111, 113 (Md. 1992) (defendant was arrested when a previously satisfied warrant remained in computer system); State v. Taylor, 621 A.2d 1252, 1253 (R.I. 1993) (defendant was arrested when an invalid outstanding warrant resulted in a "hit" from the NCIC).

The Office of Technology Assessment, the now defunct arm of Congress that was responsible for objectively analyzing complex scientific and technological issues in the latter part of the 20th century, estimated that fifty percent of the arrest entries in the NCIC failed to show the disposition of the case. OFFICE OF TECHNOLOGY ASSESSMENT, CONGRESS OF THE UNITED STATES, SPECIAL REPORT, CRIMINAL JUSTICE: NEW TECHNOLOGIES AND THE CONSTITUTION 47 (1988). As much as twenty percent of disposition information that is in the computer system is thought to be inaccurate. *Id.* In addition, a report prepared for the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary revealed that less than half of arrests result in conviction. *Id.*

9. The Fourth Amendment has several requirements for the issuance of a valid warrant. The first requirement is that probable cause for the warrant must be "supported by Oath or affirmation." U.S. CONST. amend. IV. This requirement is met by the complaining officer's sworn affidavit or oral testimony given under oath. LAFAVE, *supra* note 4, § 5.1(g). The arrest warrant may be challenged if the facts upon which the magistrate relied in making the determination of probable cause were knowingly or recklessly false. *Id.* § 5.1(g) & n.288 (citations omitted). The warrant must also be issued by a "neutral and detached" judicial officer, usually a magistrate, who will make the probable cause determination. *Id.* Magistrates need not be judges or even lawyers. Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972) (allowing municipal court clerks to issue arrest warrants for breaches of municipal ordinance). A third element of a valid arrest warrant is the particularity requirement. U.S. CONST. amend. IV. General warrants have been banned since common law: their vagueness confers too much discretionary authority on law enforcement officers. Davies, *supra* note 2, at 724. *See also* Maclin, *Central Meaning*, *supra* note 2, at 248 ("[T]he central purpose of the Fourth Amendment [is the] distrust of discretionary police power."). The earliest reported state search and seizure decision demonstrates early recognition of the illegality of general warrants. Davies, *supra* note 2, at 694 n.423 (citing Frisbie v. Butler, 1 Kirby 213 (Conn. 1785) (holding that a warrant to search entire village for a stolen pig is invalid)). The Supreme Court in *West v. Cabell* stated the rule for satisfying the particularity requirement of the Warrant Clause. 153 U.S. 78, 85-86 (1894). *See also id.* at 86 ("The principle of the common law, by which warrants of arrest, in cases criminal or civil, must *specifically* name or describe the person to be arrested . . . a warrant that does not do so will not justify the officer making the arrest.") (emphasis added). In addition, the Federal Rules of Criminal Procedure state the particularity requirements for an arrest warrant:

> The warrant shall be signed by the magistrate and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description which can identify the defendant with reasonable certainty. It shall describe the offense charged in the complaint. It shall command that

Consequently, law enforcement officials often arrest the wrong person.[11]

The story of Stephanie Johnson provides a vivid account of what can happen to an innocent person when law enforcement personnel execute a facially valid though latently defective warrant.[12] The county sheriff's department arrested Johnson, a young mother of three, just two days after she had given birth to her third child.[13] The mix-up began when she received a letter from the county court saying that she had written several bad checks.[14] Remarkably, she did not even have an active personal checking account.[15] Johnson went to the courthouse in order to clear up this obvious mistake but, to her surprise, ended up spending several days in jail until law enforcement personnel figured out the error.[16] The warrant for her arrest was actually based on erroneous information,[17] which falsely

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the defendant be arrested and brought before the nearest available magistrate.

FED. R. CRIM. P. 4(C)(1).

10. *See* ZARR, *supra* note 5, at 36-37 (explaining the difference between patent and latent defects in a warrant). An example of a latent defect in a warrant is one that is "apparently regular in form, but may have been issued by some court or official not having authority to issue warrants covering the conduct for which it is issued, but having authority to issue warrants for conduct similar to that described." *Id.* at 36. A patent defect on the other hand, renders the warrant invalid on its face. For example, a John Doe warrant, one that does not list the name of the intended arrestee, without some other description sufficient to identify him, is constitutionally invalid. Powe v. City of Chicago, 664 F.2d 639, 647 (7th Cir. 1981) (relying on West v. Cabell, 153 U.S. 78, 84-85 (1894)). Likewise, a warrant that states an incorrect name or alias of the intended arrestee requires a sufficiently identifying description of the intended to survive Fourth Amendment scrutiny. *Id.*

This Note focuses on erroneously-issued warrants that are valid in form but contain some latent defect. The existence of latent defects such as wrong names, incorrect addresses, or other inaccurate descriptions of the intended arrestee, especially those generated from erroneous information in computer databases, often result in cases of mistaken identity and arrests of the wrong person. For an in depth look at the common phenomenon of law enforcement agencies issuing facially valid but latently defective arrest warrants, see *infra* notes 11-18, 40, 105-10, 127 and accompanying text.

11. *See* Ruehman v. Sheahan, 34 F.3d 525, 527 (7th Cir. 1994) (plaintiffs in § 1983 action arrested pursuant to erroneous computer information indicating that their warrants were still outstanding); Simons v. Clemons, 752 F.2d 1053, 1055 (5th Cir. 1985) (holding that facially valid warrant had latent defect because the underlying charges were invalid and law enforcement had failed to purge the warrant from the computer system); Powe v. City of Chicago, 664 F.2d at 647 (finding a latent defect in warrant due to lack of other identifying description of intended arrestee, where authorities knew the intended arrestee used several aliases, and could therefore not be certain the name on the warrant was correct); Murray v. City of Chicago, 634 F.2d 365, 366 (7th Cir. 1980) (holding that failure to purge quashed warrant from system made subsequent issuance of the warrant invalid).

12. Robert Tharp, *Young Mother Jailed in Error: Mistaken-Identity Arrest Comes Two Days After She Gave Birth*, THE FORT WORTH STAR-TELEGRAM, Feb. 6, 1999, at 1, *available at* WL, Westnews, Ftworth-St File.

13. *Id.*

14. *Id.*

15. *Id.*

16. Law enforcement personnel based Johnson's arrest on a warrant that "matched her name, address, date of birth and physical description." *Id.*

17. The warrant for Johnson's arrest was for writing bad checks. *Id.* Although the checks had her name and address printed on them, the driver's license number that appeared on the checks did not

fingered her as a criminal.[18]

Stephanie Johnson's story depicts a growing problem in the area of constitutional law and criminal procedure, namely, whether a facially valid, though erroneously-issued warrant, can supply probable cause for the subsequent arrest of the wrong person. The resolution of this issue directly affects an individual's ability to seek redress[19] from the government for a Fourth Amendment violation.[20] The debate as to whether such warrants can constitute probable cause is important because over the last several decades, courts have increasingly limited the scope of the Fourth Amendment's protections.[21] This determination of probable cause,

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belong to her. *Id.*

18. Johnson remained in jail for two days before the police determined that her fingerprints did not match those of the person sought in the warrant. *Id.*

19. The Supreme Court first recognized the ability of an individual to sue the government for constitutional violations in *Monroe v. Pape*. 365 U.S. 167, 183 (1961). *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 211 (1984) ("The cardinal principle of constitutional tort . . . is that an injured person can sue in federal court under section 1983 even if state law provides a remedy for the government conduct of which he complains.") (citation omitted). Therefore, a claim against the federal government for a deprivation of liberty (unlawful "seizure") for violating the Fourth Amendment should not be precluded simply because there is a common law or state tort law for false imprisonment.

Congress provided a civil cause of action for the deprivation of a federal right under the "color of law" in 42 U.S.C. § 1983, which states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1994).

However, the Supreme Court has noted that "section [1983] is *not* itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes." Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (emphasis added).

20. Cases of mistaken identity resulting in the arrest of the wrong person constitute "seizures" of a person under the Fourth Amendment and should not be brought as a deprivation of liberty under the Due Process Clause of the Fourteenth Amendment. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct [excessive force in arrest, investigatory *"Terry"* stops or other seizures], that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."); United States v. Watson, 423 U.S. 411, 428-29 (1976) (Powell, J., concurring) ("[T]he Fourth Amendment speaks equally to both searches and seizures, and since an arrest . . . is quintessentially a seizure. . . . [L]ogic therefore would seem to dictate that arrests be subject to the warrant requirement [of the Fourth Amendment] at least to the same extent as searches.") (citations omitted); LAFAVE, *supra* note 4, § 5.1(a) ("It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person.").

21. Modern Fourth Amendment jurisprudence regards "the needs and interests of law enforcement [as] paramount despite the use of suspicionless and oppressive intrusions to further these interests." Tracey Maclin, *Justice Thurgood Marshall: Taking the Fourth Amendment Seriously*, 77

in turn, may adversely impact an individual's ability to seek redress from the government for such impositions.[22] Where a court upholds the existence of probable cause in spite of the arrest warrant erroneously issued in the wrong person's name, the individual subsequently arrested because of that warrant has no cause of action for civil damages against the government.[23] Therefore, a judicial finding that there was no probable

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CORNELL L. REV. 723, 741, 776 (1992) (examining the erosion of Fourth Amendment protection during Justice Thurgood Marshall's term on the Supreme Court, lauding his strong dissenting voice, which warned of the "evisceration of Fourth Amendment rights").

22. *See infra* notes 23-24 and accompanying text. Additionally, the existence and application of various types of immunity have negatively impacted an individual's right to sue the government and law enforcement officials for wrongful arrest and false imprisonment. John R. Williams, *Representing Plaintiffs in Civil Rights Litigation Under Section 1983*, 619 P.L.I. LITIG. 127, 391 (1999) (citing Malley v. Briggs, 475 U.S. 335, 341 (1986) ("Qualified immunity is, obviously, an almost irrationally pro-defendant doctrine, designed, as the Supreme Court says, to protect 'all but the plainly incompetent or those who knowingly violate the law.'")). Federal and state governments, consenting to be sued through statutory tort provisions, have altered the common law theory of sovereign immunity by which a government is free from all liability. BLACK'S LAW DICTIONARY 753 (7th ed. 1999). However, where the government has not passed legislation consenting to be sued, official immunity exists. This doctrine seeks to reconcile the following concerns:

> [T]he protection of the individual citizen against pecuniary damage caused by oppressive or malicious actions on the part of the officials of the Federal Government . . . [and] the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive of ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

Barr v. Matteo, 360 U.S. 564, 565 (1959). Liability of a local government for monetary, declaratory, or injunctive relief under 42 U.S.C. § 1983 is appropriate where the alleged unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690 (1978).

However, qualified immunity, which immunizes duties that are of a discretionary nature, is a defense to liability under § 1983. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Another source of governmental immunity is the Eleventh Amendment. U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). Lawsuits brought against state officials "in their official capacities" are considered suits against the state itself, which are barred by the Eleventh Amendment. Will v. Mich. Dep't. of State Police, 491 U.S. 58, 70-71 (1989). However, "States can, and often do, waive their Eleventh Amendment immunity." Williams, *supra*, at 419.

23. A finding of probable cause necessarily implies that no Fourth Amendment violation has occurred with respect to the Warrant Clause. Notwithstanding the evaluation of the validity of probable cause, courts have been willing to accept an officer's good-faith reliance on the validity of the warrant at the time of execution as a bar to recovery. *Harlow*, 457 U.S. at 818 ("Reliance on the objective reasonableness of an official's conduct . . . should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."); Joye v. Richland County, 47 F. Supp. 2d 663, 669-70 (D.S.C. 1999) (granting summary judgment to defendants because executing a warrant that had been issued by mistake, unbeknownst to the arresting officer, "'is not the stuff out of which a proper federal case is made'") (quoting Johnson v. Miller, 680 F.2d 39, 42 (7th Cir. 1982))); Wise v. City of Philadelphia, No. CIV.A.97-2651, 1998 WL 464918, at *3 (E.D. Pa. July 31, 1998) (granting summary judgment for defendants when officers relied on a previously satisfied bench warrant); St. Fort v. Grinnell, No. 95-C-2295, 1995 WL 632274, at *2-5 (N.D. Ill. Oct. 26,

cause based on a warrant issued in the wrong name permits the wrongfully arrested individual to seek redress from the government for a violation of his constitutional liberties.[24] Courts are split on the issue of whether a facially valid though latently defective warrant can supply probable cause for the person erroneously named in the warrant.[25]

This Note proposes a resolution to this perplexing area of constitutional criminal procedure: one that will restore dignity to individual rights in an attempt to regain the true meaning of the Fourth Amendment and curtail the "Orwellian Mischief"[26] of police invasiveness. Part II of this Note outlines the development of the law of arrest warrants and the Fourth Amendment.[27] Part III analyzes the current conflict among federal courts regarding this probable cause determination. Part IV proposes to resolve the confusion in favor of the individual and discusses the impact of this proposal on the individual's ability to seek redress from the government.

1995) (dismissing plaintiff's § 1983 claim when Sheriff relied on a facially valid warrant). *See also* Anderson M. Renick, *Orwellian Mischief—Extending the Good Faith Exception to the Exclusionary Rule:* Arizona v. Evans, 25 CAP. U. L. REV. 705, 728 (1996) ("The Evans majority's new 'good-faith' exception to the exclusionary rule allows an invalid or nonexistent computerized warrant to substitute for both probable cause to arrest and a search warrant . . . disregard[ing] the Court's prior holding in *Whitley* that an arrest made without probable cause does not justify a search when the officer is acting on inaccurate information supplied by other members of law enforcement.").

24. *See* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 418 (Frank J. Remington ed., 1965) ("If conviction is conclusive evidence of probable cause, and if probable cause subsequently found is an absolute defense to suit . . . it may be that a finding of probable cause at the preliminary examination will also serve as a bar.").

25. Berg v. Country of Allegheny, 219 F.3d 261, 271 (3d Cir. 2000) (holding that improperly issued warrant cannot constitute probable cause for an arrest). *See also* Johnson v. Miller, 680 F.2d 39, 41 (7th Cir. 1982) (resolving plaintiff's § 1983 claim against police officers for wrongful arrest on different grounds due to of fear of the "casuistic route of deeming a warrant to be valid on its face even if it contains discrepancies . . . and then invoking the proposition that the execution of a valid warrant against the person named in it does not violate the Fourth Amendment even if the warrant was issued by mistake."). *But see* United States v. Towne, 870 F.2d at 880, 884-85 (2d Cir. 1989) (upholding arrest based on a warrant later established to have been erroneously issued).

26. Justice Ginsburg adopted this phrase from the Arizona Supreme Court in her dissenting opinion in *Arizona v. Evans*. 514 U.S. 1, 25 (1995).

27. This Note primarily analyzes federal law. However, the issue of requisite probable cause for an erroneously-issued arrest warrant arises in state courts as well. *See, e.g.*, Ott v. Maryland, 600 A.2d 111 (Md. 1992); State v. Taylor, 621 A.2d 1252 (R.I. 1993). *But see Berg*, 219 F.3d at 268-69 (citing County of Sacramento v. Lewis, 523 U.S. 833, 842-43 (1998) ("[T]he constitutionality of arrests by state officials is governed by Fourth Amendment rather than due process analysis.")). Frequently these cases are either brought under state tort law or both state and federal constitutional law but are not removed to federal court. This Note will refer to state cases insofar as they are part of federal case law analyses. *See, e.g.*, *infra* note 117, 120.

II. HISTORY

A. An Overview of the Warrant Requirement and Probable Cause

The Warrant Clause of the Fourth Amendment states, "[N]o 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."[28]

Probable cause, aside from being the "glory of American legal history,"[29] is indispensable to the issuance of a valid warrant under the Fourth Amendment.[30] It is the "constitutional *sine qua non* [of] the search warrant and the arrest warrant alike."[31] The Supreme Court most cogently explained probable cause in *Brinegar v. United States*.[32] Noting the troubling line between mere suspicion and probable cause, the Court stated:

> In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . .
>
> Probable cause has come to mean more than bare suspicion: Probable cause exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed . . . .
>
> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime.[33]

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28. U.S. CONST. amend. IV. For a discussion of the particularity requirement of the Warrant Clause of the Fourth Amendment, see *supra* note 9.

29. Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM L. REV. 155, 166 (1982).

30. *See* U.S. CONST. amend. IV. *See also* WILLIAM W. GREENHALGH, THE FOURTH AMENDMENT HANDBOOK: A CHRONOLOGICAL SURVEY OF SUPREME COURT DECISIONS 10 (1995).

31. *Id.*

32. 338 U.S. 160 (1949), *reh'g denied*, 338 U.S. 839 (1949). As of February 23, 2002, Westlaw listed more than 4000 references citing to *Brinegar*. http://www.westlaw.com. *See also* http://www.lexis.com (citing *Brinegar* approximately 3900 times). *Brinegar v. United States* is "generally accepted as the best definition of probable cause." GREENHALGH, *supra* note 30, at 10.

33. *Brinegar*, 338 U.S. at 175-76 (citations and footnote omitted). *See also* Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept[,] turning on the assessment of probabilities in particular factual contexts . . . .").

In addition, a magistrate makes the probable cause determination.[34] An arrest warrant issued by a neutral and detached magistrate's informed and deliberate determination is "preferred over the hurried action of officers and others who may happen to make arrests."[35]

B. Facial Validity of Arrest Warrants and Probable Cause: The Supreme Court Speaks Out

The arrest of an individual without a valid arrest warrant and absent any justifiable circumstances for which probable cause may be based[36] is a classic Fourth Amendment violation.[37] False arrests and detentions without valid warrants or probable cause are exactly the dangers that the Framers sought to cure through the Warrant Clause of the Fourth Amendment.[38] A different question arises, however, when a law

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34. *See supra* note 9 and accompanying test. *See also* Gerstein v. Pugh, 420 U.S. 103, 120 (1975) (noting that a finding of probable cause traditionally made by magistrate in a nonadversarial proceeding). *But see* Shadwick v. City of Tampa, 407 U.S. 345, 347-54 (1972) (upholding probable cause determination by nonmagistrates).

35. United States v. Lefkowitz, 285 U.S. 452, 464 (1932). *See also* CLARENCE ALEXANDER, THE LAW OF ARREST IN CRIMINAL AND OTHER PROCEEDINGS 374 (vol. I 1949) (citing United States v. Harnick, 289 F. 256, 259 (D. Conn. 1922) (explaining that probable cause is a mixed question of law and fact, a finding of which is a "magisterial and jurisdictional act, which cannot be delegated to the accuser.")). *But see* LAFAVE, *supra* note 4, § 5.1(b) (questioning the proposition that "before-the-fact judicial authorization necessarily affords greater protection of Fourth Amendment rights" when it often seems that magistrates simply "rubber-stamp" arrest warrants).

36. For a discussion of justifiable circumstances of an arrest without a warrant, see *supra* note 4.

37. Brown v. Byer, 870 F.2d 975, 978 (5th Cir. 1989) (finding that altering a warrant supported the inference that the arresting officer knew the person he intended to arrest was not the individual described in the warrant).

38. Professor Davies argues that the Fourth Amendment was originally meant to be a ban on "too-loose warrants . . . reaffirm[ing] the common law's general resistance to conferring discretionary authority on ordinary officers." Davies, *supra* note 2, at 724. The historical record demonstrates that the Framers borrowed much of the Fourth Amendment's language from earlier state texts regarding searches and seizures. *Id*. at 669. For example, a provision adopted by Massachusetts in 1780 stated:

> Every subject has a right to be secure from all *unreasonable* searches and seizures of his person, his house, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the person or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.

Davies, *supra* note 2, at 684 & n.379 (citing MASS. CONST. of 1780, pt. 1, art. XIV, *reprinted in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 234 (Neil H. Cogan ed., 1997) (emphasis added)).

Professor Davies speculates that James Madison, a major drafter of the Fourth Amendment, may have borrowed the concept of probable cause, which had not been used in any state constitutional provisions, from a 1786 Pennsylvania customs statute requiring a "sworn-to showing of 'probable cause' as a condition for granting a search warrant for a house to a national customs collector." *Id.* at

enforcement agent arrests an incorrect person on the basis of a facially valid warrant.[39] False arrests have long been a part of this country's law enforcement history.[40] As early as *West v. Cabell*,[41] courts have entertained civil actions[42] by plaintiffs attempting to seek redress from the government and law enforcement officials for allegedly unlawful arrests and imprisonments. In *West*, police arrested and imprisoned the plaintiff, V.M. West, based on a warrant issued for a person named James West.[43] Consequently, V.M. West brought a civil action against the deputy marshal responsible for his arrest and imprisonment.[44] The lower court

703 & n.444. *But see* Maclin, *Central Meaning*, *supra* note 2, at 213 (advocating adherence to the underlying vision of the Fourth Amendment, the prevention of unchecked police discretion, rather than preoccupation "with permissible law enforcement practices of the eighteenth century," in construing the Fourth Amendment for a modern society).

39. A false arrest can manifest itself in two ways: First, the arresting agent may misidentify the person sought in the warrant, resulting in a common case of mistaken identity. Second, a warrant that appears valid on its face, but was the product of a law enforcement personnel error issuing the warrant in the wrong name, when executed, will result in the wrongful arrest of an innocent person. For a discussion of the facial validity of warrants and technical defects, see *supra* note 9 and accompanying text.

40. One legal historian has noted that false arrests are a major problem carried over from our British roots, since the time of Edward I. *See* Weber, *supra* note 29, at 155. Such cases of false arrests based on mistaken identity are still prevalent today. Local newspapers have documented numerous accounts of people all over the country who have been falsely arrested and imprisoned due to such law enforcement errors. In one recent case, local law enforcement, in the course of investigating a battery and criminal damage to property, requested a warrant for the suspect whom they identified by name. *See* Kevin Simpson, *Police Arrest Wrong Man with Right Name*, THE PANTAGRAPH BLOOMINGTON (Ill.), Mar. 25, 2000, at A4, *available at* 2000 WL 7788910. The law enforcement agents took the information listed on the warrant from the county's computerized database. *Id.* The person arrested pursuant to that warrant had the misfortune of having the same name as the real suspect of the police investigation. *Id.* The wrong man was held overnight in jail before the police discovered the mistake. *Id.*

Another man grew tired of police constantly mistaking him for his fugitive brother (even though they are fraternal twins and do not look alike) and moved into the woods after his last incarceration to become a mountain man and live off the land. *See* Troy Anderson, *Case of Mistaken Identity; Twin Jailed on Brother's Warrent* [sic], L.A. DAILY NEWS, Nov. 30, 1999, at N1, *available at* 1999 WL 7040099.

41. 153 U.S. 78 (1894).

42. This Note examines both civil cases for damages for false arrest and imprisonment as well as criminal appeals by defendants seeking to overturn their convictions. In the context of Fourth Amendment analysis and for the purpose of this Note, the difference between a civil and a criminal case is inconsequential. The constitutional question in a civil case brought under § 1983 for false arrest is the same as in a criminal case raising a Fourth Amendment violation. "'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" Graham v. Connor, 490 U.S. 386, 394 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* at 394.

43. 153 U.S. at 78-80.

44. *Id.* This action was maintained upon a marshal's bond, under a statute authorizing an injured

refused to give West's requested jury instruction, which stated that the warrant for James West could not authorize the arrest of V.M. West, even if V.M. West was the intended party.[45] On appeal, the Supreme Court reversed and remanded the case for a new trial due to the apparent defect in the warrant.[46] The Court reasoned that under common law, which the authors of the Fourth Amendment subsequently incorporated into the Warrant Clause, if the warrant does not accurately name the intended arrestee or describe him sufficiently to identify him, then the arresting officer is liable for false imprisonment.[47]

Nearly a century later, the Court articulated that an arrest based on a warrant, subsequently found to be lacking probable cause, violated an individual's Fourth and Fourteenth Amendment rights.[48] In *Whiteley v. Warden*,[49] the police arrested Harold Whiteley pursuant to a state-wide police bulletin that described him and stated that a magistrate had issued a warrant for his arrest.[50] At his state trial for breaking and entering, Whiteley moved to suppress evidence that the police had seized as fruits of the search incident to his arrest.[51] The trial judge overruled the motion to suppress the evidence and sentenced Whitely based on a finding of guilt.[52] The district court denied Whiteley's petition for habeas corpus, the Court of Appeals for the Tenth Circuit affirmed, and the Supreme Court granted certiorari.[53] The Supreme Court, finding that the issuance of the arrest warrant based on the sheriff's complaint lacked probable cause,[54]

party to sue for a breach of a deputy's duties to "faithfully perform all the duties of his office." *Id.* at 84-85.

45. *Id.* at 81.

46. *Id.* at 88. The defendant argued that the warrant met the particularity requirement of the Fourth Amendment because although the warrant stated the name of James West, the incorrect name, the defendant subjectively intended to arrest V.M. West, due to his belief that people in that part of the country "were known by other than their correct names." *Id.* at 81.

47. *Id.* at 85. Many actions for false imprisonment, however, have, over time, been heavily limited by the various immunity doctrines. *See generally* Williams, *supra* note 22, at 388-421 (discussing the effects of immunity in § 1983 actions).

48. Whiteley v. Warden, 401 U.S. 560 (1971).

49. *Id*.

50. *Id.* at 563-64. Whiteley's arrest, based on information obtained by the arresting officer from the police bulletin, was warrantless. *Id.* A warrantless arrest is clearly distinguishable from a situation in which an officer is physically in possession of a warrant. Arguably, it is more objectively reasonable for an arresting officer to rely on probable cause when he is in possession of an arrest warrant. The significance of this difference will be addressed in the analysis section of this Note. *See infra* Part III.B.

51. 401 U.S. at 561.

52. *Id.* at 561 & n.1.

53. *Id.* at 561-62.

54. *Id.* at 565. The complaint merely stated the sheriff's conclusions about the identity of the perpertrator; it failed to state that the information was based on an informant's tip. *Id.* Furthermore, the

held that the trial court erred in denying Whiteley's motion to suppress the evidence.[55] The Court reasoned that even though the arresting officers were entitled to assume that a valid warrant based on probable cause existed, "[w]here, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge."[56]

Just one month later, in an analogous context,[57] the Supreme Court ruled against an individual's allegation that the police violated his Fourth Amendment rights when they mistook him for the person actually listed in the warrant.[58] In *Hill v. California*,[59] the police arrested a man named Miller at Hill's apartment, believing him to be Hill, despite his protests that he was not the man whom they sought and ignoring the identification that he produced to confirm that fact.[60] The police conducted a search incident to that arrest,[61] the fruits of which were subsequently used to convict Hill of robbery.[62] The Court, stating its agreement with the Supreme Court of California, affirmed Hill's conviction.[63] The Court held that when the police have probable cause to arrest one person, the subsequent arrest of the wrong person based on a reasonable mistake[64] is constitutionally valid.[65] The Court reasoned that "sufficient probability,

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complaint lacked corroborating evidence. *Id.* As such, the Court found that the complaint failed to meet the requirement that the information submitted for a finding of probable cause for the issuance of an arrest warrant must be sufficient to support the independent judgment of a disinterested magistrate. *Id.* at 564-65 (citing Spinelli v. United States, 393 U.S. 410 (1969)).

55. 401 U.S. at 569. As a result of this prejudicial error, the Court remanded the case with instructions to dispose of the case unless the State made arrangements to retry Whiteley. *Id.*

56. *Id.* at 568.

57. This Note draws analogies between cases involving reasonable reliance on the existence of probable cause for a warrantless arrest and cases in which law enforcement or the courts subsequently deem a facially valid arrest warrant defective, thereby calling into question the existence of probable cause. In either scenario or variation of any such fact pattern, the result is ultimately the same: the police have arrested the wrong person.

58. Hill v. California, 401 U.S. 797, 802-05 (1971). Archie William Hill, Jr. conceded that the warrant was valid and based upon probable cause. *Id.* at 799. This concession is significant because it shifts the Court's analysis away from a valid arrest based on probable cause to a postarrest reasonableness analysis. For a more thorough discussion, see Part III.

59. 401 U.S. 797 (1971).

60. *Id.* at 799.

61. The police did not have an arrest or search warrant for Hill or his apartment. *Id.* at 799.

62. *Id.* at 801.

63. *Id.* at 802.

64. For a discussion of the difference between preissuance of arrest warrant determination of probable cause and the postarrest reasonableness analysis, see *infra* note 92 and Part III.B.

65. *Hill*, 401 U.S. at 802 (quoting California v. Hill, 446 P.2d 521, 523 (1968)). The Court held that there is no Fourth Amendment violation if the arrest is based on probable cause, even when an officer mistakenly arrests the wrong person. *Id.* at 803-04. The Court simply assumed that probable cause existed for the arrest. *Id.* The assumption that probable cause exists for an individual whom the police never intended to arrest is counterintuitive and defies logical justification. In the same vein, (albeit in the context of the application of the exclusionary rule to search warrants), deference to a

not certainty, is the touchstone of reasonableness under the Fourth Amendment."[66]

Likewise, the Supreme Court in *Baker v. McCollan*[67] upheld the dismissal of an individual's claim of false arrest and imprisonment based on mistaken identity in a § 1983 action for a deprivation of liberty under the Fourteenth Amendment.[68] In that case, Baker's brother used Baker's personal information when the police booked him for an arrest based on narcotics charges.[69] Several months later, Baker was jailed for eight days pursuant to the outstanding warrant on his brother, but which was issued in his name.[70] The Supreme Court affirmed the district court's dismissal of Baker's claim, admonishing, "The Constitution does not guarantee that only the guilty will be arrested."[71] The Court reasoned that "[a]bsent an attack on the validity of the warrant under which he was arrested," the respondent's claim of mistaken identity is insufficient to warrant due process protection under the Fourteenth Amendment.[72]

C. The Split Among the Circuits

1. The Move Away from Individual Rights

The federal courts increasingly have found the existence of probable

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magistrate's probable cause determination "as a remedial rather than a substantive question has every appearance of a cynical maneuver intended to obscure the substitution of current judicial preferences in place of the values of the Framers." Donald Dripps, *Living With* Leon, 95 YALE L.J. 906, 907 (1986). *See also infra* Part III. However, the courts do not look at the subjective intent of the officer, but instead examine whether the officer's actions were objectively reasonable. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982).

66. Hill v. California, 401 U.S. 797, 804 (1971).

67. 443 U.S. 137 (1979).

68. *Id.*

69. *Id.* at 140-41.

70. *Id.* at 141.

71. *Id.* at 145-46. Without any constraints on police discretion, however, the Fourth Amendment is meaningless. The purpose of the Bill of Rights is to "identify values that may not be sacrificed to [the] expediency" of having effective law enforcement. United States v. Leon, 468 U.S. 897, 980 (1984) (Stevens, J., dissenting). *See also supra* notes 2, 4, 5, 9, & 38, outlining the meaning of the Fourth Amendment.

72. *Baker*, 443 U.S. at 143-44. A powerful dissent by Justice Stevens, joined by Justices Brennan and Marshall, proclaimed the clear unconstitutionality of burdening the wrong man with arrest and imprisonment due to inadequate identification procedures. Justice Stevens further noted that such a burden was incongruous with the procedures "mandated by the Constitution which serve to minimize the risk of wrongful and unjustified deprivations of personal liberty." *Id.* at 153-54 (Stevens, J., dissenting). In addition, Justice Stevens also weighed the societal interests in protecting the innocent equally with the interests of apprehending the guilty. *Id.* at 156. The majority, however, concluded just the opposite, based upon the concern that every case of misidentification, when police had a valid warrant or probable cause, would constitute a deprivation of liberty. *Id.* at 146 n.5.

cause for an arrest warrant, even in circumstances where the police arrest the wrong person.[73] In a case involving an attorney who mistakenly submitted the wrong, though similar, name to the grand jury for an indictment, a federal court was unwilling to sustain an individual's claim of constitutional injury.[74] In *Herrera v. Millsap*,[75] the district attorney's office erroneously submitted the name Gerardo Herrera to the grand jury for an indictment for a hotel theft, instead of the name Gerald Herrera.[76] Consequently, a warrant was issued for Gerardo Herrera.[77] Pursuant to the warrant, police arrested and imprisoned Gerardo Herrera for several days.[78] After the police discovered the mistake and dropped the case, Gerardo Herrera brought a deprivation of liberty claim under 42 U.S.C. § 1983.[79] The district court found that because the indictment and arrest warrant were valid, Herrera suffered no constitutional injury.[80] Relying on the Supreme Court's decision in *Baker v. McCollan*,[81] the Court of Appeals for the Fifth Circuit held that an arrest pursuant to a facially valid warrant which results in that person's confinement does not violate that person's constitutional rights even though that person was not actually "wanted" for the investigated crime.[82] Herrera, however, attempted to distinguish *Baker* by arguing that his cause of action was based upon the prearrest actions taken by the police.[83] The court dismissed any possible argument of lack of probable cause by characterizing the pre-arrest actions

73. Professor Dripps reasons that in the context of evaluating the validity of probable cause for search warrants, courts eschew this constitutional quagmire by deferring to an officer's reasonable objectivity in relying on a magistrate's determination of probable cause. Dripps, *supra* note 65, at 940. The practical effect is the merging of the existence of probable cause with the issue of an officer's good faith "into a single inquiry about the sufficiency of the warrant." *Id.* at 941. Such deference to the objective good faith of the police officer executing a warrant "is at odds with the central purpose of the Fourth Amendment, which is distrust of discretionary police powers." Maclin, *Central Meaning*, *supra* note 2, at 248.

74. *See* Herrera v. Millsap, 862 F.2d 1157, 1158 (5th Cir. 1989).

75. *Id*.

76. *Id.* Although the police officer investigating the theft was informed that "Gerald Herrera" committed the crime, the police records and indictment charged "Gerardo Herrera" instead. *Id.*

77. *Id.* at 1158-59.

78. *Id*. at 1159.

79. *Id*. See text of 42 U.S.C. § 1983, *supra* note 19, for a plaintiff's cause of action under "color of law."

80. *Herrera*, 862 F.2d at 1158.

81. 443 U.S. 137 (1979).

82. *Herrera*, 862 F.2d at 1160 (citing Baker v. McCollan, 443 U.S. 137, 142-45 (1979)).

83. *Id.* at 1160. Although the decision does not detail this line of reasoning by the plaintiff, this argument seems to foreshadow possible doubt as to the validity of the warrant based on the erroneous indictment. The court failed to address the issue of probable cause, perhaps indicating that the plaintiff did not preserve this issue for appeal in the record below.

as mere negligence, at best, which is not actionable under § 1983.[84]

Similarly, courts have been willing to find the existence of probable cause, even when an outstanding warrant is improperly left in the active files. In *United States v. Towne*,[85] a Vermont State Police Sergeant arrested Edwin Towne pursuant to an outstanding warrant from New Hampshire[86] that was improperly kept in the active files.[87] A search of Towne's car incident to his arrest uncovered firearms.[88] A magistrate issued a search warrant for Towne's residence based on both an affidavit by an agent from the Bureau of Alcohol Tobacco and Firearms and Towne's arrest.[89] The search of Towne's residence uncovered several other firearms, which Towne possessed in violation of federal law, resulting in an eight-count federal indictment.[90] On appeal from his criminal conviction, Towne argued that the arresting officer in Vermont lacked probable cause to arrest him because the New Hampshire charges had been withdrawn, and thus his arrest violated the Fourth Amendment.[91] The Court of Appeals for the Second Circuit held, however, that the arresting officer's reliance on the outstanding warrant was reasonable,

84. *Id.*

85. 870 F.2d 880 (2d Cir. 1989).

86. *See* VT. STAT. ANN. tit. 13, § 4954 (1998) (authorizing warrantless arrests of fugitives from other states).

87. *Towne*, 870 F.2d at 882. Edwin Towne, Jr. allegedly assaulted a young girl in New Hampshire in 1979. *Id.* at 882. A grand jury returned an indictment in 1980. *Id.* Law enforcement personnel issued a warrant for Towne's arrest when he failed to appear in court for his arraignment on the aggravated, felonious assault charge. *Id.* Before the time of the indictment in New Hampshire, Vermont police had apprehended, indicted, convicted, and sentenced Towne on kidnapping and sexual assault charges. *Id.* Following the appeal, which reversed Towne's conviction and ordered him a new trial, he entered into a plea agreement with the Vermont State's Attorney. *Id.* During the plea negotiations, the Vermont State's Attorney was in contact with the New Hampshire authorities who had agreed to drop the pending New Hampshire charges against Towne. *Id.* However, New Hampshire never removed the indictment against Towne from its active status, and the fugitive warrant was never withdrawn. *Id.* Two years after Towne's release from prison in 1986, he became a suspect in the case of a missing teenage girl in Vermont. *Id.* A background check from the National Computer Information Center (NCIC) revealed the outstanding fugitive warrant for Towne from New Hampshire. *Id.* Police subsequently arrested Towne pursuant to that warrant. *Id.*

88. *Id.* at 882-83.

89. *Id.* at 883. A magistrate issued the search warrant one month after Towne's arrest by the Vermont State Police. *Id.*

90. 870 F.2d at 883.

91. *Id.* at 884. Towne contended that the arresting officer knew or should have known that the New Hampshire charges had been resolved because the officer was so informed by both Towne's case agent and his parole officer at the correctional facility where he served out his time pursuant to the Vermont plea agreement. *Id.* However, after Towne was apprehended on the fugitive charge, he was arraigned, and the court found probable cause for the arrest. *Id.* at 883. The court held that the arresting officer was entitled to arrest Towne based on a Vermont statute that permits a warrantless arrest of a criminal fugitive from another state. *Id.* at 882 (citing VT. STAT. ANN. tit. 13, § 4954). Towne pleaded not guilty at his arraignment. *Id.* at 883.

given the circumstances, and that there was probable cause. Thus, there was no Fourth Amendment violation.[92]

Alternatively, courts may assume the existence of probable cause and analyze a constitutional deprivation of liberty claim for wrongful arrest and imprisonment using a postwarrant reasonableness analysis. One such case is *Johnson v. Miller*.[93] In *Johnson*, a woman used Johnson's name and savings account to defraud a bank.[94] The bank caught the perpetrator but mistakenly gave the police Johnson's name and address when filing the criminal complaint.[95] The warrant that was subsequently issued listed Johnson's name and address, but gave a physical description of the real perpetrator.[96] After police arrested Johnson, she informed the judge at the preliminary hearing of the mistake. The judge then "entered an order stating, 'wrong defendant warrant to reissue.'"[97] The only change to the new warrant, however, was that it listed Johnson's correct birth date; it did not remove her name and address.[98] Because of this error, Johnson was wrongfully arrested a second time.[99] The Court of Appeals for the Seventh Circuit dismissed Johnson's § 1983 claim against the arresting officers.[100] The court first relied on dictum in *Baker*[101] to suggest that a facially valid warrant does not violate the Fourth Amendment.[102] Next, examining the

92. *Id.* at 884. The court based its finding of reasonableness under the circumstances on the fact that the arresting officer called the New Hampshire authorities prior to arresting Towne, and they confirmed that the warrant for Towne was still "active." *Id.*

In effect, the court analyzed probable cause for Towne's arrest in terms of reasonableness. *See also* Gray v. Cuyahoga County Sheriff's Dep't, 150 F.3d 579, 582-83 (6th Cir. 1998) (applying a standard of reasonableness when evaluating the constitutionality of an arrest made pursuant to a facially valid warrant). However, Professor Davies's Framing-Era research suggests that analyzing the lawfulness of an arrest in terms of reasonableness is a product of modern advocacy of aggressive law and order and has no historical basis. Davies, *supra* note 2, at 559-60, 591-601. The confusion blurring the line between the probable cause and the reasonableness analyses is manifest in the federal courts. *See, e.g.*, United States v. Davis, 94 F.3d 1465, 1467-68 (10th Cir. 1996) ("[A]rrests [are] the most intrusive of Fourth Amendment seizures and *reasonable only if supported by probable cause*.") (emphasis added).

93. 680 F.2d 39 (7th Cir. 1982).

94. *Id.* at 40.

95. *Id.*

96. *Id.* Johnson was a Caucasian female, born May 2, 1951, and five feet and five inches tall. *Id.* However, the warrant described the suspect in the bank fraud as a black female, born February 5, 1951, and five feet and seven inches tall. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 42.

101. Baker v. McCollan, 443 U.S. 137, 143-44 (1979).

102. Johnson v. Miller, 680 F.2d 39, 41 (7th Cir. 1982) ("If an arrest warrant is valid on its face, its execution against the person named in the warrant does not violate the Fourth Amendment even if, because someone has made a mistake, the person named in the warrant is not the person whom the

reasonableness of the arresting officer's actions, the court determined that an arresting officer cannot "be said to have acted wrongfully merely because the warrant he executed contained a description that did not match the appearance of Miss Johnson."[103] Finally, as to the second arrest, the court assumed that even if the arresting officer knew the warrant was mistakenly issued and was negligent in executing it, there was still no Fourth Amendment violation.[104]

These three cases represent modern Fourth Amendment jurisprudence: the willingness to excuse arguably excessive law enforcement powers in the interest of combating crime.

D. The Preservation of Individual Rights

In contrast to the trend in the case law upholding probable cause in cases of mistaken arrest and deprivation of constitutional rights, the Court of Appeals for the Third Circuit recently held that a facially valid but erroneously issued warrant cannot constitute probable cause for an arrest.[105] In *Berg v. County of Allegheny*,[106] a clerk generated a warrant for Berg when she mistakenly transposed the digits of the criminal complaint number for the person whose arrest the police actually sought.[107] Despite Berg's protestations and offer to show the arresting constable[108] his official "release documents" which signified that he was no longer on parole,[109] he was arrested and jailed for five days.[110] Berg brought a suit

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authorities intended to arrest.") (citing Baker v. McCollan, 443 U.S. 137, 143-44 (1989)).

103. *Id.*

104. *Id.*

105. *See* Berg v. County of Allegheny, 219 F.3d 261, 269-71 (3d Cir. 2000).

106. 219 F.3d 261.

107. *Id.* at 266. The events leading up to the erroneously-issued warrant deserve some attention. The supervisor of the county's probation services had requested an arrest warrant for Paul Banks for violating his parole. *Id.* A judge approved the warrant, pursuant to the requirements for probable cause and sent an Arrest Warrant Information Sheet to the warrant clerk responsible for the clearance and issuance of all arrest warrants in the county. *Id.* When entering Paul Banks's criminal complaint number into the computerized system, the clerk mistakenly transposed two numbers and retrieved Raymond Berg's file instead. *Id.* Berg was in the system because of a drunk driving charge three years earlier. *Id.* at 266-67. The clerk failed to notice that all of the information (name, date of birth, criminal complaint number, Social Security number, and address) retrieved by her entry was different from that on the Warrant Sheet. *Id.* at 267. The clerk did notice that the address was different and changed it in Berg's file to comport with what she thought was the most recent information on the Warrant Sheet. *Id.* She then generated an arrest warrant for Raymond Berg. *Id.*

108. The constable was elected by the county, authorized to make arrests, and earned a fee for each person arrested. *Id.* at 267.

109. If Berg was no longer on parole, it is implausible that law enforcement could arrest him for a parole violation.

110. *Id.* at 268. The arresting constable actually called the County Sheriff's Office, confirming

against the county, his probation supervisor, the warrant clerk, and the arresting constable, alleging civil rights violations under 42 U.S.C. §§ 1983,[111] 1985(3),[112] 1988,[113] and the Fourth,[114] Fifth,[115] and Fourteenth[116] Amendments.[117] The district court, finding that Berg's arrest was constitutional because it was based on a facially valid warrant, granted summary judgment for the defendants and dismissed the case.[118] The Third Circuit, relying in part on *Whiteley v. Warden*,[119] reversed the district court's determination of probable cause.[120] The Third Circuit reasoned that the government officials that issued the warrant did not have probable cause for an arrest warrant for Berg independent of the probable cause for the arrest of Paul Banks.[121] The *Berg* Court, distinguishing Berg's case from *Baker v. McCollan*,[122] framed the Fourth Amendment issue in terms of the preissuance requirement of probable cause for an arrest warrant.[123] The *Baker* Court, on the other hand, couched the Fourth Amendment question in terms of postissuance reasonableness.[124] The Third Circuit also held that the Fourth Amendment was applicable, even though the erroneous warrant was the result of a clerical error.[125] The court reasoned

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that Berg's warrant was still "active." *Id.* Berg's arrest took place on December 30, 1994. *Id.* at 267. Probation Services and the courts were closed due to the holidays, which resulted in Berg's nearly weeklong imprisonment. *Id.* at 268. Law enforcement officials did not clear up the mistake and release Berg until Berg's attorney intervened. *Id.*

111. 42 U.S.C. § 1983 (1994) (civil action for deprivation of liberty under official color of right).

112. 42 U.S.C. § 1985(3) (1994) (conspiracy to interfere with civil rights; to deny equal protection of the laws).

113. 42 U.S.C. § 1988 (1994) (proceedings in vindication of civil rights; attorney's fees).

114. U.S. CONST. amend. IV (unconstitutional seizure for lack of probable cause for arrest).

115. U.S. CONST. amend. V (deprivation of liberty without due process of law).

116. U.S. CONST. amend. XIV, § 1 (deprivation of liberty without due process of law).

117. Berg v. County of Allegheny, 219 F.3d 261, 268 (3d Cir. 2000). Berg originally filed the lawsuit in state court. *Id.* The defendants removed the case to the District Court for the Western District of Pennsylvania. *Id.*

118. *Id.*

119. 401 U.S. 560 (1971). *See supra* note 48-56 and accompanying test discussing *Whiteley*.

120. *Berg*, 219 F.3d at 271. The *Berg* Court also cited several state court cases to support its reliance on *Whiteley*, 401 U.S. 560, and what is now known as the "collective knowledge" rule. *Id.* at 270 n.4 (citing state cases). Courts use the collective knowledge rule to "impute" the knowledge of one officer onto another. *See* United States v. Meade, 110 F.3d 190, 193-94 & n.2 (1st Cir. 1997) ("[W]hen a law enforcement officer with information amounting to probable cause directs an officer, who lacks the knowledge to make the arrest, we 'impute' to the arresting officer the directing officer's knowledge."). When the directing officer lacks probable cause to order the arrest, the arrest itself is unlawful even though the arresting officer properly relied on the direction of the commanding officer. *Id.* at 194 n.2 (citing Whiteley v. Warden, 401 U.S. 560, 568 (1971)).

121. 219 F.3d at 271.

122. 443 U.S. 137 (1979).

123. *Berg*, 219 F.3d at 271 n.6.

124. *Id.*

125. *Id.* at 271. *But cf.* Wise v. City of Philadelphia, No. CIV.A.97-2651, 1998 WL 464918, at *2

that "[b]ecause the courts are the arm of the government charged with issuing warrants, [the probable cause] requirement is directed to court officials as well as law enforcement officers."[126]

III. FACIALLY VALID, THOUGH LATENTLY DEFECTIVE WARRANTS AS CONSTITUTING PROBABLE CAUSE

A. Why a Latent Defect in a Warrant Should Not Constitute Probable Cause for the Subsequent Arrest of the Wrong Person

As previously noted, the arrest of a completely innocent person is a fairly common occurrence.[127] The Fourth Amendment is chipped away each time a person that is arrested is not the person named in the warrant[128] or the warrant itself incorrectly identifies a person different from the individual whom the police intend to arrest.[129] In the absence of exigent circumstances that would justify a warrantless arrest,[130] the Fourth Amendment Reasonableness Clause should not be used to shield law enforcement from liability for wrongful arrests where probable cause was

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(E.D. Pa. July 31, 1998) (citing Arizona v. Evans, 514 U.S. 1, 15-16) ("Defendants cannot be held liable under § 1983 where they rely on a computerized record or a warrant which is inaccurate because of a clerical error."); Fullard v. City of Philadelphia, No. CIV.A.95-4949, 1996 WL 195388, at *9-14 (E.D. Pa. Apr. 22, 1996) (holding no § 1983 liability for a search when, because of a clerical error, the plaintiff's address, rather than that of the subject of the warrant, was erroneously specified in a valid arrest warrant).

126. *Berg*, 219 F.3d at 271. *See also* Arizona v. Evans, 514 U.S. 1, 13-15 (downplaying the significance that the unlawful arrest was the result of the mistake of a court clerk and not a police officer).

127. *See supra* notes 11-18, 40. *See also* Faye A. Silas, *A Bad Rap: Snafus in Computer Warrants*, 71 A.B.A. J. 24 (1985) (class action filed on behalf of an estimated 2000 people misidentified and wrongly arrested each year on erroneous warrants in Los Angeles County); *Appellate Summaries, Criminal Law & Procedure-Mistaken Identity*, CHI. DAILY L. BULL., Feb. 11, 2000, at 1, *available at* WL, Westnews, Chidlb (reporting appellate decision upholding mistaken arrest of an individual because probable cause existed for the person the actual person intended); Grace Murphy, *Mistaken Arrests Spur Reviews: Maine's Courts Begin a Systemwide Check of Outstanding Arrest Warrants and Will Cross-Check with the Sheriff's Departments*, PORTLAND PRESS HERALD, May 19, 2000, at 6B, *available at* 2000 WL 5082676 (reporting that two people were mistakenly arrested within the same week); Simpson, *supra* note 40, at A4 (warrant issued to the wrong man who had the same name as the person actually intended); Ed White, *City, Officers Added to Mistaken-Identity Suit Emily Bassett, Who Is Suing Kent and Mecosta Counties for Arresting Her Without Proper ID Checks, Blames City Officers for Taking Her to Jail*, THE GRAND RAPIDS PRESS, Aug. 19, 2000, at A3, *available at* 2000 WL 25161379 (woman arrested and held overnight on a warrant for another woman after telling at least three judges that she was not the woman police were seeking).

128. *See, e.g.*, Hill v. California, 401 U.S. 797 (1971); West v. Cabell, 153 U.S. 78 (1894).

129. *See, e.g.*, Baker v. McCollan, 443 U.S. 137 (1979); Herrera v. Millsap, 862 F.2d 1157 (5th Cir. 1989).

130. *See supra* note 4 and accompanying text.

lacking for a particular person when the warrant was issued.[131] No probable cause actually exists for an individual mistakenly arrested or taken into custody by the police if the police did not truly intend to arrest that particular person.[132] When courts validate the existence of probable cause in these circumstances, they implicitly impute probable cause to arrest an innocent person from the arresting officer's good-faith belief that he was arresting the correct person.[133] Likewise, probable cause is imputed to the innocent person when the arresting officer relies, in good faith, on a magistrate's determination of probable cause.[134] This imputation is disconcerting because it seems to legitimize careless or grossly negligent law enforcement behavior.[135] Equally problematic is finding the existence of probable cause when law enforcement officials or the courts later discover that the contents of a warrant or the issuance of a warrant was in error.[136] Some courts have eschewed this problem by shifting their analyses away from probable cause and towards whether the arrest was "reasonable" given the circumstances.[137] Yet, it is idiosyncratic to justify a Fourth Amendment violation based on the "reasonableness" of the arrest when, by definition, a violation is itself unreasonable.[138] As courts continue to maintain that latently defective warrants are nonetheless supportable by probable cause, the effective functioning of law

131. The presumption that it is "reasonable to rely on a defective warrant is the product of constitutional amnesia." United States v. Leon, 468 U.S. 897, 972 (1984) (Stevens, J., dissenting).

132. But see discussion of probable cause as it relates to an arresting officer's intent, *supra* note 65.

133. *See, e.g.*, Hill v. California, 401 U.S. 797, 804 (1971); United States v. Meade, 110 F.3d 190, 193-94 (1st Cir. 1997).

134. *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) ("[T]he officers' reliance on the magistrate's determination of probable cause was objectively reasonable . . . ."). *But see* Beck v. Ohio, 379 U.S. 89, 97 (1964) ("'[G]ood faith on the part of the arresting officers is not enough'. . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police.") (quoting Henry v. United States, 361 U.S. 98, 102 (1959)).

135. *See, e.g.*, Anderson, *supra* note 40 (disbelieving Jay Nugent's death, though his belongings were found below an avalanche eight years earlier, police arrested Jay's brother, Ray, believing that he was Jay).

136. *See, e.g.*, Krohn v. United States, 742 F.2d 24, 26-27 (1st Cir. 1984) (conceding that the affidavit for the issuance of the warrant was invalid, but holding that a "federal official does not violate the Constitution by executing a facially valid state warrant, if he does not know that it is invalid."); Johnson v. Miller, 680 F.2d 39, 41 (7th Cir. 1982) (refuting any claim of a violation of the Fourth Amendment even if the arresting officer had reason to know the warrant was mistakenly issued and was negligent in executing it).

137. For a criticism of the reasonableness approach, see Maclin, *Central Meaning*, *supra* note 2, at 210-214 (arguing that "[s]uch a formula lacks content, and amounts to nothing more than an ad hoc judgment about the desirability of certain police intrusions."). *See also* Part III.B. and *supra* notes 92, 134.

138. United States v. Leon, 468 U.S. 897, 970 & n.23 (1984) (Stevens, J., dissenting).

enforcement rises at the cost of eroding individual liberties that the Framers safeguarded in the Fourth Amendment.[139]

B. The Current Confusion of Federal Case Law

The development of case law in this area—constitutional claims of deprivation of liberty resulting from an erroneous arrest—has vacillated because plaintiffs have utilized different legal theories to support their claims, under either the Fourth Amendment or the Fourteenth Amendment.[140] Moreover, courts freely reconcile potentially inconsistent results by simply distinguishing the facts of each case.[141] Finally, many courts have shifted the analysis of these wrongful arrest claims away from preissuance of an arrest warrant to a postissuance of the arrest warrant reasonableness approach.[142]

The question of under which legal theory a wrongful arrest claim should be argued should no longer be a source of confusion because federal courts now require such claims to be brought as wrongful seizure claims in violation of the Fourth Amendment.[143] The Supreme Court no doubt approves of this determination because fifteen years earlier in *Baker*

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139. In the context of a search warrant, Professor Dripps goes one step further, arguing that *Leon* stands for the proposition that "a search unsupported by probable cause but pursuant to a facially valid warrant is now legal." Dripps, *supra* note 65, at 934-35. Therefore, the police impliedly have a "duty to execute the illegal warrant." *Id.* at 935. For a discussion of the original meaning of the Fourth Amendment and the Framers' intent, see Davies, *supra* notes 2, 4, 5, 9, 38, 92.

140. Before the Supreme Court in *Graham v. Connor* pronounced that the Fourth Amendment governs constitutional challenges to arrests, individuals often brought their claims as deprivations of liberty under the Due Process Clause of the Fourteenth Amendment. *See* Baker v. McCollan, 443 U.S. 137 (1979); Whiteley v. Warden, 401 U.S. 560 (1971); Brown v. Byer, 870 F.2d 975 (5th Cir. 1989); Simons v. Clemons, 752 F.2d 1053 (5th Cir. 1985); Johnson v. Miller, 680 F.2d 39 (7th Cir. 1982); Powe v. City of Chicago, 664 F.2d 639 (7th Cir. 1981).

141. *See, e.g.*, *Brown*, 870 F.2d at 978 (distinguishing *Baker* as a case of mistaken identity, which cannot be dispositive of Brown's complaint that the arresting officer intentionally altered the warrant to match her description); *Johnson*, 680 F.2d at 41 (distinguishing Johnson's case from *Baker*, based on the differences between Johnson's appearance and the physical description in the warrant).

142. In this context, courts do not question the validity of the warrant or probable cause, but instead, examine the arresting officer's reasonable belief that the warrant was valid for the intended arrestee. *See* Hill v. California, 401 U.S. 797, 803-04 (1971) (finding that because the police had probable cause to arrest Hill, the mistaken arrest of Miller based on the officers' reasonable belief that he was Hill did not violate the Fourth Amendment); Wise v. City of Philadelphia, No. CIV.A.97-2651, 1998 WL 464918, at *3 (E.D. Pa. July 31, 1998) (finding that the arresting officers reasonably relied on an invalid bench warrant); St. Fort v. Grinnel, No. 95-C-2295, 1995 WL 632274, at *3 (N.D. Ill. Oct. 26, 1995) ("An officer acting upon a facially valid warrant possesses probable cause to arrest."). *But see* Arizona v. Evans, 514 U.S. 1, 20 (1995) (Stevens, J., dissenting) (questioning the Court's proposition in *Leon* that "courts should not look behind the face of a warrant on which police have relied on in good faith.").

143. *See* Blackwell v. Barton, 34 F.3d 298, 302 (5th Cir. 1994) (relying on Graham v. Connor, 490 U.S. 386 (1989)).

v. McCollan,[144] the Court forecasted its preference for using the Fourth Amendment to dismiss a plaintiff's claim brought under the Fourteenth Amendment.[145] The Court gave significant weight to the fact that Baker did not attack the validity of the arrest warrant.[146] Consequently, the Court left unanswered the possibility of a successful challenge of the arrest on Fourth Amendment grounds, had Baker challenged the validity of the warrant itself.[147]

Whiteley v. Warden,[148] which preceded *Baker*,[149] was actually the Supreme Court's first foray into invalidating an arrest on constitutional grounds under the Fourth and Fourteenth Amendments in which probable cause was subsequently found to be deficient.[150] Other courts have subsequently relied on the Court's pronouncement in *Whiteley*[151] for analyzing similar issues.[152] The distinguishing feature in *Whiteley*, however, is that the arresting officers did not make the arrest pursuant to a warrant.[153] Instead, the arrest was based on a police bulletin, which law enforcement personal assumed was based on a valid arrest warrant.[154] This is the sort of factual difference that allows the federal courts to subjectively select their reliance on either *Whiteley* or *Baker* to support their decisions, either by distinguishing those cases in order to justify their own holdings[155] or by simply refusing to rely on them at all.[156] Hence, the muddled case law is the result of the subtle nuances created by

144. Baker v. McCollan, 443 U.S. 137, 144-45 (1979).

145. *Id.* at 144-45.

146. *Id.* at 143-44. *See* quote *infra* Part I.B.

147. *But cf. Baker*, 443 U.S. at 150 (Stevens, J., dissenting) (arguing that the absence of procedures for ensuring "a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense" violates the respondent's liberty under the Due Process Clause of the Fourteenth Amendment).

148. 401 U.S. 560 (1971).

149. 443 U.S. 137.

150. 401 U.S. at 568-69.

151. 401 U.S. 560 (1971).

152. *See, e.g.*, Berg v. County of Allegheny, 219 F.3d 261, 269-79 (3d Cir. 2000); United States v. Meade, 110 F.3d 190, 194 & n.2 (1st Cir. 1997); Ruehman v. Sheahan, 34 F.3d 525, 527 (7th Cir. 1994).

153. Whiteley v. Warden, 401 U.S. 560, 563 (1971).

154. 401 U.S. at 563-64.

155. *See* Wells & Eaton, *supra* note 19, at 257 (arguing that the Court in *Baker* distorted the facts to make the case easier).

156. *See, e.g.*, Sanchez v. Swyden, 139 F.3d 464, 468-69 (5th Cir. 1998) (relying on Baker v. McCollan, 443 U.S. 137 (1979), to dismiss Sanchez's § 1983 claim against law enforcement agents for deprivation of liberty); United States v. Meade, 110 F.3d 190, 194 (1st Cir. 1997) (finding it unnecessary to rely on *Whiteley* in order to impute knowledge of probable cause to the arresting officer because "both the directing officer and the arresting officer individually possessed the requisite knowledge"); Herrera v. Millsap, 862 F.2d 1157, 1160 (5th Cir. 1989) (dodging Herrera's attempt to distinguish his case from *Baker* by relying on cases within its own jurisdiction).

differentiating the facts[157] of each case and the issue of which constitutional provision is the basis for the claim.[158]

The most problematic factor that perpetuates the disjointed case law is the shift in analysis away from the preissuance of an arrest warrant to a postwarrant inquiry into the reasonableness of the arrest. This change implicates an analysis under the Search and Seizure Clause rather than the Warrant Clause of the Fourth Amendment.[159] The Third Circuit recognized this shift in analysis in its attempt to reconcile its decision in *Berg* with the divergent outcomes of other circuits:

> Unlike [*Baker*], Berg challenges the generation and execution of the warrant for his arrest, not the decision to incarcerate him after arrest. At issue here is not whether authorities must investigate the claims of innocence of a person who has been legally arrested but what precautions the Constitution requires before an arrest warrant is issued and executed.[160]

This shift in analysis from probable cause for the arrest warrant to reasonableness of the actual arrest distorts the original intent of the Fourth Amendment and reflects a modern expansion of police power.[161] The proper concern of the Fourth Amendment, as the Framers intended, is the "right to be secure" and not the "question-evading platitudes about 'reasonableness.'"[162]

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157. This Note suggests that instead of attempting to differentiate facts in order to justify disparate outcomes in probable cause or reasonableness determinations, courts should simply analogize the facts and legal arguments before them. *See supra* note 57. *See also* Part IV.

158. The difference between a constitutional challenge for wrongful arrest and imprisonment brought under the Fourth Amendment versus the Fourteenth Amendment is subtle. Both call into question the legality of the arrest, regardless of whether it is analyzed as a wrongful "seizure" under the Fourth Amendment or as a deprivation of liberty claim under the Fourteenth Amendment. It is not unlike the difference of a wrongful arrest claim analyzed in terms of prearrest probable cause requirements versus a postarrest analysis in terms of reasonableness. *See supra* note 92 and accompanying test. However, in order for a plaintiff to prevail on a § 1983 action for wrongful arrest, courts have moved in the direction of requiring that the arrest be challenged as an unlawful seizure in violation of the Fourth Amendment. *See* United States v. Davis, 94 F.3d 1465 (10th Cir. 1996); Blackwell v. Barton, 34 F.3d 298 (5th Cir. 1994).

159. *See* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

160. Berg v. County of Allegheny, 219 F.3d 261, 271 n.6 (3d Cir. 2000) (citing Murray v. City of Chicago, 634 F.2d 365, 367 (7th Cir. 1980) (distinguishing Baker v. McCollan, 443 U.S. 137 (1979) on the same ground)).

161. *See* Davies, *supra* note 2, at 749-50.

162. *Id.* at 750.

C. The Great Compromise: Bargaining Away the Fourth Amendment and its Effects on Individual Rights

The prearrest constitutional requirement of probable cause is not an inconsequential one. However, the need for effective law enforcement is an equally desirable goal. Unfortunately, the current balance struck between these competing goals in favor of law enforcement adversely affects an individual's rights to redress his government.[163] There are already several obstacles, such as the various immunity doctrines,[164] that encumber an individual's ability to seek redress from the federal government under § 1983 for a constitutional tort violation. However, the first hurdle to overcome is the determination of probable cause under the Fourth Amendment.[165] A judicial finding of probable cause forecloses all other inquiry into the constitutionality of the arrest. This foreclosure has the greatest impact when a court validates a latently defective warrant. Such a finding of probable cause, in spite of a technical defect in the warrant, condones erroneous law enforcement work by permitting wrongful arrests and imprisonments to go undeterred. Therefore, an individual arrested and imprisoned pursuant to a defective warrant has no means by which to remedy the social stigma of humiliation and public embarrassment, economic loss from missed employment, or any other harm[166] that may result from arrest and imprisonment.

IV. PROPOSAL FOR RESTORING THE INTEGRITY OF THE FOURTH AMENDMENT

The increasing deference to law enforcement exhibited by the federal courts in their review of probable cause for arrest warrants threatens the protection of individual liberties that the Framers guaranteed in the Fourth Amendment and therefore must be halted. The solution calls for a more stringent analysis of probable cause by the federal courts. Although there is a long history of evolved case law on the standard for probable cause, it

163. The right to seek redress from one's government for grievances is found in the First Amendment. U.S. CONST. amend. I. ("[T]he right of the people . . . to petition the Government for a redress of grievances."). The ability to sue the government for deprivation of liberty or due process is statutorily granted by 42 U.S.C. § 1983. See *supra* note 19 for the text of § 1983.

164. For an explanation of these immunities and how they can affect one's ability to sue the government, see *supra* note 22.

165. The existence of probable cause to arrest constitutes justification and "is a complete defense to an action for false arrest." Bernard v. United States, 25 F.3d 98, 102 (2d Cir. 1994).

166. Surell Brady, *Arrests Without Prosecution and the Fourth Amendment*, 59 MD. L. REV. 1, 60-63 (2000) (outlining individual harms that attach when a person is arrested).

is very easy for courts to lapse into evaluating an arrest in terms of reasonableness under the Search and Seizure Clause. Although the reasonableness analysis may be preferable in other contexts, such as evaluating a search and seizure for the purpose of suppressing evidence in a criminal prosecution, it is not justified in cases of wrongful arrest of an innocent person based on a latently defective warrant. In the former scenario of the exclusionary rule, a person has been charged with a crime and is entrenched in a criminal prosecution. In the latter scenario, the police discover that they have arrested the wrong (and innocent) person whom they neither intended to arrest nor could they charge with a crime. Although it is true that a person properly suspected by law enforcement may turn out to be innocent, the sanctity of individual liberties requires a more stringent standard of protection at the outset of the arrest. The tough-on-crime policy fueling aggressive law enforcement is not of absolute primacy here.

Moreover, a warrant that is valid on its face, but which is later determined to have a latent defect due to some erroneous information, cannot logically be valid. The Third Circuit astutely recognized this as circular reasoning when it overruled the district court's finding of probable cause based on a facially valid warrant in *Berg*.[167] This plain logic approach simply means that irrespective of whether a technical defect in a warrant is the result of a clerical error or law enforcement agent's error,[168] that warrant cannot supply probable cause for an arrest when the police subsequently arrest the wrong person in reliance on that warrant.[169] Although the warrant, on its face, gives no indication of its defect, there is no legal basis for probable cause for the issuance of the warrant.[170]

A judicial determination of the constitutional validity of an arrest under a literal reading of the Warrant Clause of the Fourth Amendment should

167. 219 F.3d 261 (3d Cir. 2000).

168. *Id.* ("Because the courts are the arm of government charged with issuing warrants, we believe this requirement is directed to court officials as well as law enforcement officers."). *But cf.* Arizona v. Evans, 514 U.S. at 14-16 (refusing to apply the exclusionary rule to suppress evidence obtained by police executing a warrant later deemed invalid due to erroneous computer information by a court clerk).

169. 219 F.3d at 270-71 ("[T]he legality of a seizure . . . depends on whether the officer[] . . . possessed the requisite basis to seize the [particular] suspect.") (quoting Rogers v. Powell, 120 F.3d 446, 453 (3d Cir. 1997)).

170. In fact, the probable cause for the person actually intended for arrest was a parole violation. *Id.* at 266. The person named in the warrant had satisfied his parole three years earlier. *Id.* at 266-67. Therefore, it was legally impossible to issue a warrant to Berg on those grounds. *See* 40 AM. JUR. PROOF OF FACTS 3D *Government Liability* § 4 (1997) ("[A]n arrest, search, or seizure may be invalid where the information received and relied upon by an officer was erroneous to begin with, or was miscommunicated to or misinterpreted by the receiving officer.").

cure the potential danger inherent in applying a lesser standard of reasonableness. A court's finding that no probable cause exists when there is any latent defect in the warrant will serve three important purposes. First, it will preserve the integrity of the Fourth Amendment. Second, it will promote accountability and responsibility in executing law enforcement and clerical functions.[171] Third, it removes the initial barrier[172] to an individual's ability to seek redress from the government.

V. CONCLUSION

The current state of federal case law dealing with latently defective arrest warrants continues to strip away the individual protections that underlie the Fourth Amendment. A proper balance must be struck between the Fourth Amendment protection of liberties and effective law enforcement. Courts have been too complacent in dismissing individual liberties. Preserving the integrity of the Fourth Amendment and respecting the Framers' intent requires a change in the way courts analyze issues of probable cause in the context of defective warrants. These ideals can only be accomplished by adhering to preissuance constitutional procedures for probable cause and resolving such issues in favor of the individual.

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171. Without the fear of potential liability under § 1983, police officers would be permitted to "run amok . . . so long as they have a piece of paper in their hands called an arrest warrant." Joye v. Richland County, 47 F. Supp. 2d 663, 669-70 (D.S.C. 1999) (quoting Johnson v. Miller, 680 F.2d 39, 42 (7th Cir. 1982)).

172. See *supra* note 165 regarding probable cause as a barrier to bringing a § 1983 claim. *See also supra* note 22 regarding obstacles to a plaintiff's ability to seek redress from the government.

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