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Policing Symmetry

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POLICING SYMMETRY*

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Every day, criminal court judges across the United States decide whether the police had probable cause to arrest a suspect. When a court finds the police lacked probable cause, the arrestee may bring a 42 U.S.C. § 1983 civil claim against the arresting officer or municipality for a wrongful arrest. Yet, under current issue preclusion rules, whether the civil court will relitigate probable cause depends, in part, on who prevailed at the criminal court hearing. If the government prevails, the suspect will be precluded from relitigating the question of probable cause because they were a party to the original suit. However, if the criminal court finds police lacked probable cause, the government may relitigate probable cause in the civil case because, under state preclusion rules, the municipality and police officials were not the "same party" that prosecuted the criminal case. This is problematic. If relitigated, not only may the criminal and civil dispositions result in different conclusions about the exact same issue, but these inconsistencies suggest a much bigger problem: a flawed, arbitrary justice system that favors the government.

There should be a rebuttable presumption that the prosecutor, municipality, and police are the same party for the purpose of issue preclusion in probable cause cases. Legal scholarship discussing the procedural relationships between criminal and civil cases wholly fails to consider how governmental identities might factor into issue preclusion determinations. This Article fills that gap. Party identity is at the core of both issue preclusion and § 1983. This Article is the first to consider how these two theories of identity should inform one another as parties shift from criminal to civil litigation.

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INTRODUCTION

Being arrested is a serious governmental intrusion that results in both short-term and long-term effects. During an arrest, the police handcuff and pat down the arrestee. And, to be clear, the pat down is not a cursory search of one's outer clothing. Rather, it is "a careful exploration of the outer surfaces of a person's clothing all over his or her body"[1] to discover weapons and evidence. These indignities continue at the police station where the arrestee may be fingerprinted, photographed, questioned, and strip searched.[2] All of this often

1. Terry v. Ohio, 392 U.S. 1, 16–17 (1968). The injury associated with an arrest is further exacerbated when the arrest occurs in public where "the citizen stands helpless, perhaps facing a wall with his hands raised," or lies facedown on the pavement as a passerby observes their arrest. *Id.* at 17 (citing L.L. Priar & T.F. Martin, *Searching and Disarming Criminals*, 45 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 481, 481 (1954)).

2. Florence v. Bd. of Chosen Freeholders, 566 U.S. 318, 325 (2012). "Strip search" may be an imprecise term, but regardless of how a strip search is performed, it is "undoubtedly humiliating and deeply offensive to many." *Id.* at 341 (Alito, J., concurring). The Court described the variations in strip search procedures as follows:

> It may refer simply to the instruction to remove clothing while an officer observes from a distance of, say, five feet or more; it may mean a visual inspection from a closer, more uncomfortable distance; it may include directing detainees to shake their heads or to run their hands through their hair to dislodge what might be hidden there; or it may involve instructions to raise arms, to display foot insteps, to expose the back of the ears, to move or spread the buttocks or genital areas, or to cough in a squatting position.

Id. at 325.

occurs without a prior determination by a neutral magistrate judge that there was probable cause.[3]

Now, imagine that a judge determines that the police lacked probable cause for the arrest in the first place. Under these circumstances, it is not surprising that criminal defendants become civil plaintiffs, frequently bringing federal civil claims under 42 U.S.C. § 1983 against the municipality and the arresting officers for deprivations of their Fourth Amendment rights. This Article focuses on an issue which, to date, scholars have ignored: the peculiar role of issue preclusion in § 1983 probable cause litigation. Or, more specifically, whether the issue preclusion doctrine binds a civil court to the criminal court's prior determination that the plaintiff was arrested or detained with or without probable cause. Indeed, a combined reading of the Full Faith and Credit Clause[4] and the Full Faith and Credit Act[5] dictate that (with some exceptions) a state court's proceedings must be honored by both state and federal courts in the United States. It naturally follows that a state court's finding that the police lacked probable cause for the arrest should be honored in a subsequent federal lawsuit.

Consider, however, a fairly run-of-the-mill example. New York City police arrest Brown and he is charged with possessing a weapon, menacing, and resisting arrest. The prosecutor dismisses the first two charges but tries the resisting arrest charge. To prove the remaining charge, the prosecutor must prove the police had probable cause to arrest Brown. At a nonjury trial the court concludes "the People" failed to prove probable cause and finds Brown not guilty.

Brown then files a civil suit alleging false arrest and false imprisonment. Not surprisingly, he seeks to preclude the officers from relitigating the question of probable cause. The trial court holds that the City of New York is precluded from relitigating the question of probable cause. Reversing, the New York Court of Appeals concludes that "[t]he city and the District Attorney are separate entities and . . . do not stand in sufficient relationship to apply the doctrine."[6]

3. A person's resulting arrest record often endures, even if the evidence is suppressed and the charges ultimately are dismissed for lack of probable cause. MADELINE NEIGHLY & MAURICE EMSELLEM, WANTED: ACCURATE FBI BACKGROUND CHECKS FOR EMPLOYMENT 9 (2013), https://www.nelp.org/wp-content/uploads/2015/03/Report-Wanted-Accurate-FBI-Background-Checks-Employment.pdf [https://perma.cc/GWM2-LJ66].

4. U.S. CONST. art. IV, § 1.

5. Act of June 25, 1948, Pub. L. No. 80-773, § 1738, 62 Stat. 869, 947 (codified at 28 U.S.C. § 1738).

6. Brown v. City of New York, 458 N.E.2d 1250, 1251 (N.Y. 1983) ("Identity of parties, an essential element for application of the doctrine of issue preclusion or collateral estoppel, was lacking here so that the determination made in the criminal case on the issue of the unlawfulness of plaintiff's arrest could not be held to bar the city from contesting the issue in the civil action."). This hypothetical is drawn loosely from the facts of *Brown v. City of New York*, 485 N.E.2d 1250, 1251 (N.Y. 1983).

In most jurisdictions, the civil defendant must have been party to the prior criminal suit for issue preclusion on the probable cause question to apply.[7] Consequently, § 1983 defendants (typically municipalities and police officials) may relitigate the probable cause question because, under current standards, they were not a party to the original action. On the other hand, § 1983 plaintiffs will almost always be bound by the criminal court's adverse decision because they were party to the original suit. This Article challenges this asymmetrical conclusion. This Article's normative claim is that there should be a rebuttable presumption that the prosecutor, municipality, and police are the *same party* for the purpose of issue preclusion in these probable cause cases.[8] While this will not guarantee that § 1983 plaintiffs will prevail, it ensures that they will not be forced to relitigate an issue that is key to their civil claim. Establishing this rebuttable presumption has the potential to impact many § 1983 cases.[9] But perhaps more importantly, implementing this rebuttable presumption corrects an asymmetry that currently skews in the government's favor.

This Article proceeds in four parts. Part I discusses the role of probable cause in civil litigation and establishes two important points. First, probable cause is a necessary element of § 1983 Fourth Amendment claims alleging false arrest and detention. Second, despite contrary legal holdings, the plaintiff should bear the burden of proving a Fourth Amendment deprivation (which in false arrest and detention cases will necessarily require the plaintiff to prove the officer lacked probable cause). Part II provides an overview of issue preclusion, particularly in the context of § 1983, and delves into the established rules concerning the "same party" requirement integral to issue preclusion determinations. Part III examines the way in which § 1983 classifies defendants. As we explain, these classifications are integral to § 1983 liability that courts and, to date, scholars have entirely ignored. Most importantly, courts and scholars have overlooked how the governmental ties that bind these defendants might inform issue preclusion determinations. Finally, Part IV argues that, even

7. *See infra* Section II.C.

8. To date, only a few scholars have considered how preclusion rules affect § 1983 determinations. *See, e.g.*, Lawrence Gene Sager, *The Supreme Court Term 1980*, 95 HARV. L. REV. 17, 280–81 (1981) (summarizing Allen v. McCurry, 449 U.S. 90 (1980)); Joshua M.D. Segal, *Rebalancing Fairness and Efficiency: The Offensive Use of Collateral Estoppel in § 1983 Actions*, 89 B.U. L. REV. 1305, 1308 (2009) ("[I]n situations where applying the holding of a criminal court decision promotes the overarching goals of efficiency and fairness, courts should apply collateral estoppel in order to prevent relitigation of a question of constitutionality in a subsequent § 1983 case."). While these discussions advance the conversation, they do not adequately consider the governmental links between prosecutors, municipalities, and police officials.

9. Removing the barrier of having to relitigate the favorable finding that police lacked probable cause on the initial arrest will no doubt increase the chance that § 1983 lawsuits move forward rather than being dismissed at the motion to dismiss or summary judgment stage simply by the rules of probability. In other words, the fewer elements needed to defeat such motions, the more likely you are to defeat such motions.

in the rare cases where § 1983 defendants establish they are not the same party as the prosecutor, courts should rarely, if ever, grant summary judgment on the probable cause issue when a criminal court has found probable cause wanting.

I. PROBABLE CAUSE IN CIVIL LITIGATION

A. *Defining Probable Cause*

Whether an arrest violates the Fourth Amendment often hinges on the question of probable cause.[10] Police officials may arrest a suspect in a public space without a warrant, but they must have probable cause to believe the person is guilty of the crime for which they are being arrested.[11] "To evaluate whether the police had probable cause to make an arrest . . . [courts] consider the nature and trustworthiness of the evidence of criminal conduct available to the police."[12] The relevant inquiry is whether a "prudent man" would believe the suspect "committed or was committing an offense" based on the facts and circumstances that were before the arresting officers.[13]

Unfortunately, probable cause is convoluted—it "is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances."[14] Probable cause is not an especially high standard, but it does afford people some protection from government intrusions.[15]

Perhaps the clearest example of an arrest without probable cause is an instance where an officer has knowingly relied upon false or misleading

10. The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S. CONST. amend. IV. The relationship between the first clause, prohibiting unreasonable searches and seizures, and the second clause, requiring probable cause, has been the subject of much debate among scholars and judges. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 8.01 (6th ed. 2016). The Fourth Amendment specifically prohibits judges from issuing warrants absent probable cause, but it does not prohibit law enforcement officials from arresting a person without a warrant. An arrest may be unreasonable and, accordingly, violate the Fourth Amendment, even if the officers have probable cause for the seizure. For example, if an officer uses excessive force during an arrest, the arrest may be unreasonable even if the officer has an arrest warrant or probable cause to believe the suspect is guilty of the crime for which they are being arrested. *See, e.g.*, Beier v. City of Lewiston, 354 F.3d 1058, 1064 (9th Cir. 2004) ("Although an excessive force claim is subject to a 'reasonableness' standard under the Fourth Amendment as is a false arrest claim, the two claims require quite different inquiries." (citing Barlow v. Ground, 943 F.2d 1132, 1135–36 (9th Cir. 1991))).

11. United States v. Watson, 423 U.S. 411, 420–24 (1976).

12. *Beier*, 354 F.3d at 1064.

13. *Id.*

14. Maryland v. Pringle, 540 U.S. 366, 371 (2003); *see also* District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (cautioning that probable cause "is 'a fluid concept' that is 'not readily, or even usefully, reduced to a neat set of legal rules'" (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983))).

15. *See* 1 CHARLES ALAN WRIGHT & ANDREW D. LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 52 (4th ed. 2002).

information in a probable cause affidavit in order to obtain an arrest warrant.[16] For example, in *Rainsberger v. Benner*,[17] the Seventh Circuit affirmed the denial of a detective's motion for summary judgment where the detective "submitted a probable cause affidavit that was riddled with lies and undercut by the omission of exculpatory evidence."[18] Finding the lies and omissions material, the court rejected the detective's argument that a corrected affidavit would have supported a probable cause determination.[19] To reach this conclusion, the court stripped away the misleading information from the affidavit and, evaluating the remaining evidence, found the claim for probable cause threadbare.[20] Although probable cause does not require absolute proof of a crime, it does require a "common-sense inquiry" and depends on the totality of the circumstances.[21] In this case, the detective's corrected affidavit was nothing more than "bare suspicion" and could not support a finding of probable cause.[22]

In somewhat less egregious examples, judges may find probable cause wanting where an officer's conclusion simply does not make sense under the law or in fact. For example, the Tenth Circuit found an officer lacked probable cause where he arrested a driver for "possession of a firearm after former conviction of a felony," but the driver's criminal record showed only a thirteen-year-old juvenile adjudication for breaking and entering.[23] Importantly, under

16. *See* Rainsberger v. Benner, 913 F.3d 640, 652 (7th Cir. 2019) (finding no probable cause where an officer relied on false information and excluded exculpatory evidence in their affidavit for an arrest warrant).

17. 913 F.3d 640 (7th Cir. 2019).

18. *Id.* at 642 (explaining plaintiff's accusations against the detective).

19. *Id.* at 643. For example, in the affidavit, the detective included phone records that placed the plaintiff inside his mother's apartment about an hour before he reported her death to police. *Id.* at 645. However, the detective did not account for the call being routed through a cell tower in Chicago, which was one hour ahead from where the plaintiff was in Indianapolis. *Id.* at 646. Importantly, the detective knew of the time difference yet chose to use the "inaccurate and incriminating" time in his affidavit. *Id.* Further, among other issues, he mischaracterized the plaintiff's behavior in a surveillance video to make it appear that the plaintiff threw away a murder weapon, but an objective view of the video showed him throwing away a piece of small trash. *Id.* In addition, the detective alleged that the plaintiff was unconcerned for his mother, as evidenced by the fact that he never asked the detective about how his mother was doing the day she died, but the detective knew the plaintiff was getting text updates from his sister. *Id.* at 647.

20. *Id.* at 648 (noting that information supporting probable cause was simply the officer's belief that the murderer may have been someone familiar to the family because the attack was not connected to a burglary).

21. *Id.*

22. *Id.* at 649 (citing Brinegar v. United States, 338 U.S. 160, 175 (1949)).

23. *See* Courtney v. Oklahoma, 722 F.3d 1216, 1221, 1227 (10th Cir. 2013). In *Courtney v. Oklahoma*, 722 F.3d 1216 (10th Cir. 2013), an officer pulled a driver over for driving eighty-two miles per hour where the posted limit was seventy-five miles per hour. *Id.* at 1220. When the officer spoke with the driver, he observed what he felt were "signs of extreme nervousness." *Id.* at 1221. When the officer explained he was suspicious of criminal activity and asked if the driver had any drugs, cash, or firearms, the driver informed the officer that he had a gun in the trunk of the vehicle. *Id.* The officer then ran the driver's criminal record and found the juvenile adjudication from May 1998. *Id.* The court

Oklahoma law, "a juvenile adjudication over ten years old" did not qualify as an underlying felony preventing possession of a firearm.[24] Thus, the court found it was unreasonable for the officer to conclude the driver was a felon in possession of a weapon.[25] Without the felony record, there was no probable cause to believe that the driver was violating the Oklahoma statute prohibiting a felon from possessing a weapon.[26]

Additionally, courts may find that the probable cause standard is not satisfied where an officer made an unreasonable conclusion regarding a material fact.[27] For example, the Eighth Circuit upheld a false arrest claim where an officer believed a woman kicked him, causing an "explosion" of pain in his calf, even though it was logistically implausible that the woman had kicked him, the officer never saw the woman kick him, and no eyewitnesses told him that she kicked him.[28] The Eighth Circuit focused on whether or not it was objectively reasonable for the officer to believe that the woman had kicked him.[29] In reaching its determination, the court found that under the totality of the circumstances, the officer's belief was unreasonable.[30]

concluded it was unreasonable for the officer to believe the driver was violating the felon in possession of a firearm statute because the traffic stop occurred in October 2010. *Id.* at 1226.

24. *Id.* at 1226.

25. *Id.* The court further reversed the grant of officer qualified immunity and rejected the officer's argument that he simply made a mistaken legal conclusion as to the scope of the firearm statute. *Id.* at 1226–27. As the court highlighted, the statute was unambiguous, and the information available to the officer at the time of the arrest showed that the driver's criminal record did not count as a felony record. *Id.* at 1227.

26. *Id.* at 1227.

27. *See* Johnson v. City of Minneapolis, 901 F.3d 963, 970 (8th Cir. 2018) (noting that when the arresting officer has not observed or been relayed information about the crime, probable cause may be lacking).

28. *Id.* at 972–73. In *Johnson v. City of Minneapolis*, 901 F.3d 963 (8th Cir. 2018), the plaintiff called the police because her seventeen-year-old son was acting violently. *Id.* at 965. When the two responding officers arrived, the woman was clutching a hammer for her safety and allowed them entry into her apartment building. *Id.* After speaking with the woman and her son, the police moved to arrest the son, who was located just outside the apartment door in the hallway, and a struggle quickly ensued. *Id.* at 965–66. During this struggle, the woman retreated further into her apartment in order to give the officers room. *Id.* at 966. While struggling to place the teenager under arrest, one of the officers felt a sharp pain, which he described as an "explosion" in his calf, which led him to ask the woman if she had kicked him. *Id.* She said she had not, but the officer was adamant, even though he did not see her kick him, nor did he know if she was even standing close enough to kick him. *Id.* He placed her under arrest based on his conclusion, and she spent three days in jail and later sued under § 1983 for violations of the Fourth Amendment. *Id.*

29. *See id.* at 967.

30. *Id.* In relevant part, the court focused on the fact that she was 5'4" and weighed about 140 pounds, had a physical disability, and was wearing a nightgown and slippers. *Id.* at 968. Further, the woman did not react negatively to the officers, nor was she evasive when they asked her about the alleged kick. *Id.* Perhaps most persuasive to the court was that the officer did not observe the woman kicking him and no one told him that she had; for the court this "cu[t] decisively against . . . probable cause." *Id.* at 969. In denying his claim for qualified immunity, the court pointed to a previous case where the Eighth Circuit held "that an officer who did not witness a crime did not have arguable

Finally, a judge or jury may find that the officers simply lacked sufficient information to meet the probable cause standard, despite it being a very low bar. As the Seventh Circuit instructed in *Fox v. Hayes*,[31] "[p]robable cause may be a loose concept, but it leaves no room for the absurd."[32] In *Fox*, one of the § 1983 plaintiffs, Mr. Fox, was arrested and charged with the murder of his three-year-old daughter, Riley Fox, after she was kidnapped, assaulted, and drowned.[33] Mr. Fox was eventually cleared and filed a § 1983 claim against multiple defendants, including the municipality and police involved with the criminal investigation.[34] The jury awarded the Foxes $12.2 million in damages.[35]

Reviewing the jury's verdict in favor of the Foxes, the court rejected the detectives' "laundry list of facts" that purportedly supported a finding of probable cause.[36] The court repeatedly explained that a jury did not have to credit the detectives' testimony, especially when it was contradictory.[37] After taking "out the fluff" of the detectives' argument, the court found the detectives simply did not have enough evidence or facts to transform a suspicion into probable cause.[38]

Thus, although probable cause is a low standard, it does not permit arrests that are based on nothing more than false information, unreasonable conclusions of fact or applications of law, or mere suspicion. And there is no question that police occasionally arrest, detain, and imprison people without probable cause. When they do, as evidenced by *Fox*, criminal defendants may bring a civil action against the police.

However, when the case shifts from criminal to civil court, as counterintuitive as it might seem, the probable cause standard remains constant. Typically, criminal courts apply a much higher burden of proof than civil courts. To establish guilt in a criminal case, the prosecutor must prove the defendant's guilt "beyond a reasonable doubt."[39] In contrast, to establish liability in a civil

probable cause to arrest a suspect after speaking with her only for 'twenty seconds' when other eyewitnesses were present and would have exonerated her." *Id.* at 971 (quoting Kuehl v. Burtis, 173 F.3d 646, 648 (8th Cir. 1999)).

31. 600 F.3d 819 (7th Cir. 2010).

32. *Id.* at 834.

33. *Id.* at 825.

34. *Id.*

35. *Id.* at 826.

36. *Id.* at 834 (explaining that the defendants' version of the facts supporting probable cause was not given deference on appeal, but rather the Foxes' story determined the outcome).

37. *Id.* The court recognized that an unemotional parent or odd behavior could alert an officer to involvement, but that testimony was inconsistent with Mr. Fox's actual behavior that day. *Id.*

38. *Id.* at 835. Mr. Fox spent about eight months in jail, and no one was ever charged with Riley Fox's murder. *Id.* at 825.

39. *In re* Winship, 397 U.S. 358, 361 (1970) ("The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation.").

case, the plaintiff must do so by a preponderance of the evidence.[40] Probable cause, however, carries its own evidentiary standard. "[T]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt."[41] This standard falls somewhere above a reasonable suspicion and below a preponderance of the evidence.[42] Accordingly, it is nonsensical to "prove probable cause beyond a reasonable doubt" or "prove probable cause by a preponderance of the evidence." Probable cause has its own standard and simply asks whether the officer had reasonable grounds to believe the suspect was guilty of the offense for which he was arrested. The probable cause standard should remain the same, regardless of whether it is being litigated in a civil or criminal context.

Furthermore, it is useful to note that although discovery procedures vary in civil and criminal disputes, these differences are irrelevant to probable cause determinations. The court's probable cause determination focuses on what the officer reasonably believed at the time of the arrest, thus analyzing reasonableness from the officer's perspective at that time.[43] Accordingly, the officer possesses all the relevant information the government needs to establish whether there was probable cause for the suspect's arrest.[44] Therefore, it is irrelevant whether criminal discovery procedures are more limited than civil discovery procedures.

B. *Probable Cause in § 1983 Litigation*

If an officer arrests a suspect absent probable cause, the question is what, if any, civil remedy is available to the putative plaintiff. Most states recognize the torts of false imprisonment and malicious prosecution. Some states also recognize false arrest, which is arguably a subset of false imprisonment claims.[45]

40. Herman & MacLean v. Huddleston, 459 U.S. 375, 387 (1983).

41. Maryland v. Pringle, 540 U.S. 366, 371 (2003).

42. The Court described the relationship between probable cause, reasonable suspicion, and a preponderance of the evidence as such:

> We have described reasonable suspicion simply as "a particularized and objective basis" for suspecting the person stopped of criminal activity, and probable cause to search as existing where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found. We have cautioned that these two legal principles are not "finely-tuned standards," comparable to the standards of proof beyond a reasonable doubt or of proof by a preponderance of the evidence.

Ornelas v. United States, 517 U.S. 690, 696 (1996).

43. *See* United States v. Reed, 443 F.3d 600, 603 (7th Cir. 2006) ("[C]ourts must focus on the real world situation as known to the officer at th[e] time.").

44. Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir. 2008) (noting that a court making a probable cause determination considers "only the information possessed by the arresting officer at the time of the arrest").

45. Although they may arise from a single set of circumstances, these torts differ slightly from one another. A false arrest occurs when the defendant arrests the plaintiff without the authority to do

Additionally, the same operative facts that create the state tort law claim will typically give rise to a *federal* cause of action.[46] Accordingly, when harmed by a government official, an individual may have both cognizable state and federal claims.

To prevail under § 1983, a plaintiff must prove that a person ("person" includes municipalities) acting under color of state law subjected or caused the plaintiff to be subjected to the deprivation of a federally protected right.[47] This includes the deprivation of a constitutional right.[48] In fact, § 1983 is one of the primary ways in which constitutional claims are litigated and constitutional rights upheld.[49] In one respect, this Article concerns *how* a § 1983 plaintiff proves a Fourth Amendment violation and, specifically, whether they are able to rely on a prior criminal court determination.

Even if a plaintiff is able to establish a Fourth Amendment violation, it does not necessarily follow that the arresting officer or the municipality will be liable. Qualified immunity generally protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their

so—either because the defendant lacks the privilege to arrest (for example, a civilian) or because the defendant lacks probable cause for the arrest. W. PAGE KEETON, Dan B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, FALSE IMPRISONMENT, PROSSER AND KEETON ON TORTS § 11 (W. Page Keeton ed., 5th ed. 1984). In contrast, false imprisonment is an unlawful restraint of an individual's mobility. Unlike false arrest, false imprisonment does not require a showing of official governmental authority. *Id.* Moreover, a defendant may commit the tort of false imprisonment without necessarily committing the tort of false arrest. *Id.* Finally, to prove a malicious prosecution claim, the plaintiff must show that the defendant, with the requisite intent, instigated criminal proceedings against the plaintiff without probable cause and the prosecution has ended in favor of the plaintiff. *Id.* As one torts treatise explains, malicious prosecution "differs from false arrest in that the [former] does not necessarily involve any detention of the plaintiff at all." DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS § 586 (2d ed. 2016). Similarly, a defendant may commit malicious prosecution without ever detaining the plaintiff. *Id.*

The Supreme Court has also recognized that false arrest and malicious prosecution differ from one another. *See* Wallace v. Kato, 549 U.S. 384, 388–90 (2007) (distinguishing among false arrest, false imprisonment, and malicious prosecution).

46. Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."), *overruled on other grounds by* Monell v. Dep't. of Soc. Servs., 436 U.S. 658 (1978).

47. Section 1983 reads in pertinent part:

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

42 U.S.C. § 1983.

48. *See Monroe*, 365 U.S. at 183.

49. Hehemann v. City of Cincinnati, No. 93-3766, 1994 WL 714387, at *5 (6th Cir. Dec. 21, 1994) ("It goes without saying that § 1983 plays a critical role in the preservation of civil rights in this country. It guards the freedoms that form the core of the Constitution, and its invocation must remain unburdened in order to enable the vigilant protection of our most precious liberties.").

conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[50] Furthermore, as the Supreme Court recently suggested in *District of Columbia v. Wesby*,[51] § 1983 probable cause claims are well-primed for a grant of qualified immunity.[52] "Given its imprecise nature, officers will often find it difficult to know how the general standard of probable cause applies in 'the precise situation encountered.'"[53] Consequently, even if a court finds that an officer lacked probable cause to arrest a plaintiff, the court may also find that the officer is entitled to qualified immunity.

Similarly, § 1983 plaintiffs frequently encounter difficulty establishing municipal liability. Qualified immunity is not available to municipalities and should have no impact on those cases.[54] However, the Court has been clear that a municipality will not be liable simply because it employs a tortfeasor.[55] Rather, a plaintiff must establish that the municipality, through its policy or custom, caused the plaintiff to be deprived of a constitutional right.[56] Yet § 1983 plaintiffs often have trouble identifying a municipal policy that caused their deprivations.[57]

These additional challenges do not diminish the import of this Article. As Section I.B establishes, if a § 1983 plaintiff is unable to establish a Fourth Amendment violation, the claim is doomed from the outset. To prevail, regardless of whether one is suing an individual or a municipality, § 1983 plaintiffs must establish that they were deprived of a federally protected right. To this end, this section considers how an arrestee constructs a § 1983 claim for an arrest or detention absent probable cause.

50. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Recently, people from across the political spectrum have advocated for eliminating the qualified immunity defense. Jordan S. Rubin, *High Court Won't Hear Law Enforcer Qualified Immunity Cases (3)*, https://news.bloomberglaw.com/us-law-week/justices-wont-take-up-law-enforcer-qualified-immunity-doctrine [https://perma.cc/83FR-U3ZF (staff-uploaded archive)] (June 15, 2020, 5:17 PM). In June, the Supreme Court denied certiorari on several cases petitioning the Court to overhaul the affirmative defense. *Id.* Additionally, on June 25, 2020, the U.S. House of Representatives passed H.R. 7120, the "George Floyd Justice in Policing Act." H.R. 7120, 116th Cong. (2020); *see also* Teressa Ravenell, *Law Enforcement Officials, Qualified Immunity, and the Absolute Immunity of Anonymity*, AM. CONST. SOC'Y (Aug. 3, 2020), https://www.acslaw.org/expertforum/law-enforcement-officials-qualified-immunity-and-the-absolute-immunity-of-anonymity/ [https://perma.cc/2TRZ-66E3]. If enacted, § 102 of H.R. 7120 would eliminate the qualified immunity defense for law enforcement officials. H.R. 7120 § 120; Ravenell, *supra*.

51. 138 S. Ct. 577 (2018).

52. *Id.* at 590.

53. *Id.*

54. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

55. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978).

56. *Id.*

57. *See* Blum v. Koch, 716 F. Supp. 754, 759 (S.D.N.Y. 1989) (noting that because a municipal "policy may be difficult to prove by direct evidence, it may be inferred from a municipal defendant's acts or failure to act," but the latter requires "more proof than a single alleged deprivation").

As one might intuit, a wrongful arrest may very well lead to additional civil claims regarding detention, prosecution, and conviction. Whether these allegations are classified as Fourth Amendment or Fourteenth Amendment claims is complicated. Typically, courts analyze claims that a police officer arrested a person without probable cause—false arrest claims—as Fourth Amendment deprivations.[58] This makes sense since the Fourth Amendment explicitly references seizures, which qualify as arrests. Similarly, courts traditionally treat claims of prosecutorial misconduct during trial as Fourteenth Amendment claims.[59] Courts, however, have vacillated between applying the Fourth and Fourteenth Amendments to § 1983 claims regarding detention following an arrest. Until recently, most courts held that the Fourth Amendment governed "false detention" claims from arrest until a criminal defendant was brought before a judge.[60] However, courts were split as to whether the Fourth Amendment or the Fourteenth Amendment's guarantee of substantive due process governed the detention after the defendant had appeared in court.[61]

Manuel v. City of Joliet[62] illustrates the tension between these two claims. In 2013, Elijah Manuel filed a § 1983 suit against the City of Joliet and several of its police officials alleging that they had deprived him of his Fourth Amendment rights.[63] Officers had arrested Manuel on March 18, 2011, for possession of a bottle of vitamins that officers claimed were illegal drugs.[64] The officers falsified reports to support their claim, and when Manuel was brought before a judge for a probable cause determination, the judge found probable cause existed based entirely upon the police department's allegations and

58. *See* Albright v. Oliver, 510 U.S. 266, 274 (1994) ("[T]he Fourth Amendment's relevance to the deprivations of liberty . . . go hand in hand with criminal prosecutions.").

59. Courts uniformly treat claims that law enforcement or prosecutorial officials failed to disclose exculpatory evidence as Fourteenth Amendment claims. *See* Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & C.R. L. REV. 1, 4 (2003). Interestingly, as Professor Michael Avery notes in another article, courts are divided on whether § 1983 claims that law enforcement officials have fabricated evidence implicate the Fourth Amendment or the Fourteenth Amendment. Michael Avery, *Obstacles to Litigating Civil Claims for Wrongful Conviction: An Overview*, 18 B.U. PUB. INT. L.J. 439, 445–46 (2009).

60. *See* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 ("The Fourth Amendment . . . has been thought to define [due process] for seizures of person or property in criminal cases, including the detention of suspects pending trial.").

61. In tort terms, claims before a judicial appearance are false arrest claims, while claims after the court appearance are malicious prosecution claims. Courts frequently use state tort law terms to describe § 1983 claims. *See infra* notes 82–90 and accompanying text. Judges and scholars have argued that doing so creates confusion. *See infra* notes 90–96 and accompanying text. While we agree with the general idea that referring to § 1983 in state law terms may cause some confusion regarding § 1983's elements, we nevertheless employ these terms to differentiate between two types of § 1983 Fourth Amendment claims—those premised on unlawful arrest and those based upon unlawful detention.

62. 137 S. Ct. 911 (2017).

63. *Id.* at 916.

64. *Id.* at 915.

fabrications.[65] Manuel was held in jail for forty-eight days before he was finally released.[66] Approximately two years later, he filed a § 1983 claim against the City of Joliet and several of its police officers claiming he was deprived of his Fourth Amendment rights.[67] The Seventh Circuit affirmed the lower court's dismissal of Manuel's claim, reasoning that "once detention by reason of arrest turns into detention by reason of arraignment . . . the Fourth Amendment falls out of the picture and the detainee's claim that the detention is improper becomes a claim of malicious prosecution violative of due process."[68] In short, under the Seventh Circuit's rationale, a judicial proceeding shifts a § 1983 claim from a Fourth Amendment claim to a Fourteenth Amendment procedural due process claim.[69]

In 2016, the Supreme Court granted Manuel's petition for certiorari to determine "[w]hether an individual's Fourth Amendment right to be free from unreasonable seizure continues beyond legal process so as to allow a malicious prosecution claim based upon the Fourth Amendment."[70] In an opinion written by Justice Kagan, the Court held that "pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case."[71] The Court reasoned that the Fourth Amendment protects individuals during both arrest and pretrial detention.[72] According to the Court, the primary issue is not whether a judge determined there was probable cause but whether the "legal process" has actually satisfied the Fourth Amendment probable cause requirement.[73] Put a bit differently, a judicial determination does not magically create probable cause.[74] Probable cause is created by the supportable underlying facts of the case. When those facts are nonexistent, perhaps because law enforcement officials fabricated evidence, probable cause is also nonexistent, and the plaintiff has stated a cognizable Fourth Amendment claim.[75] Accordingly, the Court explicitly rejected the idea that a judicial determination can "extinguish the detainee's Fourth Amendment claim" or convert it into a Fourteenth Amendment claim.[76] Thus, *Manuel* makes clear that a person arrested and detained without probable

65. *Id.*

66. *Id.* at 915–16.

67. *Id.* at 916.

68. Manuel v. City of Joliet, 590 F. App'x 641, 643–44 (7th Cir. 2015) (quoting Llovet v. City of Chicago, 761 F.3d 759, 763 (7th Cir. 2014)), *rev'd*, 137 S. Ct. 911 (2017).

69. *Manuel*, 137 S. Ct. at 916.

70. *Id.* at 923 (emphasis omitted).

71. *Id.* at 918.

72. *Id.* at 919.

73. *Id.* at 918–19.

74. *Id.* (noting that "[t]he judge's order holding Manuel for trial therefore lacked any proper basis" because "[a]ll that the judge had before him were police fabrications about the pills' content").

75. *Id.*

76. *Id.*

cause may have a viable § 1983 claim for deprivation of their Fourth Amendment rights.

Following *Manuel*, a § 1983 plaintiff can allege three types of Fourth Amendment claims: (1) claims based upon arrest without probable cause (false arrest); (2) claims based upon pretrial detention without probable cause (false imprisonment); and (3) claims based upon excessive force or police brutality (assault and battery claims).[77] This Article focuses only on the first two categories. Section I.B.1 explains § 1983 malicious prosecution claims. Section I.B.2 describes false arrest claims. Importantly, to establish either claim, a § 1983 plaintiff must prove there was not probable cause.

1. Section 1983 "Malicious Prosecution" Claims

For years, judges and scholars have debated the concept of a § 1983 "malicious prosecution claim."[78] As previously noted, this debate primarily consists of two arguments. The first argument is whether unlawful detention claims should be characterized as Fourth or Fourteenth Amendment claims and whether § 1983 malicious prosecution claims incorporate state tort law elements.[79] The second asks what elements a plaintiff must prove for a viable § 1983 malicious prosecution claim.[80] *Manuel* makes clear that pretrial detentions in the absence of probable cause fall within the parameters of the Fourth Amendment. However, as Justice Alito points out in his dissent, the majority fails to explain the elements of this "constitutional tort."[81]

Not surprisingly, courts continue to disagree about the elements that a plaintiff must prove to succeed on a § 1983 malicious prosecution claim. Four circuits require a § 1983 plaintiff to satisfy one or more elements of a state tort claim for malicious prosecution in addition to establishing the absence of probable cause.[82] Four circuits only require a § 1983 plaintiff to establish the

77. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 388 (1989) (noting that all claims that "law enforcement officials used excessive force in the course of making . . . a[] 'seizure'" should be "analyzed under the Fourth Amendment's 'objective reasonableness standard'"); Chavez v. County of Bernalillo, 3 F. Supp. 3d 936, 993 n.18 (D.N.M. 2014) (classifying the plaintiff's false arrest and false imprisonment claims as Fourth Amendment claims).

78. *See, e.g.*, Erin E. McMannon, Note, *The Demise of § 1983 Malicious Prosecution: Separating Tort Law from the Fourth Amendment*, 94 NOTRE DAME L. REV. 1479, 1479–80 (2019) (suggesting that "use of the language of malicious prosecution tort law to describe what really amounts to a Fourth Amendment seizure claim under § 1983" causes unnecessary confusion).

79. *See, e.g.*, Albright v. Oliver, 510 U.S. 266, 270–71 n.4 (1994) (analyzing whether unlawful detention claims fall under the Fourth or Fourteenth Amendments without deciding whether § 1983 claims incorporate state tort law elements).

80. *Id.* at 270 n.4 (deciding the first argument and relegating discussion of the second argument to a footnote).

81. *Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) ("[T]o flesh out the elements of this constitutional tort, we must look for 'tort analogies.'").

82. *See, e.g.*, Cook v. Sheldon, 41 F.3d 73, 79 (2d Cir. 1994) ("Though section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law.");

constitutional violation.[83] Two circuits have held state common law is inapplicable in this context.[84] One circuit has not yet addressed the issue.[85]

In circuits adopting a state common law approach to § 1983 unlawful detention claims, a plaintiff's federal § 1983 claim and state tort law claim will be substantially the same. For example, to establish a state tort claim under New York state law, a plaintiff is required to meet each of the following elements:

Johnson v. Knorr, 477 F.3d 75, 81–82 (3d Cir. 2007) (stating the plaintiff can establish a § 1983 malicious prosecution claim through the Fourth Amendment by demonstrating "(1) the defendant initiated a criminal proceeding; (2) the criminal proceeding ended in his favor; (3) the defendant initiated the proceeding without probable cause; (4) the defendant acted maliciously or for a purpose other than bringing the plaintiff to justice; and (5) the plaintiff suffered deprivation of liberty"); Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004) ("We look to [state] law to determine the legal effect of the state court's action because we have incorporated the relevant elements of the common law tort of malicious prosecution into our analysis under § 1983."); Blue v. Lopez, 901 F.3d 1352, 1357 (11th Cir. 2018) (citing Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003)) ("To establish a federal claim for malicious prosecution under § 1983, a plaintiff must prove (1) the elements of the common-law tort of malicious prosecution and (2) a violation of his Fourth Amendment right to be free from unreasonable seizures.").

83. *See, e.g.*, Hernandez-Cuevas v. Taylor, 723 F.3d 91, 100–01 (1st Cir. 2013) (quoting Evans v. Chalmers, 703 F.3d 636, 647 (4th Cir. 2012)) (announcing the court was "join[ing] those four circuits that have adopted a purely constitutional approach, holding that a plaintiff may bring a suit under § 1983 . . . if he can establish that: 'the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in plaintiff's favor'"); Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000) (citing Brooks v. City of Winston-Salem, 85 F.3d 178, 183 (4th Cir. 1996)) ("[T]here is no such thing as a '§ 1983 malicious prosecution' claim. . . . [It] is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution—specifically, the requirement that the prior proceeding terminate favorably to the plaintiff."); Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010) (internal citations omitted) (stating malicious prosecution is a "separate constitutionally cognizable claim" under the Fourth Amendment and a § 1983 plaintiff can establish this claim by showing (1) "a criminal prosecution was initiated against the plaintiff and that the defendant 'ma[d]e, influence[d], or participate[d] in the decision to prosecute;'" (2) "there was a lack of probable cause for the criminal prosecution;" (3) "'as a consequence of a legal proceeding,' the plaintiff suffered a 'deprivation of liberty;'" and (4) "the criminal proceeding must have been resolved in the plaintiff's favor"); Pierce v. Gilchrist, 359 F.3d 1279, 1288 (10th Cir. 2004) (citing Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996)) ("[A]lthough the common law elements provide the 'starting point' for the analysis of a § 1983 malicious prosecution claim, the ultimate question is whether plaintiff can prove a constitutional violation.").

84. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 953–54 (5th Cir. 2003) ("The initiation of criminal charges without probable cause may set in force events that run afoul of . . . the Fourth Amendment . . . . [A]nd some such claims may be made under 42 U.S.C. § 1983. Regardless, they are not claims for malicious prosecution and labeling them as such only invites confusion."); Kurtz v. City of Shrewsbury, 245 F.3d 753, 758 (8th Cir. 2001) (citing Gunderson v. Schlueter, 904 F.2d 407, 409 (8th Cir. 1990)) ("[T]his court has uniformly held that malicious prosecution by itself is not punishable under § 1983 because it does not allege a constitutional injury.").

85. *See* Harris v. Village of Ford Heights, No. 17 C 4184, 2018 WL 2718029, at *4 (N.D. Ill. June 6, 2018) (explaining that prior to *Manuel*, the Seventh Circuit's view was that state law malicious prosecution claims foreclosed federal malicious prosecution claims, but the Supreme Court "called this notion into question"). The Supreme Court in *Manuel* directed the Seventh Circuit to decide the elements of a malicious prosecution claim under the Fourth Amendment. *Manuel*, 137 S. Ct. at 922 ("We leave consideration of this dispute to the Court of Appeals.").

"(1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff; (2) the termination of the proceeding in favor of the plaintiff; (3) the absence of probable cause for the criminal proceeding; and (4) actual malice."[86] The Second Circuit requires a § 1983 plaintiff suing for unlawful detention in New York to meet the same elements.[87] Like the Second Circuit, the Tenth Circuit has continued to require a plaintiff to allege actual malice to state a § 1983 claim for unlawful detention following *Manuel*.[88] Specifically, the Tenth Circuit noted that "*Manuel* did not address whether the tort of malicious prosecution, as opposed to some other common law cause of action, provides an appropriate framework for these Fourth Amendment § 1983 claims" and, accordingly, continued to rely on its own pre-*Manuel* precedent.[89] These courts reason that in the absence of federal common law, state tort law governs.[90]

Both courts and scholars have criticized the practice of importing state tort law elements into § 1983's constitutional element. Professor Sheldon Nahmod, a leading scholar on § 1983, notes that requiring § 1983 plaintiffs to prove state tort law elements "seriously *under-protects* constitutional rights because plaintiffs who can show a deprivation of their constitutional rights by a state actor causing compensable injury might nevertheless be unable to state a claim if they cannot establish all of the common law elements of malicious prosecution."[91] Additionally, as Justice Alito points out in his dissenting opinion, "[t]here is a severe mismatch between [malicious prosecution tort]

86. Mendez v. City of New York, 27 N.Y.S.3d 8, 12 (N.Y. App. Div. 2016).

87. Dufort v. City of New York, 874 F.3d 338, 350 (2d Cir. 2017) (citing Smith-Hunter v. Harvey, 734 N.E.2d 750 (N.Y. 2000)).

88. *See* Margheim v. Buljko, 855 F.3d 1077, 1085 (10th Cir. 2017) (requiring the plaintiff to allege (1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages to state § 1983 Fourth Amendment malicious prosecution claim).

89. *Id.* at 1084 (applying Wilkins v. DeReyes, 528 F.3d 790, 799 (10th Cir. 2008)).

90. Some courts have concluded that 42 U.S.C. § 1988, which directs district courts to apply state law when federal laws "are deficient in the provisions necessary to furnish suitable remedies," applies to § 1983. 42 U.S.C. § 1988(a); *see, e.g.*, Giles v. Campbell, 698 F.3d 153, 154–56 (3d Cir. 2012) (holding Delaware survival law applied to prisoners' § 1983 claims against corrections officers after one officer died because the relevant Federal Rule of Civil Procedure did not outline what substantive law applies when a party to the lawsuit dies); Pietrowski v. Town of Dibble, 134 F.3d 1006, 1008 (10th Cir. 1998) (concluding that an Oklahoma abatement statute applied to arrestee's § 1983 malicious prosecution claim because federal law failed to address whether claim abates when party to lawsuit dies).

91. Brief for Sheldon H. Nahmod as Amici Curiae Supporting Respondents at 16, Manuel v. City of Joliet, 137 S. Ct. 911 (2017) (No. 14-9496); *see also Manuel*, 137 S. Ct. at 925 (Alito, J., dissenting) ("In some instances, importing a malice requirement into the Fourth Amendment would leave culpable conduct unpunished. . . . In other cases, the malice requirement would cast too wide a net.").

elements and the Fourth Amendment."[92] Malice, a core element of malicious prosecution, is a subjective standard while the Court has been clear that the Fourth Amendment reasonableness requirement is an objective standard.[93] Justice Alito concludes, quite appropriately, "[t]hese two standards—one subjective and the other objective—cannot co-exist."[94] Furthermore, Professor Nahmod and Justice Alito both argue that malicious prosecution's favorable termination element undermines the purpose of the Fourth Amendment, which is to protect people from all unreasonable seizures, regardless of whether they are charged and legal proceedings are initiated.[95] In short, there are strong arguments against integrating state tort law elements into § 1983's constitutional inquiry. Yet, in practice, only three circuits have rejected all state tort law elements in their constitutional analysis of § 1983 malicious prosecution claims.[96]

Despite all the various ways courts approach § 1983 unlawful detention claims, there is one common denominator: each approach requires a plaintiff to establish an absence of probable cause to prevail on a § 1983 Fourth Amendment malicious prosecution claim.[97] Furthermore, even if a plaintiff is unable to establish a Fourth Amendment claim premised upon unlawful detention, the plaintiff may prevail on a theory of false arrest.[98]

92. *Manuel*, 137 S. Ct. at 925.

93. *Id.*

94. *Id.*

95. *Id.* at 925–26 (arguing malicious prosecution's favorable-termination element "makes no sense" because "[t]he Fourth Amendment, after all, prohibits *all* unreasonable seizures—regardless of whether a prosecution is ever brought or how a prosecution ends"); *see* Brief for Sheldon N. Nahmod as Amici Curiae Supporting Respondents, *supra* note 91, at 20 ("Making the termination of criminal proceedings in favor of the accused a prerequisite for all § 1983 'malicious prosecution' suits alleging unlawful pretrial detention would contradict established precedents of this Court.").

96. Three circuits have rejected the malice requirement but require the plaintiff to prove that criminal proceedings have terminated in the plaintiff's favor. *See, e.g.*, Hernandez-Cuevas v. Taylor, 723 F.3d 91, 100–01 (1st Cir. 2013) (quoting Evans v. Chalmers, 703 F.3d 636, 647 (1st Cir. 2012)) (adopting a "purely constitutional approach" to § 1983 malicious prosecution claims and noting one element of this approach is that "criminal proceedings terminated in plaintiff's favor"); Humbert v. Mayor of Baltimore City, 866 F.3d 546, 555 (4th Cir. 2017) (noting elements of malicious prosecution case are "the defendant (1) caused (2) a seizure of the plaintiff pursuant to legal process unsupported by probable cause, and (3) criminal proceedings terminated in [the] plaintiff's favor"); King v. Harwood, 852 F.3d 568, 578–80 (6th Cir. 2017) (rejecting malice element but requiring plaintiff to prove favorable termination). Although the Tenth Circuit has also rejected a common law approach to a malicious prosecution claim under § 1983, the Tenth Circuit views the common law elements of malicious prosecution as the starting point of the federal claim. Pierce v. Gilchrist, 359 F.3d 1279, 1288 (10th Cir. 2004) (citing Taylor v. Meacham, 82 F.3d 1556, 1561 (10th Cir. 1996)) ("[A]lthough the common law elements provide the 'starting point' for the analysis of a § 1983 malicious prosecution claim, the ultimate question is whether plaintiff can prove a constitutional violation.").

97. *See supra* notes 80–85 and accompanying text.

98. *See infra* Section I.B.2.

2. Section 1983 "False Arrest" Claims

There is no question that when a person is arrested without probable cause, they have a cognizable § 1983 claim.[99] Nevertheless, circuits are split regarding which party bears the burden on the probable cause issue, with six placing the burden on the plaintiff, three placing the burden on the defendant, and three following the applicable state law.[100] Much of this confusion seems to be a consequence of doctrines colliding. This section explains, quite simply, that § 1983 plaintiffs bear the burden of establishing the absence of probable cause when they bring a Fourth Amendment "false arrest" claim.[101]

In practice, when a police official arrests a person without probable cause, the arrestee will have at least two claims: a state tort law claim for false arrest (or false imprisonment) and a federal civil claim for deprivation of their Fourth Amendment right.[102] In many jurisdictions, to prevail on the state law claim, the plaintiff must simply prove that "(1) the defendant intended to confine him, (2) the plaintiff was conscious of the confinement, (3) the plaintiff did not consent to the confinement, and (4) the confinement was not otherwise privileged."[103] The plaintiff does *not* have to prove that the defendant lacked probable cause; "[r]ather, the defendant may establish probable cause as an absolute defense to the action."[104]

A federal claim based on a false arrest theory differs from a state tort law claim in several respects. To state a viable § 1983 claim, a plaintiff is required to plead two allegations: (1) that they were deprived of a federally protected right, and (2) that the person who deprived them was a person acting under the color of state law.[105] The plaintiff must also specifically identify the constitutional right of which they were deprived.[106] Not surprisingly, plaintiffs will usually ground § 1983 false arrest claims on the Fourth Amendment, which

99. *See* Wallace v. Kato, 549 U.S. 384, 397 (2007) (acknowledging "a § 1983 claim seeking damages for a false arrest in violation of the Fourth Amendment" and discussing the statute of limitations for such a claim).

100. *See* Sarah Hughes Newman, Note, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 355–64 (2006).

101. *See infra* notes 121–29 and accompanying text.

102. Most states recognize the tort of false arrest or imprisonment. Some states recognize and treat false arrest as a separate and distinct tort, although it is probably better understood as a subset of false imprisonment claims. Under the law of torts, "[f]alse arrest . . . describes the setting for false imprisonment when it is committed by an officer or by one who claims the power to make an arrest." DOBBS ET AL., *supra* note 45, § 4.14.

103. Wright v. Musanti, 887 F.3d 577, 587 (2d Cir. 2018).

104. *Id.* (citing Jaegly v. Couch, 439 F.3d 149, 152 (2d Cir. 2006)).

105. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Peterson v. Korobellis, No. 09-6571, 2010 WL 5464205, at *4 (D.N.J. Dec. 28, 2010).

106. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" (citing Graham v. Connor, 490 U.S. 386, 395 (1989))).

guarantees people the right to be free from an unreasonable search and seizure.[107] To do so, a plaintiff must simply allege that there was an arrest and that the arrest was made without probable cause.[108]

Surprisingly, federal courts have not uniformly allocated burdens of production and persuasion in these claims. Most circuits hold that a plaintiff bears the burden of proving the defendant lacked probable cause.[109] However, several circuits have suggested that the burden shifts from the plaintiff to the defendant to show probable cause once the plaintiff "makes a prima facie case of unlawful arrest," which the plaintiff may do by showing that they were arrested without a warrant.[110] The burden then shifts to the defendant to prove there was evidence of probable cause.[111] This approach may be partially attributable to a misappropriation of state common law.[112] Regardless, it oversimplifies how burdens typically function in civil proceedings.

There are three types of "burdens" in civil litigation: (1) burden of pleading, (2) burden of production, and (3) burden of persuasion.[113] The burden of pleading refers to a party's obligation to allege or raise a claim or defense.[114] For example, Rule 8 of the Federal Rules of Civil Procedure places the burden of pleading the claim on the party seeking relief and the burden of pleading an affirmative defense on the responding party.[115] The burdens of production and persuasion are evidentiary burdens.[116] The burden of production dictates which party must come forward and present or produce evidence in support of the disputed claim or defense.[117] The party bearing the burden of persuasion must

107. U.S. CONST. amend. IV.

108. *See, e.g.*, Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988) (stating that if there was probable cause, the arresting officer is not liable under § 1983 for a false arrest).

109. *See, e.g.*, Bogan v. City of Chicago, 644 F.3d 563, 570 n.4 (7th Cir. 2011) ("[I]n this circuit, we long have followed the rule that 'a plaintiff claiming that he was arrested without probable cause carries the burden of establishing the absence of probable cause.'" (quoting McBride v. Grice, 576 F.3d 703, 706 (7th Cir. 2009) (per curiam))); *see also* Newman, *supra* note 100, at 358 ("The First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits place the burden on the plaintiff to prove lack of probable cause . . . .").

110. *See, e.g.*, Dubner v. City of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001) ("Although the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest.").

111. *Id.*

112. *See* Newman, *supra* note 100, at 362 ("[T]hese circuits place the burden of proof for probable cause on the defendant based on their interpretation of *Pierson*, the common law, and policy justifications.").

113. Schaffer *ex rel.* Schaffer v. Weast, 546 U.S. 49, 56 (2005) (noting that "burden of proof" is composed of "burden of persuasion" and "burden of production").

114. *Id.*

115. FED. R. CIV. P. 8(a)–(b).

116. *Schaffer*, 546 U.S. at 56.

117. *Id.*

convince or persuade the factfinder of the truth of their allegation.[118] "[I]f the evidence is evenly balanced, the party that bears the burden of persuasion must lose."[119]

Furthermore, the burdens of production and persuasion *usually* follow the burden of pleading. Put a bit differently, the party who bears the burden of pleading a claim or defense also typically bears the burdens of production and persuasion regarding that particular claim or defense.[120] Accordingly, a plaintiff will usually bear the burden of pleading, production, and persuasion on all of the elements of their case in chief, and a defendant will typically bear all three burdens on all of the elements of their affirmative defenses.[121]

Therefore, one could reasonably conclude that determining which party bears the burden of proving the presence or absence of probable cause depends on whether probable cause is viewed as an element of the plaintiff's claim or as a defense to a claim of false arrest. Although state common law may treat probable cause as an affirmative defense to the tort of false arrest, under § 1983 jurisprudence, it should be an element of a § 1983 plaintiff's case in chief.[122] As previously mentioned, to state a claim under § 1983, a plaintiff must allege that the defendant, acting under color of state law, deprived them of a federally protected right.[123] In the context of a false arrest claim, the Fourth Amendment is usually the right at issue.[124] Accordingly, the *plaintiff* must allege that they were deprived of their Fourth Amendment right.[125] Furthermore, because the Court has made clear that a warrantless arrest does not necessarily violate the Fourth Amendment,[126] there is only one way to establish a Fourth Amendment violation in this particular context: to establish the absence of probable cause.[127] Thus, the probable cause issue is a necessary element nestled into the plaintiff's Fourth Amendment claim.[128] Accordingly, it makes little sense to assign a § 1983 defendant the burden of pleading or proving probable cause.

118. Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries, 512 U.S. 267, 274–75 (1994).

119. *Id.* at 272.

120. *See Schaffer*, 546 U.S. at 56–58.

121. *See id.* at 57.

122. *See supra* notes 102–07 and accompanying text.

123. *See supra* note 106 and accompanying text.

124. *See supra* notes 107–08 and accompanying text.

125. *Id.*

126. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 323 (2001) (holding that a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation, does not violate the Fourth Amendment); United States v. Watson, 423 U.S. 411, 415 (1976).

127. *Watson*, 423 U.S. at 417.

128. *See* U.S. CONST. amend. IV. To be clear, there are some types of Fourth Amendment claims, like excessive force, where a § 1983 plaintiff does not have to establish that the police lacked probable cause. *See, e.g.*, Graham v. Connor, 490 U.S. 386, 395 (1989) ("[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its

Except for those few circuits that follow state common law, most circuits recognize that the plaintiff bears the ultimate burden of persuading the factfinder that the defendant lacked probable cause in § 1983 cases alleging false arrest.[129] Nevertheless, a few circuits have adopted a burden-shifting framework to resolve evidentiary disputes of probable cause.[130] For example, in *Martin v. Duffie*,[131] the Tenth Circuit held that a plaintiff established a prima facie case for his Fourth Amendment false arrest claim "by showing arrest and confinement without a warrant and without other justification."[132] Once the plaintiff meets this initial burden, the burden passes to the defendant to produce evidence of probable cause.[133] It is important to recognize that even when courts adopt a burden shifting framework, the burden of persuasion remains with the plaintiff at all times.[134] Only the burden of production shifts between the plaintiff and defendant.[135]

Clearly, probable cause is an integral element of any § 1983 false arrest claim. If the arresting officer had probable cause to believe the arrestee committed a crime, the arrest does not violate the Fourth Amendment, and, accordingly, there is no § 1983 liability under this particular theory.[136] Regardless of whether § 1983 plaintiffs frame their claims as a false arrest or false detention claim, they should bear the burden of proving a Fourth Amendment violation. To prevail in this particular context, they will have to prove that the police lacked probable cause to arrest and/or detain them.[137] In many cases, a criminal court will have already determined this exact point: the police lacked probable cause to arrest and detain the arrestee. Part II considers whether § 1983 plaintiffs may rely on the earlier criminal case to prove this element of their false arrest and false detention claims.

'reasonableness' standard."). But in false arrest and false detention cases, the lack of probable cause is precisely what gives rise to the plaintiff's cause of action. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018) (citing *Atwater*, 532 U.S. at 354) ("A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence.").

129. *See supra* notes 109–13 and accompanying text.

130. *See, e.g.*, Dubner v. City of San Francisco, 266 F.3d 959, 965 (9th Cir. 2001).

131. 463 F.2d 464 (10th Cir. 1972).

132. *Id.* at 469.

133. *Id.*

134. *Id.* ("Ultimately plaintiff had what is often described as the risk of nonpersuasion on the issue of lack of probable cause.").

135. *See id.*

136. To state a Fourth Amendment claim for false arrest, a plaintiff must allege two elements: (1) that there was an arrest and (2) that the arrest was made without probable cause. Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988). If there was probable cause, the arresting officer is not liable under § 1983 for a false arrest. *See* Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004) ("Because probable cause to arrest constitutes justification, there can be no claim for false arrest where the arresting officer had probable cause to arrest the plaintiff."); Peterson v. Korobellis, No. 09-6571, 2010 WL 5464205, at *6 (D.N.J. Dec. 28, 2010).

137. *See* Manuel v. City of Joliet, 137 S. Ct. 911, 918 (2017).

II. THE PRECLUSION DOCTRINES

For most Civil Procedure professors, the mere mention of "prior litigation" conjures up three related doctrines: issue preclusion, claim preclusion, and full faith and credit. A basic prerequisite for all three is litigation across cases. Claim preclusion, which prevents a plaintiff from litigating a claim that should have been brought in an earlier action,[138] is largely irrelevant to this Article. However, issue preclusion and intra-jurisdiction application through the full faith and credit doctrine are central to this Article.

Issue preclusion and full faith and credit are closely related doctrines. Issue preclusion, a common law doctrine, prevents a party from litigating an issue in the second case that was already litigated in the first case.[139] The Full Faith and Credit Clause is a bit broader, requiring that states follow and effectuate "the public acts, Records and judicial Proceedings of every other State."[140] Accordingly, if a court in one state has found that the police lacked probable cause to arrest a suspect, the Full Faith and Credit Clause would seem to require every other state to honor that decision. Notably, however, Article IV of the Constitution only applies to the states.[141] The Full Faith and Credit Act applies equally to state and federal courts.[142] Combined, the Full Faith and Credit Clause and the Full Faith and Credit Act ensure that (with some exceptions) a state court's proceedings will be honored by both state and federal courts in the United States.

Section 1983 jurisprudence intertwines the Full Faith and Credit Act and state issue preclusion rules.[143] As just noted, the Full Faith and Credit Act

138. Allen v. McCurry, 449 U.S. 90, 94 (1980). Preclusion has a long history rooted in common law. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4403 (2d ed. 2002). Interestingly, though, claim preclusion and issue preclusion have different origins. Alexandra Bursak, Note, *Preclusions*, 91 N.Y.U. L. REV. 1651, 1653 (2016). Historically, res judicata, or claim preclusion, was "a nuclear, private right, limited only to the two parties of the first adjudication." *Id.* at 1662. In contrast, issue preclusion "began as a tool of judicial legitimacy and became a means of achieving efficiency," promising "broad protection for litigants threatened by vexatious and repetitive suits." *Id.* at 1663.

139. *Allen*, 449 U.S. at 94.

140. U.S. CONST. art. IV, § 1; *see also* Katherine C. Pearson, *Common Law Preclusion, Full Faith and Credit, and Consent Judgments: The Analytical Challenge*, 48 CATH. U. L. REV. 419, 441–47 (1999) ("Full faith and credit has been interpreted as federalizing the application of claim and issue preclusion.").

141. Univ. of Tenn. v. Elliott, 478 U.S. 788, 799 (1986) ("The Full Faith and Credit Clause is of course not binding on federal courts . . . .").

142. Act of June 25, 1948, Pub. L. No. 80-773, § 1738, 62 Stat. 869, 947 (codified at 28 U.S.C. § 1738) ("[R]ecords and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . ."); *see also* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (noting that § 1738 "directs all courts to treat a state-court judgment with the same respect that it would receive in the courts of the rendering State").

143. *See infra* Section II.A.

requires federal courts to follow state court determinations.[144] The Supreme Court, however, has taken this a step further and held that the Full Faith and Credit Act requires "all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so."[145] Accordingly, the relevant question is: Would the State preclude the parties from relitigating the issue?

Preclusion rules have the potential to impact subsequent § 1983 litigation regarding unlawful arrests and detention in two obvious ways. When the criminal proceedings end in a determination that the government official had probable cause to believe the suspect committed a crime, the § 1983 defendant may argue that the suspect—now the civil plaintiff—is prohibited from relitigating this issue in the civil proceeding.[146] This means the plaintiff will lose their § 1983 unlawful arrest and detention claim.[147] On the other hand, when the criminal proceedings have ended in a determination that probable cause was lacking, the plaintiff, formerly the criminal defendant, may argue that the defense is precluded from challenging this conclusion. This offensive use of issue preclusion would bind the civil court to the prior conclusion, which means the plaintiff is spared the burdens of proving this element of their § 1983 claim.[148] Thus, it is important to understand what issue preclusion rules govern § 1983 litigation.

A. *Issue Preclusion in § 1983 Litigation*

Viewed entirely through the lens of the Full Faith and Credit Act, the issue seems clear—courts litigating § 1983 claims of false arrest are bound by the criminal courts' prior probable cause determination. Unfortunately, the Court created a far more complicated framework for determining the effect of prior litigation on later § 1983 claims in *Allen v. McCurry*[149] by linking the Full Faith and Credit Act to state preclusion rules.[150]

144. § 1738, 62 Stat. at 947.

145. Allen v. McCurry, 449 U.S. 90, 96 (1980).

146. *See, e.g.*, Cameron v. Fogarty, 806 F.2d 380, 383 (2d Cir. 1986); Autrey v. Stair, 512 F. App'x 572, 576 (6th Cir. 2013); Buttino v. City of Hamtramck, 87 F. App'x 499, 499–500 (6th Cir. 2004); Haupt v. Dillard, 17 F.3d 285, 285 (9th Cir. 1994).

147. As explained in Part I, if the arresting officer had probable cause to believe the arrestee committed a crime, the officer did not violate the Fourth Amendment and there is no § 1983 liability. *See supra* note 136 and accompanying text.

148. Of course, the plaintiff would have to prove the other elements of their § 1983 claim, but they would be freed from proving this central element.

149. 449 U.S. 90 (1980).

150. *See id.* at 96.

In 1980, the Supreme Court first addressed the question of issue preclusion in § 1983 litigation in *Allen*.[151] In April 1977, Willie McCurry was arrested after a gunfight with several undercover officers.[152] Following his surrender, the officers entered McCurry's residence without a warrant, allegedly to search for other persons.[153] While there, the officers seized drugs and contraband they found in plain view as well as drugs and contraband hidden in drawers and in auto tires on the porch.[154] "At the pretrial suppression hearing, the trial judge excluded the evidence seized from the dresser drawers and tires, but denied suppression of the evidence found in plain view."[155]

Following his conviction, McCurry brought a § 1983 action against two named police officers, several unnamed police officials, the city of St. Louis, and its police department, alleging, among other things, that the search of the drawers and tires deprived him of his Fourth Amendment right to be free from an unreasonable seizure.[156] From there, things got a bit odd. The defendants moved for partial summary judgment, arguing that McCurry was precluded from relitigating the lawfulness of the search.[157] The peculiarity of this is that at the suppression hearing the criminal judge suppressed some of the evidence—a clear indication that at least some portion of the search was unreasonable and in violation of the Fourth Amendment. Nevertheless, the defendants seemed to disregard this adverse finding against them and characterized the search as lawful.[158] And the district court followed suit, granting the defendants' motion for summary judgment and noting that "the only issue in the instant lawsuit [is] whether the entrance into plaintiff's home and the resulting search was lawful [and] was litigated on the merits at his criminal trial in state court and determined adversely to his position."[159] From this, the district court concluded that the plaintiff was "collaterally estopped from relitigating the constitutionality of the search."[160]

151. *Id.* at 91 (explaining that the issue before the Court was "whether the unavailability of federal habeas corpus prevented the police officers from raising the state courts' partial rejection of McCurry's constitutional claim as a collateral estoppel defense to the § 1983 suit against them for damages").

152. *Id.* at 92.

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* Brief for Respondent at 2–4, *Allen*, 449 U.S. 90 (No. 79-935) (alleging that his constitutional rights had been infringed when (1) the police officers conspired to conduct an illegal search of his home, (2) his home was illegally searched, and (3) he was assaulted by police officers upon being arrested).

157. McCurry v. Allen, 466 F. Supp. 514, 515 (E.D. Mo. 1978), *rev'd*, 606 F.2d 795 (8th Cir. 1979), *rev'd*, 449 U.S. 90 (1980).

158. *Id.*

159. *Id.*

160. *Id.* at 515–16. On appeal, McCurry argued that "even if the doctrine of collateral estoppel generally applies to this case, he should be able to proceed to trial to obtain damages for the part of the seizure declared illegal by the state courts." *Allen*, 449 U.S. at 93 n.2.

McCurry appealed and the Supreme Court granted certiorari to determine "whether the rules of res judicata and collateral estoppel are generally applicable to § 1983 actions."[161] Specifically, McCurry argued that he should have an opportunity to relitigate the criminal judge's conclusion that the search did not violate the Fourth Amendment.[162] He reasoned that federal courts should not be bound by the state court's determination because "Congress enacted this legislation to provide a federal forum for litigants in respondent's position to protect their federally guaranteed constitutional rights."[163] The Supreme Court rejected McCurry's argument, holding instead that "Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so."[164] In other words, if courts in the state where the first case was decided would preclude a party from relitigating the issue, then courts in the second case should do the same, even if the first court was a state court and the second a federal court.[165] And, of course, "the common law of preclusion by judgment is not uniform among the states, with some states following modern trends and other states adhering to mutuality and similarly strict prerequisites."[166]

B. *Issue Preclusion in the States*

Although state issue preclusion rules are not identical, they share some common characteristics. The Restatement (Second) of Judgments explains: "When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."[167] Dissected, there are four basic requirements: (1) the issue must be actually litigated, (2) the issue must be determined by a valid and final judgment, (3) the determination must have been essential to the judgment, and (4) the action is between the same parties who

161. *Allen*, 449 U.S. at 96.

162. *See* Brief for Respondent, *supra* note 156, at 7–8.

163. *Id.* at 10.

164. *Allen*, 449 U.S. at 96.

165. Pearson, *supra* note 140, at 442 ("Because of the relationship between preclusion principles and full faith and credit, the Supreme Court often has emphasized that the 'first step' in analyzing an enforcement question involving full faith and credit is to determine the rendering state's law on claim and issue preclusion.").

Let us return to the example offered in the introduction: a New York City district attorney prosecutes an arrestee for resisting arrest and the New York judge determines the officer lacked probable cause for the arrest. *See supra* p. 102 and note 6. Now let's assume the arrestee brings a § 1983 suit against the officer in a New Jersey federal court (perhaps because the officer resides there). Under the Court's holding in *Allen*, the federal court in New Jersey is to apply New York state issue preclusion rules to determine whether to give the New York criminal court's conclusion preclusive effect.

166. Pearson, *supra* note 140, at 443.

167. RESTATEMENT (SECOND) OF JUDGMENTS § 27 (AM. L. INST. 1982).

litigated the initial action.[168] If just one of these requirements is missing, that issue will need to be relitigated in the subsequent case. For example, if the criminal defendant pleads guilty or the prosecutor drops the charges, then the matter hasn't been litigated and there is no valid final judgment. Similarly, if the criminal defendant prevails on other grounds, a court will likely conclude that the probable cause issue determination was not essential to the judgment. The preclusion element that is *easily* the most cumbersome for criminal cases turned civil is the same-party requirement.

C. *Issue Preclusion's "Same Party" Requirement*

Historically, issue preclusion rules required that the two cases be "between the same parties."[169] "Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment."[170] For example, if Plaintiff sues Defendant A for patent infringement and the court finds that Plaintiff did not have a valid patent, Plaintiff could later sue Defendant B for infringing the same patent, and Defendant B would not be able to claim that Plaintiff was precluded from relitigating the issue.[171] "[T]he mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties."[172] In short, so long as they had not been a party to the original suit, either party could overcome the argument that they were precluded from litigating the issue by relying on the mutuality doctrine. The mutuality doctrine, however, eventually yielded to concerns of judicial efficiency.

The Supreme Court recognized the defensive use of issue preclusion in 1971 in *Blonder-Tongue Laboratories*, *Inc. v. University of Illinois Foundation*.[173] Specifically, the Court held that a plaintiff could be precluded from litigating a claim against a new defendant that the plaintiff previously litigated and lost.[174] Accordingly, Defendant B, referenced in the preceding paragraph, would be able to assert issue preclusion against Plaintiff, and so the court would preclude Plaintiff from relitigating the issue if they had fully litigated the issue against Defendant A.

168. *See id.*

169. *See* 1 A.C. FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 418 (Edward W. Tuttle ed., 5th ed. 1925). However, in its earliest form and well into the eighteenth century, "[u]nlike res judicata, which tied the identity of a claim to the party who brought it, estoppel looked to the judicial record as the authoritative source of preclusion." Bursak, *supra* note 138, at 1665.

170. Parklane Hoisery Co. v. Shore, 439 U.S. 322, 326–27 (1979).

171. *See, e.g.*, *id.* at 327–28 (describing a similar scenario).

172. *Id.* at 327.

173. 402 U.S. 313 (1971).

174. *Id.* at 329.

Then, eight years later in *Parklane Hosiery Co. v. Shore*,[175] the Court recognized that in certain limited circumstances a plaintiff who had not previously been party to a suit could assert issue preclusion against a defendant.[176] The Court reasoned that because the defendant had a full and fair opportunity to litigate its claims in the earlier action, it was precluded from relitigating the issue in a second action.[177] The Court pointed out that issue preclusion has a dual purpose: to protect litigants from the burden of relitigating an identical issue with the same party or their privy and to promote judicial economy by preventing needless litigation.[178] Specifically, the Court concluded that "the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied."[179] The Court advised trial courts to consider the following factors: (1) ease with which plaintiff could have joined the first case;[180] (2) foreseeability of future litigation and incentive for defendant to vigorously defend the first case;[181] (3) whether there have been inconsistent judgments in prior cases; and (4) whether different procedures apply in cases which, amongst other things, may have denied the defendant a full and fair opportunity to litigate the issue in the first case and might have resulted in inconsistent judgments.[182] It is noteworthy that *Parklane*

175. 439 U.S. 322 (1979).

176. *Id.* at 337. In *Parklane*, Shore brought a class action civil suit against Parklane alleging that Parklane had issued a materially false and misleading proxy statement in connection with a merger. *Id.* at 324. According to the complaint, Parklane's proxy statement had violated numerous sections of the Securities Exchange Act of 1934 and various rules and regulations promulgated by the Securities and Exchange Commission. *Id.* Before Shore's lawsuit came to trial, the SEC filed suit against the same defendants, alleging that the proxy statement issued by Parklane was materially false and misleading in essentially the same respects as those that had been alleged in Shore's complaint. *Id.* In the SEC case, after a four-day trial, the court found that the Parklane proxy statement was materially false and misleading in the respects alleged and entered a declaratory judgment to that effect. *Id.* at 324–25. In the second case, Shore moved for partial summary judgment against Parklane, alleging that Parklane was collaterally estopped from relitigating the issues that had been resolved against it in the earlier action brought by the SEC. *Id.* at 325.

177. *Id.* at 332–33.

178. *Id.* at 326.

179. *Id.* at 331.

180. *Id. Parklane* suggests that where a plaintiff had the opportunity to join the first case but did not, the use of offensive collateral estoppel should be barred. In terms of policy, it would be unfair for a plaintiff to rely on a previous judgment against the defendant but not be bound by a judgment in favor of the defendant. This would promote a "wait and see" approach and subsequently lead to an increase in litigation.

181. *Id.* at 332 (reasoning that the foreseeability of private suits following a government judgment should have made Parklane litigate the prior SEC lawsuit "fully and vigorously"). If future suits are not foreseeable to a defendant, then the defendant has less incentive to defend earnestly in the first case. *Id.*

182. *Id.*

concerned two civil cases, both of which were initiated in federal district courts.[183]

Parklane demonstrates, as a general matter, how the mutuality doctrine has eroded over time. Importantly, *Parklane*'s preclusion rules do not apply to § 1983 Fourth Amendment claims in which the plaintiff wants to rely on an earlier state criminal court disposition.[184] As *McCurry* makes clear, a federal court must apply the relevant state preclusion rules when a § 1983 plaintiff wants to rely on a prior *state* court decision.[185] Thus, state law, not federal law, will govern preclusion decisions in most § 1983 claims that allege an absence of probable cause unless the § 1983 plaintiff was prosecuted in federal court.[186]

Nevertheless, today, most states follow the rule outlined in *Parklane*, allowing a litigant who was not a party to the original suit to *assert* issue preclusion against a litigant who was party to the original suit. More specifically, twenty states have rejected a requirement of mutuality for issue preclusion altogether.[187] Accordingly, a party who did not participate in the

183. *Id.* at 324. *But see* United States v. Mendoza, 464 U.S. 154, 158–64 (1984) (holding that the government was exempt from the use of nonmutual offensive collateral estoppel). In *Mendoza*, the Supreme Court distinguished the case at bar from *Parklane*, noting that "the party against whom the estoppel is sought is the United States." *Id.* at 159. The Court ultimately held "that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case." *Id.* at 162. However, the Court did note that "[t]he concerns underlying our disapproval of collateral estoppel against the Government are for the most part inapplicable where mutuality is present." *Id.* at 163–64.

184. Federal common law—*Parklane*—applies when a party wants to rely on a prior *federal court* judgment. *See* Taylor v. Sturgell, 553 U.S. 880, 892 (2008) ("The preclusive effect of a federal-court judgment is determined by federal common law.").

185. *See* Allen v. McCurry, 449 U.S. 90, 97–98 (1980).

186. *Id.* at 96 ("Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so.").

187. *See, e.g.*, Johnson v. Union Pac. R.R., 104 S.W.3d 745, 750 (Ark. 2003) (stating that claim preclusion does not require mutuality of parties before the doctrine is applicable); Aetna Cas. & Sur. Co. v. Jones, 596 A.2d 414, 422–23 (Conn. 1991) (same); Columbia Cas. Co. v. Playtex FP, Inc., 584 A.2d 1214, 1217 (Del. 1991) (same); Exotics Haw.-Kona, Inc. v. E.I. Dupont De Nemours & Co., 90 P.3d 250, 263 (Haw. 2004) (expanding collateral estoppel and recognizing nonmutual offensive issue preclusion); Moore v. Cabinet for Hum. Res., 954 S.W.2d 317, 319 (Ky. 1997) ("Thus, the Court abandoned the mutuality requirement of *res judicata* in adopting non-mutual collateral estoppel, applicable when at least the party to be bound is the same party in the prior action."); Hossler v. Barry, 403 A.2d 762, 766 (Me. 1979) ("[T]he doctrine of mutuality of estoppel should no longer govern the application of collateral estoppel in the courts of this State."); Commonwealth v. Stephens, 885 N.E.2d 785, 791 (Mass. 2008) ("Historically, mutuality of the parties was required in order for collateral estoppel to apply, a requirement now abandoned in civil cases." (citation omitted)); Aufderhar v. Data Dispatch, Inc., 452 N.W.2d 648, 650 (Minn. 1990) (stating mutuality is not required for issue preclusion); Marcum v. Miss. Valley Gas Co., 672 So. 2d 730, 733 (Miss. 1996) (same); Peterson v. Neb. Nat. Gas Co., 281 N.W.2d 525, 527 (Neb. 1979) (same); Paradise Palms Cmty. Ass'n v. Paradise Homes, 505 P.2d 596, 599 (Nev. 1973) (recognizing many courts have abandoned mutuality requirement and limited requirement of privity to party against whom res judicata is asserted and adopting that standard for collateral estoppel); Cutter v. Town of Durham, 411 A.2d 1120, 1121 (N.H. 1980) (expressing mutuality is not essential); State v. Gonzalez, 380 A.2d 1128, 1133 (N.J. 1977) (same);

original action may still preclude someone who was a party to the original action from relitigating an issue decided in the original case. Sixteen states and the District of Columbia, however, have developed their own tests to determine when it is appropriate to preclude a defendant from relitigating an issue that had been unfavorable to them in an earlier state action.[188] For example, the District of Columbia requires a litigant who wishes to assert nonmutual offensive issue preclusion against another litigant to satisfy a two-part inquiry, which requires the trial court to consider the fairness of precluding the party from relitigating the issue.[189] Similarly, under Illinois law, courts are to apply a fairness inquiry.[190] Alternatively, some states are willing to relax the mutuality requirement for defensive use of collateral estoppel.[191] Interestingly, Louisiana

Silva v. State, 745 P.2d 380, 384 (N.M. 1987) (same); B.R. DeWitt, Inc. v. Hall, 225 N.E.2d 195, 198 (N.Y. 1967) (same); Bowen *ex rel*. Doe v. Arnold, 502 S.W.3d 102, 115 (Tenn. 2016) (same); Trepanier v. Getting Organized, Inc., 583 A.2d 583, 588 (Vt. 1990) (same); Walden v. Hoke, 429 S.E.2d 504, 508 (W. Va. 1993) (same); Sumpter *ex rel.* Michelle T. v. Crozier, 495 N.W.2d 327, 331 (Wis. 1993) (same); Tex. W. Oil & Gas Corp. v. First Interstate Bank of Casper, 743 P.2d 857, 864 (Wyo. 1987), *aff'd*, 749 P.2d 278 (Wyo. 1988) (same).

188. Sixteen states, as well as the District of Columbia, permit offensive nonmutual issue preclusion, usually after certain conditions are met or if principles of fairness justify its use. *See, e.g.*, Briggs v. Newton, 984 P.2d 1113, 1120 (Alaska 1999) (asserting different conditions to be met to invoke nonmutual issue preclusion); Vandenberg v. Superior Ct., 982 P.2d 229, 237 (Cal. 1999) (same); Cent. Bank Denver, N.A. v. Mehaffy, Rider, Windholz & Wilson, Att'ys at L., 940 P.2d 1097, 1101 (Colo. App. 1997) (same); Modiri v. 1342 Rest. Grp., Inc., 904 A.2d 391, 395 (D.C. 2006) (same); Anderson v. City of Pocatello, 731 P.2d 171, 178–79 (Idaho 1986) (same), *aff'd on reh'g*, 731 P.2d 171 (Idaho 1987); Herzog v. Lexington, 657 N.E.2d 926, 930 (Ill. 1995) (same); Kimberlin v. DeLong, 637 N.E.2d 121, 125 (Ind. 1994) (same); Fischer v. City of Sioux City, 654 N.W.2d 544, 547 (Iowa 2002) (same); Garrity v. Md. State Bd. of Plumbing, 135 A.3d 452, 458–63 (Md. 2016) (recognizing Maryland had recognized defensive use for years but was long unsettled as to offensive use, and affirming the offensive use in specific case where certain elements were met); James v. Paul, 49 S.W.3d 678, 684–85 (Mo. 2001) (stating certain factors must be considered before nonmutual issue preclusion will apply); Shannon v. Moffett, 604 P.2d 407, 411 (Or. Ct. App. 1979) (same); Shaffer v. Smith, 673 A.2d 872, 874 (Pa. 1996) (quoting Safeguard Mut. Ins. v. Williams, 345 A.2d 664, 668 (Pa. 1975)) (same); Providence Tchrs. Union v. McGovern, 319 A.2d 358, 361 (R.I. 1974) (same); Graham v. State Farm Fire & Cas. Ins., 287 S.E.2d 495, 496 (S.C. 1982) (same); Eagle Props., Ltd. v. Scharbauer, 807 S.W.2d 714, 721 (Tex. 1990) (same); State v. Mullin-Coston, 95 P.3d 321, 324 (Wash. 2004) (same).

189. *Modiri*, 904 A.2d at 395.

190. *Herzog*, 657 N.E.2d at 930 (noting the court previously stated that "circuit courts must have broad discretion to ensure that application of offensive collateral estoppel is not fundamentally unfair to the defendant, even though the threshold requirements for collateral estoppel are otherwise satisfied").

191. Four states have abandoned the mutuality requirement for defensive issue preclusion but have not yet recognized it with regard to offensive issue preclusion. *See* Wetzel v. Ariz. State Real Est. Dep't., 727 P.2d 825, 828–29 (Ariz. Ct. App. 1986) (approving of offensive nonmutual issue preclusion but noting the mutuality requirement has been abandoned for defensive use of the doctrine); Anco Mfg. & Supply Co. v. Swank, 524 P.2d 7, 13 (Okla. 1974) (same); Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., 336 N.W.2d 153, 159 (S.D. 1983) ("We now join those jurisdictions which have allowed the use of collateral estoppel or res judicata in a civil action when a new defendant affirmatively raises these defenses to bar a plaintiff from reasserting issues the plaintiff has actually previously litigated and lost on the merits against another defendant."); Macris & Assocs., Inc. v. Neways, Inc., 16 P.3d 1214, 1224 (Utah 2000) ("[I]ssue preclusion applies even if only 'the party *against* whom the

rejected the use of collateral estoppel and res judicata entirely until 1991, when the legislature passed a statute recognizing res judicata. Now, Louisiana requires that "the party against whom the collateral estoppel would be applied generally must either have been a party, or privy to a party, in the prior litigation."[192] Seven states still require mutuality of parties, either requiring the same party or a party in privity.[193] In short, states approach issue preclusion differently when a person who wasn't a party to the original suit wishes to use a previously litigated issue against a defendant who was a party to the earlier suit.

Regardless of whether a party proceeds under state or federal preclusion rules or which state rule applies, a party generally will only be able to assert issue preclusion *against* a person or entity that was the same party involved in the original litigation. In other words, a nonparty will not be precluded from relitigating an issue that was decided in the initial case. This, of course, raises the following question: Does a party qualify as the same party or a nonparty?

In *Taylor v. Sturgell*,[194] the Supreme Court addressed "the rule against nonparty preclusion."[195] Like all issue preclusion claims, *Taylor* involved two different lawsuits.[196] In the first, Greg Herrick brought a lawsuit against the Federal Aviation Administration ("FAA") to obtain records.[197] He lost.[198] Then, less than one month later, Brent Taylor, Herrick's friend, brought a

[doctrine] is asserted [was] a party or in privity with a party to the prior adjudication.'" (quoting Swainston v. Intermountain Health Care, 766 P.2d 1059, 1061 (Utah 1988))).

192. Chastant v. Chastant, 2013-1402, p. 8 (La. App. 3 Cir. 4/23/14); 138 So. 3d 801, 807 (citing Terrell v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989)). *See generally* LA. STAT. ANN. § 13:4231 (Westlaw through the 2020 2d Extraordinary Sess.) (defining res judicata as "a valid and final judgment . . . between the same parties"); St. Paul Mercury Ins. v. Williamson, 224 F.3d 425, 436 (5th Cir. 2000) (recognizing that a state statute superseded Welch v. Crown Zellerbach Corp., 359 So. 2d 154, 156–57 (La. 1978)).

193. *See* Suggs v. Ala. Power Co., 123 So. 2d 4, 6 (Ala. 1960) ("[I]n order for the judgment in the prior suit to render the question in a subsequent suit res adjudicata, the same issues of fact must have been involved, within issues pleaded or which ought to have been litigated, between the same parties or privies, and applied to the parties or privies at the time of the rendition of that judgment." (quoting H.G. Hill Co. v. Taylor, 174 So. 481, 484 (Ala. 1937)); Stogniew v. McQueen, 656 So. 2d 917, 919 (Fla. 1995) (same); Minnifield v. Wells Fargo Bank, 771 S.E.2d 188, 192 (Ga. Ct. App. 2015) (requiring mutuality of collateral estoppel); N. Nat. Gas Co. v. Nash Oil & Gas, Inc., 506 F. Supp. 2d 520, 528 (D. Kan. 2007) (applying Kansas state law); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 384 (N.D. 1992) ("For purposes of both res judicata and collateral estoppel in this state, only parties or their privies may take advantage of or be bound by the former judgment."); Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 981 (Ohio 1983) (espousing that the general rule is that issue preclusion requires mutuality); Selected Risks Ins. Co. v. Dean, 355 S.E.2d 579, 581 (Va. 1987) (same).

194. 553 U.S. 880 (2008).

195. *Id.* at 893.

196. *Id.* at 885 (explaining Brent Taylor filed an action seeking documents from the FAA after his friend Greg Herrick had previously brought an unsuccessful suit seeking the same records).

197. *Id.*

198. *Id.*

lawsuit against the FAA seeking the same records.[199] The question in the case was whether Herrick should be treated as the same party as Taylor and, accordingly, precluded from relitigating the issue previously decided against Taylor.[200] This might be best understood as a two-fold question: whether Taylor and Herrick are, in fact, the same party and, if not, whether the court should nevertheless treat them as the same party.

Not surprisingly, the case turned on the second issue: whether the court should treat Taylor and Herrick as the same party (nobody suggested they were actually the same party, simply that they should be treated as such).[201] Relying on the Eighth Circuit decision *Tyus v. Schoemehl*,[202] the trial court held that Taylor was precluded from relitigating the issue that Herrick previously lost because Taylor qualified as Herrick's "virtual representative."[203] The Supreme Court disagreed. The Court recognized several circumstances in which a party should be treated as the same party. The six exceptions the Court recognized are: (1) the party agrees to be bound, (2) the party has preexisting substantive legal relationship with a party in the original, (3) the party was adequately represented by someone with the same interests who was a party in the original action, (4) the party assumed control over the prior litigation, (5) the party is relitigating through a proxy, and (6) some special statutory scheme expressly forecloses successive litigation by nonlitigants.[204] However, the Court refused to extend this list to include "virtual representation."[205]

To be clear, nonparty collateral estoppel may take two forms: (1) a nonparty may attempt to preclude a party to the earlier litigation from relitigating a point (for example, *Parklane*);[206] or (2) a party may attempt to preclude a person who was not party to the first case from relitigating a point that was decided in that case (for example, *Taylor*).[207] Here, the issue is not whether a nonparty may assert issue preclusion against a person who was a party to the previous suit—the § 1983 plaintiff clearly was a party to in the original

199. *Id.* The D.C. Circuit held that Taylor could not bring the case because there was "virtual representation" between Herrick in the first case and Taylor in the second. *Id.*

200. *Id.*

201. *Id.* at 905.

202. 93 F.3d 449 (8th Cir. 1996), *overruled by* Taylor v. Sturgell, 553 U.S. 880 (2008).

203. *Taylor*, 553 U.S. at 888 (explaining that the trial court granted summary judgment to Fairchild and FAA because Taylor's suit was barred by claim preclusion. Even though Taylor was not the same party, the court found Taylor was virtually represented in the first lawsuit brought by Herrick). The virtual representation doctrine is "[t]he principle that a judgment may bind a person who is not a party to the litigation if one of the parties is so closely aligned with the nonparty's interests that the nonparty has been adequately represented by the party in court." *Virtual Representation Doctrine*, BLACK'S LAW DICTIONARY (10th ed. 2014).

204. *Taylor*, 553 U.S. at 888.

205. *Id.* at 895–96.

206. *See supra* notes 175–84 and accompanying text.

207. *See supra* notes 194–205 and accompanying text.

criminal action. Courts consistently allow § 1983 defendants who were not named parties in the original action to assert issue preclusion arguments against § 1983 plaintiffs who were the criminal defendant in the original case. Rather, the question at the heart of this Article is whether to treat the defendants in § 1983 probable cause actions as the same party that prosecuted the criminal proceeding, which would allow the § 1983 plaintiff to preclude them from rearguing the probable cause determination. There is little question that the civil defendants were not parties in the criminal case—the criminal case is between the state and criminal defendant—yet there is a very strong argument that they should be treated as though they were parties in the criminal case.

III. PARTY, PURPOSE, AND PRECLUSION

Section 1983 litigation is bound to questions of public identity. In virtually all claims alleging a constitutional deprivation, the public identity inquiry is twofold: first, whether to classify the defendant as a state or local official[208] and second, whether the defendant was acting "'under color of' state law."[209] Under current jurisprudence, the same-party requirement can be conceptually challenging in the context of municipal liability and municipal entities and, more specifically, whether these defendants should be considered the same party as the prosecutor charged with litigating the criminal case. Section III.A discusses the most relevant actors in both the criminal and civil cases. Section III.B explains how courts classify these actors. Section III.C offers a normative conception of the relationship between criminal prosecutors and civil defendants in § 1983 probable cause litigation. Specifically, we argue that, given their shared public character, when a § 1983 plaintiff sues a municipality or police officials for an arrest without probable cause, courts should presume same-party status amongst the defendants and the district attorney who prosecuted the criminal case.

A. *The Parties*

As is always the case with issue preclusion, the litigation contemplated by this Article involves two cases. The first case is the criminal case, brought by the state against the defendant. The second case is the civil case brought by the § 1983 plaintiff against the police or the municipality. At first glance, criminal

208. *See* McMillian v. Monroe County, 520 U.S. 781, 789 (1997) (considering whether a sheriff should be classified as a state or local official).

209. *See* Monroe v. Pape, 365 U.S. 167, 184 (1961) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)) (concluding that government officials act under color of state law even when they misuse their power), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). Despite the similarity in phrasing, these are two very different questions. A police official may not act under color of state law, but, nevertheless, a court may classify the official as a local, rather than state, officer.

and civil litigation seem to assume very different postures. Yet, as explored below, there is one thing that all criminal cases and § 1983 claims have in common—a governmental actor or entity will be a party to the suit.

Criminal law is often understood to punish wrongs against the public generally.[210] This is reflected in the parties to a criminal case. Although crimes often have victims, the suit is between the state and the criminal defendant rather than between the victim and the perpetrator. Furthermore, by labeling something criminal, we legitimize the public prosecution of the crime and empower the state, through a prosecutor, to act on behalf of the public against the accused.[211] In a criminal action, the state is represented by a prosecutor.

In the criminal case, the litigation is between "the State" or "the People" and a private defendant. Ironically, one of the primary actors in the criminal case—the prosecutor—will be wholly absent from future civil litigation, even when prosecutorial decisions caused or contributed to the constitutional deprivations. This is because district attorneys enjoy prosecutorial immunity.[212] And as if prosecutorial immunity does not offer sufficient protection, sovereign immunity offers prosecutors an additional shield from liability.[213]

Consequently, when civil plaintiffs bring a Fourth Amendment § 1983 action, they often will sue the police involved in the arrest and detention, as well as the municipality that employs them.[214] The civil case may appear very different from the criminal case, but upon closer examination there are clearly shared elements. First, both the criminal defendant and civil plaintiff may allege a Fourth Amendment violation although they seek different remedies. The criminal defendant wants the evidence suppressed while the civil plaintiff seeks monetary or injunctive relief. Additionally, in both criminal and civil cases, the opposing party is the government or an official acting under the color of state law. The problem is that the shift in parties between the criminal and civil litigation complicates questions of mutuality in issue preclusion disputes. The

210. Ambrose Y.K. Lee, *Public Wrongs and the Criminal Law*, 9 CRIM. L. & PHIL. 155, 155 (2015).

211. *Id.* at 158 ("To say that a wrong properly concerns the public . . . implies that the public community, or more concretely the state as embodying and acting on behalf of the public, may permissibly take actions in response to it . . . ." (emphasis omitted)).

212. Kalina v. Fletcher, 522 U.S. 118, 131 (1997) ("[T]he prosecutor is fully protected by absolute immunity when performing the traditional functions of an advocate.").

213. *See, e.g.*, Brown v. U.S. Postal Inspection Serv., 206 F. Supp. 3d 1234, 1254 (S.D. Tex. 2016) (noting that when state law classifies prosecutors as state actors, sovereign immunity bars suits against them).

214. *See, e.g.*, Manuel v. City of Joliet, 137 S. Ct. 911, 916 (2017); Morfin v. City of East Chicago, 349 F.3d 989, 994–95 (7th Cir. 2003); Dawson v. Jackson, 748 F. App'x 298, 299 (11th Cir. 2018). Unlike prosecutors who may plead absolute immunity, police officials may only plead qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). Municipalities are not entitled to any form of immunity. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980).

first case is between the state (represented by the prosecutor) and the criminal defendant while the second case is between the former criminal defendant and the municipality and individual officers. One party is clearly the same—the criminal defendant/civil plaintiff; the question is whether the governmental entities—the prosecutor, the municipality, and local police officials—should be presumed to be the same party across the cases.[215]

B. *State, Local, or Private Individual*

Liability in § 1983 litigation can easily turn on whether a defendant is classified as a state official, a municipal official, or a person acting in a private capacity. If the court classifies the defendant as a state official, they will have sovereign immunity for actions seeking monetary relief.[216] Similarly, if the court finds that the defendant was acting in a private capacity, then the plaintiff will not be able to meet the requirement that the defendant acted under the color of state law.[217] Thus, the public identity issue in § 1983 actions is twofold: first, whether to classify the defendant as a state or local official and second, whether the defendant was acting under color of state law.[218]

How courts label the parties sets the stage for preclusion determinations—prosecutors are labeled "state actors" when they file charges and argue suppression motions.[219] On the other hand, municipalities and local police are "local" characters.[220] Given these characterizations there is an obvious argument that courts should not treat them as the same party in issue preclusion disputes. This section considers the governmental identity of the various actors.

Whether to classify a local prosecutor as a state or local entity is a complicated question. In many respects a local prosecutor is a state official.[221]

215. There is little question that the civil plaintiff was a party in the criminal disposition.

216. Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 KAN. B. ASS'N 14, 22 (1998).

217. *Id.*

218. *See* Monroe v. Pape, 365 U.S. 167, 184 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

219. *See* Carter v. City of Philadelphia, 181 F.3d 339, 352 (3d Cir. 1999) ("Other courts of appeals have similarly recognized the hybrid nature of the district attorney's office—distinguishing between a DA's prosecutorial function and his role as elected county policymaker.").

220. *See* Owen v. City of Independence, 445 U.S. 622, 637–40 (1980).

221. Professor Michelle Dempsey offers the following useful explanation:

> In acting qua prosecutor, one acts on behalf of the state. In England and the US, for example, prosecutors act in the name of the 'Queen' or the 'People of . . .', the 'State of . . .', or the 'City of . . .'. This observation helps explain the sense in which prosecutorial action *is* state action. It is important to note the kind of claim being advanced here: it is a conceptual claim regarding the role of prosecutor and the nature of prosecutorial action. The claim is simply that prosecutors act on behalf of their state in the sense that they act as agents of the state.

MICHELLE MADDEN DEMPSEY, PROSECUTING DOMESTIC VIOLENCE: A PHILOSOPHICAL ANALYSIS 48 (2009).

Yet, their role in government is more complicated. Joan Jacoby describes the multiple roles of prosecutors as follows:

> He is the principal representative of the state before the courts, charged with the responsibility of upholding the laws and the constitution. He is reviewing officer for all arrests made by the police and is therefore an interpreter of the laws, capable of influencing the character and quality of law enforcement decisions through the decisions he makes in charging crimes. . . . He is a locally elected politician with an independent source of power—the local voters—and can exercise independent judgment and discretion by making key policy decisions for his community.[222]

In short, district attorneys are a bit of a hybrid, acting as both state and local officials.[223]

In contrast to district attorneys, municipalities are more local in character. Municipalities, literally, are created by the states. A municipality, or municipal corporation, is "[a] city, town, or other local political entity formed by charter from the state and having the autonomous authority to administer the state's local affairs."[224] In an earlier piece, Professor Teressa Ravenell explains the dissemination of power from state to local governments and officials as follows:

> Through a charter, a state may give municipalities within its domain the power to administer certain local affairs and activities. This state charter may delegate certain powers to a governing body . . . . [A] charter may delegate certain powers to a specific municipal official, such as a sheriff, or may allow the governing body to delegate certain powers. Finally, "low-level" municipal employees are charged with executing the policy and decisions enacted by the governing body and governing officials.[225]

Municipalities, like prosecutors, are created by the state to perform a specific function. In the case of municipalities, that function is to carry out "the state's local affairs."[226] Yet, unlike prosecutors, municipalities do not enjoy sovereign immunity.[227] As the Court explains in *Owen v. City of Independence*,[228] "the municipality was an arm of the State, and when acting in that 'governmental' or 'public' capacity, it shared the immunity traditionally accorded the sovereign."[229] However, the Court went on to explain "[b]y including municipalities within the class of 'persons' subject to liability for

222. JOAN E. JACOBY, THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY, at xv (1980).

223. *Id.*

224. *Municipality*, BLACK'S LAW DICTIONARY (7th ed. 1999).

225. Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 163–64 (2011).

226. *See supra* note 222 and accompanying text.

227. *See* Owen v. City of Independence, 445 U.S. 622, 645 (1980).

228. 445 U.S. 622 (1980).

229. *Id.* at 645.

violations of the Federal Constitution and laws, Congress—the supreme sovereign on matters of federal law—abolished whatever vestige of the State's sovereign immunity the municipality possessed."[230] Local governments are not liable because they are unrelated to the state—they clearly derive their authority and existence from the state. Rather, they are liable *despite* being an arm of the state.[231]

Finally, we must consider how courts characterize police officials in § 1983 litigation. A § 1983 plaintiff may choose to sue a governmental employee in the employee's "personal" or "official capacity."[232] As the Supreme Court explained in *Kentucky v. Graham*,[233] when a plaintiff sues a government official in their official capacity, it is "in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity."[234] Accordingly, when, for example, § 1983 plaintiffs sue Philadelphia police officers in the officers' "official capacity," they are in fact suing the City of Philadelphia—the entity for whom the officers work.[235] This, of course means that the plaintiff will have to prove that the municipality subjected or caused the plaintiff to be subjected to the deprivation of a federally protected right. In short, the case really becomes a "*Monell* claim"[236] against the municipality.[237] On the other hand, when a § 1983 plaintiff sues a police official

230. *Id.* at 647–48.

231. *Id.* at 646 (noting that, historically, courts treated municipalities as an arm of the state when acting in a governmental or public capacity but "by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation").

232. *See* Hafer v. Melo, 502 U.S. 21, 25 (1991) (comparing "personal-capacity suits" and "official capacity" suits).

233. 473 U.S. 159 (1985)

234. *Id.* at 165–66.

235. *See id.* at 166. Similarly, when § 1983 plaintiffs sue a department or entity within a municipality, they actually are suing the municipality. *See* Garcia v. City of Merced, 637 F. Supp. 2d 731, 760 (E.D. Cal. 2008) (dismissing § 1983 action against police department and sheriff's department because "[n]aming a municipal department as a defendant is not an appropriate means of pleading a § 1983 action against a municipality"); Hoisington v. County of Sullivan, 55 F. Supp. 2d 212, 214 (S.D.N.Y. 1999) ("Under New York law, a department of a municipal entity is merely a subdivision of the municipality and has no separate legal existence.").

236. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978); *see, e.g.*, Fareed Nassor Hayat, *Preserving Due Process: Applying* Monell *Bifurcation to State Gang Cases*, 88 U. CIN. L. REV. 129, 159 (2019) ("A *Monell* claim refers to a lawsuit against a State entity (*i.e.* a police department, municipal entities, government agency, etc.) that claims that the State's use of custom or policies violate the constitutional rights of an individual."); Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 944–47 (2014).

237. *See Monell*, 436 U.S. at 691–92. As the Court explained in *Monell*, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* To prevail against a municipality, a § 1983 plaintiff must identify a municipal policy or custom and prove that it caused the plaintiff to be deprived of a constitutional right. *Id.* This is easier said than done. *See* Cox v. District of Columbia, 821 F. Supp.

in the officer's personal capacity, the officer, theoretically, will be personally liable if the plaintiff prevails.[238]

When a § 1983 plaintiff sues a government official in their personal capacity, the plaintiff must prove that the defendant was acting under color of state law to prevail.[239] This element ensures that government officials are not liable under § 1983 for their private conduct. For example, when a police official is at home, off duty, and mowing their lawn, there is little question that they should be characterized and treated as a private actor. However, when public employees don a cloak of authority bestowed upon them by the state as a privilege of their employment, they are *personally* liable under § 1983.[240]

In *Monroe v. Pape*,[241] the plaintiffs brought a § 1983 suit against thirteen Chicago police officers for depriving them of their Fourth Amendment rights.[242] The City of Chicago argued that the alleged acts "were committed contrary to all state laws and city ordinances" and, accordingly, the defendants were not acting under the color of state law.[243] Rejecting this argument, the Supreme Court held that, despite their abuse of power, the officers acted under color of state law.[244] "This is because such officials are 'clothed with the authority' of state law, which gives them power to perpetrate the very wrongs

1, 17 (D.D.C. 1993) ("Once a municipal policy or custom has been established, causation, often an even more difficult hurdle, must be spanned. The plaintiff must prove that there is 'a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation.'" (quoting City of Canton v. Harris, 489 U.S. 378, 385 (1989))).

238. *See infra* notes 263–64 and accompanying text (noting that municipalities almost always indemnify police officials for the costs of liability and litigation).

239. Kentucky v. Graham, 473 U.S. 159, 165–66 (1985) ("Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law."). To be clear, § 1983 plaintiffs will always be required to prove that the defendant acted under color of state law. In contrast, when a plaintiff sues a municipality (or sues a municipal employee in their official capacity, which is the equivalent of suing the municipality), the under-color-of-state-law element is irrelevant. A municipality, as an arm of the state, always acts under the color of state law.

It is also useful to note that the under-color-of-state-law element is similar but distinct from the "state action" element necessary to establish most constitutional deprivations. *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 935 n.18 (1982) (recognizing two distinct elements and holding "that [although] conduct satisfying the state-action requirement of the Fourteenth Amendment satisfies the statutory requirement of action under color of state law, it does not follow from that that all conduct that satisfies the under-color-of-state-law requirement would satisfy the Fourteenth Amendment requirement of state action").

240. Monroe v. Pape, 365 U.S. 167, 184 (1961) ("Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law.'" (quoting United States v. Classic, 313 U.S. 299, 325–26 (1941), *overruled on other grounds by Monell*, 436 U.S. 658)).

241. 365 U.S. 167 (1961).

242. *Id.* at 203.

243. Brief for Respondents at 2, *Monroe*, 365 U.S. 167 (No. 39).

244. *Monroe*, 365 U.S. at 184. One interesting—but often ignored—point about *Monroe* is that throughout the opinion the Court refers to city police officials as acting under color of state law. *See id.* at 167. This, arguably, reflects the idea that city officials ultimately derive their power from the state.

that Congress intended § 1983 to prevent."[245] The officers' liability in *Monroe* was very much premised on their status as governmental officials. They were liable under § 1983 *because* they were officials acting under the color of state law.

To summarize, governmental status is a principal element determining whether a § 1983 plaintiff has a viable claim against a defendant. Section 1983 requires that the defendant acted under color of state law. As an arm of the state, a municipality always acts under color of state law. District attorneys performing prosecutorial duties not only act under color of state law, but most states treat them as a state actor, entitling them to sovereign immunity and shielding them from liability. Finally, executive officials, like police officers, are liable under § 1983 when they act under color of state law, and although they indirectly derive their power from the state, they are considered local officials and are entitled to only qualified immunity. In the end, whether courts categorize a defendant as a private individual, local official, or state actor will often be dispositive. Yet, importantly, each of these entities, at least indirectly, derives their power from the state.

C. *Reconceptualizing § 1983 Defendants*

Courts and scholars considering the effect of issue preclusion rules in § 1983 litigation where a criminal court previously made a probable cause determination have given woefully little attention to the relationship among actors in the criminal justice system, and particularly the shared public identity of these actors. Identity is also a key component of preclusion doctrines. One of the basic requirements of issue preclusion is that the person against whom it is being asserted was a party to the original suit.[246] As argued in the preceding section, identity is also a key element of § 1983 liability. Because the civil plaintiff was the criminal defendant in the original suit, many courts will allow a civil defendant (e.g., the police or municipality) to assert issue preclusion in the subsequent civil case. On the other hand, courts refuse to allow the civil plaintiff to assert issue preclusion against the police or municipality, reasoning that neither was a party to the original suit. Yet preclusion rules ignore the shared government identity of § 1983 defendants.[247]

245. Lugar v. Edmondson Oil Co., 457 U.S. 922, 949 n.5 (1982).

246. Taylor v. Sturgell, 553 U.S. 880, 884 (2008) (quoting Hansberry v. Lee, 311 U.S. 32, 40 (1940)). There are recognized exceptions to this requirement. *See supra* Section II.C.

247. Furthermore, the public/private debate operates on several different planes: (1) public interest versus private right, (2) public law versus private law, and (3) public official versus private litigant.

In *Taylor*, the parties framed the issue, in part, as a question about the distinction between public interests and private rights. Brief for the Federal Respondent at 34, *Taylor*, 553 U.S. 880 (No. 07-371) ("Because the right of disclosure under FOIA is a public right, a more flexible standard for establishing privity is appropriate."). The Court has defined the right at issue as a "public interest" when the litigation only has an "indirect impact on the [plaintiff's] interest." Richards v. Jefferson County, 517

1. Merging Identities

As detailed in Section III.B, courts classify § 1983 defendants as state, local, or private and will often categorize the official based upon their conduct. For example, prosecutors may be labeled state actors when they prosecute crimes but local officials when making hiring decisions.[248] Similarly, police officials may be acting under color of state law when they restrain a suspect but acting in a personal capacity when they subdue their child. Thus, we might understand conduct on a sort of spectrum, with state conduct on one end and private behavior on the other. The prosecutor, municipality, and local officials are all a bit of a hybrid of state and local power and their conduct falls somewhere along this spectrum.

Furthermore, prosecutors, municipalities, and police officials are joined by the public nature of their identities. Liability determinations often depend on whether courts characterize them as state, local, or private actors. Yet, when we look at where their power originates, all public actors are, in fact, state actors. The lines we draw between state and local officials largely differentiate who is entitled to sovereign immunity and who is not.

More importantly, in the context of criminal prosecutions where the prosecutor chooses to pursue criminal charges and challenges plaintiffs' motions to suppress evidence, the prosecutor, municipality, and police are "the same

U.S. 793, 803 (1996). The Court has noted that "the States have wide latitude to establish procedures . . . to limit the number of judicial proceedings" in cases involving a public interest. *Id.* In contrast, a private right is "a right that forms part of a person's legal status or personal condition." *Personal Right*, BLACK'S LAW DICTIONARY (10th ed. 2014). Arguably, when litigation involves a private right, as opposed to a public interest, courts are less likely to give preclusive effect to prior litigation. *See, e.g.*, *Richards*, 517 U.S. at 803 (distinguishing between "public" and "private" actions).

Courts and scholars may also present the public/private debate as the distinction between public law and private law. Although scholars have failed to settle on a definition of "public law," the distinction endures, with many scholars speaking of the differences as both self-evident and dispositive. *See* Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 136 2 (1982). Professor Abram Chayes's description of the public law/private law distinction is perhaps the most cited. He describes lawsuits as the traditional "vehicle for settling disputes between private parties about private rights." Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282 (1976). He notes that, in contrast, the object of modern public law litigation "is the vindication of constitutional or statutory policies." *Id.* at 1284. Consequently, defendants in public law litigation will usually be government officials. Thus, under Chayes's definition, the public law/private law distinction seems to turn on two variables: (1) the source of the law and (2) the identity (and number) of the litigants. *See id.* at 1282–84. Courts and legal scholars have used both of these variables, separately and together, to define public law. *See, e.g.*, Garner v. Teamsters, 346 U.S. 485, 494–95 (1953) (noting that a law may be classified as public or private based upon the breadth of its application, "the body of law from which they are derived," or whether a state is a party to the proceedings); David Sloss, *Polymorphous Public Law Litigation: The Forgotten History of Nineteenth Century Public Law Litigation*, 71 WASH. & LEE L. REV. 1757, 1767–68 (2014).

248. *See, e.g.*, Walker v. City of New York, 974 F.2d 293, 296 (2d Cir. 1992); Carter v. City of Philadelphia, 181 F.3d 339, 352 (3d Cir. 1999); Esteves v. Brock, 106 F.3d 674, 678 (5th Cir. 1997); Owens v. Fulton County, 877 F.2d 947, 952 (11th Cir. 1989).

party," united behind the same aim—prosecuting the defendant.[249] As Joan Jacoby explains, "[t]he prosecutor during the intake process assumes a nonadversarial review and investigative role, judging and evaluating the policeman's work, until the charging decision is made. From that point on, as the representative of the state, his role is one of advocacy."[250] Similarly, police officials' roles shift from that of an investigator before a suspect is charged to a witness or "coordinator of witnesses and evidences."[251] In short, while their goals and expectations may initially be divergent,[252] once a prosecutor has decided to pursue charges against a suspect, they essentially have endorsed the police officials' decision to arrest. This is especially important to the issue in this Article—whether civil courts should give preclusive effect to a criminal court's determination during a suppression hearing that the police lacked probable cause to arrest. At this point in the criminal process, it is fair to presume that the police and prosecutor are "on the same team" and share a common goal.[253]

2. Disturbing "the Peace and Repose of Society"

Given the investment and participation of prosecutors, municipalities, and police officials in the criminal justice process, it seems odd that they are not bound by its determinations. As one commentator explains:

> The most purely public purpose served by res judicata lies in preserving the acceptability of judicial dispute resolution against the

249. But see JOAN E. JACOBY & EDWARD C. RATLEDGE, THE POWER OF THE PROSECUTOR 38 (2016), for a different take on the relationship between police and prosecutors:

> Relationships between the police and prosecutors are always 'iffy' if for no other reason than the inherent differences in the goals of the two agencies. For police, it is to protect the public by keeping the peace, enforcing the law, solving crimes, and arresting offenders suspected of the crimes. For prosecution, it is to review police work for the legal sufficiency, make realistic charging decisions, pursue the successful prosecution of defendants, and obtain reasonable and appropriate sanctions.

250. JACOBY, *supra* note 222, at 112.

251. *Id.*

252. There is a strong argument that prosecutors *should* remain neutral until they decide to charge. Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.").

253. Theoretically, by deriving power from the state, police officials (even those behaving unlawfully) have aligned themselves with the state and should be treated as the same party as the municipal representative who litigated the first case—the prosecutor.

One might counter that the § 1983 doctrine distinguishes between government officials and the municipalities that employ them. As the Court explains in *Monell*, "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). The problem with this approach is that it allows the § 1983 doctrine to drive the issue of preclusion determination and ignores the clear relationships among these various government entities that may be manifested in the criminal proceedings.

> corrosive disrespect that would follow if the same matter were twice litigated to inconsistent results. It is easier to live with the abstract knowledge that our imperfect trial processes would often produce opposite results in successive efforts than to accept repeated concrete realizations of that fact.[254]

It seems particularly problematic that key players in the criminal justice system—police and local governments—may collaterally challenge criminal dispositions. As the Court said in *Owen* when it refused to extend qualified immunity to municipalities:

> [h]ow "uniquely amiss" it would be, therefore, if the government itself—"the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct"—were permitted to disavow liability for the injury it has begotten.[255]

Similarly, it seems deeply problematic that government actors heavily involved and invested in the criminal justice system—police and municipalities—are not bound by probable cause determinations when the case shifts from criminal to civil courts, regardless of whether those determinations are favorable or unfavorable to their defense. Consistency seems especially important in the context of criminal dispositions, where varied results would seem to be evidence of a flawed and imperfect system where "truth" and "justice" are relative terms.[256] If those who are part of the criminal justice system challenge its outcomes, shouldn't we all?

Consistent with these concerns, the Court has refused to hear civil cases brought by prisoners that would undermine their criminal conviction. In *Heck v. Humphrey*,[257] Roy Heck filed a § 1983 action against the police and prosecutors alleging that their investigation and prosecution deprived him of his constitutional rights.[258] Heck did not seek injunctive relief or release, but rather compensatory and punitive monetary damages.[259] Nevertheless, the Court held that, under these circumstances, there was no cause of action available to a § 1983 plaintiff absent a showing that criminal action terminated in favor of the accused.[260] Stressing the importance of finality and consistency, the Court offered the following rationale:

254. WRIGHT ET AL., *supra* note 138.

255. Owen v. City of Independence, 445 U.S. 622, 651 (1980).

256. Typically, when a party asserts issue preclusion, they will rely on a prior *civil* disposition. *See, e.g.*, *In re* Beegkey, 529 B.R. 98, 103 (Bankr. E.D. Pa. 2015).

257. 512 U.S. 477 (1994)

258. *Id.* at 478–79.

259. *Id.* at 479.

260. *Id.* at 489.

> This requirement "avoids parallel litigation over the issues of probable cause and guilt . . . and it precludes the possibility of the claimant [*sic*] succeeding in the tort action after having been convicted in the underlying criminal prosecution, in contravention of a strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction." . . . We think the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement.[261]

Clearly the circumstances are a bit different in cases where the criminal court found that there was not probable cause, but the principles are the same. Allowing a civil defendant to relitigate the probable cause question has the potential to lead to inconsistent results. So why allow it?

The primary reason civil courts allow police and municipalities to relitigate the question of probable cause is that they were not parties to the original suit, which was brought by the prosecutor, a state actor.[262] This assumption appears to ignore two important considerations: (1) that all power derived from the state and the state label, arguably, is a means to determine who is entitled to sovereign immunity; and (2) in many criminal cases the prosecutor, municipality, and police have shared interests and a common aim.

Additionally, practice suggests there is little division between municipalities and their police officials. In her groundbreaking article, *Police Indemnification*, Professor Joanna Schwartz offers empirical evidence that "[p]olice officers are virtually always indemnified" in the § 1983 suits brought against them.[263] In other words, when police officials have civil judgments entered against them (either through trial or settlement) the government

261. *Id.* at 484–86.

262. For example, in *McCurry v. Allen*, 688 F.2d 581 (8th Cir. 1982), McCurry brought a § 1983 action against police officials for an illegal search of his home. *Id.* at 583. On remand, McCurry argued that the defendant police officials were "collaterally estopped to deny that part of the search and seizure of evidence from his home was unconstitutional because, in his state criminal prosecution, the trial court granted his motion to suppress a portion of the evidence seized." *Id.* at 587. This seems a sound argument. Based upon the outcome of the criminal court proceedings, there is little question that the police deprived McCurry of his Fourth Amendment right to be free from an unreasonable search and seizure when they searched drawers in his home and the tires on the back porch of his home. Nevertheless, the Eighth Circuit quickly dismissed McCurry's argument that the criminal court's conclusion should be given preclusive effect. *Id.* The court reasoned, "[o]ffensive use of collateral estoppel is clearly inappropriate in this case, because the present defendants were not parties to the prior state-court proceedings." *Id.* In other words, the criminal case was between the state and McCurry, and the officers were not viewed as the same as the "state."

263. Schwartz, *supra* note 236, at 890 ("Between 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor, and their contributions amounted to just .02% of the over $730 million spent by cities, counties, and states in these cases.").

employer—not the individual official—almost always foots the bill. Furthermore, "many municipal employers also provide legal representation for their employees in civil suits against the employee—even when the employee is being sued in a personal capacity and the municipality is not a party to the suit."[264] In essence, the municipality stands in its employee's stead, accepting the obligations of representation and the onuses of liability. So understood, the municipality is represented in both the criminal and the civil suits, through the prosecutor in one and, for all intents and purposes, the defendant in the second.[265]

* * *

Federal courts hearing § 1983 actions classify public parties according to state municipal law and state issue preclusion law. When interpreting preclusion's same-party requirement, courts consistently hold that the prosecutors, police officials, and municipalities are not the same party. As this section demonstrates, courts have failed to appreciate the logical and practical connection between the state and municipal police officials. Given the common public identity of prosecutors, municipalities, and police (and their shared interests in the criminal justice system), we suggest that courts should presume same-party status in most § 1983 probable cause cases and preclude the defendants from relitigating the criminal court's finding. This approach comports with normative values. Specifically, a desire for both consistency and equity should prompt courts to treat these governmental entities as the same party. However, there may be the rare case in which there is a clear and documented misalignment or disagreement amongst these parties. In those cases, the municipality or the police should have an opportunity to come forward with evidence that they, in fact, should not be treated as the same party as the State. For example, the official might offer evidence that the government is not representing or indemnifying them, or that the prosecutor's interest or arguments are misaligned with the municipalities. But, in these rare occasions, the burden of production would fall on the civil defendant.

Though few and far between, we anticipate there will be occasions where § 1983 police officials and municipalities successfully rebut the presumption that the court should treat them as the same party as the prosecutor. However, even in these rare cases, it is important that the court consider how the criminal

264. Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 842 (2017).

265. A prosecutor is a hybrid, acting as a local official and state official. Although courts may classify a prosecutor as a state actor when prosecuting a case, it is important to remember that they remain an elected official. This role continues, even when they are in court. Consequently, a prosecutor must consider the interests of the municipality.

proceeding affects a motion for summary judgment on the question of probable cause.

IV. JUST PROCEDURE

Even if a federal court determines that a police officer who is now being sued civilly is not the same party that litigated the criminal case, that court should rarely, if ever, dismiss the plaintiff's claim on summary judgment on the question of probable cause.

Rule 56 of the Federal Rules of Civil Procedure ("Rule 56") orders a federal district court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[266] The Supreme Court has explained that there is a genuine dispute when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party."[267] This raises an interesting question: whether the prior criminal determination establishes a genuine dispute regarding probable cause when a § 1983 defendant moves for summary judgment on the question of probable cause.

Noting that judges often disagree about whether summary judgment should be granted, Professor Suja Thomas has proposed a "consensus requirement."[268] "Under this requirement, if one judge decides a reasonable jury could find for the nonmoving party, summary judgment will be denied."[269] She offers three reasons for this requirement, one of which is particularly relevant to this Article: the problem of massaging facts.[270] Professor Thomas offers the following description of this practice:

> Massaging facts occurs when judges who possess the same information use it in different manners. Massaging facts can occur in a number of ways. It can occur when a court ignores relevant facts. It also can happen when courts do not consider different ways to view the facts. In other words, they do not take into account the reasonable inferences favoring the party not moving for summary judgment.[271]

This practice is particularly interesting when considering the effect of criminal court determinations in civil litigation. At least one judge—a criminal court judge—has already determined whether there was probable cause. Assume that the criminal judge found probable cause wanting. From this, one might conclude that a reasonable jury could also determine that the officer lacked

266. FED. R. CIV. P. 56.

267. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

268. Suja A. Thomas, *Reforming the Summary Judgment Problem: The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2244 (2018).

269. *Id.*

270. *Id.* at 2252.

271. *Id.*

probable cause and, accordingly, the defendant's motion for summary judgment on this issue should be denied.

Thus, it is important to understand how federal courts should apply Rule 56. As the dissenting Justices explained in *Johnson v. Louisiana*,[272] "it has long been explicit constitutional doctrine that the Seventh Amendment civil jury must be unanimous."[273] Again, summary judgment should be denied only when a reasonable jury could find in favor of the nonmoving party.[274] Theoretically, if we are to interpret the summary judgment standard against the background of the Seventh Amendment to deny the defendant's motion for summary judgment, the court must decide that all twelve jurors could (not would) find for the § 1983 plaintiff when the defendant moves for summary judgment on the issue of probable cause.[275]

Yet, in practice, courts seemingly do not apply such a burdensome standard. One district judge offers the following useful observation as he "struggled" to determine whether there was a genuine issue of material fact: "the measure is not whether an entire and presumptively unanimous 'jury' of from six to twelve members could find for the nonmoving party, but rather whether one such fact finder could find for that party so long as that individual juror is acting reasonably."[276] And while the Supreme Court has not held that the possibility of one reasonable juror finding for the nonmoving party is a sufficient basis for denying summary judgment, it has advised trial court judges to bear the following in mind:

272. 406 U.S. 356 (1972).

273. *Id.* at 382 ("[U]nanimity was one of the peculiar and essential features of trial by jury at the common law. No authorities are needed to sustain this proposition." (quoting Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897))). Importantly, in *Johnson*, the issue was not whether a civil verdict required a unanimous verdict. Rather, the question was whether a criminal guilty verdict issued by a divided state jury (nine of twelve jurors) violates the Federal Constitution. *Id.* at 357–58. A majority of the Court held that it did not. *Id.* at 364 ("We perceive nothing unconstitutional or invidiously discriminatory, however, in a State's insisting that its burden of proof be carried with more jurors where more serious crimes or more severe punishments are at issue.").

274. Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468–69 (1992).

275. As Justice Brennen explained in his dissent in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the burden of production and persuasion in summary judgment should follow the burden of pleading. *Id.* at 330–31 (Brennan, J., dissenting); *see also* Teressa E. Ravenell, *Hammering in Screws: Why the Court Should Look Beyond Summary Judgment When Resolving Section 1983 Qualified Immunity Disputes*, 52 VILL. L. REV. 135, 183 (2007) ("Both legal scholarship and appellate opinions seem to agree with Justice Brennan's assessment."). Accordingly, because § 1983 plaintiffs bear the burden of proving the defendant deprived them of a constitutional right, they also bear the burden of production at the summary judgment stage. *See supra* Section I.B (establishing that § 1983 plaintiff bears the burden of proof on the question of probable cause).

276. Mass. Inst. of Tech. v. Harman Int'l Indus., Inc., 584 F. Supp. 2d 297, 308 n.7 (D. Mass. 2008); *see also* Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 964 (9th Cir. 2009) ("[S]uccessfully opposing [the defendant's] motion for summary judgment did not mean that the [plaintiff] had established liability or would obtain a favorable, unanimous jury verdict.").

> [S]ummary judgment motions [do] not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.[277]

Unfortunately, applying the summary judgment standard seems, at best, cumbersome.[278] Professor Thomas argues that summary judgment requires a judge to do the impossible: "For a judge to determine what a reasonable jury could find, it appears that a judge would be required to imagine who would sit on the jury, how the jurors would deliberate, and the conclusion that they would reach."[279]

This is not to suggest that summary judgment is always inappropriate. A court can and should grant a motion for summary judgment when the movant shows that there is no evidence on the record to support a necessary element of the nonmoving party's claim or defense. For example, when § 1983 plaintiffs fail to offer any evidence that the defendant caused them to be deprived of a constitutional right, summary judgment is clearly appropriate—a jury cannot find for the plaintiff unless they establish all of the elements of their claim. However, when a § 1983 plaintiff alleges false arrest, false detention, or malicious prosecution claims and a criminal court has already found probable cause wanting, the plaintiff will be able to come forward with evidence showing there is a genuine issue of material fact: the criminal court record and their own testimony regarding the events.

The fact-specific nature of probable cause makes it especially difficult to predict how a jury will rule on the issue. In *District of Columbia v. Wesby*,[280] the Court noted the following about probable cause:

> Probable cause "turn[s] on the assessment of probabilities in particular factual contexts" and cannot be "reduced to a neat set of legal rules." It is "incapable of precise definition or quantification into percentages." Given its imprecise nature, officers will often find it difficult to know

277. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158–59 (1970)).

278. *Id.* at 265–67 (Brennan, J., dissenting) ("[H]ow does a judge assess how one-sided evidence is, or what a 'fair-minded' jury could 'reasonably' decide?"); *see also* Thomas, *supra* note 268, at 2251 ("[T]he reasonable jury standard is impossible to implement.").

279. Thomas, *supra* note 268, at 2249.

280. 138 S. Ct. 577, 590 (2018).

> how the general standard of probable cause applies in "the precise situation encountered."[281]

This argument applies with equal force to jurors. Just as law enforcement officials may be uncertain whether probable cause exists, jurors are likely to disagree on the question of probable cause. Reviewing precisely the same facts, some may conclude there was probable cause while others may conclude there was not. The likely inconsistency among juror's determinations is a clear indication that summary judgment is inappropriate.

Understood a bit differently, a criminal court's prior determination that the police official lacked probable cause, in essence, evidences that a reasonable jury could return a verdict in favor of a § 1983 plaintiff on this particular issue and, accordingly, summary judgment is inappropriate.[282]

CONCLUSION

As a general matter, procedural rules are intended to simplify the litigation process.[283] Today, preclusion rules are anything but straightforward. The same-party requirement, once a bright-line rule requiring complete mutuality, has been dimmed and blurred by a series of exceptions. The problem, however, is not the exceptions, but the rule itself. Strict application of preclusion's same-party requirement has the potential to distort justice and undermine confidence and efficiency. Courts have created the exceptions to avoid the problems that arise when they rigidly apply the mutuality requirement.

Perhaps this is most true as we shift from the criminal to civil justice systems. Suppression hearings are of "critical importance . . . to our systems of criminal justice."[284] They "typically involve questions concerning the propriety of police and government conduct that took place hidden from the public

281. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018) (quoting Illinois v. Gates, 462 U.S. 213, 232 (1983)); *see also* Ziglar v. Abbasi, 137 S. Ct. 1843, 1866 (2017); Maryland v. Pringle, 540 U.S. 366, 371 (2003).

282. *See* Thomas, *supra* note 268, at 2250 ("[I]f a reasonable jury could find in only one way, then it seems likely that the judges would agree on the result."). Similarly, in *Scott v. Harris*, 550 U.S. 372 (2007), Justice Stevens dissented, concluding that summary judgment was inappropriate. *Id.* at 390 (Stevens, J., dissenting). He reasoned that "[i]f two groups of judges can disagree so vehemently about the nature of the pursuit and the circumstances surrounding that pursuit, it seems eminently likely that a reasonable juror could disagree with this Court's characterization of events." *Id.* at 396. And although the majority implicitly rejected Justice Stevens's argument, it is important to note that the existence of videotape documenting the events giving rise to the claim was crucial to the Court's determination. *Id.* at 378 (majority opinion) ("There is, however, an added wrinkle in this case: existence in the record of a videotape capturing the events in question. . . . The videotape quite clearly contradicts the version of the story told by respondent and adopted by the Court of Appeals.").

283. *See, e.g.*, James C. Dezendorf, *The New Federal Rules of Procedure*, 18 OR. L. REV. 26, 27 (1938) ("The prime objective of the [Federal Rules of Civil Procedure] is to simplify and expedite the handling of civil cases.").

284. Gannett Co. v. DePasquale, 443 U.S. 368, 436 (1979) (Blackmun, J., concurring in part and dissenting in part).

view"—the very same conduct that will be at the heart of the § 1983 claim.[285] Yet blind application of issue preclusion's same-party requirement mandates that courts disregard the criminal court's determination that the police violated the Constitution and allows them to relitigate this question in the civil case. Presuming same-party status of governmental actors in this context is not a panacea. It does, however, correct a serious asymmetry in the law and ensures that civil procedural rules do not override our substantive determinations.

285. *Id.* at 428.