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# It Wasn't Me—Unintended Targets of Arrest Warrants

Brandon V. Stracener

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# It Wasn't Me—Unintended Targets of Arrest Warrants

Brandon V. Stracener*

*Innocent people are being arrested multiple times on arrest warrants intended for others. By virtue of sharing a name with someone who is the legitimate target of law enforcement, these innocent people experience unfair disruptions in their lives almost any time they have contact with law enforcement. As of today, the courts afford them no relief, based in part on a series of unfortunate interpretations of the Fourth Amendment. Nothing stops law enforcement from repeatedly arresting the same person as long as the person arrested has the opportunity to see a judge after spending several days in jail. Courts throughout this country accept that these innocent people can be arrested ad infinitum, as long as they see a judge within a reasonable amount of time.*

*This Note examines the development of jurisprudence on the particularity requirement in the Warrant Clause of the Fourth Amendment. Through a series of logical missteps, courts have whittled away at the otherwise clear Fourth Amendment avenue of*

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* Senior Research Fellow, California Constitution Center. Lecturer, University of California, Berkeley, School of Law, Spring 2017. Term Clerk, U.S. District Court for the Eastern District of California, 2017–18. Temporary Clerk, U.S. District Court for the Northern District of California, 2016. J.D., University of California, Berkeley, School of Law, 2016; B.A. University of California, Berkeley, 2012. Special thanks to Professor Kathryn Abrams, Professor Saira Mohamed, and the participants in the Spring 2015 *California Law Review* Publishing Workshop for their substantive feedback and encouragement. Additional thanks to Professor Charles Weisselberg and the *California Law Review* Notes & Comments Department for their substantive comments and suggestions. I would also like to thank Zachary Zaharoff and Jesús Alejandro Barrientos for their substantive feedback and infinite patience in this process. A final thank you to all the members of *California Law Review* and University of California, Berkeley, School of Law who have contributed to this piece in some way—this is truly a collaborative process.

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*relief for the unintended targets of arrest warrants. As long as the name on the warrant is the correct name for the target of the warrant, courts deem the Warrant Clause satisfied. And the officers on the scene cannot be blamed for acting in good faith when they arrest an individual whose name is identical to the name on the warrant. Thus, the only avenue left for these victims is an inadequate Fourteenth Amendment over-detention analysis.*

*This Note asserts that the avenue for relief lies in following a correct interpretation of the Fourth Amendment's Warrant Clause that courts have thus far ignored. Under this interpretation, victims can obtain injunctive relief through 42 U.S.C. § 1983, a statute permitting suit against persons acting under the color of state law for violations of federal constitutional or statutory rights.*[1] *Through this cause of action, victims can enjoin the organizations that issue these warrants to update them in a manner that satisfies the Fourth Amendment's particularity requirement. Most importantly, victims can stop worrying that every interaction with law enforcement will result in spending several days in jail for a crime they did not commit.*

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1. *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of [state law], subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

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## INTRODUCTION: NEW CONDITIONS APPLIED TO THE SAME CONSTITUTIONAL REQUIREMENT

Imagine that you are on your way to a family reunion. You are sitting in a parked car with your children, waiting for a loved one to return from their trip into the supermarket. Police officers, looking for a robbery suspect, approach you and ask for your identification. The officers return and inform you that you have warrants out for your arrest. You haven't committed any crimes, and you certainly would not have multiple warrants out for your arrest! The officers take you out of your car, twist your arms, and place you in handcuffs in front of your children. You miss your family reunion.

Four hours later, after checking your fingerprints, the police determine you are not the target of the warrants. They release you and advise you to stay home until the warrants clear. But they won't clear—these warrants have been active for five years. And this is not the first time you have been arrested for these same warrants.[2] In fact, you have been arrested, jailed, or detained eleven times in fifteen months for bench warrants issued in another city.[3] Before this arrest, you were attempting to call your lawyer to resolve the situation, but the police officers told you to hang up right before arresting you. You also had a copy of the article from a prominent newspaper detailing your story, with your photograph on it![4] But that did not matter to the arresting officers.

2. *See* Charlie Goodyear, *A Victim Who Keeps Getting Arrested*, SFGATE (Sept. 21, 2004), http://www.sfgate.com/news/article/A-victim-who-keeps-getting-arrested-tangled-in-2723585.php [https://perma.cc/6VTH-24Z4].

3. *Id.* (noting that Stancy Nesby of Oakland, California, "has been arrested, jailed or detained 11 times in 15 months, all because of bogus bench warrants issued in San Francisco").

4. *Id.* (detailing how Nesby presented a *San Francisco Chronicle* newspaper story bearing her photo and detailing her experience thus far to arresting officers).

Perhaps you can find a way to stop these needless arrests and disruptions to your life. You seek justice in the courts. But summary judgment is granted against you, and in favor of the city that issued these warrants.[5] To your surprise, the court holds that the city that issued the warrant "has no duty to correct mistaken warrants or otherwise protect [you] from bench warrants outstanding in [your] name."[6] Justice denied.

Stancy Nesby's story in Northern California is not the only example of this phenomenon. For instance, over the course of five years in Los Angeles County, more than 1,480 innocent persons were wrongfully incarcerated because their names just happened to match the wrong warrant at the wrong time.[7] Nor is this problem limited to California: Illinois, Texas, and Massachusetts all face this issue.[8] Intuitively, it is difficult to blame the arresting officers on the scene for relying on warrants that feature the same name and a similar description—sometimes even the same birthday—as the wrongfully arrested individual. Indeed, we are inundated with stories where officers inadvertently let a serious criminal go with only a citation.[9] This societal concern for officers failing to arrest serious criminals suggests that the problem of an innocent person arrested under an arrest warrant lies with the warrant itself. And unless the proper authorities—often county sheriff departments—update warrants to prevent repeat arrests of the same innocent person, someone unlucky enough to have a particular name may end up arrested seven times on a warrant intended for someone else.[10] Unfortunately,

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5. Nesby v. City & County of San Francisco, No. 434-494, 2006 WL 3193854 (Cal. Super. Ct. July 26, 2006).

6. *Id.*

7. *See* Robert Faturechi & Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011), http://articles.latimes.com/2011/dec/25/local/la-me-wrong-id-20111225 [https://perma.cc/TCQ7-EVFY]; *see also* Faye A. Silas, *A Bad Rap: Snafus in Computer Warrants*, 71 ABA J. 1, 24 (1985) (referring to a class action filed on behalf of approximately 2,000 people misidentified and wrongfully arrested based on arrest warrants in Los Angeles County).

8. *See, e.g.*, Herrera v. Millsap, 862 F.2d 1157, 1158–59 (5th Cir. 1989); Gero v. Henault, 740 F.2d 78, 83 (1st Cir. 1984); *see also* Brown v. Patterson, 823 F.2d 167, 168 (7th Cir. 1987) (holding that none of the defendants were liable for violating 42 U.S.C. § 1983 (2012)). The court observed, "The Chicago telephone book lists 15 Anthony Browns and 4 Tony Browns. No doubt some of them are both young and black and therefore covered, at least loosely, by the description in the warrant. Goodness knows how many of them have been or will be arrested in the quest for Anthony Moseley." *Id.*; Powe v. City of Chicago, 664 F.2d 639, 642–43 (7th Cir. 1981).

9. *See, e.g.*, Richard Simon, *Traffic Stops—Tickets to Surprises*, L.A. TIMES (May 15, 1995), http://articles.latimes.com/1995-05-15/local/me-841_1_routine-traffic-stops [https://perma.cc/V5GA-MV8A] (referring to multiple traffic stops that resulted in capturing perpetrators of violent felonies, as well as Los Angeles Police Department officers stopping "Richard Ramirez—the man later convicted of being the Night Stalker—for a minor traffic violation and let[ting] him go with a citation").

10. *See* Gant v. County of Los Angeles, 772 F.3d 608, 612 (9th Cir. 2014). Government reporting has indicated substantial issues regarding criminal history records. *See* BUREAU OF JUSTICE STATISTICS, USE AND MANAGEMENT OF CRIMINAL HISTORY RECORD INFORMATION 38 (2001) ("In the view of most experts, inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency affecting the Nation's criminal history record information systems."); BUREAU OF JUSTICE STATISTICS, IMPROVING ACCESS TO AND INTEGRITY OF CRIMINAL

the ramifications of being arrested multiple times extend far beyond that of the substantial burdens imposed on one's life by repeatedly spending significant time in jail—for example, employment and law school applications often inquire about past *arrest* records, and an arrest itself permits law enforcement to extract your DNA for use in its databases.[11] Today, being arrested has serious consequences, even if one is released after only a few hours.

This Note suggests that the particularity requirement in the Warrant Clause of the Fourth Amendment[12] contains the doctrinal solution for this problem. Through the vehicle of a 42 U.S.C. § 1983 cause of action, innocent persons can enjoin the issuer of the warrant to update the warrant to prevent future major disruptions to their lives. Part I of this Note traces the development of the Fourth Amendment's particularity requirement, a requirement that courts have fallaciously morphed from the initial rule that the U.S. Supreme Court formulated in 1894.[13] The morphed version of this rule currently resides in the Federal Rules of Criminal Procedure,[14] where a correct name alone is deemed sufficient, no matter how particular (or not) the warrant actually is. Courts have continued to employ this simple, bright-line rule—that a correct name satisfies the particularity requirement—despite the growing awareness that innocent persons with matching names are being wrongfully incarcerated pursuant to an arrest warrant. This trend logically conflicts with the reasoning of cases involving "John Doe" arrest warrants, warrants that contain the name "John Doe" with no additional description of the subject of the warrant, which multiple circuits have held are not valid warrants.[15]

Part II examines the detour that occurred after the Supreme Court's decision in *Baker v. McCollan*, which directed federal appeals courts' attention away from particularity requirement concerns and toward a procedural due process framework.[16] Subsequently, courts have tended to promulgate holdings that would support the repeated wrongful arrest of persons other than the subject of the warrant, as long as the person arrested appears before a judge in a reasonable amount of time.

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HISTORY RECORDS 11, 13 (2005) (observing "significant backlogs, older records that have no dispositions, and infrequent audits to ensure accuracy of [criminal history] records," including at least twenty-three states that had not audited their databases in the past five years and thirteen of those twenty-three states with no plan to conduct an audit within the next three years).

11. *See* Maryland v. King, 133 S. Ct. 1958, 1962 (2013) (holding that "a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment").

12. U.S. CONST. amend. IV ("[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly* describing . . . the persons or things to be seized.") (emphasis added).

13. West v. Cabell, 153 U.S. 78 (1894).

14. FED. R. CRIM. P. 4(b)(1)(A).

15. *See infra* Part I.D.

16. 443 U.S 137, 140–41 (1979).

Part III explores possible doctrinal solutions to the problem of repeated arrests based on mistaken identity. First, I reject the suggestion that we should shift away from assessing the reasonableness of the arrest and toward assessing only probable cause for the arrest based on a warrant.[17] This solution focuses attention on the wrong party—the officers making the arrest—instead of on the party issuing the insufficiently particular warrant. Instead, I advocate that the Fourth Amendment's particularity requirement is not met when law enforcement knows that the warrant description, even with a full and accurate name, includes innocent persons. I also reject the notion that, because courts may remain hesitant about muddying today's simple, bright-line rule for the particularity of arrest warrants, a solution could lie somewhere within the due process framework. Contemporary court decisions that engage in this due process analysis do not provide much hope for victims.[18]

Part IV reviews the numerous hurdles a plaintiff must face before being able to obtain a remedy through the vehicle of section 1983. Although these hurdles create great difficulty for a victim in obtaining an injunction against the party that issued the insufficiently particular warrant, they also serve as suitable controls for preventing a flood of litigation if a doctrinal shift were to occur. And if the section 1983 plaintiff can overcome these hurdles, then the plaintiff might actually achieve a judgment against the truly liable party—the agency responsible for making warrants sufficiently particular. These barriers help to ensure fairness to law enforcement officials who operate in good faith and to focus attention on the party worthy of the deterrent function of section 1983 liability.

## I.
## THE DEVELOPMENT OF THE PARTICULARITY REQUIREMENT

### *A. The Supreme Court's Relative Lack of Development*

The seminal case on the particularity requirement of the Warrant Clause is *West v. Cabell*.[19] In this case, a man named Vandy M. West was arrested pursuant to a warrant for a James West.[20] Vandy West brought suit against the arresting officer; the officer countered that the warrant was indeed intended for Vandy M. West.[21] The trial court "instructed the jury that, if they believed that

17. *See* Melanie Schoenfeld, *Constitutional Amnesia: Judicial Validation of Probable Cause for Arresting the Wrong Person on a Facially Valid Warrant*, 79 WASH. U. L.Q. 1227 (2001); *infra* Part III.

18. *See infra* Part II; *Baker*, 443 U.S. at 140–41; Rivera v. County of Los Angeles, 745 F.3d 384 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014).

19. Gero v. Henault, 740 F.2d 78, 83 (1st Cir. 1984). *See generally* West v. Cabell, 153 U.S. 78 (1894).

20. *Cabell*, 153 U.S. at 85.

21. *Id.*

the plaintiff was the man for whose arrest the commissioner issued the warrant, the defendants were not liable for damages on account of the mere fact of arrest."[22]

Upon taking this case, the Supreme Court observed a general rule: "By the common law, a warrant for the arrest of a person charged with crime must truly name him, or describe him sufficiently to identify him."[23] The Court reversed the judgment against the arresting officers because "the effect of the rulings and instructions of the court [caused the jury] to understand that the private intention of the magistrate was a sufficient substitute for the constitutional requirement of a particular description in the warrant."[24] Thus, the Court developed a bright-line rule: a warrant with an incorrect name and without a description sufficient to identify the warrant's target fails to satisfy the particularity requirement of the Fourth Amendment.[25] The intended target of a warrant is irrelevant to the inquiry.[26] Later, in *Wong Sun v. United States*, the Court held that this particularity requirement applies to both arrest and search warrants. Thus, warrants must truly name the person or sufficiently describe them under the particularity requirement.[27]

### *B. Early Decisions Make the Particularity Requirement Less Restrictive*

Since *Cabell*, the particularity requirement in relation to arrest warrants has only developed in the federal courts of appeal—the Supreme Court's attention has gravitated toward search warrants instead.[28] In *Cox v. Durham*, the first federal appellate case to rely on *Cabell*, the Eighth Circuit upheld the warrant in question as sufficiently particular.[29] The court distinguished the facts of the case from *Cabell* by reference to "the modern doctrine . . . that a man may be sufficiently described by the initial letter of his given name, as well as by the name in full."[30] The court reasoned that "this is so especially where a man is commonly designated by the initial letter of his given name, and where he answers to that name and makes a practice of writing his name in that way

22. *Id.*
23. *Id.*
24. *Id.* at 88.
25. The Court did note that the warrant here commanded "the arrest of James West, and" did not otherwise designate or describe "the person to be arrested." *Id.* at 85.
26. *See* United States v. Swanner, 237 F. Supp. 69, 71–72 (E.D. Tenn. 1964) (observing that *Cabell* held that a warrant bearing an incorrect name "would not justify the arrest of a person who had never been known or called by that name . . . irrespective of the intention of the issuing officer").
27. 371 U.S. 471, 481 n.9 (1963) ("The requirement applies both to arrest and search warrants. A description of a suspect merely as 'Blackie Toy,' operator of a laundry somewhere on Leavenworth Street, hardly is information 'particularly describing . . . the person . . . to be seized.'").
28. *See* United States v. Donovan, 429 U.S. 413, 427 n.16 (1977) (observing that *Cabell*, in contrast, "concerns the need for proper identification of the subject of an arrest warrant"); Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967).
29. 128 F. 870, 874 (8th Cir. 1904).
30. *Id.* at 873.

in ordinary business transactions."[31] The warrant named a "J. I. Cox" when the intended subject of the warrant was James T. Cox.[32] The court also relied on "the rule" that an "omission" or "mistake" in relation to the middle name or middle initial "is not regarded as material."[33] The reasoning here signaled a modest retreat from *Cabell*'s rather defendant-friendly bright-line rule. Nonetheless, the Eighth Circuit's analysis remained functional, acknowledging the context that could shed light on whether this warrant was sufficiently particular. No further development occurred in relation to the name on an arrest warrant until the adoption of the Federal Rules of Criminal Procedure.

### *C. The Federal Rules of Criminal Procedure Undermine the Constitutional Command of the Particularity Requirement*

Adopted in 1944, the Federal Rules of Criminal Procedure contain a requirement that has remained virtually unchanged to this day: a warrant must "contain the defendant's name *or*, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty."[34] The rule's language suggests that the defendant's name alone will satisfy the requirement—"a description by which the defendant can be identified with reasonable certainty" only matters when the defendant's name is unknown.[35]

This logical leap, if it can be called logical, does not reflect the rule outlined in *Cabell*, or even the reasoning of *Cox*. An incorrect name without any additional description invalidates a warrant. It does not logically follow that a correct name alone can, as a categorical rule, ensure that the warrant is valid. This is a common logical fallacy: the statement, "If not X, then not Y" does *not* equate to, "If X, then Y." In this situation, X would be a proper name on the arrest warrant, and Y would be a sufficiently particular warrant. Another example to illustrate this is a peanut butter-and-jelly sandwich. If a sandwich lacks jelly, then it is not a peanut butter-and-jelly sandwich. But if the sandwich has jelly, it does not logically follow that the sandwich is a peanut butter-and-jelly sandwich.

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31. *Id.*

32. *Id.*

33. *Id.*; *see also* O'Halloran v. McGuirk, 167 F. 493, 494 (1st Cir. 1909) ("At the common law, and in the federal courts, this would not be a misnomer, because, at the common law, everything beyond the surname and the Christian name proper is inconsequential.").

34. FED. R. CRIM. P. 4(b)(1)(A) (emphasis added).

35. *See* United States v. Curtis, 427 F.2d 630, 632 n.2 (D.C. Cir. 1970). The first federal court to reference the Federal Rules of Criminal Procedure alongside *Cabell* observed that, "there is room for nickname and alias warrants under the Federal Rules of Criminal Procedure." *Id.* But "an extra dimension of risk" would arise because "the validity of the arrest" would depend "on the accuracy of the witness as to whether the person arrested had in fact used the name set forth in the warrant." *Id.* The court relied on *United States v. Swanner*, 237 F. Supp. 69, 71–72 (E.D. Tenn. 1964), where a judge ruled a warrant invalid in part due to its reliance on an alias when "the defendant had never been known or called by that name and was not himself a party to the officer obtaining this misnomer."

The *Cox* court's reliance on "modern doctrine"—that persons are known by their first initial alone coupled with their last name, with the middle initial being immaterial—shows that the Fourth Amendment's particularity requirement includes something more than a correct name.[36] In contrast, a categorical rule that a name alone—as long as it is correct—renders a warrant valid ignores the reality that individuals, especially in modern-day cities with high populations, could share the same name. Thus, this categorical rule necessarily ignores the constitutional command of the Fourth Amendment: that the warrant "particularly" describe "the person . . . to be seized."[37] Faithful application of the Warrant Clause of the Fourth Amendment, as proposed by this Note,[38] will ensure adherence to constitutional requirements.

### *D. Modern Development of the Particularity Requirement: The John Doe Warrant*

Cases involving "John Doe" warrants—warrants that do not actually name the warrant's subject—demonstrate the independent force of the particularity requirement beyond the simple name requirement of the Federal Rules of Criminal Procedure. Multiple circuits have held that warrants containing the name "John Doe" with no additional description of the subject of the warrant are invalid. This illustrates the principle outlined in *Cabell* that a name that does not sufficiently identify the warrant's target fails to meet the Warrant Clause's particularity requirement.

The issue of "John Doe" warrants first presented itself in *United States v. Jarvis*, where the government had obtained an indictment against a known codefendant and a then-unknown defendant, "John Doe."[39] Subsequently, a "'John Doe' warrant issued, but there was no description of this 'John Doe' in either the indictment or the warrant."[40] The trial court relied on "'extrinsic evidence' [that] was available which provided clear, sufficient identification of the defendant."[41] The Second Circuit reasoned that "such extrinsic evidence" could not "be used to validate an otherwise invalid warrant."[42] The use of this extrinsic evidence would defeat the very purpose of the warrant requirement: to "permit a neutral magistrate to make the decision whether to authorize arrest, rather than leaving this decision up to the prosecutor or officer."[43] The court reasoned that "[i]f the prosecution were permitted to arrest on the basis of 'John Doe' warrants supplemented by extrinsic evidence, the requirement for a

36. *Cox*, 128 F. at 873.
37. U.S. CONST. amend. IV.
38. *See infra* Part III.B.
39. 560 F.2d 494, 496 (2d Cir. 1977), *cert. denied*, 435 U.S. 934 (1978).
40. *Id.*
41. *Id.* at 497.
42. *Id.*
43. *Id.*

particularized warrant, issued by a magistrate, would become a nullity."[44] Thus, the court held that the "John Doe" warrant "on which Jarvis was arrested was not a valid warrant."[45] In sum, the warrant itself must be sufficiently particular to identify the actual target of the warrant.

The Third Circuit went a step further. In *United States v. Doe*, the warrant contained the first name "Ed."[46] But the court did "not think that this additional piece of information render[ed] the warrant sufficiently specific to satisfy the [F]ourth [A]mendment."[47] Although "extrinsic information" known to the officer "will be necessary to execute" the warrant, and a warrant's "written description cannot conceivably eliminate all possibilities of erroneous execution," the court reasoned that the "warrant in this case does *not* reduce to a tolerable level the number of potential subjects: anyone with the first name 'Ed'—and there must be thousands of 'Eds' in the Pittsburgh area—is fair game."[48] The court also explained that the particularity requirement is distinct from probable cause: "even assuming that the officer swearing out a 'John Doe' warrant has demonstrated probable cause to arrest someone, the warrant, by its terms, will allow the executing officer to make his own inferences in effecting an arrest. For these reasons, 'John Doe' warrants consistently have been held illegal."[49]

The Second and Third Circuits clarify that the particularity requirement has independent force because we want to ensure that neutral magistrates serve as a check on the executive power of law enforcement. And if a showing of probable cause through extrinsic evidence can obviate the need for a particularized warrant, then the judiciary's purported check on the executive becomes rather hollow. Additionally, the Third Circuit here has provided a functional outlook on the use of names in warrants—a name that covers multiple people, or at least thousands of people, cannot be sufficiently particular. By extension, the same principle that renders a name of "Ed," which covers multiple people named "Ed," insufficiently particular could render a full legal name that covers multiple people insufficiently particular, especially where this full legal name has demonstrably led to the arrest of an innocent person multiple times.

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44. *Id.*

45. *Id. Compare Jarvis*, 560 F.2d at 494, *with* United States v. Ferrone, 438 F.2d 381, 389 (3d Cir. 1971) (finding a "John Doe warrant" to be "valid" because it provided a "physical description" of "a white male with black wavy hair and stocky build . . . coupled with the precise location at which he could be found"), *and* United States v. Espinosa, 827 F.2d 604, 611 (9th Cir. 1987) ("The search warrant for Espinosa provided a more detailed physical description of the individual to be searched than in *Ferrone*."). *Ferrone* relied in part on *United States v. Ventresca*, 380 U.S. 102, 108 (1965) ("Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area.").

46. 703 F.2d 745, 747 (3d Cir. 1983).

47. *Id.*

48. *Id.* at 748.

49. *Id.* at 747.

The Fifth Circuit echoed this functional analysis when it held that a warrant incorrectly identifying the defendant, Hirschhorn, as an individual named "Theilen" was nonetheless valid.[50] The officers knew the defendant as "Theilen" based on an anonymous informant, and the "three warrants at issue" centered on two of the defendant's apartments and a "Buick automobile driven by him" with a specific license plate number.[51] Thus, the additional description rendered this warrant sufficiently particular.

The First Circuit reached a similar result in *United States v. Pérez-González* with respect to a John Doe warrant.[52] The John Doe warrant in question included "the description 'Male, White Hispanic, Approximately 5 feet 9 inches and 210 pounds' and was accompanied by a photograph of Pérez-González standing on a Humvee with a sledgehammer."[53] The court declined to invalidate this warrant in part because "the warrant was accompanied by a photo, a significant factor in assessing its adequacy."[54]

Ultimately, the results in these Warrant Clause cases are inconsistent: if the name is incorrect, incomplete, or not supplied at all, then the court will examine the remainder of the description in the warrant to determine the warrant's validity.[55] But if the name on the warrant matches the actual name of the defendant, then the court will conduct no further inquiry—the warrant is valid per the Federal Rules of Criminal Procedure. This standard flies in the face of the rationale espoused in cases on "John Doe" warrants, or even in the case of the Third Circuit, a warrant with a name that simply covers too many people. Courts' attention to factors beyond the name featured in the arrest warrant better reflect the Fourth Amendment's constitutional command that a warrant "particularly" describe "the person . . . to be seized"[56] than the Federal Rules' rigid and simple name requirement.

## II.
## THE SUPREME COURT FINALLY WEIGHS IN, DISTRACTING FROM THE ISSUE

The Supreme Court's decision in *Baker v. McCollan* set the stage for future courts to give short shrift to particularity requirement issues in cases of

50. United States v. Hirschhorn, 649 F.2d 360, 362–63 (5th Cir. 1981).
51. *Id.* at 362.
52. 445 F.3d 39, 44 (1st Cir. 2006).
53. *Id.* at 43.
54. *Id.* at 44.
55. The modern use of DNA identifiers in John Doe warrants also supports this proposition, albeit at the state court level. *See* People v. Robinson, 224 P.3d 55, 61 (Cal. 2010) ("[W]e find that an unknown suspect's unique DNA profile satisfies the 'particularity' requirement for an arrest warrant."); State v. Dabney, 663 N.W.2d 366, 372 (Wis. 2003) (concluding that "the DNA profile satisfies the particularity requirements in identifying a suspect whose name is not known"). *See generally* Micah Sucherman, Note, People v. Robinson*: Developments and Problems in the Use of "John Doe" DNA Arrest Warrants*, 99 CALIF. L. REV. 885 (2011).
56. U.S. CONST. amend. IV.

mistaken identity.[57] There the Court favored an over-detention analysis under the Fourteenth Amendment, despite the particular facts of *Baker* precluding a Fourth Amendment analysis.[58] In *Baker v. McCollan*, the plaintiff's brother had "somehow procured a duplicate" of the plaintiff's "driver's license, identical to the original in every respect except that" it contained the brother's photograph in place of the plaintiff's.[59] The brother was arrested on narcotics charges, booked, made to "sign[] various documents," and released on bail under the plaintiff's identity.[60] A warrant was ultimately issued in the plaintiff's name.[61]

The plaintiff was stopped for running a red light and mistakenly detained under the warrant.[62] The plaintiff remained in county jail for three days, protesting mistaken identity,[63] until "officials compared his appearance against a file photograph of the wanted man and, recognizing their error, released him."[64]

The Court observed that the plaintiff's claim was "not for the wrong name being placed on the warrant or the failure to discover" and change the name, "but rather for the intentional failure to investigate and determine that the wrong man was imprisoned."[65] Observing that the plaintiff launched no "attack on the validity of the warrant," the Court concluded that the plaintiff's claim "gives rise to no claim under the United States Constitution."[66]

The Court noted without explanation that the plaintiff's arrest and detention were "pursuant to a warrant conforming, for purposes of our decision, to the requirements of the Fourth Amendment."[67] The Court then analyzed the plaintiff's claim under a Fourteenth Amendment framework. Although the Court observed that "detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law,'" the Court concluded that it was "quite certain that a detention of three days over a New Year's weekend does not and could not amount to such a deprivation."[68] The disposal of the warrant's validity in such a summary fashion, especially when the plaintiff had not raised a Fourth Amendment claim, coupled with its primary focus on the duration of detention created a

57. *See* 443 U.S. 137 (1979).

58. *See id.* at 143–44 (observing that the plaintiff made no Fourth Amendment claim, then holding without explanation that the warrant conformed "to the requirements of the Fourth Amendment").

59. *Id.* at 137, 140.

60. *Id.* at 140–41.

61. *Id.* at 141.

62. *Id.*

63. *Id.* at 144.

64. *Id.* at 141.

65. *Id.* at 143.

66. *Id.* at 143–44.

67. *Id.* at 144.

68. *Id.* at 145.

ripple effect that has produced faulty reasoning in subsequent decisions in the federal courts of appeals. As a result, the importance of satisfying the Fourth Amendment's particularity requirement for arrest warrants remains neglected, and cases of repeated mistaken identity now fall under an ill-fitting over-detention analysis.

### *A. Murray v. City of Chicago* and *Powe v. City of Chicago Shed Some Light on the Issue*

A little more than a year after *Baker* was decided, the Seventh Circuit distinguished the facts of *Baker* from the facts laid out in *Murray v. City of Chicago*.[69] The plaintiff in this case had been the victim of a theft—her "purse and checkbook were stolen."[70] Some of the stolen checks "were cashed at various retail stores," ultimately resulting in the plaintiff's arrest.[71] The court dismissed all but one complaint.[72] But the plaintiff mistakenly believed that all the charges were dismissed and failed to appear, prompting the court to issue a warrant for her arrest.[73] The plaintiff ultimately learned of the warrant and appeared in court, and the warrant "was quashed and recalled by the court,"[74] meaning the court deemed the warrant invalid. Unfortunately, the plaintiff was later arrested at her home "by two Chicago police officers, pursuant to the invalid warrant."[75] Despite the plaintiff's explanation that the warrant had been recalled, the officers still took the plaintiff to police headquarters, where she was "forced to strip naked and submit to searches conducted and observed by Chicago police officers" and released after being held "for six or seven hours."[76]

In reversing the district court's grant of summary judgment to various defendants, the Seventh Circuit observed deficiencies in affidavits from the clerk's office personnel and the police department about the transmission and receipt of "warrant recalls."[77] In addition to concluding that the plaintiff suffered "a violation of constitutional rights by being arrested and detained pursuant to an invalid warrant," the court also stated, "The defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other. Someone is surely at fault for failing to establish or execute appropriate procedures for preventing such serious malfunctionings in the administration of justice."[78] But the court did acknowledge an available affirmative defense for

69. 634 F.2d 365 (7th Cir. 1980).
70. *Id.* at 365.
71. *Id.* at 366.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

the arresting officers, that of "good faith action under apparently valid authority."[79] This acknowledgement implies that, if the arresting officers were successful in their good-faith defense, then the "[s]omeone" who is "surely at fault"[80] must be the party responsible for the invalid warrant. Finally, the court distinguished this case from *Baker*, observing, "In that case there was a valid warrant. It merely named the wrong suspect. . . ."[81] Here, the court realized that some party must be responsible for the arrest of an innocent person under a warrant that named both her and the warrant's legitimate target. If arresting officers act in good faith, then the responsible party must be the one responsible for issuing or failing to correct the invalid warrant. But the mere reversal of summary judgment by the Seventh Circuit—the appropriate remedy given the procedural posture of the case—did not quite arrive at any firm conclusions about who was at fault.

Approximately one year later, the Seventh Circuit in *Powe v. City of Chicago* addressed yet another case that involved a plaintiff arrested pursuant to a warrant arising out of the actions of another individual.[82] The plaintiff in this case, Andrew Powe, "was the victim of an armed robbery committed by one Ernest Brooks, who took . . . Powe's wallet containing his identification."[83] Brooks, later arrested for another crime, used Powe's stolen identification, pleaded guilty, was sentenced to probation, and then violated probation.[84] A warrant was issued for the arrest of "Andrew Powe, a/k/a Ernest Brooks" with the Cook County Sheriff's Fugitive Warrant Section.[85]

Later, the Chicago police stopped the real Andrew Powe for a traffic offense.[86] A routine computer check revealed the warrant, and Powe was placed under arrest, spending the night in jail (unable to post bond until the next day).[87] After Powe explained the circumstances in court and the prosecutor was permitted the opportunity to investigate, Powe was ultimately discharged.[88] Three months after this discharge, Chicago police stopped Powe for speeding.[89] A computer search for outstanding warrants revealed the probation violation warrant.[90] Powe spent the night in jail and was released the next day, "many hours" after a Cook County Probation Department employee,

79. *Id.* at 367 (citations omitted).
80. *Id.* at 366.
81. *Id.* at 367.
82. *See* 664 F.2d 639, 642–43 (7th Cir. 1981).
83. *Id.* at 642.
84. *Id.*
85. *Id.* at 642–43.
86. *Id.* at 643.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*

"who had a photograph of the actual probation violator, informed the Chicago police officers . . . that Powe was not the man sought in the warrant."[91]

The court referred to Powe's allegations in the complaint, where Powe claimed "that the warrant 'was without adequate specificity to identify the intended arrestee.'"[92] Powe also alleged that the warrant was deficient "when [it] was reissued after his first arrest."[93] Specifically, Powe "complain[ed] that the warrant was issued in his name *in spite of the knowledge on the part of law enforcement* agencies . . . that Brooks was 'a person who employed several aliases.'"[94]

After observing their prior holding in *Murray* that "*Baker* cannot be applied to preclude the arrestee's claim of an unconstitutional deprivation of liberty" when "an arrest is made pursuant to an invalid warrant," the court then examined precedent for the Fourth Amendment's particularity requirement.[95] Ultimately, the court concluded, "Where the authorities do not know, or are uncertain of the intended arrestee's name, then the name placed on the warrant . . . is, to one degree or another, arbitrary."[96]

Applying the particularity requirement to the facts of this case, the court reasoned that a warrant that "simply gives one or two of several names which, for all the authorities know, the arrestee might or might not be using, does not provide sufficient information on which an arrest may be based."[97] Coupled with no other description of the person in the warrant, this created "a substantial risk . . . that a person to whom not the least suspicion has attached will be arrested."[98] In addition to concluding that "[t]his risk cannot be tolerated under the [F]ourth [A]mendment," the court observed that the risk was "avoidable"—in this case, "the authorities clearly had had sufficient contact with the man who violated probation to be able to describe him in the warrant."[99] Ultimately, "[t]he failure to describe him, although authorities knew there was some uncertainty about his true name, render[ed] the warrant invalid."[100]

Unlike other cases, *Powe* featured a situation in which law enforcement was aware of the possibility that the name in the warrant, ordinarily sufficient to satisfy the particularity requirement of the Fourth Amendment, did not actually belong to the subject of the warrant. This awareness of a substantial

91. *Id.*
92. *Id.* at 644.
93. *Id.*
94. *Id.* (emphasis added).
95. *Id.* at 644–46.
96. *Id.* at 647.
97. *Id.* at 647–48.
98. *Id.* at 648.
99. *Id.*
100. *Id.*

risk that the warrant could lead to the detention of an innocent person featured prominently in the court's opinion.

As discussed earlier, the Seventh Circuit in *Murray* acknowledged that a party must be at fault for the violation of a plaintiff's constitutional rights resulting from an invalid warrant, but the court merely hinted at that fault lying with the agency responsible for the warrant.[101] Nor did the court specify just what sort of "violation of constitutional rights" had occurred as a result of plaintiff "being arrested and detained pursuant to an invalid warrant."[102] Fortunately, in *Powe* the Seventh Circuit squarely addressed the Fourth Amendment particularity issue and found the warrant lacking.[103] Taken together, these cases represent steps in the appropriate direction toward a faithful application of the Fourth Amendment's particularity requirement.

### *B. Subsequent Circuit Court Decisions Fail to Scrutinize the Fourth Amendment Issue*

Other cases have largely remained silent on Fourth Amendment concerns related to warrants with names matching an innocent individual.[104] Even the Seventh Circuit has retreated from its decision in *Powe*, ostensibly by distinguishing its facts from the facts in newer cases. For instance, in *Brown v. Patterson*, a city police officer arrested the plaintiff, Anthony Brown, pursuant to a county warrant for an "Anthony Moseley, alias 'Anthony Brown.'"[105] Brown matched the warrant description of a black male.[106] Two months after being charged with Moseley's offenses, Brown appeared in court and "was discharged with the notation that the wrong defendant was in court."[107] The warrant for Moseley was reissued.[108] A week after Brown's court appearance, "three police officers arrived at Brown's home *in Phoenix* to arrest him again

101. Murray v. City of Chicago, 634 F.2d 365, 366–67 (7th Cir. 1980) (reasoning that "[t]he defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other" while acknowledging the availability of a "good faith" defense available to the arresting officers).

102. *Id.* at 366.

103. *Powe*, 664 F.2d at 648.

104. *See, e.g.*, Soto v. Ortiz, 526 F. App'x 370, 374 (5th Cir. 2013) (concluding that there was no due process violation where a "Carlos Soto" was arrested by city police pursuant to a county warrant for a "Carlos Reyes Soto" that also contained a matching social security number and date of birth). The court, in an unpublished per curiam memorandum, cited to *Baker* and observed that in this case, a law enforcement official investigated Soto's identity based on a phone call from Soto's wife. *Id.* at 375. Despite confirming that Soto's date of birth and social security number matched the warrant, the official continued investigating by obtaining a fax from the county that issued the warrant. But the fax was of poor quality, and the three-day delay in Soto's release was only caused by a holiday weekend. *Id.* The official resumed investigation the day after the holiday weekend, and Soto was ultimately released. *Id.*

105. 823 F.2d 167, 168 (7th Cir. 1987).

106. *Id.*

107. *Id.*

108. *Id.*

on the warrant for Moseley," only deciding not to arrest Brown when he showed the officers his court "half-sheet" dismissing the charges.[109]

The court acknowledged that "[t]he problem illustrated by this case is potentially a serious one," observing that the "Chicago telephone book lists 15 Anthony Browns and 4 Tony Browns. . . . Goodness knows how many of them have been or will be arrested in the quest for Anthony Moseley."[110] The court distinguished this case from *Powe* (the warrant in *Powe* "in fact named the wrong person"), *Doe* (where only a name of "Ed" was given), and *Cabell* ("where the Supreme Court merely held that a warrant to be valid must specifically name or identify the person to be arrested").[111] In contrast, in this case the arrest warrant for Anthony Moseley did name or identify the person to be arrested.[112] Concluding that no Fourth Amendment issue was present in this case, the court then focused on the potential liability for due process violations.[113]

The Seventh Circuit arrived at a similar conclusion in *White v. Olig*.[114] In this case, the plaintiff, Willie D. White was arrested pursuant to a warrant in a different county for a "Willie White."[115] The plaintiff had the same date of birth as was on the warrant. The subject of the warrant was "described as a six foot tall black male, weighing 180 pounds."[116] The plaintiff was "a five foot seven, 175 pound black male from [the issuing county]."[117] But the court referred to the general rule that "an arrest warrant that correctly names the person to be arrested is considered constitutionally sufficient and need not contain any additional identifying information," concluding that, "despite [the warrant's] lack of detail, [it] was facially valid under the Fourth Amendment."[118]

This recent shift reflects the modern tendency to treat the particularity requirement as a brief, simple analysis.[119] Despite the constant reference to the Fourth Amendment and potential violations of constitutional rights, this cursory analysis appears merely to satisfy the Federal Rules of Criminal

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109. *Id.*
110. *Id.*
111. *Id.* at 169.
112. *Id.*
113. *Id.* at 169–70; *see infra* Part III.
114. 56 F.3d 817, 819 (7th Cir. 1995).
115. *Id.* at 818. "Willie White" was the correct subject of the warrant, but the subject was not the same individual as the plaintiff. *Id.*
116. *Id.* at 818.
117. *Id.* at 819.
118. *Id.*
119. *See, e.g.*, Wanger v. Bonner, 621 F.2d 675, 682 (5th Cir. 1980) (citing to the Federal Rules of Criminal Procedure when observing that "[g]enerally, the inclusion of the name of the person to be arrested on the arrest warrant constitutes a sufficient description to satisfy the fourth amendment requirement that the person to be seized be described with particularity").

Procedure rather than the Fourth Amendment itself.[120] Although these courts may be taking the lead from the Supreme Court in *Baker*, the facts in these cases are different. Here, Fourth Amendment issues are squarely presented, whereas in *Baker*, the plaintiff did not make a Fourth Amendment challenge to the warrant under which he was arrested. The constitutional commands of the Fourth Amendment should not suddenly disappear when a court relies on the Federal Rules of Criminal Procedure for its reasoning. Relying solely on the Federal Rules of Criminal Procedure deprives individuals such as Stancy Nesby of relief from an unending pattern of wrongful arrests and detentions that last multiple days at a time; heeding the Fourth Amendment's particularity requirement ensures the protection of the constitutional right to be free from unreasonable seizures and preserves the liberty of innocent people.

### *C. Recent Cases: The Ninth Circuit and the Los Angeles County Sheriff's Department*

The particularity requirement has received recent attention stemming from a large number of individuals arrested and jailed in Los Angeles County pursuant to warrants for different persons.[121] The court in *Rivera v. County of Los Angeles* recently addressed these issues.[122] The plaintiff in this case, Santiago Ibarra Rivera, was arrested twice pursuant to a warrant issued in 1985 for "Santiago Rivera."[123] Rivera was first arrested in 1989, but he was released after fingerprint analysis revealed that he was not the subject of the warrant.[124] Rivera was issued a judicial clearance form, "which indicated that he was not the subject of the warrant."[125] The court reissued the warrant "but did not indicate that Rivera had been determined not to be its subject."[126] The warrant

120. *Compare* FED. R. CRIM. P. 4(b)(1)(A) (stating that a warrant must "contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty"), *with* U.S. CONST. amend. IV (stating that "no Warrants shall issue, but upon probable cause . . . and particularly describing . . . the persons or things to be seized"). The constitutional requirement does not expressly indicate that a name alone "particularly" describes the person to be seized, especially if the name belongs to different individuals.

121. *See* Faturechi & Leonard, *supra* note 7 (discovering that "wrongful incarcerations occurred more than 1,480 times in the last five years"); *see also* Robert Faturechi & Jack Leonard, *Sheriff Lee Baca to Create Task Force to Address Wrongful Jailings*, L.A. TIMES (Dec. 28, 2011), http://articles.latimes.com/2011/dec/28/local/la-me-wrong-id-jails-20111228 [https://perma.cc/8WS2-TFJM] (finding that "the jailings occur because of breakdowns not just by jail officials but by police who arrest the wrong people and by the courts, which have issued warrants that did not precisely identify the right suspects").

122. 745 F.3d 384 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014).

123. *Id.* at 386–87.

124. *Id.* at 386.

125. *Id.* at 387.

126. *Id.*

listed a date of birth matching Rivera's, as well as a physical description matching him.[127]

Twenty years later, the San Bernardino Sheriff's Department stopped a car in which Rivera was a passenger.[128] A routine warrant check based on Rivera's identification revealed the warrant.[129] Rivera explained that he was not the subject of the warrant and had been issued a judicial clearance form to this effect, but he could not produce the form when asked.[130] Rivera was arrested, detained in San Bernardino for two days, and then transferred to the Los Angeles Sheriff's Department.[131] Rivera was not released from custody until approximately thirty-two days after his arrest.[132] The court issued Rivera a new judicial clearance form, added Rivera's photograph and fingerprints to the case file, and "reissued the warrant with the true subject's middle name, which differs from Rivera's middle name."[133]

The court rejected Rivera's argument that the reissued 1989 warrant violated the Fourth Amendment by failing to include "a number corresponding to the true subject's fingerprints."[134] Referring to precedent,[135] the court determined that "a warrant containing the subject's name, sex, race, hair color, eye color, and date of birth (rather than approximate age), in addition to approximate height and weight, is sufficiently particular, even if it does not list places that the subject might be found."[136] The court also referred to the holdings of the Seventh and Fifth Circuits "that the inclusion of the subject's name alone satisfies the particularity requirement."[137] Because the warrant "contained both the subject's name and a detailed physical description," it satisfied the particularity requirement.[138]

Although Judge Paez dissented in part, he concurred with the majority's conclusion regarding the particularity requirement of the Fourth Amendment.[139] Like so many other courts in recent times, Judge Paez focused on the Fourteenth Amendment over-detention claim, or "whether it 'was or

127. *Id.* ("The 1989 warrant described the subject as a Hispanic male with brown hair and brown eyes, 5'5" tall, and 180 pounds in weight . . . [whereas] . . . Rivera's driver's license described him as 5'6" tall and as weighing 170 pounds.").

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* at 388.

135. *See* United States v. Espinosa, 827 F.2d 604, 610–11 (9th Cir. 1987) (upholding a "John Doe" warrant that included a physical description, a residence, and two vehicles in which the subject might be located).

136. *Rivera*, 745 F.3d at 388 (emphasis removed).

137. *Id.* (citing White v. Olig, 56 F.3d 817, 819 (7th Cir. 1995); Powe v. City of Chicago, 664 F.2d 639, 645 (7th Cir. 1981); Wanger v. Bonner, 621 F.2d 675, 682 (5th Cir. 1980)).

138. *Id.*

139. *Id.* at 393.

should have been known that the detainee was entitled to release.'"[140] Judge Paez concluded that Rivera's alleged complaints to two Los Angeles County officials created a genuine issue of material fact that officials failed to take simple investigatory steps resulting in a due process violation.[141] Regardless, even Judge Paez ignored the clear problem in this situation—an innocent individual was arrested *again*, *twenty years later*, under the same warrant, which was known to be overinclusive by virtue of matching both the individual's name and the name of the intended target.

Even more concerning circumstances surrounded Kelvin Gant, a plaintiff in *Gant v. County of Los Angeles*.[142] Here, Gant had been arrested on warrants issued for his "non-identical twin brother, Kevin Gant, between five and seven times."[143] In 2008, Kelvin Gant was arrested for the warrants "even though he showed the officer a 'judicial clearance form' verifying that a warrant for 'Kevin Gant' was not meant for him."[144] A "Live Scan" report generated from the plaintiff's fingerprints revealed that the unique identifying number, known as a CII number, belonging to the subject of the warrant did not match the plaintiff.[145] The plaintiff was detained overnight and released the next day after a court appearance.[146]

The court identified the central issue to Gant's Fourth Amendment claim: "whether the failure of a law enforcement agency to update a warrant abstract in its computerized database violates the Fourth Amendment's particularity requirement when an individual, like Kelvin Gant, can show that the description has resulted in his mistaken arrest on approximately seven different occasions."[147]

Because the warrant in question contained a CII number that did not belong to the plaintiff "and the warrant was sufficiently particular to rule out Gant [the plaintiff]," the court concluded that the district court did not err by dismissing Gant's Fourth Amendment claims against the defendant municipality responsible for issuing and updating the warrant.[148] The court acknowledged that "[t]he outcome . . . might be different if the warrant . . . did not include a CII number"; in these situations, "inputting notice of judicial clearance forms . . . may be necessary to prevent repeated mistaken arrests."[149]

140. *Id.* at 396 (quoting Lee v. City of Los Angeles, 250 F.3d 668, 683 (9th Cir. 2001)).
141. *Id.* at 394, 396–97.
142. 772 F.3d 608, 612 (9th Cir. 2014).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 616.
148. *Id.*
149. *Id.*

The court also observed that the warrant in *Rivera* did not include a CII number, yet the warrant was upheld.[150]

By the court's reasoning, and the similar reasoning of many federal appellate courts in recent years, innocent individuals whose names match the intended target of a warrant, with nothing more, can be arrested an infinite number of times with practically no recourse.

## III.
## THE PARTICULARITY REQUIREMENT IS THE DOCTRINAL SOLUTION TO THE PROBLEM OF REPEATED ARRESTS BASED ON MISTAKEN IDENTITY

Independent of doctrinal concerns, being arrested multiple times for a warrant that was intended for someone else, even with the same name, is problematic, if not a fundamental miscarriage of justice. As our population continues to grow and identity theft becomes increasingly prevalent, circumstances where a warrant names both the intended subject and an innocent bystander will increase. The question remains whether a person truly lacks any constitutional protection against being detained multiple times for a warrant that includes his or her name, but is intended for someone else.

### *A. Focusing on the Arresting Officers Does Not Resolve the Problem of Constitutionally Deficient Warrants*

As discussed previously, assigning liability to police officers on the scene, especially when their department is not responsible for issuing or updating the warrant, seems neither intuitively fair nor likely to solve the problem of a constitutionally deficient warrant.[151] In many of these situations, responding officers are examining warrants with identical names, dates of birth, and similar physical descriptions. Many would actually fault an officer for failing to arrest an individual who is an inch or two shorter than the person described in the warrant who claims, "I'm John Smith but not *that* John Smith!" Ultimately, assigning liability to arresting officers who have to make quick decisions on the scene runs the risk of overdeterring officers who attempt to enforce valid warrants against valid targets.[152] Such an approach also fails to get at the root of the problem—the deficient warrant itself, and the agency (often a county sheriff's department) responsible for updating it.

150. *Id.* at 617 (citing Rivera v. County of Los Angeles, 745 F.3d 384, 388 (9th Cir. 2014)).

151. *See supra* Introduction; *see also infra* Part IV.

152. *Cf.* Herring v. United States, 555 U.S. 135, 137–38 (2009) (observing an officer's reliance on arrest warrant information relayed to him through multiple warrant clerks and a search conducted incident to the arrest occurring in ten to fifteen minutes before a warrant clerk could inform the officer that the arrest warrant had actually been recalled). The Court ultimately held that the evidence recovered during the search need not be excluded based on the officer's good-faith reliance on what he believed to be a valid warrant. *Id.* at 145.

These policy concerns animate the good-faith exception, an affirmative defense for officers acting on search or arrest warrants. The good-faith exception will often prevent the assignment of liability to officers arresting someone with an identical name and similar description to the actual target of an arrest warrant.[153] The facts in *Hill v. California* provide a paradigmatic example of this exception in the arrest warrant context.[154] Although the officers arrested the wrong individual with a different name from the one on the warrant, "the arresting officers had a reasonable, good-faith belief that the arrestee . . . was in fact [the subject of the warrant], . . . and 'when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.'"[155] The officers had a reasonable, good-faith belief despite the arrestee being two inches shorter and ten pounds lighter than the subject of the warrant.[156]

Two policies motivate the application of the good-faith exception to the exclusionary rule for *search* warrants: (1) a desire not to confer a huge "benefit" to guilty defendants by having evidence excluded when the officer acted in good faith;[157] and (2) the exclusionary rule's purpose "to deter willful or flagrant actions by police, not reasonable, good-faith ones."[158] These two policy motivations also support a good-faith exception for officers executing what appears to be a valid *arrest* warrant. First, guilty defendants could benefit from employing aliases or claiming mistaken identity when police officers are overdeterred from executing arrest warrants. Second, there is little deterrent function in imposing liability for an insufficiently particular warrant on an actor—the arresting police officer—who does not issue or control the warrant.

If an officer is arresting an individual pursuant to information in a warrant that matches the individual almost completely, it is hard to imagine that the

153. *See, e.g.*, *Rivera*, 745 F.3d at 389 (reasoning that arresting deputies "were not unreasonable" because "[t]he name and date of birth on the warrant matched [plaintiff's] exactly" and "[t]he height and weight descriptors associated with the warrant, although not matching [plaintiff] exactly, were within one inch and ten pounds of [plaintiff]'s true size"); Reed v. Baca, 564 F. App'x 880, 880 (9th Cir. 2014); Murray v. City of Chicago, 634 F.2d 365, 366–67 (7th Cir. 1980) (acknowledging that arresting officers may plead and prove good faith as an affirmative defense to arresting plaintiff under an invalid warrant but also stating that "[t]he defendants should not be permitted to 'get off the hook' by merely pointing the finger at each other").

154. 401 U.S. 797, 802 (1971); *see also* United States v. Benavides, 854 F.2d 701, 702 (5th Cir. 1988) ("The execution of that warrant in subjective and objective good faith brings the actions of the officers within the good-faith exception to the exclusionary rule [for evidence procured during a search]."); United States v. Leon, 468 U.S. 897, 907–08 (1984) ("Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.").

155. *Hill*, 401 U.S. at 802 (citing People v. Hill, 466 P.2d 521, 523 (Cal. 1968)); *see also* Brown v. Patterson, 823 F.2d 167, 169 (7th Cir. 1987) (finding no liability for the arresting officer because the officer "did not" act unreasonably when "arresting the wrong person").

156. *Hill*, 401 U.S. at 803 n.6.

157. *Leon*, 468 U.S. at 907–08.

158. United States v. Williams, 622 F.2d 830, 840 (5th Cir. 1980).

officer is not acting reasonably or in good faith. The defect is in the warrant itself, not the officer who enforces it on behalf of the issuing agency. One could argue that eliminating the good-faith exception and employing a sort of strict liability or even a negligence standard would still provide a deterrent effect on officers arresting unintended targets of warrants. But this assertion does not address why strict liability, or a negligence standard, should apply to the officers on the scene instead of the agency that issued the warrant.

Further, courts are unlikely to hold the arresting officer's employer liable, assuming the employing agency did not issue the problematic warrant or fail to update it when able. The arresting officer's objectively reasonable behavior did not cause the deprivation of due process—the insufficient warrant did. And if the employing agency had a policy[159] that caused the arresting officer's objectively reasonable behavior, then such a policy would not give rise to liability here in light of the good-faith exception.

At least one other scholar has suggested that the solution lies with the arresting officers. Melanie Schoenfeld suggests that focusing on reasonableness of the arrest instead of probable cause for an arrest based on a warrant "distorts the original intent of the Fourth Amendment and reflects a modern expansion of police power."[160] Although reasonableness may function well in the context of "evaluating a search and seizure for the purpose of suppressing evidence in a criminal prosecution," it is not the appropriate standard when an innocent person has been wrongfully arrested.[161] The primary justification for this heightened standard in the case of wrongful arrest is that "the sanctity of individual liberties requires a more stringent standard of protection at the outset of the arrest."[162] According to Schoenfeld, even a clerical error is enough to prevent a warrant from supplying probable cause for an arrest.[163] Schoenfeld provides three "important purposes" for maintaining a stringent standard in relation to deficient warrants: (1) preserving the integrity of the Fourth Amendment; (2) promoting accountability; and (3) removing the initial barrier to victims seeking redress from the government.[164]

Although Schoenfeld's arguments promote the Fourth Amendment's individual protections as fully as one can, they do not take into account the root cause of the wrongful arrests: constitutionally deficient warrants. If promoting accountability is a desired goal, then finding a route to impose liability upon the agency responsible for updating the warrant will best serve that goal.

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159. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 690–91 (1978) (requiring the plaintiff to show that the municipal defendant had either an official policy or an informal custom, "even though such a custom has not received formal approval through the body's official decisionmaking channels").

160. Schoenfeld, *supra* note 17, at 1249.

161. *Id.* at 1251.

162. *Id.*

163. *Id.*

164. *Id.* at 1252.

Schoenfeld's argument, if accepted, would remove the hurdles a victim normally faces in seeking relief. But the Supreme Court is not likely to accept Schoenfeld's argument—it has rejected respondeat superior liability in the context of litigation against municipal entities[165] and often requires subjective, deliberate indifference for liability against state actors.[166]

Ultimately, the most effective way to deter agencies from issuing insufficiently particular warrants is to hold them liable. In many of the cases discussed above, the issuing agency was the county sheriff. And if a victim can overcome the hurdles of section 1983 litigation to impose liability on the agency in control of updating the warrant, then the important purposes of Schoenfeld's proposal will either be served or rendered irrelevant.

### *B. The Particularity Requirement: Focusing on the Constitutionality of the Warrant Itself Is the Correct Path to Liability for the Agency that Issued the Warrant*

As noted above, focusing on the officers arresting the victim at the scene is a mistake. Courts have quickly disposed of Fourth Amendment claims against officers who made an arrest under a facially valid (though insufficiently particular) warrant.[167] But this quick disposal of Fourth Amendment claims is due in part to the lack of attention courts have given to the particularity requirement. At first glance, it is shocking to realize that a case from 1894[168] continues to serve as the primary Supreme Court precedent for determining the sufficiency of an arrest warrant. Since *Baker*, courts have shifted their focus in mistaken-identity arrest cases to Fourteenth Amendment due process concerns. But the barebones treatment of a constitutional requirement—that warrants "particularly" describe "the persons or things to be seized"[169]—appears to rest more on misguided reliance on the Federal Rules of Criminal Procedure, an illogical inversion of the Fourth Amendment's constitutional command.[170] A warrant that identifies two people, or several people, even if the warrant meets the Federal Rules of Criminal Procedure's name requirement, fails to particularly describe the target of the warrant. Constitutional requirements must always be met, regardless of statutory guidance.

But imposing a requirement of omniscience on the part of law enforcement in issuing and updating warrants does not seem fair, either. *Powe* and *Gant* provide guidance. The court in *Powe* concluded that the warrant

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165. *See* Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 691 (1978).

166. *See, e.g.*, City of Canton v. Harris, 489 U.S. 378, 388 (1989).

167. *See, e.g.*, Rivera v. County of Los Angeles, 745 F.3d 384, 389 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014); Reed v. Baca, 564 F. App'x 880, 880 (9th Cir. 2014).

168. West v. Cabell, 153 U.S. 78, 85 (1894).

169. U.S. CONST. amend. IV.

170. *See* FED. R. CRIM. P. 4(b)(1)(A) (stating that a warrant must "contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty").

lacked particularity because the officers *knew* that the subject of the warrant might not possess the name in the warrant.[171] This knowledge or awareness of a "substantial risk"[172] that an innocent person could be arrested pursuant to the warrant motivated the reasoning in *Powe*. And the court in *Gant* acknowledged that the case could have been very "different" if a CII number, a unique identifier tied to one's fingerprints and other identifying information, was not present in the warrant.[173] Thus, *Gant* implicitly acknowledges that a warrant might fail to meet constitutional muster—by failing to meet the Warrant Clause's particularity requirement—even while meeting the Federal Rules of Criminal Procedure's name requirement.

If the particularity requirement can actually provide a remedy to someone arrested on a warrant intended for a different person with the same name, the question remains: What should be the minimum level of culpability? A form of strict liability does not seem fair or workable, and such a standard would be inconsistent with section 1983 jurisprudence.[174] Aside from money damages for those deprived of their liberty solely because they share a name with someone suspected of criminal activity, a workable remedy would also have a deterrent effect. Here, we might seek to encourage the law enforcement agencies that issue and update warrants to maintain a policy of updating warrants when they learn of a lack of particularity. This would mean that, when a correct name is provided, insufficient particularity occurs only where the agency was aware of a risk that made it necessary to include other identifying information.[175] The identifying information necessary to render the warrant sufficiently particular could include a CII number (a unique identifying number

171. Powe v. City of Chicago, 664 F.2d 639, 648 (7th Cir. 1981).

172. *Id.*

173. Gant v. County of Los Angeles, 772 F.3d 608, 616 (9th Cir. 2014).

174. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 828 (1994) (observing that "[a] prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment"); City of Canton v. Harris, 489 U.S. 378, 388 (1989) (requiring subjective deliberate indifference to the victim's rights).

175. *Cf.* Herring v. United States, 555 U.S. 135, 146 (2009) ("If the police have been shown to be *reckless* in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.") (emphasis added); Arizona v. Evans, 514 U.S. 1, 17–18 (1995) (O'Connor, J., concurring) (observing "the advent of powerful, computer-based recordkeeping systems that facilitate arrests" and the need for law enforcement not to "rely on [these systems] blindly" because "the benefits of more efficient law enforcement mechanisms [come with] the burden of corresponding constitutional responsibilities"). Although these cases involved exceptions to the exclusionary rule for warrantless searches, these rationales apply with equal force to a law enforcement agency's failure to update arrest warrant entries to prevent multiple mistaken-identity arrests in the section 1983 context, where mere negligence is not sufficient for liability. *See Harris*, 489 U.S. at 388 (requiring subjective, deliberate indifference for a failure to train police officers); Daniels v. Williams, 474 U.S. 327, 328 (1986) (holding that "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property"); Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 691 (1978) (rejecting respondeat superior liability in the context of litigation against municipal entities).

often generated from fingerprints),[176] photographs of the correct and incorrect warrant target, descriptions of tattoos that distinguish the intended warrant target from other innocent persons, or any other distinguishing information to guide officers on the scene.

Such a standard also ensures that officers acting in an objectively reasonable manner without awareness that the warrant applies to an innocent individual will not be exposed to liability that deters effective law enforcement. It is unclear whether such a standard could be treated as an exception to the Federal Rules of Criminal Procedure, or if the Federal Rules of Criminal Procedure would need an amendment to reflect this new standard. Because the Fourth Amendment's particularity requirement must always be satisfied, one can argue that an amendment to the Federal Rules of Criminal Procedure is unnecessary. But given the heavy reliance by multiple courts on the Federal Rules of Criminal Procedure, an amendment would better clarify the need to satisfy the particularity requirement.

### *C. A Due Process Inquiry Does Not Effectively Address Mistaken-Identity Arrests*

Because courts may wish to continue treating the particularity requirement as a simple, bright-line inquiry that ends up tilted toward law enforcement interests, one might propose a more robust due process inquiry as an alternative solution. The focus would be on the agency that detains the arrestee—often the same county sheriff department that is responsible for issuing the arrest warrant. But courts would conduct their inquiry under due process principles. Unfortunately, no form of due process inquiry will properly address both the true cause of repeated mistaken-identity arrests *and* afford appropriate relief to innocent arrestees.

*Baker* pointed the way to treating mistaken-identity arrests solely as issues involving due process when the Court stated that a "detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'"[177] In his concurrence, Justice Blackmun went further, suggesting that no particular amount of time must pass before a due process violation might arise from "a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints."[178] Although the majority explicitly stated that three days "does not and could not amount to such a deprivation," one could imagine that the "lapse of a certain amount of time" is a flexible requirement.[179]

176. *See Gant*, 772 F.3d at 612.
177. Baker v. McCollan, 443 U.S. 137, 145 (1979).
178. *Id.* at 148 (Blackmun, J., concurring).
179. *Id.* at 145 (majority opinion).

### 1. *The Limitations of a Procedural Due Process Inquiry*

*Baker* is not clear about what kind of due process violation is at play. The majority opinion reads as if this is a procedural due process inquiry: the Fourteenth Amendment "protects only against deprivations of liberty accomplished without 'due process of law.'"[180] A procedural due process inquiry would be consistent with the majority's reasoning that a sheriff "executing an arrest warrant" is not required by the Constitution "to investigate independently every claim of innocence."[181]

The *Mathews* balancing test[182] could serve as a helpful tool in determining whether a law enforcement agency is required to afford additional process by updating a warrant with identifying information beyond the name. The test involves weighing three factors: (1) "the private interest that will be affected"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the . . . fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[183] The first factor, the private interest, is relatively weighty—nobody wants to be detained in a jail for any time at all, much less multiple days, for something they have not done. This interest increases if one considers an individual's interest in not being jailed repeatedly for the same warrant that identifies a different person with the same name.[184] Were courts to observe an increased private interest for subsequent mistaken-identity arrests of the same person under the same warrant, they could engage in a more robust procedural due process inquiry that might actually afford plaintiffs relief.

The second and third factors help indicate when a law enforcement agency should be obligated to update its warrant. For the second factor, the risk of an erroneous deprivation that arises from a failure to update a warrant is low when a law enforcement agency has no reason to know that the warrant could identify more than one person.[185] But when law enforcement becomes aware that an innocent person falls under the current warrant description, the risk of erroneous deprivation is high: any police contact with the innocent person can result in their detention for one or more days until the confusion is sorted out. This risk is what the CII numbers on the warrant in *Gant* addressed, and what

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180. *Id.*

181. *Id.* at 145–46.

182. *See* Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

183. *Id.* at 335.

184. The applicability of the *Mathews v. Eldridge* balancing test to facts involving multiple erroneous deprivations remains an open question. This Note assumes that the risk of multiple erroneous deprivations fits into the private interest factor.

185. *See* Faturechi & Leonard, *supra* note 7 (finding that "wrongful incarcerations occurred more than 1,480 times in the last five years" as compared to "the 15,000 inmates in the county's jails at any given time").

an update to a warrant or a judicial clearance without the CII numbers would have accomplished.

On the other hand, a defendant law enforcement agency could argue that, as in *Gant*, these extra steps to update a warrant do not reduce the risk of the innocent person being arrested again—the CII numbers and the judicial clearance form itself did not stop the arrest of the innocent person.[186] Thus, although the risk of an erroneous deprivation is high in this situation, the defendant law enforcement agency will assert that the value of the additional procedural safeguards is low.

The governmental interest, or the third factor, provides the final insight into when a warrant should be updated. A defendant law enforcement agency can argue that the fiscal and administrative burden of proactively updating every single warrant with new information might be unduly large. But the relatively low amount of time spent adding in a new form, new identification number, or even a photograph for those cases *where the agency has become aware of the insufficient particularity of the warrant* (i.e., because someone with an identical name who is not the target of the warrant was arrested) tilts the balance in favor of updating the warrant in these specific situations.

One problem with the use of a procedural due process framework is that the usual remedy in cases where the balance militates in favor of greater process is providing the individual an opportunity to be heard.[187] If this is the case, then the only protection procedural due process affords is against being detained for "too long." So long as the detainee appears before a judge within a reasonable amount of time, it does not matter if the detainee is wrongfully arrested on a warrant intended for someone else several times. Unless procedural due process can justify the updating of warrants as a form of process, the Warrant Clause's particularity requirement will be the only likely avenue for complete relief from repeated *arrests* instead of repeated *detentions*.

### *2. The Limitations of a Substantive Due Process Inquiry*

Justice Blackmun's concurrence in *Baker* suggests that the appropriate inquiry could be one based on substantive due process. Justice Blackmun stated that he did not believe that the majority opinion foreclosed a *Rochin*[188] inquiry, and he provided an example of conduct that would be "far more 'shocking' than anything [the *Baker* petitioner] has done": a "sheriff who deliberately and

186. *See* Gant v. County of Los Angeles, 772 F.3d 608, 612 (9th Cir. 2014).

187. *See Mathews*, 424 U.S at 333 ("The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'") (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

188. *See* Rochin v. California, 342 U.S. 165, 172 (1952) (applying the "conduct that shocks the conscience" standard to a substantive due process claim).

repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints."[189]

Unfortunately, the relevant substantive due process standard—executive government conduct that "shocks the conscience"[190]—might be difficult to meet in the context of overdetaining an innocent person. Putting Justice Blackmun's concurrence aside, the Supreme Court has reasoned that "only the most egregious official conduct" in the context of "abusive executive action" can violate substantive due process rights.[191] Nonetheless, the victims arrested multiple times on a warrant not intended for them have done nothing wrong—in contrast to the defendant in *Rochin*[192]—and some of these victims have been arrested as many as eleven times.[193] These facts could approach a level of egregious conduct that shocks the conscience.

If substantive due process is the appropriate framework, then plaintiffs must identify a fundamental right. The Ninth Circuit, as well as other courts, has recognized "that an individual has a liberty interest in being free from incarceration absent a criminal conviction."[194] Despite acknowledging that the Supreme Court also recognized this liberty interest in *Baker*, the Ninth Circuit also observed that the plaintiff in *Baker* received due process.[195] Nevertheless, the Ninth Circuit reasoned that "the paradigmatic liberty interest under the [D]ue [P]rocess [C]lause is freedom from incarceration."[196]

Although it recognized a liberty interest, which would justify operating under a substantive due process framework, the Ninth Circuit still conducted its analysis as a procedural due process claim in light of the *Mathews* factors.[197] The Ninth Circuit's application of a procedural due process inquiry to a liberty interest—freedom from incarceration absent a criminal conviction—appears in other cases. This includes the Supreme Court's observation in *Baker* "that the mistaken incarceration of an individual in other circumstances [than those in *Baker*] may violate his or her right to due process 'after the lapse of a certain

189. Baker v. McCollan, 443 U.S. 137, 148 (1979) (Blackmun, J., concurring).

190. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998); *Rochin*, 342 U.S. at 172.

191. *See Lewis*, 523 U.S. at 836 (holding that "causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender" does not shock the conscience; only "a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience"). It is unclear how far outside of a high-speed pursuit context *Lewis* applies—the Court reasoned that application of a "deliberate indifference" standard "is sensibly employed only when actual deliberation is practical." *Id.* at 851. *But see Rochin*, 342 U.S. at 172, 174 (overturning conviction based on evidence obtained by involuntary stomach pumping).

192. Rochin was suspected of selling narcotics and, when confronted by police, swallowed two morphine capsules. *See* 342 U.S. at 166.

193. Goodyear, *supra* note 2.

194. Oviatt By & Through Waugh v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (citing *Baker*, 443 U.S. at 144).

195. *Id.*

196. *Id.*

197. *Id.* at 1475.

amount of time.'"[198] A fundamental right under substantive due process is not something that is only violated after the passing of enough time—a fundamental right under substantive due process is something that a government actor simply cannot violate at all. Moreover, in his partial dissent in *Rivera*, Judge Paez stated that "the only inquiry is simply whether it 'was or should have been known [by the County] that the detainee was entitled to release,'"[199] which is a procedural due process inquiry.

In sum, if due process is an avenue at all, courts will use a procedural due process inquiry to analyze arrests of innocent persons under warrants not intended for them. And as previously discussed, procedural due process' remedy—an opportunity to be heard at some point—does not address the problem of multiple arrests and detentions. Ultimately, the most complete form of relief lies in judicial enforcement of the particularity requirement. This enforcement can actually ensure that innocent people are not arrested repeatedly pursuant to warrants for different persons bearing the same name.

Moreover, the Supreme Court in *Graham v. Connor* expressed reluctance to rely on a Fourteenth Amendment "substantive due process" approach when "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct."[200] In these cases, "that Amendment [e.g., the Warrant Clause], not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[201] Because insufficient particularity in warrants and failures to update those warrants have caused[202] the repeated arrests of innocent persons in many cases, the Fourth Amendment is the more appropriate lens through which to examine the constitutionality of a non-updated warrant.

## IV.
## OBSTACLES TO VINDICATING CONSTITUTIONAL RIGHTS UNDER SECTION 1983

Unfortunately, even if plaintiffs can employ either the Fourth or Fourteenth Amendment to make a section 1983 claim, they still face the obstacle of determining which defendants can be held accountable. Intuitively, assigning liability to the police officers on the scene, especially those who did not issue the warrant but are simply executing it, seems inappropriate. The

198. Lee v. City of Los Angeles, 250 F.3d 668, 684 (9th Cir. 2001) (citing *Baker*, 443 U.S. at 144–45); *see also* Fairley v. Luman, 281 F.3d 913, 915 (9th Cir. 2002) (affirming a jury verdict against the City of Long Beach Police Department when the plaintiff "continuously protested the mistaken identity over the course of his twelve-day detention").

199. Rivera v. County of Los Angeles, 745 F.3d 384, 396 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014) (Paez, J., concurring in part and dissenting in part).

200. Graham v. Connor, 490 U.S. 386, 395 (1989).

201. *Id.*

202. 42 U.S.C. § 1983 (2012) (imposing liability on any person acting under color of law who "subjects, or causes [another] to be subjected" to a deprivation of constitutional rights). As a constitutional tort, section 1983 claims require a plaintiff to prove causation to establish a defendant's liability.

good-faith exception supports this notion by excusing officers who act objectively reasonable in executing the warrant, even if the warrant is not sufficiently particular.

A plaintiff must therefore move up the chain of authority to find a suitable defendant. Bringing a suit against an individual sheriff or police chief at the head of the organization responsible for issuing and updating the warrant is the most likely path to success. But to hold these parties liable, courts require a showing of an official policy or a custom to hold the offending agency liable.[203]

### *A. The Primary Hurdle: Showing an Official Policy or Custom of the Issuing Agency*

Because a county sheriff might not be directly involved in the issuance of an arrest warrant or updating that warrant,[204] a plaintiff's best option is to bring suit against the sheriff in their official capacity—effectively a suit against the county itself. Although municipalities are not eligible for qualified immunity,[205] a plaintiff still faces the obstacle of establishing some form of official policy or unofficial custom. For instance, despite an official policy stating otherwise, a plaintiff could allege in their complaint that the actual custom or practice of the county and county sheriff's department is *not* to include additional identifying information when made aware that an arrest warrant could apply to an innocent person.[206] But a plaintiff must be cautious about characterizing the failure to update the warrant as an omission or some form of a failure to train employees to update the warrants properly. Such a claim would require a plaintiff to show that a reasonable policy maker would conclude "that the plainly obvious consequence" of the failure to act would

203. *See* Monell v. Dep't of Soc. Servs. Of N.Y., 436 U.S. 658, 690–91 (1978) (requiring the plaintiff to show that the municipal defendant had either an official policy or an informal custom, "even though such a custom has not received formal approval through the body's official decisionmaking channels"). Other concerns can arise if the sheriff is deemed to be a final policymaker for the state, rather than the county or other local municipality. *See* McMillian v. Monroe County, 520 U.S. 781, 783 (1997) (holding that the Monroe County sheriff, based on interpretation of state law, "represent[ed] the State of Alabama and is therefore not a county policymaker," resulting in the sheriff being immune from suit in his official capacity).

204. If the sheriff were directly involved in issuing the warrant or failing to update it, suit against the sheriff in their official capacity would be available as long as they were a municipal policymaker and not a state policymaker. *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) ("[I]t is plain that municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.").

205. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980) ("[T]here is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals.").

206. *See* Brief for Appellee at 7–8, Smith v. County of Los Angeles, 584 F. App'x 716 (9th Cir. 2014) (No. 12-56690).

result in the deprivation.[207] To obtain relief, this failure to update the warrant could not be an isolated incident—it would need to happen repeatedly.[208]

### *B. State Suits Often Are Not an Option*

The only remedy available to a plaintiff in these circumstances is usually through the federal courts. For instance, the court in *Brown v. Patterson* observed "There ought to be a remedy for a false arrest and incarceration, . . . [but], in all likelihood, there is none under state law in the circumstances of this case because of the broad tort immunities that law enforcement officers in Illinois enjoy."[209] The availability of the section 1983 action in the federal courts ensures the protection of constitutional rights through future deterrence by remedying harms suffered by individuals without any options in state court. If a plaintiff is to have any relief at all, being able to find an appropriate, non-immune defendant in federal court is a must.

## CONCLUSION

Mistakes occur. It is unreasonable to expect that there will never be a mistaken identity in the case of an arrest pursuant to a warrant. But an innocent person arrested seven times for an arrest warrant with a different intended subject cannot be written off as the cost of doing justice—the repeated mistake, without appropriate steps taken to remedy the situation, is a fundamental miscarriage of justice. Courts have relegated an important requirement of the Fourth Amendment—that the warrant particularly describe the person to be seized—to a cursory, rote analysis in contravention of the Fourth Amendment's constitutional command. Although the bright-line rule from the Federal Rules of Criminal Procedure is easy to apply, the result leaves innocent people without any recourse.

Our growing population faces a serious problem if courts continue to evaluate constitutional requirements based on a statute that does not adequately incorporate those constitutional requirements. Multiple holdings suggest that an individual does not suffer a constitutional violation no matter how many times they are arrested on a warrant intended for someone else, as long as the detainee appears before a judge in a reasonable amount of time. This cannot be right. Yet there is no need for the Constitution to evolve as part of a living

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207. *See* Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 411–13 (1997).

208. *See* Connick v. Thompson, 563 U.S. 51, 54 (2011) (holding that a district attorney's office cannot be held liable under section 1983 "for failure to train based on a single *Brady* violation").

209. 823 F.2d 167, 168 (7th Cir. 1987); *see also* Karen J. Kruger, *Governmental Immunity in Maryland: A Practitioner's Guide to Making and Defending Tort Claims*, 36 U. BALT. L. REV. 37, 62 (2006) (discussing ways in which local governments "have retained governmental immunity"); Gerald T. Wetherington & Donald I. Pollock, *Tort Suits Against Governmental Entities in Florida*, 44 FLA. L. REV. 1, 5 (1992) (discussing municipal immunity as developed under Florida constitutional, statutory, and common law).

document; rather, times have changed, and the same requirements and protections found in the Constitution must apply to these new circumstances.[210]

Limitation of liability to agencies who know of an insufficiently particular warrant and fail to update it—whether it be with unique identifying numbers, photographs to distinguish intended warrant targets from innocent parties, or other biometric information—will ensure that cases involving repeated mistaken-identity arrests remain consistent with section 1983 caselaw. And the numerous hurdles a plaintiff faces in a section 1983 suit—including various defendant immunities and requirements of the plaintiff—will ensure that there will not be a flood of new litigation as courts make a much needed doctrinal adjustment to protect constitutional rights.

210. The Supreme Court is no stranger to applying constitutional provisions to new technologies or new contexts. *See, e.g.*, Riley v. California, 134 S. Ct. 2473, 2480, 2482 (2014) (addressing "whether the police may, without a warrant, search digital information on a cell phone" seized from an arrested individual under the well-settled test of "the reasonableness of a warrantless search incident to a lawful arrest" as an exception to the Fourth Amendment's warrant requirement); United States v. Jones, 132 S. Ct. 945, 948, 949–50 (2012) (holding that "the attachment of a Global-Positioning-System (GPS) tracking device to an individual's vehicle" by FBI agents and its use "to monitor the vehicle's movements on public streets" constitutes a Fourth Amendment search under "common-law trespass" principles). Technology has increased the ease with which agencies can update and maintain records (including warrants), and our growing population has created a new context where many individuals share identical names and even dates of birth.