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The Case for Replacing the Independent Intermediary Doctrine with Proximate Cause and Fourth Amendment Review in § 1983 Civil Rights Cases

Amanda Peters*

Abstract

Plaintiffs who file claims under § 1983 of the Civil Rights Act encounter a strange blend of civil rights, tort, and criminal procedure laws. When civil rights plaintiffs sue officers and government agencies for violations of their Fourth Amendment rights, federal courts may cut off liability using qualified immunity, but they may also use a lesser-known defense of sorts called the independent intermediate doctrine. When courts permit officers to raise both qualified immunity and the doctrine, the two defensive theories provide officers something akin to absolute immunity. The doctrine treats judges, prosecutors, grand jurors, and fact finders as superseding agents who shield officers from liability once they find probable cause, even though these intermediaries' actions are foreseeable. The doctrine is heavily relied upon in the Fifth Circuit, but every Circuit aside from the First has adopted it. The Supreme Court has rejected the doctrine because it ignores congressional intent and proximate cause principles that existed at the time the Civil Rights Act was created. The doctrine heavily favors law enforcement officer defendants and leaves civil rights plaintiffs without a path to trial or a remedy for their civil rights violations. This Article is the first to examine this

* Professor, South Texas College of Law Houston. B.A., Texas Tech University; J.D., Texas Tech University School of Law. I would like to thank my employer and my family for their continued support and encouragement of my scholarship. And I would like to thank the plaintiffs in the Waco biker mass arrest cases who inspired my § 1983 articles. You may have lost the first battle on the independent intermediary doctrine, but you may yet win the war.

doctrine, its history, its impact, and the serious confusion it has caused among federal circuit and district courts nationwide. The Article examines the many criticisms and detractors of the doctrine and suggests the only way to unify precedent, honor congressional intent, and properly review unlawful arrests, searches, and seizures is by using an analysis that includes proximate cause and the Fourth Amendment.

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I. INTRODUCTION

Section 1983 assigns liability to governments and their agents when they violate the constitutional rights of citizens.¹ Many civil rights lawsuits allege Fourth Amendment violations following an unreasonable search and seizure, an unlawful arrest, or the use of excessive force.² Even though these specific violations invoke the Fourth Amendment, the Supreme Court has said § 1983, housed within the Civil Rights Act, creates a “species of tort liability.”³ Consequently, these violations are often referred to as “constitutional torts.”⁴ The Act’s purpose is to deter state actors from using their power and position to commit constitutional torts and to compensate citizens when that deterrence fails.⁵

Section 1983 includes no immunities on its face.⁶ However, the Supreme Court has upheld common law defenses that were available when the Act was created if they do not conflict with Congress’s intent.⁷ Qualified immunity is one such defense that protects law enforcement officers unless they violate a clearly established law.⁸ When officers successfully claim immunity—and

1. 42 U.S.C. § 1983 (2020); *see* *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658, 690–91 (1978) (noting that cities, governments, and governing bodies can be held liable under § 1983). *See generally* *Monroe v. Pape*, 365 U.S. 167, 174–75, 190–91 (1961) (explaining that the Civil Rights Act of 1971 was enacted in reaction to certain states’ failure to “enforce the laws with an equal hand”), *overruled on other grounds by* *Monell v. Dep’t of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

2. *Graham v. Connor*, 490 U.S. 386, 392 (1989) (describing the Fourth and Eighth Amendments as “the two most textually obvious sources of constitutional protection against physically abusive governmental conduct”); *see also* *Deville v. Marcantel*, 567 F.3d 156, 163 (5th Cir. 2009) (noting that the plaintiffs raised constitutional grounds based upon “unreasonable search and seizure, false arrest, battery, excessive force, and malicious prosecution”). *But see, e.g.,* *Cornett v. Longois*, 871 F. Supp. 918, 921 (E.D. Tex. 1994) (recognizing a circuit split as to whether malicious prosecution is a constitutional tort or a state tort claim only); *Shaw v. Garrison*, 328 F. Supp. 390, 397 (E.D. La. 1971) (raising allegations of civil rights violations stemming from the First, Fifth, and Fourteenth Amendments), *aff’d*, 467 F.2d 113 (5th Cir. 1972).

3. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

4. *McMillian v. Monroe Cty.*, 520 U.S. 781, 784 (1997). The concept of “constitutional torts” began with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*. 403 U.S. 388, 390–97 (1971) (holding that plaintiff’s civil rights violation was not limited to state tort claims but could encompass constitutional violations of his Fourth Amendment rights).

5. *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

6. *Malley v. Briggs*, 475 U.S. 335, 342 (1986); *see* 42 U.S.C. § 1983.

7. *Wyatt*, 504 U.S. at 164; *see Malley*, 475 U.S. at 339–40.

8. *Hope v. Pelzer*, 536 U.S. 730, 739–40 (2002).

they often do⁹—the plaintiff is barred from suit.¹⁰

Another barrier to suit raised by civil rights defendants is the independent intermediary doctrine.¹¹ The doctrine was created by the Fifth Circuit, but federal courts nationwide have employed it.¹² Other federal courts call it the “taint exception,” the “no causation” rationale, the “superseding cause” rule, and the “breaks-the-chain-of-causation” principle.¹³

Simply stated, the doctrine says that unless officers lied or omitted facts when they submitted the case for review to an intermediary—a magistrate, judge, prosecutor, or grand jury—that intermediary’s independent review insulates the officer from liability even if that officer violated constitutional rights.¹⁴ Essentially, courts using the doctrine hold that the intermediary’s decision to move forward with the case acts as a superseding cause, which breaks the chain of causation from the officer’s illegal act to the plaintiff’s injuries that flowed as a consequence from that act.¹⁵ The problem with this doctrine is two-fold. First, that any of these intermediaries finds probable cause after the officer does, whether or not it objectively exists, is foreseeable, thus it is not a superseding event. It should not sever liability for an officer making an unlawful arrest. Second, the United States Supreme Court has stated this doctrine is not rooted in the history of civil rights law—proximate cause is—and therefore, is not a valid defense to a civil rights claim.¹⁶

9. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION CLAIMS AND DEFENSES, at § 3.19 (C) (Aspen 4th Ed. Supplement, 2020) (finding that § 1983 civil rights cases are often resolved in favor of the officer through the defense of qualified immunity).

10. *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985) (“Qualified immunity . . . is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.”).

11. The doctrine was created by the Fifth Circuit in *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), but further developed by *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982) and *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988).

12. *See Wyatt*, 504 U.S. at 161.

13. *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986) (referring to the district court’s use of the “no causation” rationale); *Briggs v. Malley*, 748 F.2d 715, 717 (1st Cir. 1984) (applying the “chain of causation” principle), *aff’d*, 475 U.S. 335 (1986); *Republic Fire & Cas. Ins. Co. v. Charles*, No. CV 17-5967, 2018 WL 310378, at *4 (E.D. La. Jan. 5, 2018) (applying the “taint exception”); *Adams v. Parsons*, No. Civ. A. 2:10-0423, 2011 WL 1464856, at *7 (S.D.W. Va. Apr. 15, 2011) (using “the superseding cause rule”); *Fitch v. Morrow*, No. Civ.A. H-03-1686, 2005 WL 1828592, at *5, *8 (S.D. Tex. Aug. 1, 2005) (explaining the plaintiff’s use of the “breaks the causal chain’ theory” and the court’s use of the “breaks the chain of causation’ principle”), *aff’d*, 199 F. App’x 347 (5th Cir. 2006).

14. *See Hand*, 838 F.2d at 1427–28.

15. *See id.*

16. *Malley*, 475 U.S. at 344–45.

In *Malley v. Briggs*, the Supreme Court said it wanted to make clear that this doctrine should not be used in civil rights cases because it was “inconsistent” with § 1983 and proximate causation principles that make a man responsible for the expected consequences of his acts.¹⁷ The Court stated that torts common law has consistently recognized a causal link between the criminal complaint and the arrest that follows, which § 1983 also recognizes.¹⁸ The Supreme Court therefore endorsed a Fourth Amendment analysis to decide whether an officer should be qualifiedly immune from suit:

[T]he same standard of objective reasonableness that we applied in the context of a suppression hearing in *Leon* . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest. Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable . . . will the shield of immunity be lost.¹⁹

While *Malley*’s facts involved an arrest pursuant to a warrant, the Court emphasized that under no circumstances should courts continue to use the doctrine in § 1983 cases.²⁰

After *Malley*, it seemed that federal courts would stop using the doctrine.²¹ But like a phoenix rising from the ashes, so it arose again two years later, resurrected by a stubborn or oblivious Fifth Circuit Court, which made no reference whatsoever to the Supreme Court’s repudiation of the doctrine.²²

Since then, the Third, Fifth, Sixth, Tenth, and Eleventh Circuit Courts of

17. *Malley*, 475 U.S. at 344 n.7.

18. *See id.*

19. *Id.* at 344–45 (referencing *United States v. Leon*, 468 U.S. 897, 923 (1984)) (citation omitted).

20. *See id.* at 344 n.7. The Supreme Court called the doctrine the “‘no causation’ rationale,” but the district court relied on the Fifth Circuit’s cases that created what the Fifth Circuit called the “independent intermediary doctrine.” *See Buehler v. City of Austin/Austin Police Dep’t*, 824 F.3d 548, 553 (5th Cir. 2016) (referring to “[past] cases applying the independent intermediary doctrine”); *Briggs v. Malley*, 748 F.2d 715, 716–17 (1st Cir. 1984) (explaining that the district court relied on two Fifth Circuit cases), *aff’d*, 475 U.S. 335 (1986).

21. *See Malley*, 475 U.S. at 344 n.7. One federal court was actually hopeful that *Malley v. Briggs* would resolve the conflicts in federal courts on how to resolve these cases. *See Easton v. City of Boulder*, 776 F.2d 1441, 1448 (10th Cir. 1985) (“The circuit courts . . . are not in agreement, and at times even different panels within the same circuit appear to have been in unknowing conflict on the issue. . . . Since the Supreme Court has granted certiorari in *Briggs*, a definitive resolution of the matter is likely to be forthcoming.”).

22. *See Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988).

Appeals have employed it.²³ The Ninth Circuit uses its own variation of the doctrine, which includes a rebuttable presumption.²⁴ The Eighth Circuit uses a torts foreseeability analysis, plus the doctrine.²⁵ Finally, the Seventh Circuit has authored cases that use the doctrine exclusively, use the *Malley*-endorsed analysis exclusively, use the doctrine and *Malley*-endorsed analysis combined, and use a torts foreseeability rule.²⁶ Adding to the confusion, the Second, Fourth, and District of Columbia Circuits have opinions that endorse the doctrine, along with subsequent opinions that either reject it or endorse *Malley* without overruling the doctrine-friendly opinions.²⁷ It is not just the circuit courts that are all over the place: some district courts have also issued opinions that contradict their circuit court's preferred analysis.²⁸ The only jurisdiction that is consistent is the First Circuit, which has repeatedly rejected the independent intermediary doctrine.²⁹

23. See, e.g., *Powers v. Hamilton Cty. Pub. Def. Comm'n*, 501 F.3d 592, 609–12 (6th Cir. 2007); *Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005); *Egervary v. Young*, 366 F.3d 238, 250 (3d Cir. 2004); *Robinson v. Maruffi*, 895 F.2d 649, 655–56 (10th Cir. 1990); *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989).

24. See *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988) (discussing the rebuttable presumption that the intermediary acted independently).

25. See *Small v. McCrystal*, 708 F.3d 997, 1006–07 (8th Cir. 2013) (relying on the causation rule and tort foreseeability notions to find that officers misrepresented facts on the warrant and that the ensuing arrests were a foreseeable result of their actions); *Ames v. United States*, 600 F.2d 183, 185–86 (8th Cir. 1979) (using the causation analysis).

26. See e.g., *Herzog v. Vill. of Winnetka*, 309 F.3d 1041, 1044 (7th Cir. 2002) (engaging in a tort foreseeability analysis); *King v. Young*, 21 F.3d 430 (Table), *1, *3 (7th Cir. 1994) (using *Malley* exclusively); *Jones v. City of Chi.*, 856 F.2d 985, 993–95 (7th Cir. 1988) (using the doctrine and *Malley* together); *Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir. 1972) (using the doctrine exclusively in a pre-*Malley* period).

27. See e.g., *Smith v. Munday*, 848 F.3d 248, 252–56 (4th Cir. 2017) (using the *Malley* analysis); *Evans v. Chalmers*, 703 F.3d 636, 648 (4th Cir. 2012) (employing the doctrine); *Kerman v. City of New York*, 374 F.3d 93, 127 (2d Cir. 2004) (endorsing the *Malley* test); *Zahrey v. Coffey*, 221 F.3d 342, 352 (2d Cir. 2000) (rejecting the doctrine without overruling *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999)); *Townes*, 176 F.3d at 147 (2d Cir. 1999) (using the doctrine); *White v. Frank*, 855 F.2d 956, 961 (2d Cir. 1988) (rejecting the doctrine); *Edmond v. U.S. Postal Serv. Gen. Counsel*, 949 F.2d 415, 422–23 (D.C. Cir. 1991) (rejecting the doctrine without overruling *Dellums v. Powell*, 566 F.2d 167, 191–94 (D.C. Cir. 1977)); *Dellums*, 566 F.2d at 191–94 (D.C. Cir. 1977) (using the doctrine pre-*Malley*).

28. See, e.g., *Carter v. Georgevich*, 78 F. Supp. 2d 332, 334 (D. N.J. 2000) (using a foreseeability analysis, which contradicts the doctrine the Third Circuit has used); *Hamrick v. City of Eustace*, 732 F. Supp. 1390, 1396 (E.D. Tex. 1990) (stating that the doctrine is inconsistent with § 1983 and using a *Malley* analysis, despite the Fifth Circuit's continued endorsement of the former); *Stevens v. Sanpete Cty.*, 640 F. Supp. 376, 384 n.13 (D. Utah 1986) (siding with *Malley*, even though the Tenth Circuit has used the doctrine), *aff'd*, 846 F.2d 76 (10th Cir. 1988).

29. See, e.g., *Buenrostro v. Collazo*, 973 F.2d 39, 45 (1st Cir. 1992); *Wagenmann v. Adams*, 829

Needless to say, this area of law is a mess. Federal courts acknowledge that much.³⁰ In one case, the Second Circuit listed decisions supporting, renouncing, or contradicting the doctrine's use before concluding the opinions "yield[ed] few coherent principles."³¹ The Third Circuit acknowledged tension in the case law, noting "the cases on intervening causes are legion and difficult to reconcile" before taking the easy way out and deciding the case on other grounds.³² The Fifth Circuit also recognized its created rule has been a source of friction in the federal courts.³³ A Pennsylvania district court called the doctrine "unsettled,"³⁴ while a Texas district court noted that the case that created the doctrine had its "detractors" and "other Federal Circuits are at variance with it."³⁵ None of these inconsistencies have been lost on civil rights plaintiffs, who have demanded that courts stop using the doctrine because it is at odds with the Supreme Court.³⁶

Section 1983 plaintiffs are upset because the doctrine makes it hard for them to get to trial.³⁷ In these civil rights suits, defendants do not necessarily deny they violated rights or caused injuries.³⁸ They simply hope the doctrine

F.2d 196, 212–13 (1st Cir. 1987); *Briggs v. Malley*, 748 F.2d 715, 717–21 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

30. See, e.g., *Malley v. Briggs*, 475 U.S. at 344 n.7; *Beck v. City of Upland*, 527 F.3d 853, 865–66 (9th Cir. 2008); *Zahrey v. Coffey*, 221 F.3d 342, 354–55 (2d Cir. 2000); *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988).

31. *Hector v. Watt*, 235 F.3d 154, 161 (3d Cir. 2000) (citing *Zahrey*, 221 F.3d at 351).

32. *Id.*

33. See *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554 (5th Cir. 2016).

34. *Cherry v. Garner*, No. Civ.A. 03-CV-01696, 2004 WL 3019241, at *10, n.24 (E.D. Pa. Dec. 30, 2004).

35. *Von Williams v. City of Bridge City*, 588 F. Supp. 1187, 1190 (E.D. Tex. 1984), *aff'd sub nom. Williams v. City of Bridge City*, 760 F.2d 267 (5th Cir. 1985).

36. See *El-Amin v. Flores*, No. CV H-17-1268, 2018 WL 8733162, at *9 (S.D. Tex. Dec. 19, 2018) (holding that the doctrine conflicts with *Malley* and the "overwhelming circuit consensus"); *Fitch v. Morrow*, No. Civ.A. H-03-1686, 2005 WL 1828592, at *5–6 (S.D. Tex. Aug. 1, 2005) (discussing the plaintiff's "strongly worded" question in a trial motion: "Just how long will the United States Court of Appeals for the Fifth Circuit, this Court, and other federal district courts bound by Fifth Circuit precedent, continue to openly ignore (if not consciously defy) the United States Supreme Court's express rejection of the 'breaks the causal chain' theory?"), *aff'd*, 199 F. App'x 347 (5th Cir. 2006).

37. See Lynn Adelman, *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT MAG. (Fall 2017), <https://www.dissentmagazine.org/article/supreme-court-assault-civil-rights-section-1983>.

38. E.g., *Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989) (explaining that defendants "have not argued on appeal that their conduct in seizing and initially detaining Barts satisfied the [F]ourth [A]mendment, but have instead argued that various defenses bar the action against them even if they violated the Constitution").

helps them avoid paying any damages.³⁹ Unfortunately, though the Civil Rights Act identifies an injury, when the doctrine applies, the plaintiff is left without a remedy. This hardly seems just to plaintiffs.

A number of courts characterize the doctrine as another sort of qualified immunity.⁴⁰ It creates a near impenetrable layer of double protection from suit: qualified immunity plus the independent intermediate doctrine.⁴¹ Courts recognize that this is akin to absolute immunity.⁴² The problem with this is that the Supreme Court has refused to give law enforcement officers absolute immunity.⁴³ The doctrine creates added protection for officers by cutting off all future reviews of probable cause after the intermediary becomes involved in the case. This goes against the *Malley* Court's objectively reasonable standard, which requires trial and appellate courts to review the officer's probable cause decision.⁴⁴

This article seeks to examine the historical background of the law, its formation and resilience, the inconsistencies that exist within it, the heavy burdens it places on plaintiffs, and the various reasons courts have upheld it, rejected it, or replaced it. The author hopes to convince federal courts to abandon it and follow Supreme Court precedent, because the doctrine is inconsistent with civil rights law and historic proximate cause concepts, it leads to absurd and disparate results, and appellate Fourth Amendment de novo review is necessary to review allegations of Fourth Amendment civil rights violations.

39. See Adelman, *supra* note 37 (discussing Section 1983, how qualified immunity allows defendants to escape liability, and what defendants really have to pay for if they are convicted).

40. See *Cruse v. Blackburn*, No. CV 3:17-00485, 2018 WL 793501, at *5-7 (S.D.W. Va. Jan. 16, 2018); *Atwood v. Cheney*, No. 1:12-CV-168-SA-DAS, 2016 WL 3910658, at *4-8 (N.D. Miss. July 14, 2016); *Jones v. Eder*, No. CV H-15-2919, 2016 WL 4571114, at *3-4 (S.D. Tex. July 19, 2016), *aff'd*, 778 F. App'x 327 (5th Cir. 2019); *Basler v. Barron*, No. CV H-15-2254, 2016 WL 1672573, at *3-4 (S.D. Tex. Apr. 27, 2016); *Eubanks v. Freburger*, No. 11-60714-CIV, 2012 WL 4936061, at *3-4 (S.D. Fla. Oct. 17, 2012); *Fitch*, 2005 WL 1828592 at *10-11 (showing that both the original district court opinion and the appeal placed the doctrine's analysis under a broader qualified immunity analysis).

41. See *Kugle v. Shields*, 62 F.3d 395, *4-5 (5th Cir. 1995) (examining how the independent intermediate doctrine and qualified immunity interact and coincide).

42. *Id.* at *4. (explaining that the doctrine essentially creates absolute immunity).

43. *Malley v. Briggs*, 475 U.S. 335, 339-43 (1986).

44. See *Malley*, 475 U.S. at 339-42.

II. HISTORICAL BACKGROUND

To better understand the doctrine and its application to civil rights claims for false arrest and malicious prosecution, it is important to understand how the torts of false arrest and malicious prosecution—both of which require probable cause—developed over time, and how civil rights grew to encompass these claims.⁴⁵ The Supreme Court begins its analysis with the common law of torts because it “provide[s] the appropriate starting point for the inquiry under § 1983,”⁴⁶ so this is where the article begins.

A. *The Development of False Arrest and Malicious Prosecution Tort Law*

Before the Civil Rights Act came into being, and long before it was used to hold police officers accountable for civil rights violations, the New York Supreme Court in 1861 recognized that being free from “groundless arrest” is a right all citizens possess.⁴⁷ In 1860, another New York court held that anyone who began a baseless legal proceeding against another would be liable for the resulting complaint, indictment, or legal action.⁴⁸

As early as 1895, state courts decided unlawful arrest claims where the defendant allegedly acted with malice.⁴⁹ Courts were inconsistent about whether malice had to be present for civil liability to attach in cases with arrests lacking probable cause.⁵⁰ No liability existed in cases with omissions or clerical errors in the arrest warrant.⁵¹ However, when the “offense” charged was not a crime,⁵² or when someone adopted or participated in a warrant later deemed void or unlawful, the defendant could be held liable.⁵³ In 1900, one Missouri court said liability for false imprisonment extended to anyone who played a role in the imprisonment; it was not confined to the person who

45. See Jacques L. Schillaci, *Unexamined Premises: Toward Doctrinal Purity in 1983 Malicious Prosecution Doctrine*, 97 NW. U.L. REV. 439, 443–69 (2002) (discussing the history of malicious prosecution and Section 1983).

46. *Heck v. Humphrey*, 512 U.S. 477, 483 (1994) (quoting *Carey v. Phipus*, 435 U.S. 247, 257–258 (1978)).

47. See *Comfort v. Fulton*, 39 Barb. 56, 57 (N.Y. Gen. Term 1861).

48. *Perkins v. Mitchell*, 31 Barb. 461, 468 (N.Y. Gen. Term 1860).

49. See J.E. Macy, Annotation, *False Imprisonment: Liability of Private Citizen for False Arrest by Officer*, 21 A.L.R.2d 649–51, 664 (1952).

50. *Id.*

51. *Id.* at 652–54.

52. *Id.* at 655–59, 665.

53. *Id.* at 659–61.

unlawfully seized the plaintiff.⁵⁴

Over time, courts began to hold that when the truth was laid before a judge without dishonesty and the judge found probable cause to begin criminal proceedings, lay complainants and prosecutors who honestly believed the crime had occurred could not be held liable.⁵⁵ These cases arose at a time when the local magistrate would hear from live witnesses and the prosecutor before a person was arrested; if the magistrate found the charges truthful, an arrest warrant would issue.⁵⁶

After the turn of the century, New York courts determined that when a judge found probable cause that a crime was committed by the accused, that decision protected the complainant, a private citizen, from civil liability unless he omitted material facts or lied.⁵⁷ In California, if the affiant's claim produced some evidence of the charged offense, it was equally sufficient to protect the complainant.⁵⁸ However, when the basis for the affiant's belief was missing from the affidavit,⁵⁹ or when the allegations were too stale or too speculative,⁶⁰ the defendant was liable for damages.

In 1900, the California Supreme Court held that only when the affiant's statements amounted to probable cause did the judge have authority to arrest and deprive the accused of his freedom.⁶¹ In other states, if a judge erroneously found probable cause, but the mistake was an honest one, the affiant was not liable.⁶² However, if the affiant's accusations did not allege a crime⁶³ or there were fatal errors in the affidavit,⁶⁴ the defendant was liable. In the middle of the twentieth century, courts began to apply these rules designed for lay people to government and state actors.⁶⁵

54. *Monson v. Rouse*, 86 Mo. App. 97, 100–01 (1900).

55. *Macy*, *supra* note 49, at 662.

56. *Id.* at 662–63.

57. *See, e.g., Coleman v. Brown*, 110 N.Y.S. 701, 703 (App. Div. 1908); *Smith v. Bell Fyfe Foundry Co.*, 111 N.Y.S. 202, 205 (App. Div. 1908).

58. *See Dusy v. Helm*, 59 Cal. 188, 190 (1881).

59. *Fkumoto v. Marsh*, 62 P. 303, 304–05 (Cal. 1900).

60. *Neves v. Costa*, 89 P. 860, 862–65 (Cal. Ct. App. 1907).

61. *Fkumoto*, 62 P. at 304.

62. *Macy*, *supra* note 49, at 676–677 (discussing decisions from Illinois and Kansas).

63. *See Hauss v. Kohlar*, 25 Kan. 640, 643–45 (1881).

64. *See Bryan v. Congdon*, 86 F. 221, 222–25 (8th Cir. 1898) (“[I]f a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set that process in motion is responsible in damages to him upon whom the indignity and deprivation of liberty have been visited.”).

65. *See Monroe v. Pape*, 365 U.S. 167, 172 (1961) (holding that police officers were in violation

B. The Development of § 1983 Liability

Just before state courts began grappling with citizen liability for false arrests and malicious prosecutions, the United States was beginning to confront claims of state and federal rights violations.⁶⁶ In the 1870s, the United States Congress and President Grant were concerned that states, particularly those in the South, were incapable or unwilling to halt civil rights violations committed by the Ku Klux Klan.⁶⁷ States had legal remedies to address the civil rights violations, but they were not being enforced equally.⁶⁸ Congress's main purpose in creating what was then known as the Ku Klux Klan Act was to provide a federal remedy for federal rights violations.⁶⁹ A senator from Ohio said the new Act "authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal courts."⁷⁰ Nearly 100 years later, the Supreme Court applied this Act to those acting under color of law.⁷¹

In 1961, the Supreme Court held in *Monroe v. Pape* that the Civil Rights Act, formerly known as the Ku Klux Klan Act, applied to Illinois officers who unlawfully ransacked a man's home, detained him, and interrogated him.⁷² The Court held, in extending this liability to officers, that the law "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."⁷³ The Court expressly declined to extend liability to municipalities or governments.⁷⁴ Nearly two decades later, the Supreme Court interpreted the word "persons" subject to § 1983 liability to include cities, governments, and governing bodies.⁷⁵

The common law has created defenses to § 1983 liability, many of which

of the Fourth Amendment when they arrested a plaintiff without a warrant and refused to bring him before a judge for a probable cause hearing), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

66. *Id.* at 170–71 (1961).

67. *Id.* at 172, 174.

68. *Id.* at 174–75.

69. *Id.* at 172, 174–76, 178.

70. *Id.* at 179–80.

71. *Id.* at 188–92.

72. *Id.* at 169, 191.

73. *Id.* at 187.

74. *Id.* at 187–92.

75. *See* *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 690–91 (1978).

center around the concept of whether the officer acted in good faith or is otherwise immune from suit.⁷⁶ Qualified immunity is probably the most common defense raised under the good faith umbrella in § 1983 cases.⁷⁷ It protects a police officer in two ways.⁷⁸ First, it protects an officer whose “conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁷⁹ Second, it protects an officer when his conduct was objectively reasonable.⁸⁰

It is important to note that this objectively reasonable standard also exists in Fourth Amendment jurisprudence,⁸¹ which causes potential misunderstandings when courts are unclear which objectively reasonable standard they are relying upon in § 1983 cases. When civil rights cases center around unlawful arrests and seizures, objective reasonableness could refer either to the qualified immunity standard, the probable cause standard, or both.

When it comes to qualified immunity, the standard is objective, rather than subjective, because a subjective belief would require testimony from the officer and a trial; the qualified immunity officers enjoy shields them from liability and the lawsuit itself.⁸² Qualified immunity ensures that only officers who had fair notice that their conduct was illegal can be sued.⁸³ Qualified

76. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982) (calling qualified immunity a “‘good faith’ defense”).

77. *E.g., id.*

78. *See, e.g., Cerone v. Brown*, 246 F.3d 194, 199 (2d Cir. 2001) (quoting *Harlow*, 457 U.S. at 818, and citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)).

79. *Jenkins v. City of N.Y.*, 478 F.3d 76, 87 (2d Cir. 2007).

80. *See Malley v. Briggs*, 475 U.S. 335, 343–44 (1986) (“[A]n officer who knows that objectively unreasonable decisions will be actionable may be motivated to reflect . . . upon whether he has a reasonable basis for believing that [he has] probable cause. But such reflection is desirable, because it reduces the likelihood that the officer’s request for a warrant will be premature. Premature requests for warrants are at best a waste of judicial resources; at worst, they lead to premature arrests, which may injure the innocent or, by giving the basis for a suppression motion, benefit the guilty.”). For a more in-depth discussion of qualified immunity and the civil rights defendants who attempt to claim it, see Amanda Peters, *Mass Arrests & the Particularized Probable Cause Requirement*, 60 B.C.L. REV. 217, 240–46 (2019).

81. *E.g., Heien v. North Carolina*, 574 U.S. 54, 66 (2014) (“The Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved.”).

82. *See Harlow*, 457 U.S. at 815–16; *Jenkins*, 478 F.3d at 87 n.9.

83. *See Malley*, 475 U.S. at 344 (“[W]e hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing . . . defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest.”); *see also Jenkins*, 478 F.3d at 87.

immunity is one type of defense to civil rights cases, whereas the independent intermediary doctrine is another.

III. THE INDEPENDENT INTERMEDIARY DOCTRINE

In the 1970s, the Fifth Circuit created an additional bar to plaintiffs' § 1983 lawsuits: what would later become known as the independent intermediary doctrine.⁸⁴ The court held that if all the facts that would support a probable cause decision are presented to an independent intermediary and the presenter does not omit or misrepresent any facts, the causal chain of the officer's unlawful arrest is broken by the intermediary's probable cause.⁸⁵ However, if the officer withholds facts or lies to the intermediary, the taint of the unlawful arrest remains and the plaintiff can proceed to trial.⁸⁶

This created a unique theory of causation, with no roots in civil rights or traditional torts law. Historically, courts used proximate cause in malicious prosecution and false arrest cases.⁸⁷ The independent intermediary doctrine magically absolves officers from unlawful arrests as much as a supervening cause would, even though the consequences that flow from a false arrest are foreseeable whereas a superseding event is not. All the officer needs to relieve himself from a lawsuit using the independent intermediary doctrine is to have a judge, prosecutor, or grand jury to review the case, which is inevitable. There is nothing supervening about these actors' roles in the process. Their presence, which is predictable, should not cut off liability for an officer in a civil rights case who should have foreseen that his arrest violated the plaintiff's civil rights.

When this doctrine is applied, it has two practical results: it bars trial and appellate judges from reviewing probable cause *de novo*, and it ensures most § 1983 plaintiffs never make it to trial.⁸⁸ In order to better understand the

84. See *Hand v. Gary*, 838 F.2d 1420, 1427–28 (5th Cir. 1988).

85. *Id.*

86. See *id.* at 1428.

87. *E.g.*, *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (noting that a man is “responsible for the natural consequences of his actions”); *Monson v. Rouse*, 86 Mo. App. 97, 100–01 (1900) (holding anyone involved in false arrest liable); *Perkins v. Mitchell*, 31 Barb. 461, 468 (N.Y. Gen. Term 1860) (holding person liable for filing baseless charge).

88. See, *e.g.*, *Murray v. Earle*, 405 F.3d 278, 292–93 (5th Cir. 2005) (declining to review *de novo* the trial court's ruling regarding a juvenile's interrogation which insulated the officer from § 1983 liability); see also *Illinois v. Gates*, 462 U.S. 213, 236 (1983) (“[A]fter-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's

independent intermediary doctrine, it is important to examine its evolution. The next section will refer to the progress of the doctrine's creation as a "story" due to the many plot twists in its history.

A. *The Federal Courts Shape, Obliterate, Resurrect, and Defend the Doctrine*

This is the part of the story when the doctrine is created. The doctrine began with *Rodriguez v. Ritchey*, an en banc plurality opinion with one concurrence and three dissents.⁸⁹ In that case, FBI agents mistook Margaret Rodriguez for Margaret Waltz, who was involved in an illegal gambling enterprise.⁹⁰ A year after Rodriguez's arrest, her lawyer discovered her case was one of mistaken identity.⁹¹ After her case was dismissed because prosecutors realized officers had arrested the wrong Margaret, Rodriguez sued, alleging officers unlawfully arrested her without probable cause.⁹² The defendants moved for summary judgment, arguing they pursued charges based upon their good faith belief they arrested the true suspect, and the judge granted the motion.⁹³

On appeal, the Fifth Circuit was torn between denying a federal common law remedy for the agents' negligence and permitting Rodriguez to have a trial.⁹⁴ In the end, the court determined that "if the facts supporting an arrest are put before an intermediate such as a magistrate or grand jury, the intermediate's decision breaks the causal chain and insulates an initiating party."⁹⁵ Because a grand jury indicted her, its decision shielded the officers

'determination of probable cause should be paid great deference by reviewing courts.')

 (citation omitted). *But see* *Ornelas v. United States*, 517 U.S. 690, 699 (1996) ("We therefore hold that as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal.').

89. 556 F.2d 1185, 1194–1209 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978).

90. *Id.* at 1187.

91. *Id.* at 1188.

92. *Id.*

93. *Id.*

94. *Id.* at 1189–90 ("The federal common law jurisdictional base has a somewhat nebulous place in this suit. Ms. Rodriguez does not assert a federal common law cause of action, and ordinarily this would end the matter. It could be argued, however, that such a claim is implicit Moreover, the panel majority . . . drew upon general common law tort theory to bolster its conclusion that a cause of action had been stated. As a result, we deem it appropriate to consider whether a federal common law claim is present to support jurisdiction in this case.').

95. *Id.* at 1193.

from liability.⁹⁶ Moreover, the court held her arrest did not violate her constitutional rights because actual innocence does not vitiate the lawfulness of the arrest.⁹⁷ The court ultimately dismissed her suit.⁹⁸

Because the concept of insulation by an intermediate in a civil rights case was borrowed from tort law,⁹⁹ the court cited to an American Law Report (A.L.R.) article written in 1952 about private citizen liability for false arrest as support.¹⁰⁰ The Court also cited to the Restatement (Second) of Torts.¹⁰¹ The Restatement section cited by the court references tort cases with private citizens who were not civilly liable because they did not persuade or influence the arrest decision.¹⁰²

The court's reliance on these tort sources was surprising given the fact that federal courts nationwide were holding § 1983 covered government agents' constitutional torts.¹⁰³ Sixteen years before *Rodriguez* was decided, the Supreme Court in *Monroe v. Pape* sought to resolve conflicts among circuits interpreting § 1983 by holding the Civil Rights Act subjected government agents who acted under color of law to liability for violations of the Fourth Amendment.¹⁰⁴ It is therefore hard to reconcile why the Fifth Circuit created its own rule and relied on secondary sources that addressed private citizen liability when the Supreme Court had already resolved the issue of liability for state actors. *Rodriguez* was factually analogous to the law the Supreme Court created, not the secondary sources cited.¹⁰⁵

96. *Id.* at 1194.

97. *Id.* at 1190–91, 1192 n.24.

98. *Id.* at 1194.

99. *See, e.g.,* *Hopkinson v. Lehigh Valley R.R.*, 164 N.E. 104, 106 (N.Y. 1928) (explaining that the plaintiff in a malicious prosecution case must rebut probable cause by showing the defendant omitted facts or falsified evidence that would have impacted the magistrate's or prosecutor's decision). As the above case illuminates, there are concepts from the doctrine present in older cases, but those cases were tort cases, not civil rights cases. *Id.*

100. *Rodriguez*, 556 F.2d at 1193 n.34 (citing *Macy*, *supra* note 49, at 643, 662–65, 674–79).

101. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 45A cmt. c (AM. LAW INST. 1965)).

102. RESTATEMENT (SECOND) OF TORTS § 45A cmt. c (AM. LAW INST. 1965).

103. *See Monroe v. Pape*, 365 U.S. 167, 191–92 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

104. *Id.* at 172–92.

105. *Compare Rodriguez*, 556 F.2d at 1186–88, 1192–93 (dismissing a case where the appellant was negligently arrested in her own beauty parlor and indicted on gambling charges by a detective because the court stated there was no constitutional violation or common law remedy) *with Monroe*, 365 U.S. at 171 (“Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of [42 U.S.C. § 1983].”).

The Fifth Circuit had another opportunity to address officer liability for civil rights violations five years later in *Smith v. Gonzales*.¹⁰⁶ After Douglas Smith had an argument with his daughter's boyfriend, someone falsely accused him of having an incestuous relationship with his daughter.¹⁰⁷ As a result of this allegation, investigating officer Thomas Lane sought to commit Smith to a psychiatric ward and was successful; Smith spent weeks committed to an insane asylum.¹⁰⁸ A grand jury indicted Smith for sexual crimes, following his trial, a jury acquitted him, and the prosecutor dismissed another pending case against him.¹⁰⁹ Smith sued Lane for the civil commitment, arrest, and malicious prosecution.¹¹⁰ Lane won the civil suit.¹¹¹

On appeal, the Fifth Circuit reasoned that the lawful arrest warrant invalidated Smith's false arrest claim.¹¹² The court said, "The [C]onstitution does not guarantee that only the guilty will be arrested . . . If it did, section 1983 would provide a cause of action for every defendant acquitted—indeed for every suspect released."¹¹³ The court found that the prosecutors and judges made their own decisions to move forward on Smith's case, rendering any bad faith Lane had irrelevant.¹¹⁴ When it came to the malicious prosecution claim, the court found that the independent intermediaries' decisions broke any causal chain stemming from Lane's actions.¹¹⁵

Smith connected the idea of good faith and intermediaries to the duties of officers, warrants, and probable cause in two ways. First, it found that just as subjective good faith is irrelevant when an officer violates the law, so too is subjective bad faith when the arrest is supported by a valid warrant or probable cause.¹¹⁶ Second, it found an officer has a legal duty to arrest a person once a valid warrant issues, regardless of his feelings about the defendant.¹¹⁷ In this way, *Smith* was the first decision to connect its new tort causation theory to Fourth Amendment law.

106. 670 F.2d 522 (5th Cir. 1982).

107. *Id.* at 524–25.

108. *Id.* at 525.

109. *Id.*

110. *Id.*

111. *Id.* at 525.

112. *Id.* at 526.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 527.

117. *Id.*

This is the part of the story when the Fifth Circuit does not want to use the doctrine, defendants insist it must, but the court finds a partial way out. In *Wheeler v. Cosden Oil & Chemical Co.*, the Fifth Circuit originally ruled that Texas agents who unlawfully arrested two men based on false statements in an arrest warrant were liable to the plaintiffs for malicious prosecution and unlawful arrest.¹¹⁸ The court used a Fourth Amendment analysis in determining these rights had been violated.¹¹⁹ However, the defendants requested a rehearing because the Fifth Circuit had not considered causation; both the first and second opinion were decided after the court's *Smith* decision.¹²⁰ In response, the court begrudgingly said it was "constrained" to follow *Smith* because it was "the law of the Circuit, and we must follow it."¹²¹ The Fifth Circuit cleverly, and with rebellious flare, narrowed both *Rodriguez's* and *Smith's* holdings to false arrest claims by stating neither decision applied the doctrine to malicious prosecution claims.¹²² Because the court limited the doctrine, the plaintiffs were permitted to move forward on the malicious prosecution claim even if the doctrine put an end to their false arrest claim.¹²³

This is the part of the story when the doctrine is adopted by a Rhode Island district court, but is subsequently repudiated by the First Circuit and the Supreme Court. In 1981, Rhode Island State Police officers arrested James and Louisa Briggs for drug possession.¹²⁴ Police investigators heard two vague references to marijuana use in a wiretap of a phone call about a Briggs family party.¹²⁵ Based on that phone call, Corporal Edward Malley authorized the arrests of twenty-two people for drug possession; the warrants were signed by a judge.¹²⁶ After their arrest, a grand jury chose not to return an indictment against them.¹²⁷

James and Louisa then sued Malley under § 1983, alleging he violated

118. 734 F.2d 254, 256, 260–62 (5th Cir. 1984), *reh'g denied*, 744 F.2d 1131 (5th Cir. 1984).

119. *Id.* at 257, 261.

120. *Wheeler v. Cosden Oil & Chem. Co.*, 744 F.2d at 1132–1133.

121. *Id.* at 1132 ("We are constrained to agree with Appellees that *Smith v. Gonzales*, 670 F.2d 522 (5th Cir. 1982), governs this aspect of the appeal.")

122. *See id.* at 1132–33.

123. *Id.*

124. *Malley v. Briggs*, 475 U.S. 335, 337–38 (1986).

125. *Id.*

126. *Id.* at 337–38.

127. *Id.* at 338.

their rights.¹²⁸ The district court, however, “found police officers to be immune from liability for negligently seeking warrants without probable cause.”¹²⁹ The court alternately relied upon the *Rodriguez*¹³⁰ and *Smith*¹³¹ decisions for support.¹³² The court held that the judge, acting as intermediary, broke the causal connection between Malley’s unlawful actions and the arrests.¹³³

When the plaintiffs appealed to the First Circuit, the court began by reiterating that a magistrate’s approval of a warrant did not prevent a jury’s review of probable cause.¹³⁴ The court stated that “judicial imprimatur is [not] an impregnable shield against any attack on the sufficiency of the underlying affidavit”¹³⁵ because that “is unquestionably bootstrapping.”¹³⁶ The court relied on *Harlow v. Fitzgerald*’s¹³⁷ test for qualified immunity in civil rights cases, which is whether the officer’s actions were objectively reasonable.¹³⁸ The First Circuit found *Harlow*’s test replaced the torts subjective good faith/malice standards that had been transplanted into civil rights law.¹³⁹

The court reasoned that allowing magistrates to shield officers from liability would encourage sloppy police work and the burden of protecting people from unlawful arrests should not fall squarely on the intermediary.¹⁴⁰ Ultimately, the court placed liability from arrests lacking probable cause on

128. *Id.*

129. *Briggs v. Malley*, 748 F.2d 715, 716–17 (1st Cir. 1984), *aff’d*, 475 U.S. 335 (1986).

130. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) (“[I]f the facts supporting an arrest are put before an intermedia[ry] such as a magistrate or grand jury, the intermedia[ry]’s decision breaks the casual chain and insulates an initiating party.”).

131. *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982) (specifying that an intermediary’s actions, which break the causal chain, include issuing a warrant or returning an indictment), *cert. denied*, 459 U.S. 1137 (1983).

132. *Briggs*, 748 F.2d at 717.

133. *Id.*

134. *Id.* at 716–17 (referencing *B.R.C. Transport Co. v. Fontaine*, 727 F.2d 7, 10 n.1 (1st Cir. 1984)).

135. *Id.* at 717 (quoting *Fontaine*, 727 F.2d at 10 n.1.)

136. *Fontaine*, 727 F.2d at 10 n.1.

137. 457 U.S. 800, 818 (1982) (“We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”).

138. *Briggs*, 748 F.2d at 721 (“Applying the standard of official immunity enunciated in *Harlow*, we hold that *only* where an officer is ‘constitutionally negligent,’ that is, where the officer should have known that the facts recited in the affidavit did not constitute probable cause, will liability attach.”).

139. *Id.* at 718.

140. *Id.* at 720.

officers.¹⁴¹ Several policy reasons supported the court’s ruling: 1) personal liability would deter officers from making unlawful arrests; 2) officers and agencies would be more likely to adopt remedial measures if they were held liable for negligent arrests; 3) fewer and less substantial constitutional violations would occur if remedies included monetary damages; and 4) plaintiffs deserved a remedy for civil rights violations.¹⁴²

The First Circuit strongly criticized the Fifth Circuit’s causation rule:

The “chain of causation” theory does not withstand scrutiny. If we use the tort concept of “but for” cause to determine when a causal connection is present, it seems clear that “but for” the police officer’s submission of the warrant to the magistrate, the warrant would not issue and the search or arrest would not occur. It is the decision of the police officer to bring the matter to the magistrate that is the active cause of the search or arrest. Where that decision is the result of negligence, [i.e.], failure to exercise a modicum of judgment about the presence of probable cause, that negligence is the cause of the improper search or arrest.¹⁴³

The First Circuit ruled in favor of James and Louisa Briggs, and Malley appealed to the Supreme Court.¹⁴⁴ The Supreme Court observed that although § 1983 includes no immunities to suit, an official may have one if he can identify a common law immunity defense from tort actions available when the Civil Rights Act became law in 1871.¹⁴⁵ The Court declared it is the officials who carry the burden of demonstrating that public policy requires immunity be given to them.¹⁴⁶

The Court then examined Malley’s argument, an argument lifted from the *Rodriguez* court’s legal analysis:¹⁴⁷ Malley claimed he was analogous to the historical layperson—referenced in *Rodriguez*’s secondary sources¹⁴⁸—

141. *Id.* at 719–20.

142. *Id.* at 720.

143. *Id.* at 721.

144. *Id.* at 721; *Malley v. Briggs*, 475 U.S. 335, 339 (1986).

145. *Malley*, 475 U.S. at 339–40.

146. *Id.* at 340.

147. *See Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc) (analyzing whether the plaintiff stated a claim for relief under federal common law and holding that she could not avail herself of “any type of common law remedy, federal or otherwise”).

148. *Id.* at 1193 n.34 (describing the common law liability standard for a layperson who has given

seeking an arrest.¹⁴⁹ The Court rejected his argument because historically, complainants were not protected from suit if they acted maliciously or without probable cause because the result of their actions were foreseeable.¹⁵⁰ Moreover, historically, malice had always been an issue for the jury to decide.¹⁵¹ The Court, agreeing with the First Circuit,¹⁵² said *Harlow*'s objective reasonableness standard applied to these circumstances.¹⁵³ It cautioned federal courts to exercise restraint when assessing immunity: "We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress'[s] intent by the common[]law tradition."¹⁵⁴ The Court found that qualified immunity was accorded to defendants in 1871,¹⁵⁵ the *Harlow* standard ensured officers would be cautious when applying for a warrant,¹⁵⁶ damages imposed the cost on the party responsible for the constitutional tort, and victims of constitutional torts deserved a remedy.¹⁵⁷ The Court also found that premature requests for warrants wasted judicial resources and led to unlawful arrests of innocent people.¹⁵⁸

In conclusion, the Court held the *Harlow* standard applied.¹⁵⁹ While Malley did not pursue his First Circuit court argument that the judge's decision broke the causal chain, the Supreme Court nevertheless addressed the argument's soundness.¹⁶⁰ The Court stated that "[i]t should be clear,

information to the police about the commission of a crime).

149. *Malley*, 475 U.S. at 340.

150. *Id.* at 340–41.

151. *Id.* at 341.

152. See *Briggs v. Malley*, 748 F.2d 715, 718 (1st Cir. 1984) (applying the objective reasonableness standard to police officers for § 1983 purposes), *aff'd*, 475 U.S. 335 (1986).

153. *Malley*, 475 U.S. at 341.

154. *Id.* at 342.

155. *Id.* at 341. ("Given malice and the lack of probable cause, the complainant enjoyed no immunity.").

156. *Id.* at 343.

157. *Id.* at 344.

158. *Id.* at 343–44.

159. *Id.* at 344–45.

160. *Id.* at 344 n.7. Justice White, who wrote the majority opinion in *Malley*, also questioned the doctrine in a 1982 dissent to a denial of certiorari. *Smith v. Gonzales*, 459 U.S. 1005, 1005–06 (1982) (White, J., dissenting). In that dissent, Justice White said the doctrine conflicted with the rule in three other circuit courts. *Id.* at 1006. And he questioned the strength of the decision in *Rodriguez v. Ritchey*, 556 F.2d 1185 (5th Cir. 1977) (en banc), due to its plurality status and the fact that there were three distinct opinions written by the Fifth Circuit justices who decided the case. *Smith*, 459 U.S. at 1006.

however, that the [d]istrict [c]ourt's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983 . . . [because] § 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'¹⁶¹ The Court reasoned that because the common law acknowledged a causal link between the issuance of a complaint and an arrest, § 1983 recognized a causal link between the officer's actions and the arrest.¹⁶² Again, the traditional civil rights causation principle was proximate cause, not the Fifth Circuit's novel causation approach.

This is the part of the story where the Fifth Circuit abandons its doctrine following *Malley's* clear rejection of it. The *Malley* opinion was released in 1986.¹⁶³ In 1987, the Fifth Circuit decided *United States v. Burzynski Cancer Research Institute*, which addressed constitutional tort claims, immunity standards, alleged civil rights violations stemming from an unlawful search, and most importantly, the independent intermediary doctrine.¹⁶⁴ The *Burzynski* analysis of the constitutional tort claims began by referencing the qualified immunity standard set out in *Harlow*, which is the objectively reasonable standard *Malley* endorsed.¹⁶⁵ Importantly, the court read *Burzynski's* complaint about the warrant as if the pleadings were true: that the federal government sought and executed the warrant in order to put *Burzynski* out of business.¹⁶⁶

The court then addressed the defendant's argument that the warrant was issued after a federal magistrate signed it, so the magistrate cut off any malice or lack of probable cause.¹⁶⁷ This is what the Fifth Circuit said in reply to the defendant's argument: "Dr. Burzynski counters by *correctly* pointing out that the Supreme Court rejected the rationale underlying that broadly-stated rule in *Malley v. Briggs*."¹⁶⁸ The court then determined that nowhere in *Burzynski's* claim did he allege the warrant lacked probable cause or contained omissions or false statements, and thus, *Burzynski* failed to establish the federal agents who obtained the search warrant violated any

161. *Malley*, 475 U.S. at 344 n.7 (quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds* by *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978)).

162. *Id.*

163. *Malley*, 475 U.S. at 344.

164. 819 F.2d 1301, 1308–11 (5th Cir. 1987).

165. *Id.* at 1309.

166. *Id.* at 1309–10.

167. *Id.* at 1309.

168. *Id.* (citing *Malley v. Briggs*, 475 U.S. 335, 344 & n.7 (1986)).

constitutional rights.¹⁶⁹ The *Burzynski* case is important because it acknowledged *Malley*'s repudiation of the doctrine; the court dutifully followed the *Harlow* and *Malley* standards. However, the Fifth Circuit's obedience to the Supreme Court would be short-lived.

This is the part of the story where the doctrine is resurrected from the dead. One year after *Burzynski*, the Fifth Circuit decided *Hand v. Gary*,¹⁷⁰ which is easily the most cited of the independent intermediary doctrine cases.¹⁷¹ *Hand* involved a stolen truck, a plaintiff who tried to extort money from the truck's owner, and a state and federal criminal investigation into the plaintiff's act.¹⁷² State prosecutors dismissed indictments obtained against Hand, the plaintiff, who then sued the truck's owner and law enforcement agents under § 1983.¹⁷³ While Hand's civil complaint was pending, a federal prosecutor indicted and tried Hand, but the jury acquitted him.¹⁷⁴ Hand won his § 1983 suit and the original investigating officer, Gary, appealed.¹⁷⁵

The Fifth Circuit said it had two questions to resolve: (1) whether Gary's pursuit of a criminal case after he learned Hand was suing him for civil rights violations was an act of malicious prosecution; and (2) whether Gary falsely arrested Hand.¹⁷⁶ While Hand alleged Gary pursued the federal indictment to shield himself from civil liability,¹⁷⁷ Gary rebutted this allegation by showing that the last indictment was based upon the federal prosecutor's independent investigation of the case.¹⁷⁸

The *Hand* court stated that in malicious prosecution cases, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to

169. *Id.* at 1309–10.

170. 838 F.2d 1420 (5th Cir. 1988).

171. It has been cited by ten other circuits and by hundreds of district court cases. *E.g.*, *Small v. McCrystal*, 708 F.3d 997, 1006 (8th Cir. 2013); *Evans v. Chalmers*, 703 F.3d 636, 648 (4th Cir. 2012); *Moore v. Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009); *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1067 (9th Cir. 2004); *Egervary v. Young*, 366 F.3d 238, 247 (3d Cir. 2004); *Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000); *Aronson v. City of Akron*, 116 F.3d 804, 813 (6th Cir. 1997); *Felix de Santana v. Velez*, 956 F.2d 16, 18 (1st Cir. 1992); *Barts v. Joyner*, 865 F.2d 1187, 1196 (11th Cir. 1989); *Jones v. City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988).

172. *Hand*, 838 F.2d at 1422–23.

173. *Id.* at 1423.

174. *Id.*

175. *Id.*

176. *Id.* at 1424.

177. *Id.* at 1426 (“Plaintiff alleged that [the officer] and others had caused the third criminal indictment to issue simply to gain leverage in a civil suit . . .”).

178. *Id.* at 1427.

show his actions were not improperly motivated because he did not impact the prosecution or act with malice.¹⁷⁹ The court found that Gary met his burden because he withheld no evidence from the federal agents, “probable cause was reascertained,” proper procedures were followed, and he testified truthfully before the grand jury.¹⁸⁰

On the false arrest claim, the *Hand* court sought to harmonize its precedent with Judge Hill’s concurrence in *Rodriguez*.¹⁸¹ Judge Hill did not want to send a message that a grand jury immunizes officers and prosecutors from malicious acts or bad faith.¹⁸² Consequently, the *Hand* court held that

the chain of causation is broken only where all the facts are presented to the grand jury, where the malicious motive of the law enforcement officials does not lead them to withhold any relevant information . . . from the independent intermediary. Any misdirection of the magistrate or the grand jury by omission or commission perpetuates the taint of the original official behavior.¹⁸³

Again, the court concluded that “Gary withheld no information from the federal agents, . . . prosecutors[,] . . . or from the federal grand jury,” so he was immune from suit.¹⁸⁴

Significantly, *Hand* never referenced *Malley* or the *Harlow* standard *Malley* endorsed. It is as if the panel deciding *Hand* in 1988 was unaware of the *Malley* decision from 1986, even though the Fifth Circuit acknowledged it and the independent intermediary doctrine’s demise in *Burzynski* in 1987.¹⁸⁵ Was the Fifth Circuit being willfully disobedient? Or was the *Hand* panel negligent in keeping up with legal developments and binding precedent? There are no other valid explanations for the doctrine’s resurgence. If the court did not think *Malley* applied, it would have distinguished the case on the facts like appellate courts frequently do.

This is the part of the story when the Fifth Circuit gets overly defensive about the doctrine and uses slippery language to denigrate *Malley*. In 2005,

179. *Id.* at 1426.

180. *Id.* at 1427.

181. *Id.* at 1427–28.

182. *Rodriguez v. Ritchey*, 556 F.2d 1185, 1194–95 (Hill, J., concurring).

183. *Hand*, 838 F.2d at 1427–28.

184. *Id.* at 1428.

185. *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1309 (5th Cir. 1987).

the Fifth Circuit tried to explain the *Malley-Burzynski-Hand* debacle in *Murray v. Earle*.¹⁸⁶ It began by claiming that the *Malley* Court merely “intimated” in dicta that the doctrine was inconsistent with § 1983, the Court’s decision in *Monroe v. Pape*, and tort liability in general,¹⁸⁷ even though the Supreme Court stated it wanted to make its rejection “clear” to a district court that had specifically relied upon the independent intermediary doctrine created by *Rodriguez* and *Smith*.¹⁸⁸

The Fifth Circuit then said it only “implicitly endorsed” the Supreme Court’s suggestions in *Burzynski* when it held that *Malley* required its repudiation of the doctrine.¹⁸⁹ The *Murray* court implied that because *Hand*’s holding was “qualified” and “consistent with other circuit precedent,” it was legitimate, even though it never mentioned *Malley* or *Burzynski* in the opinion.¹⁹⁰ The “circuit precedent” the Fifth Circuit relied on was its own, including *Rodriguez* and *Smith*, which were discounted as illogical and inconsistent by the First Circuit and Supreme Court decisions; all three decisions the Fifth Circuit cited predated *Malley* and thus were overruled by *Malley*.¹⁹¹ In sum, this 2005 Fifth Circuit decision was trying to rewrite history by upholding a doctrine *Malley* said had no place in civil rights law, and by suggesting that the very cases the Supreme Court found unpersuasive were actually credible after all.¹⁹²

The *Murray* court went on to describe the causation rule as one that “has since prevailed in this circuit for almost two decades.”¹⁹³ It considered *Burzynski* a momentary contradiction that failed to discuss its reasoning in depth, and thus the Fifth Circuit was “unwilling to disregard firmly ensconced circuit precedent in favor of such a cursory analysis of *Malley*’s dicta.”¹⁹⁴ Although the court recognized doctrine “tension” among the circuits, it ultimately held that in the present case, which involved officers unlawfully taking a juvenile’s confession in violation of the Fifth Amendment, the state

186. 405 F.3d 278, 291 (5th Cir. 2005).

187. *Id.*

188. *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986).

189. *Murray*, 405 F.3d at 291.

190. *Id.* at 291–92.

191. *Id.* at 291 n.49.

192. *Id.* at 291; *Malley*, 475 U.S. at 344 n.7.

193. *Murray*, 405 F.3d at 292.

194. *Id.*

judge acted as a neutral intermediary.¹⁹⁵ For now, this is the end of the doctrine's development story.

B. The Doctrine's Independent Intermediaries

The Fifth Circuit has said the focus of the causation doctrine is on the independent decision maker who is able “to impartially and objectively evaluate the underlying facts and . . . reach its own decision.”¹⁹⁶ This hypothetical decision maker could be a judge, magistrate, justice of the peace, prosecutor, grand jury, or petit jury.¹⁹⁷ Though the people who occupy these roles may be charged with finding probable cause, determining whether an arrest was lawful, or deciding guilt or innocence, not all are in fact neutral or independent. They have disparate knowledge about criminal law and procedure, and not all are charged with making wholly independent decisions. While many courts theorize these intermediaries are equal and completely independent, some courts recognize they are not.¹⁹⁸ Consider what one district court said about the prosecutor and judge in a case where defendants tried to claim the doctrine:

The prosecutor who controls the reasons for dismissal set out in his motion is obviously not a neutral impartial intermediary, and the judge may not be sufficiently informed about the facts of the arrest, as required to break the chain of causality. There is no indication that the particular facts of the arrest were put before the judge in the instant case, no less that there was a “full and fair presentation of the facts.”¹⁹⁹

195. *Id.* at 292–93.

196. *Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999).

197. *E.g.*, *Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989) (explaining that intervening acts could result from a “prosecutor, grand jury, judge, and jury”); *Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir. 1972) (explaining sentencing as “a discretionary function of the trial judge”); *Rollins v. Hattiesburg Police Dep’t*, No. 2:14CV61-KS-MTP, 2015 WL 4276386, at *9 (S.D. Miss. July 14, 2015) (identifying the trial judge as the independent intermediary).

198. *See* Judge Paul L. Friedman, *Threats to Judicial Independence and the Rule of Law*, A.B.A.: *Section of Litigation Committee on the American Judicial System* (Nov. 18, 2019), <https://www.americanbar.org/groups/litigation/initiatives/committee-on-american-judicial-system/in-the-news/threats-to-judicial-independence-and-rule-of-law/>.

199. *Goodarzi v. Hartzog*, No. Civ. A. H-12-2870, 2013 WL 3110056, at *20 (S.D. Tex. June 14, 2013).

Several courts see gradations of independence among the intermediaries. While the Supreme Court has stated that “the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely” with the prosecutor,²⁰⁰ not all prosecutors make independent decisions.²⁰¹ The Fifth Circuit cannot decide whether prosecutors are independent intermediaries.²⁰² For example, in one opinion, the court said prosecutors “are not . . . ‘impartial intermediar[ies]’ capable of insulating an officer from liability”; rather, they are “inherently biased part[ies].”²⁰³ However, three years earlier, the Fifth Circuit held a prosecutor was an independent intermediary.²⁰⁴ Other Fifth Circuit and district court opinions have concluded they are not.²⁰⁵ This is one of many inconsistencies with the doctrine and its application.

Federal courts have questioned whether magistrates are independent intermediaries.²⁰⁶ In *Malley*, the Supreme Court recognized that “ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should.”²⁰⁷ An Iowa district court found this true when it determined a magistrate failed to catch that the warrant affidavit erroneously relied on a statute because the officers carelessly read the law.²⁰⁸ The truth is omissions, malice, and shoddy work sometimes make their way to an overworked, distracted, lazy, incompetent, or unethical intermediary.²⁰⁹ The doctrine, however, presumes that all intermediaries are

200. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

201. *See, e.g., Goodarzi*, 2013 WL 3110056 at *20 (determining a prosecutor was not independent). The Ninth Circuit has adopted a unique rule when it comes to prosecutors. There is a presumption that the prosecutor exercised independent discretion in making the charging decision that can be rebutted only when the plaintiff establishes the officers influenced or pressured the prosecutor to seek charges. *See Smiddy v. Varney*, 665 F.2d 261, 266–67 (9th Cir. 1981).

202. *Compare Cuadra v. Houst. Indep. Sch. Dist.*, 626 F.3d 808, 813–14 (5th Cir. 2010) (finding a prosecutor was independent), *with Russell v. Altom*, 546 F. App’x 432, 437 (5th Cir. 2013) (stating prosecutors are not impartial intermediaries).

203. *Russell*, 546 F. App’x at 437.

204. *Cuadra*, 626 F.3d at 813–14.

205. *E.g., Hale v. Fish*, 899 F.2d 390, 401 (5th Cir. 1990) (explaining that “an assistant district attorney is not an ‘impartial intermediary’ under *Hand*”); *Goodarzi*, 2013 WL 3110056 at *20 (holding that prosecutors are not impartial intermediaries).

206. *See e.g., Malley v. Briggs*, 475 U.S. 335, 345–46 (1986); *Baldwin v. Estherville, Iowa*, 218 F. Supp. 3d 987, 1003 (N.D. Iowa 2016).

207. *Malley*, 475 U.S. at 345–46.

208. *Baldwin*, 218 F. Supp. 3d at 1003.

209. *See generally* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U.L. REV. 261, 262–97

wholly independent, attentive, honest, and hard-working folks. Most cases cite *Hand*'s standard without considering the adjective "independent," focusing instead on the word "intermediary," as if the role the person occupies is enough to insulate officers from liability for their constitutional torts.²¹⁰

One sees any number of intermediary scenarios play out in these cases. Typically, when one person acts maliciously or assumes multiple intermediary roles, courts find for the plaintiff.²¹¹ When there were multiple intermediaries involved, however, courts favor defendants.²¹² Some courts try in earnest to carefully assess the independence of the intermediary.²¹³ In one

(2011) (explaining how common it is for prosecutors to be overworked and the harms defendants experience when prosecutors are overworked).

210. *E.g.*, *Murray v. Earle*, 405 F.3d 278, 291–92 (5th Cir. 2005) (reaffirming the *Hand* standard due to its deep entrenchment in "circuit precedent").

211. *E.g.*, *White v. Frank*, 855 F.2d 956, 957, 961–62 (2d Cir. 1988) (finding no immunity for officers who acted with malice and assumed roles of complaining witnesses, arrest warrant affiants, grand jury witnesses, hearing witnesses, and trial witnesses); *Thomas v. Sams*, 734 F.2d 185, 187, 189–92 (5th Cir. 1984) (finding for the plaintiff where a bad actor played the role of complaining witness, magistrate authoring and signing the arrest warrant, and judge who deliberately sought not to get an independent intermediary involved and, thus, could not immunize his malicious conduct); *Harper v. Merckle*, 638 F.2d 848, 852 (5th Cir. 1981) (deeming defendant judge's actions unlawful where he "acted as complaining witness, prosecutor, factfinder, and judge").

212. *E.g.*, *Armstrong v. Asselin*, 734 F.3d 984, 994 (9th Cir. 2013) ("Officers Asselin and Vandegriff consulted with six prosecutors and obtained warrants from five judicial officials. As [*Messerschmidt v. Millender*, 565 U.S. 535 (2012)] holds, we would have to treat all eleven prosecutors and judges as 'plainly incompetent' to deny Officer Asselin and the other officers qualified immunity."); *Allen v. Jackson Cty.*, Civ. No. 1:12-CV-57-HSO-RHW, 2014 WL 940270, at *10 (S.D. Miss. March 11, 2014) (finding for the defendant where three different judges and a grand jury acted as independent intermediaries); *Berry v. Bennett*, No. 3:10-CV-2160-D BK, 2010 WL 5464879, at *4 (N.D. Tex. Dec. 6, 2010) (finding for the defendant where both the judge and the grand jury independently determined probable cause); *Causey v. Par. of Tangipahoa*, 167 F. Supp. 2d 898, 906 (E.D. La. 2001) ("[I]ndependent persons or bodies made four findings of probable cause as to plaintiff's involvement with the crime, three after he confessed.>").

213. *E.g.*, *Collins v. Doyle*, 209 F.3d 719, at *5 (5th Cir. 2000) ("[T]he district attorney's office had complete discretion to decide whether to initiate and pursue charges . . ."); *Hector v. Watt*, 235 F.3d 154, 164 (3d Cir. 2000) (Nygaard, J., concurring) (determining that the magistrate's independent judgment was not compromised); *Eubanks v. Gerwen*, 40 F.3d 1157, 1160–61 (11th Cir. 1994) (finding that the prosecutor was given all information by officers and made an independent decision to go forward with the case); *Dellums v. Powell*, 566 F.2d 167, 193–94 (D.C. Cir. 1977) (remanding the case to the trial court to decide, among other things, whether the prosecutor's decision to charge the plaintiffs was made without influence or pressure from the police chief); *Smith v. Tullis*, No. 5:15-CV-493-DAE, 2016 WL 6634948, at *9 (W.D. Tex. Nov. 8, 2016) (deciding the county attorney "is not sufficiently autonomous" under these facts, so he could not be deemed an independent intermediary); *Arceneaux v. La., Dep't of Pub. Safety*, No. Civ. 04-1033, 2008 WL 2369188, at *4 (W.D. La. June 10, 2008) (analyzing carefully all of the documents and findings of the judge and comparing them to the warrant affidavit to determine the judge heard all of the facts and made an

district court opinion, the judge emphasized repeatedly that the investigating officers and prosecutor were wholly independent from the influence of the arresting officer.²¹⁴ In another decision, the judge stressed that the prosecutor accepted charges without any influence by the civil defendants after she considered both exculpatory and inculpatory evidence and presented all of the facts to a grand jury, which indicted the plaintiff twice.²¹⁵ But careful analysis in these opinions is the exception, not the rule.

C. *The Doctrine's Unclear Burden-Shifting Framework*

Hand was the first court to address, in part, who carries the burden of proof in civil rights cases.²¹⁶ For malicious prosecution, once the plaintiff establishes a prima facie case, the burden shifts to the defendant to show his conduct did not impact the prosecution or she did not act with malice.²¹⁷ The burden of proof for false arrest, however, is much less clear.²¹⁸ The *Hand* court spoke in terms of taint evidence and presenting versus omitting evidence necessary to determine probable cause.²¹⁹ Because *Hand* left a lot unclear, courts are inconsistent about who carries the burden and what that burden even is.²²⁰ As a result, the burden is mostly whatever courts want it to be. This section will address cases that rule the defendant carries the burden, cases that rule the plaintiff carries the burden, the numerous burdens articulated by courts, and the unreasonable burden courts have determined plaintiffs must meet.

independent decision); *Rhodes v. Smithers*, 939 F. Supp. 1256, 1277–78 (S.D.W. Va. 1995), (concluding, after careful consideration, that the prosecutor “made an independent decision to proceed before the grand jury”), *aff’d*, 91 F.3d 132 (4th Cir. 1996).

214. *Cherry v. Garner*, No. Civ.A. 03-CV-01696, 2004 WL 3019241, at *9 n.19, *10. (E.D. Pa. Dec. 30, 2004).

215. *Cuadra v. Hous. Indep. Sch. Dist.*, No. CV H-07-3300, 2009 WL 10703694, at *9 (S.D. Tex. Aug. 17, 2009), *aff’d*, 626 F.3d 808 (5th Cir. 2010).

216. *Hand v. Gary*, 838 F.2d 1420, 1426 (5th Cir. 1988).

217. *Id.* at 1426–27.

218. *Id.* at 1427–28.

219. *Id.*

220. *Id.* at 1428. Compare *Shields v. Twiss*, 389 F.3d 142, 147–48 (5th Cir. 2004) (suggesting that, in false arrest cases, the burden of evidence is first placed on the defendant), with *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994) (holding that, to meet their burden in false arrest cases, the plaintiff must show that an intermediary actually relied on false information).

1. The Defendant Carries the Burden

One 2019 Fifth Circuit opinion held that the defendant must prove they presented the intermediary with all of the evidence or the doctrine does not apply.²²¹ One 2004 Fifth Circuit decision held the plaintiff failed to *rebut* the defendants' testimony, which suggests the burden of evidence begins with the defendant.²²² District courts in Georgia, Mississippi, and Texas have also suggested the burden of evidence in these cases rests with defendants.²²³ Another Fifth Circuit decision stated the defendants had the burden of pleading the doctrine, but they waived it.²²⁴ In 2018, a Texas district court held that the burden of establishing that the causal link was broken by an intermediary rested with defendants.²²⁵ Finally, in three recent Texas and Mississippi district court decisions, the courts held the defendants must prove with direct evidence that an independent intermediary actually found probable cause before they may lay claim to the doctrine.²²⁶ None of those courts were satisfied with the defendants' evidence.²²⁷

2. The Plaintiff Carries the Burden

Although there are more cases that suggest the burden of evidence rests with plaintiffs, the specific burden differs, perhaps reflecting the stage of the proceedings, or possibly revealing the merits of the plaintiff's case or the

221. *Winfrey v. Johnson*, 766 F. App'x 66, 71 (5th Cir. 2019), *cert. denied*, 140 S. Ct. 377 (mem.) (2019) (“[I]t is [the Defendant’s] burden to prove the omitted material information was presented to the judge. He has not done so.”).

222. *Shields*, 389 F.3d at 148.

223. *E.g.*, *Farmer v. Lawson*, 510 F. Supp. 91, 96 (N.D. Ga. 1981) (“The questions for the fact-finder are whether the sheriffs knew or should have known that the search warrant was invalid and whether the sheriffs acted in good faith in securing the search warrant. The burden of proof is on the defendants to demonstrate that their actions were taken in good faith.”) (citing *Douthitt v. Jones*, 619 F.2d 527, 533–34 (5th Cir. 1980); *Skehan v. Bd. of Trs. of Bloomburg State Coll.*, 538 F.2d 53, 61–62 (3d Cir. 1976)).

224. *Scribner v. Dillard*, 141 F. App'x 240, 242–44 (5th Cir. 2005).

225. *Cook v. City of Tyler*, No. 6:17-CV-00333-RWS, 2018 WL 4473110, at *10 (E.D. Tex. Sept. 18, 2018).

226. *Sinegal v. City of El Paso*, 414 F. Supp. 3d 995, 1002–03 (W.D. Tex. 2019); *Holcomb v. McGraw*, 262 F. Supp. 3d 437, 452 n.4 (W.D. Tex. 2017); *Keith v. Schuh*, No. CIV. A. 1:96CV39-D-D, 1997 WL 457487, at *7 n.6 (N.D. Miss. July 14, 1997), *rev'd on other grounds*, 157 F.3d 900 (5th Cir. 1998).

227. *Sinegal*, 414 F. Supp. 3d at 1011; *Holcomb*, 262 F. Supp. 3d at 452; *Keith*, 1997 WL 457487, at *14.

mood of the judge.²²⁸ These burdens are included here from the most onerous to the least. Some Fifth Circuit cases, along with some Texas and Mississippi trial court cases, state the plaintiff has to affirmatively show the intermediary actually *relied* upon false information.²²⁹ Other courts hold the plaintiff has to offer evidence of taint.²³⁰ Several Fifth Circuit and Texas trial opinions hold the plaintiff must prove tainted evidence was *presented* to the intermediary.²³¹ Yet other Fifth Circuit and trial court opinions have held that the plaintiff has to allege facts that raise a plausible claim or reasonable

228. Compare *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994) (holding that the plaintiff must show that an intermediary actually relied on false information to meet their burden), with *Wooten v. Roach*, 431 F. Supp. 3d 875, 897 (E.D. Tex. 2019) (holding plaintiffs in false arrest cases to a lesser burden by only requiring them to present evidence that raises a plausible claim or reasonable inference that the intermediaries' decisions were tainted), and *McLin v. Ard*, 866 F.3d 682, 690–91 (5th Cir. 2017) (ruling that plaintiffs must only show evidence that the defendants tainted the intermediaries' deliberation to meet their burden).

229. See *Taylor*, 36 F.3d at 456–57; *Furlow v. Baker*, No. 6:18-CV-00127-RWS, 2019 WL 1984142, at *3 (E.D. Tex. Apr. 11, 2019); *Newsome v. Mississippi*, No. 1:18cv178-HSO-RHW, 2018 WL 3876585, at *3–4 (S.D. Miss. Aug. 15, 2018), *appeal dismissed*, 788 Fed. App'x 958 (5th Cir. Dec. 24, 2019); *Rollins v. Hattiesburg Police Dep't*, No. 2:14CV61-KS-MTP, 2015 WL 4276386, at *8–9 (S.D. Miss. July 14, 2015); *Allen v. Jackson Cty.*, No. 1:12-cv-57-HSO-RHW, 2014 WL 940270, at *11 (S.D. Miss. Mar. 11, 2014); *McAllister v. Desoto Cty.*, No. 2:09CV163-SA-DAS, 2011 WL 2516260, at *5 (N.D. Miss. June 23, 2011), *aff'd*, 470 F. App'x 313 (5th Cir. 2012); *Reynolds v. Strayhorn*, No. A-05-CA-638 LY, 2006 WL 3341030, at *5 (W.D. Tex. Nov. 15, 2006); *Taylor-Hill v. Keyes*, No. Civ. A. 204CV40-MTP, 2006 WL 3231962, at *2 (S.D. Miss. Nov. 7, 2006).

230. See *Buehler v. City of Austin/Austin Police Dep't*, 824 F.3d 548, 554–55 (5th Cir. 2016); *Spivey v. Robertson*, 32 F. App'x 127 at *1 (5th Cir. 2002); *Lake-Crunk v. City of Hous. Police Dep't*, No. CV H-18-1113, 2018 WL 2337136, at *2 (S.D. Tex. May 22, 2018); *Lomas v. Par. of Ascension*, No. CV 16-00645-BAJ-RLB, 2017 WL 3929305, at *5 (M.D. La. Sept. 7, 2017); *Hagan v. Jackson*, No. 1:13CV268-HSO-RHW, 2014 WL 4914801, at *9 (S.D. Miss. Sept. 30, 2014); *Cook v. Perkins*, No. Civ. A. 12-258-SCR, 2013 WL 5720327, at *8 (M.D. La. Oct. 21, 2013), *aff'd sub nom. Cook v. Graves*, 575 F. App'x 505 (5th Cir. 2014); *Chisolm v. DeSoto Police Dep't*, No. 3:12-CV-5025-M, 2013 WL 5190886, at *4 (N.D. Tex. Sept. 16, 2013); *Davis v. City of Shinnston*, No. 1:12CV53, 2013 WL 4805814, at *8–9 (N.D.W. Va. Sept. 9, 2013); *Dumans v. Fort Bend Cty.*, No. Civ. A. 4:08-CV-01359, 2009 WL 7808946, at *5 (S.D. Tex. June 29, 2009); *Trois v. Long*, No. A-07-CA-965-SS, 2008 WL 11409933, at *3 (W.D. Tex. Nov. 7, 2008), *aff'd*, 362 F. App'x 399 (5th Cir. 2010); *Goldyn v. Clark Cty.*, No. 2:06-CV-0950-RCJ-RJJ, 2007 WL 2592797, at *6 (D. Nev. Aug. 31, 2007), *aff'd*, 346 F. App'x 153 (9th Cir. 2009); *Maier v. Green*, 485 F. Supp. 2d 711, 720 (W.D. La. 2007); *Barker v. McBride*, No. Civ. A. 00-1623, 2002 WL 575694, at *2–5 (E.D. La. Apr. 16, 2002).

231. See *Lock v. Torres*, 694 F. App'x 960, 964 (5th Cir. 2017); *Jennings v. Patton*, 644 F.3d 297, 301 (5th Cir. 2011); *Marshall v. Austin City Police Dep't*, No. A-18-CV-410-LY, 2018 WL 5018484, at *4 (W.D. Tex. Oct. 16, 2018); *Glaster v. City of Mansfield*, No. 14-627, 2015 WL 852412, at *7 (W.D. La. Feb. 26, 2015); *Bryant v. Oaks*, No. 2:13CV00022, 2014 WL 7330787, at *5 (W.D. Va. Dec. 19, 2014), *aff'd sub nom. Bryant v. Carico*, 616 F. App'x 84 (4th Cir. 2015); *Sullivan v. Boyd Tunica, Inc.*, No. Civ. A. 206CV016-B-A, 2007 WL 541619, at *5 (N.D. Miss. Feb. 16, 2007); *Morgan v. City of Waco*, No. 3-01-CV-2818-K, 2003 WL 21640563, at *2–3 (N.D. Tex. July 9, 2003), *amended by* No. 3-01-CV-2818-K, 2003 WL 21653869, at *1 (N.D. Tex. July 11, 2003).

inference that there was no probable cause or that the intermediary's decision was tainted.²³² The most commonly espoused burden—suggested by the Fifth Circuit and district courts in Texas, Louisiana, and Mississippi—merely requires plaintiffs to plead defendants tainted the intermediary's deliberations.²³³ However, in rare cases when the plaintiff wins, the Fifth Circuit and Texas district courts have excused insufficient pleadings.²³⁴

Another aspect that varies is whether the appellate court views the pleadings in a light most favorable to the plaintiff.²³⁵ For example, the Fifth Circuit and district courts in Louisiana and Texas have assumed the plaintiff's

232. See *Shaw v. Villanueva*, 918 F.3d 414, 416 (5th Cir. 2019) (describing the standard to survive a motion to dismiss); *Wooten*, 431 F. Supp. 3d at 897 (stating that the plaintiffs met the burden with plausible allegations that the facts and law presented to intermediaries were incomplete); *Hagwood v. Doe*, No. 3:16-CV-3038-G-BN, 2018 WL 1833053, at *2 (N.D. Tex. Mar. 27, 2018), *report and recommendation adopted by* No. 3:16-CV-3038-G-BN, 2018 WL 1813152 (N.D. Tex. Apr. 17, 2018); *Republic Fire & Cas. Ins. Co. v. Charles*, No. CV 17-5967, 2018 WL 310378, at *4 (E.D. La. Jan. 5, 2018); *McGee v. Baylor Univ. Med. Ctr.*, No. 3:17-CV-438-M-BN, 2017 WL 4325790, at *5 (N.D. Tex. Aug. 28, 2017); *Brodnik v. Lanham*, No. CV 1:11-0178, 2016 WL 4087361, at *6–7 (S.D.W. Va. Aug. 1, 2016); *Smith v. Mursura*, No. A-15-CA-1017-SS, 2015 WL 13730830, at *2 (W.D. Tex. Dec. 29, 2015); *Tilmon v. Texas*, No. A-14-CA-499-SS, 2015 WL 1292269, at *10 (W.D. Tex. Mar. 23, 2015); *Spease v. Cooper*, No. 1:12-CV-371, 2014 WL 526142, at *13 (E.D. Tex. Feb. 4, 2014).

233. See *Curtis v. Sowell*, 761 F. App'x 302, 305 (5th Cir. 2019); *McLin v. Ard*, 866 F.3d 682, 689–90 (5th Cir. 2017); *Jordan v. Brumfield*, 687 F. App'x 408, 416 (5th Cir. 2017); *Deville v. Marcantel*, 567 F.3d 156, 170 (5th Cir. 2009); *Villegas v. City of El Paso*, No. EP-15-CV-00386-FM, 2020 WL 981878, at *8 (W.D. Tex. Feb. 28, 2020); *Abdullah v. Texas*, No. A-18-CA-1076-LY, 2019 WL 981942, at *5 (W.D. Tex. Feb. 27, 2019); *Willis v. Bastrop Cty.*, No. A-18-CV-0093-RP, 2019 WL 252051, at *7 (W.D. Tex. Jan. 17, 2019); *Thorpe v. WMS Gaming, Inc.*, No. 3:16CV00147-NBB-RP, 2018 WL 4621906 at *4 (N.D. Miss. Sept. 26, 2018); *Buehler v. City of Austin*, No. 1:17-CV-724-LY, 2018 WL 4225046, at *2–4 (W.D. Tex. Sept. 5, 2018) (stating that plaintiff only needs to raise a plausible claim in his pleadings); *Finley v. Griffin*, No. 5:17-CV-136-BQ, 2018 WL 10626249, at *3–4 (N.D. Tex. Apr. 12, 2018); *Binning v. Bally Gaming, Inc.*, No. 3:16-CV-00146-NBB-RP, 2018 WL 296782, at *4–5 (N.D. Miss. Jan. 4, 2018); *Alexander v. Crozier*, No. A-15-CA-544-RP, 2016 WL 676480, at *2 (W.D. Tex. Feb. 18, 2016); *Jordan v. City of New Orleans*, No. CV 15-1922, 2016 WL 633666, at *7 (E.D. La. Feb. 17, 2016), *aff'd sub nom.* *Jordan v. Brumfield*, 687 F. App'x 408 (5th Cir. 2017); *Richardson v. Hunt Cty.*, No. 3:09-CV-2342-K, 2010 WL 1779409, at *2 n.2 (N.D. Tex. Apr. 6, 2010), *report and recommendation adopted by* No. 3:09-CV-2342-K, 2010 WL 1779403 (N.D. Tex. Apr. 30, 2010); *Culpepper v. Williams*, No. Civ. A. 1:06CV125LGJM, 2007 WL 2406970, at *2 (S.D. Miss. Aug. 20, 2007); *Calhoun v. City of Austin*, No. A-06-CA-185 AA, 2007 WL 9700763, at *3–4 (W.D. Tex. Jan. 11, 2007).

234. See *Winfrey v. Rogers*, 901 F.3d 483, 491 (5th Cir. 2018), *cert. denied sub nom.* *Johnson v. Winfrey*, 139 S. Ct. 1549 (2019); *Fields v. Tex. Dep't of State Health Servs.*, No. 4:16-CV-607-ALM-CAN, 2017 WL 9285416, at *7 (E.D. Tex. Sept. 13, 2017).

235. Compare *McLin*, 866 F.3d at 688 (viewing the pleadings in the light most favorable to the defendant), with *Anderson v. Flemming*, No. 3:16CV37-DPJ-FKB, 2017 WL 2380249, at *2 (S.D. Miss. May 31, 2017) (viewing the pleadings in the light most favorable to the plaintiff).

facts are true.²³⁶ But the Fifth Circuit has also said that when there are “different interpretations” of facts from the plaintiff and defendant or “inconsistencies,” this is not enough to establish actual taint.²³⁷ This is particularly concerning given the fact that the Supreme Court has stated that in civil rights cases, the courts *must* view the facts in the complaint as true.²³⁸

Even if all of these cases suggest the plaintiff has the burden, what that burden actually requires the plaintiff to prove or plead is unclear. As a result, plaintiffs have no idea what to expect in district court or on appeal, which poses a notice problem when they are deciding whether to file suit.

3. An Impossible Burden for Plaintiffs

If the plaintiff is required to carry the burden, the burden courts have articulated is frankly impossible to meet.²³⁹ Courts have expected plaintiffs to produce evidence they cannot access or evidence with no available record.²⁴⁰ The Supreme Court has recognized that it is rare that a prosecutor reveals retaliatory thinking or that he acted as a rubber stamp, and it would be “unrealistic to expect a prosecutor to reveal his mind” when deciding to seek an indictment.²⁴¹ Yet, some courts expect the plaintiff to prove that the intermediary *relied* upon tainted evidence.²⁴² Plaintiffs have stated in the plainest way possible they cannot produce evidence that is inaccessible or that

236. See *McLin*, 866 F.3d at 690–91, 695; *United States v. Burzynski Cancer Research Inst.*, 819 F.2d 1301, 1309–10 (5th Cir. 1987); *Ferguson v. Dunn*, No. 1:16-CV-272, 2017 WL 9286964, at *4 (E.D. Tex. May 19, 2017), *report and recommendation adopted by* No. 1:16-CV-272, 2017 WL 2728631, at *1 (E.D. Tex. June 23, 2017), *aff’d*, 803 F. App’x 808 (5th Cir. 2020); *Paddio v. City of Hammond*, No. Civ. A. 97-343, 1997 WL 289704, at *3 (E.D. La. May 28, 1997).

237. *Buehler*, 824 F.3d at 556.

238. *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); see also *Sherwin Manor Nursing Ctr., Inc. v. McAuliffe*, 37 F.3d 1216, 1219 (7th Cir. 1994) (stating that federal courts cannot apply a more stringent pleading requirement than the required notice requirement).

239. See *Hartman v. Moore*, 547 U.S. 250, 264 (2006) (stating that it is often “unrealistic” to think an intermediary would divulge their reasoning for seeking an indictment, yet some courts require plaintiffs in false arrest cases to prove that this same intermediary made their decision based upon tainted or incomplete information).

240. *Id.*; see also *Shields v. Twiss*, 389 F.3d 142, 145–47 (5th Cir. 2004) (alleging that the court expected plaintiff to produce grand jury evidence that was impossible to get).

241. *Hartman*, 547 U.S. at 264.

242. See, e.g., *Taylor v. Gregg*, 36 F.3d 453, 457 (5th Cir. 1994) (holding that the plaintiff must show that an intermediary actually relied on false information to meet their burden).

does not exist, but their pleas have fallen on deaf ears.²⁴³

Consider the following real scenario as proof that the burden is impossible. In ruling against the plaintiff, the trial court in *Allen v. Jackson County* stated the plaintiff could not prove what the magistrate relied on, in addition to the warrant affidavit, in making her decision to issue a warrant.²⁴⁴ This step in the case—seeking an arrest warrant—is often the earliest in the criminal process.²⁴⁵ It happens long before a criminal defendant knows he will be arrested, he will need to hire a criminal lawyer, he will go to trial and discover the officer’s actions were unlawful, he will be acquitted or have his case dismissed for lack of probable cause, or he will file a lawsuit and retain a civil lawyer. When the magistrate makes her decision, there is no court reporter present or notes kept as to what the magistrate heard or knew, aside from the facts presented in the warrant affidavit.²⁴⁶ Indeed, the magistrate will likely not explain to the officer present what she relied upon in making her decision. She will simply sign or not sign the warrant and the case will proceed or it will not. How then can the plaintiff be expected to provide evidence of what the magistrate heard, much less considered?²⁴⁷ The simple answer is he cannot. Yet, the district court in this case ruled the plaintiff was barred from suit because he could not prove what the judge contemplated in finding probable cause, aside from the warrant affidavit.²⁴⁸

243. *E.g.*, *Fox v. City of Greensboro*, 807 F. Supp. 2d 476, 497 (M.D.N.C. 2011) (arguing that “providing additional details ‘would be unduly burdensome . . . since all those who would have knowledge about [the alleged] conversations are named Defendants.’” (quoting petitioner’s pre-trial motion)).

244. *Allen v. Jackson Cty.*, No. 1:12-cv-57-HSO-RHW, 2014 WL 940270, at *11 (S.D. Miss. Mar. 11, 2014).

245. *See Paradis v. Brady*, No. CV-03-150-N-BLW, 2006 WL 8445418, at *6 (D. Idaho Mar. 31, 2016) (stating that, in Idaho, the issuance of a warrant is the first step of the criminal process and is done only after an intermediary determines that there is “probable cause” for an arrest); *Lattimore v. State*, 958 So. 2d 192, 198 (Miss. 2007) (stating that criminal “proceedings are held to have been initiated” when a warrant is issued and a defendant is arrested (citing *Nicholson v. State*, 523 So. 2d 68, 74 (Miss. 1998))).

246. *See Linda Zhang, Retaliatory Arrests and the First Amendment: The Chilling Effects of Hartman v. Moore on the Freedom of Speech in the Age of Civilian Vigilance*, 64 UCLA L. REV. 1328, 1351 (2017) (asserting that finding evidence showing tainted decision making is “likely to be a rare and consequently [a] poor guide[] in structuring a cause of action,” largely because the evidence that would provide a basis for this is largely unknowable (citing *Hartman v. Moore*, 547 U.S. 250, 254 (2006))).

247. *See Hartman*, 547 U.S. at 264 (questioning how a plaintiff would go about receiving evidence of an intermediary’s considerations in rendering an arrest warrant decision when it would be “unrealistic” to think that an intermediary would divulge that information”).

248. *Allen v. Jackson Cty.*, No. 1:12-cv-57-HSO-RHW, 2014 WL 940270, at *11 (S.D. Miss., Mar.

Take another impossible thing for plaintiffs to prove: what the grand jury heard, saw, or knew when it considered an indictment. Grand jury proceedings are secret.²⁴⁹ Court reporters and recordings of testimony are the exception, not the rule.²⁵⁰ Grand jurors and everyone involved in a grand jury investigation or a criminal case before the grand jury are sworn to secrecy.²⁵¹ If grand jury testimony is recorded, the law sets a high burden on a party seeking records of grand jury testimony.²⁵² Those records are obtained in the rarest of cases, a civil rights suit not being one of them.²⁵³ Furthermore, the law prohibits anyone from being present during deliberations, making it legally impossible for the plaintiff to prove what the grand jury considered when making its decision.²⁵⁴ Again, a civil rights plaintiff cannot satisfy this evidentiary burden.²⁵⁵

Civil rights plaintiffs have offered proof, in the rarest of cases, that the grand jury considered the wrong kind of law,²⁵⁶ did not hear exculpatory

11, 2014).

249. *See, e.g.*, TEX. CODE CRIM. P. ANN. art. 19.36 (West 2020) (charging bailiffs who escort grand jurors to “keep secret the proceedings of the grand jury”); *id.* art. 19.34 (stating that the decisions and evidence considered by the grand jury will be kept secret unless the “truth or falsity of evidence given in the grand jury room” is under investigation).

250. *See, e.g.*, *Shields v. Twiss*, 389 F.3d 142, 145–46 (5th Cir. 2004). *But see* FED. R. CRIM. P. 6(e)(1); TEX. CODE CRIM. P. ANN. art. 20.012(a) (West 2020).

251. *See, e.g.*, TEX. CODE CRIM. P. ANN. art. 19.34 (West 2020) (“You solemnly swear that you will . . . keep secret . . .”); *id.* art. 19.36 (charging bailiffs who escort grand jurors to “keep secret the proceedings of the grand jury”). *See generally id.* art. 20.02 (titled “Proceedings Secret”).

252. *E.g., id.* art. 20.02(d) (permitting disclosure after a criminal defendant demonstrates a “particularized need,” which is a nearly impossible burden to meet in any court).

253. *See, e.g., Shields*, 389 F.3d at 147–48 (holding the defendant did not meet the “particularized need” standard in a civil rights case); Order Granting Defendant’s Motion to Dismiss at *11, *Wilson v. Strohman*, Civil No. 1-17-CV-00453-ADA (Apr. 6, 2020) (on file with author) (stating that the law in Texas permits criminal defendants to access grand jury testimony when they can demonstrate a particularized need, but these plaintiffs could not identify one).

254. *E.g.*, TEX. CODE CRIM. P. ANN. art. 20.011(b) (West 2020) (stating that only grand jurors may be present when the grand jury is deliberating).

255. *See, e.g.*, Order Granting Defendant’s Motion to Dismiss at *10 n.2, *Wilson*, Civil No. 1-17-CV-00453-ADA (on file with author) (stating that “[t]he Court is not requiring plaintiffs to prove the impossible—what occurred inside the secret proceedings of a grand jury[,]” before finding plaintiffs failed to meet their burden by proving what evidence the grand jury considered).

256. *See Russell v. Altom*, 546 F. App’x 432, 437 (5th Cir. 2013) (explaining that the District Attorney “present[ed] [the grand jury] three charges based on violations of a . . . [civil statute] that contain[ed] no criminal penalties of any kind”).

evidence,²⁵⁷ relied upon problematic charging instruments,²⁵⁸ did not know all of the facts or evidence,²⁵⁹ reviewed false allegations in the affidavit,²⁶⁰ or returned 106 indictments related to one case “using identical fill-in-the-blank indictments” in a single day, which hardly demonstrates independence or individualized probable cause assessments.²⁶¹ None of these plaintiffs were successful, because the court said they offered speculation or otherwise failed to establish that these facts tainted the proceedings.²⁶² Why should the plaintiff have the burden to unearth evidence of taint, malice, or omissions when it is the defendant or persons aligned with the defendant who organized and participated in these proceedings?

Some courts implicitly recognize the tension between the burden imposed and the practical hurdles plaintiffs have to scale.²⁶³ For example, in *Shields v. Twiss*, the plaintiff did everything he could to obtain grand jury evidence: he attempted to subpoena grand jurors so he could depose them, but the defendants quashed his subpoenas; he sought to obtain records from the hearings, but discovered there were none; after he was ordered by the judge not to contact any grand jurors, he sought permission from another court, but failed.²⁶⁴ The district court ruled against him because he failed to show that

257. *E.g.*, *Savino v. City of New York*, 331 F.3d 63, 69 (2d Cir. 2003) (noting that certain exculpatory evidence was not presented to the grand jury). The State, however, is not obligated to provide the grand jury with exculpatory evidence nor does the defendant have a corresponding right to have a well-informed grand jury. *United States v. Williams*, 504 U.S. 36, 51–52 (1992); *see also* *Savino*, 331 F.3d at 75 (explaining that the prosecutor has “the discretion and authority to decide what evidence to present to the grand jury”).

258. Order Granting Defendant’s Motion to Dismiss at *2, *Wilson*, Civil No. 1-17-CV-00453-ADA (on file with author) (finding that the prosecutor used the exact same charging instrument and affidavit for 177 criminal defendants arrested en masse; all cases were later dismissed).

259. *Krueger v. Bremer*, No. 94-50332, 1995 WL 84147, at *3 (5th Cir. Feb. 8, 1995); *Trois v. Long*, No. A-07-CA-965-SS, 2008 WL 11409933, at *3 (W.D. Tex. Nov. 7, 2008), *aff’d*, 362 F. App’x 399 (5th Cir. 2010).

260. *Shaw v. Villanueva*, 918 F.3d 414, 416, 418 (5th Cir. 2019) (finding that although the policeman lied in affidavit, the officers who presented the affidavit did not know of the lie, so there was no evidence they intended to deceive intermediary).

261. Plaintiffs’ First Amended Complaint at *31, *Smith v. Strohman*, Civil Action No. 1:17-cv-474-ADA (Feb. 19, 2019) (on file with author).

262. *See, e.g.*, *Russell v. Altom*, 546 F. App’x 432, 437 (5th Cir. 2013) (“[T]he improper inclusion of a statute with no criminal penalties does nothing to undercut the other half of the indictment, which was based on a clearly applicable statute that carries criminal penalties.”).

263. *See, e.g.*, *Shields v. Twiss*, 389 F.3d 142, 147 (5th Cir. 2004) (recognizing that the plaintiff’s requirement of showing a particularized need faces the procedural prospect of overcoming the “well-established, long-standing public policy” that protects the secrecy of grand jury proceedings).

264. *Id.* at 145–46.

evidence was withheld from the grand jurors.²⁶⁵

On appeal, Shields alleged that the judicial orders made it impossible for him to obtain evidence to support his claims.²⁶⁶ The Fifth Circuit began its analysis by acknowledging that under federal and state law there is a “general rule of secrecy [that] shrouds the proceedings of grand juries.”²⁶⁷ The court then recognized an exception to the rule, before determining that Shields could not meet it under these circumstances.²⁶⁸ In the end, the court affirmed the district court’s decision.²⁶⁹ If the law, the district courts, and the appellate courts deny attempts to obtain grand jury evidence, how can they expect plaintiffs to produce it in civil rights cases?

It is more logical and just to require defendants to establish that they presented all the facts to the intermediary, as only they know what facts were actually presented.²⁷⁰ If the facts were presented to a magistrate or a judge, the defendants would know what those intermediaries heard, whereas the plaintiff would not. If the intermediary was a grand jury, only the defendants would know what the grand jury heard.²⁷¹ The plaintiff has no real ability to uncover the evidence that the grand jury saw or heard. Courts adhering to the doctrine could permit a jury to decide factual issues about what evidence the intermediary considered when the plaintiff’s and defendant’s assertions differ. That is what courts in other jurisdictions do.²⁷²

265. *Id.* at 146.

266. *Id.* at 147.

267. *Id.*

268. *Id.* at 147–48.

269. *Id.* at 148–49.

270. *See Shields*, 389 F.3d at 148 (denying plaintiff’s request to obtain grand jury evidence when defendant deputy testified under oath “that she presented all relevant information in her possession” to the grand jury, leaving plaintiff with no way to rebut such testimony); *see also Fox v. City of Greensboro*, 807 F. Supp. 2d 476, 497 (M.D.N.C. 2011) (asserting that “all those who would have knowledge about [the alleged] conversations are named Defendants”).

271. *See, e.g., TEX. CODE CRIM. P. ANN.* art 20.011 (West 2020) (limiting the persons who may be present during grand jury proceedings, and not including the accused, who would be the plaintiff in a subsequent civil rights case).

272. *See LoSacco v. City of Middletown*, 822 F. Supp. 870, 876 (D. Conn. 1993) (holding that if pleadings, assumed true, by plaintiffs raise a factual issue as to whether officer made false assertions or omitted information to the intermediary, it is a question for the jury to resolve), *aff’d*, 33 F.3d 50 (2d Cir. 1994).

IV. FEDERAL RESPONSES TO THE DOCTRINE

This section will examine some of the cases that have used an independent intermediary analysis and the results those courts reached.

A. *The Doctrine Is Inapplicable and the Plaintiff Can Sue*

A number of courts have found the causation rule inapplicable.²⁷³ Because the Fifth Circuit created the rule, it makes sense to start with a Fifth Circuit case that found it inapplicable: *Winfrey v. Rogers*.²⁷⁴ In *Winfrey*, the plaintiff was considered a murder suspect after a blundered investigation that began with forensic science errors and ended with a lying jailhouse informant.²⁷⁵ Officers knowingly omitted these problems from the affidavits they used to obtain search and arrest warrants.²⁷⁶ Winfrey sat in jail for two years awaiting trial before a jury quickly acquitted him.²⁷⁷ Winfrey sued a police investigator for malicious prosecution.²⁷⁸

On appeal, the defendant claimed the grand jury and the trial judge were independent intermediaries, thus barring Winfrey's suit.²⁷⁹ The Fifth Circuit assumed that because neither side presented evidence to the contrary, the grand jury probably heard no more than the facts from the warrant affidavits.²⁸⁰ The court could not determine whether "all the facts [were] presented to the grand jury" or the judge.²⁸¹

The *Winfrey* decision is important for a few reasons. First, the court endorsed a neutral burden by suggesting that both sides need to produce

273. See, e.g., *Winfrey v. Rogers*, 901 F.3d 483, 497 (5th Cir. 2018) (explaining that "the chain of causation between the officer's conduct and the unlawful arrest 'is broken only where *all the facts* are presented to the grand jury'" (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010))), cert. denied sub nom. *Johnson v. Winfrey*, 139 S. Ct. 1549 (2019); *Cuadra*, 626 F.3d at 813–14 (5th Cir. 2010); *Buehler v. City of Austin*, No. 1:17-CV-724-LY, 2018 WL 4225046, at *4 (W.D. Tex. Sept. 5, 2018); *Nerio v. Evans*, No. A-17-CA-037-LY, 2017 WL 2773716, at *4 (W.D. Tex. June 26, 2017); *Smith v. Tullis*, No. 5:15-CV-493-DAE, 2016 WL 6634948, at *8 (W.D. Tex. Nov. 8, 2016).

274. 901 F.3d 483 (5th Cir. 2018).

275. *Id.* at 488–89.

276. *Id.* at 489.

277. *Id.* at 490.

278. *Id.* at 493.

279. *Id.* at 496–97.

280. *Id.* at 497.

281. *Id.* (quoting *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 813 (5th Cir. 2010)).

evidence about what facts the intermediaries heard.²⁸² Second, because the warrant affidavits were missing important facts, the court presumed the other intermediaries were missing facts too.²⁸³ The court clearly felt sympathy for Winfrey because the facts were egregious.²⁸⁴ Winfrey's sister's appeal—she was also convicted for a crime she did not commit—led the Fifth Circuit to say that the defendant had to prove the alleged omitted evidence was actually presented to the judge.²⁸⁵ These two opinions are favorable for plaintiffs because they liken the doctrine to an affirmative defense by placing the burden of proving what the intermediary heard on the party aligned with the intermediary.

Among the other courts that have ruled the doctrine inapplicable, some courts found enough factual differences in the pleadings, assuming the plaintiff's pleadings were true, to determine the plaintiff should have a trial.²⁸⁶ Other courts determined the alleged intermediaries were not independent enough or legally qualified to be intermediaries.²⁸⁷ While a number of courts

282. *Id.* at 496–97. The *Winfrey* court was not the only court to create a neutral evidentiary burden. See *McLennan v. Longhorn Car-Truck Rental*, No. A-08-CA-327 LY, 2008 WL 11358066, at *3 (W.D. Tex. May 8, 2008).

283. *Winfrey*, 901 F.3d at 497.

284. See *id.* at 489 (detailing the errors in the investigation).

285. *Winfrey*, 766 F. App'x at 71.

286. See *Buehler v. City of Austin*, No. 1:17-CV-724-LY, 2018 WL 4225046, at *3–4 (W.D. Tex. Sept. 5, 2018) (denying motion to dismiss because of differences between the warrant affidavit and the plaintiff's complaint, even though the plaintiff did not plead any specific misrepresentations); *Basler v. Barron*, No. CV H-15-2254, 2016 WL 1672573, at *4 (S.D. Tex. Apr. 27, 2016) (stating that the plaintiff alleged specific facts that, if presumed true, would raise a factual issue for a jury to resolve); *Buchanek v. City of Victoria*, No. Civ. A. V-08-08, 2008 WL 4093623, at *6 (S.D. Tex. Aug. 28, 2008) (“[T]he assertions contained in Buchanek’s Amended Complaint paint a picture of an unreasonable, malicious and politically-motivated investigation which was undertaken without any underlying merit.”); *Jackson v. Alleghany Cty.*, No. Civ. A. 707CV0417, 2008 WL 3992351, at *19 (W.D. Va. Aug. 28, 2008) (holding that the plaintiff alleged enough facts to establish that the officers’ wrongful acts led to his arrest without probable cause); *Culpepper v. Williams*, No. Civ. A. 1:06CV125LGJM, 2007 WL 2406970, at *2 (S.D. Miss. Aug. 20, 2007) (holding that the pleadings were sufficient to survive a motion to dismiss); *Calhoun v. City of Austin*, No. A-06-CA-185 AA, 2007 WL 9700763, at *3 (W.D. Tex. Jan. 11, 2007) (holding that the pleading sufficiently alleged that the arrest warrant contained materially false statements and omissions).

287. See *Nerio v. Evans*, No. A-17-CA-037-LY, 2017 WL 2773716, at *4 (W.D. Tex. June 26, 2017) (stating that, if the plaintiff’s allegations were true, the magistrate did not act independently, as the officers arrested the wrong person and falsely identified him); *Smith v. Tullis*, No. 5:15-CV-493-DAE, 2016 WL 6634948, at *8 (W.D. Tex. Nov. 8, 2016) (holding that a magistrate did not act independently, as officers arrested the wrong person and falsely identified him); *Goodarzi v. Hartzog*, No. Civ. A. H-12-2870, 2013 WL 3110056, at *20 (S.D. Tex. June 14, 2013) (finding that the defendant’s arguments raise doubts as to the judge’s independence).

found the bad actor had withheld information, lied to the intermediary, or there was a factual issue on these issues,²⁸⁸ other courts determined that not all of the facts, as required by *Hand*, had been presented to the intermediary.²⁸⁹ Some courts have found it impossible for the intermediary to have known all the facts because the presence of later-discovered exculpatory evidence, if presented, would have resulted in a finding of no probable cause.²⁹⁰ Still other courts rule the doctrine does not apply for cloudier reasons.²⁹¹

B. *The Doctrine Applies and the Plaintiff Is Barred from Suit*

A number of federal courts applying the rule found that the intermediaries made truly independent decisions, uninfluenced by the officers.²⁹² Others held

288. See *Morris v. Dearborne*, 181 F.3d 657, 673 (5th Cir. 1999); *Borunda v. Richmond*, 885 F.2d 1384, 1390 (9th Cir. 1988) (allowing plaintiff to proceed to trial because of conflicting facts given by officers and “striking omissions in the police report”); *Arizmendi v. Brownsville Indep. Sch. Dist.*, No. 1:16-CV-00063, 2017 WL 4479951, at *2, *4–7 (S.D. Tex. May 26, 2017) (acknowledging a factual issue as to whether the officer knowingly or recklessly misrepresented material statements in the warrant affidavit he submitted to the magistrate), *rev’d sub nom.* *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir.), *cert. denied*, 140 S. Ct. 220 (2019); *Ferguson v. Dunn*, No. 1:16-CV-272, 2017 WL 9286964, at *5 (E.D. Tex. May 19, 2017) (explaining that an officer “misdirected” the judge numerous times in his affidavit when the law did not even authorize his arrest); *Smith*, 2016 WL 6634948, at *8 (stating that the Justice of the Peace was given a warrant application with facts the officer knew the evidence did not supported); *Rodriguez v. City of Houston*, No. Civ. A. H-06-2650, 2007 WL 1189639, at *7 (S.D. Tex. Apr. 19, 2007) (denying motion to dismiss where plaintiff alleged officers concealed exculpatory evidence from prosecutors, grand jury, and others involved in the investigation); *Seibert v. Cannaday*, No. 3:03-CV-0672-P, 2005 WL 646048, at *8 (N.D. Tex. Mar. 18, 2005) (explaining a factual issue as to whether officer circulated false information about plaintiff).

289. See *Bolton v. City of Austin*, No. A-17-CA-077-SS, 2018 WL 2392557, at *3 (W.D. Tex. May 25, 2018); *Goodarzi*, 2013 WL 3110056, at *20 (“There is no indication that the particular facts of the arrest were put before the judge in the instant case, no less that there was a full and fair presentation of the facts.”) (internal quotation marks omitted); *Hamrick v. City of Eustace*, 732 F. Supp. 1390, 1396 n.3 (E.D. Tex. 1990).

290. See *Jones v. Eder*, No. CV H-15-2919, 2016 WL 4571114, at *4 (S.D. Tex. July 19, 2016), *aff’d*, 778 F. App’x 327 (5th Cir. 2019), *cert. denied*, 206 L. Ed. 2d 937 (May 18, 2020); *Morris*, 69 F. Supp. 2d at 886.

291. See, e.g., *Garza v. Guerra*, No. Civ. A. B-08-084, 2010 WL 2607275, at *14 (S.D. Tex. June 25, 2010) (stating that an examining trial is not a final judgment, so a probable cause determination made there does not insulate the defendant), *aff’d*, 463 F. App’x 316 (5th Cir. 2012); *Garza v. City of Austin*, No. A-08-CA-534-LY, 2009 WL 10700446, at *3 (W.D. Tex. Nov. 24, 2009) (holding that the doctrine does not apply to “novel” facts, which included officers arresting the wrong person); *McLennan v. Longhorn Car-Truck Rental*, No. A-08-CA-327 LY, 2008 WL 11358066, at *3 (W.D. Tex. May 8, 2008) (ruling it was “premature” to apply the doctrine at the time).

292. See *Buehler v. City of Austin/Austin Police Dep’t*, 824 F.3d 548, 556 (5th Cir. 2016) (reasoning that the grand jury heard from both sides before making its decision and, thus, was truly

that the plaintiff simply failed to show the actors deceived the intermediary or acted maliciously.²⁹³ One court found that even though proffered evidence may have been misleading, there was no evidence that the misrepresentations affected the intermediary's deliberations.²⁹⁴ Some courts found that the plaintiff failed to prove knowing misconduct or otherwise failed to meet the declared burden.²⁹⁵ In rare cases, the plaintiff knew the facts that the intermediary heard and the court found that these facts were sufficient to satisfy the rule.²⁹⁶ Courts have denied claims when the bad actor was not a

independent); *Eubanks v. Gerwen*, 40 F.3d 1157, 1161 (11th Cir. 1994) (noting that the officers "did not make the decision as to whether or not to prosecute Eubanks; nor did they act in such a way as to improperly influence the decision by the State Attorney"); *Cherry v. Garner*, No. Civ. A. 03-CV-01696, 2004 WL 3019241, at *10 (E.D. Pa. Dec. 30, 2004) (noting that the officer did not influence wholly independent intermediaries).

293. *See Rothstein v. Carriere*, 373 F.3d 275, 284 (2d Cir. 2004) (noting that the plaintiff cannot win when he fails to show irregular proceedings before the grand jury); *Barts v. Joyner*, 865 F.2d 1187, 1195–97 (11th Cir. 1989) (noting that the plaintiff failed to show that the officers deceived the intermediaries); *Holcomb v. McGraw*, 262 F. Supp. 3d 437, 451–52 (W.D. Tex. 2017) (observing that the plaintiffs failed to prove that the officers tainted the magistrate's probable cause decision); *Griffith v. Pamerleau*, No. SA-14-CV-591-PM, 2015 WL 2446003, at *5 (W.D. Tex. May 20, 2015) (finding no evidence that the officer tainted the intermediary's deliberations); *Morgan v. City of Waco*, No. 3-01-CV-2818-K, 2003 WL 21640563, at *3 (N.D. Tex. July 9, 2003) (finding no evidence that the intermediary's decision was tainted).

294. *Crostley v. Lamar Cty.*, No. 5:10-CV-017, 2010 WL 11468796, at *6 (E.D. Tex. July 21, 2010).

295. *See Smith v. Sheriff, Clay Cty.*, 506 F. App'x 894, 900 (11th Cir. 2013) (noting that even though court was "troubled by the omissions of certain facts from the affidavit," at most, the omissions were negligent, which is not enough); *Charles v. Brajdic*, 420 F. Supp. 3d 1319, 1324 (S.D. Fla. 2019) (finding that the plaintiff offered no taint evidence); *Thompson v. Roussell*, No. 2:17-CV-101-KS-MTP, 2018 WL 9786079, at *4 (S.D. Miss. June 11, 2018) (noting that the plaintiff's complaint about an officer's unprofessionalism did not rise to level of taint or omission), *aff'd*, No. 18-60672, 2020 WL 1651277 (5th Cir. Apr. 2, 2020); *Scott v. White*, No. 1:16-CV-1287-RP, 2018 WL 2014093, at *4 (W.D. Tex. Apr. 30, 2018) (finding no proof of knowing conduct); *Henry v. City of Taylor*, No. A-06-CA-1007 AWA, 2008 WL 2557489, at *6 (W.D. Tex. June 19, 2008) (finding no knowing conduct); *Cherry*, 2004 WL 3019241, at *2 n.5 (noting that the plaintiff "provided no additional factual support for her claims[,] . . . no additional depositions, affidavits or other competent, helpful or supporting evidence").

296. *See Furlow v. Baker*, No. 6:18-CV-00127-RWS, 2019 WL 1984142, at *3–4 (E.D. Tex. Apr. 11, 2019) (noting the court sifted through the evidence presented to the grand jury and determined that all of the information was presented to the special prosecutors who presented the case to the grand jury); *Arceneaux v. Louisiana*, No. Civ. 04-1033, 2008 WL 2369188, at *4 (W.D. La. June 10, 2008) (observing that the court carefully analyzed all of the documents and the judge's findings, and compared them to the warrant affidavit to determine that the judge heard all of the facts and made an independent decision); *Porter v. Lowndes Cty.*, 406 F. Supp. 2d 708, 712 (N.D. Miss. 2005) (observing that the grand jury heard all of the evidence, given the record the plaintiff provided and what the court was able to ascertain).

defendant or when the defendant did not present the facts to the intermediary.²⁹⁷ In a handful of cases, it was the intermediary who acted with malice or unethically.²⁹⁸ In these cases, the officers were shielded from suit because they were not the bad actors.²⁹⁹ Finally, some courts approach the doctrine's application in a strict-liability way without analyzing the facts.³⁰⁰

C. Rejection of the Doctrine Outright

Several courts in circuits that adhere to the doctrine struggle with *Malley's* clear rejection of it and seem confused about which higher court to follow.³⁰¹ They find ways to reject *Hand's* test and apply *Malley's*³⁰² and

297. See *Carlson v. Lapuszynski*, No. A-10-CA-130-AWA, 2011 WL 2412607, at *6–8 (W.D. Tex. June 9, 2011) (assessing all the material the intermediary had, along with an alleged omission, and determining that the evidence supported a probable cause finding); *Cuadra v. Hous. Indep. Sch. Dist.*, No. CV H-07-3300, 2009 WL 10703694, at *9 (S.D. Tex. Aug. 17, 2009) (determining that the defendants were not liable because they were not bad actors), *aff'd*, 626 F.3d 808 (5th Cir. 2010), *cert denied*, 563 U.S. 1033 (2011); *Peters v. City of Biloxi*, 57 F. Supp. 2d 366, 371–73 (S.D. Miss. 1999) (determining that despite confusing language in the warrant affidavit, the record was clear that the intermediary considered all of the evidence).

298. See *Evans v. Chalmers*, 703 F.3d 636, 647–49 (4th Cir. 2012) (finding that the prosecutor acted unethically and pursued charges when the evidence was not credible); *Duncan v. Nelson*, 466 F.2d 939, 943 (7th Cir. 1972) (“[T]he failure to inform the plaintiff properly of his right to plead not guilty and the failure to furnish counsel was attributable to the court and not to the sheriff.”); *Rhodes v. Smithers*, 939 F. Supp. 1256, 127–78 (S.D.W. Va. 1995) (finding that the officers performed their duty of presenting evidence to the prosecutor, and any misleading of the grand jury or bad faith in seeking charges did not involve the officers).

299. See *supra* note 298.

300. See *Rolle v. West*, No. 5:18-CV-8-OC-30PRL, 2018 WL 3134417, at *2 (M.D. Fla. Mar. 5, 2018); *Rolle v. Shelfer*, No. 5:18-CV-18-OC-30PRL, 2018 WL 3151668, at *2 (M.D. Fla. Mar. 5, 2018); *Pardue v. Jackson Cty.*, No. 1:14-CV-290-KS-MTP, 2016 WL 3024153, at *2 (S.D. Miss. May 25, 2016); *Roderick v. City of Gulfport*, 144 F. Supp. 2d 622, 628 (S.D. Miss. 2000).

301. E.g., *Richardson v. Bridges*, No. 5:09-CV-186, 2015 WL 13598319, at *8–13 (E.D. Tex. Dec. 17, 2015) (examining probable cause pursuant to the causation doctrine, *Franks*, and *Malley* analysis); *Maier v. Green*, 485 F. Supp. 2d 711, 719 (W.D. La. 2007) (citing both *Hand* and *Malley* together as if the latter supports the former); *Hightower v. Schaubhut*, No. Civ. A. 89-3243, 1990 WL 58129, at *3–4 (E.D. La. Apr. 26, 1990) (stating that “the Supreme Court questioned the validity of this broken causation rule and noted that such a rule was inconsistent with the Court’s prior interpretation of section 1983,” but then citing *Malley* and *Hand* together and performing a probable cause analysis).

302. See *Smith v. Tullis*, No. 5:15-CV-493-DAE, 2016 WL 6634948, at *9 (W.D. Tex. Nov. 8, 2016) (determining that intermediaries were not independent or did not have decision-making authority, so there was no causation argument); *Sanders v. Kemper Cty.*, No. 3:13CV906LRA, 2014 WL 4626704, at *5 (S.D. Miss. Sept. 15, 2014) (finding a conclusory statement in the search warrant affidavit because it provided no information to the intermediary, and that the *Hand* rule does not apply to search warrants); *Garza v. City of Austin*, No. A-08-CA-534-LY, 2009 WL 10700446, at *1–3

interestingly, sometimes doctrine-friendly circuit courts bless those decisions.³⁰³ In *Winfrey*, the Fifth Circuit relied on a *Malley* analysis rather than its own doctrine, and it has done the same in other cases too.³⁰⁴ Perhaps when it deems the plaintiff worthy enough, it uses *Malley*, and when it does not, it uses the doctrine; the former is more forgiving to plaintiffs than the latter.

D. Straddling the Hand and Malley Divide

In *Jones v. City of Chicago*, the Seventh Circuit straddled the fence between a *Hand* analysis and a *Malley* analysis.³⁰⁵ Judge Posner authored the thoughtful and well-written opinion.³⁰⁶ George Jones was falsely accused of capital murder following the brutal sexual assault and murder of a teenage girl.³⁰⁷ Jones was a brainy, accomplished, and well-thought-of teen in high school.³⁰⁸ In contrast, the investigators were incompetent, reckless, and dishonest: the identification procedures they used were extremely suggestive, the evidence pointed to other suspects, and the lab reports indicated Jones was innocent.³⁰⁹ However, none of these facts came to light.³¹⁰ A grand jury

(W.D. Tex. Nov. 24, 2009) (finding that the doctrine does not apply to the “novel” facts of this case, therefore the plaintiff could move forward); *Henry v. City of Taylor*, No. A-06-CA-1007 AWA, 2008 WL 2557489, at *6 (W.D. Tex. June 19, 2008) (examining probable cause supporting two warrants); *Hightower*, 1990 WL 58129, at *3–4; *Hamrick v. City of Eustace*, 732 F. Supp. 1390, 1396 (E.D. Tex. 1990) (“As for the specific theory that the intermediary’s decision to issue a warrant breaks the causal chain, the Supreme Court has specifically held that such a theory is inconsistent with their interpretation of section 1983.”); *Farmer v. Lawson*, 510 F. Supp. 91, 96 (N.D. Ga. 1981) (“The questions for the fact-finder are whether the sheriffs knew or should have known that the search warrant was invalid and whether the sheriffs acted in good faith in securing the search warrant.”).

303. *E.g.*, *Taylor v. City of Nederland*, 685 F. Supp. 616, 617–18 (E.D. Tex. 1988), *aff’d*, 868 F.2d 1269 (5th Cir. 1989).

304. *Winfrey v. Rogers*, 901 F.3d 483, 492–94 (5th Cir. 2018), *cert. denied sub nom. Johnson v. Winfrey*, 139 S. Ct. 1549 (2019); *see also* *Blake v. Lambert*, 921 F.3d 215, 220–22 (5th Cir. 2019) (analyzing facts using a *Malley* analysis); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 n.8 (5th Cir. 2000) (using an objectively reasonable test).

305. 856 F.2d 985, 992–96 (7th Cir. 1988).

306. *Id.* at 988.

307. *Id.*

308. *Id.* at 988–89.

309. *Id.* at 988–91.

310. *See id.* at 988–91 (describing how defendants employed faulty investigation practices, even when the evidence pointed to someone other than Jones, and the subsequent steps investigators took to conceal their bad actions).

indicted Jones and his case proceeded to trial.³¹¹ During trial, an officer who knew about concealed exculpatory evidence came forward, the judge granted a mistrial, and the prosecutor dismissed the case.³¹² Jones sued the City of Chicago and its officers for false arrest and malicious prosecution and won more than \$800,000 in damages.³¹³ The defendants appealed to the Seventh Circuit.³¹⁴

Judge Posner began by acknowledging that arresting a person without probable cause violates both the Fourth Amendment and the common law, and the victim is entitled to receive damages.³¹⁵ The defendants tried to argue the prosecutor's decision to pursue charges led to the harms Jones suffered in jail as he awaited trial.³¹⁶ But Judge Posner said the jury could have believed the officers caused Jones's injuries.³¹⁷ After all, had the prosecutor known what the police knew, he would have dismissed the case.³¹⁸ Judge Posner then reasoned,

a prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.³¹⁹

Following this *Hand*-like causation analysis, the court moved to a *Malley* analysis, determining that the officers' actions were not objectively reasonable and that the defendant's causal argument was "unsound."³²⁰ The

311. *Id.* at 990.

312. *Id.* at 991.

313. *Id.* at 988.

314. *Id.*

315. *Id.* at 992.

316. *Id.* at 993.

317. *Id.*

318. *Id.*

319. *Id.* at 994 (internal citations omitted).

320. *Id.* at 995–96.

court then affirmed the jury's decision in favor of Jones.³²¹

V. THE DOCTRINE CANNOT WITHSTAND SCRUTINY

There are many reasons to get rid of the doctrine and not one reason to keep it. The doctrine has been wielded when it suits the courts, abandoned when it does not, and it has created absurd results. What the First Circuit said about the independent intermediary doctrine in 1984 is no less true today: it is incapable of withstanding scrutiny.³²²

It cannot withstand scrutiny because it has no history in common law torts or in the Civil Rights Act. A decade before the Act became law, courts not only recognized a right to be free from groundless arrests,³²³ but also held citizens civilly liable for *instituting* one, regardless of whether an intermediary was involved.³²⁴ In this way, the courts used a proximate cause standard.

The Act's primary purpose was to provide a federal remedy for plaintiffs.³²⁵ It permitted *any* person deprived of *any* constitutional right to bring an action against the defendant in the federal courts.³²⁶ The Supreme Court has held that an official may claim an immunity if he can identify one from the common law tort immunities available in 1871.³²⁷ However, the doctrine came into being more than a century after the Civil Rights Act was enacted, which supports the Supreme Court's statement that the doctrine is "inconsistent" with § 1983 because it was not a defense that existed at the time of the Act's creation.³²⁸

It cannot withstand scrutiny because it does not adhere to classic tort causation principles. In *Monroe*, the Supreme Court held that the Civil Rights Act "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."³²⁹ In *Malley*, the First Circuit rejected the causation rule because it does not follow the classic torts "but for" proximate causation model: but for the officer's poor investigation,

321. *Id.*

322. *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

323. *See* *Comfort v. Fulton*, 39 Barb. 56, 57 (N.Y. Gen. Term 1861).

324. *See* *Perkins v. Mitchell*, 31 Barb. 461, 468 (N.Y. Gen. Term 1860).

325. *Monroe v. Pape*, 365 U.S. 167, 172, 178 (1961), *overruled on other grounds by* *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

326. *Id.* at 179–80.

327. *Malley v. Briggs*, 475 U.S. 335, 339–40 (1986).

328. *Id.* at 342, 344 n.7.

329. *Monroe*, 365 U.S. at 187.

the magistrate would not have signed the warrant, and the defendant would not have been arrested.³³⁰ The Supreme Court stated in *Malley* that because the common law acknowledged a causal link between the issuance of a complaint and an arrest, § 1983 recognizes a causal link between the officer's actions and the arrest.³³¹

It cannot withstand scrutiny because it is based on off-topic secondary sources, and it flies in the face of binding statutory and Supreme Court authority. Instead of relying on the Civil Rights Act or *Monroe*, which hold officers liable for the natural consequences of their actions,³³² the *Rodriguez* and *Smith* courts justified their newly created doctrine by citing to secondary tort law sources that addressed private citizen tort liability, not state actor liability.³³³ The Supreme Court rejected *Malley*'s argument that he was like the private citizens in the cases cited by the A.L.R. article because, historically, complainants who acted maliciously or without probable cause were liable for their actions.³³⁴ For these reasons, the doctrine must fail.

It cannot withstand scrutiny because it places courts in a position to choose not to enforce civil rights claims.³³⁵ In *Malley*, the Supreme Court cautioned courts to exercise restraint when immunizing officers because it is not the courts' role to "make a freewheeling policy choice" about the Civil Rights Act, but to interpret the congressional intent behind the Act.³³⁶ *Monroe* is jam-packed with congressional intent.³³⁷ In comparison, no court relying on any iteration of the doctrine has ever attempted to connect it to congressional intent. It simply cannot be done. Courts that use the doctrine

330. *Briggs v. Malley*, 748 F.2d 715, 721 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

331. *Malley*, 475 U.S. at 344 n.7.

332. *Monroe*, 365 U.S. at 187 ("Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

333. See *supra* notes 100–105 (explaining how the court in *Rodriguez* relied on secondary sources for support); *supra* notes 112–117 (explaining how *Smith* was the first decision to connect the doctrine to the Fourth Amendment).

334. *Malley*, 475 U.S. at 340–41.

335. See *e.g.*, *Imber v. Pachtman*, 424 U.S. 409, 412–13, 427 (1976) (choosing to uphold absolute immunity for a prosecutor who knowingly used false testimony and suppressed material evidence at the plaintiff's criminal trial, notwithstanding the Court's assertion that "this immunity does leave the genuinely wronged defendant without civil redress against a prosecutor whose malicious or dishonest action deprives him of liberty").

336. *Malley*, 475 U.S. at 342.

337. See *Monroe v. Pape*, 365 U.S. 167, 171–92 (1961) (discussing the congressional intent behind § 1979 and ultimately holding that officers are liable for the natural consequences of their actions), *overruled on other grounds by Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658 (1978).

are making prohibited freewheeling policy decisions.³³⁸ The doctrine allows judges to circumvent the Civil Rights Act and legislate from the bench. It allows courts to have an unjustifiable bias against § 1983 plaintiffs, as well as an unwarranted trust in law enforcement officers that the founders of our country and the authors of the Act a century later were wise not to have.

VI. THE DOCTRINE LEADS TO ABSURD RESULTS

The doctrine creates illogical outcomes. This section will examine two cases with absurd results and an entire category of cases with completely contradictory outcomes and rationales to illustrate this point.

In *Graham v. Dallas Area Rapid Transit*, officers pulled Terry Graham, an African-American man, out of a bus, despite the fact that the bus riders and Graham, all of whom witnessed an assault the officers were investigating, told the officers that Graham was not the suspect.³³⁹ Graham was polite, but officers falsely claimed he was drunk and arrested him for public intoxication, which is a low-level misdemeanor requiring no intermediary's approval.³⁴⁰ Officers handcuffed Graham, placed him under arrest, and as they directed him to the patrol car, one officer used force against Graham and the two began to struggle on the ground.³⁴¹ This struggle formed the basis for his second arrest: assault on a peace officer, which is a felony offense.³⁴² Notably, the officers' report contained no allegation that any officer was assaulted or suffered injuries.³⁴³ Officers pepper sprayed and beat Graham, causing him "extensive facial injuries"; he had to be admitted to the hospital because the jail refused to take him.³⁴⁴ The hospital records did not indicate he had ingested any alcohol or that he was intoxicated.³⁴⁵ The grand jury indicted Graham for the felony offense, but the Dallas District Attorney's Office

338. See *Malley*, 475 U.S. at 342 ("We reemphasize that our role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice, and that we are guided in interpreting Congress' intent by the common-law tradition.")

339. 288 F. Supp. 3d 711, 720 (N.D. Tex. 2017).

340. *Id.* at 721, 743.

341. *Id.* at 722.

342. *Id.* at 722–23.

343. *Id.* at 722.

344. *Id.*

345. *Id.*

dismissed the case.³⁴⁶ Graham sued.³⁴⁷

The Texas district court found that the defendants violated Graham's Fourth Amendment rights in the public intoxication arrest, but not in the assault on a peace officer arrest that occurred minutes later.³⁴⁸ The reason: the first arrest required no intermediary approval so there was no causal break, whereas the second arrest was untouchable and unreviewable because a grand jury indicted him.³⁴⁹ Graham should have been able to put both arrests before a jury because the second arrest was a direct result of the first unlawful arrest. The court's reasoning on the basis of the intermediary's involvement is illogical.

In 2005, a forty-five-year-old African-American woman named Michell Deville was driving with her two-year-old granddaughter in her car when an officer stopped her for speeding.³⁵⁰ Though she complied with the officer's request to see her license and registration, she informed him she was not speeding.³⁵¹ When he requested that she step out of the car, she refused and said that she had done nothing wrong.³⁵² He asked her to step out of her car again and told her he was calling Child Protective Services to take her granddaughter away from her.³⁵³ Deville called family members and begged them to come to the scene.³⁵⁴

When another officer arrived and asked Deville to get out of the car and she refused, he used a heavy flashlight to smash her window.³⁵⁵ Officers forcefully pulled Deville from her vehicle, and she suffered head injuries as a result.³⁵⁶ After she received treatment for her injuries at the hospital, she was charged with speeding, aggravated assault, and resisting arrest.³⁵⁷ Officers later claimed they arrested her for failing to sign the speeding ticket, but Deville said she was never given a ticket, shown a ticket, or asked to sign a

346. *Id.*

347. *Id.* at 723.

348. *Id.* at 737–40.

349. *Id.* at 737–41.

350. *Deville v. Marcantel*, 567 F.3d 156, 161 (5th Cir. 2009).

351. *Id.*

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.* at 162.

356. *Id.*

357. *Id.*

ticket.³⁵⁸ The district attorney dismissed all charges.³⁵⁹

Nine months later, when the police department heard about her civil suit, they arrested her again for two baseless charges, which the district attorney also dismissed.³⁶⁰ The only difference between the first set of charges and the second set was that the officers arrested her pursuant to a warrant authorized by a justice of the peace for the second set.³⁶¹

On appeal, the Fifth Circuit noted that the original officer had a history of bad arrests, numerous citizens had filed complaints against him, and both the sheriff and the district attorney had asked him to resign, the latter because he had previously falsely arrested another person.³⁶² In this case, the officer had no evidence that Deville was speeding, his suggestion that he initially arrested her for failing to sign a ticket was implausible, and his actions were objectively unreasonable, so the court found he was not entitled to qualified immunity.³⁶³ Even though there was no probable cause to support the second set of arrests, because an intermediary signed the warrants and the plaintiffs could not prove the intermediary's decision was tainted, Deville was barred from suit on those two groundless arrests.³⁶⁴ Again, this result is absurd, particularly because the court recognized the warrant for the first arrest was not supported by probable cause.³⁶⁵

Common law torts dating back to the creation of the Civil Rights Act held actors who instigated baseless arrests liable.³⁶⁶ Plaintiffs who demonstrated an absence of probable cause could sue for malicious prosecution and false arrest.³⁶⁷ The Civil Rights Act was designed to protect citizens from these kinds of civil rights violations. Had the *Graham* and *Deville* courts applied *Monroe*, *Malley*, and *Harlow*, as the Supreme Court required, they would have found the officers' actions objectively unreasonable. The fact that the officers in Deville's case got a justice of the peace to sign the warrants should not

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 165–66.

363. *Id.* at 166.

364. *Id.* at 170.

365. *Id.* at 166, 170.

366. *See Malley v. Briggs*, 475 U.S. 335, 340–41 (1986) (“In 1871, the generally accepted rule was that one who procured the issuance of an arrest warrant by submitting a complaint could be held liable if the complaint was made maliciously and without probable cause.”).

367. *See id.* at 340–42.

insulate them from suit.³⁶⁸ A Texas district court confronted with analogous facts—an incredible defendant, a suspicious arrest, and a significant delay following the initial arrest—ruled in favor of the plaintiff for a unique reason, which was affirmed by the Fifth Circuit.³⁶⁹ There simply is no reason for such disparate and illogical results.

But it is not just cases like *Graham*'s and *Deville*'s that lead to illogical, uneven, and unjust results. The absurdity is seen in cases with similarly situated plaintiffs whose cases end with contradictory results and rationales. Consider a class of cases as one example: mistaken identity cases.³⁷⁰ In *Rodriguez*, officers arrested the wrong Margaret, but the Fifth Circuit found that her actual innocence did not vitiate probable cause, and its new doctrine barred suit.³⁷¹ In a 2009 case, a Texas district court ruled that the plaintiff's mistaken identity case was "novel" and therefore the doctrine did not apply to bar suit.³⁷² However, it appeared as if there was nothing unique about the case's facts other than that the judge did not want to apply the doctrine. In a 2005 Texas case, where the wrong Kelli was arrested, the district court found that the officers' actions were, at most, negligent, but because a prosecutor reviewed his probable cause affidavit, the doctrine conferred qualified immunity.³⁷³

In a 2017 Texas case, officers should have arrested Carlos Nerio who lived at one address, but instead mistakenly arrested Carlos Henry Nerio, Jr., who lived at another address.³⁷⁴ The officers included the latter Carlos's name on the warrant, even though he was innocent.³⁷⁵ The court held that "the judge

368. *Compare Malley*, 475 U.S. at 341 ("Given malice and the lack of probable cause, the complainant enjoyed no immunity."), with *Deville*, 567 F.3d at 170 ("[R]eview by [an] independent intermediary relieves [defendants] of liability for the alleged false arrest.").

369. *Garza v. Guerra*, No. Civ. A. B-08-084, 2010 WL 2607275, at *1–4, *17–18 (S.D. Tex. June 25, 2010), *aff'd*, 463 F. App'x 316 (5th Cir. 2012).

370. *See Kugle v. Shields*, No. 93-5567, 1995 WL 450219, at *1 (5th Cir. July 7, 1995); *Rodriguez v. Ritchey*, 556 F.2d 1185, 1187–88 (5th Cir. 1977); *Nerio v. Evans*, No. 17-CA-037-LY, 2017 WL 2773716, at *1 (W.D. Tex. June 26, 2017); *Garza v. City of Austin*, No. A-08-CA-534-LY, 2009 WL 10700446, at *3 (W.D. Tex. Nov. 24, 2009), *report and recommendation adopted by* No. A-08-CA-534-LY, 2009 WL 10700498; *Fitch v. Morrow*, No. Civ. A. H-03-1686, 2005 WL 1828592, at *10–11 (S.D. Tex. Aug. 1, 2005), *aff'd*, 199 F. App'x 347 (5th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007).

371. *Rodriguez*, 556 F.2d at 1187–88, 1190–91.

372. *Garza*, 2009 WL 10700446, at *3.

373. *Fitch*, 2005 WL 1828592, at *10–11.

374. *Nerio*, 2017 WL 2773716, at *1.

375. *Id.*

was presented a warrant for the wrong Carlos Nerio, and the judge's decision to authorize a warrant could not have been independent of the agents' conduct" and, therefore, the doctrine did not apply and the plaintiff could proceed to trial.³⁷⁶ Compare a 1995 Fifth Circuit case, where the real suspect named Christy was tall with long, black hair and the innocent Christi was short with blonde hair, yet the innocent Christi was arrested for the offense.³⁷⁷ Although the officer noted the physical discrepancies, he never investigated them before he applied for the warrant.³⁷⁸ The court indicated that the wrong arrest could have been avoided had the officer been more careful, but it ultimately held that the officer was only negligent, not malicious, so he was immune from suit.³⁷⁹

It is not just the results of these cases that are inconsistent; it is also the rationales and the legal basis for immunizing or not immunizing the officer from liability based upon the application of the doctrine. That courts have acknowledged "differing results" and tensions in the doctrine's application is yet another reason to abandon its use.³⁸⁰

VII. THE DOCTRINE IS REDUNDANT

As it stands, courts that use the doctrine give officers two levels of protection: qualified immunity plus the independent intermediary doctrine. Both act as barriers to suit. Together, they form an absolute immunity, which is prohibited by the Supreme Court for anyone besides judges and prosecutors.³⁸¹ Qualified immunity provides sufficient protection; courts do not need to provide an additional defense. According to *Malley*, the standard that *Harlow* set out is sufficient to protect officers from frivolous lawsuits:

The *Harlow* standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment," and we believe it

376. *Id.* at *4.

377. *Kugle v. Shields*, No. 93-5567, 1995 WL 450219, at *1 (5th Cir. July 7, 1995).

378. *Id.*

379. *Id.* at *3-5.

380. *See Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000) (noting that courts have varied in determining which actions are considered to be superseding causes that break the causal chain).

381. *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (rejecting absolute immunity for officers applying for a warrant because "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law").

sufficiently serves this goal. Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.³⁸²

The doctrine is also redundant because *Franks v. Delaware* already provides a procedure and a remedy to deal with lies, misstatements, and omissions in a warrant.³⁸³ Many cases that implicate the doctrine already raise *Franks* claims.³⁸⁴ In fact, the language from *Franks* that created the procedure judges use to evaluate the honesty or dishonesty of the underlying facts in a warrant mimics the language of the doctrine: truthful factual statements supporting probable cause, honest officers and affiants who believe the facts supporting probable cause are true, and independent magistrates who are informed about all facts when assessing probable cause.³⁸⁵ Because much of the concerns addressed in the doctrine are part of the *Franks* analysis, courts should be more willing to abandon the doctrine.

VIII. THE FOURTH AMENDMENT'S ROLE IN § 1983 CASES

The Fourth Amendment has utility for these types of cases for at least two reasons. First, it helps courts analyze whether the defendant's tortious

382. *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

383. 438 U.S. 154, 171 (1978).

384. See *Winfrey v. Rogers*, 901 F.3d 483, 494–97 (5th Cir. 2018), *cert. denied sub nom.* *Johnson v. Winfrey*, 139 S. Ct. 1549 (2019); *Smith v. Sheriff, Clay Cty.*, 506 F. App'x 894, 898 (11th Cir. 2013); *Hale v. Fish*, 899 F.2d 390, 400 (5th Cir. 1990); *Arizmendi v. Brownsville Indep. Sch. Dist.*, No. 1:16-CV-00063, 2017 WL 4479951, at *3 (S.D. Tex. May 26, 2017) (analyzing *Franks* and stating “[t]he court may make its own legal determination of probable cause in a § 1983 claim”), *overruled on other grounds sub nom.* *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir.), *cert. denied*, 140 S. Ct. 220 (2019); *Hayes v. Nacogodches [sic] Cty.*, No. 6:15-CV-608-JDL, 2016 WL 6235510, at *7 (E.D. Tex. Oct. 25, 2016); *Phillips v. City of Center*, No. 9:15-CV-54, 2016 WL 99591, at *6 (E.D. Tex. Jan. 8, 2016); *Richardson v. Bridges*, No. 5:09-CV-186, 2015 WL 13598319, at *8 (E.D. Tex. Dec. 17, 2015); *Braud v. Spell*, No. 2:14-CV-03132, 2015 WL 7432813, at *2–3 (W.D. La. Nov. 19, 2015), *aff'd*, 667 F. App'x 443 (5th Cir. 2016); *Wyatt v. Anderson*, No. A-13-CA-191-SS, 2014 WL 670855, at *15–21 (W.D. Tex. Feb. 20, 2014) (removing alleged false statements from warrant); *Chisolm v. DeSoto Police Dep't*, No. 3:12-CV-5025-M, 2013 WL 5190886, at *4 (N.D. Tex. Sept. 16, 2013); *Haskins v. Hood*, No. 1:10CV457-LG-RHW, 2010 WL 5106775, at *3 (S.D. Miss. Dec. 9, 2010); *McLennan v. Burke*, No. A-08-CA-327 LY, 2010 WL 11545939, at *3 (W.D. Tex. Apr. 30, 2010), *aff'd*, 425 F. App'x 377 (5th Cir. 2011); *Arceneaux v. Louisiana*, No. Civ. 04-1033, 2008 WL 2369188, at *3–6 (W.D. La. June 10, 2008).

385. *Franks*, 438 U.S. at 164–65.

conduct led to a § 1983 violation. Second, it should be considered in permitting successive factfinders to determine whether there was in fact probable cause to support the search and seizure, arrest, or continued prosecution. By cutting off all review after an intermediary's probable cause decision, courts are abdicating their duty to assess de novo the objective reasonableness of the officer's actions, which is required under a § 1983 analysis.

As stated earlier, courts are not clear whether the objective reasonableness standard used in these cases comes from the second prong of the qualified immunity test or whether it comes from the probable cause standard. The objective reasonableness standard is used in both civil rights claims and in Fourth Amendment claims that arise in the criminal procedure context. There is evidence in other § 1983 claims that the Fourth Amendment objective reasonableness test should be used when examining civil rights violations that implicate the Fourth Amendment. In 1989, the Supreme Court decided *Graham v. Connor*, a case that addressed excessive force claims.³⁸⁶ The opinion was written by conservative Chief Justice Rehnquist.³⁸⁷ The Court reasoned that it was better to analyze excessive force claims using the Fourth Amendment's "objective reasonableness" standard rather than a rule the Fourth Circuit created.³⁸⁸ Just as the *Malley* Court wanted to make "clear" that the objective reasonableness test applies in § 1983 claims where malice was alleged,³⁸⁹ the *Graham* Court stated it wanted to "make explicit" that all excessive force claims must be analyzed using a Fourth Amendment reasonableness standard that examines the reasonableness of when and how the plaintiff's seizure was made.³⁹⁰

In *Graham*, the Supreme Court rejected the Fourth Circuit's test that examined the officer's subjective intent and whether he acted maliciously.³⁹¹ What mattered was whether the officer's actions were objectively reasonable.³⁹² The Court reasoned that because the Fourth Amendment

386. 490 U.S. 386, 388 (1989).

387. *Id.*

388. *Id.* at 391–92.

389. *Malley v. Briggs*, 475 U.S. 335, 341, 344 n.7 (1986).

390. *Graham*, 490 U.S. at 395.

391. *Id.* at 397–98.

392. *Id.* at 397 (noting that in the context of the Fourth Amendment, the question of "reasonableness" must be considered objectively and within the circumstances of the situation, without concern for intent).

“provides an explicit textual source of constitutional protection” against unlawful arrests and seizures, it must be the guide for examining these civil rights violations.³⁹³ More recently, the Supreme Court found that a plaintiff’s § 1983 claim that alleged lack of probable cause to support an arrest “fits the Fourth Amendment, and the Fourth Amendment fits [the plaintiff’s] claim, as hand in glove.”³⁹⁴ The Fourth Amendment provides the best test to evaluate Fourth Amendment civil rights violations.

Not only is the text of the Fourth Amendment the best method to evaluate these claims, it is also the best guiding light for officers. The Supreme Court has stated that the Fourth Amendment needs to be “readily administrable” by officers on the job.³⁹⁵ Ad hoc decisions and uncertainty in the Fourth Amendment context are evils the Supreme Court has repeatedly avoided.³⁹⁶ The Supreme Court has favored “readily applicable” rules over “highly sophisticated set[s] of rules” for officers who are tasked with making quick, on-the-job search and arrest decisions.³⁹⁷ Using the same Fourth Amendment objective reasonableness standard for criminal procedure and civil liability purposes achieves that goal.

In cases where the independent intermediary doctrine is used, courts hold that appellate court probable cause review is cut off by the intermediary’s decision. However, appellate courts should be permitted to review whether the officer had probable cause to make the arrest de novo. This review is required to prevent the weakening of the Fourth Amendment’s protections and to maintain a unified system of law.³⁹⁸ In *Ornelas v. United States*, the Supreme Court stated that it had never deferred to a trial court’s determination of probable cause or reasonable suspicion.³⁹⁹ The Supreme Court in the landmark *Leon* case admitted that reasonable minds often differ on whether a warrant affidavit establishes probable cause.⁴⁰⁰ That is to be expected. When educated, law-trained professionals debate about whether probable cause in

393. *Id.* at 395.

394. *Manuel v. City of Joliet*, 137 S. Ct. 911, 917 (2017).

395. *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

396. *Oliver v. United States*, 466 U.S. 170, 181 (1984) (acknowledging that using an “ad hoc” case-by-case meaning of the Fourth Amendment principles causes issues for courts, police, and citizens).

397. *New York v. Belton*, 453 U.S. 454, 458 (1981).

398. *Ornelas v. United States*, 517 U.S. 690, 697–98 (1996) (noting that de novo review helps create well-defined rules and makes it feasible to decide beforehand whether an invasion of privacy is justified after balancing privacy concerns and the needs of law enforcement).

399. *Id.* at 697.

400. *United States v. Leon*, 468 U.S. 897, 914 (1984).

any given case objectively exists, it creates a legal purification process.

De novo probable cause determinations require independent review by appellate courts “to maintain control of, and to clarify, the legal principles” because an appellate court’s primary function is to be “an expositor of [the] law.”⁴⁰¹ The *Ornelas* Court reasoned that de novo review unifies precedent and provides officers with defined rules that make upholding the Fourth Amendment easier.⁴⁰² Had the Fifth Circuit reviewed the objective reasonableness of the officers’ actions in a case it clearly did not want to dismiss, it would have corrected the trial court’s erroneous ruling that insulated the officer’s unlawful actions in coercing a juvenile’s confession.⁴⁰³ The Fifth Circuit was better versed in law than the trial judge who made that ruling.⁴⁰⁴ The correct law interpretation should have prevailed over a bad trial court ruling. That the correct law did not prevail only leads to more legal confusion among courts and officers.

Criminal courts have long examined probable cause de novo at any stage in the proceedings.⁴⁰⁵ In fact, by the time a defendant’s felony conviction is affirmed on appeal, probable cause for the crime in any given case could be determined by the arresting officer, the prosecutor, the magistrate, the grand jury, the trial judge, the petit jury, *and* the appellate court.⁴⁰⁶ Unlike the barrier that the doctrine has created in reviewing probable cause objectively, in a criminal case, one probable cause determination has no impact on another. Probable cause is reviewed de novo each time. Like the de novo review of probable cause in criminal cases, de novo review of probable cause at any stage of a civil rights case is not burdensome; appellate courts have been doing

401. *Ornelas*, 517 U.S. at 697; *Miller v. Fenton*, 474 U.S. 104, 114 (1985).

402. *Ornelas*, 517 U.S. at 697–98.

403. See *Murray v. Earle*, 405 F.3d 278, 293 (5th Cir. 2005) (“Like the state appellate court, we disagree with the trial court’s ruling, yet we are constrained to hold that it constituted a superseding cause of LaCresha’s injury, relieving the defendants of liability under § 1983.”).

404. *Id.* at 289–93 (analyzing the pertinent law).

405. E.g., *Rainsberger v. Benner*, 913 F.3d 640, 647–52 (7th Cir. 2019) (finding that the officer lacked probable cause to arrest after the court removed misleading statements and added omissions to the warrant affidavit); *Humbert v. Mayor of Baltimore City*, 866 F.3d 546, 556–58 (4th Cir. 2017) (holding that the affidavit lacked probable cause when the court removed the officer’s reckless statement that a rape victim identified the defendant as her attacker), *cert. denied*, 138 S. Ct. 2602 (2018).

406. See, e.g., *Arizmendi v. Brownsville Indep. Sch. Dist.*, No. 1:16-CV-00063, 2017 WL 4479951, at *3 (S.D. Tex. May 26, 2017) (analyzing *Franks* and stating that “[t]he court may make its own legal determination of probable cause in a § 1983 claim”), *overruled on other grounds sub nom.* *Arizmendi v. Gabbert*, 919 F.3d 891 (5th Cir.), *cert. denied*, 140 S. Ct. 220 (2019).

it for years, even in jurisdictions that adhere to the doctrine.⁴⁰⁷

Finally, just as a magistrate's probable cause determination does not prohibit a criminal defense attorney from filing a motion to suppress evidence based on a lack of probable cause to search or arrest, a magistrate's probable cause determination should not prevent an objectively reasonable probable cause review in a civil rights case.⁴⁰⁸ The Supreme Court has made clear in a number of its decisions "that the magistrate's word on probable cause [is] not the last word" and that the officer's actions are to be evaluated objectively by a reviewing court.⁴⁰⁹

IX. CONCLUSION

The independent intermediary doctrine has sown confusion and dissent among federal courts analyzing liability in civil rights cases. The Supreme Court set out to unify circuit courts with *Monroe v. Pape*,⁴¹⁰ and to create one test in civil rights cases invoking the Fourth Amendment in *Malley v. Briggs*.⁴¹¹ The Fifth Circuit's resurrected doctrine continues to divide federal courts on these issues. Using the rule endorsed by the *Malley* Court would unite precedent in this area of law. A unified rule would provide future civil rights plaintiffs and lawyers better notice about their odds of winning at trial and on appeal, which would lead to a better allocation of judicial resources, along with streamlined outcomes.

The rule has not held officers who violate civil rights accountable.⁴¹² The

407. *E.g.*, *Dempsey v. Bucknell Univ.*, 834 F.3d 457, 462–81 (3d Cir. 2016) (explaining that a magistrate's finding of probable cause did not prevent the circuit court's de novo review of probable cause in a search warrant); *Arizmendi*, 2017 WL 4479951, at *3 (analyzing *Franks* and stating that "[t]he court may make its own legal determination of probable cause in a § 1983 claim"); *Eubanks v. Freburger*, No. 11-60714-CIV, 2012 WL 4936061, at *3–8 (S.D. Fla. Oct. 17, 2012) (assessing probable cause de novo despite relying on independent intermediary doctrine); *Bolling v. Hood*, No. 1:10CV189-LG-RHW, 2010 WL 5060471, at *3–4 (S.D. Miss. Dec. 6, 2010) (discussing the independent intermediary doctrine and nonetheless "embark[ing] on a . . . commonsense [determination] whether . . . a reasonable officer could have believed there [was] a fair probability [Plaintiff] committed the crime charged (quoting *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000)); *Hightower v. Schaubhut*, No. Civ. A. 89-3243, 1990 WL 58129, at *3–4 (E.D. La. Apr. 26, 1990) (explaining the doctrine and engaging in de novo review); *Schiller v. Strangis*, 540 F. Supp. 605, 611–12 (D. Mass. 1982) (assessing probable cause in a civil rights case).

408. *Pollack v. Rinaldi*, No. 84 Civ. 2375-CSH, 1985 WL 1404, at *5–6 (S.D.N.Y. May 22, 1985).

409. *Id.* at *6.

410. 365 U.S. 167, 172–92 (1961).

411. 475 U.S. 335, 351 n.7 (1986) (Powell, J., concurring) (applying Fourth Amendment analysis).

412. See, e.g., *Graham v. Dall. Area Rapid Transit*, 288 F. Supp. 3d 711, 721–41 (N.D. Tex. 2017)

First Circuit reasoned that the intermediary cannot be “the sole protector of the [F]ourth [A]mendment.”⁴¹³ Officers must also be required to enforce Fourth Amendment rights. A Utah district court said when it rejected the doctrine that it was not excusing police officers from their duty to safeguard Fourth Amendment rights.⁴¹⁴ When law enforcement officers are held accountable, it leads to fewer arrests of innocent people, it punishes bad actors, and it encourages law enforcement agencies to promote training, which leads to fewer civil rights violations. It is time to replace the doctrine with proximate cause and the Fourth Amendment, both of which have been endorsed by the United States Supreme Court in civil rights cases.

(holding that an officer was not liable for arresting and harming a citizen, even though the arrest stemmed from an illegal stop).

413. *Briggs v. Malley*, 748 F.2d 715, 720 (1st Cir. 1984), *aff'd*, 475 U.S. 335 (1986).

414. *Stevens v. Sanpete Cty.*, 640 F. Supp. 376, 383 n.13 (D. Utah 1986), *aff'd*, 846 F.2d 76 (10th Cir. 1988).

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