Boston College Law Review

Volume 60 | Issue 1 Article 5

1-29-2019

Mass Arrests & the Particularized Probable Cause Requirement

Amanda Peters
South Texas College of Law Houston, apeters@stcl.edu

MASS ARRESTS & THE PARTICULARIZED PROBABLE CAUSE REQUIREMENT

AMANDA PETERS

MASS ARRESTS & THE PARTICULARIZED PROBABLE CAUSE REQUIREMENT

AMANDA PETERS*

Abstract: Three Supreme Court cases—*United States v. Di Re*, *Ybarra v. Illinois*, and *Maryland v. Pringle*—established the need for individualized or particularized probable cause in multiple-suspect arrests and searches. These three Supreme Court decisions have been used by plaintiffs seeking to sue police departments and municipalities under 42 U.S.C. § 1983 for civil rights violations stemming from mass arrests unsupported by probable cause. Oddly enough, these decisions have also been relied upon by defendants who allege that the law is unclear when it comes to particularized probable cause and multiple-suspect arrests. This Article seeks to carefully examine the history of mass arrests in America and analyze the probable cause requirement of the Fourth Amendment along with existing federal cases on multiple-suspect, group, and mass arrests, to demonstrate that the jurisprudence in this area is settled and clear. The Fourth Amendment's probable cause analysis is and should be no different for individual arrests than for high-volume arrests.

INTRODUCTION

The Fourth Amendment of the U.S. Constitution mandates that all arrests be supported by probable cause.[1] The U.S. Supreme Court has repeatedly described probable cause as the facts and circumstances the officer knows that would warrant a reasonable, prudent person in believing a criminal offense has been, is being, or will be committed by the suspect.[2] Offic-

* Helen and Harry Hutchens Research Professor and Professor of Law, South Texas College of Law Houston. I would like to thank Natalie Stanley for her research assistance, Claire Caton for introducing me to the "Waco Biker Shootout" cases, and the South Texas College of Law Houston administration and faculty for their encouragement and support of faculty research and scholarship.

[1] U.S. CONST. amend. IV.

[2] Michigan v. DeFillippo, 443 U.S. 31, 37 (1979); Gerstein v. Pugh, 420 U.S. 103, 111 (1975); Adams v. Williams, 407 U.S. 143, 148 (1972); Beck v. Ohio, 379 U.S. 89, 91 (1964); Draper v. United States, 358 U.S. 307, 313 (1959); Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Carroll v. United States, 267 U.S. 132, 162 (1925). In *United States v. Chadwick,* Judge Tauro stated:

> We do not handcuff our government agents by requiring that they arrest only when the facts upon which they wish to rely would warrant a man of reasonable caution—as opposed to one of extraordinary sophistication—in concluding criminal activity

ers must have probable cause to arrest a specific person.[3] The Supreme Court calls this particularized probable cause.[4]

When officers make an unlawful arrest without probable cause, significant criminal and civil consequences follow. Evidence seized pursuant to that arrest may be excluded or the case may be dismissed. Unlawfully arrested individuals may file civil rights lawsuits under 42 U.S.C. § 1983 alleging that their Fourth Amendment rights were violated.[5] Indeed, this is a common § 1983 claim.[6] Probable cause is not always easy to establish, particularly in weak or complex cases.[7] This challenge is magnified when officers arrest individuals *en masse*.

Mass arrests happen more frequently than one might imagine. Any number of scenarios might give rise to a high-volume arrest: protests, police raids, undercover stings, even raucous parties. There are numerous cases that illustrate the incidence of mass arrests.[8] In 2018, the Supreme Court defended

---

> was taking place. They are merely required to meet a standard that can be understood by the average reasonably prudent person.

393 F. Supp. 763, 769 (D. Mass. 1975), *aff'd*, 532 F.2d 773 (1st Cir. 1976), *aff'd*, 433 U.S. 1 (1977).

[3] *See* Illinois v. Gates, 462 U.S. 213, 229–31 (1983) (evaluating whether a confidential informant's tip established the requisite probable cause for the arrest of a husband and wife); Texas v. Brown, 460 U.S. 730, 741–42 (1983) (noting that probable cause is necessary to support the seizure of property in plain view); Ybarra v. Illinois, 444 U.S. 85, 91 (1979) (stating that a search or seizure of a person must be supported by probable cause); Berger v. New York, 388 U.S. 41, 59 (1967) (explaining that the purpose of the probable cause requirement is protecting constitutionally protected areas from state intrusion until the state has reason to believe that a specific crime has been or is being committed).

[4] *Ybarra*, 444 U.S. at 91.

[5] 42 U.S.C. § 1983 (2018); *see* Vodak v. City of Chicago, 639 F.3d 738, 750 (7th Cir. 2011) (describing plaintiffs' primary complaint in a class action civil rights lawsuit as the city of Chicago's decision to arrest 900 people without probable cause).

[6] DAVID B. BROOKS, TEXAS PRACTICE: CIVIL RIGHTS SUITS § 2.31 (2d ed. 2018) (citing excessive force and arrest without probable cause as the two most common § 1983 claims in Texas lawsuits); Tal J. Lifshitz, Note, *"Arguable Probable Cause": An Unwarranted Approach to Qualified Immunity*, 65 U. MIAMI L. REV. 1159, 1166 (2011) ("[Section] 1983 litigation has skyrocketed to combat numerous constitutional violations—with the Fourth Amendment's prohibition against unreasonable searches and seizures being a popular vehicle for such claims."); Jessica R. Lonergan, *Protecting the Innocent: A Model for Comprehensive, Individualized Compensation of the Exonerated*, 11 N.Y.U. J. LEGIS. & PUB. POL'Y 405, 409 (2008) (stating that exonerees frequently raise lack of probable cause in civil rights lawsuits).

[7] Lifshitz, *supra* note 6, at 1185 ("The concept of probable cause has been grounded in criminal law and procedure for over two centuries. Ease of application and clarity, however, are not qualities with which the standard is endowed.").

[8] *See, e.g.*, Wright v. Cuyler, 563 F.2d 627, 628 (3d Cir. 1977) (considering the arrest of between eight and twenty persons who fit the description of the assailant); Wong v. Hayakawa, 464 F.2d 1282, 1282 (9th Cir. 1972) (noting that an undisclosed number of student protesters were arrested at one time); Urban v. Breier, 401 F. Supp. 706, 708 (E.D. Wis. 1975) (examining the arrest of fifty-four persons). Older opinions also used the phrase "dragnet arrests." *See, e.g.*, Ed-

the actions of Washington D.C. officers who arrested twenty-one partygoers in an abandoned house, sixteen of whom sued alleging that the officers lacked probable cause to arrest them.[9] In 2015, 177 motorcycle enthusiasts who gathered in Waco, Texas were arrested following a confrontation at a restaurant that resulted in nine deaths.[10] Dozens of bikers are suing the police chief, his assistant, the arresting officers, the District Attorney, the Sheriff, the city, the county, and state law enforcement officials for Fourth Amendment violations stemming from those arrests.[11] Hundreds of people were arrested following the Occupy Wall Street and Occupy Oakland protests that took place in 2011 and 2012.[12] After their arrests, many protestors initiated lawsuits alleging officers violated their constitutional rights.[13] Other cases that received less media attention have also challenged mass arrests on Fourth Amendment grounds.[14]

---

wards v. Philadelphia, 860 F.2d 568, 571 n.2 (3d Cir. 1988) (referring to the arrest of forty to fifty youths as a "dragnet arrest").

[9] District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018).

[10] *In Waco Biker Melee, 4 of 9 People Shot Dead with Gun Type Police Use*, CHI. TRIB. (Dec. 11, 2015), http://www.chicagotribune.com/news/nationworld/ct-waco-biker-shooting-20151211-story.html [http://perma.cc/QFK5-YJRF].

[11] Tommy Witherspoon, *More Twin Peaks Bikers File Civil Lawsuits*, WACO TRIB. (May 15, 2017), http://www.wacotrib.com/news/courts_and_trials/more-twin-peaks-bikers-file-civil-lawsuits/article_c5ff8ff4-c8f9-5496-b9d6-02c03c10233f.html [https://perma.cc/3867-BZQQ].

[12] *80 Arrested at Occupy Wall Street Protest*, NBC NEWS (Sept. 24, 2011, 10:12 PM) (reporting on eighty arrests made in New York), http://www.nbcnews.com/id/44656667/ns/us_news-life/t/arrested-occupy-wall-street-protest/#.WmujWKinE2w [http://perma.cc/9XBM-3Q2H] [hereinafter *80 Arrested*]; Michael Cavna, *Occupy Oakland: After 2nd Arrest, Comics Journalist Susie Cagle Shares Her On-the-Ground Experience*, WASH. POST (Jan. 31, 2012), https://www.washingtonpost.com/blogs/comic-riffs/post/occupy-oakland-after-2nd-arrest-comics-journalist-susie-cagle-shares-her-on-the-ground-experience/2012/01/30/gIQAAu7UgQ_blog.html?utm_term=.98dd1c7fc62f [http://perma.cc/3NQA-HSSC] (reporting on three hundred to four hundred arrests in Oakland).

[13] *See* Berg v. New York City Police Comm'r Raymond Kelly, No. 12-CV-3391 (TPG), 2016 WL 4257525, at *6 (S.D.N.Y. Aug. 10, 2016) ("A reasonable jury could find that police officers detained the protestors, without probable cause or a warrant, due to a motive that belies defendants' claimed privilege."), *rev'd*, Berg v. Kelly, 897 F.3d 99 (2nd Cir. 2018); Angell v. City of Oakland, No. 13-CV-00190 NC, 2015 WL 65501, at *6 (N.D. Cal. Jan. 5, 2015) ("Plaintiffs assert [they had] a common interest in ensuring that they would not be subject to mass arrests without individual determinations of probable cause . . . ."); Gersbacher v. City of New York, 134 F. Supp. 3d 711, 722 (S.D.N.Y. 2015) ("Defendants offer no argument based on the pleadings that even arguable probable cause [to arrest] existed."); Tommy Witherspoon, *47 More Bikers Sue Over Twin Peaks Arrests*, WACO TRIB. (May 13, 2017), http://www.wacotrib.com/news/city_of_waco/more-bikers-sue-over-twin-peaks-arrests/article_f1f86c73-a30b-5361-8ca3-5433f89c6dfd.html [http://perma.cc/W9QX-MHFB].

[14] *See* Wilson v. City of Boston, 421 F.3d 45, 49 (1st Cir. 2005) (finding that plaintiff was unlawfully arrested at a "job fair" that the police advertised to individuals with open warrants).

It is important to note at the outset that mass arrests are not inherently illegal.[15] It is difficult, however, for officers to execute a lawful mass arrest. Courts have likened mass arrests to a form of police harassment[16] or an act of oppression,[17] and have determined that arrestees are entitled to a rare, judicial form of expunction.[18] Following one particularly egregious incident, the District of Columbia Circuit Court of Appeals found in *Sullivan v. Murphy* in 1973 that a mass arrest resulted in "a situation in which the police did not govern themselves by their ordinary procedures, which are calculated to guard against an arrest without probable cause, even in the case of a massive civil disturbance."[19] In this way, mass arrests have the potential to undermine the rights established by the Fourth Amendment, specifically the right to an arrest supported by probable cause.[20] Although it is possible for a cautious law enforcement agency to carry out a large-scale arrest without violating civil rights, too often the chaos that precedes the arrests and their unusual circumstances make it impossible to arrest each person while honoring the Fourth Amendment's probable cause requirements.

The aftermath of mass arrests can be costly. Processing and housing large numbers of arrestees is expensive.[21] The criminal and civil trials that

---

[15] *See* I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 1049–50 (1984) (noting that mass arrests can be conducted in "full compliance with all Fourth Amendment requirements").

[16] *See* Hughes v. Rizzo, 282 F. Supp. 881, 885 (E.D. Penn. 1968) (stating that "mass arrests without legal justification, and similar harassment, are so clearly improper").

[17] *See* Morgan v. City of DeSoto, 900 F.2d 811, 814 (5th Cir. 1990) (considering the mass arrest of high school students). In *Morgan*, Judge Reavley stated:

> This court is unable to . . . find any justification for the extent of this operation. . . . [W]e can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the liability, how can any party deny that the criminal justice system operated here as an instrument of oppression?

Id.

[18] *See* United States v. Schnitzer, 567 F.2d 536, 539–40 (2d Cir. 1977) (explaining that expunction of an arrest record is a form of equitable relief granted only in "extreme circumstances," such as when the procedures accompanying a mass arrest render judicial determination of probable cause impossible); *Hughes*, 282 F. Supp. at 885 (ordering expunctions for "hippies" and other protesters who were arrested *en masse*); *Urban*, 401 F. Supp. at 713 (ordering arrests of fifty-four bikers expunged).

[19] Sullivan v. Murphy, 478 F.2d 938, 967 (D.C. Cir. 1973).

[20] *See* Russell Covey, *Police Misconduct as a Cause of Wrongful Convictions*, 90 WASH. U. L. REV. 1133, 1175 (2013) ("[P]olice misconduct remains troubling even where the victim of that misconduct is engaged in unlawful behavior. Such misconduct undermines the effectiveness of constitutional rules established to protect the bodily integrity, privacy, and autonomy of citizens from incursion by the state.").

[21] Cassie L. Smith, *County Pays First Twin Peaks-Related Lawsuit Bill*, WACO TRIB. (Sept. 29, 2015), http://www.wacotrib.com/news/mclennan_county/county-pays-first-twin-peaks-related-

follow a mass arrest tax local resources.[22] Many mass arrest criminal cases are ultimately dismissed by prosecutors because they lack probable cause.[23] Moreover, high-volume arrests strain the criminal justice and judicial systems in ways that create the potential for additional constitutional torts and civil rights violations.[24]

Settlements, litigation costs, and attorneys' fees are easily the highest mass arrest expenditures. In 2008, for example, an assistant city attorney for Houston boasted that the city's purse strings were protected by paying § 1983 plaintiffs just under one million dollars following a mass arrest of 278 people.[25] But, that amount did not include other litigation-related costs.[26] In 2014, New York City paid arrestees claiming Fourth Amendment violations and their attorneys a combined eighteen million dollars, which could bal-

---

lawsuit-bill/article_462f5c3f-25c5-556a-9400-efd88c606730.html [http://perma.cc/7NHG-4M4A] (reporting that county applied for approximately $250,000 in state funds, in part to pay for costs associated with housing inmates).

[22] *Id.* (reporting that before the first criminal trial had ended, the county spent $1,000,000 on extra courthouse security, government employee overtime, and other costs associated with the Waco biker mass arrests and their litigation).

[23] *See, e.g.*, Mitchell v. City of New York, 841 F.3d 72, 76 (2d Cir. 2016) (stating that the prosecutor declined to prosecute thirty trespassing cases following a mass arrest); Bernini v. City of St. Paul, 665 F.3d 997, 1002 (8th Cir. 2012) (reporting that charges against one hundred and sixty protesters arrested *en masse* were all dismissed); *Sullivan*, 478 F.2d at 956 (noting that anti-war demonstrators argued that the "unusually high number of dismissals" proved their arrests were "without foundation"); Harvey Rice, *Judge Rips Kmart Raid's Mass Arrests*, HOUS. CHRON. (July 29, 2005) https://www.chron.com/news/houston-texas/article/Judge-rips-Kmart-raid-s-mass-arrests-1925397.php [http://perma.cc/6NML-Y7GU] (explaining that all 278 individuals arrested had their charges dismissed); Tommy Witherspoon, *DA Dismisses 15 More Biker Cases in Twin Peaks Shootout*, WACO TRIB. (May 3, 2018) https://www.wacotrib.com/news/courts_and_trials/da-dismisses-more-biker-cases-in-twin-peaks-shootout/article_bf47ff08-dec4-56f1-aa82-7926d5cd9d0e.html [http://perma.cc/BR3L-8JSM] (reporting that, following dismissals, the lead prosecutor expects only twenty-five to thirty cases to remain of the more than one hundred and fifty initial charges in the Waco Biker shootout cases).

[24] *See* Lloyd N. Cutler, *Civil Strife and the Law: An Overview*, *Proceedings of the Thirty-First Annual Judicial Conference Third Judicial Circuit of the United States*, 47 F.R.D. 383, 496–97 (1968) (commenting on problems that arise within law enforcement during periods of civil disorder). Cutler stated, describing arrests occurring in the Third Circuit:

> The normal system of arrests, confinement, preparation of charges, assignment of counsel and appearance before a judge was simply not geared to cope with these large numbers. . . . [W]e have reason to believe that a significant number were confined for more than two days before their initial court appearance.

Id.

[25] Carolyn Feibel, *Houston Close to Settling Kmart Lawsuits from '02 Raid*, HOUS. CHRON. (June 17, 2008), https://www.chron.com/news/houston-texas/article/Houston-close-to-settling-Kmart-lawsuits-from-02-1771312.php [http://perma.cc/3LNK-WBTB].

[26] *Id.*

loon to thirty-five million before litigation ends.[27] And in 2017, McClennan County, Texas, where the Waco bikers were arrested, spent one million dollars for added courthouse security, overtime fees, and other costs before the first of 154 criminal trials had ended.[28] The related civil trials have yet to begin.

The upside of mass arrest civil litigation is that police departments and governments receive an opportunity to learn from their mistakes and create constitutionally sound law enforcement practices. But, this after-the-fact realization comes at great financial cost.[29] Furthermore, the Supreme Court has acknowledged that § 1983 lawsuits carry substantial social costs due to the fear they induce among law enforcement officials and municipalities that arrest decisions will be second guessed through harassing lawsuits.[30]

Despite their problematic nature, mass arrests continue to occur. Federal courts have been tasked with addressing Fourth Amendment civil rights violations that stem from these cases. Due to their unique facts, arguments, and circumstances, the courts have taken different approaches to resolving these cases. The Supreme Court addressed group searches and arrests in a series of cases often cited by lower federal courts in mass arrest cases.[31] The First, Second, Eleventh, and District of Columbia Circuits, along with two district federal courts, have sided with § 1983 plaintiffs by interpreting the law on probable cause for mass arrests in a way that honors the historical underpinnings of the Fourth Amendment and these Supreme Court cases.[32] The District of Columbia and the Eighth Circuits have addressed particularized probable cause in the context of riot cases where the mob acted cohesively as a unit.[33] Finally, the Tenth Circuit has taken a sharp turn from all

---

[27] Erin Durkin, *City Pays $18 Million to Settle Lawsuits Stemming from 2004 Republican National Convention at Madison Square Garden* (Jan. 15, 2014), http://www.nydailynews.com/new-york/city-pays-18m-settle-rnc-lawsuits-article-1.1581416 [http://perma.cc/Q4GW-9STC]; Jim Dwyer, *Mass Arrests During '04 Convention Leave Big Bill and Lingering Mystery*, N.Y. TIMES, Jan. 7, 2014, at A17.

[28] Smith, *supra* note 21.

[29] *See* Cindy George, *Settlement Reached in '02 Houston Street Racing Raid*, HOUS. CHRON. (Apr. 13, 2008), https://www.chron.com/news/houston-texas/article/Settlement-reached-in-02-Houston-street-racing-1588940.php [http://perma.cc/9SCL-76UD] (detailing settlements reached with more than one hundred plaintiffs following a mass arrest near a street racing venue, and reporting that "[l]awyers on both sides conceded that the years of legal wrangling have changed" the Houston Police Department for the better).

[30] Anderson v. Creighton, 483 U.S. 635, 638 (1987); *see* Briggs v. Malley, 748 F.2d 715, 719 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986) (expressing concern over "the potential 'chill' upon law enforcement activities which the possibility of personal liability might create").

[31] *See infra* notes 111–155 and accompanying text.

[32] *See infra* notes 196–254 and accompanying text.

[33] *See infra* notes 261–291 and accompanying text.

of the above courts by declaring the law on mass arrests not clearly established.[34] This Article will carefully analyze each of these decisions.

This Article seeks to examine the historical significance of mass arrests, analyze their Fourth Amendment probable cause application, and provide clarity for federal courts confronted with resolving probable cause issues in mass arrest cases. Part I describes the history of unlawful mass arrests in the United States.[35] Part II details the probable cause requirement as it applies to both criminal and civil cases.[36] Part III examines the approaches that federal courts have used to evaluate probable cause in mass arrests.[37] Finally, Part IV suggests how governments could reduce the occurrence of mass arrests and their accompanying Fourth Amendment civil rights implications.[38]

I. THE HISTORICAL SIGNIFICANCE OF MASS ARRESTS

To understand the prevalence of mass arrests, it is important to first examine their history. Mass arrests arrived in the colonies with British rule.[39] During the American Revolution, British soldiers used general warrants to arrest colonists by the dozens.[40] It was due in part to these mass arrests, along with general searches of homes and personal effects, that the Framers drafted the Fourth Amendment of the Constitution.[41] The language and concepts included within the Fourth Amendment—a prohibition against unreasonable seizures, the necessities of personal security, warrants that required probable cause supported by oaths and assurances, and specific descriptions of the arrestee—would have protected against the mass arrests colonists witnessed.[42]

Yet, the Fourth Amendment's ratification did not put an end to mass arrests. They were used to arrest hundreds of women and men in the anti-venereal raids of the 1910s,[43] to rid the country of suspected communists and radicals during the earlier half of the 1900s,[44] to arrest, discriminate against,

---

[34] Callahan v. Unified Gov't of Wyandotte Cty., 806 F.3d 1022, 1028 (10th Cir. 2015).

[35] *See infra* notes 39–61 and accompanying text.

[36] *See infra* notes 62–155 and accompanying text.

[37] *See infra* notes 156–318 and accompanying text.

[38] *See infra* notes 319–365 and accompanying text.

[39] *See* Tracey Maclin & Julia Mirabella, *Framing the Fourth*, 109 MICH. L. REV. 1049, 1052–53 (2011) (detailing the frequency of mass arrests in the British colonies).

[40] *Id.* at 1055.

[41] *See id.* at 1053–55 (discussing colonists' legal reaction to general warrants).

[42] *See* U.S. CONST. amend IV (protecting against unreasonable searches and seizures).

[43] Scott Wasserman Stern, *The Long American Plan: The U.S. Government's Campaign Against Venereal Disease and Its Carriers*, 38 HARV. J. L. & GENDER 373, 390–91 (2015).

[44] *See* Justin Hansford, *Jailing a Rainbow: The Marcus Garvey Case*, 1 GEO. J. L. & MOD. CRITICAL RACE PERSP. 325, 344–45 (2009) (explaining the FBI-approved Palmer raids in 1920 in which 10,000 immigrants who were considered "leftists" and communists were arrested and deported); Robert P. Wasson, Jr., *Resolving Separation of Powers and Federalism Problems Raised*

and harass African-Americans as "vagrants" during the Jim Crow Era,[45] and to forcefully end labor strikes.[46] These arrests, exercised for discriminatory or authority-wielding purposes, violated the constitutional rights of those arrested.[47] Even when mass arrests were executed with legitimate justice concerns, criminal procedural rights were often ignored or suspended, perhaps because they were too hard to comply with during large-scale arrests. [48]

In the latter half of the twentieth century, experts, policy makers, and governments attempted to eliminate mass arrests by creating plans to carry out arrests while safeguarding constitutional rights. In the New Deal era, for example, criminal justice professionals "understood that policies of mass arrest and detention on less than probable cause . . . were simply not sensible ways of using scarce law enforcement resources."[49] Violent mass arrests of civil rights protesters were part of the impetus for sweeping civil rights

---

by Erie*, the Rules of Decision Act, and the Rules Enabling Act: A Proposed Solution*, 32 CAP. U. L. REV. 519, 539 n.66 (2004) ("Nationwide raids involving mass arrests without benefit of habeas corpus, hasty prosecutions, and mass deportations, conducted under the authority of Attorney General A. Mitchell Palmer from 1919–21 in the wake of the Russian Revolution were intended to rid the country of Communists, Syndicalists, and others deemed radical.").

[45] *See* Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 B.C. THIRD WORLD L.J. 81, 91 (2004) (detailing the mass arrest of African-Americans in Tulsa under Jim Crow laws); Karla Mari McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. J. RACIAL & ETHNIC JUST. 163, 194–95 (2010) (describing the discriminate use of vagrancy laws against African-Americans under Jim Crow laws).

[46] *See* Sean A. Andrade, *Biting the Hand That Feeds You: How Federal Law Has Permitted Employers to Violate the Basic Rights of Farmworkers and How This Has Begun to Impact Other Industries*, 4 U. PA. J. LAB. & EMP. L. 601, 608 n.32 (2002) (explaining that law enforcement staged mass arrests to limit the effectiveness of agricultural strikes); Anjali S. Dalal, *Shadow Administrative Constitutionalism and the Creation of Surveillance Culture*, 2014 MICH. ST. L. REV. 61, 70 n.42 (deeming the mass arrest under the Palmer raids a scandal); Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOY. U. CHI. L.J. 969, 1013 n.173 (2016) (noting that mass arrests were made during the Pullman strikes).

[47] *See* Harvey Rishikof & Patrick Bratton, *11/9–9/11: The Brave New World Order: Peace Through Law—Beyond Power Politics or Peace Through Empire—Rationale Strategy and Reasonable Policy*, 50 VILL. L. REV. 655, 663 n.35 (2005) (noting that the Palmer raids were based on "random and indiscriminate information"); Stern, *supra* note 43, at 390–91 (discussing the mass arrests of "suspicious" women during the anti-venereal panic); Wasson, *supra* note 44, at 540 n.66 (stating that the Palmer raids violated habeas corpus).

[48] *See* Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1448, 1450 n.15 (1965) (detailing the efforts of the Department of Justice to eliminate the Ku Klux Klan in 1871 using mass arrests and mass prosecutions, whilst suspending the habeas corpus proceedings); Ryan White, *Two Sides of Polygamy*, 2009 UTAH L. REV. 495, 497–98 (explaining that the mass arrests of polygamists in the 1930s, 1940s, and 1950s became a public relations nightmare for the government in part due to violations of the polygamists' due process rights).

[49] Louis Michael Seidman, *Akhil Amar and the (Premature?) Demise of Criminal Procedure Liberalism*, 107 YALE L.J. 2281, 2316 (1998) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)).

legislation in the 1960s that began under President John F. Kennedy and was later enacted by President Lyndon B. Johnson.[50]

In the 1960s, after Dr. Martin Luther King's assassination and the riots that followed, Lloyd Cutler, prominent lawyer, presidential legal adviser, and White House Chief of Counsel, suggested that there was a critical need to maintain the normal criminal and judicial processes following riots, civil disobedience, and emergencies that produced mass arrests.[51] He described a Washington D.C. judge who strove to give every one of the two thousand civil rights protestors arrested in that city appointed counsel and appropriate bail, and provide other procedural safeguards in spite of the enormous toll these measures took on the justice system.[52] This judge stated:

> A mass arrest situation like no other we are likely to be confronted with, is a test of our commitment to the rule of law. Every effort must be made to accord to the citizens involved in these situations their full and complete rights, just as at any other time. The courts, rather than participate in the symbolic burning of individual rights, should be islands of calm in the midst of the hysteria. . . . Whenever American institutions have provided a hysterical response to an emergency situation, we have come later to regret it.[53]

After the Civil Rights Movement, a number of police departments adopted manuals and policies that addressed how to legally conduct mass arrests during large-scale protests, demonstrations, and acts of civil disobedience, if such measures became necessary.[54] But when the Vietnam War

---

[50] John G. Stewart, *When Democracy Worked: Reflections on the Passage of the Civil Rights Act of 1964*, 59 N.Y.L. SCH. L. REV. 145, 149 (2015). Stewart stated:

> Television coverage of police dogs and fire hoses dispersing young protestors, many of elementary-school age, coupled with mass arrests of youthful demonstrators that filled the city jail, finally provided the impetus Kennedy needed to follow the path that Humphrey and others had been urging. Kennedy spoke to the nation on June 11, 1963 and announced he would send to Congress the most comprehensive and enforceable civil rights bill in America's history.

Id.

[51] Cutler, *supra* note 24, at 498–99.

[52] *Id.* at 499.

[53] *Id.* at 498–99 (quoting Judge Harold Greene).

[54] *See* Wash. Mobilization Comm. v. Jefferson, 617 F.2d 848, 849 (D.C. Cir. 1980) (noting that the police department adopted new procedures following unlawful incidents of mass arrest); Sullivan v. Murphy, 478 F.2d 938, 946 (D.C. Cir. 1973) (stating that new procedures accompanying mass arrests were adopted following the riots of 1968). Judge Leventhal in *Sullivan* explained:

> During the widespread rioting and looting that followed the 1968 assassination of Dr. Martin Luther King, it became obvious that the customary arrest, booking, and arraignment procedures were too cumbersome to be used in periods of massive civil

broke out and war protestors marched on the streets, officers yet again resorted to mass arrests to control the chaos.[55] The District of Columbia Circuit Court of Appeals described one day of arrests following the May Day demonstrations:

> Some 7,926 arrests took place on Monday, May 3, 1971. These resulted in disorderly conduct charges lodged against 7,599 persons. The resulting strains on the criminal justice system were unparalleled. Police resources were stretched to the limit; detention facilities were filled to overflowing; the prosecutor's office was inundated with complaints; and the Superior Court's calendar was choked for months.[56]

During the May Day demonstrations, Washington D.C. officers arrested a total of 14,517 people for a variety of misdemeanor offenses related to their anti-Vietnam War protests.[57] One concern courts and legal observers had about these arrests were the number of innocent passersby swept up in the process.[58] In the following decades, numerous protests—over politics, war, international summits, and economic inequality—would be followed with large-scale arrests.[59]

> disorder. . . . In response to the recommendations of various committees appointed in the aftermath of the 1968 riots, new procedures were adopted by the Superior Court and by the Police Department to expedite the processing of persons arrested during large scale disorders.

478 F.2d at 946 (footnotes omitted).

[55] *See Sullivan*, 478 F.2d at 942 (stating that thousands of individuals were arrested in connection with protests against the Vietnam War).

[56] *Id.* at 948.

[57] *Id.* at 942–43.

[58] *Id*. at 949–50 (articulating the Circuit Court and legal observers' concern that that innocent persons were arrested). Even the Assistant Police Chief indicated uncertainty as to the legality of police action, telling the local newspaper that law enforcement "had to do something," the "rightness" of which could be judged by others later. *Id.* at 949.

[59] *See Vodak*, 639 F.3d at 740 (stating that nearly nine hundred arrestees sued on the basis of unlawful arrest following protests against the Iraq war); Papineau v. Parmley, 465 F.3d 46, 52–53 (2d Cir. 2006) (reviewing the mass arrests of Native American protesters of taxation in New York); Barham v. Ramsey, 434 F.3d 565, 569 (D.C. Cir. 2006) (detailing the arrest of hundreds of protesters in Washington D.C. opposing the 2002 annual World Bank and International Monetary Fund meetings); Tracy v. Neuberger, 840 F. Supp. 2d 1183, 1184–86 (D. Minn. 2012) (considering the circumstances of a group arrest outside the 2008 Republican National Convention); *80 Arrested, supra* note 12 (reporting on eighty arrests made in New York following the Occupy Wall Street economic inequality protests); Cavna, *supra* note 12 (stating that three hundred to four hundred individuals were arrested after the Occupy Oakland economic inequality protests); Durkin, *supra* note 27 (reporting that New York City settled mass arrest lawsuits after the Republican National Convention protests).

In 2007, after Hurricane Katrina devastated New Orleans, the American Bar Association (ABA) was tasked with examining mass arrests and the way the criminal justice system responds to them.[60] One ABA delegate, Kim Askew, suggested that constitutional rights be respected following catastrophes, and that "mass arrests and mass prosecutions are unacceptable."[61] It is because of this nation's history with unlawful mass arrests that its governments and law enforcement agencies must find ways to diminish their occurrence and the constitutional rights violations associated with them.

II. PROBABLE CAUSE FOR MASS ARRESTS

Mass arrests continue to plague criminal and civil courts today. In reviewing these cases, courts begin their analysis by examining the probable cause for the arrest. The reasonableness of the probable cause plays a role in both civil and criminal mass arrest cases, but the legal analysis varies. The criminal probable cause determination is the genesis for the determination of civil liability.[62] Therefore, this section will examine the Fourth Amendment's probable cause requirement in both the criminal and civil contexts.

A. What Is "Probable Cause" in the Criminal Context?

According to the Fourth Amendment, searches and seizures, including an arrest, which is a seizure of a person, must be reasonable.[63] Probable cause makes the arrest reasonable.[64] The origins of the probable cause requirement can be traced to the English grand jury, long before the Bill of Rights was written.[65] At that time, it was (and still is) the quantum of evidence required to support a grand jury indictment.[66] Over the years, making the probable cause determination shifted from the exclusive domain of the grand jury to the shared purview of the government actor making the arrest.[67] This shift took place as probable cause changed from one concept to another.

---

[60] *See* Kim J. Askew, *Crisis Does Not Suspend the Constitution*, LITIG. MAG., Spring 2007, at 1–2 (setting out a guide for the justice system during times of disaster in the opening statements of the Chair of the ABA's Litigation Section).

[61] *Id.*

[62] Lifshitz, *supra* note 6, at 1176 (explaining that some "courts bifurcate the application of qualified immunity to probable cause determinations by addressing two levels of objective-reasonableness analysis—one for Fourth Amendment purposes and one for qualified immunity purposes").

[63] U.S. CONST. amend. IV.

[64] *See id.* (requiring probable cause for searches and seizures).

[65] ANDREW E. TASLITZ, ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE 186 (3rd ed. 2007).

[66] *Id.*

[67] *Id.*

Scholars suggest that "probable cause" in criminal procedure was predated by a list of grounds for criminal suspicion,[68] which included lifestyle factors, reputation, and activities that might suggest a suspect was a criminal in general.[69] Over time, the list of justifications for probable cause gave way to the probability that a specific crime had been committed by a specific person.[70] "Gradually probable cause float[ed] free of subjective suspicion and mov[ed] toward objective guilt."[71] In this way, probable cause was likened to evidence supporting an objective assessment of the prospect of criminal conviction versus what it had been before: the officer's subjective reason to arrest the suspect.[72]

In 1878, the Supreme Court stated that probable cause was an objective belief that, considering the facts and circumstances, led a prudent and cautious person to believe a crime had been committed.[73] Though probable cause remains an objective standard to this day,[74] the Supreme Court has repeatedly emphasized its foundation is probability, not certainty.[75] The Circuit Courts of Appeal have suggested probable cause is satisfied with a more-probable-than-not test.[76] The Supreme Court in *Brinegar v. United States* held in 1949 that probable cause requires less evidence than what is required to justify a criminal conviction, but requires more than mere suspicion.[77]

---

[68] BARBARA J. SHAPIRO, "BEYOND REASONABLE DOUBT AND PROBABLE CAUSE": HISTORICAL PERSPECTIVES ON THE ANGLO-AMERICAN LAW OF EVIDENCE 141–42 (1991).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* (citing Stacey v. Emery, 97 U.S. 642, 645 (1878)).

[74] *See* Carroll v. United States, 267 U.S. 132, 162 (1925) (describing an objective standard determined by "the facts and circumstances within [officers'] knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief" that a crime was committed).

[75] *See* District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (explaining probable cause as a flexible concept that requires only a probability of criminal activity); Illinois v. Gates, 462 U.S. 213, 231–32 (1983) (stating the same).

[76] *See, e.g.*, Wilkes v. Young, 28 F.3d 1362, 1370 (4th Cir. 1994) (suggesting the quantum of evidence required to support probable cause is a "more probable than not" showing); United States v. Raborn, 872 F.2d 589, 593–94 (5th Cir. 1989) (noting that decisions from the Fifth Circuit require either a preponderance of evidence or "something less" to satisfy the probable cause requirement); United States v. Cruz, 834 F.2d 47, 50 (2d Cir. 1987) (articulating a "more probable than not" test for establishing probable cause).

[77] Brinegar v. United States, 338 U.S. 160, 175 (1949); *see* Gerstein v. Pugh, 420 U.S. 103, 121 (1975) (explaining that the probable cause determination "does not require the fine resolution of conflicting evidence that a reasonable-doubt or even a preponderance standard demands, and credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief in guilt").

The more-probable-than-not standard allows officers more freedom to make arrests without fearing repercussions for error. This standard is more reasonable. After all, if jurors are not required to be convinced of guilt beyond all doubt at the end stages of the criminal trial, officers should not be held to a guilt certainty standard at the early stages of the criminal law process.[78] The Supreme Court in *Brinegar* stated:

> Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of *reasonable* men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.[79]

Probable cause is judged objectively by courts[80] using a totality of the circumstances analysis.[81] In 1964, the Supreme Court proclaimed in *Beck v. Ohio* that the constitutionality of an arrest depends upon the following:

> [W]hether at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.[82]

---

[78] *See Brinegar*, 338 U.S. at 176 (reasoning that the more-probable-than-not standard gives law enforcement officers "fair leeway" to keep communities safe). Reflecting on the probable cause requirement in *Briggs v. Malley*, Judge Bownes stated:

> [Probable cause] is a standard whose basic contours a police officer can reasonably be expected to know. We recognize, however, that police officers cannot be held to the standards of lawyers or judges. It cannot be considered negligence, therefore, for a police officer to seek an arrest or search warrant in a merely questionable situation.

748 F.2d 715, 719 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

[79] *Brinegar*, 338 U.S. at 176 (emphasis added).

[80] *See id*. at 176 (stating that probable cause must be based on "facts leading sensibly to their conclusions of probability").

[81] *See Gates*, 462 U.S. at 230.

[82] Beck v. Ohio, 379 U.S. 89, 91 (1964).

In sum, where the Fourth Amendment is concerned, the ends never justify the means.[83] Whether an arrest is reasonable hinges on whether the officer had probable cause at the time the arrest was made.[84]

B. What Is Probable Cause in the § 1983 Context?

Reasonableness also plays a role in the civil rights analysis, particularly in the context of unlawful arrest claims. But, the probable cause analysis in a § 1983 case is a little more complicated; not all courts agree on which analysis to use. To understand the different approaches, it is important to first examine § 1983 in general.

Section 1983 specifies that any governmental authority acting under color of law who violates another's statutory or constitutional rights is liable to the injured party.[85] An arrest lacking probable cause can be considered a violation of the person's Fourth Amendment rights. Consider what the First Circuit Court of Appeals said when it explained the basis for § 1983 civil liability:

> [U]nder our system of government the police have a duty to fight crime without violating constitutional rights. This is difficult at times, but it is what the constitution requires. If we cannot demand of our police officers that they recognize when they do not have the authority to make a search or effect an arrest, then we have given up the very idea of a rule of law. The exercise of police power *within* the law is the very foundation of the social contract. We should expect police officers to have a basic understanding of the limits of their power and we must hold them liable when, negligently or intentionally, they overstep these bounds.[86]

There are at least five ways to establish government liability under § 1983 for civil rights violations.[87] A plaintiff may allege (1) an unlawful governmental policy or decision; (2) an unlawful custom or practice; (3) an inadequate training or supervision program; (4) an illegal decision made by

---

[83] *See id.* at 96 ("An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.").

[84] JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 151 (5th ed. 2012).

[85] 42 U.S.C. § 1983 (2018).

[86] *Briggs*, 748 F.2d at 719–20 (footnote omitted).

[87] Ratliff v. City of Houston, No. CIV.A.H-02-3809, 2005 WL 1745468, at *3 (S.D. Tex. July 25, 2005).

a final policymaking authority; or (5) the government's endorsement or approval of unlawful acts.[88] Some of these claims are harder to prove than others and they vary depending on who is being sued. In general, however, plaintiffs must prove two things: (1) the violation of a clearly established statutory law or constitutional right; and (2) a reasonable person would have been aware of such a law or right when the violation occurred.[89]

Although both the criminal probable cause and the civil probable cause analyses are grounded in reasonableness, the analysis is different for each. Courts and critics suggest that unlike the *actual* probable cause standard that officers, lawyers, and judges use in criminal cases—whether there was probable cause to support the arrest—the civil probable cause standard is weaker.[90]

There are at least two significant differences between the civil standard and the actual probable cause standard used in criminal cases. First, in civil cases, probable cause is judged using an objective reasonableness standard.[91] Courts examine the facts and circumstances known to officers at the time of the arrest, along with the criminal charge's elements. They then objectively assess whether the officers had probable cause to arrest. This more lenient standard allows officers some room for error.[92] Second, though the Supreme Court has never adopted or sanctioned this analysis,[93] the majority

---

[88] *Id.*

[89] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[90] *See* Oliveira v. Mayer, 23 F.3d 642, 649 n.2 (2d Cir. 1994) (explaining the difference between the Fourth Amendment's and civil litigation's reasonableness standards is that the latter rests on the reasonable man standard, which is less strict); Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1348 n.15 (7th Cir. 1985) (stating the same); Lifshitz, *supra* note 6, at 1163 (criticizing courts for "adopting a reduced threshold for law enforcement officers seeking immunity"); Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving § 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 145 (2007) (commenting that only "arguable probable cause" is necessary to grant qualified immunity to § 1983 defendants).

[91] *Harlow*, 457 U.S. at 819 ("By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts.").

[92] Hunter v. Bryant, 502 U.S. 224, 229 (1991).

[93] Walczyk v. Rio, 496 F.3d 139, 168 (2d Cir. 2007) (Sotomayor, J., concurring). In *Walczyk*, Justice Sotomayor, then sitting on the Second Circuit Court of Appeals, observed:

> It is not surprising, then, that "arguable probable cause" finds no mention in any Supreme Court opinion; the need for a separate term to describe this concept arises only once we have improperly splintered the "clearly established" inquiry. Because I believe "arguable probable cause" is both imprecise and an outgrowth of the first flaw in our qualified immunity analysis, I do not agree with the majority's use of the term.

Id.

of Circuit Courts have used an "arguable probable cause" test.[94] The First Circuit created this standard in 1985 in *Floyd v. Farrell,* and since then, a number of courts have adopted it.[95] In *Floyd*, the First Circuit stated:

> We . . . have held that seeking an arrest warrant is "objectively reasonable" so long as the presence of probable cause is at least arguable. An officer will be held liable for seeking an arrest warrant later found to be without probable cause only if there *clearly* was no probable cause at the time the warrant was requested. We think this rule can be extended to warrantless arrests as well . . . . Despite a finding of no probable cause at a later hearing, a police officer should not be found liable under § 1983 . . . because the presence of probable cause was merely questionable at the time of the arrest. His qualified immunity is pierced only if there clearly was no probable cause at the time the arrest was made.[96]

The Eleventh Circuit stated it more succinctly: "[a]rguable probable cause exists if, under all of the facts and circumstances, an officer reasonably could—not necessarily would—have believed that probable cause was present."[97]

Unlike the objective reasonableness standard, which has been adopted by all federal courts, the arguable probable cause standard has been harshly criticized.[98] Judge Bumb, a federal district judge in New Jersey, once com-

---

[94] *See* Davidson v. City of Stafford, 848 F.3d 384, 392 (5th Cir. 2017) (finding that the officers lacked "arguable probable cause" to arrest the defendant); Ismail v. Cty. of Orange, 676 F. App'x 690, 692 (9th Cir. 2017) (stating that "arguable probable cause to support an arrest is all that is necessary for liability under § 1983"); Huff v. Reichert, 744 F.3d 999, 1007 (7th Cir. 2014) (explaining that an officer need only have arguable probable cause to earn protection under qualified immunity); Skop v. City of Atlanta, 485 F.3d 1130, 1137 (11th Cir. 2007) (identifying "arguable probable cause" as the applicable standard in § 1983 cases); Cortez v. McCauley, 478 F.3d 1108, 1120 & n.15 (10th Cir. 2007) (en banc) (referring to "arguable probable cause" as the standard used to earn qualified immunity); Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004) (stating that the defendant was entitled to qualified immunity if he could prove that "arguable probable cause" existed at the time of arrest); Cox v. Hainey, 391 F.3d 25, 33 (1st Cir. 2004) (holding the defendant to the requirement of showing "arguable probable cause"); Smithson v. Aldrich, 235 F.3d 1058, 1062 (8th Cir. 2000) (describing "arguable probable cause" as the standard for qualified immunity purposes).

[95] *See* Floyd v. Farrell, 765 F.2d 1, 5 (1st Cir. 1985) (articulating the arguable probable cause standard).

[96] *Id.* (citations omitted).

[97] Crosby v. Monroe Cty., 394 F.3d 1328, 1332 (11th Cir. 2004).

[98] *See* Lifshitz, *supra* note 6, at 1159 (arguing the standard is unnecessary); Ravenell, *supra* note 90, at 146 (noting that the Supreme Court has never adopted this standard); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199, 1222 ("Given the fact that probable cause can be established on facts that show only a 'fair probability' of criminal conduct (a 'practical, nontechnical conception'), to permit 'arguable'

mented that the standard "is a confusing construct, because it suggests that qualified immunity is available whenever fair-minded officers may disagree on the presence of probable cause. . . . 'Qualified immunity does not turn upon what an average officer thinks may be reasonable.'"[99] Justice Sonia Sotomayor, while sitting on the Second Circuit Court of Appeals, wrote that the standard has never been adopted by the Supreme Court and should no longer be espoused because it is a mischaracterization of the law.[100] The standard has also been roundly criticized by scholars as illogical and one that unnecessarily broadens an already generous probabilities-based standard.[101] One critic suggested the standard permits officers immunity "because they acted 'reasonably unreasonable.'"[102] The Third, Fourth, and Sixth Circuit Courts of Appeals have not adopted or have outright rejected the "arguable probable cause" standard, relying instead on mere objective reasonableness.[103] Regardless of whether federal courts rely on objective reasonableness or arguable probable cause, the analysis in civil cases is more lenient than the actual probable cause standard used in the criminal context.

C. What Is Probable Cause in the Mass Arrest Context?

Although the Supreme Court asserts that probable cause is "not a high bar,"[104] developing probable cause to arrest a group is often more challenging than the probable cause assessment in a single-arrest case. As an example, consider the Waco cases involving 177 bikers who were arrested *en masse* and charged with engaging in organized crime with intent to assault

---

probable cause to justify a search is to degrade the Fourth Amendment's protections to a very low level.").

[99] Peterson v. Bernardi, 719 F. Supp. 2d 419, 429 n.9 (D. N.J. 2010) (quoting Rab v. Borough of Laurel Springs, No. 08-2413, 2009 WL 5174641, at *5 n.4 (D. N.J. Dec. 18, 2009)).

[100] *Walczyk*, 496 F.3d at 165.

[101] *See, e.g.*, Lifshitz, *supra* note 6, at 1184 (describing "arguable probable cause" as an overly forgiving standard that should "never result in an award of immunity to defendant officers").

[102] *Id.* at 1160.

[103] *See* Blaylock v. City of Philadelphia, 504 F.3d 405, 412–14 (3d Cir. 2007) (conducting an objective reasonableness probable cause analysis); Greene v. Barber, 310 F.3d 889, 898 n.2 (6th Cir. 2002) (noting the existence of the arguable probable cause standard only in dicta); Torchinsky v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991) (setting out the "objective reasonableness" test used in § 1983 actions). A search has not turned up any Fourth Circuit cases that refer to the phrase "arguable probable cause."

[104] Kaley v. United States, 571 U.S. 320, 338 (2014) ("This Court has repeatedly declined to require the use of adversarial procedures to make probable cause determinations. Probable cause, we have often told litigants, is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people,] not legal technicians, act.") (internal quotations omitted).

or murder another.[105] According to scene and booking photos, most of the arrestees were men who shared physical characteristics: shaved heads and bushy facial hair.[106] Most of the bikers wore the same attire.[107] They moved rapidly once shots were fired, making it difficult for undercover officers to identify who was participating in criminal acts of violence and who was trying to escape from the threat of violence.[108] Under these facts, the Supreme Court's blanket statement that probable cause is not hard to establish seems a bit superficial.[109] Without a careful probable cause assessment, mass arrests can easily "transform the probable cause test into a meaningless measure of suspicion" in which everyone present is swept up by law enforcement.[110]

The Supreme Court has laid the framework for assessing probable cause in mass arrest cases beginning with individualized or particularized probable cause. The following cases will illustrate this framework.

One of the first cases to examine multiple-suspect arrests was *United States v. Di Re*, decided by the Supreme Court in 1948.[111] In that case, law enforcement officials approached a man who was selling counterfeit coupons from his car.[112] Officers arrested all three men in the car: Buttitta, Reed, and Di Re.[113] The first two were implicated in the fraud, but officers had no probable cause to arrest Di Re. The Court held it was impermissible for the officers to presume Di Re's guilt from his presence with the others or to infer that all parties were guilty when the officers only had evidence against two of the men.[114] The Court stated:

---

[105] John Carroll, *DA to Seek to Dismiss Charges Against More Than 20 Twin Peaks Bikers*, KWTX NEWS (Feb. 7, 2018), http://www.kwtx.com/content/news/DA-to-seek-to-dismiss-charges-against-more-than-20-Twin-Peaks-bikers-473216573.html [http://perma.cc/YQ37-URDF] ("Police arrested the 177 bikers after the melee, all of whom were charged with engaging in organized crime and all of whom were initially ordered held in lieu of $1 million bonds.").

[106] *See Waco Biker Shoot Out*, CBS NEWS (May 17, 2015), https://www.cbsnews.com/pictures/biker-gang-shootout-in-waco/ [http://perma.cc/2TV2-L86T] (providing booking photos for comparison).

[107] *Id.*

[108] *Dramatic Video of Deadly Texas Biker Gang Shootout Leaked,* CBS THIS MORNING (Oct. 30, 2015), https://www.youtube.com/watch?v=FU5TQ80x0nY [perma.cc/2Y9E-Y44N].

[109] *See Kaley*, 571 U.S. at 338 (noting that the probable cause standard is not difficult to meet).

[110] Tracey Maclin, *The* Pringle *Case's New Notion of Probable Cause: An Assault on* Di Re *and the Fourth Amendment*, 2004 CATO SUP. CT. REV. 395, 435.

[111] 332 U.S. 581 (1948).

[112] *Id.* at 583.

[113] *Id.*

[114] *Id.* at 592–94.

> The argument that one who "accompanies a criminal to a crime rendezvous" cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is [in public] . . . and where the alleged substantive crime is one which does not necessarily involve any act visibly criminal. . . . Presumptions of guilt are not lightly to be indulged from mere meetings.[115]

The Court, in the above statement, emphasized that it is possible for criminal activity to be ongoing without the knowledge of everyone present.[116] As such, Di Re's conviction was reversed because the officers lacked probable cause to arrest him.[117] The *Di Re* Court explained that although officers may have probable cause to arrest a person, they do not necessarily have probable cause to arrest someone who is with that person at the time of arrest.[118] In this way, the Court held that the officers possessed individualized probable cause to arrest the two men with Di Re, but did not have individualized probable cause to arrest Di Re. As such, his arrest was unlawful.

The next noteworthy probable cause case involving multiple suspects, *Ybarra v. Illinois*, was decided by the Supreme Court more than 30 years later.[119] Though it addressed the lawfulness of a search, rather than an arrest, courts have applied *Ybarra*'s holding to group arrest cases.[120] In *Ybarra*, officers obtained a warrant to search a tavern and a bartender named Greg for heroin after Greg offered to sell heroin to an informant.[121] When officers arrived to execute the warrant, they discovered ten or more patrons inside. For safety reasons, officers patted down each patron with one officer returning to search Ybarra's suspicious cigarette carton.[122] He

---

[115] *Id.* at 593.

[116] WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2(e) (5th ed. 2012).

[117] *Di Re*, 332 U.S. at 595.

[118] LAFAVE, *supra* note 116, § 3.6(c) ("In light of *Di Re*, it seems clear beyond question that the mere fact of present association with a person whom the police have grounds to arrest for conduct on some past occasion does not constitute probable cause for the arrest of the associate as well.").

[119] Ybarra v. Illinois, 444 U.S. 91 (1979).

[120] *See* Callahan v. Unified Gov't of Wyandotte Cty., 806 F.3d 1022, 1028–29 (10th Cir. 2015) (noting that *Ybarra* requires that the probable cause be particularized to the individual who is arrested in a group arrest scenario); Barham v. Ramsey, 434 F.3d 565, 570–73 (D.C. Cir. 2006) (applying *Ybarra*); Wilson v. City of Boston, 421 F.3d 45, 49–56 (1st Cir. 2005) (applying *Ybarr*'s holding); Dinler v. City of New York, No. 04 CIV. 7921 RJS JCF, 2012 WL 4513352, at *1–6 (S.D.N.Y. Sept. 30, 2012) (applying *Ybarra*).

[121] *Ybarra*, 444 U.S. at 87–88.

[122] *Id.* at 88–89.

found heroin inside and arrested Ybarra for drug possession. At his trial, Ybarra moved to suppress the heroin, claiming the search was unlawful.[123]

The Supreme Court had little difficulty holding the search unlawful.[124] The agents knew nothing about Ybarra except that he was present in a public place when officers executed a search warrant.[125] The Court cautioned that a "person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause."[126] The *Ybarra* Court reiterated that when the standard is probable cause, it must be particularized. The fact that officers had a valid warrant to search Greg and the tavern did not give them authority to search the tavern's patrons.[127] Each patron possessed individual rights against unreasonable searches or seizures. [128] The Supreme Court recognized that the constitutional standard of probable cause requires a compromise between law enforcement's duty to protect the community and the people's right to be free from unlawful invasions of privacy.[129] The Court concluded that Ybarra's rights were violated when officers searched him before having particularized probable cause to do so.[130]

The most recent multiple-suspect Supreme Court case, *Maryland v. Pringle*,[131] decided in 2003, reiterated *Di Re's* and *Ybarra's* holdings. In *Pringle*, officers obtained consent to search a vehicle from the driver after detaining him for a traffic violation.[132] During the search, officers discovered $763 in the glove compartment and five baggies of cocaine hidden behind a backseat armrest. There were three men in the car: Partlow drove and owned the car, Pringle sat in the front passenger seat near the glove compartment box with the money in it, and Smith sat in the back seat near the hidden drugs.[133] Officers gave the men an ultimatum: admit who owned the drugs or all would be arrested.[134] The men remained silent and officers subsequently arrested all three for drug possession. At the police station, Pringle told police the drugs were solely his. At trial, he moved to suppress the

---

[123] *Id.* at 89.

[124] *See id.* at 90–91 (stating succinctly that authorities had "no reason to suppose" that they had probable cause to search Ybarra).

[125] *Id.* at 91.

[126] *Id.*

[127] *Id.* at 91–92.

[128] *Id.*

[129] *Id.* at 95 (citing *Brinegar*, 338 U.S. at 176).

[130] *Id.*

[131] 540 U.S. 366, 368–69 (2003).

[132] *Id.* at 368.

[133] *Id.*

[134] *Id.* at 368–69.

drugs arguing the officer lacked probable cause to arrest him, but the trial court denied his motion. He appealed.[135]

The Supreme Court held that the officers had probable cause to arrest.[136] After discussing probable cause generally, the Court engaged in a multiple-arrestee probable cause analysis.[137] The Court determined it was "an entirely reasonable inference . . . that any or all three of the occupants [possessed] the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly."[138]

In reaching this conclusion, the Court rejected Pringle's assertion that his arrest was a case of "guilt-by-association."[139] The *Pringle* Court contrasted the facts of the cases Pringle relied upon—*Ybarra* and *De Ri*, both of which led to insufficient probable cause findings—with the facts of the present case.[140] In doing so, the opinion delved into a fact-specific analysis, comparing the three cases. The Court distinguished *Ybarra's* search of patrons in a public tavern from the "relatively small car" where Pringle and the other two men were detained.[141] Moreover, the Justices believed that the large quantity of drugs and cash found inside the car inferred a common, criminal enterprise of drug dealing in which all men took part as opposed to Ybarra, the "unwitting tavern patron."[142]

The *Pringle* Court likewise distinguished *De Ri* because although officers in that case had information that only two arrestees were culpable, the officers arrested all three men in the car.[143] The *Pringle* Court stated that when officers can single out guilty parties, they must do so instead of making a group arrest. In *Pringle*, however, none of the men in the car admitted to possessing the drugs, which obfuscated the officers' process of singling out the guilty party. Following its brief comparison to *Di Re*, the Court promptly concluded that the officers had sufficient probable cause to make the arrest.[144]

Pringle draws criticisms from academics and criminal procedure experts for several reasons. First, the unanimous, Rehnquist-written opinion is terse,

---

[135] *Id.*
[136] *Id.* at 374.
[137] *Id.* at 372.
[138] *Id.*
[139] *Id.*
[140] *Id.* at 372–73.
[141] *Id.* at 373.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 372–74.

conclusory, and its holding is insufficiently explained.[145] It fails to give lower courts a framework for analysis or a replicable application. Second, although it is feasible that officers could have arrested all three men for possession, it is irrational, based on the totality of the circumstances, that officers could have possessed probable cause to arrest only Pringle and not the others. The car was not Pringle's, Pringle was not the driver, and though he was closest to the money in the glove compartment, the drugs were next to the back-seat passenger.[146] Professor Wayne LaFave suggests that the Court's conclusion may have been "a mere slip of the pen" as there was no logic to support it.[147]

Third, the opinion waivers between supporting and contradicting *Di Re* and *Ybarra*.[148] On the one hand, it acknowledges that probable cause must be particularized and cites to *Ybarra* as support for this basic premise.[149] On the other hand, the opinion offers an "all or any" arrest option when officers are confronted with multiple suspects who act jointly to commit a crime and refuse to cooperate with the police investigation.[150] The Supreme Court has never suggested this option in any other case before or since *Pringle*.

LaFave concluded, therefore, that the Court seemed to operate from an impermissible probable cause assumption that "upon proof of a known felony by one of the three, arrest of all three [was] permissible."[151] If true, this would be in direct contradiction to *Di Re's* holding. Another scholar, Tracey Maclin, suggested that the *Pringle* Court merely provided "lip service" to particularized probable cause.[152] In the end, what is clear is that *Pringle* is a one-off opinion that does not aspire to do more than analyze the unique

---

[145] *See* LAFAVE, *supra* note 116, §§ 3.2(e), 3.6(c) (observing that the *Pringle* Court never stated or discussed the issue of probable cause, instead seeming to "avoid[] the issue altogether" and describing the analysis as weak); Jason D. Johnson, *Totality of the Circumstances: Why Individualized Suspicion Is No Longer Necessary in the Multi-Suspect Context:* Maryland v. Pringle, 124 S. Ct. 795 (2003), 29 S. ILL. U. L.J. 361, 376 (2005) ("[T]he Court did not lay down any helpful guidelines or parameters for implementing the test in future multi-suspect scenarios. The Supreme Court simply came to the conclusion that in the present case, under the totality of the circumstances, there was probable cause."); Maclin, *supra* note 110, at 406 (calling the opinion "compact and cryptic," while offering only "a cursory statement of black-letter law").

[146] *See* Maclin, *supra* note 110, at 413–14 (arguing that the facts would suggest the other two passengers in the car were more likely the owners or held a greater proprietary interest).

[147] LAFAVE, *supra* note 116, § 3.2(e).

[148] *See* Maclin, *supra* note 110, at 413–14 (finding the conflict between *Pringle*, *Di Re*, and *Ybarra* "troublesome").

[149] *Pringle*, 540 U.S. at 368–69.

[150] *Id.* at 372 (describing as a reasonable inference that "any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine. Thus, a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly").

[151] LAFAVE, *supra* note 116, § 3.2(e).

[152] Maclin, *supra* note 110, at 415.

facts before it. This is evident from the Court's fact-intensive analysis and the fact-specific distinctions it drew between *Ybarra* and *Di Re*.[153] Its utility in the greater Fourth Amendment probable cause analysis is thus questionable.

There is another important point that gets lost in *Pringle's* criticism: the underlying criminal charge of drug possession. Drug possession requires proof of mere knowledge and control over the drugs, which are easy elements for officers and prosecutors to establish.[154] Given the simple charge, the tiny car, and the small number of defendants, it is a mistake for parties and courts to extrapolate *Pringle's* reasoning and holding to complex criminal charges, intricate fact patterns, or mass arrests. Yet, *Pringle* is used by attorneys representing § 1983 defendants to sow probable cause uncertainty, and in doing so, shield officers from civil rights lawsuits.[155]

III. IMMUNITY FROM SUIT AND PARTICULARIZED VERSUS "GROUP PROBABLE CAUSE"

Di Re, *Ybarra*, and *Pringle* are criminal cases that addressed unlawful arrests based upon an alleged lack of probable cause. But, those decisions have been used by courts in mass arrest civil litigation to determine whether an officer had objective probable cause to arrest and therefore was immune from suit. This section will examine § 1983 defendant immunity and how the aforementioned Supreme Court precedent has impacted federal courts on the standard for probable cause in mass arrest cases.

---

[153] *Pringle*, 540 U.S. at 373–74.

[154] *See Pringle*, 540 U.S. at 372 (concluding that it was reasonable to infer that the parties had knowledge and control over the cocaine found inside the vehicle); Darryl K. Brown, *The Perverse Effects of Efficiency in the Criminal Process*, 100 VA. L. REV. 183, 199 (2014) ("Some offenses are harder to prove because they include elements that require costlier proof efforts; it is easier to prove possession than sale of drugs, and easier to prove strict liability offenses than crimes with mental-state requirements for every element.").

[155] *See* Defendant Reyna's Motion to Dismiss at 8, English v. City of Waco, No. 1:17-cv-478-SS (W.D. Tex. July 14, 2017), 2017 WL 7789107 [hereinafter Defendant's Motion to Dismiss] (stating that "competing views" after *Pringle* about probable cause in group settings makes the law not clearly established); Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 15, David Scott v. Cty. of San Bernadino, No. 5:14-cv-02490-VAP-KK (C.D. Cal. Feb. 17, 2016), 2016 WL 1650627 (positing that *Pringle* and *Ybarra* notify "law enforcement that particularized suspicion is required and can be met in a group setting, but fail to clarify when probable cause does or does not exist for a group"); Supplemental Brief of Defendants/Appellants at 3, Gambrill v. Unified Gov't of Wyandotte Cty., Nos. 14-3234, 14-3229, 14-3233, 14-3235 (10th Cir. Dec. 14, 2015) 2015 WL 9166047 (arguing that *Pringle* makes an officer's decision to arrest an entire group debatable).

A. Unlawful Arrest Liability and Immunity

In the civil rights lawsuits that follow mass arrests, arrestees frequently sue the officers involved and the governments or officials responsible for the alleged rights violations. Some of these parties may be immune from suit for federal claims under § 1983.[156]

Officers are the most obvious defendants in § 1983 cases when a claim is predicated on an unlawful arrest.[157] Members of law enforcement, like other § 1983 defendants, may be protected from suit by qualified immunity,[158] which "recognizes the hardships of subjecting public officials to the rigors of litigation, but it balances that concern against the interest in allowing citizens to vindicate their constitutional rights."[159] In the law enforcement context, qualified immunity protects a police officer in one of two ways. First, it protects officers whose "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[160] Second, it protects an officer who believed his actions were lawful *if* his belief was objectively reasonable.[161] In this way, qualified immunity ensures that only officers who had fair notice that their conduct was illegal can be sued.[162]

---

[156] *See* Jenkins v. City of New York, 478 F.3d 76, 86–87 nn.7 & 9 (2d Cir. 2007) (explaining that qualified immunity only applies to federal claims and the immunity is one to suit, not to liability).

[157] BROOKS, *supra* note 6, § 2.31 (noting that the majority of § 1983 lawsuits are brought against municipal officers).

[158] Malley v. Briggs, 475 U.S. 335, 340–41 (1986) (discussing the history of this defense that police officers enjoy).

[159] Barham v. Ramsey, 434 F.3d 565, 572 (D.C. Cir. 2006); *see* Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 501 (2008) ("The idea behind the qualified immunity defense is to protect officials from being dragged through a burdensome discovery process and trial on insubstantial claims, or on claims that assert violations of law that were not clearly established at the time of the challenged conduct.").

[160] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

[161] *Malley*, 475 U.S. at 343–44. Reflecting on the benefit conferred from the rule of limited immunity in *Malley*, Justice White wrote:

> [A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect . . . upon whether he has a reasonable basis for believing that his affidavit establishes probable cause. But such reflection is desirable, because it reduces the likelihood that the officer's request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.

Id.

[162] *See Jenkins*, 478 F.3d at 87 (setting out the protections for officers whose conduct falls within reasonable bounds).

The law recognizes a difference between an officer who, in hindsight, could have made better decisions and an officer who knowingly violated the law.[163] Officers in the former category and those who act when the law is unclear are immune from suit.[164] In this way, officers are held to similar, but not equal standards in civil and criminal cases.[165] The reason the standard is objective rather than subjective is that a subjective belief would require testimony from the officer and a trial; the qualified immunity that officers enjoy shield them not just from liability but from the lawsuit itself.[166]

Municipalities and governments may be sued under § 1983, as may government officials.[167] A municipality may be liable under § 1983 when an "action pursuant to official municipal policy . . . caused a constitutional tort."[168] Although § 1983's legislative history indicates municipalities were not necessarily intended to be exempt from suit,[169] Congress believed they could be held liable for their own actions, not for the actions of their employees.[170] Thus, governments cannot be held liable under tort theories of respondeat superior or vicarious liability,[171] but can be held liable when they have created and executed policies that result in deprivations of feder-

---

[163] *See* Hunter v. Bryant, 502 U.S. 224, 229 (1991) (stating that the law provides protection to officers who make "mistaken judgments" but not to officers who "knowingly violate the law") (quoting *Malley*, 475 U.S. at 343).

[164] *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 479–80 (1986) (finding a clear Fourth Amendment violation that opened the government to suit and liability); Callahan v. Unified Gov't of Wyandotte Cty., 806 F.3d 1022, 1029 (10th Cir. 2015) ("We cannot ask officers to make a legal determination—that law professors probably could not agree upon—without any guidance from the courts and then hold them liable for guessing incorrectly. Qualified immunity exists to prevent exactly that.").

[165] *See Malley*, 475 U.S. at 343–44 (stating that "the same standard of objective reasonableness that we applied in the context of a suppression hearing . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest").

[166] *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982) (detailing the development of this doctrine); *Jenkins*, 478 F.3d at 87 n.9 (noting that qualified immunity is an immunity from lawsuits).

[167] *See* Bernini v. City of St. Paul, 665 F.3d 997, 1007–08 (8th Cir. 2012) (stating that a municipality can be sued under § 1983); Morgan v. City of DeSoto, 900 F.2d 811, 815 (5th Cir. 1990) (noting that government officials could be liable under § 1983). Not all jurisdictions permit law enforcement agencies to be sued based upon civil rights violations. In these instances, the city, county, or state body that oversees the agency may be sued, not the agency itself. *See Jenkins*, 478 F.3d at 93 n.19 (noting that New York City's statutory scheme makes the New York City Police Department a "non-suable agency").

[168] Monell v. N.Y. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

[169] *Id.* at 669.

[170] *See id.* at 665–83, 691 (providing a legislative history and concluding that "a municipality cannot be held liable *solely* because it employs a tortfeasor").

[171] *Id*. at 691–94.

ally-protected rights.[172] The Supreme Court has stated that "a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.'"[173] It is the policy that distinguishes municipal decisions from employee decisions.[174] In order for liability to attach to municipalities, however, a municipal employee must violate a constitutional right.[175]

In some instances, prosecutors are sued for unlawful arrests.[176] Unlike officers and municipalities, however, prosecutors are protected by absolute immunity when they act within the scope of their duties.[177] There are reasons for the prosecutor's more expansive immunity:

> The common-law immunity of a prosecutor is based upon the same considerations that underlie the common-law immunities of judges and grand jurors acting within the scope of their duties. These include concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.[178]

It is the prosecutor who has the legal knowledge required and authority to dismiss a case lacking probable cause.[179] Indeed, prosecutors are ethical-

---

[172] *See* Vodak v. City of Chicago, 639 F.3d 738, 740, 747 (7th Cir. 2011) (stating that a § 1983 plaintiff must demonstrate that the municipality committed a constitutional tort at the "policymaking level of government"); Burge v. St. Tammany Parish, 336 F.3d 363, 369 (5th Cir. 2003) (explaining that municipalities are liable under § 1983 for maintaining an official policy that deprives individuals of a constitutionally or federally protected right).

[173] City of Canton v. Harris, 489 U.S. 378, 389 (1989) (quoting *Monell*, 436 U.S. at 694).

[174] *Pembaur*, 475 U.S. at 479–80.

[175] Wilson v. Town of Mendon, 294 F.3d 1, 7 (1st Cir. 2002).

[176] *See* Crane v. Texas, 759 F.2d 412, 427–31 (5th Cir. 1985) (finding prosecutor liable on the basis that he enacted policy to issue arrest warrants lacking probable cause); Original Complaint at 20, English v. City of Waco, No. 1:17-cv-478-SS (W.D. Tex. July 14, 2017), 2017 WL 2179430 (alleging the District Attorney waived immunity by "insert[ing] himself in the role of an investigator/detective . . . prior to a determination of probable cause" and by challenging and thwarting the officers' arrest decisions).

[177] *Malley*, 475 U.S. at 341–42.

[178] Imbler v. Pachtman, 424 U.S. 409, 422–23 (1976) (footnote omitted).

[179] *See* Mitchell v. City of New York, 841 F.3d 72, 76 (2d Cir. 2016) (noting that the prosecutor declined to prosecute thirty trespassing cases following a mass arrest); Gonzalez v. City of Elgin, 578 F.3d 526, 530–35 (7th Cir. 2009) (reporting that counts of mob action, resisting arrest, and battery for arrested crowd were later dismissed by prosecutors); Sullivan v. Murphy, 478 F.2d 938, 956 (D.C. Cir. 1973) (stating that an overwhelming number of May Day arrest cases were dismissed for want of prosecution, which plaintiffs argued was an indication that probable cause was lacking); Bilick v. Dudley, 356 F. Supp. 945, 948 (S.D.N.Y. 1973) (reporting that the prosecutor dismissed all charges against the eighty-six defendants arrested).

ly bound to dismiss cases that are unsupported by probable cause.[180] Consequently, it is uncommon for the prosecutor to be a named defendant in a § 1983 lawsuit. Nevertheless, courts have been asked to examine the actions of prosecutors who overstep their traditional roles to exert policymaking authority or order unlawful arrests, searches, or seizures.[181] When a prosecutor acts outside of her traditional duties,[182] that conduct may subject her to § 1983 liability.[183]

Section 1983 is designed to right constitutional wrongs.[184] It provides equitable relief to a person whose constitutionally-guaranteed rights were violated.[185] Law enforcement officers, governments, public officials, and prosecutors alike should all be wary of mass arrests because the lawsuits

---

[180] *See, e.g.*, TEX. GOV'T CODE ANN. art. 10, § 9, Rule 3.09 (a) (West 2018) (detailing the special responsibilities of the prosecutor).

[181] *See Pembaur*, 475 U.S. at 481–85 (considering whether a county prosecutor was acting to create county policy); *Crane*, 759 F.2d at 431 (finding that the prosecutor was not liable personally because he was carrying out official duties when he violated a Fourth Amendment right; instead, the county, his employer, was liable for damages).

[182] *See* Buckley v. Fitzsimmons, 509 U.S. 259, 273–74 (1993) (contrasting the traditional duties of the prosecutor with those of a detective or police officer). Justice Stevens in *Buckley* elaborated:

> There is a difference between the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is "neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other." Thus, if a prosecutor plans and executes a raid on a suspected weapons cache, he "has no greater claim to complete immunity than activities of police officers allegedly acting under his direction."

Id. (citations omitted).

[183] *See Pembaur*, 475 U.S. at 485 (finding that the prosecutor issued a policy determination rather than legal advice, and therefore was acting outside of his prosecutorial function); Rowe v. City of Fort Lauderdale, 279 F.3d 1271, 1280 (11th Cir. 2002) ("To the extent he stepped out of his prosecutorial role to perform 'the investigative functions normally performed by a detective or police officer,' however, [the prosecutor] does not have absolute immunity.").

[184] *Sullivan*, 478 F.2d at 966 ("Assuming a determination of constitutional violations, it is undeniable that the Federal courts having subject matter jurisdiction also have broad equitable power to remedy and obviate all traces of the constitutional wrong.")

[185] *Id.*

that follow may favor plaintiffs.[186] Success for plaintiffs often just means surviving summary judgment because settlements frequently follow.[187]

B. Federal Court Analysis of Probable Cause in Mass Arrest Lawsuits

In § 1983 lawsuits, plaintiffs commonly claim that officers did not have probable cause to arrest them.[188] The existence of probable cause is an absolute defense to an unlawful arrest claim.[189] When a plaintiff alleges a violation of the Fourth Amendment predicated upon a lack of probable cause to arrest and a defendant raises the existence of probable cause as a defense, the court must carefully examine probable cause from an objective standpoint and determine whether the officer's arrest was reasonable.[190] The reasonableness inquiry is "assessed in light of the legal rules that were 'clearly established' at the time" of the arrest.[191]

In 2002, the Supreme Court clarified what "clearly established" means in *Hope v. Pelzer*:

> [Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful. For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very

---

[186] *See* Dellums v. Powell, 566 F.2d 167, 173, 208 (D.C. Cir. 1977) (stating that the jury awarded the plaintiffs arrested following May Day protests a total of $12 million, with each plaintiff receiving approximately $10,000); Abdell v. City of New York, No. 05-CV-8453, 2015 WL 898974, at *1 (S.D.N.Y. 2015) (reporting that the jury awarded the plaintiffs in a mass arrest case $40,000 each in compensatory damages, and entered an award of $25,000 against one defendant).

[187] *Compare* Lopez v. City of Houston, No. CIV.A. 03-2297, 2005 WL 1770938, at *3, *18, *22 (S.D. Tex. July 25, 2005) (stating that allegations of unlawful mass detention survived summary judgment) *with* George, *supra* note 29 (reporting that the City of Houston settled pending mass detention lawsuits on the eve of trial).

[188] *See Vodak*, 639 F.3d at 740, 746–47 (stating that 900 arrestees sued on the basis of unlawful arrest); *Gonzalez*, 578 F.3d at 537–39 (noting that six people challenged the lawfulness of their arrests); *Morgan*, 900 F.2d at 812–15 (reporting that countless juveniles were arrested, seven of whom sued the city for arresting them without probable cause); *Sullivan*, 478 F.2d at 966–67 (explaining that 400 arrestees challenged the lawfulness of their arrests); *see also Lopez*, 2005 WL 1770938, at *1–2 (indicating that seventy-seven plaintiffs, out of 278 total arrestees, sued alleging that the arrest warrants against them lacked probable cause).

[189] *Gonzalez*, 578 F.3d at 537.

[190] Sykes v. Anderson, 625 F.3d 294, 306 (6th Cir. 2010) (using a totality of the circumstances analysis to determine whether the officer "had knowledge at the moment of the arrest . . . to warrant a prudent person . . . in believing . . . that the seized individual ha[d] committed . . . an offense") (internal quotes omitted); *Gonzalez*, 578 F.3d at 537–39 (examining the merits of unlawful arrest claims for all charges).

[191] Anderson v. Creighton, 483 U.S. 635, 639 (1987).

> action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.[192]

Stated another way, this standard protects "all but the plainly incompetent or those who knowingly violate the law."[193]

In mass arrest lawsuits, federal courts often rely on the Supreme Court's *Di Re*, *Ybarra*, and *Pringle* decisions to examine the reasonableness of the officer's basis for probable cause and the lawfulness of the officer's actions at the time of the arrest. Some courts and scholars have suggested that the multiple-suspect probable cause analysis is challenging.[194] Indeed, federal judges have sympathized with officers in their decisions about who to arrest, how to arrest, and when to arrest a group *en masse*.[195] Some courts, particularly in more recent decisions, have had difficulty harmonizing Supreme Court precedent, which has led them to rule that the law is not clearly established and thus the defendants are immune from suit. This section will examine these contrasting federal court decisions.

1. Section 1983 Cases Cited by Plaintiffs

Though mass arrest litigation arose before the twenty-first century,[196] the issue of whether probable cause is clearly established in mass arrest cases has been raised only recently. Several circuit courts of appeals and federal district courts have followed Supreme Court precedent, and consequently have favored plaintiffs in these suits.

One of the first post-*Pringle* mass arrest cases was *Wilson v. City of Boston*, decided by the First Circuit Court of Appeals in 2005, in which officers arrested 192 individuals, including Wilson, the plaintiff, after creating

---

[192] Hope v. Pelzer, 536 U.S. 730, 739 (2002) (quotations and citations omitted).

[193] *Malley*, 475 U.S. at 341.

[194] *See, e.g.*, *Callahan*, 806 F.3d at 1024–26 (observing that the "question of probable cause in multi-suspect situations is far from beyond debate"); LAFAVE, *supra* note 116, § 3.6(c) (arguing that *Pringle* brings a level of uncertainty to this analysis).

[195] *See Vodak*, 639 F.3d at 743 ("In the confused and alarming circumstances that we've described, the authority of the police to order the crowd to disperse and return to its starting point cannot be questioned . . . and is not." (citations omitted)); Urban v. Breier, 401 F. Supp. 706, 711 (E.D. Wis. 1975) (sympathizing with the police by stating that the court could "appreciate the scope of the task of local law enforcement personnel as methods of criminal conduct become more sophisticated and better organized" but adding that police "are not to be permitted to act in derogation of established constitutional standards . . . ."); *Sullivan*, 478 F.2d at 966 (recognizing the hesitation to second-guess officers' decision to arrest).

[196] *See, e.g.*, *Sullivan*, 478 F.2d at 966–67 (considering the suspension of procedural safeguards to ensure the integrity of arrests of thousands following Vietnam May Day demonstrations, which subjected officers to litigation to determine whether they had probable cause to arrest).

a pretend job fair they advertised to people who had outstanding warrants.[197] Despite Wilson's insistence that she did not have any outstanding warrants and the fact that police had no criminal record for her, officers arrested her, along with everyone else in attendance.[198] She later sued, alleging her arrest was unlawful.[199]

The First Circuit determined Wilson's arrest scenario was highly unusual: it was not a warrantless arrest supported by probable cause, it was not made at the direction of an officer who had probable cause, and it was not made pursuant to a lawful warrant.[200] Any of these circumstances would have legally justified her arrest. In Wilson's case, not a single officer present concluded she had committed a crime, yet she was arrested.[201]

Importantly, when the defendant officers alleged on appeal that the other 191 arrests were made pursuant to valid arrest warrants, the court responded by quoting *Ybarra*: "'mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause' for a[n] . . . arrest."[202] Relying further on the language of *Ybarra*, the First Circuit emphasized that an arrest must be supported by probable cause "particularized with respect to that person."[203] The court determined that Wilson's arrest violated the Fourth Amendment and the law prohibiting her arrest was clearly established.[204] Though the court ultimately held that the officer maintained immunity because Wilson was released at the scene once officers realized they had erred, it relied heavily on *Ybarra* to condemn the unlawful arrest.[205]

In 2006, the District of Columbia Circuit Court of Appeals examined probable cause in *Barham v. Ramsey.*[206] *Barham* began with hundreds of protesters in Washington D.C. who opposed the annual World Bank and International Monetary Fund meetings.[207] Officers, believing the protestors had committed petty crimes and were planning to impede traffic in the metropolitan area, cordoned off Pershing Park, where many of the protesters

---

[197] Wilson v. City of Boston, 421 F.3d 45, 49 (1st Cir. 2005).

[198] *Id.* at 47–50.

[199] *Id.* at 51. Specifically, Wilson alleged false imprisonment, intentional infliction of emotional distress, and constitutional violations. *Id.*

[200] *See id.* at 54 (observing that the arrest did not fall into any traditional arrest scenario).

[201] *Id.*

[202] *Id.* at 56 (quoting Ybarra v. Illinois, 444 U.S. 91, 91 (1979)).

[203] *Id.*

[204] *Id.* at 56–60.

[205] *Id.* at 57–59.

[206] 434 F.3d 565 (D.C. Cir. 2006).

[207] *Id.* at 569.

gathered.[208] Officers subsequently arrested 386 people for failure to obey an officer.[209]

The arrestees sued alleging the officers unlawfully detained them after failing to issue a warning and giving them a chance to disperse.[210] The federal district court found that the officers' actions were "ludicrous" because they never gave an order, which the protestors could not have failed to obey, before they arrested everyone.[211] The trial court determined that there was no probable cause to arrest the group.[212]

The D.C. Circuit Court agreed that the officers violated the arrestees' Fourth Amendment rights.[213] The court stated that "no reasonable officer . . . could have believed that probable cause existed to order the sudden arrest of every individual in Pershing Park."[214] It also noted that even if officers had probable cause to arrest *some* protestors, at no point did they have probable cause to arrest *all* protestors.[215] The *Barham* court then reiterated what the Supreme Court in *Ybarra* and other courts have said: an arrest must be predicated by particularized probable cause; this prerequisite cannot be undercut by the fact that officers had probable cause to arrest only some criminal actors in the group.[216]

The court was particularly bothered that one officer-defendant made no effort to identify a single arrestee's specific criminal acts.[217] It also disagreed with the idea of a designated area of arrest.[218] The *Barham* court warned against making arrests in a "randomly selected zone."[219] Although the court acknowledged that its holding did not prohibit officers from arresting an unruly, obstructive, or violent mob, this crowd could not be characterized as such.[220] Ultimately, the court determined that the officers lacked probable cause, and, as a result, some defendants were not immune from suit.[221]

---

[208] *Id.* at 569–70.
[209] *Id.* at 570.
[210] *Id.* at 570–71, 573.
[211] *Id.* at 571.
[212] *Id.*
[213] *Id.* at 573.
[214] *Id.*
[215] *Id.*
[216] *Id.*; *see Ybarra*, 444 U.S. at 91 (stating that an individual's mere proximity to those suspected of criminal activity cannot serve as the basis for probable cause); *Callahan*, 806 F.3d at 1028–29 (reciting this standard from *Ybarra*).
[217] *See Barham*, 434 F.3d at 574 (emphasizing the officer's failure to ascribe crimes to specific individuals).
[218] *Id.*
[219] *Id.*
[220] *Id.* at 575.
[221] *Id.* at 568.

In *Papineau v. Parmley,* also decided in 2006, the Second Circuit Court of Appeals examined a § 1983 claim made by several dozen members of the Native American Onondaga Nation against New York law enforcement officials following the Nation's protest on sales taxation.[222] After some protestors walked onto an interstate to distribute printed materials denouncing the tax, officers indiscriminately arrested all protestors—men, women, and children.[223] All charges eventually were either dismissed or resulted in acquittal.[224]

Though the plaintiff class never raised the issue of lack or probable cause to arrest, the Second Circuit addressed this issue in the context of another claim.[225] The *Parmley* court found that the officers unlawfully arrested every one of the several dozen protestors because the officers were unable to identify a single person who had committed the criminal act from which all other arrests flowed.[226] The court concluded that

> Defendants could not, then, have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances. Without the ability to identify those individuals . . . defendants cannot . . . justify their actions. Quite simply, on the facts alleged, we cannot say as a matter of law that the police had an objectively reasonable basis to conclude that the plaintiffs [violated the law] at the time of the arrests. Defendants were accordingly not entitled to qualified immunity.[227]

In rendering its decision, the *Parmley* court examined the elements of the offense and the facts to determine that the officers lacked probable cause.[228] Even though the court did not rely upon *Ybarra*, *Di Re*, or *Pringle* in rendering its decision, its rationale mimicked *Ybarra's* particularized probable cause language and analysis.[229]

The Eleventh Circuit has mirrored *Ybarra's* rationale as well. In rejecting a request to permit mass searches in its 2004 decision *Bourgeois v. Peters*, the court stated the "text of the Fourth Amendment contains no exception for large gatherings of people."[230] Although this decision was not in

---

[222] 465 F.3d 46, 52 (2d Cir. 2006).
[223] *Id.* at 52–53.
[224] *Id.* at 53–54.
[225] *Id.* at 54, 58–60.
[226] *Id.* at 59–60.
[227] *Id.* at 60 (citation omitted).
[228] *Id.*
[229] *See id.* at 59–60 (reasoning that officers could not make an "indiscriminate mass arrest" when they were unable to determine which individual broke the law).
[230] Bourgeois v. Peters, 387 F.3d 1303, 1311 (11th Cir. 2004).

response to a § 1983 lawsuit and was based upon a mass search, rather than a mass arrest, the reasoning of the court—that the Fourth Amendment requires *individualized* suspicion[231]—echoes *Ybarra's* particularized probable cause requirement.

In a 2012 mass arrest case, *Dinler v. City of New York*, the Southern District of New York rejected the defendants' proposed "group probable cause" argument.[232] In *Dinler*, protesters, journalists, and bystanders sued New York City for their unlawful arrests following protests of the City's 2004 Republican National Convention.[233] The issue the court was asked to address was "*how* probable cause determinations must be made when the police suspect large groups of people of unlawful activity."[234] Citing *Ybarra*, the court stated that being near individuals who are committing crimes is not enough to satisfy the probable cause requirement.[235] The court stated that "probable cause must be particular to the individual being arrested."[236]

The *Dinler* court emphasized the Supreme Court's consistent particularized probable cause precedent by quoting part of the Court's *Pringle* opinion that relied on *Ybarra* for support:

> The Supreme Court recently reaffirmed that, notwithstanding the difficulty of defining probable cause precisely, "[t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that belief of guilt must be particularized with respect to the person to be searched or seized."[237]

The defendants, unable to articulate particularized probable cause to arrest the individuals, alternatively argued that they needed "group probable cause" when confronted with a crowd of lawbreakers.[238] The *Dinler* court replied that group probable cause was "by no means as firmly established as defendants suggest" before relying upon the Second Circuit's *Parmley* decision, which stated that officers are not entitled to indiscriminately arrest a mass of people when they lack particularized probable cause to do so.[239]

---

[231] *Id.* at 1313.

[232] Dinler v. City of New York, No. 04 CIV. 7921 RJS-JCF, 2012 WL 4513352, at *5–6 (S.D.N.Y. Sept. 30, 2012).

[233] *Id.* at *1.

[234] *Id.* at *3.

[235] *Id.* (citing *Ybarra*, 444 U.S. at 91).

[236] *Id.*

[237] *Id.* (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)).

[238] *Id.* at *4.

[239] *Id.* (citing *Parmley*, 465 F.3d at 60).

The court then distinguished two cases the defendants relied upon—both involving riotous crowds acting together to violate the law.[240] The court emphasized:

> [While *Carr* and *Bernini*] provide insight into how the state can preserve public order and enforce the law in mass protest or riot situations, . . . they do not, and could not, alter the constitutional requirement of individualized probable cause as a prerequisite for lawful arrest. Rather, they stand for the unremarkable proposition that, where a group of individuals is acting in concert such that a reasonable police officer could conclude that every member of the group violated the law, that officer would be justified in arresting every member of the group. . . . As such, [the two cases] do not endorse a theory of collective or group liability, nor do they reflect a departure from the rule of individualized probable cause. They merely offer a method of reaching individualized probable cause in a large, and potentially chaotic, group setting. Individualized probable cause remains the lodestar in these cases. An individual's participation in a lawbreaking group may, in appropriate circumstances, be strong circumstantial evidence of that individual's own illegal conduct, but, no matter the circumstances, an arresting officer must believe that every individual arrested personally violated the law. Nothing short of such a finding can justify arrest. The Fourth Amendment does not recognize guilt by association.[241]

In the end, the *Dinler* court relied upon *Pringle*, *Ybarra*, and *Parmley* to support its decision and reject the concept of group probable cause outside of unusual, riotous circumstances.[242]

Finally, in 2016, the District Court for the District of Columbia held in *Lane v. District of Columbia* that officers violated civil rights in a multiple-suspect arrest of three men for possession of a gun when they had compelling evidence the gun belonged to only one man in the group.[243] The case began when officers approached three men sitting on some steps, who they suspected were using drugs and drinking alcohol.[244] Once officers cleared the men of wrongdoing and told them to leave, one man left behind a jacket that police discovered concealed a gun. None of the men admitted to owning the jacket. Two of the men, however, were wearing jackets and one was

---

[240] *Id.* at *5.
[241] *Id.* at *6.
[242] *Id.* at *3–6.
[243] Lane v. District of Columbia, 211 F. Supp. 3d 150, 167 (D.D.C. 2016).
[244] *Id.* at 158.

not. Nevertheless, officers arrested all three men for unlawfully possessing the firearm.[245]

The court framed the issue by asking "whether a reasonable officer would have understood that it was unconstitutional to arrest all three men for what appeared to be a single crime, when the most compelling evidence pointed toward [the man who was not wearing a jacket]."[246] After acknowledging that the Supreme Court's probable cause definition lay between bare suspicion and having enough evidence to support a guilty conviction, the *Lane* court stated that officers at a minimum needed *some* evidence that *each* arrestee committed a crime.[247]

The court then examined what is required to arrest multiple individuals when the evidence does not clearly point to a single, guilty person.[248] The D.C. District Court acknowledged that "a 'round 'em all up' approach" is plainly unlawful, but "there are times when more than one suspect may be arrested for a single crime" as in *Pringle*.[249] The *Lane* court concluded that any suggested "uncertainty [in the mass arrest context] does not mean that there is no limiting principle" for mass arrests, citing *Barham's* unlawful mass arrest scenario for support.[250]

The court found that regardless of any present uncertainty, the officers were not immune from suit.[251] The court's conclusion rested on *Ybarra's* basic particularized probable cause premise.[252] It was unreasonable that the officers would arrest the two men with jackets when they suspected the man without one, and thus the arrest of all three men was unreasonable.[253] This opinion also echoed the sentiment of *Di Re* by suggesting that when officers have probable cause to arrest fewer than all the people in a multi-suspect arrest, they cannot arrest everyone.[254] In the end, the *Lane* court relied upon *Ybarra*, *Pringle*, *Barham*, and Professor LaFave's commentary as support to deny the defendants' motion to dismiss the Fourth Amendment unlawful arrest claim.[255]

---

[245] *Id.* at 158–60.
[246] *Id.* at 167.
[247] *Id.* at 167–68, 175–76.
[248] *Id.* at 168.
[249] *Id.*
[250] *Id.*
[251] *Id.* at 168–69.
[252] *Id.* at 169.
[253] *Id.*
[254] *See* United States v. Di Re, 332 U.S. 581, 593–94 (1948) (finding that mere presence among a group of criminals is insufficient to create probable cause).
[255] *Lane*, 211 F. Supp. 3d at 168–69.

The First, Second, Eleventh, and District of Columbia Circuit Courts of Appeals, as well as federal district courts in New York and the District of Columbia, have denied defendants immunity from suit in multiple-suspect and mass arrest cases. Whether the arrests stemmed from protests, sting operations, or suspected criminal activity, these courts firmly held that the Fourth Amendment requires particularized probable cause for each arrestee. By relying upon *Di Re*, *Ybarra*, and *Pringle*, these courts have allowed plaintiffs to move forward with civil rights litigation.

2. Section 1983 Cases Cited by Defendants

Defendants in mass arrest cases typically make one or two arguments in their attempts to dismiss the lawsuits. Some allege adequate probable cause; others assert that the law on probable cause in mass arrest cases is not clearly established and therefore, officers must maintain immunity from suit. Section 1983 defendants argue that *Pringle* created probable cause uncertainty, even though it relied on *Ybarra's* particularized probable cause standard in its holding.[256] The federal courts ruling in favor of these arguments fall into two categories: some believe the arrested mass was acting as a cohesive, riotous unit and thus, officers were permitted to arrest everyone, while others believe that the law on probable cause for group arrests is contradictory and therefore, unable to satisfy the "clearly established" rights violation requirement.[257] This section will examine both lines of reasoning.

a. Carr & Bernini*: Riot Cases*

The *Dinler* court referred to two opinions, cited by defendant-officers to support their "group probable cause" argument, which the court soundly rejected.[258] Both involved mass arrests for offenses related to rioting.[259] The

[256] *See, e.g.*, Brief and Special Appendix for Defendants-Appellants at 32–34, Bell v. City of New York, No. 12-4420-cv (2d Cir. Mar. 18, 2013), 2013 WL 1192951 ("[N]othing in [*Ybarra* or *Pringle*] would have given notice to the police officers . . . that the arrests . . . violated clearly established law applicable to sorting in situations where a group, acting as a unit, breaks the law."); Defendants' Opposition to Plaintiffs' Motion for Summary Judgment at 15, Scott v. Cty. of San Bernadino, No. 5:14-cv-02490-VAP-KK (C.D. Cal. Feb. 17, 2016), 2016 WL 1650627 (contending that *Pringle* and *Ybarra* notify "law enforcement that particularized suspicion is required and can be met in a group setting, but fail to clarify when probable cause does or does not exist for a group"); Defendant's Motion to Dismiss, *supra* note 155, at 8 (arguing that "competing views" after *Pringle* about probable cause in group settings makes the law not clearly established).

[257] *See Anderson*, 483 U.S. at 639 (setting forth the "clearly established" standard).

[258] *Dinler*, 2012 WL 4513352, at *4–6 (citing Carr v. District of Columbia, 587 F.3d 401 (D.C. Cir. 2009), and *Bernini*, 665 F.3d at 997).

[259] *Id.*

first case, cited in recent § 1983 litigation,[260] is *Carr v. District of Columbia*, which was decided in 2009 by the D.C. Circuit Court of Appeals.[261] In that case, 250 marchers were arrested following violent protests during President George W. Bush's second inauguration.[262] According to police witnesses, when one protestor hurled a brick through a police car window, the entire crowd cheered and began to throw objects at the police; the police continued to observe the crowd act as a unified, angry, destructive mob.[263] As officers began to arrest them, the group dispersed with around seventy members running into an alley, where they found themselves corralled between walls and officers. All were arrested and charged with rioting. Several of the arrestees later sued claiming that their arrests lacked particularized probable cause.[264]

The district court granted the plaintiffs' motion for summary judgment on the basis that the officers lacked particularized probable cause to arrest each person.[265] It relied primarily on the *Ybarra* and *Barham* opinions because officers only generally referred to the "mob" of people when describing criminal behavior, and could not identify a single member's specific criminal acts.[266] The federal district court was troubled that defendants "offered no indication of how the arresting officers could distinguish between the protestors and any other person who might have been in the alley at the time the arrest was ordered."[267]

On appeal, the District of Columbia Court of Appeals reversed the lower court's decision on the unlawful arrest claim.[268] The *Carr* court first suggested that crimes related to rioting could be committed by a group behaving as this one did.[269] The court then distinguished its *Barham* decision from the present case by stating that the *Barham* mass of 386 people was not acting as a cohesive mob whereas the *Carr* group was.[270] The court em-

---

[260] *See* Memorandum of Law in Support of Defendants Kyle Kirchmeier, Morton County, City of Mandan, Jason Ziegler, Stutsman County, and Chad Kaiser's Motion to Dismiss, Dundon v. Kirchmeier, No. 1:16-CV-00406 (D. N.D. Feb. 6, 2017), 2017 WL 3071655 [hereinafter Memorandum of Law in Support of Motion to Dismiss] ("*Carr* thus demonstrates that a reasonable officer . . . could have believed that the Fourth Amendment did not require a probable cause determination with respect to each individual in a large and potentially riotous group before making arrests."); Defendant's Motion to Dismiss, *supra* note 155, at 9–10 (citing *Carr*, 587 F.2d 401).

[261] *See generally* 587 F.3d 401.

[262] *Id.* at 403–04.

[263] *Id.* at 404.

[264] *Id.* at 404–05.

[265] Carr v. District of Columbia, 565 F. Supp. 2d 94, 100–02 (D.D.C. 2008), *aff'd in part, rev'd in part*, 587 F.3d 401 (D.C. Cir. 2009).

[266] *Id.*

[267] *Id.* at 104 n.14.

[268] *Carr*, 587 F.3d at 401.

[269] *Id.* at 405–06.

[270] *Id.* at 407 (citing *Barham*, 434 F.3d at 565).

phasized that "probable cause must be particularized, . . . but . . . that showing is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law."[271]

Believing it to be "practically impossible" for officers to establish probable cause for each mob member, the court acknowledged that an innocent person could have been arrested that day, but probable cause only required probability of guilt, not certainty of it.[272] The *Carr* court concluded that law enforcement need only show that the officers were reasonable in believing that everyone arrested had engaged in criminal conduct.[273] Importantly, however, the court believed that there were enough issues of fact for the case to reach a jury, thus denying the officers' attempts to maintain immunity from suit.[274]

Although at least one federal district court found *Carr's* wisdom "questionable,"[275] the Ninth Circuit Court of Appeals agreed with it in 2015 in *Lyall v. City of Los Angeles*.[276] The *Lyall* court stated that officers are not required to have individualized suspicion for each group member detained when officers believe the group is acting as one and it is impossible for officers to separate the guilty from the innocent.[277] The Ninth Circuit emphasized the importance of public safety and an officer's right to investigate when there is a belief that criminal activity is afoot.[278] The *Lyall* court interpreted *Ybarra* this way:

> *Ybarra* stands for the proposition that, if a person is simply present [near] potential criminal activity, without . . . engaging in criminal activity . . . the police do not have probable cause to search him or reasonable suspicion sufficient to detain him . . . . *Ybarra* does not, however, imply that the police can never possess reasonable suspicion or probable cause unless it is individualized. If a group or crowd of people is behaving as a unit and it is not possible (as it was in *Ybarra*) for the police to tell who is armed and dangerous or

---

[271] *Id.* (citation omitted).

[272] *Id.* at 408.

[273] *Id.* at 409.

[274] *Id.*

[275] *See* Tracy v. Neuberger, 840 F. Supp. 2d 1183, 1191 n.5 (D. Minn. 2012) ("The parties argue at length about whether a mass arrest without particularized probable cause as to each individual arrested is constitutional, as held by the D.C. Circuit in *Carr*. . . . Regardless of *Carr's* (questionable) wisdom, the Court need not opine here whether a mass-arrest order is lawful since it concludes there is no evidence linking the order to [Plaintiff's] actual arrest.").

[276] Lyall v. City of Los Angeles, 807 F.3d 1178, 1194 (9th Cir. 2015).

[277] *Id.* at 1194–95.

[278] *Id.*

> engaging in criminal acts and who is not, the police can have reasonable suspicion as to the members of the group.[279]

Lyall thus strays further from *Carr*'s reasoning by stating that when officers cannot parse the guilty from the innocent, they are not required to have individualized suspicion.[280] *Carr*, on the other hand, upheld the officers' mass arrest by finding that they had a reasonable belief that there were no innocents in the group.[281] Both decisions stray too far from the requirements of the Fourth Amendment. That officers find it difficult or impossible to ascertain who is guilty from who is innocent should not dispose of the individualized reasonable suspicion or particularized probable cause requirements.

The second riot decision referenced in *Dinler*[282] is the Eighth Circuit Court of Appeals' opinion from 2012 in *Bernini v. City of St. Paul*.[283] In that case, after several days of political protests during the 2008 Republican National Convention, an official closed routes to St. Paul's downtown area. When a group of nearly 360 protestors committed acts of violence aimed at barricaded officers and attempted to march towards an area where First Lady Laura Bush was traveling via motorcade, officers detained the crowd.[284] The police officers then determined through investigation that 200 of those detained should be released and only 160 of them should be arrested. Eventually, all criminal charges were dismissed and thirty-two protestors sued the city claiming that officers had lacked probable cause to arrest them. The district court granted the defendants' motion for summary judgment and the plaintiffs appealed to the Eighth Circuit.[285]

On appeal, the issue before the *Bernini* court was whether the officers violated the Fourth Amendment by arresting the crowd when they had particularized probable cause to arrest only a few individuals. The *Bernini* court was quick to distinguish *Ybarra* by stating "[w]hat is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons."[286] The *Bernini* court relied upon the D.C. Circuit's opinion in *Carr* to reach its conclusion that the officers' actions were reasonable.[287]

---

[279] *Id.* at 1195.
[280] *Id.*
[281] *Carr*, 587 F.3d at 408.
[282] *Dinler*, 2012 WL 4513352, at *4–6.
[283] *Bernini*, 665 F.3d 997.
[284] *Id.* at 1001–02.
[285] *Id.* at 1002–03.
[286] *Id.* at 1003.
[287] *Id.* at 1003–04.

The court was not entirely clear, however, about which group of protestors the police had probable cause to arrest. The *Bernini* court held that the officers were permitted to arrest sixteen of the plaintiffs because video footage showed that they were preparing to violently confront officers immediately before their arrest.[288] Another group whose members outnumbered officers and was heading towards First Lady Bush was also lawfully arrested, according to the court.[289] From the opinion, it is unclear how many people were in that group and of those, how many were arrested. Nevertheless, the Eighth Circuit held that the mass arrest of approximately one hundred people, including nine *Bernini* plaintiffs, was reasonable because they appeared to join the protestors and they outnumbered officers, even though there is no indication they engaged in any criminal activity. The court believed the officers acted reasonably by investigating, even if they did so only after they had detained the large group, and by releasing more than half of those detained later. Without further analysis, the court concluded that the officers maintained their qualified immunity from suit.[290]

The *Bernini* opinion is illogical and under-explained. The decision focused on officer safety, the peril the group may have caused had they reached the First Lady, and the fact that arrestees outnumbered the officers. It does not adequately explain how officers had probable cause to arrest each of the three separate groups of protestors, much less each protestor. Yet, *Bernini* has been used as legal support by subsequent defendants facing § 1983 civil rights litigation.[291]

Perhaps the cases in this section can be meaningfully distinguished based solely upon the charges the arrestees faced or the way the masses acted. These cases could also be more narrowly read as sanctioning the arrest of a mass if there is particularized probable cause *supported by evidence* that the mass acted both criminally and cohesively.

b. Callahan*: The Not "Clearly Established" Case*

Section 1983's "clearly established" standard divides defendants who knowingly violated a clearly established right and thus waived qualified immunity from those who did not violate a clearly established right and thus

---

[288] *Id.*

[289] *Id.* at 1004–05.

[290] *Id.* at 1005.

[291] *See, e.g.*, Memorandum of Law in Support of Motion to Dismiss, *supra* note 260, at 24 (drawing similarities between the plaintiffs' claims and the situation in *Bernini*); Defendant's Motion to Dismiss, *supra* note 155, at 8 (citing *Bernini* for the proposition that an officer could find probable cause for every individual in a large and "potentially riotous" group).

maintained qualified immunity.[292] This section examines an outlier Tenth Circuit Court of Appeals opinion that § 1983 defendants have begun to cling to,[293] which found that the legal standard for probable cause in mass arrest cases is not clearly established.[294]

In 2015, the Tenth Circuit examined whether the differences between *Ybarra* and *Pringle* rendered the law on probable cause in multi-suspect arrests unclear.[295] In *Callahan v. Unified Government of Wyandotte County*, a group of police officers sued their employer for violating their Fourth Amendment rights.[296] The employer had reason to believe that SWAT unit officers were stealing property from homes while executing search warrants.[297] The employer created a sting operation designed to catch the thieves. During the search, some officers unlawfully appropriated property while others did not. The problem was they were all wearing headgear that covered their faces and bulky uniforms, which made it impossible to ascertain the identity of the thieves. As a result, all officers were arrested after they returned to police headquarters. Following their arrest, an investigation revealed that only three officers had stolen property during the search. The innocent officers sued alleging that their rights had been violated by the group arrest.[298]

The Tenth Circuit first examined the parameters of qualified immunity. It stated that only law enforcement defendants who are plainly incompetent or who knowingly violate the law maintain immunity from suit.[299] The court stated that the law violation must be "so obviously improper that any reasonable officer would know it was illegal" because courts are not in the position to "second-guess judgments of law enforcement with the benefit of hindsight."[300] The *Callahan* court, thus, found that the district court had erred in focusing its attention on a generic analysis of probable cause instead of exploring the law on group arrests:[301]

> The proper and properly-focused inquiry is whether the law was clearly established that an officer could not arrest an entire small

---

[292] *Anderson*, 483 U.S. at 639.

[293] *See* Appellants' Reply Brief at 11 n.2, Valdez v. Derrick, No. 15-cv-00109 (10th Cir. Jan. 6, 2017), 2017 WL 106914 (citing Callahan, 806 F.3d 1022); Defendant's Motion to Dismiss, *supra* note 155, at 8 (relying on *Callahan*, 806 F.3d 1022).

[294] *Callahan*, 806 F.3d at 1028.

[295] *Id.*

[296] *Id.* at 1024–26.

[297] *Id*. at 1024.

[298] *Id*. at 1025.

[299] *Id*. at 1026.

[300] *Id*. at 1027.

[301] *Id*. at 1028.

> group when he knows some unidentifiable members, if not all members, of that group have committed a crime. This question of probable cause in multi-suspect situations is far from beyond debate.[302]

The court then stated that this debate began with a conflict between *Ybarra* and *Pringle*. The *Callahan* plaintiffs argued that *Ybarra* required officers to have particularized probable cause, yet their employer had arrested everyone despite knowing that only some SWAT officers had committed theft.[303] In other words, the law enforcement employer decided to arrest first and investigate second.

Next, the court rebuked the district court for ignoring the *Pringle* opinion, which it believed muddied the law on probable cause determinations in multi-suspect arrests.[304] After discussing the facts and holdings of both *Ybarra* and *Pringle*, the Tenth Circuit ruled that the contrasting opinions rendered the law unclear and thus, the arresting officers maintained their immunity.[305] The court lamented that *Pringle's* circumstances did not translate to different facts—more suspects, a larger crime scene, a different charge—nor did the *Pringle* Court's questionable analysis.[306] It nevertheless concluded that:

> Before we hold officers liable, we must ensure that they were fairly put on notice that their actions were unlawful. The contours of the law must be sufficiently drawn so that a reasonable officer knows when he is acting outside of those lines—the law must be clearly established. That was simply not the case here. Though *Ybarra* requires particularized probable cause, *Pringle* raises questions regarding how that requirement is satisfied in multi-suspect situations. . . . We cannot ask officers to make a legal determination—that law professors probably could not agree upon—without any guidance from the courts and then hold them liable for guessing incorrectly. Qualified immunity exists to prevent exactly that. Plaintiffs offer us no other case on point to establish that Defendants violated their clearly established rights by arresting the entire unit.[307]

---

[302] *Id.*
[303] *Id.*
[304] *Id.*
[305] *Id.* at 1029.
[306] *Id.*
[307] *Id.*

In the end, the *Callahan* court held that the employer did not waive its qualified immunity from suit by arresting all SWAT unit officers.[308]

There are two notable flaws with the Tenth Circuit's reasoning. First, the *Callahan* court focused exclusively on *Ybarra* and *Pringle* in its opinion.[309] It never mentioned the *Pringle* Court's critical discussion of *Di Re*. The *Pringle* Court stated that the difference between *Di Re* and *Pringle* was that officers in *Pringle* were unable to ascertain who committed the crime, whereas in *Di Re*, the officers had probable cause to believe that only two of the three men were engaged in criminal activity,.[310] The *Pringle* Court stated that when officers can single out who committed the crime, the law requires that officers arrest only those people.[311]

In *Callahan*, however, the police-employer knew from observing the surveillance video that only some of the officers on the SWAT team were stealing.[312] Although the uniforms made it impossible to determine who was stealing while they were being surveilled, the employer later narrowed the guilty group to three officers following an investigation.[313] An investigative detention, versus a full-fledged arrest of the group, could have established who possessed the stolen goods after the search. Investigatory detentions are designed to sort out who committed a crime whereas group arrests net everyone, innocent and guilty alike. In *Callahan*, all officers were placed under arrest (in front of their colleagues, no less) when they returned to the police headquarters. The employer had reasonable suspicion to conduct an investigatory detention; however, a group arrest was unwarranted. *Di Re* was directly on point, given *Callahan's* facts. Not only did the Tenth Circuit overlook *Di Re* entirely, it failed to properly analyze whether the employer had probable cause to arrest everyone in the group or just some individuals in the group, or whether at the time of arrest, the employer had mere reasonable suspicion to detain and investigate. All facts point to the presence of reasonable suspicion, not probable cause.

Second, the *Pringle* Court was careful to limit its holding to its unique facts: the three men were sitting in a small car and appeared to be engaging in drug dealing with a large amount of cash in the glove compartment and five baggies of cocaine in the backseat of the car, giving officers probable

---

[308] *Id.* at 1024.
[309] *Id.* at 1028–30.
[310] *Pringle*, 540 U.S. at 373–74.
[311] *Id.* at 374.
[312] *Callahan*, 806 F.3d at 1025.
[313] *Id.*

cause to arrest them for drug possession.[314] The Supreme Court carefully distinguished these facts from *Ybarra's* tavern-wide search.[315] In fact, the *Callahan* opinion discussed these distinctions in its own opinion, yet concluded that the law was unclear and impossible for courts and academics to resolve.[316] But, if the *Pringle* Court could contrast small, intimate settings, from large, public settings, certainly other courts and law enforcement officers could do the same.

Rather than distinguishing these cases on facts, the *Callahan* court refused to engage in judicial oversight of official rights violations, which is the *purpose* of § 1983. The judges instead threw up their hands, suggested that the task of assessing probable cause in multiple-suspect cases was too difficult (even though countless courts had done it before), and held that the law was unclear in group arrest cases.[317] No other court has done what *Callahan* did: concede too much too early. Unfortunately, when federal courts refuse to carefully analyze facts like the Supreme Court did in *Di Re*, *Ybarra*, and *Pringle*, civil rights plaintiffs are unable to pierce immunity and pursue litigation.[318]

IV. WAYS TO REDUCE INCIDENTS OF MASS ARRESTS

High-volume arrests result in enough litigation, settlements, and angst to be more trouble than they are worth. Law enforcement agencies should seek to lessen their occurrence. One obvious suggestion is for officers to

---

[314] *Pringle*, 540 U.S. at 371–72 (emphasizing the facts of the case). Chief Justice Rehnquist described the situation as follows:

> In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was $763 of rolled-up cash in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money. We think it an entirely reasonable inference *from these facts* that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine.

Id. (footnote omitted) (emphasis added).

[315] *Id.* at 373 ("This case is quite different from *Ybarra.*").

[316] *Callahan*, 806 F.3d at 1029.

[317] *Id.* at 1028.

[318] *See* Garcia v. Escalante, 678 F. App'x 649, 656 (10th Cir. 2017) ("Simply put, neither controlling precedent from the Supreme Court or our court, nor the clearly established weight of authority from other courts, squarely governs the factual circumstances present here or places the relevant Fourth Amendment probable-cause question beyond debate.") (quotations and citations omitted); Gambrill v. Unified Gov't of Wyandotte Cty, 636 F. App'x 981, 983 (10th Cir. 2016) ("Finding *Callahan's* guidance controlling, we follow its direction. And so we reverse the district court's denial of qualified immunity to the individual defendants and dismiss the Unified Government's appeals for lack of jurisdiction.").

detain and investigate when they have individualized reasonable suspicion and to arrest only when they have particularized probable cause. Some police officers have been able to follow these legal guidelines and maintain immunity.[319] Several cities have also crafted plans to avoid liability following arrests for demonstrations, marches, or other acts of civil disobedience.[320] Even when cities and police departments have plans to *lawfully* arrest groups of people, however, not everyone follows the plan. This section will offer a few suggestions to minimize liability in the context of mass arrests by recommending measures that safeguard constitutional rights.

A. Lawful Mass Detentions as an Alternative to Unlawful Mass Arrests

Far fewer civil rights lawsuits stem from mass detentions lacking reasonable suspicion than mass arrests lacking probable cause.[321] Perhaps this is because a detention has far fewer legal consequences for individuals than an arrest, not to mention, it is a much less intrusive restraint on liberty. It appears that would-be plaintiffs feel less litigious when they are released at the scene following a brief detention than when they are released from jail following a full-fledged arrest. Would-be defendants should keep this in mind.

A detention is generally predicated upon individualized reasonable suspicion.[322] On the other hand, a "[m]ass detention, by its very definition,

---

[319] *See, e.g.*, Wilson v. Jean, 661 F. App'x 234, 237–38 (3d Cir. 2016) (finding officers had particularized probable cause to arrest single protestor because of his conduct in front of a fire station); Estate of Rosenbaum v. City of New York, 975 F. Supp. 206, 210 (E.D.N.Y. 1997) (praising New York police chief because he "discouraged officers from making [mass] arrests for . . . 'minor' crimes" and "engag[ing] in aggressive crowd control tactics, . . . [which] was communicated to officers under his command").

[320] *See supra* notes 49–61 and accompanying text.

[321] *But see* Lyall v. City of Los Angeles, 807 F.3d 1178, 1181 (9th Cir. 2015) (setting forth plaintiffs' complaints of mass detention); Lopez v. City of Houston, No. H-03-2297, 2008 WL 437056, at *9 (S.D. Tex. Feb. 14, 2008) (indicating mass detention was carried out without reasonable suspicion); Ratliff v. City of Houston, No. CIV.A.H-02-3809, 2005 WL 1745468, at *8 (S.D. Tex. July 25, 2005) (considering the question of "mass, suspicionless containment").

[322] Terry v. Ohio, 392 U.S. 1, 27 (1968) (explaining the standard of reasonable suspicion). Justice Warren explained as follows:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

is based on a lack of individualized suspicion."[323] Logically, it seems like unlawful mass detentions would lead to civil rights litigation. But, individualized reasonable suspicion is not *always* a prerequisite for a lawful detention.[324]

Even though officers must have articulable reasonable suspicion (articulation is achieved through the officers' detailed explanation for the detention), there are times when the detention is evaluated first and foremost by its reasonableness.[325] A classic example of this reasonableness-first analysis occurs in checkpoint cases where officers create a roadblock designed to briefly detain drivers and passengers, none of whom are individually suspected of committing a specific crime.[326] Another common lawful mass detention occurs in emergency situations when officers must detain a large group of people while securing an area and locating suspects.[327] Both of these types of detentions, when deemed reasonable, are permissible, even when they result in mass detentions.

Detentions are permitted primarily for investigative purposes,[328] to briefly ensure that officers remain safe during encounters with civilians,[329] and to

---

Id. (footnote and citations omitted).

[323] Christian J. Rowley, Note, Florida v. Bostick*: The Fourth Amendment—Another Casualty of the War on Drugs*, 1992 UTAH L. REV. 601, 634.

[324] *See* United States v. Paetsch, 782 F.3d 1162, 1169 (10th Cir. 2015) (observing that individualized reasonable suspicion is not required where the public interest outweighs the individual's liberty interests).

[325] *See id.* (describing reasonableness as the "touchstone of the Fourth Amendment"); United States v. Maltais, 403 F.3d 550, 556 (8th Cir. 2005) (concluding that an investigative detention was "reasonably necessary to achieve the purpose of the temporary seizure").

[326] *See Maltais*, 403 F.3d at 556 (citing Samson v. California, 547 U.S. 843, 855 n.4 (2006), City of Indianapolis v. Edmond, 531 U.S. 32, 37–38 (2000), United States v. Martinez–Fuerte, 428 U.S. 543, 545 (1976), and Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 447 (1990)).

[327] *See generally* Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755 (2004) (stating that "the government has repeatedly resorted to mass detentions in emergencies").

[328] *See* Illinois v. Wardlow, 528 U.S. 119, 125 (2000) (explaining that officers were permitted to "detain the individuals to resolve the ambiguity").

[329] Rowley, *supra* note 323, at 628 (criticizing this practice). One scholar, Christian Rowley, stated:

> The *Bostick* standard circumvents the traditional requirement of individualized suspicion. The decision allows the interdiction of an entire vehicle and the concurrent mass detention of a group of individuals without the slightest showing of particularized suspicion. This type of seizure without particularized suspicion was one of the most obnoxious features of the general writs and is precisely the type of police behavior that the Fourth Amendment was intended to preclude.

Id. (footnote omitted).

resolve ambiguities.[330] They are generally far less invasive than arrests. Nevertheless, because a detention can look like an arrest and even morph into one, courts must determine whether the detention lasted too long, was implemented in an unacceptable manner, or was otherwise unreasonable in achieving its purpose.[331] Although officers should use the least intrusive means available to investigate in the shortest amount of time possible,[332] the fact that the detention could have been shorter in duration or handled better does not necessarily render the detention unconstitutional, as officers must make quick decisions in rapidly changing circumstances.[333] Courts are reluctant to second-guess these decisions, particularly when they involve felonious criminal activity, or community or officer safety concerns.[334]

Several courts have found legitimate reasons for mass detentions. In 2012, the U.S. District Court for the District of Colorado decided *United States v. Paetsch*, which held that officers acted reasonably in detaining drivers and passengers in twenty vehicles for thirty minutes while they waited to determine which car contained stolen money and a GPS tracking device following a bank robbery.[335] The court found that the detention was reasonable given the severity of the crime, even when some aspects of the detention were troubling.[336] In another case decided that year, *Bernini v. City of St. Paul*, the U.S. District Court for the District of Minnesota upheld the detention of a large group of protestors who behaved dangerously because the detention was short in duration and officers attempted to differen-

---

[330] *Wardlow*, 528 U.S. at 125 (explaining that although conduct "was ambiguous and susceptible of an innocent explanation," officers were permitted to "detain the individuals to resolve the ambiguity").

[331] *See* Bernini v. City of St. Paul, 665 F.3d 997, 1005 (8th Cir. 2012) (finding a detention reasonable because it was investigatory in nature and lasted only as long as reasonably necessary); *Maltais,* 403 F.3d at 556 (considering the circumstances surrounding detention of plaintiffs).

[332] United States v. Tilmon, 19 F.3d 1221, 1225–26 (7th Cir. 1994).

[333] *See* Ryburn v. Huff, 565 U.S. 469, 477 (2012) (explaining that "reasonableness 'must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight'" and observing that "'[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving'") (quoting Graham v. Connor, 490 U.S. 386, 396–97 (1989)); *Tilmon*, 19 F.3d at 1225–26 ("A court in its assessment should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing.").

[334] *See Paetsch,* 782 F.3d at 1169 (emphasizing the importance of the public interest in the reasonableness calculus).

[335] United States v. Paetsch, 900 F. Supp. 2d 1202, 1205–10, 1215 (D. Colo. 2012), *aff'd*, 782 F.3d 1162 (10th Cir. 2015).

[336] *Id.* at 1215–16.

tiate and separate innocent persons from those suspected of engaging in criminal activity.[337]

Courts are pleased when officers actually investigate and sort out the guilty from the innocent before making the decision to arrest individuals.[338] The opposite is true too: courts are displeased when officers round up the innocent and guilty alike, making no effort to investigate or distinguish between detainees.[339] Consider what Judge Posner said in a case involving the mass arrest of protestors:

> Nothing is more common than for mass arrests in riots or demonstrations to net a sizable percentage of innocents. Persons knowingly involved in a disturbance are quicker to size up the situation and flee when the police close in on them; innocents often freeze in puzzlement, becoming sitting ducks easily swept up in the police charge.[340]

Posner's sound observation that in a mass arrest scenario the guilty flee and the innocent stay has been true in other mass arrest cases.[341] One federal court praised "police efforts to sort lawbreakers from bystanders, and to advise the latter that they should leave."[342] This kind of reasonableness persuades a court to believe that officers acted appropriately.

Police officers may think that to contain a crisis they must arrest first and investigate second. Detaining and investigating simultaneously, however, is a better and far more constitutionally sound option. Although it is the duty of officers to protect members of the public from violent crime and to

---

[337] Bernini v. City of St. Paul, No. CIV. 09-2312 PAM/JJG, 2010 WL 4386888, at *5 (D. Minn. Oct. 28, 2010), *aff'd*, 665 F.3d 997 (8th Cir. 2012).

[338] *See Bernini*, 665 F.3d at 1005 (observing that the police "attempted to discern who had been part of the unit at the intersection and released approximately 200 people, including seven of the plaintiffs, at the park"); Dinler v. City of New York, No. 04 CIV. 7921 RJS JCF, 2012 WL 4513352, at *1 (S.D.N.Y. Sept. 30, 2012) (stating that the crucial issue turned on the "officers' efforts to release innocent bystanders and to make sure that they arrested only those who participated in the unlawful march").

[339] *See* Mallory v. United States, 354 U.S. 449, 456 (1957) ("It is not the function of the police to arrest . . . at large and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause.'").

[340] Vodak v. City of Chicago, 639 F.3d 738, 750 (7th Cir. 2011).

[341] *See* Tommy Witherspoon, *Judge Rules Twin Peaks Biker, Wife Jailed with Sufficient Probable Cause*, WACO TRIB. (Aug. 17, 2015), http://www.wacotrib.com/news/twin-peaks-biker-shooting/judge-rules-twin-peaks-biker-wife-jailed-with-sufficient-probable/article_7f6da5d8-b70f-55fc-9cd3-6f7dc9d56964.html [http://perma.cc/78MY-G8XV] (reporting that under cross examination, law enforcement agent agreed with arrestees' attorney that arrested couple did not flee, were cooperative with police during the investigation, and did not appear to realize that they were suspects).

[342] *Dinler*, 2012 WL 4513352, at *6.

investigate suspected crime, they are also sworn to uphold the legal standards for detention and arrest. If the reason for detention can be characterized as a general interest in crime control, it is unconstitutional.[343] The beauty of detentions, however, is that officers, through good investigation, can make better arrest decisions that are more likely to fit within the Fourth Amendment's parameters.

Police departments and cities should consider training officers to detain *en masse* before arresting *en masse*, if the facts warrant such action. Of course, officers must still be able to articulate reasonable suspicion for doing so. Detentions are always evaluated for reasonableness; when an officer's actions cross that line, he risks exposure to civil liability. But, given the small number of lawsuits stemming from mass detentions, their less intrusive nature, and their lower threshold requirement, a questionable mass detention is better than a questionable mass arrest.

B. Increased Law Enforcement Training

Most police departments have in-house training on pertinent criminal law and procedural developments. Nevertheless, multiple-suspect and mass arrests are important but unlikely training topics. Training on these subjects could result in fewer lawsuits against officers, officials, and governments. Failure to train officers is a theory of liability under § 1983, albeit a limited one.[344] The Supreme Court in *City of Canton v. Harris* held that "inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[345] The *Harris* Court stated that § 1983 plaintiffs must establish that the officers' training was inadequate for the tasks the officers were required to perform and the training deficiency was closely related to the constitutional violation.[346]

Subsequent courts have framed the test another way. The Seventh Circuit Court of Appeals ruled that holding a city liable based upon a failure to train theory requires the plaintiff to prove that the city acted with deliberate indifference.[347] Evidence of "(1) failure to provide adequate training in light

---

[343] *Ratliff*, 2005 WL 1745468, at *10, *12 (citing Illinois v. Lidster, 540 U.S. 419, 424–26 (2004)) (noting that the city plan reflected unlawful interest in general crime control when it sought to detain teenagers before they had committed a crime for the purpose of ascertaining whether they were violating curfew, alcohol, or traffic laws).

[344] City of Canton v. Harris, 489 U.S. 378, 387 (1989) (stating that "there are limited circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983").

[345] *Id.* at 388.

[346] *Id.* at 390–91.

[347] Sornberger v. City of Knoxville, 434 F.3d 1006, 1029–30 (7th Cir. 2006).

of foreseeable consequences; or (2) failure to act in response to repeated complaints of constitutional violations by its officers" satisfies the deliberate indifference requirement.[348]

In order to hold a municipality or government liable for the deliberate indifference of its officers, the indifference must amount to a policy or custom.[349] A single arrest does not establish this level of indifference.[350] The Second Circuit explained that a "training program is not inadequate merely because a few of its graduates deviate from what they were taught."[351] Nevertheless, multiple mass arrest incidents may lead to a finding of liability under this theory.

One would hope that any government forced to settle millions of dollars in damages would learn from a single incident and not repeat its folly. New York City, however, was unable to learn from its mass arrest mistakes.[352] A New York federal district court concluded that because the city had several pending lawsuits stemming from multiple instances of mass arrests, this fact created a "plausible inference of deliberate indifference" to training officers "how to determine individual probable cause, instead of sweeping up arrestees *en masse*."[353] For this reason, police departments and governments would be well-advised to conduct and follow special training on mass arrests, understanding that once they have unlawfully arrested a group, they may be more susceptible to losing their qualified immunity in consecutive group arrest civil rights cases.

C. Diversified Arrest Policymaking Authority

Section 1983 liability can also attach through governmental officials who act as policymakers.[354] Chiefs of police, sheriffs, city council members, and elected district attorneys have been deemed policymakers liable for constitutional torts under § 1983.[355] Liability may arise when a policy,

---

[348] *Id.*

[349] *Harris*, 489 U.S. at 389.

[350] *See* Jenkins v. City of New York, 478 F.3d 76, 95 (2d Cir. 2007) (finding that a single arrest by an officer did not amount to a showing that a city had a faulty training program).

[351] *Id.*

[352] *See* Osterhoudt v. City of New York, No. 10CV3173(RJD)(RML), 2012 WL 4481927, at *2 (E.D.N.Y. Sept. 27, 2012) (indicating that the city had entered into multiple settlement agreements).

[353] *Id.*

[354] *See* Burge v. St. Tammany Parish, 336 F.3d 363, 369 (5th Cir. 2003) (explaining that policymakers can be found liable under § 1983 for maintaining an official policy that deprives individuals of their rights).

[355] *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 485 (1986) ("In ordering the Deputy Sheriffs to enter petitioner's clinic the County Prosecutor was acting as the final decisionmaker for

ordinance, regulation, decision, or plan results in the deprivation of constitutional rights.[356] Officials may be held liable when lawmakers have delegated policymaking authority.[357] Policymaking liability may also flow from a failure to act when there was a duty to avoid civil rights violations.[358] Whether someone is an official with policymaking authority is a question of state law to be decided by judges not juries.[359]

Local governments and officials may avoid liability by diversifying mass arrest decision-making authority. This could be accomplished by obtaining advice from multiple governmental legal departments before, during, and after a high-volume arrest. Many municipalities, governments, states, agencies, and elected officials have legal counsel and even entire legal divisions, particularly in mid-sized and larger cities. One purpose of these legal divisions is to limit governmental exposure to litigation and to provide legal counsel when civil liability issues arise. Given the expense governments face in these types of lawsuits, they should be looking to these legal divisions to minimize liability.

The Supreme Court has recognized that governments "often spread policymaking authority among various officers and official bodies."[360] Indeed, important decision-making authority is often so spread out that any one official or entity may have limited decision-making authority.[361] It is possible for governments and officials to minimize exposure even further by creating a checks-and-balances system by which various legal departments and entities are consulted prior to the decision to execute a mass arrest.

It is better practice to develop a policy for group or mass arrests that requires legal advisors from various governmental agencies to sanction the arrest while suspects are still only detained. Such a plan may minimize the potential for constitutional rights violations. For example, the district attorney, a legal representative for the law enforcement agency, the county attorney, and the city council or mayor could agree to hold any decision to arrest

---

the county, and the county may therefore be held liable under § 1983."); Dean v. Cty. of Gage, 807 F.3d 931, 941–43 (8th Cir. 2015) (explaining that under Nebraska state law, the Sheriff makes the final decision to arrest a suspect and thus the county could be held liable for unlawful arrests); Morgan v. City of DeSoto, 900 F.2d 811, 815 (5th Cir. 1990) (observing that City Council members, the Police Chief, and the Director of Public Safety could all be liable if they participated in the order of unlawful mass arrests).

[356] *See Burge*, 336 F.3d at 369 (explaining that liability arises under § 1983 when an official policy deprives individuals of their federally or constitutionally protected rights).

[357] Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984).

[358] *See Burge*, 336 F.3d at 369 (noting that liability may arise under § 1983 when a policymaker fails to "act affirmatively" to avoid violations).

[359] Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).

[360] *Pembaur*, 475 U.S. at 483.

[361] *Id.*

a group *en masse* until it has been screened by more than one lawyer, legal department, or advisor. Although it may be desirable to allow some decisions to be made ad hoc,[362] greater legal input and increased caution would likely reduce civil rights violations and lawsuits.

A potential danger of this approach is that it could spread liability, exposing more officials to suit.[363] But, there is also a danger in allowing only one body have control over mass arrest decisions. The Seventh Circuit implied in a mass arrest lawsuit involving nine hundred arrestees that the City Council should have "constrain[ed] the [Chicago Police] Superintendent's authority to make mass arrests in demonstration situations" but because it did not, it was deemed the policymaker and the city was liable for its decisions.[364] The court further suggested that in order for municipalities to be shielded from liability, city ordinances should constrain or limit policy-maker decisions when it comes to unlawful mass arrests.[365] Ultimately, when governments are able to pool legal resources to research and apply the law to a developing legal problem, it is likely that cooler minds will prevail, greater precautions will benefit all concerned, probable cause will be carefully and objectively assessed, and incidents of civil liability will be minimized.

CONCLUSION

Federal courts have confronted the concept of probable cause as it applies to multiple-suspect, group, and mass arrests. No court—not the Supreme Court in its recent *Wesby* decision[366] nor any other federal court—has adopted or sanctioned the concept of "group probable cause" or its equivalent.

The three Supreme Court opinions addressing probable cause in multi-suspect searches and arrests, including *Pringle*, reiterate that probable cause must be particularized. This fact alone settles the area of law and puts it beyond the realm of debate. Although *Pringle* was a heavily fact-specific case

---

[362] Eric J. Miller, *Role-Based Policing: Restraining Police Conduct "Outside the Legitimate Investigative Sphere,"* 94 CAL. L. REV. 617, 655 (2006) ("Other practices may be unsystematic and ad hoc, dependent upon the discretion of individual officials—police officers or prosecutors. These law-enforcement norms help the individual officer and the institution to determine its role, thereby identifying the scope of its authority.").

[363] *See Morgan*, 900 F.2d at 815 (finding that liability may be imposed on City Council members, the Police Chief, and the Director of Public Safety for their involvement in ordering mass arrests).

[364] *Vodak*, 639 F.3d 738 at 747–48.

[365] *Id.* at 748–49.

[366] District of Columbia v. Wesby, 138 S. Ct. 577, 589–93 (2018) (focusing its analysis on whether the action taken by the police was clearly established as prohibitive).

with little application to future multiple-suspect arrests, Justice Sonya Sotamayor recently stated in her *Wesby* concurrence that all probable cause determinations are "heavily factbound."[367] It is puzzling, therefore, that the Tenth Circuit refused to engage in a factually dense analysis of probable cause in *Callahan*, especially when the actions of the police-employer fell so short of satisfying the Fourth Amendment's probable cause standard to justify the arrest of all members of the group.

The majority of federal courts that have analyzed group and mass arrests have held that the Fourth Amendment does not require different probable cause standards for individual versus multiple-person arrests. The probable cause requirement should be taken at face value to require that officers have particularized probable cause to arrest, regardless of the number of arrestees. Whether this means that officers must have individualized probable cause to arrest a specific person for a specific crime or particularized probable cause that all persons in a riotous mob were acting as one criminal unit, officers must demonstrate that their actions were reasonable and the arrest was based upon probable cause. In *Barham*, the District of Columbia Court of Appeals confirmed this point: "case law addressing large-scale demonstration scenarios does not suspend—or even qualify—the normal operation of the Fourth Amendment's probable cause requirements."[368]

When the Framers drafted the Fourth Amendment, it was, in part, designed to eliminate unlawful mass arrests, which were commonplace when our nation was just a colony. It is illogical then for a twenty-first century federal court to consider sanctioning an arrest that lacks probable cause when the Framers sought to eliminate such arrests by ratifying the Fourth Amendment more than 200 years ago.

Citizens whose Fourth Amendment rights were violated by an officer's unlawful arrest deserve a chance to appear in court and litigate their cases. At a minimum, when Fourth Amendment rights are violated, plaintiffs should have the right to a trial and an opportunity to hold officers, governments, and officials accountable for civil rights violations. To prevent them from litigating violations of their Fourth Amendment rights in court is to devalue the Fourth Amendment's probable cause requirement entirely.

---

[367] *Id.* at 593 (Sotamayor, J., concurring).

[368] Barham v. Ramsey, 434 F.3d 565, 575 (D.C. Cir. 2006).