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Revitalizing Fourth Amendment Protections: A True Totality of the Circumstances Test in § 1983 Probable Cause Determinations

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ABSTRACT: The Article analyzes claims of police misconduct and false arrest, specifically addressing the issue of whether a police officer may ignore evidence of an affirmative defense, such as self-defense, when determining probable cause for an arrest. The inquiry most often arises in § 1983 civil claims for false arrest where the officer was aware of evidence a crime had been committed, but was also aware of facts indicating the suspect had an affirmative defense to the crime observed. In extreme cases, the affirmative defense at issue is actually self-defense in response to the officer's own unlawful conduct. As police brutality and false arrest claims rise, so too will the prevalence of this issue.

The Article examines rulings from all jurisdictions having addressed the topic and highlights the matter of Thomas v. City of Galveston *involving a citizen who was arrested when attempting to stop two police officers from stealing his generator in the aftermath of a hurricane. In a subsequent civil suit for false arrest, the officers defended the claim by asserting they had probable cause for the arrest, despite knowing Mr. Thomas was merely defending his property from their own mischievous conduct. Finding for Mr. Thomas, the court concluded that under certain circumstances, a police officer's awareness of the facts supporting an affirmative defense can negate probable cause. This view, however, is not universal—several other courts have reached the opposite conclusion: that an affirmative defense bears no relevance in probable cause analysis. An examination of rulings nationally reveals common themes on this issue as courts struggle to reconcile the incorporation of an affirmative defense with existing principles governing probable cause analysis.*

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Consideration of an available affirmative defense when analyzing probable cause helps to ensure accountability of police officers who unlawfully arrest a citizen they know, or reasonably should know, committed no crime. Scenarios such as those in Thomas v. City of Galveston *are not as unique as one might assume. The Article provides numerous examples from across the country of courts grappling with this issue.*

The Article brings some analytical coherence to the complicated legal and factual situations that may lead courts to abandon certain traditional rules governing probable cause in favor of more leniency for plaintiffs seeking a remedy for police misconduct. The Article concludes with a recommendation that courts adopt and apply a general rule that facts supporting an affirmative defense shall be considered among the totality of facts and circumstances available to the arresting officer, and that such exculpatory facts shall be evaluated with the same level of scrutiny afforded inculpatory facts.

I. INTRODUCTION

In the aftermath of Hurricane Ike, Kerry Thomas purchased a diesel generator that would become the sole source of power for his family's home and an invaluable community resource to be shared with his neighbors. Mr. Thomas feared the generator he had purchased would be a target for thieves. Never did he foresee, however, that the thieves he feared would be those who swore an oath to protect him and his property from such acts. When Mr. Thomas caught two men, who turned out to be local police officers, in the act of stealing his generator, he issued a threat in an attempt to defend his property: "identify yourself or you will be fired upon."[1] The officers retaliated, beat him unconscious, and then arrested *him* on false charges with the apparent motive of averting prosecution for their own misdeeds.[2]

In a subsequent civil suit for false arrest, the officers claimed to have had probable cause to arrest Mr. Thomas because they had observed him issue a threat. It was undisputed that he had issued a threat; thus, the elements of that crime were present, and under most circumstances this alone would be sufficient to establish probable cause and defeat a claim for false arrest. But what about the officers' knowledge that Mr. Thomas only issued the threat as an attempt to defend his property from their unlawful conduct? Should knowledge of these facts affect probable cause for the arrest?

As the district court in *Thomas v. City of Galveston* concluded, "under certain circumstances, a police officer's awareness of the facts supporting a[n] [affirmative] defense *can* eliminate probable cause."[3] This view, however, is not universal—several other courts have reached the opposite conclusion:

1. Thomas v. City of Galveston, 800 F. Supp. 2d 826, 830 (S.D. Tex. 2011). Ruling occurred at the pleading stage and the matter did not proceed to trial; as a result, the facts set forth in this article are as alleged by Mr. Thomas. The defendant police officers, through pleadings and deposition testimony, provided an intra-conflicting account of the incident.

2. *Id.*

3. *Id.* at 836 (emphasis added) (quoting Jocks v. Tavernier, 316 F.3d 128, 135 (2d Cir. 2003)).

that an affirmative defense bears no relevance in probable cause analysis.[4] While a modest plurality of courts,[5] including the *Thomas* court, have concluded an affirmative defense may be relevant, most limit its relevance to only those circumstances where the defense is deemed *conclusive*.[6] An affirmative defense to a crime, such as self-defense or defense of property, is traditionally asserted by a defendant in a criminal proceeding on the issue of guilt, but should an available affirmative defense to the crime *also* be considered when determining probable cause to make an arrest? The Article concludes that when a law enforcement officer is evaluating whether probable cause exists to invoke the power of arrest and detention, he must consider not only the presence of the elements of the crime, but also the readily available evidence of an affirmative defense that would establish the observed act was actually justified or otherwise permitted by law. Probable cause is most commonly thought of in the "criminal law" context, as the inquiry is often at the heart of certain pre-trial matters in a criminal case, such as a motion to suppress evidence or a motion to dismiss the charge. This Article, however, centers on the role of probable cause in civil suits for false arrest brought pursuant to 42 U.S.C. § 1983. More specifically, the Article examines whether—and when—the existence of an affirmative defense affects probable cause such that the claimant may overcome immunity hurdles and prove a valid constitutional claim for false arrest.

The issue at the heart of this Article is present not only in situations where officers abuse their arresting power to misdirect claims of their own unlawful conduct, as in *Thomas* and other cases involving police misconduct, but also where officers unreasonably ignore evidence of a lawful justification for committing an otherwise criminal act. This includes, for instance, a citizen arrested for assault, notwithstanding available evidence she was acting in self-defense, or arrested for possession of either a firearm or a controlled substance, despite presenting a license or prescription to possess the same. Even if these charges are later dropped or the citizen is eventually acquitted due to the affirmative defense, the arrest alone may have caused significant, irreparable harm. If the citizen cannot afford bail, she may sit in jail for months or years waiting for her day in court—all the while, her children are placed in foster care, her employment terminated, her vehicle repossessed,

4. *See, e.g.*, Holman v. City of York, 564 F.3d 225, 229 (3d Cir. 2009) ("First, justification or necessity is an affirmative defense. In making the 'fundamentally . . . factual analysis . . . at the scene,' such affirmative legal defenses are not a relevant consideration in an officer's determination of probable cause." (citation omitted) (quoting Holman v. Koltanovich, No. 4:06-cv-2133, 2007 WL 3125048, at *8 (M.D. Pa. Oct. 23, 2007))).

5. *See infra* note 95.

6. *See, e.g.*, *Thomas*, 800 F. Supp. 2d at 836 ("[I]f the arresting officer knows of facts that conclusively establish that an affirmative defense applies, it cannot accurately be said that the officer has probable cause . . . ."). See *infra* Section IV.B for full analysis on the "conclusivity" requirement imposed by nearly all courts that have determined an affirmative defense to be relevant in probable cause analysis.

and her credit destroyed, not to mention the humiliation and damage to her reputation. It is unreasonable to allow an officer to ignore or evaluate differently evidence of an affirmative defense on a blind presumption that the matter will eventually be "worked out" through the justice system, a system that is both slow and imperfect, and historically prejudicial to those of color and of limited resources.

Part II of the Article provides an overview of a 42 U.S.C. § 1983 claim for false arrest, the general principles that guide probable cause analysis, the components of the doctrine of qualified immunity, and the traditional role of an affirmative defense in resolving criminal culpability. Part III summarizes the case of *Thomas v. City of Galveston*, where the district court found, on the pleadings, that probable cause was absent because the arresting officers possessed first-hand knowledge the citizen was merely defending his property from the officers' own misconduct. The *Thomas* opinion embodies a comprehensive, multi-jurisdictional review of the law on the issue and arrives at the general conclusion that under certain circumstances, facts implicating an affirmative defense could negate probable cause. Even if a version of the *Thomas* conclusion prevails, however, courts must still grapple with a number of related questions. This Article attempts to answer these questions by using *Thomas* as a touchstone to analyze scenarios, both empirically and theoretically, to determine when a plaintiff could overcome an officer's qualified immunity defense and establish a constitutional claim for false arrest, where the officer possessed knowledge of the affirmative defense.

Part IV of the Article discusses why an affirmative defense is rightfully made part of probable cause analysis, and Part V explains how such a finding can be reconciled with certain interrelated and universally accepted doctrine, namely: (1) that an affirmative defense is to be asserted in a criminal proceeding as a defense to the crime; (2) that an officer has no duty to conduct further investigation once probable cause is established; and (3) that an officer's motives or beliefs are irrelevant in probable cause analysis. These three principles are juxtaposed with the prevailing maxim requiring consideration of the *totality of facts* available to the officer. As this Article explains, in determining the existence of probable cause for purposes of § 1983 liability, the analysis requires inclusion of *all* factual information available to the officer at the time of the arrest, including the officer's knowledge of exculpatory information which may establish that in fact no crime had been committed.

Part VI discusses the viability and limitations of including an affirmative defense in probable cause analysis—particularly, how doing so may not be "clearly established" for purposes of imposing liability. Also discussed is the effect the rule may have on an officer's ability to carry out her duties, and the impact the rule could have on the frequency and success of § 1983 claims for false arrest. Dispersed throughout the Article are examples and hypotheticals which offer guidance on when and to what extent an available affirmative

defense should play a role in the probable cause determination. The Article concludes with a recommendation that courts adopt and apply a general rule that facts supporting an affirmative defense shall be considered among the totality of facts and circumstances available to the arresting officer, and that such exculpatory facts shall be evaluated with the same level of scrutiny afforded inculpatory facts (hereinafter, the "True Totality Rule"). In light of the recent Supreme Court rulings in *District of Columbia v. Wesby*[7] and *Kisela v. Hughes*[8] where egregious constitutional violations went unchecked because the relevant law was "unclear," it is more important than ever for there to be a universally accepted and applied standard on this issue (i.e., clearly established)[9] to prevent innocent citizens from being deprived of their liberties without a remedy in the law.

In the last two decades, the United States has seen an alarming rise in reported police misconduct, both in the way of false arrests and excessive force, with the latter too often resulting in the wrongful death of an innocent citizen. Many scholars attribute this rise to the Supreme Court lowering the bar for probable cause to a level where it barely retains meaning and expanding the availability of qualified immunity to all but the most egregious intentional acts by government officials. Adoption and application of the rule proposed by this Article may not resolve or reverse this troubling trend but would at the very least signal acknowledgment that the Fourth Amendment remains a vital component in protecting citizens from unreasonable and unlawful government action, and that arrests and seizures should be made only when reasonably justified by the *true totality* of the facts observed.

II. OVERVIEW

Citizens able to overcome unfounded charges exemplified in *Thomas* may seek civil damages by bringing a claim for false arrest under 42 U.S.C. § 1983. The statute provides a cause of action against a government actor for conduct in violation of a right protected by the Constitution or federal law—in this

7. District of Columbia v. Wesby, 138 S. Ct. 577, 589–92 (2018) (granting qualified immunity in line with its conclusion that where the issue remains unsettled among courts and jurisdictions, it cannot be said that the law is "clearly established" in such a way that all reasonable officers would understand the conduct to be unlawful).

8. Kisela v. Hughes, 138 S. Ct. 1148 (2018). In one of its most astounding rulings yet, the Court granted immunity to an officer who shot a woman in her driveway without cause or provocation; the Court found that existing precedent made it unclear to the officer whether it was unlawful to shoot an innocent citizen posing no immediate threat. In dissent, Justice Sotomayor, joined by Justice Ginsburg, found that the decision of the majority "is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Id.* at 1162 (Sotomayor, J., dissenting).

9. As discussed further in Section VI.A, in order for a citizen to overcome a state actor's claim of qualified immunity and proceed to trial on a constitutional claim, the law surrounding the constitutional violation must be "clearly established"—a bar that has been set so high in recent Supreme Court rulings that qualified immunity has nearly morphed into absolute immunity.

instance, the right to be free from an unlawful arrest. A § 1983 claim for false arrest may be defended on the merits by establishing probable cause and also by asserting qualified immunity from suit. The Sections below set forth a brief overview of a § 1983 claim, as well as a summary of the law governing probable cause and the qualified immunity defense. The final Section describes the concept of an affirmative defense to a crime and lays the foundation for why an affirmative defense has a rightful seat at the probable cause table.

A. SECTION 1983 FALSE ARREST CLAIM

Under common law, a false arrest or false imprisonment has occurred when a person's liberty is restrained against his or her will and without legal justification.[10] A federal cause of action for false arrest arises pursuant to 42 U.S.C. § 1983, which provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .[11]

A claim for false arrest under § 1983 requires a showing that (1) the individual effecting the arrest was acting under the color of state law, and (2) the arrest deprived the plaintiff of rights and privileges secured by the Constitution or laws of the United States.[12] In most actions for false arrest, the first of these two requirements is easily satisfied by alleging and proving the actor was a law enforcement officer acting under the guise of his employment in such capacity.[13] It is typically the second requirement that generates the most contention. To establish the arrest constituted a deprivation of a secured right, the plaintiff must show that the arrest was in violation of his or her Fourth Amendment right to be free from unreasonable searches and seizures.[14] A warrantless arrest is unreasonable under the Fourth Amendment absent probable cause.[15] However, the burden of proof on this issue is

10. *See generally* Annotation, *Malice and Want of Probable Cause as Element or Factor of Action for False Imprisonment*, 137 A.L.R. 504 (1942) (cataloging rulings espousing this notion).

11. 42 U.S.C. § 1983 (2012).

12. Street v. Corr. Corp. of Am., 102 F.3d 810, 814 (6th Cir. 1996) (citing Simescu v. Emmet Cty. Dep't of Soc. Servs., 942 F.2d 372, 374 (6th Cir. 1991)).

13. 14A C.J.S. *Civil Rights* § 369 (2019); *see also* West v. Atkins, 487 U.S. 42, 49–50 (1988) ("It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State.").

14. U.S. CONST. amend. IV.

15. United States v. Watson, 423 U.S. 411, 417–24 (1976).

somewhat murky.[16] Courts are split as to whether the burden is on the arrestee to prove the absence of probable cause, or on the government to prove its presence.[17] The often intertwined standards for proving the defense of probable cause (defense from liability) and the defense of qualified immunity (defense from suit)[18] further complicate the issue.

B. PROBABLE CAUSE

The primary determinant of success in a § 1983 action based on false arrest is the presence or absence of probable cause.[19] The Supreme Court has found the probable cause standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime."[20] As the Supreme Court expounded in *Brinegar v. United States*, "[t]he rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice."[21] The probable cause determination involves an inquiry into whether "the totality of facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a *reasonable person* to

16. For an in-depth analysis on this issue, see Sarah Hughes Newman, Note, *Proving Probable Cause: Allocating the Burden of Proof in False Arrest Claims Under § 1983*, 73 U. CHI. L. REV. 347, 354–64 (2006). Further contributing to the discussion is a piece by Jonathan Levy, Note, *A Principled Approach to the Standard of Proof for Affirmative Defenses in Criminal Trials*, 40 AM. J. CRIM. L. 281 (2013).

17. The question of who bears the burden of establishing the existence or absence of probable cause varies jurisdictionally. *Compare* Sullivan v. City of Pembroke Pines, 161 F. App'x 906, 908 (11th Cir. 2006) ("To prove a § 1983 claim for false arrest, a plaintiff must demonstrate the absence of probable cause." (citing Rankin v. Evans, 133 F.3d 1425, 1436 (11th Cir. 1998))), *with* Dickerson v. Napolitano, 604 F.3d 732, 751 (2d Cir. 2010) ("When an arrest is not made pursuant to a judicial warrant, the defendant in a false arrest case bears the burden of proving probable cause as an affirmative defense." (citing Broughton v. State, 373 N.Y.S.2d 87, 95 (1975))). Who bears the burden also depends on whether the claim is brought under state or federal law; for discussion on this variable, see *Rankin*, 133 F.3d at 1436. It is also worth noting that if probable cause is found present for *any* of the charges forming the basis for arrest, the § 1983 claim for false arrest will likely be defeated. *See* Wells v. Bonner, 45 F.3d 90, 95 (5th Cir. 1995) ("If there was probable cause for any of the charges made . . . then the *arrest* was supported by probable cause, and the claim for false arrest fails." (emphasis added) (citing Heck v. Humphrey, 512 U.S. 477, 485–87 (1994))).

18. *See* Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 148–57 (2012).

19. *See, e.g.*, Schertz v. Waupaca Cty., 875 F.2d 578, 582 (7th Cir. 1989) ("[T]he existence of probable cause for arrest is an absolute bar to a Section 1983 claim for unlawful arrest . . . ." (citing Mark v. Furay, 769 F.2d 1266, 1269 (7th Cir. 1985))); 4 HOWARD FRIEDMAN & CHARLES J. DIMARE, LITIGATING TORT CASES § 50:42 (2018) ("Like the tort of false arrest, the basis of a § 1983 claim for false arrest is the lack of probable cause.").

20. Gerstein v. Pugh, 420 U.S. 103, 112 (1975).

21. Brinegar v. United States, 338 U.S. 160, 176 (1949).

conclude that the suspect had committed or was committing an offense."[22] An objective inquiry excludes the officer's actual beliefs and focuses only on what the facts and circumstances available to a particular officer would lead a prudent man to believe.[23] The traditional objective inquiry also ignores the subjective motives of the arresting officer, but, notably, it does not remove from the analysis the officer's personal knowledge of related facts present at the time of the arrest.[24] Both inculpatory facts (those tending to establish guilt) and exculpatory facts (those tending to clear from guilt) must be considered.[25] Though "[t]he test for probable cause is not reducible to [a] 'precise definition or quantification,'" like "beyond a reasonable doubt or by a preponderance of the evidence," the standard is clearly higher than a reasonable suspicion, but lower than what is required to secure a conviction.[26] The standard does not require high probability,[27] but, as one commentator

22. United States v. Levine, 80 F.3d 129, 132 (5th Cir. 1996) (emphasis added) (citing United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995)); *accord* NOAH J. GORDON, 5 AM. JUR. 2D *Arrest* § 33 (2019); *see also* United States v. Moncivais, 401 F.3d 751, 756 (6th Cir. 2005) (finding that "determination of probable cause involves evaluating the historical facts leading up to the arrest, and whether those facts, viewed by an 'objectively reasonable police officer,' satisfy the legal standard of probable cause" (citing Ornelas v. United States, 517 U.S. 690, 696 (1996))).

23. Whren v. United States, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *But see* Wyatt v. Cole, 504 U.S. 158, 178 n.2 (1992) (distinguishing the common law defense of probable cause and the modern qualified immunity inquiry, the court opined, "[a]t common law, a plaintiff can show the lack of probable cause either by showing that the actual facts did not amount to probable cause (an objective inquiry) or by showing that the defendant lacked a sincere belief that probable cause existed (a subjective inquiry). . . . But relying on the subjective belief, rather than on an objective lack of probable cause, is clearly exceptional." (citation omitted)).

24. *See infra* Section V.C.

25. *Accord* Andrews v. Scuilli, 853 F.3d 690, 699 (3d Cir. 2017); Stansbury v. Wertman, 721 F.3d 84, 93 (2d Cir. 2013); Buck v. City of Albuquerque, 549 F.3d 1269, 1281 (10th Cir. 2008); *see, e.g.*, Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015) ("A probable cause determination is based on the 'totality of the circumstances,' and must take account of 'both the inculpatory *and* exculpatory evidence.'" (quoting Gardenhire v. Schubert, 205 F.3d 303, 318 (6th Cir. 2000))); Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) ("An officer contemplating an arrest is not free to disregard plainly exculpatory evidence, even if substantial inculpatory evidence (standing by itself) suggests that probable cause exists." (citing Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988))); *see also* Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMPLE POL. & CIV. RTS. L. REV. 1, 9 (2003) (comparing rulings on this issue and finding that while most courts conclude an officer has no duty to investigate all exculpatory leads, "they cannot turn a blind eye toward potentially exculpatory evidence known to them"). While the Supreme Court has not explicitly ruled on this point, writing in dissent in *United States v. Watson*, Justice Marshall, joined by Justice Brennan, opined that both inculpatory and exculpatory evidence are to be considered in evaluating the validity of a warrant, and in that matter concluded the exculpatory evidence present was in fact sufficient to invalidate the warrant. United States v. Watson, 423 U.S. 411, 452 n.18 (1976) (Marshall, J., dissenting).

26. Florida v. Harris, 568 U.S. 237, 243 (2013) (citing Maryland v. Pringle, 540 U.S. 366, 371 (2003)); Illinois v. Gates, 462 U.S. 213, 235 (1983).

27. *See, e.g.*, United States v. Winchenbach, 197 F.3d 548, 555–56 (1st Cir. 1999) ("The probable cause standard does not require the officers' conclusion to be ironclad, or even highly

noted, at a minimum the arresting officer should be convinced that it is at least more likely than not the suspect is or was engaged in criminal activity.[28] All seem to agree the standard is a "fluid concept—turning on the assessment of probabilities in particular factual contexts . . . ."[29]

Probable cause is evaluated through the eyes and ears of the arresting officer, rather than the view point of a bystanding officer who may be unaware of exculpatory evidence available to the arresting officer.[30] In *Thomas* for example, a third officer arriving on the scene at the point of Mr. Thomas' defensive threats would likely have had probable cause to arrest Mr. Thomas, where such officer presumably lacked knowledge of the other officers' earlier conduct that gave rise to the affirmative defense.

In many instances, probable cause is established at the point the officer has knowledge of the existence of facts to satisfy the necessary elements of a crime.[31] Most courts agree that once the officer possesses a reasonable belief that a crime has been or is about to be committed, i.e., probable cause, the officer has no duty to conduct further investigation before effecting the arrest.[32] The corollary is that officers may not cherry pick the facts that establish probable cause while disregarding those that negate it.[33]

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probable. Their conclusion that probable cause exists need only be reasonable." (citing Texas v. Brown, 460 U.S. 730, 742 (1983))).

28. *See* Sherry F. Colb, *Probabilities in Probable Cause and Beyond: Statistical Versus Concrete Harms*, 73 L. & CONTEMP. PROBS., Summer 2010, at 69, 72 n.10 (indicating that for an officer to "reasonably believe" something to be true, he must, at the very least, believe it "is more likely to be true than it is to be false").

29. *Gates*, 462 U.S. at 232. Notably, however, what constitutes the "totality of the circumstances" often depends on how the court interprets the reasonableness standard. *See* JAMES A. ADAMS & DANIEL D. BLINKA, PROSECUTOR'S MANUAL FOR ARREST, SEARCH AND SEIZURE § 6-6(B) (2d ed. 2004).

30. *See, e.g.*, Jocks v. Tavernier, 316 F.3d 128, 137–38 (2d Cir. 2003). In *Jocks*, the plaintiff had asserted false arrest claims against two arresting officers. The court found that while the first officer lacked probable cause as a result of that officer's first-hand knowledge of the plaintiff's affirmative defense, the second officer, who arrived later and had no knowledge of the facts giving rise to the affirmative defense, was, as a matter of law, not liable for false arrest.

31. *See, e.g.*, Beauchamp v. City of Noblesville, 320 F.3d 733, 745–46 (7th Cir. 2003) ("Once an officer has established probable cause on every element of a crime, he need not continue investigating to test the suspect's claim of innocence." (citing Gramenos v. Jewel Cos., 797 F.2d 432, 437–42 (1986))).

32. *See, e.g.*, Ahlers v. Schebil, 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused." (citations omitted)); Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 128 (2d Cir. 1997) ("Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest."). But see *infra* Section V.B for a discussion on courts who have required law enforcement to conduct some minimal investigation before concluding a crime had actually been committed.

33. Bigford v. Taylor, 834 F.2d 1213, 1218 (5th Cir. 1988) ("As a corollary . . . of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause." (footnote omitted)).

As discussed in the next Section, even when it is found the arrest was without probable cause, the officer may nonetheless be granted immunity from the claim if the court finds the officer was reasonable in believing probable cause was present.

C. *QUALIFIED IMMUNITY DEFENSE*

Occupations in law enforcement present many challenges and risks. One of these risks is the possibility of being sued for an action taken in the course and scope of employment. In an effort to minimize unsubstantiated claims and permit law enforcement "liberty to exercise their functions with independence and without fear of consequences," government actors are entitled to assert qualified immunity as a barrier to being sued.[34] As the name implies, this type of immunity is protective, but is not an absolute shelter from civil liability. The doctrine of qualified immunity provides protection for "government officials performing discretionary functions . . . 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."[35] The standard is specifically designed to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment."[36] A primary function of the doctrine is to reduce "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."[37] Thus, qualified immunity, at least in theory, offers not only protection from liability, but immunity from suit entirely.[38] For this reason, the issue of qualified immunity is typically a matter resolved "by the court long before trial."[39]

Qualified immunity analysis involves two general inquiries: whether the plaintiff's allegations, taken as true, amount to a constitutional violation, and

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34. Pierson v. Ray, 386 U.S. 547, 554 (1967) (quoting Scott v. Stansfield (1868) 3 LR Exch. 220 at 223).

35. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (emphasis added).

36. *Id.*

37. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

38. Pearson v. Callahan, 555 U.S. 223, 237 (2009) ("Qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985))).

39. Hunter v. Bryant, 502 U.S. 224, 228 (1991); *see also* Borello v. Allison, 446 F.3d 742, 746 (7th Cir. 2006) ("Qualified immunity protects a defendant from liability as well as from the burden of standing trial. For that reason, courts should determine as early on in the proceedings as possible whether a defendant is entitled to qualified immunity." (citations omitted)); Littrell v. Franklin, 388 F.3d 578, 584–85 (8th Cir. 2004) ("The law of our circuit is clear. The issue of qualified immunity is a question of law for the court, rather than the jury, to decide: '[I]t is the province of the jury to determine disputed predicate facts, the question of qualified immunity is one of law for the court.'" (quoting Peterson v. City of Plymouth, 60 F.3d 469, 473 n.6 (8th Cir. 1995))). *But see* Brosseau v. Haugen, 543 U.S. 194, 206 (2004) (Stevens, J., dissenting) ("Although it is preferable to resolve the qualified immunity question at the earliest possible stage of litigation, this preference does not give judges license to take inherently factual questions away from the jury." (citations omitted)).

whether the conduct alleged was objectively reasonable in light of a clearly established law at the time that the challenged conduct occurred. Although the first inquiry is indeed susceptible to contention, it is the second that has become the source for many legal and scholarly debates. This second inquiry is better understood as two separate inquiries: (1) whether the allegedly violated constitutional right was clearly established at the time of the incident; and if so, (2) whether the conduct of the officer was objectively reasonable in light of the clearly established law.[40] In *Saucier v. Katz*, the Supreme Court mandated that courts first consider the constitutionality of the action prior to evaluating whether it was clear law; this mandate was intended to promote the development of constitutional law in this area.[41] That mandate, however, was short-lived. Just eight years later, in *Pearson v. Callahan*, the Court reversed its position, therein and thereafter providing trial courts discretion to dispose of the claim at the pleading stage if it cannot be shown that the law was clearly established.[42] The Supreme Court has time and again set a high bar for what it means to be "clearly established," demanding that, "'[t]he contours of [a] right [are] sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right.'"[43] Recently, in *District of Columbia v. Wesby*, the Court found "[t]he 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him,"[44] and that the inquiry "requires a high 'degree of specificity.'"[45]

In suits premised on false arrest, the rule provides that an officer should not be held personally liable where he reasonably, but mistakenly, concludes that probable cause was present for the arrest.[46] The defense provides "ample room for mistaken judgments" and aims to "protect[] 'all but the plainly

40. *See Pearson*, 555 U.S. at 244.

41. Saucier v. Katz, 533 U.S. 194, 201 (2001) ("A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry." (citing Siegert v. Gilley, 500 U.S. 226, 232 (1991))).

42. *Pearson*, 555 U.S. at 236 ("[W]hile the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). As one can imagine, most courts, in the name of judicial efficiency, often choose to pass over the constitutional question if it can be determined that the law was not clearly established, resulting in a dearth of development of constitutional law in this area.

43. Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (alterations in original) (emphasis added) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).

44. District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018).

45. *Id.* (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam)).

46. *See Anderson*, 483 U.S. at 638–39. The intent of the immunity defense is to shield from liability police officers "who act in ways they reasonably believe to be lawful." *Id.* at 641 (citing Malley v. Briggs, 475 U.S. 335, 344–45 (1986)).

incompetent or those who knowingly violate the law.'"[47] Expressed another way, qualified immunity should be granted if "officers of reasonable competence could disagree on whether the probable cause test was met."[48] Thus, qualified immunity aims to protect those officers who make a reasonable error in determining whether there is probable cause to arrest.[49] Frequently, the defense of qualified immunity and an officer's defense on the merits to the false arrest claim become indistinct.[50] It is often observed that a plaintiff who can overcome a qualified immunity defense in the early stages of litigation, will ultimately satisfy the second element of a § 1983 false arrest claim, where both hinge on the existence or absence of probable cause. Of course, a multitude of factors will vary the outcome, including substantiation of the facts as alleged, as well as who bears the burden of proof on the probable cause determination.[51] Defeating qualified immunity is no easy task. To overcome the defense, a plaintiff must "point[] to a clearly analogous case establishing a right to be free from the specific conduct at issue" or show that "the conduct [at issue] is so egregious that no reasonable person could have believed that it would not violate clearly established rights."[52]

In essence, and in practice, the qualified immunity defense gives law enforcement two bites at the reasonableness apple: Even if it is found that the evidence was insufficient for a reasonable officer to conclude the suspect had committed a crime (i.e., no probable cause), the officer may still escape liability if it is found the mistake was a reasonable one, or that the relevant law was not clearly established at the time of arrest.

Consider the following example: An officer arrests a suspect for possession of stolen property, even though he had no evidence of the suspect's intent to possess property that was stolen. If specific intent were required to establish probable cause in that jurisdiction, a court may find the officer lacked probable cause for the arrest, yet rule he is entitled to immunity protection if it found a reasonable officer would also have not known that

47. Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting *Malley*, 475 U.S. at 343, 341).

48. Robison v. Via, 821 F.2d 913, 921 (2d Cir. 1987) (citations omitted); *see also Malley*, 475 U.S. at 341 ("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.").

49. *Anderson*, 483 U.S. at 642–43.

50. Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 142 (2012) ("Despite these (at least theoretical) differences between an affirmative defense on the merits and a qualified immunity from suit, the two concepts are often interchanged, if not outright conflated.").

51. See *supra* Section II.A for a brief discussion on who bears the burden of proof on the issue of probable cause.

52. Smith v. City of Chicago, 242 F.3d 737, 742 (7th Cir. 2001) (citing Saffell v. Crews, 183 F.3d 655, 658 (7th Cir. 1999)).

evidence of *mens rea* was necessary to establish probable cause.[53] Since the test is objective, the officer in this example may be entitled to immunity even if he subjectively was aware the law in his jurisdiction required evidence of intent for probable cause, as long as it could be shown that a reasonable officer would not have been wise to the law. Qualified immunity would offer similar protection in scenarios involving an available affirmative defense where it is found that a reasonable officer would not have been aware of the law that gave rise to the affirmative defense.

D. AFFIRMATIVE DEFENSE TO A CRIME

"[A]n 'affirmative defense' is any defense that assumes the [commission of the act] . . . but raises other facts that, if true, would" negate the element of intent, or "establish a valid excuse or justification or a right to engage in the conduct in question."[54] In other words, an affirmative defense admits the *act*, but refutes the act was *criminal*.[55] Common affirmative defenses include: (i) justification defenses such as self-defense, defense of property, or necessity; (ii) excuse defenses such as insanity, duress, diminished capacity, intoxication, and infancy;[56] and, (iii) statutory affirmative defenses such as those which provide authorization or permission for what would otherwise be

53. *See, e.g.*, Rodis v. City of San Francisco, 558 F.3d 964, 969 (9th Cir. 2009). *Rodis* involved the arrest of a suspect for the crime of possession of counterfeit currency, a specific intent crime. The court acknowledged "that 'when specific intent is a required element of the offense, the arresting officer must have probable cause for that element in order to reasonably believe that a crime has occurred.'" *Id.* (quoting Gasho v. United States, 39 F.3d 1420, 1428 (9th Cir. 1994)). While it determined the officers lacked probable cause on that element, and thus lacked probable cause for the arrest, the court nonetheless granted qualified immunity to the officers on its finding that the law in this area was not sufficiently clear to impose civil liability.

54. Stephen Michael Everhart, *Putting a Burden of Production on the Defendant Before Admitting Evidence that Someone Else Committed the Crime Charged: Is It Constitutional?*, 76 NEB. L. REV. 272, 290 (1997) (quoting State v. Cohen, 568 So. 2d 49, 51–52 (Fla. 1990)).

55. There remains some disagreement on the issue of whether an affirmative defense negates the criminality of the act, or merely serves as a legal excuse for committing a criminal act. This Author is of the view that if an affirmative defense establishes the suspect was not guilty of a crime, it follows then that the act committed was not a *criminal* act, even if under different circumstances the same act would have been deemed criminal. This is not to say that an act that is made not criminal by virtue of an affirmative defense becomes lawful; an act in violation of a criminal code remains unlawful, but is not *criminal* if performed with a legal excuse or justification.

56. Worth noting is that an excuse defense will almost never defeat probable cause; not because excuse defenses are irrelevant to the analysis, but because it would be nearly impossible for an arresting officer to be aware of sufficient facts at the scene of the arrest that would permit an objectively reasonable officer to conclude an excuse defense was available. Moreover, while a statutory defense or justification may make an otherwise criminal act not criminal, the same cannot be said for an excuse defense, such as intoxication or insanity. Such defenses acknowledge a "crime" has been committed but excuse the individual's actions due to the individual's mental capacity or state of mind at the moment of the act.

deemed unlawful conduct.[57] Unlike a traverse, an affirmative defense traditionally does not concern itself with the elements of the offense at all, it concedes them.[58] "In effect, an affirmative defense says, 'Yes, I did it, but I had a good reason.'"[59] However, some courts have found that an affirmative defense, such as self-defense, can actually negate the *mens rea* element for the crime charged.[60] Essentially, "I did the act, but my intent was to protect myself, not commit a crime."

Courts often confuse "satisfaction of the elements of crime" with the "commission of a crime," in discussing probable cause, but the two are quite distinct. The former indicates the suspect has committed acts for which he could be found guilty of a crime absent a legal justification; the latter indicates the suspect acted unlawfully and without legal justification. Though a suspect may have committed an act satisfying the elements of a particular criminal code, if the suspect is found not guilty of the crime as a result of an established defense, it cannot be said the suspect committed a crime, or that his conduct was criminal.[61] With few exceptions,[62] a proven affirmative defense removes all criminal culpability. Thus, an otherwise criminal act that is justified or permitted by an affirmative defense is no crime at all.[63] This point is crucial to understanding and contemplating the inclusion of an affirmative defense

57. Examples of statutory affirmative defenses include: a license to possess a firearm; authorization to possess a firearm by virtue of employment (e.g., police officer or security guard); or authorization to possess a controlled substance (e.g., via a medical marijuana card or a valid prescription for Vicodin or OxyContin or another Schedule II or Schedule III prescribed narcotic). Without the statutory affirmative defense, these acts are criminal. In jurisdictions where affirmative defenses are deemed irrelevant or only arguably relevant in determining probable cause, officers are not required to consider the presentment of a license or prescription prior to effecting arrest. *See, e.g.*, State v. Fry, 174 P.3d 1258, 1260 (Wash. Ct. App. 2008) (concluding "the mere production of a document purporting to be a marijuana use authorization does not prohibit further investigation by the State. . . . Whether the affirmative defense of medical use of marijuana was viable was an issue for trial").

58. White v. Arn, 788 F.2d 338, 344–45 (6th Cir. 1986) (explaining that a defendant claiming self-defense does not dispute or negate the elements of the crime charged, but instead seeks to establish the elements of self-defense).

59. *Cohen*, 568 So. 2d at 52.

60. *See, e.g.*, Engle v. Isaac, 456 U.S. 107, 108 (1982) (finding that under Ohio law, a claim of self-defense challenged the *mens rea* requirement for culpability, and thus put the burden on the state to disprove the defense). *But see* Thomas v. Arn, 704 F.2d 865, 875 (6th Cir. 1983) ("Self-defense does not negate an element of aggravated assault; instead it excuses and makes non-criminal an act which would otherwise be criminal.").

61. *See supra* note 55.

62. *See supra* notes 55–56 and accompanying text.

63. *See* State v. Ouellette, 37 A.3d 921, 926 (Me. 2012) ("Self-defense, like other justifications, is a complete defense, meaning that it negates the commission of the crime; an act committed in self-defense is 'simply no crime at all.'" (quoting State v. Singleton, 974 A.2d 679, 690 (Conn. 2009))); *see also* Aparicio v. Artuz, 269 F.3d 78, 98 (2d Cir. 2001) ("Affirmative defenses are complete defenses that, once proven by the defendant by a preponderance of the evidence, negate criminal liability for an offense, notwithstanding that the State has otherwise proven all the elements of that offense beyond a reasonable doubt.").

in probable cause analysis, where the fundamental inquiry is whether the arresting officer reasonably believed the suspect was *guilty of committing a crime.*[64]

III. *THOMAS V. CITY OF GALVESTON*

The case of *Thomas v. City of Galveston* illustrates when an officer's alleged knowledge of an affirmative defense may negate probable cause in a § 1983 civil action for false arrest.[65] *Thomas* involved an incident which occurred in Galveston, Texas in the wake of Hurricane Ike.[66] Galveston is an island off the coast of Texas and has endured 14 catastrophic hurricanes over the last 100 years.[67] Hurricane Ike struck the island on September 13, 2008 and was devastating, completely destroying 2,228 homes.[68] Prior to the hurricane making landfall, the mayor of Galveston issued a mandatory evacuation of the island—everyone was to leave except for police and fire personnel, and a handful of city officials. Although the evacuation was labeled mandatory, it was not a crime to stay. Kerry Thomas and his wife chose to stay on the island and ride out the storm. Their decision to stay was motivated in part by concerns that their home would be vandalized and looted if they left it vacant, as was the case when they evacuated for Hurricane Rita in 2005.

When the 110 mile per hour winds finally died down and the 17-foot surge of water subsided, Mr. Thomas made his way to the nearest supply store and purchased a 15,000 kilo-watt generator which would be used to power his home until utilities were restored.[69] He left the generator on a flatbed trailer parked directly in front of his house.[70] To give the appearance it was secured, Mr. Thomas hung across the unit two heavy log chains, which doubled as a

64. *See* Peng v. Mei Chin Penghu, 335 F.3d 970, 976 (9th Cir. 2003) ("Under California law, an officer has probable cause for a warrantless arrest 'if the facts known to him would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.'" (alteration in original) (quoting People v. Adams, 175 Cal. App. 3d 855, 861 (1985))); Penn v. Harris, 296 F.3d 573, 576–77 (7th Cir. 2002) ("Probable cause exists when, based on the facts known, a reasonable person would believe a person was guilty of committing an offense." (citing Cervantes v. Jones, 188 F.3d 805, 811 (7th Cir. 1999))); *see also* Neely v. Henkel, 180 U.S. 109, 123 (1901) (stating that extradition is proper "only upon evidence establishing probable cause to believe him guilty of the offence charged").

65. Thomas v. City of Galveston, 800 F. Supp. 2d 826, 835–38 (S.D. Tex. 2011).

66. *Id.* at 829.

67. TEX. HURRICANE CTR. FOR INNOVATIVE TECH., TEXAS COASTAL COUNTIES WITH DIRECT HURRICANE HITS (1900–2008) (2008), *available at* http://hurricane.egr.uh.edu/sites/hurricane.egr.uh.edu/files/files/counties.pdf [https://perma.cc/ZS8A-E8H2].

68. DIV. OF EMERGENCY MGMT., STATE OF TEX., HURRICANE IKE: IMPACT REPORT 18 (2008), *available at* https://www.fema.gov/pdf/hazard/hurricane/2008/ike/impact_report.pdf [https://perma.cc/26DM-Z9M7].

69. According to Mr. Thomas, he had also promised his neighbors free use of the generator to run their necessary appliances and charge their cellular phones.

70. *Thomas*, 800 F. Supp. 2d at 830.

crude alarm. Curfew having been set at 8:00 PM, Mr. Thomas and his wife turned in early.[71]

Around 10:00 PM, Mr. Thomas awoke to the sound of barking dogs.[72] He looked out his second-floor bedroom window and saw what looked like two men with flashlights lurking around where he had parked the trailer.[73] He then heard the metal on metal sound of the log chain being slowly removed from atop his generator. Mr. Thomas put on his slippers and proceeded downstairs.[74] Through the window next to the front door Mr. Thomas yelled at the individuals to identify themselves.[75] The flashlights stopped moving, but there was no response.[76] Mr. Thomas repeated the request numerous times over a period of several minutes.[77] No response. He located his rifle which he had kept near the front door, opened the door and stood just inside the doorway with the rifle at port arms.[78] Hoping to scare off who he thought to be looters, he stated, "[I]dentify yourself or you will be fired upon."[79] Immediately the flashlights began to move again, but the individuals did not run away. Instead, one exclaimed, "Galveston Police, throw down your gun."[80] This was the first and only time the individuals lurking around the Thomas' generator had identified themselves as law enforcement.[81]

Mr. Thomas immediately bent down, placed his rifle on the porch, and put his hands in the air with his palms forward.[82] According to Mr. Thomas, the two apparent looters, now in the role of police officers, threw him from his porch, beat him unconscious, and took him to jail.[83] He was released several days later and all charges were dismissed "in the interest of justice."[84]

Mr. Thomas subsequently brought a § 1983 claim alleging false arrest and excessive force, among other claims.[85] In a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), the police officers sought qualified immunity from the false arrest claim, asserting probable cause to arrest Mr.

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71. *Id.* at 830.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* Port arms is a military term describing the act of holding a rifle diagonally in front of the body with the muzzle pointing upward and to the left. U.S. DEP'T OF THE ARMY, DRILL AND CEREMONIES fig.5-4 (2003), *available at* https://www.usarmyband.com/pdf/FM_3_21_5.pdf [https://perma.cc/U9H2-SBFF].

79. *Thomas*, 800 F. Supp. 2d at 830.

80. *Id.*

81. *See id.*

82. *Id.*

83. *Id.*

84. *Id.* at 831.

85. *Id.*

Thomas for violating curfew and for committing a terroristic threat.[86] As to the charge of violating curfew, the district court ruled that no reasonable officer could have believed a man standing in his own doorway was in violation of curfew.[87] However, much more complex was the issue of whether the yelling of "identify yourself or you will be fired upon" was sufficient to give rise to probable cause in light of Mr. Thomas' allegations the officers knew the threat was in direct response to the officers' own mischievous conduct. The issue before the federal district court was whether probable cause analysis required consideration of the officers' first-hand knowledge of Mr. Thomas' affirmative defense of defense of property.[88]

Although this particular issue had yet to be resolved in the Fifth Circuit when *Thomas* was decided, other courts had found probable cause analysis requires the evaluation of both inculpatory and *exculpatory* evidence, and in *Jocks v. Tavernier*, the Second Circuit found "a police officer's awareness of the facts supporting a defense can *eliminate* probable cause."[89] The facts in *Thomas* were comparable to those in *Jocks*, wherein the court found relevant the allegations that the arresting officer knew the suspect was acting in defense to the officer's own misconduct.[90] Allowing *Jocks* to proceed to trial, the Second Circuit found that "a reasonable jury could have concluded that [the officer] should have known that Jocks was acting in self-defense" and "could therefore find that the arrest lacked probable cause."[91] Similarly, in *Thomas*, the court held "[p]laintiff's actions were allegedly provoked entirely by the conduct of the officers, so the officers would have known that [the] Plaintiff only made a threat of force in defense of his property and had those [sic] done nothing wrong."[92] In view of the facts presented, and in line with the logic expressed by a handful of other courts on this issue, the district court in *Thomas* concluded there *were* circumstances in which facts pertaining to an affirmative defense were pertinent in probable cause analysis.[93] The court opined, "[a]t a minimum, if the arresting officer knows of facts that conclusively establish that an affirmative defense applies, it cannot accurately be said that the officer has probable cause that the suspect committed the offense."[94]

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86. *Id.* at 834.

87. *Id.* at 836–38.

88. *See id.* at 834–36.

89. Jocks v. Tavernier, 316 F.3d 128, 135 (2d Cir. 2003) (emphasis added).

90. In *Jocks*, the officer unlawfully and unreasonably pointed his pistol at Jocks and threatened to blow his head off; in response, Jocks threw the handset of a payphone at the officer and ran for his life. *Id.* at 132–36.

91. *Id.* at 136.

92. *Thomas*, 800 F. Supp. 2d at 836.

93. *Id.* at 835–37.

94. *Id.* at 836. In denying the defendant's motion to dismiss the false arrest claim, the district court found Mr. Thomas' allegations pertaining to the officers' own culpable conduct were sufficient to establish the officers' awareness of the affirmative defense of defense of property which consequently negated any claim of probable cause. *Id.* at 837. The court ruled

The ruling exemplifies what appears to be the plurality view on the issue: An officer's knowledge of an available affirmative defense is relevant in the probable cause analysis.[95] This plurality view, however, stops short of the rule proposed by this Article. Even courts concluding an affirmative defense is relevant in the analysis incorporate the caveat that the facts of the affirmative defense must first be deemed "conclusive."[96] Courts routinely find that while inculpatory facts are to be evaluated using a "probable" or "reasonably credible" standard, exculpatory facts should be evaluated using a separate "conclusive" standard.[97] As discussed in greater detail in Part IV, the totality of circumstances test does not require nor permit such differing standards for inculpatory and exculpatory evidence; instead, the entirety of the facts available must be evaluated under the objectively prudent officer standard.

What follows is discussion and examination of the relevance of an affirmative defense in probable cause analysis, and the proposition that inclusion is not only required by the totality of circumstances approach but is the most appropriate method of determining Fourth Amendment reasonableness.

IV. AFFIRMATIVE DEFENSE RELEVANCE IN PROBABLE CAUSE ANALYSIS

The basic inquiry in determining probable cause ex post in a civil action for false arrest is a simple one: Upon review of all the facts and circumstances available to the arresting officer, was the seizure reasonable? Probable cause analysis should not burden law enforcement with the onus of selecting at the scene of the arrest which facts to consider and which to disregard, nor should it require the officer to weigh differently inculpatory and exculpatory facts. Instead, the analysis should permit, and arguably require, the officer to consider unrestricted the totality of facts available. It is upon a review of this totality of facts that the officer shall make a reasonable determination as to whether it is probable that the suspect had committed a crime. The following Sections explain why the rule proposed by this Article is in alignment with the totality of facts and circumstances test, why differing evaluative standards for

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that Thomas had alleged sufficient facts to state a claim for false arrest and to foreclose the defendants' immunity defense. *Id.* The defendants' motion to dismiss was denied and the case was allowed to proceed to trial. *Id.* at 846. Following some initial discovery, the defendants proposed settlement, and the matter was ultimately resolved prior to trial.

95. In each of the Second, Fifth, Sixth, Seventh, and Eleventh Circuits, at least one federal court has ruled that an affirmative defense to a crime is relevant in probable cause analysis.

96. *See, e.g.*, Williams v. Sirmons, 307 F. App'x 354, 358 (11th Cir. 2009); Hodgkins *ex rel.* Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004) ("A police officer may not ignore conclusively established evidence of the existence of an affirmative defense . . . ." (citations omitted)); *Jocks*, 316 F.3d at 135; Fridley v. Horrighs, 291 F.3d 867, 874 (6th Cir. 2002); *Thomas*, 800 F. Supp. 2d at 836.

97. *See supra* note 96 and accompanying text.

inculpatory and exculpatory facts is improper, and how an available affirmative defense may impact the criminality of an act.

A. TOTALITY OF THE FACTS AND CIRCUMSTANCES TEST

As previously noted, probable cause analysis requires an objective consideration of the totality of facts and circumstances available to the officer at the moment of arrest. Totality, meaning "an aggregate amount,"[98] is all-inclusive. Thus, the rule compels a review of each and every fact available to the officer, whether inculpatory, exculpatory, or neutral. The totality requirement was avowed by the Supreme Court in *Illinois v. Gates*, where the Court "reaffirm[ed] the totality-of-the-circumstances analysis that traditionally has informed probable cause determinations."[99] Though the *Gates* ruling pertained to probable cause for a search, the standard has been applied universally to all Fourth Amendment protections.[100] Even when the "totality" descriptor is not present, when the Court describes what must be considered in determining probable cause, it consistently does so with language implying the review shall be all-inclusive.[101] Even Fourth Amendment intrusions that are not subject to strict application of probable cause are evaluated for "reasonableness, under all the circumstances."[102]

Although the Supreme Court has yet to rule explicitly on the probable cause-affirmative defense issue,[103] adoption of the True Totality Rule would generally comport with the Court's proclivity to require review of *everything* in determining Fourth Amendment reasonableness. Even as recent Supreme Court precedent has subtly eroded Fourth Amendment protections and substantially lowered the bar for probable cause, it remains steadfast in the

98. THE MERRIAM-WEBSTER DICTIONARY (2016); ROGETS II, THE NEW THESAURUS 1024 (1988) ("An amount or quantity from which nothing is left out or held back.").

99. Illinois v. Gates, 462 U.S. 213, 238 (1983) (citations omitted).

100. *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) (applying the totality of facts and circumstances test in evaluating probable cause of an arrest while citing the *Gates* decision).

101. *See, e.g.*, Florida v. Harris, 568 U.S. 237, 248 (2013) (holding that courts should not prescribe "an inflexible set of evidentiary requirements" when evaluating probable cause, noting that "every inquiry into probable cause" requires consideration of "all the facts"); *see also* Ornelas v. United States, 517 U.S. 690, 700–01 (1996) (Scalia, J., dissenting) ("[P]robable cause . . . involve[s] a two-step process. First, a court must identify all of the relevant historical facts known to the officer . . . .").

102. New Jersey v. T.L.O., 469 U.S. 325, 341 (1985); *see also* Almeida-Sanchez v. United States, 413 U.S. 266, 298 (1973) (White, J., dissenting) ("The clear rule of the circuit, however, is that conveyances may be stopped and examined for aliens without warrant or probable cause when in *all* the circumstances it is reasonable to do so." (emphasis added)).

103. In *District of Columbia v. Wesby*, the Court was presented with a set of facts similar to those addressed by this Article. District of Columbia v. Wesby, 138 S. Ct. 577, 583–85 (2018). Though not specifically acknowledging the issue as one involving an affirmative defense (the Court referred to it as an "innocent explanation"), its holding there may offer some insight on how it might view the relevance of an affirmative defense in probable cause analysis. *Id.* at 588. The *Wesby* matter is discussed further in Section VI.A below.

notion that courts should not review in isolation each fact known to the arresting officer, but should instead "consider 'the whole picture'" in evaluating probable cause.[104] In fact, the Court in *District of Columbia v. Wesby*, admonished the lower court for evaluating the facts one by one, finding "[t]he totality-of-the-circumstances test 'precludes this sort of divide-and-conquer analysis.'"[105]

Supreme Court precedent aside, the true totality approach in evaluating probable cause is appropriate because it provides the most practical, straightforward method for law enforcement to evaluate the situation. Officers should be free to make a determination based on all the evidence available to them, and not be forced to weigh evidence differently based on whether it indicates guilt or innocence. A rule requiring an officer to exclude certain facts from the analysis could inhibit an officer's reasonable determination of probable cause, where she would have to pick and choose what evidence she is allowed to consider, as opposed to simply making a reasonable judgment based upon everything she has observed. Officers should be given reasonable discretion in assessing the probability of whether the suspect would actually be found guilty of a crime observed and should not be limited or restricted by the formalistic distinction between the elements of a crime and the elements of an affirmative defense.

The trial court in *Diop v. City of New York*, applying a rule bearing similarities to that proposed by this Article, found that the officer's awareness of Diop's affirmative defense of necessity prohibited the court from finding as a matter of law that the officer had probable cause for the arrest.[106] Diop was observed running a red light, fleeing the scene of an accident, and driving the wrong way down a one-way street.[107] These facts standing alone would no doubt amount to probable cause. However, the officer was also aware that Diop had been robbed and was acting at the direction of one of the robbers holding a knife to his neck. The court held:

> These facts should have indicated to Officer Blake that Diop's reckless driving was 'necessary as an emergency measure to avoid an imminent . . . private injury' and thus was not criminal under N.Y. Penal Law § 35.05(2). In light of these facts, which Officer Blake was required to consider in determining whether there was probable cause, the Court is unable to conclude as a matter of law that Officer Blake had probable cause to arrest Diop.[108]

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104. *Id.* at 588 (quoting United States v. Cortez, 449 U.S. 411, 417 (1981)).

105. *Id.* (quoting United States v. Arvizu, 534 U.S. 266, 274 (2002)).

106. Diop v. City of New York, 50 F. Supp. 3d 411, 419–20 (S.D.N.Y. 2014).

107. *Id.* at 419.

108. *Id.* at 419–20 (footnote omitted) (citations omitted). Of course, to negate probable cause, the facts must establish the unlawful conduct was in fact necessary. *See* Holman v. City of York, 564 F.3d 225, 229 (3d Cir. 2009) (holding that facts of affirmative defense were insufficient

If the ultimate goal of the probable cause requirement is to limit warrantless arrests to only those found objectively reasonable under the Fourth Amendment, the most appropriate rule is one that would not only permit but require an officer to consider the entirety of the facts available. The true totality approach is also appropriate because it goes to the heart of the Fourth Amendment reasonableness requirement. Only upon a review of *all* the facts and circumstances available to the officer should it be judged whether a warrantless arrest was reasonable. As it stands, there exists no Supreme Court jurisprudence signaling exceptions to or exclusions from its totality standard for determining probable cause,[109] and most circuits have found the standard mandates consideration of both inculpatory and exculpatory facts.[110]

B. "CONCLUSIVITY" REQUIREMENT

Even courts that have agreed an affirmative defense is relevant in probable cause analysis will often weigh differently the inculpatory and exculpatory evidence available to the officer; that is, *reasonably credible* evidence is sufficient for an officer to believe the elements of a crime are present for the purpose of establishing probable cause, yet only *conclusive* evidence of an affirmative defense can negate it.[111] Courts often equate

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to compel a reasonable officer to conclude it was necessary to trespass onto private property in order to avoid risk of injury).

109. The only opinion of the Court that teeters on this proposition is *United States v. Williams*, where, in a five to four ruling, the Court found a prosecutor's failure to disclose to the grand jury substantial exculpatory evidence in its possession insufficient to dismiss an otherwise valid indictment. United States v. Williams, 504 U.S. 36, 51 (1992). The Court found the responsibility of a grand jury is "to assess whether there is adequate basis for bringing a criminal charge" and historically "it has always been thought sufficient to hear only the prosecutor's side." *Id.* at 37, 51. Moreover, "'[i]t would run counter to the whole history of the grand jury institution' to permit an indictment to be challenged 'on the ground that there was inadequate or incompetent evidence before the grand jury.'" *Id.* at 54 (alteration in original) (quoting Costello v. United States, 350 U.S. 359, 363–64 (1956)). It is upon this historical precedent pertaining specifically to the grand jury process the ruling is based, not on a newly proscribed rule permitting a prosecutor to purposefully hide from the grand jury evidence establishing no crime was committed. As Justice Stevens explained in his dissent, "[r]equiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding . . . . But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary." *Id.* at 69 (Stevens, J., dissenting). Justice Stevens goes on to quote a passage from the U.S. Department of Justice, United States Attorneys' Manual: "[W]hen a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." *Id.* at 69–70.

110. *See supra* note 25 and accompanying text.

111. *See, e.g.*, Williams v. Sirmons, 307 F. App'x 354, 359 (11th Cir. 2009) ("[I]n determining whether probable cause to arrest exists, an officer must consider all facts and circumstances within that officer's knowledge, including facts and circumstances *conclusively establishing* an

conclusive with the officer having observed the evidence first-hand.[112] This conclusivity requirement has the propensity to result in constitutional violations without any avenue for recovery, particularly in cases where an officer is permitted to disregard evidence that clearly signals the presence of an affirmative defense. For example, suppose an officer arrives on the scene of a fight that had just ended. The first party claims the other assaulted him. The other, with visible facial injuries, claims he was only acting in self-defense, and a half dozen bystanders corroborate that claim. In jurisdictions invoking the conclusivity requirement, if the statement of the first party was deemed *reasonably credible*, it alone would be sufficient to justify the arrest of the second, despite the abundance of evidence he was acting in self-defense; such courts would likely find that since the officer did not observe the exculpatory evidence first-hand, the defense would likely not be deemed *conclusive*.

The above example highlights why this "first-hand knowledge/ conclusivity" requirement is unreasonable. Certainly, an officer's first-hand knowledge of an event may be given more credence than an account by a witness, but this does not mean the witness account should carry no weight at all. The witness statement should be reviewed in conjunction with the entirety of the evidence available, and an assessment should be made upon that totality review. If the statement of a witness is deemed sufficient to establish probable cause, then, under certain circumstances, a statement from a witness should also be sufficient to establish a probable cause-negating affirmative defense.[113] A rule limiting affirmative defense inclusion to only those scenarios when the facts are observed first-hand by the arresting officer would permit the officer in the second scenario to subject both men to the awfulness of arrest, even though one was clearly a victim.

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affirmative defense." (emphasis added)); Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004) ("A police officer may not ignore *conclusively established* evidence of the existence of an affirmative defense . . . ." (emphasis added)); Estate of Dietrich v. Burrows, 167 F.3d 1007, 1012 (6th Cir. 1999) ("[T]he officers in this case had full knowledge of facts and circumstances that *conclusively established*, at the time of the [plaintiffs'] arrests, that the plaintiffs were justified—by statute—in carrying concealed weapons during their work." (emphasis added)). See also Judge Smith's concurring opinion in *Mazuka v. Rice Twp. Police Dep't* for an in-depth analysis on the infusion of an affirmative defense in probable cause analysis, and her conclusion that "an affirmative defense is only applicable to the probable cause analysis when a reasonable officer making an arrest without a warrant would *conclusively know* that the affirmative defense excuses the offending conduct." Mazuka v. Rice Twp. Police Dep't, 655 F. App'x 892, 897 (3d Cir. 2016) (Smith, J., concurring). No court has expressly adopted the proposition that evidence of an affirmative defense should be weighed equally among evidence tending to establish guilt.

112. *See, e.g.*, Jocks v. Tavernier, 316 F.3d 128, 137–38 (2d Cir. 2003); *see also Hodgkins*, 355 F.3d at 1061 (concluding that a conclusive affirmative defense must be considered, but absent first-hand knowledge of the facts giving rise to the defense "the officer is free to arrest her and leave the assessment of the . . . affirmative defense for a judicial officer").

113. Again, where there are conflicting credible statements, and the determination of guilt is not clear, the officer will be given significant leeway in determining reasonableness for the arrest, particularly where there is reason to believe arrest is prudent under the circumstances.

Requiring conclusivity is unnecessary in most circumstances, where the tests for probable cause and qualified immunity are both founded in reasonableness: whether it was *reasonable* for the officer to believe the conduct observed was criminal, despite evidence of an available affirmative defense to the conduct (probable cause), and whether *reasonable* officers could disagree as to whether the conduct observed was made lawful by an available affirmative defense (qualified immunity). Thus, the test need not be one of conclusivity or even reasonable conclusivity of the affirmative defense, but rather, *probability* that a crime had been committed in view of the *totality of the facts*—both inculpatory and exculpatory.[114] Just as the traditional probable cause determination contemplates whether the facts available would lead a reasonable officer to believe an unlawful act had been committed, this analysis would consider whether a reasonable officer would have believed an affirmative defense was available to justify that unlawful act. In cases presenting a close call, the officer would be given substantial deference, as probable cause jurisprudence has always provided. This is especially true in situations involving exigent or urgent circumstances.

Under exigent circumstances, or when the officer has reason to believe the suspect is likely to escape arrest or commit further criminal acts, it may be found *reasonable* for the officer to institute arrest despite strong evidence of an available affirmative defense. Conversely, if no such circumstances are present, it may be found *unreasonable* for the officer to ignore even weak indication of an affirmative defense.[115]

C. *Effect of an Affirmative Defense on the Criminality of an Act*

At trial on the criminal charge, if evidence of an affirmative defense is determined sufficient to legally justify the act, the jury should find no crime was committed—not guilty. As a corollary, if facts are observed at the scene which establish an affirmative defense to the crime, a reasonable officer should conclude no crime was committed—no probable cause. Only a reasonable belief that a crime has been or is about to be committed

114. There is no reason for the two-part test proposed by the court in *Thomas* and by Judge Smith in her concurring opinion in *Mazuka*. *Mazuka*, 655 F. App'x at 895–900. What Judge Smith describes in her concurring opinion is a test whereby the officer would have to first determine whether it was probable that the elements of the crime were present, and then evaluate separately whether the available exculpatory evidence conclusively establishes an affirmative defense. A much simpler approach is to allow the officer to review the totality of the evidence equally, and perform a single evaluation based on probability and reasonableness, as the Constitution requires.

115. *See, e.g.*, Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999). In *Kuehl*, the court held "officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect, at least in the absence of exigent circumstances . . . ." *Id.* Here, the court found the officers failed to interview an eyewitness to an altercation who would have confirmed the act was in self-defense. *Id.* The court concluded that such minimal investigation "would not have unduly hampered the process of law enforcement." *Id.* at 651.

shall permit an officer to lawfully effect an arrest.[116] It follows then, the determination of whether an officer believed a crime had been committed must comprise a review of all evidence, including that which may make the observed act not criminal.[117] Certain courts have mistakenly excluded from the analysis evidence of an available affirmative defense on the grounds that an officer has no duty to conduct further investigation or evaluate the merits of an affirmative defense once the elements of the crime are satisfied.[118] Merely observing conduct that satisfies the elements of a crime, however, is not always sufficient to form a reasonable basis to believe the conduct is criminal, especially when additional facts are available indicating the conduct was not criminal.[119]

A police officer needs only probable cause to effect the arrest, as opposed to a belief beyond a reasonable doubt;[120] though the evaluative standards are distinct, the underlying inquiry at both the moment of the arrest and at the criminal proceeding is the same: Is the suspect (or accused) guilty of committing a crime?[121] Presumably, the primary objectives of an arrest are to

116. Devenpeck v. Alford, 543 U.S. 146, 152 (2004) ("The Fourth Amendment protects '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." (alteration in original) (citing United States v. Watson, 423 U.S. 411, 417–24 (1976); Brinegar v. United States, 338 U.S. 160, 175–76 (1949))).

117. *See* Diop v. City of New York, 50 F. Supp. 3d 411, 419–20 (S.D.N.Y. 2014), discussed in detail at *supra* Section IV.A. Notably, other courts have expressed the opposite view, finding that an affirmative defense *does not* decriminalize an otherwise criminal act. *See, e.g.*, State v. Fry, 228 P.3d 1, 6 (Wash. 2010) ("An affirmative defense does not per se legalize an activity and does not negate probable cause that a crime has been committed."); *see also* United States v. Mahmood, No. 07-MJ-603, 2009 WL 1118085, at *1 (E.D.N.Y. Apr. 27, 2009) ("Facts giving rise to an affirmative defense, however, do not negate probable cause; an affirmative defense 'is an excuse for a crime, not a denial of one.'" (quoting Labensky v. County of Nassau, 6 F. Supp. 2d 161, 177 (E.D.N.Y. 1998))). Worth noting, the *Labensky* holding pertained specifically to the defense of entrapment, an affirmative defense which several courts have viewed differently in this context.

118. *See, e.g.*, Morris v. Town of Lexington, 748 F.3d 1316, 1325 (11th Cir. 2014); United States v. Cooper, 293 F. App'x 117, 119 (3d Cir. 2008) (citing Commonwealth v. Robinson, 600 A.2d 957, 959 (Pa. Super. Ct. 1991)); Commonwealth v. Romero, 673 A.2d 374, 377 (Pa. Super. Ct. 1996); GeorgiaCarry.Org, Inc. v. Metro. Atlanta Rapid Transit Auth., No. 1:09-CV-594-TWT, 2009 WL 5033444, at *5 (N.D. Ga. Dec. 14, 2009).

119. *See Diop*, 50 F. Supp. 3d at 419–20, discussed in detail at *supra* Section IV.A.

120. Paff v. Kaltenbach, 204 F.3d 425, 436 (3d Cir. 2000) ("[T]he law recognizes that probable cause determinations have to be made 'on the spot' under pressure and do 'not require the fine resolution of conflicting evidence that a reasonable doubt or even a preponderance standard demands.'" (quoting Gerstein v. Pugh, 420 U.S. 103, 121 (1975))).

121. In *McCarthy v. De Armit*, the Supreme Court of Pennsylvania summed up the definition of probable cause in this way: "The substance of all the definitions is a reasonable ground for belief of guilt." McCarthy v. De Armit, 99 Pa. 63, 69 (1881) (cited approvingly in Carroll v. United States, 267 U.S. 132, 161 (1925)). To be clear, the officer need not predict with certainty whether the suspect would be found guilty, but instead need only make a reasonable determination of

ensure prosecution for a crime and to protect the public from continued criminal conduct. If the totality of the evidence observed by the officer reveals a complete affirmative defense to an alleged crime, neither objective is indulged by arresting the suspect for the sole reason that certain elements of the crime are observed. If the true inquiry is whether the officer reasonably believed the conduct was criminal (and thus justifying arrest for the purpose of ensuring prosecution or protecting the public), the inquiry must include available facts that could establish the conduct was in fact not criminal.

Maintaining focus on the "totality" and "reasonableness" requirements has underpinned the success of some plaintiffs on this issue; still, many courts are reluctant to include evidence of an affirmative defense in the analysis, often due to misplaced reliance on principles appearing to, but that do not, require exclusion. Part V explains how the True Totality Rule is actually in harmony with certain principles on which courts often rely when refusing to consider evidence of an affirmative defense in the probable cause determination.[122]

V. AFFIRMATIVE DEFENSE INCLUSION SQUARES WITH TRADITIONAL PROBABLE CAUSE PRINCIPLES

There are certain universally accepted interrelated probable cause concepts that some courts have found to be in conflict with affirmative defense inclusion in probable cause analysis. To the contrary, the Rule aligns and can be uniformly reconciled with the general principles of each. One position commonly asserted by defendant officers (and regularly adopted by courts) is that an affirmative defense is a mechanism to be invoked at trial to determine guilt, and is therefore not relevant at the scene of an arrest on the determination of probable cause.[123] Another is the notion that once an officer has probable cause for the arrest, he has no duty to investigate further or to rule out claims of innocence.[124] The third is the often unqualified assertion that an officer's subjective motives are irrelevant in probable cause analysis.[125] As will be discussed below, these general principles remain substantially undisturbed even upon adoption of the True Totality Rule.

A. AN AFFIRMATIVE DEFENSE IS ASSERTED AT TRIAL IN DEFENSE OF THE CRIME

An argument often made against affirmative defense inclusion in the probable cause analysis is that an affirmative defense is to be presented at trial

whether it is *probable* that they be found guilty based on the totality of facts and circumstances available to the officer at the time of the arrest.

122. *See infra* Part V.

123. *See infra* Section V.A.

124. *See infra* Section V.B.

125. *See infra* Section V.C.

on the issue of guilt, not evaluated on the scene of an arrest.[126] It is true that an affirmative defense is typically asserted by the defendant in response to a criminal complaint, and facts supporting the defense are evaluated in criminal proceedings in determining guilt beyond a reasonable doubt. Often, however, these facts are also available to the officer prior to effecting the arrest. Certainly, it would be unreasonable to require an officer to predict with certainty at the moment of arrest how a jury would resolve a factual dispute on the issue; nonetheless, when there is no reasonable dispute as to the existence of facts supporting an affirmative defense, the officer's knowledge of such facts should affect probable cause.

The use of an affirmative defense at trial and the inclusion of facts supporting an affirmative defense in probable cause analysis are not mutually exclusive and, in fact, utilize distinct analyses. In a criminal proceeding, facts supporting an affirmative defense are evaluated to resolve whether a crime had been committed;[127] in a civil action for false arrest, such facts are evaluated to determine the reasonableness of the arrest.[128] At the criminal trial, the fact finder considers all admissible facts in existence that support the affirmative defense; in probable cause analysis, only those facts available to the arresting officer are reviewed.[129] In a criminal setting, the burden of proving the affirmative defense varies by defense and by jurisdiction,[130] but at the scene of the arrest, it is *always* the burden of the officer to consider the totality of facts in resolving probable cause. Moreover, the determination of guilt beyond a reasonable doubt and the reasonableness of an arrest are independently resolvable. Consider this hypothetical: A citizen is found in possession of marijuana by a police officer.[131] The citizen tells the officer he has a prescription but has no prescription card in his possession. Because the officer has no obligation to believe the suspect, and presumably no duty to investigate further, the officer likely has probable cause to proceed with the

126. *See, e.g.*, Holman v. City of York, 564 F.3d 225, 231 (3d Cir. 2009) (finding it would be impractical to require the officer to "painstakingly . . . weigh possible defenses" on the scene of the arrest, "particularly given the rapidity with which the events transpired here"); State v. Decker, No. 73949-2-1, 2017 WL 1137220, at *5 (Wash. Ct. App. Mar. 27, 2017), *review dismissed*, State v. Decker, 403 P.3d 43 (Wash. 2017) (finding that the validity of an affirmative defense is a determination made by the court, not an arresting officer).

127. 115 AM. JUR. PROOF OF FACTS 3D 309, *Proof of Necessity Defense in a Criminal Case* § 22 (2019).

128. *See* Hunter v. Bryant, 502 U.S. 224, 227 (1991).

129. Beck v. Ohio, 379 U.S. 89, 96 (1964); *accord* Smith v. Dowson, 158 F.R.D. 138, 141 (D. Minn. 1994) (finding evidence relating to police investigation which occurred after the arrest was irrelevant in probable cause analysis).

130. *See* Martin v. Ohio, 480 U.S. 228, 235–36 (1987) (discussing state law on burden shifting in proving self-defense; all but two states put the burden on the prosecution to prove the absence of self-defense once properly raised by the defendant).

131. In this hypothetical, the alleged crime is possession of marijuana and the affirmative defense is a medical marijuana prescription. But these facts could be easily interchanged with other possession-related crimes for which a statutory affirmative defense would remove criminal culpability, such as having a prescription for a controlled substance, or a license to possess a firearm.

arrest. Assume, however, the suspect had provided the prescription card to the officer. Should presentment of the license defeat probable cause? While one would assume that presentment of a license *should* keep someone from being hauled into jail, courts are split on whether production of a prescription card is sufficient to thwart probable cause to arrest.[132] Moreover, it may be reasonable for the officer to discredit, and thus ignore, the presentment of the affirmative defense, if there is evidence the document is fake or otherwise fraudulent.[133]

Now add the additional fact that the suspect had previously been arrested by this officer on the same charge, and in that case it was determined the suspect's license was in fact valid. In this scenario, probable cause is likely lacking where a reasonable officer with that information would have known the defense was available and therefore no crime had been committed. The point made here is that the citizen, under all versions of the hypothetical, should be found not guilty if able to present *at trial* a valid license to possess. Such a finding, however, would not affect probable cause for the original arrest ex post, which, as illustrated here, is a separate and distinct inquiry. Only upon an independent finding that the officer was unreasonable in ignoring exculpatory facts available should a court find probable cause lacking.

The Third Circuit addressed the issue in the context of criminal firearm possession where licensure was an affirmative defense to the crime.[134] Failing to distinguish the use of an affirmative defense at trial with its role in probable cause analysis, the Third Circuit found the affirmative defense of licensure irrelevant to the determination of probable cause.[135] Following Pennsylvania

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132. *See, e.g.*, United States v. Fieck, 54 F. Supp. 3d 841, 843 (W.D. Mich. 2014) (stating that defendant's medical marijuana card, allowing him to both grow and consume medical marijuana, did not negate probable cause for a search warrant); People v. Strasburg, 56 Cal. Rptr. 3d 306, 311 (Ct. App. 2007) ("The fact that defendant had a medical marijuana prescription, and could lawfully possess an amount of marijuana greater than that Deputy Mosely initially found, does not detract from the officer's probable cause."). *But see* Allen v. Kumagai, 356 F. App'x 8, 9 (9th Cir. 2009) (holding "the officers' knowledge of his medical authorization may be relevant to whether they had probable cause to believe he had committed a crime").

133. Permitting an officer to discount or believe to be fraudulent a written prescription or similar authorization document presented by a citizen pre-arrest is in line with the permitted, yet controversial practice of government agencies refusing to give full faith and credit to birth certificates presented for the purpose of obtaining a passport. *See generally* Sanchez v. Kerry, 648 F. App'x 386 (5th Cir. 2015) (per curiam) (discussing doubt as to validity). In *Sanchez*, however, there were factors that created doubt as to the validity of the government issued passport (i.e., it was issued by a particular midwife who was known for issuing fraudulent birth certificates). *Id.* Thus, absent reason to doubt the authenticity of the document, officers should be compelled to take it at face value; otherwise, there would be no realized value in possessing and presenting the document.

134. United States v. Cooper, 293 F. App'x 117, 120 (3d Cir. 2008); United States v. Bond, 173 F. App'x 144, 146 (3d Cir. 2006).

135. *See, e.g.*, *Cooper*, 293 F. App'x at 120 (finding that the affirmative defense of licensure is irrelevant); *Bond*, 173 F. App'x at 146 (citing Commonwealth v. Bigelow, 399 A.2d 392, 396 (Pa. 1979)) (finding that the affirmative defense of licensure is irrelevant).

courts, who have interpreted the relevant criminal statute (which contains the affirmative defense of licensure) as not requiring the prosecution to prove at trial that the suspect did not have a license for the firearm, the Third Circuit concluded the arresting officer also need not consider licensure prior to making the arrest.[136] In *United States v. Bond*, the court noted that "under Pennsylvania law, a police officer has probable cause to arrest an individual for violation of section 6108 based solely on the officer's observation that the individual is in possession of a firearm on the streets of Philadelphia."[137] Though an officer observing a citizen with a firearm may have reasonable suspicion sufficient to stop and question the individual to determine whether they had a license, to say the officer had probable cause to arrest the citizen is an extreme conclusion.[138] Applying the probable cause standard used in *Bond* to other conduct prohibited without a license by statute exposes the unfeasibility of universal application. For instance, Pennsylvania Statute section 1501 expressly prohibits the driving of a "motor vehicle upon a highway or public property,"[139] something several million Pennsylvanians do every day. Like section 6108 (firearm possession), section 1501 (operating a motor vehicle) includes the affirmative defense of *licensure* (i.e., a driver's license).[140] Applying the standard used in *Bond*, probable cause for an arrest for a violation of section 1501, i.e., driving a car, would materialize upon the mere observation by law enforcement of an individual driving a motor vehicle in the Commonwealth of Pennsylvania—an absurd result when viewed in this context.[141]

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136. *See, e.g.*, *Cooper*, 293 F. App'x at 117; *Bond*, 173 F. App'x at 146.

137. *Bond*, 173 F. App'x at 146 (citing Commonwealth v. Romero, 673 A.2d 374, 377 (1996)). Later, in *Cooper*, the court appeared to retract slightly its position in *Bond*, finding observation of an individual of a firearm in a public place provided *reasonable suspicion* to detain the individual, as opposed to probable cause for the arrest. *Cooper*, 293 F. App'x at 119. In *Cooper*, the individual did not have a license. *Id.*

138. *See generally* United States v. Santana, 427 U.S. 38, 48 (1976) (Marshall, J., dissenting) ("While a police decision that the time is right to arrest a suspect should properly be given great deference . . . the power to arrest is an awesome one and is subject to abuse." (citation omitted)); BeVier v. Hucal, 806 F.2d 123, 127 (7th Cir. 1986) (finding an officer has a duty "to make a thorough investigation and exercise reasonable judgment before invoking the awesome power of arrest and detention" (quoting Moore v. Marketplace Rest., Inc., 754 F.2d 1336, 1345–46 (7th Cir. 1985))).

139. 75 PA. CONS. STAT. § 1501 (2018).

140. *Compare* 75 PA. CONS. STAT. § 1501 ("No person, except those expressly exempted, shall drive any motor vehicle upon a highway or public property in this Commonwealth unless the person has a driver's license valid under the provisions of this chapter."), *with* 18 PA. CONS. STAT. § 6108 (2018) ("No person shall carry a firearm, rifle or shotgun at any time upon the public streets or upon any public property in a city of the first class unless . . . such person is licensed to carry a firearm . . . .").

141. Even assuming *Cooper* overruled *Bond* (which is unlikely due to the fact the *Cooper* opinion makes no mention of *Bond*) the standard set out in *Cooper* would still lead to ridiculous results if applied broadly, in that it would create reasonable suspicion sufficient to permit an officer to pull over any person he observed operating a vehicle on a public highway.

Certain courts have found the argument persuasive that an affirmative defense is logically irrelevant in probable cause analysis because, to assert an affirmative defense, one must first admit having committed the crime, and an admission of having committed a crime conclusively establishes probable cause.[142] This argument, however, ignores the procedural distinctions between a criminal trial (where the inquiry is the culpability of the defendant), and the later-in-time civil suit for false arrest (where the inquiry is the reasonableness of the seizure). Contrary to the view of some,[143] the right to assert an affirmative defense to a criminal charge does not somehow make evidence of the defense irrelevant in probable cause analysis. Though an officer may not be burdened with the task of determining guilt beyond a reasonable doubt at the scene of the arrest, the Fourth Amendment nonetheless requires a reasonable determination be made as to the probability of guilt. If the officer has evidence that the suspect is legally justified in his actions, this factor must play a role in assessing such probability. As noted in *Thomas*, "[t]he Fourth Amendment does not permit police officers to arrest individuals whom they know have done nothing wrong, based solely on the formalistic distinction between 'elements of a crime' and 'affirmative defenses.'"[144]

B. NO DUTY TO INVESTIGATE FURTHER ONCE PROBABLE CAUSE IS ESTABLISHED

The law provides that once a law enforcement officer has an objectively reasonable belief that a crime has or is about to be committed, the officer has

142. *See* Beiles v. City of Chicago, 987 F. Supp. 2d 830, 836–37 (N.D. Ill. 2013) ("There is no legal basis for allowing an affirmative defense, which might have allowed the plaintiff to escape a conviction . . . to interfere with the established . . . probable-cause-to-arrest analysis." (quoting Humphrey v. Staszak, 148 F.3d 719, 724 (7th Cir. 1998))); Morrison v. Exec. Aircraft Refinishing, Inc., 434 F. Supp. 2d 1314, 1318 (S.D. Fla. 2005) ("By its very definition, '[a]n affirmative defense is established only when a defendant *admits the essential facts* of a complaint and sets up other facts in justification or avoidance.'" (alteration in original) (quoting Will v. Richardson-Merrell, Inc., 647 F. Supp. 544, 547 (S.D. Ga. 1986))); Corbett v. Goode, No. 87-7360, 1990 WL 181499, at *5 (E.D. Pa. Nov. 19, 1990) ("Defendants persuasively argue that the availability of the affirmative defense in the statute is logically irrelevant to issue of whether probable cause to arrest existed: 'The availability of an affirmative defense focuses on the ultimate analysis of guilt *at trial*, but has nothing to do with whether the threshold elements of the offense, or probable cause, existed *at the time of arrest* . . . [I]n order to assert the affirmative defense, plaintiff must first admit that she committed the crime of defiant trespass as charged. Logically, an admission that she committed the act charged also constitutes an admission that probable cause existed.'" (alteration in original) (quoting Memorandum of Law in Support of Defendant's Motion for Summary Judgment at 15, 16)).

143. *See, e.g.*, *Humphrey*, 148 F.3d at 724 ("Entrapment is not part of our Fourth Amendment probable-cause-to-arrest analysis. . . . [It] is an affirmative defense of a criminal defendant to otherwise culpable conduct.").

144. Thomas v. City of Galveston, 800 F. Supp. 2d 826, 836 (S.D. Tex. 2011).

no duty to investigate further before arresting the suspect.[145] It follows, then, that an officer would have no furthering obligation to investigate a suspect's claims of innocence[146] or mere assertion of an affirmative defense to the crime.[147] Courts have held an officer's failure to pursue potentially exculpatory leads will not in itself negate probable cause.[148] As such, the law does not require the officer to "exhaust every potentially exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established."[149] The query in a civil matter for false arrest is whether probable cause existed to reasonably believe a suspect engaged in criminal conduct; this reasonableness standard "does not require an officer to be certain that subsequent prosecution of the arrestee will be successful."[150] As noted by the Supreme Court, "[t]he Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted—indeed, for every suspect released."[151] Without diminishing these basic tenets, some courts have imposed on an officer a duty to conduct some minimal investigation when principles of reasonableness require it. In *Romero v. Fay*, the Tenth Circuit acknowledged police need not interview alleged alibi witnesses, but found the officers had a duty "to

145. *See, e.g.*, Ahlers v. Schebil, 188 F.3d 365, 371 (6th Cir. 1999) ("Once probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused."); Schertz v. Waupaca Cty., 875 F.2d 578, 583 (7th Cir. 1989) ("[I]t appears that once police officers have discovered sufficient facts to establish probable cause, they have no constitutional obligation to conduct any further investigation in the hopes of uncovering potentially exculpatory evidence." (citing Baker v. McCollan, 443 U.S. 137, 145–46 (1979))).

146. *Baker*, 443 U.S. at 145–46 ("Given the requirements that arrest be made only on probable cause and that one detained be accorded a speedy trial, we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence . . . ."); *accord* Beauchamp v. City of Noblesville, 320 F.3d 733, 744 (7th Cir. 2003); *see also* Panetta v. Crowley, 460 F.3d 388, 395–96 (2d Cir. 2006) ("[A]n officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause.").

147. *See Baker*, 443 U.S. at 145–46 (holding that an officer has no duty to investigate the validity of any defense prior to effecting an arrest); *see also* Frodge v. City of Newport, 501 F. App'x 519, 527 (6th Cir. 2012) ("[W]hen a suspect asserts an affirmative defense, this does not automatically vitiate probable cause. The officer is not required to accept the explanation without question . . . ."); Hodgkins *ex rel.* Hodgkins v. Peterson, 355 F.3d 1048, 1061 (7th Cir. 2004).

148. *See, e.g.*, Wadkins v. Arnold, 214 F.3d 535, 541 (4th Cir. 2000) ("Although an officer may not disregard readily available exculpatory evidence of which he is aware, the failure to pursue a potentially exculpatory lead is not sufficient to negate probable cause." (citations omitted)); Jean v. City of New York, No. 08-CV-00157, 2009 WL 3459469, at *6 (E.D.N.Y. Oct. 22, 2009) ("Simply asking a few more questions to get a more complete picture might have even saved Jean from the burden of undergoing stressful and time-consuming prosecution. Hindsight, of course, is 20–20. But the law does not require hindsight, let alone a perfect investigation prior to establishing probable cause to arrest."); Black v. District of Columbia, 466 F. Supp. 2d 177, 180 (D.D.C. 2006) ("[F]ailure to investigate a suspect's alibi does not belie probable cause." (citation omitted)).

149. Torchinsky v. Siwinski, 942 F.2d 257, 264 (4th Cir. 1991) (citation omitted).

150. Krause v. Bennett, 887 F.2d 362, 371 (2d Cir. 1989).

151. *Baker*, 443 U.S. at 145.

reasonably interview witnesses readily available at the scene, investigate basic evidence, or otherwise inquire if a crime has been committed at all before invoking the power of warrantless arrest and detention."[152] Similarly, in *Sevigny v. Dicksey,* the Fourth Circuit found probable cause lacking where the officer unreasonably failed to interview witnesses at the scene of an automobile accident who would have verified the arrestee's version of the facts.[153] There, the court emphasized the officer's failure to "avail himself of readily available information that would have clarified matters to the point that one of the offenses would have been flatly ruled out as factually unsupportable."[154] In *Bigford v. Taylor*, the Fifth Circuit concluded the facts available to the officer were insufficient to establish probable cause where "[m]inimal further investigation . . . would have reduced any suspicion created by the facts the police had discovered."[155] In each case, the courts supported the idea that officers must conduct some investigation when reasonableness requires it.

A cognizable argument can be made that probable cause analysis requires not only an inquiry into the totality of facts available to the officer at the moment of arrest, but also the reasonableness of the investigation performed.[156] Much uncertainty lies in the interpretation of the phrase "readily available" used by many courts in discussing the totality of the information *available* to the officer—whether it encompasses only facts actually known to the officer at the moment of arrest, or also includes those additional potentially exculpatory facts which could be obtained with minimal effort or investigation. Whether an officer has a duty to conduct a minimal investigation into potentially exculpatory facts is beyond the scope of this Article, but it would seem that a rule requiring at least some minimal investigation in non-exigent circumstances would appeal to the notion of reasonableness.

For jurisdictions that already require a minimal investigation into potentially exculpatory evidence prior to making an arrest, imposing the True Totality Rule would add little to any burden on law enforcement. Even in jurisdictions that hold that no investigation is necessary in resolving probable cause, such a view would not be offended by the True Totality Rule, as the Rule would only require consideration of the officer's *present knowledge* of facts supporting an affirmative defense. Such knowledge is within the totality of facts and circumstances which must be considered in determining

152. Romero v. Fay, 45 F.3d 1472, 1476–77, 1477 n.2 (10th Cir. 1995).

153. Sevigny v. Dicksey, 846 F.2d 953, 956–58 (4th Cir. 1988).

154. *Id.* at 957.

155. Bigford v. Taylor, 834 F.2d 1213, 1219 (5th Cir. 1988); *see also* Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999).

156. *See* Barfield v. Louisiana *ex rel.* La. Dep't of Justice, 325 F. App'x 292, 296 (5th Cir. 2009) ("[A]n officer must have probable cause to make an arrest based on an investigation that was reasonable under the circumstances.").

reasonableness for the seizure, especially where such seizure is deemed lawful only upon an objectively reasonable conclusion "that the suspect had committed or was committing an offense."[157] As noted by the court in *Thomas*, "[t]his is in line with the distinction . . . between considering facts actually known by the officer (which officers must do) and investigating all potential defenses (which they need not to do)."[158]

C. OFFICER MOTIVES ARE IRRELEVANT IN PROBABLE CAUSE ANALYSIS

In *Whren v. United States*, the Supreme Court concluded matter-of-factly that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[159] These facts alleged to be known to the officers establish Mr. Thomas' right to defend his property, and, thus, if found to be true, should negate probable cause.[160] *Thomas* illustrates the distinction between an officer's *motive* (subjective) and his awareness of certain *facts* relating to such motive (which may be objectively evaluated).

Moreover, a distinction should be noted between the arguably legitimate ulterior motives of law enforcement exemplified in *Whren* and cases cited therein, and the self-serving unlawful motives present in cases such as *Thomas* and *Jocks*. For instance, in *Whren*, the ulterior motive was to gather evidence to secure an arrest for the commission of an actual crime. Conversely, in *Thomas* and *Jocks*, the officers' alleged motive for the arrest was to cover up their own unlawful conduct. In *Whren*, an articulated distinction could be made between the officer's subjective motive and the objectively reasonable basis for seizure; this is not the case in *Thomas* and *Jocks*, where the officers' subjective motive for the arrest and objective reasonableness are inseparable, and therefore must be analyzed as such.

VI. VIABILITY OF THE RULE AND ISSUES WITH IMPLEMENTATION

Adoption of the True Totality Rule will require significant flexibility by the courts, education and training of law enforcement, and monitoring. First, courts will need to grapple with whether the rule would apply to pending cases, or only to matters arising after the adoption of the rule, for purposes of

157. *See, e.g.*, United States v. Levine, 80 F.3d 129, 132 (5th Cir. 1996) (citing United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995)).

158. Thomas v. City of Galveston, 800 F. Supp. 2d 826, 836 (S.D. Tex. 2011).

159. Whren v. United States, 517 U.S. 806, 813 (1996); *see also* Scott v. United States, 436 U.S. 128, 138 (1978) (agreeing that "[s]ubjective intent alone . . . does not make otherwise lawful conduct illegal or unconstitutional"); Gustafson v. Florida, 414 U.S. 260, 266 (1973) (holding that an officer may search a suspect's person incident to a custodial arrest, even without a subjective fear of the suspect); United States v. Robinson, 414 U.S. 218, 221 n.1 (1973) (finding a traffic-violation arrest to be lawful, even if it were a pretext for a drug search).

160. *Thomas*, 800 F. Supp. 2d at 837 ("'[I]n assessing probable cause to effect an arrest,' [the officers] could not 'ignore information known to [the]m which proves that the suspect is protected by an affirmative legal justification for his suspected criminal actions.'" (first and third alterations in the original) (quoting Painter v. Robertson, 185 F.3d 557, 571 (6th Cir. 1999))).

the clearly established prong of qualified immunity. To overcome current obstacles of the "clearly established" prong of the qualified immunity defense, courts must find that existing clearly established rules of law already encompass the True Totality Rule, must analyze the clearly established prong of qualified immunity only after analyzing and ruling preliminarily on probable cause *with* consideration of facts supporting an available affirmative defense, and must be wary of analyzing the issue *arguendo*. Additionally, police departments will need to retrain their officers; while this Article posits that officers have always had the duty to incorporate both inculpatory and exculpatory facts into the analysis, most officers have not been trained on the role of an affirmative defense in evaluating probable cause. Finally, the rule must be monitored to ensure its application does not result in excessive liability against law enforcement; the primary purpose of the rule is to reduce the frequency in which innocent citizens are arrested, not to increase the frequency of false arrest claims.

A. OBSTACLES TO OVERCOME IN LIGHT OF THE "CLEARLY ESTABLISHED" PRONG OF THE QUALIFIED IMMUNITY DEFENSE

Immediate adoption of the rule proposed by this Article may nonetheless leave some plaintiffs without a remedy, as the government actor could argue the rule had not yet been established at the time of their alleged conduct. As previously discussed, a government official may be immune from liability even for proven violations of a citizen's constitutional right if the conduct alleged was objectively reasonable in light of the clearly established law at the time the challenged conduct occurred.[161] Thus, even if it was determined that a particular arrest was unlawful, liability would be avoided unless the law relevant to the particular incident was "so clearly established that no reasonable officer, faced with the situation before [the defendant], could have believed that probable cause to arrest existed."[162]

The Supreme Court has never given a wholly convincing definition of what it means for a right to be "clearly established,"[163] but in view of its cumulative precedent spanning the last three decades, and particularly in its recent holding in *District of Columbia v. Wesby*, it appears the Court is willing to find liability only where there is an established law highly specific to the issue in question, and which has been applied to facts similar to the case at hand.[164] The Court in *Wesby* not only reiterated its previously expressed view that "[t]he

161. Anderson v. Creighton, 483 U.S. 635, 639 (1987) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982)).

162. Post v. City of Fort Lauderdale, 7 F.3d 1552, 1559 (11th Cir. 1993); *see also Anderson*, 483 U.S. at 640 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.").

163. John C. Williams, Note, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1298–99 (2012).

164. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 589–90 (2018).

rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted[,]'"[165] but reemphasized the need to utilize "a high 'degree of specificity'" in determining whether the rule, law, or right in question was clearly established.[166] In *Wesby*, officers arrested several individuals for trespass despite their claims that they believed they had permission to be there (arguably, an affirmative defense, though the court referred to it as an "innocent explanation").[167] The Court determined that there was no "robust" precedent requiring an officer to accept the individuals' "bona fide belief" that they had permission to be on the property, and to the contrary, there existed precedent indicating the officers had no such duty; as a result, the Court found the officers could not have been found to have violated a law so clearly established that all officers would know of it.[168] Rather than analyzing the relevance of the evidence tending to dissipate probable cause, the Court instead concluded the plaintiffs failed to establish the "clearly established prong" necessary to overcome the defense of qualified immunity.[169] This ruling signals the reality that even if the Court were to encounter the affirmative defense-probable cause issue, it would likely refuse to decide the question and instead determine that, because it had not yet decided the question, it was not clearly established. Thus the officers, and arguably all future officers into perpetuity, would be entitled to qualified immunity.

While the court in *Thomas* was willing to dissipate qualified immunity upon finding to be clearly established the general rule that a citizen has a right to be free from an unreasonable seizure, had that been appealed, the current Supreme Court would likely have found such a finding violative of its maxim "that courts must not 'define clearly established law at a high level of generality . . . .'"[170] Notable is another recent ruling in *White v. Pauly*, where the Court opined a law is not "clearly established" with sufficient specificity unless the § 1983 plaintiff can "identify a case where an officer acting

165. *Id.* at 590 (quoting Saucier v. Katz, 533 U.S. 194, 202 (2001)).

166. *Id.* (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015) (per curiam)). The degree of specificity was further refined in *Kisela v. Hughes*, where the Court found that the law was not sufficiently clear in the Ninth Circuit on question of whether it was reasonable for an officer to shoot a woman standing in her driveway with a kitchen knife who, as the facts were described by Justice Sotomayor in her dissent, "posed no objective threat of harm to officers or others, had committed no crime, and appeared calm and collected during the police encounter." Kisela v. Hughes, 138 S. Ct. 1148, 1158 (2018) (Sotomayor, J., dissenting) (per curiam). Although the Ninth Circuit *had* previously denied qualified immunity to an officer under similar circumstances (the suspect had a crossbow, as opposed to a knife), the Court went out of its way to distinguish that case from the one before it and, as a result, appeared to shift the definition of "similar" to mean something closer to "identical." *Id.* at 1159, 1161.

167. *Wesby*, 138 S. Ct. at 589.

168. *Id.* at 591–93.

169. *Id.* at 593.

170. *Id.* at 590 (quoting Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)).

under similar circumstances . . . was held to have violated the Fourth Amendment."[171]

The rulings in *Wesby*, *White* and others illustrate the Court's apparent disconnect from the origins and intent of the Fourth Amendment, and further demonstrate how qualified immunity has slowly morphed into absolute immunity, or frighteningly close to it. In an effort to protect government actors from liability, the specificity now required for a law to be clearly established swings the scales so far in favor of the government that it has become nearly impossible for plaintiffs to overcome qualified immunity. Not only did the Court in *Wesby* amplify its prior specificity requirement on the clearly established prong, it reiterated that courts should avoid resolving the constitutional claim when the matter can be disposed of pre-trial upon a finding of qualified immunity.[172]

The Doctrine of Qualified Immunity was created by the Court, not by Congress, and many scholars opine that the Doctrine directly contradicts the intent of Congress in enacting § 1983 of the Civil Rights Act of 1871.[173] Congress could take action to effectively eliminate or modify the Doctrine as necessary to ensure access to relief to those harmed by unconstitutional acts of government officials.[174]

1. Clearly Established General Constitutional Rules Already Encompass the True Totality Rule

Even if the True Totality Rule is not by itself clearly established in a particular jurisdiction, clearly established general statements of the law may be capable of giving the government actor fair and clear warning. While the Supreme Court in recent cases has discouraged defining clearly established law at a high level of generality,[175] it has in the past found that "a general

171. White v. Pauly, 137 S. Ct. 548, 552 (2017).

172. *Wesby*, 138 S. Ct. at 589 n.7 ("We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim." (quoting Camreta v. Greene, 563 U.S. 692, 707 (2011))).

173. *See* Caryn J. Ackerman, Comment, *Fairness or Fiction: Striking a Balance Between the Goals of § 1983 and the Policy Concerns Motivating Qualified Immunity*, 85 OR. L. REV. 1027, 1027 (2006) ("[I]f left unfettered, the doctrine persistently threatens the promise of 42 U.S.C. § 1983—that all persons have a remedy by law when public officials deprive them of rights secured by the Constitution and laws of this country."); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1802–03 (2018) (describing how the modern doctrine exceeds the liability defenses contemplated at the time the law was enacted).

174. *See* Jon O. Newman, Opinion, *Here's a Better Way to Punish the Police: Sue Them for Money*, WASH. POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c06o8ad4-3959-11e6-9ccd-d6005beac8b3_story.html [https://perma.cc/R8LK-GFMU] (arguing that "the defense of qualified immunity should be abolished" by Congress). *But see generally* Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999 (2018) (proposing a good case for why the judicial branch is best suited to course correct the Doctrine that has lost its way).

175. *See, e.g.*, *Wesby*, 138 S. Ct. at 590.

constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'"[176]

The Court's earlier views on this issue, that "a general constitutional rule already identified in the decisional law" could satisfy the fair warning requirement,[177] provide a more balanced approach in analyzing the availability of qualified immunity. In *Thomas*, the defendant officers contended that because the Fifth Circuit had not previously ruled that probable cause analysis included the officer's knowledge of a suspect's affirmative defense, the concept was not clearly established for purposes of qualified immunity.[178] In support, the defendants relied on *Sorenson v. Ferrie* wherein the court held if the legal standard is novel, unknown or ambiguous, then prevailing law may not be clearly established.[179] The court in *Thomas*, however, flatly rejected any assertion the concept was novel or unknown, finding that both the constitutional "right to be free from arrest without probable cause,"[180] and that probable cause determination requires examination of "the 'totality of facts and circumstances within a police officer's knowledge at the moment of arrest[,]'" including those demonstrating an available affirmative defense,[181] were clearly established. Although the Fifth Circuit had yet to expressly rule on the specific issue, and in fact had declined to do so on two prior occasions,[182] the court in *Thomas* found the general proposition was clearly established.[183]

Arriving at the opposite conclusion, however, the district court in *Sanchez v. Labate* granted qualified immunity despite allegations the officers were aware of evidence the suspect was acting in self-defense.[184] The court in

176. United States v. Lanier, 520 U.S. 259, 271 (1997) (alteration in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). However, "when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary" in order for the rule of law to be clearly established. *Id.* at 271.

177. *Id.*

178. *See* Defendants' Motion to Dismiss for Failure to State a Claim at 21, Thomas v. City of Galveston, 800 F. Supp. 2d 826 (S.D. Tex. 2011) (No. 4:10-cv-3331), 2011 WL 13322923.

179. Sorenson v. Ferrie, 134 F.3d 325, 330 (5th Cir. 1998).

180. *Thomas*, 800 F. Supp. 2d at 837 (quoting Mangieri v. Clifton, 29 F.3d 1012, 1016 (5th Cir. 1994)); Estate of Dietrich v. Burrows, 167 F.3d 1007, 1012 (6th Cir. 1999).

181. *Thomas*, 800 F. Supp. 2d at 836 (quoting United States v. Wadley, 59 F.3d 510, 512 (5th Cir. 1995)).

182. *See* United States v. Craig, 381 F. App'x 459, 461 (5th Cir. 2010); Piazza v. Mayne, 217 F.3d 239, 246–47 (5th Cir. 2000).

183. *Thomas*, 800 F. Supp. 2d at 837; *accord* Williams v. Sirmons, 307 F. App'x 354, 358–59 (11th Cir. 2009) (explaining that "[t]he law has been clearly established since at least the Supreme Court's decision in *Carroll v. United States* . . . that probable cause determinations involve an examination of all facts and circumstances *within an officer's knowledge at the time of an arrest*." (citation omitted) (quoting *Dietrich*, 167 F.3d at 1012)).

184. Sanchez v. Labate, 564 F. App'x 371, 372–74 (10th Cir. 2014).

Sanchez concluded that, at the time of the arrest, it "was not clearly established" that an officer must give any credence to an affirmative defense where the elements of the crime are otherwise established.[185] The court found unconvincing the plaintiff's assertion that holdings in other circuits clearly establish the requirement; the court found only Supreme Court or Tenth Circuit decisions specifically to this point could make the law "clearly established" for purposes of qualified immunity.[186] Adding blur to the haze is this question of whether the clarity of a relevant rule of law should be viewed with such jurisdictional restrictions.[187] That is, whether courts should look to other jurisdictions in determining the "established" factor of the test.[188]

If a particular jurisdiction had yet to rule on the issue, an argument could be made that no reasonable officer in that jurisdiction could have known that the affirmative defense must be considered. But what if the jurisdiction had not yet addressed the issue, but the majority of other circuits had found affirmative defenses must be considered? Or, what if the rule had been adopted in a particular jurisdiction, but there was an intra-circuit split on whether evidence of the defense must be observed first-hand? Also, even if a jurisdiction had ruled on the issue, if the ruling pertained only to a particular affirmative defense, such as self-defense, a subsequent officer who failed to

185. *Id.* at 372–74 (quoting Robbins v. Oklahoma, 519 F.3d 1242, 1249 (10th Cir. 2008)). Because the court analyzed the effect of the affirmative defense on probable cause despite finding the law "not clearly established," it remains unclear whether the court's ruling was that probable cause was not negated by the affirmative defense (because either "evidence of self-defense . . . was [not] *conclusively* established" or because New Mexico law does not require evidence of an affirmative defense to be presented to a grand jury in determining probable cause for an indictment), or whether the officer was entitled qualified immunity despite probable cause having been negated (because the concept "was not clearly established"); or both. *Id.* at 374. The court's analysis here presents a prime example of how courts intermingle and even merge the inquiries, furthering confusion in a realm that is already frightfully confusing, even among scholars.

186. *Id.*

187. *See* Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 955 (2015) (noting that "[d]espite some Supreme Court guidance on what law counts in the clearly-established-law analysis, the question of what law controls is itself still amazingly unclear").

188. Though a majority of courts will consider cases from other jurisdictions when determining whether a particular law is "clearly established" for purposes of qualified immunity, others have ruled only binding precedent shall govern. *See id.* at 955 n.287 (listing cases exemplifying the willingness of the majority of circuit courts to consider rulings from other circuits). *Compare Dietrich*, 167 F.3d at 1012 ("When determining whether a right is 'clearly established,' we look 'first to decisions of the Supreme Court, then to decisions of this Court and other courts within our circuit, and finally to decisions of other circuits.'" (quoting Daugherty v. Campbell, 935 F.2d 780, 784 (6th Cir. 1991))), *with Sanchez*, 564 F. App'x at 372–73 (finding the law "not clearly established" without a ruling by the Supreme Court or the Tenth Circuit). In whole, there appears to be no consistency in this regard. Some courts, like in *Sanchez*, have found that only decisions of the Supreme Court and those within its circuit can be deemed "clearly established," while other courts, such as the *Thomas* court, may consider what the plurality or majority has found, and yet others, like the court in *Dietrich*, incorporate a hierarchical approach that may or may not include consideration of rulings from other jurisdictions.

consider evidence of a different type of affirmative defense, such as necessity, would arguably be without notice of any obligation to consider that defense.[189]

While the ruling in *Sanchez* correctly states that the specific issue before it had not yet been ruled on in the jurisdiction, such a narrow view, like that of the sitting Supreme Court, ignores the clearly established general principles recognized by the court in *Thomas*. The *Thomas* interpretation better aligns with the underlying objectives of the Fourth Amendment and § 1983, as it ensures a remedy for those victimized by false arrest when law enforcement violates clearly established rights set out in the Constitution. Nevertheless, until courts analyze and rule on probable cause in the manner proposed by this Article, citizens will continue to be without a remedy.

2. Analyze Probable Cause First, then Qualified Immunity

As discussed previously, the Supreme Court often emphasizes how courts should avoid addressing the merits of the case when the matter can be resolved on qualified immunity grounds.[190] The reasoning often lies in the promotion of judicial efficiency, as well as the concept that qualified immunity is a defense from suit, and thus law enforcement should be spared from trial. However, if such matters never reach evaluation of the merits, the law can never be clearly established, and extreme constitutional violations will continue undeterred and without recourse.[191] In scenarios where the facts establish a probable cause-negating affirmative defense, courts should analyze probable cause in light of the affirmative defense before summarily granting qualified immunity. The trial court in *Lischner v. Upper Darby Township*, described the need and value to first consider whether the affirmative defense would negate probable cause.[192]

In the context of the particular affirmative defense present in *Lischner*, the court expressed its concern that:

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189. For instance, the Third Circuit has found that evidence of affirmative defenses specifically included in the statute setting forth elements of the crime is relevant in evaluating probable cause; however, the Third Circuit has found that defenses found elsewhere in the law, such as necessity and statute of limitations, need not be considered by an officer. Holman v. City of York, 564 F.3d 225, 230 (3d Cir. 2009) (discussing Radich v. Goode, 886 F.2d 1391, 1396 (3d Cir. 1989)).

190. *See* District of Columbia v. Wesby, 138 S. Ct. 577, 590 (2018); *see also* James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601, 1603–06 (2011) (providing a concise overview of what he refers to as the "order of battle" as it evolved from the mandatory constitutional analysis coming out of *Saucier* to the discretionary model that arose from *Pearson* and remains today the law of the land).

191. *See* Blum, *supra* note 187, at 925–40 (providing a particularized analysis of rulings exemplifying the deleterious consequence of failing to address the merits of the underlying constitutional claim).

192. Lischner v. Upper Darby Twp., No. 05-4546, 2007 WL 433170, at *4 (E.D. Pa. Feb. 5, 2007).

> [I]f courts never reach the question of whether [the affirmative defense is present] in the context of reviewing probable cause, the law will never achieve any greater clarity, and the affirmative defense—which negates the criminality or wrongfulness of the act—will in most cases protect only against conviction, not against the potential inconvenience and stigma of arrest.[193]

The court in *Lischner* emphasized the need to clarify the law so that officers can more easily ascertain, prior to arrest, whether the conduct observed is protected by an affirmative defense; the court reasoned such clarity is necessary to give effect to the right to freedom of expression without risk of arrest and detention. This highlights the major concern regarding the "clearly established" hurdle: If courts routinely grant qualified immunity on failure of the "clearly established" prong, thus avoiding determination on the merits, establishment of a constitutional violation on those particular facts can never be had; thus, if the *exact* scenario occurs again, even if it involved the *same* parties, the defendant police officers arguably could re-assert qualified immunity on the same grounds previously asserted because the constitutional violation was not analyzed and ruled on (and therefore not "established") in the prior case. As eloquently stated by Judge Willett in a concurring opinion:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because those questions are yet unanswered. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads defendants win, tails plaintiffs lose. . . . The current "yes harm, no foul" imbalance leaves victims violated but not vindicated; wrongs are not righted, wrongdoers are not reproached, and those wronged are not redressed.[194]

In order for future plaintiffs to demonstrate the rule proposed by this Article was clearly established at the time of the arrest, courts must, before ruling on qualified immunity, analyze and issue a ruling on probable cause, with such analysis incorporating evidence of the available affirmative defense among the totality of facts considered. If courts continually bypass the analysis in matters involving an affirmative defense, and instead resolve the matter

193. *Id.* at *11 (footnote omitted); *see also* Jonathan M. Freiman, *The Problem of Qualified Immunity: How Conflating Microeconomics and Law Subverts the Constitution*, 34 IDAHO L. REV. 61, 87–88 (1997) ("Though a plaintiff's suit successfully overcoming a defendant's claim of qualified immunity would generate precedent, under *Anderson* a plaintiff cannot overcome qualified immunity unless the law was clear at the time of the alleged incident, that is, unless the decision would add nothing to useful precedent.").

194. Zadeh v. Robinson, 902 F.3d 483, 499 (5th Cir. 2018) (Willett, J., concurring), *withdrawn*, 928 F.3d 457 (5th Cir. 2019).

solely on a finding that incorporation of an affirmative defense was not yet clearly established, citizens will continue to suffer violations of their rights without a remedy. Minor sacrifices in judicial efficiency are justified when necessary to ensure fundamental rights remain secure. Of course, courts analyzing probable cause in the way proposed here must also avoid the tendencies and pitfalls of analyzing arguendo.

3. The Harm of Arguendo

Compounding the confusion on the "clearly established" issue are courts that hold affirmative defenses are irrelevant, then analyze, arguendo or in dicta, whether the evidence of the affirmative defense would have been sufficient to negate probable cause if such evidence were relevant; in these instances, the courts *always* conclude the evidence was not sufficient.[195] In many of these arguendo-rulings, courts declare that the affirmative defense is *irrelevant*, but the analysis reveals the true finding is that the facts of the affirmative defense in the particular case were *insufficient* to negate probable cause. It is quite clear from these rulings that had the facts been sufficient to negate probable cause, the court may have expressed a contrary rule at outset of its analysis: that facts of an affirmative defense *are* relevant. Establishing legal principles based on factual conclusions is dangerous, and likely to impact future cases in a way not intended by these courts. The potential consequence is that a court in a subsequent case faced with facts of an affirmative defense that *are* sufficient to negate probable cause would disregard them in light of earlier precedent broadly deeming them irrelevant regardless.[196]

Courts analyzing in arguendo also exhibit an apparent propensity to afford greater weight to facts supporting their conclusion (i.e., that the affirmative defense is irrelevant), and disregard entirely facts that challenge it, resulting in precedent that is inherently fact-biased. It is also not clear from decisions that include arguendo analysis whether the review and conclusion are merely superlative dicta or part of its holding, and regardless, whether it makes the law any more clear for purposes of qualified immunity.[197]

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195. *See, e.g.*, United States v. Marin, 138 F. App'x 945, 946 (9th Cir. 2005); Radich v. Goode, 886 F.2d 1391, 1396–97 (3d Cir. 1989).

196. Even if the court chose not to disregard the facts in the later case despite the earlier ruling, the defendant officer could successfully assert qualified immunity on the grounds that the earlier ruling deemed affirmative defenses irrelevant, and therefore the officer was not unreasonable in ignoring the facts supporting the affirmative defense.

197. If merely dicta, then it offers little to no advancement in the law, particularly as to whether the law was clearly established. *See* Williams v. Taylor, 529 U.S. 362, 365 (2000) ("[T]he phrase 'clearly established Federal law, as determined by [this] Court' refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." (second alteration in original)); Hamilton v. Cannon, 80 F.3d 1525, 1530 (11th Cir. 1996) ("The law cannot be established by dicta. Dicta is particularly unhelpful in qualified immunity cases where we seek to identify clearly established law."). *But see* Hanes v. Zurick, 578 F.3d 491, 496

The unfortunate consequence of ruling in this manner is the potential to leave a future plaintiff without a remedy: Even when the facts available *are* sufficient to negate probable cause, the officer could claim immunity by pointing to the prior case that held, in its arguendo hypothetical analysis, that the affirmative defense was irrelevant to the probable cause determination. To ensure citizens retain a remedy for an arrest that is determined unreasonable in light of the totality of facts and circumstances, courts should analyze the sufficiency of the affirmative defense as part of the core analysis, not in arguendo.[198]

In view of the vast array of conflicting rulings nationally as to whether and when an affirmative defense is relevant in probable cause determinations, what amounts to a constitutional violation is anything but concrete and fails to establish a law that is predictable or clear for anyone. Additional confusion has come from courts picking and choosing, seemingly arbitrarily, which exculpatory facts or which affirmative defenses bear on probable cause, as well as courts that find the evidence irrelevant then analyze it anyway. A nationally propounded standard that recognizes the general constitutional principles acknowledged by the court in *Thomas* would limit judicial variance on the issue and may clearly establish the law to a level sufficient to give an officer "fair notice" when her conduct was unconstitutional. Unfortunately, this is highly unlikely to occur any time soon given the recent action of the Court to further strengthen and expand the qualified immunity doctrine and to heighten the burdens to establish a law as "clearly established." Short of a significant and unexpected shift in the views of certain Justices, Congressional

(7th Cir. 2009) ("When a court holds that certain conduct violates a constitutional right but that the right was not clearly established, the constitutional ruling is arguably dicta . . . but it still may clearly establish the law for future conduct." (citing Pearson v. Callahan, 555 U.S. 223, 236–38 (2009))); Wilkinson *ex rel.* Wilkinson v. Russell, 182 F.3d 89, 112 (2d Cir. 1999) (Calabresi, J., concurring) ("[L]ucid and unambiguous dicta concerning the existence of a constitutional right can without more make that right 'clearly established' for purposes of a qualified immunity analysis." (citing County of Sacramento v. Lewis, 523 U.S. 833, 841 n.5 (1998))); *see also* Aaron Belzer, Comment, *The Audacity of Ignoring Hope: How the Existing Qualified Immunity Analysis Leads to Unremedied Rights*, 90 DENV. U. L. REV. 647, 649–50 (2012) (discussing how even where a court finds certain governmental conduct in violation of a constitutional right, if the court in the same breath excuses the conduct as objectively reasonable, a later court could find its conclusion pertaining to the constitutional violation mere dicta).

198. In lieu of analyzing the matter arguendo, the court could instead exercise its discretion to first analyze the constitutional claim and issue a ruling in this regard. Even if the court ultimately determines the law was not clearly established and for that reason the officers are entitled to qualified immunity, a ruling on the constitutionality of the acts alleged may help clarify the law in this area. This not only benefits future plaintiffs but educates law enforcement on the constitutionality of certain conduct. Of course, as discussed above, in ruling on the constitutional issue, courts must view the facts in the light most favorable to the plaintiff rather than choosing the facts that align with a preconceived legal conclusion. Courts must also ensure the ruling on the constitutional issue is not perceived as merely dicta. *See* Blum, *supra* note 187, at 925–43.

action may ultimately be necessary to overcome the "clearly established" hurdle.[199]

B. BURDEN ON LAW ENFORCEMENT

The purpose of the proposed rule is not to impose more burden or liability on police officers, or to create additional causes of action for false arrest—the purpose of the rule is to reduce false arrests and to ensure citizens have a remedy when they are falsely arrested. Application of the proposed rule would impose civil liability only if it was found that the arresting officer unreasonably disregarded facts that would have established a complete defense to the crime. Courts and law enforcement defendants often take the position that consideration of an available affirmative defense would be over burdensome on officers who are often forced to make split-second decisions at the scene of an alleged crime.[200] There is no dispute that in some situations the inclusion of this additional factor will add to an already challenging, complex analysis. However, the current analysis already requires a review of the totality of facts and circumstances—the rule merely confirms that evidence of an affirmative defense is among the totality that must be evaluated. The rule does not extend a requirement that the officer investigate and rule out every possible affirmative defense, or that the officer give credence to mere claims of innocence. The officer need only consider the facts and circumstances before her. The rule would also not require an officer to know and understand every possible affirmative defense that the suspect could assert at trial; the officer need only contemplate the affirmative defenses of which a reasonable, prudent officer would be aware.[201] For

199. Professor James E. Pfander, in his article, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, offers an intriguing alternative to relying on the Supreme Court or Congress to resolve the issue. Pfander, *supra* note 190, at 1606–11. In the Article, Professor Pfander posits, "[section] 1983 and *Bivens* litigants should be entitled to obtain an immunity-free determination of their constitutional claims by initiating a suit for nominal damages against the responsible officer." *Id.* at 1607. He asserts, "[b]y removing the threat of personal liability, and with it much of the justification for qualified immunity, the suit for nominal damages would allow the plaintiff to secure a constitutional decision even where the law was not clearly established." *Id.* at 1607–08. While the absence of compensatory damages may result in limited "immunity-free" cases brought, even a few a year could have a significant impact on the development of constitutional law involving circumstances where extreme constitutional violations too often go unpunished. *See id.* at 1608.

200. *See, e.g.*, Holman v. City of York, 564 F.3d 225, 229 (3d Cir. 2009). Holman was protesting outside an abortion clinic when, as he alleges, he was forced to step onto private property in order to avoid being struck by an on-coming car. He was subsequently arrested for trespass. The court found irrelevant his claim that the officer should have known his otherwise unlawful conduct was justified by necessity. The court reasoned that "[r]equiring [an officer] . . . painstakingly to weigh possible defenses, would be impractical, particularly given the rapidity with which the events transpired here." *Id.* at 231.

201. Arguably, however, an officer should be obligated to have knowledge of all possible affirmative defenses available under the law. If ignorance of the law is not available to citizens as a defense to criminal culpability, perhaps it should not be available to police officers as a defense

instance, in *Sands v. McCormick*,[202] the court appropriately concluded the officer had probable cause to arrest the suspect despite some available evidence that the statute of limitations had run on the crime charged (an affirmative defense). In this instance, the court ultimately ruled that the affirmative defense was *irrelevant*, but on the issue of officer liability, it could have come to the same conclusion by ruling the defense *relevant* and the facts *insufficient*. Here, due to the complexities of this particular affirmative defense, no reasonable officer could have had sufficient facts to know the defense would be available at the time of the arrest. Conversely, defenses such as self-defense, defense of property, and necessity could be established with facts typically available to an arresting officer.

Moreover, contrary to the fears expressed by courts and law enforcement, the rule would not require officers to perform the same level of analysis required by judges and juries at trial on the criminal charge. At trial on a criminal charge, the fact finder views *all the evidence*, and determines, *beyond a reasonable doubt*, whether the suspect was guilty of the crime charged. In pre-arrest probable cause analysis, however, the arresting officer need only consider the *evidence available at the time of the arrest*, and determine, within a *reasonable degree of probability,* whether the suspect was guilty of a crime.[203] Though the standard of proof for probable cause is substantially less than what is necessary to convict, the basic inquiry remains the same: Did the suspect commit a crime?[204] If the officer is aware of facts of an affirmative defense that would lead a reasonable officer to believe the answer to that query is no, then it would be unreasonable to subject the citizen to a fundamental right-depriving arrest and the collateral consequences that follow. Importantly, the rule would permit officers to make reasonable mistakes, while discouraging officers from arresting a citizen who they have reason to believe had committed no crime. Because the rule would not require an officer to conduct any additional analysis beyond the totality of the circumstances test, and in fact would relieve the officer of the burden of discerning what type of evidence can be evaluated, the additional encumbrance, if any, would be negligible.

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to civil liability; that is, if a citizen is deemed to have knowledge of the entire criminal code and all available affirmative defenses, so too should a reasonable, prudent officer vested with the power of enforcing these laws.

202. *See* Sands v. McCormick, 502 F.3d 263, 265 (3d Cir. 2007).

203. *See* Mazuka v. Rice Twp. Police Dep't, 655 F. App'x 892, 896 (3d Cir. 2016) (Smith, J., concurring) ("As its name implies, probable cause 'require[s] a belief of guilt that is reasonable, as opposed to certain.'" (alteration in original) (quoting Wright v. City of Philadelphia, 409 F.3d 595, 601–02 (3d Cir. 2005))).

204. *See supra* Section IV.C.

C. POTENTIAL IMPACT ON § 1983 ACTIONS FOR FALSE ARREST

Adoption of the rule proposed by this Article is likely to result in an increase in meritorious § 1983 claims for false arrest. Presumably, all matters that would have been summarily dismissed upon a finding that the officer had no duty to consider the affirmative defense before making the arrest or that such duty was not clearly established, would now proceed to trial.[205] With knowledge of the new rule, civil rights attorneys may be more inclined to accept cases that include evidence that the arresting officer was aware of the citizen's affirmative defense. While this particular issue has arisen in only a few cases comparatively, the low volume may be a result of the present lack of clarity as to the role of an affirmative defense in the analysis. Upon implementation of the new rule, it may be discovered that a significant percentage of alleged false arrests involve facts giving rise to an affirmative defense. Thus, in addition to an increase in the success rate of such claims, there may be an influx in lawsuits filed. Any increase in the volume of claims, however, will hopefully be short-lived.

One would hope that as each jurisdiction adopts the proposed rule and applies it to pending cases, law enforcement agencies would take appropriate steps to train police officers as to the relevance of an affirmative defense in probable cause analysis. It's perhaps naïve and overly optimistic to believe that agencies will be proactive in this step. A few large verdicts or settlements may be necessary to spur such action. Section 1983 monetary awards are intended to be both compensatory and punitive. While the statute aims to provide monetary compensation to the victims of false arrest, the primary effect sought is the prevention and deterrence of future similar conduct. Historically, only significant payouts beget significant change. Considering the right to roam free is arguably the most fundamental of all rights, any increase in the success rate or volume of false arrest claims as a result of the rule proposed would be unquestionably justified.

VII. CONCLUSION

The specific query posed by the court in *Thomas* was "[a]re there any circumstances in which facts relating to affirmative defenses, such as defense of property, [are] relevant to the probable cause inquiry?"[206] While acknowledging there is no duty to investigate an alleged affirmative defense, the court found "under certain circumstances, a police officer's awareness of

205. Notably, an increase in cases proceeding to trial would result in broader and more robust precedent and thus more clarity for courts and law enforcement.

206. Plaintiff's Supplemental Brief on Issues Discussed During the Hearing on Defendants' Motion to Dismiss Held June 10, 2011 at 2, Thomas v. City of Galveston, 800 F. Supp. 2d 826 (S.D. Tex. 2011) (No. H-10-3331), 2011 WL 13273799.

the facts supporting a defense can eliminate probable cause."[207] As exemplified in *Thomas*, one such circumstance arises upon allegations the § 1983 plaintiff was acting in defense of the officer's own unlawful conduct.[208]

A review of cases nationally reveals other prospective factual circumstances where a suspect's affirmative defense may be germane to the analysis. Though most are theoretical, a few courts have found facts of the affirmative defense sufficient to defeat the comparatively low requirements for establishing probable cause. Notably, courts have been remarkably inconsistent on this issue: Some claim the affirmative defense is never relevant, then discuss the relevance anyway; a plurality have found there are circumstances where the defense could bear on probable cause, at least arguably, but on the facts at hand concluded the defense had no effect on reasonableness; and, a minority of courts have found the affirmative defense was not only relevant, but sufficient to negate probable cause. Courts consider a myriad of factors in determining whether evidence of an affirmative defense concerns probable cause, and the weight given to each varies not only among jurisdictions, but even among courts within a jurisdiction. The multitude of factors and inconsistent application, coupled with the inherent complexities of probable cause analysis, highlight the need for a simple, uniform rule.

The rule expressed in *Thomas*, while it represents a bold move in the right direction, stops short of ensuring Fourth Amendment reasonableness. The "conclusive knowledge" requirement places the bar too high, incorporates unnecessary complexity, and, as the examples shared in this Article reveal, creates the potential to result in constitutional harm without a remedy. Instead, absent exigent circumstances, all facts available to the arresting officer should be on equal footing when the reasonableness of the arrest is evaluated objectively. As explained herein, application of the True Totality Rule would not require a significant departure from the way most courts are analyzing probable cause. Of the courts that have deemed evidence of an affirmative defense irrelevant, most ultimately go on to analyze the sufficiency of such evidence anyway, performing an analysis which is nearly indistinguishable to the reasonableness assessment proposed by the True Totality Rule.

Courts finding the available affirmative defense irrelevant often opine that the viability of an affirmative defense is better suited for review by judges and juries than by an officer on the scene of the arrest. The general view of

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207. *Thomas*, 800 F. Supp. 2d at 836 (quoting Jocks v. Tavernier, 316 F.3d 128, 135 (2d Cir. 2003)).

208. Although Thomas' complaint is void of specific allegations that the affirmative defense negated probable cause, the court inferred from the complaint an allegation the officers *knew* they were attempting to steal his generator and thus *knew* Thomas was acting in defense of such unlawful conduct. *Id.* at 837 ("Plaintiff's actions were allegedly provoked entirely by the conduct of the officers, so the officers would have known that Plaintiff only made a threat of force in defense of his property and had those [sic] done nothing wrong.").

these courts is to permit the officer to make the arrest despite the affirmative defense, and then let the justice system iron it out. This is a sensible approach in scenarios where an officer reasonably believes the suspect is likely to escape or commit additional crimes, or when the scene is one of chaos. But when these circumstances are not present, and an officer has a reasonable opportunity to evaluate the situation in order to make a determination of whether to take away the citizen's right to be free, exculpatory facts, such as those supporting an affirmative defense, should be weighed before affecting the arrest. While the charges may ultimately be dropped, or the citizen may eventually be acquitted of the crime charged as a result of the affirmative defense,[209] these post-arrest actions will not undo the embarrassment and expense, and all the ripple effects, of having been arrested in the first place. The arrest alone can be devastating to a citizen, particularly one with limited resources. Whereas a citizen with means to afford bail may be released in a few hours, a citizen without such resources may spend months or even years waiting for the evidence of their affirmative defense to be evaluated.[210] Even a short stay in jail while the justice system "irons it out" could result in the citizen losing her job and health care benefits, being unable to pay her bills, being evicted, losing her vehicle by repossession, having her children removed from her custody and placed in foster care, suffering irreparable harm to her credit, reputation and status in the community, and the list goes on. While it may seem reasonable to remove from the officer the burden of performing the analysis on the scene of an arrest, this burden is justified by the need to get it right; it is absurd to allow an officer to ignore or evaluate differently exculpatory evidence on the notion that the matter will eventually be worked out in the justice system, a system that is both slow and imperfect, and historically prejudicial to those of color and of limited means. This is not to say that the mere existence of evidence of an affirmative defense will necessarily negate probable cause for the arrest; in fact, under most circumstances the officer will have probable cause for the arrest despite some evidence of an available affirmative defense. However, when an officer has an

209. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009—STATISTICAL TABLES 24 (2013), *available at* http://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/N4VJ-8JY3]. The data in Table 21 reveals that approximately 1 out of every 3 defendants in the nation's largest counties were not convicted of any crime. *Id.* at 24 tbl.21.

210. *See* ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRE-TRIAL/REMAND IMPRISONMENT LIST 3 (2d ed. 2012), *available at* http://www.prisonstudies.org/sites/default/files/resources/downloads/world_pre-trial_imprisonment_list_2nd_edition_1.pdf [https://perma.cc/R3BX-BWXR] (revealing that, in 2012, approximately 480,000 men and women were held in U.S. jails awaiting trial); *see also* REAVES, *supra* note 209, at 22–23 (finding that defendants detained before trial waited a median of 68 days in jail, but in some areas, defendants were found to have waited over two years for their trial). The study also found that 34 percent of those held in jail awaiting trial were detained solely because they could not make bail. REAVES, *supra* note 209, at 17 tbl.12.

objectively reasonable basis to believe, as a result of an affirmative defense, it is not probable that the suspect has committed a crime, the officer should refrain from exercising his extreme and potentially devastating power of arrest.

Application of the True Totality Rule may, on occasion, result in an officer choosing to not arrest a citizen who is actually guilty of the crime. Such a consequence, however, would align with the maxim that it is better to let 100 guilty men go free than for one innocent to suffer.[211] Notably, a decision to not arrest the suspect at the scene does not necessarily result in a guilty man going free or unpunished. Choosing to not arrest does not foreclose an opportunity for law enforcement to investigate further and later bring charges. Conversely, choosing to arrest despite available evidence that no crime was committed may forever impact the innocent citizen's life and her view on justice and the justice system. Of course, in adopting the rule proposed by this Article, courts must synchronously conclude, as the *Thomas* court did, that the rule *is already clearly established* by the fact that it is encompassed within the prevailing notions that the right to be free from arrest without probable cause is a clearly established constitutional right, and that it is clearly established that probable cause requires a review of *all* the facts and circumstances available to the officer. Without this contemporaneous finding, or, alternatively, Congressional action, constitutional violations will continue without a remedy, and a constitutional right without a remedy is no right at all.

211. *See* Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), *in* 9 THE WRITINGS OF BENJAMIN FRANKLIN 293 (Albert H. Smyth ed., 1907) ("That it is better 100 guilty Persons should escape than that one innocent Person should suffer, is a Maxim that has been long and generally approved."); *see also* VOLTAIRE, ZADIG 53 (Project Gutenberg 2006) (1749) (ebook) ("[T]hat generous Maxim; *that 'tis much more Prudence to acquit two Persons, tho' actually guilty, than to pass Sentence of Condemnation in one that is virtuous and innocent.*"); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 358 (9th ed. 1978) (1783) ("[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.").