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BEARING FALSE WITNESS: PERJURED AFFIDAVITS AND THE FOURTH AMENDMENT

"Thou shalt not bear false witness against thy neighbour." [2]

I. Introduction

The "central value of the Fourth Amendment" is the protection of the sanctity of the home from unjustifiable intrusion by law enforcement officials. [3] It is settled law that before law enforcement officers may enter a home to conduct a search or make an arrest they must, absent consent [4] or exigent circumstances, [5] first procure a valid warrant from a neutral and detached magistrate. [6] The entire beneficial nature of the warrant requirement, however, rests upon the necessary assumption that in each case the law enforcement officer's warrant application affidavit faithfully provides to the magistrate a ***446** truthful rendition of the underlying facts and circumstances necessary for an independent judicial determination. The Fourth Amendment "is no barrier at all if it can be evaded by a policeman concocting a story that he feeds a magistrate." [7]

Cases presenting the issue of allegedly falsified warrant affidavits arise routinely in the lower courts throughout the United States. The United States Supreme Court, however, has not addressed the issue in almost thirty years. The Court not only left many important doctrinal questions unanswered in its 1978 decision in Franks v. Delaware, [8] but no scholarly examination of the problem of police perjury in warrant affidavits has since occurred. [9] This absence of guidance for lower courts is especially acute because Franks predates both the Supreme Court's revolutionary reinterpretation of the Fourth Amendment [10] and the development of most modern civil rights law. [11] Thus, it is not surprising that lower courts have been unable to formulate coherent and consistent legal standards in this important area of the law. Unfortunately, the only area where lower courts have been consistent exists in erecting inappropriate barriers to the vindication of the serious wrongs perpetrated by perjured warrant affidavits.

This Article addresses these important issues in both the criminal context of motions to suppress and in the civil context of actions brought pursuant to 42 U.S.C. § 1983. [12] Part II discusses the prevalence of falsified warrant affidavits. ***447** Part III explains how such police perjury strikes at the very heart of the protections against unreasonable searches and seizures that the warrant clause of the Fourth Amendment provides. Part IV explains the Supreme Court's holding in Franks and identifies the many questions left unanswered by the majority opinion. Parts V, VI, and VII articulate the proper legal doctrines to govern cases of allegedly falsified warrant affidavits and explain why the barriers erected by the lower courts are unjustifiable. This Article concludes that allegations of perjurious warrant affidavits present pure issues of fact to be resolved by the trier of fact. If the trier of fact determines that one or more perjured statements in the warrant affidavit caused the search or arrest, then the Fourth Amendment has been violated, entitling the victim to relief without the necessity of surmounting any additional legal barriers.

II. The Problem of Falsified Warrant Affidavits

Legal scholars have generally assumed, with no empirical foundation, that law enforcement officers so rarely file perjured warrant affidavits that the issue is unworthy of concern. Indeed, to the extent the issue has been discussed at all, scholars have concluded that the warrant requirement itself operates as an effective deterrent to such police perjury. [13] Scholars of the Fourth Amendment generally advance the argument that law enforcement officers not only have less incentive to lie in a warrant affidavit, but also that it is more difficult for them to do so because they file the warrant affidavit prior to conducting the search. [14] At that stage, officers are unaware of whether the search will be successful in discovering the sought-after contraband or other evidence of illegality. Scholars bolster this argument with the assertion that a magistrate is more likely to uncover police perjury when deciding whether to issue a warrant than a judge, ruling on a motion to suppress after the occurrence of the search. [15]

The assumption that police perjury in warrant affidavits is rare and effectively deterred by the warrant application process is counter-intuitive and ***448** contradicted by all available evidence. Inasmuch as lies and deception are an acceptable feature of much routine law enforcement activity, [16] it should come as no surprise that scholars have found that law enforcement officers frequently lie to their own superiors in police reports [17] and even perjure themselves in testimony at criminal trials. [18] The general consensus among scholars notes the pervasiveness of police perjury at suppression hearings. [19] Indeed, substantial evidence demonstrates that police perjury is so common that scholars describe it as a "subcultural norm rather than an individual aberration." [20] There is no reason to believe that police perjury does not also present a serious problem in warrant affidavits. In fact, many of the same empirical investigations upon which scholars base their conclusion that police perjury constitutes a serious problem in these other contexts also document widespread perjury by law enforcement officers in warrant affidavits. [21]

***449** The disturbing ease with which one can find examples of falsified warrant applications provides powerful evidence of the serious problem of police perjury in our society. In 2002, the United States Foreign Intelligence Surveillance Court (FISC) reported that in September of 2000, the federal government admitted to "misstatements and omissions of material acts" in "75 FISA applications related to major terrorist attacks directed against the United States." [22] As a result, the court refused to accept inaccurate affidavits from FBI agents and even prohibited one FBI agent from appearing before the court as a FISA affiant. [23] Six months later, in March 2001, the federal government admitted to "similar misstatements in another series of FISA applications." [24] More disturbing is the Justice Department's apparent lack of interest in the punishment of the FBI agents or the prevention of similar future occurrences. The FISC noted that:

> These incidents have been under investigation by the FBI's and the Justice Department's Offices of Professional Responsibility for more than one year to determine how the violations occurred in the field offices, and how the misinformation found its way into the FISA applications and remained uncorrected for more than one year despite procedures to verify the accuracy of FISA pleadings. As of this date, no report has been published, and how these misinterpretations occurred remains unexplained to the Court. [25]

In 2001, the FBI undertook "Operation Candyman," one of the largest investigations into the internet distribution of child pornography. The operation's efforts were jeopardized upon discovery that the sworn affidavits of an FBI Special Agent, filed in support of numerous applications to search the ***450** suspects' residences, contained knowingly false statements of purported fact. [26]

Similarly, subsequent evidence revealed that the warrant authorizing the search of the Branch Davidian compound near Waco, Texas, which resulted in a law enforcement disaster and the death of several innocent children, was based on an affidavit containing many falsehoods. [27] Search and arrest warrants and the resulting criminal prosecution for federal gun crimes are routinely based on the purported accuracy of the information contained in the National Firearms Registration and Transfer Record, maintained by the Bureau of Alcohol, Tobacco, and Firearms. The head of the National Firearms Act branch of the Bureau has stated, "When we testify in court, we testify that the database is one hundred percent accurate. That's what we testify to, and we will always testify to that. As you probably well know, that may not be one hundred percent true." [28] Abundant examples of law enforcement officers falsifying statements of their own observations in warrant affidavits also exist. [29] One such example is the well-documented common practice of police officers including fictitious statements from nonexistent confidential

informants in warrant affidavits.[30] Even when a confidential informant actually exists, law enforcement officers frequently falsify statements in the warrant ***451** affidavit regarding the informant's reliability or credibility.[31]

Police perjury in warrant affidavits thus constitutes a serious problem. Contrary to the prevailing wisdom, the warrant application process is entirely unsuited to the discovery of false statements in warrant affidavits.[32] The magistrate conducts the warrant application ex parte and rarely questions the police officer about the content of the affidavit. In any event, the magistrate lacks the investigative resources to verify the truthfulness of the statements in the officer's affidavit.[33] Additionally, because the law enforcement officer who signs the warrant affidavit oftentimes simply relays information learned from another officer,[34] the warrant affidavit may consist entirely of hearsay.[35] In such cases, the supposed ability of the magistrate to judge the credibility of the affiant becomes an ineffective safeguard. Even when a search is based on a warrant, the first opportunity the criminal process affords the defendant to challenge the factual basis for the search occurs at an after-the-fact suppression hearing. At that time, the magistrate's prior issuance of a warrant generally creates "a presumption of validity with respect to the affidavit supporting the search warrant."[36] Thus, a warrant-based search is generally less vulnerable to challenge than a warrantless search.

The Founding Fathers crafted the Fourth Amendment in direct response to "the harsh experience of householders having their doors hammered open by magistrates and writ-bearing agents of the crown."[37] Today, the warrant clause of that amendment is the only safeguard that exists to prevent arbitrary and unjustified governmental intrusions into the sanctity of the home. The efficacy of that protection, in turn, depends entirely upon the truthfulness of the underlying affidavit sworn to by the police officer. Perjured affidavits filed by ***452** law enforcement officers thus strike at the very heart of the Fourth Amendment.

III. The Eroding Effects of Perjury on the Fourth Amendment

The Fourth Amendment requires that, in order to withstand constitutional scrutiny, a warrant must: (1) be issued by a neutral and detached magistrate; (2) set forth under oath or affirmation facts sufficient to establish probable cause; and (3) particularly describe the place to be searched and the persons or things to be seized.[38] Perjurious warrant affidavits defeat each of the three requirements imposed by the warrant clause of the Fourth Amendment.[39] Probable cause for a search warrant exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found" in the particular place for which the warrant is sought.[40] In each case, an assessment of probable cause requires the consideration of two necessary elements: (1) the totality of the facts and circumstances of the particular case; and (2) whether these facts and circumstances are sufficient to constitute probable cause.[41]

Although the Supreme Court has repeatedly stated that the foundation of the probable cause analysis is "the known facts and circumstances," this somewhat misleading statement creates a misperception of objectivity.[42] A police officer's assertions in a warrant affidavit are ordinarily based upon "hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily."[43] ***453** Moreover, the significance of the information in the warrant affidavit, which itself may be entirely innocent,[44] often depends upon the assertion and characterization of background "facts and circumstances" by the law enforcement officer.[45] In short, the Fourth Amendment does not require that "every fact recited in the warrant affidavit is necessarily correct;" rather, merely that the officer's assertions therein "be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true."[46] Therefore, probable cause is not necessarily based on actual reality but on the factual nature of the law enforcement affiant's state of mind and veracity. Intentionally or recklessly false statements in warrant affidavits by police officers strip the Fourth Amendment's warrant clause of its value.[47]

The purpose of the probable cause requirement is to ensure that residential searches and seizures are constitutionally permissible only when based on individualized suspicion of wrongdoing created by the actions of the home's occupant.[48] Unless one engages in the implausible assumption that the law enforcement officer acts without purpose, the officer's necessary intent behind an intentionally or recklessly false statement in a warrant affidavit is to manufacture probable cause or particularity where none actually exists.

When the focus is shifted from the reporting of the facts and circumstances in sworn affidavits filed by law enforcement officers to the determination of whether those facts and circumstances sufficiently establish probable cause, it becomes apparent that perjured warrant affidavits strike at the very heart of the Fourth Amendment warrant clause. The central purpose of the warrant clause is to prevent unjustifiable governmental intrusions into the sanctity of the home, not merely to deter or punish such intrusions after the fact. [49] The ***454** distinctive means chosen by the Founding Fathers to achieve this purpose is the requirement of ex ante review of the necessity and scope of the proposed police action by an independent decision-maker. [50] To ignore the magistrate requirement wrongly conflates warrant-based searches and seizures with warrantless searches and seizures, thereby writing the warrant clause out of the Fourth Amendment. Precisely for this reason, the United States Supreme Court has uniformly held that a search or seizure inside a home, even if based on probable cause and executed with particularity, violates the Fourth Amendment absent a valid warrant issued ex ante by a neutral and detached magistrate. [51] In contrast, courts will deem a residential search or arrest conducted pursuant to a warrant issued by a neutral and detached magistrate constitutional even in the absence of actual probable cause and particularity. [52] Thus, the examination of the constitutional significance of intentionally or recklessly false statements in warrant affidavits must concentrate on the magistrate requirement of the Fourth Amendment for the simple reason that "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." [53]

A. Perjury and the "Neutral and Detached" Magistrate

The magistrate requirement of the warrant clause of the Fourth Amendment is a separation of powers provision, which turns on the nature of the person ***455** making the judgment, whether or not the requested warrant should be issued. [54] An individual must be truly impartial and independent to qualify as a "neutral and detached magistrate." [55] A police officer, prosecutor, or anyone else actively involved in the investigation of the alleged criminal activity lacks the requisite independence and impartiality necessary to serve as a magistrate. [56] "Whatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." [57]

The United States Supreme Court has repeatedly emphasized that the very purpose of the warrant clause of the Fourth Amendment is to mandate that the decision whether a residential search or seizure is justifiable must be made by a neutral and detached magistrate and not a law enforcement officer:

> The informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests. Security against unlawful searches is more likely to be attained by resort to search warrants than by reliance upon the caution and sagacity of petty officers while acting under the excitement that attends the capture of persons accused of crime. [58]

Perjurious statements in warrant affidavits by law enforcement officers deprive magistrates of the accurate information necessary to exercise their informed judgment and thereby impermissibly substitute the police officer for the magistrate as the actual decision-maker in the warrant issuance process. [59] The Supreme Court noted this intent of the warrant clause: "The right of privacy was deemed too precious to entrust to the discretion of [law enforcement officials]. Power is a heady thing; and history shows that the police acting on their own cannot be trusted." [60]

***456** It is violative of the most fundamental values of the Fourth Amendment for the magistrate to act as a mere "rubber stamp" for warrant decisions actually made by law enforcement officers. [61] For this reason, the United States Supreme Court has consistently held that a valid warrant cannot be based on an affidavit which contains only the beliefs, suspicions, or conclusions of a police officer. [62] "Sufficient information must be presented to the magistrate to allow that official to determine probable cause." [63]

Other bedrock Fourth Amendment principles serve to guarantee that the independent and detached magistrate, rather than a law enforcement officer, makes the assessment of whether the underlying facts and circumstances sufficiently establish probable

cause. Thus, neither a search nor a seizure may be justified on the basis of information learned as a result of the search or seizure or any other after-acquired knowledge. [64] An essential corollary to this principle is the established doctrine that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate." [65] Absent stringent judicial enforcement of this "four corners" rule, the warrant clause would be rendered meaningless with search and arrest warrants issued not on the basis of the independent and informed judgment of the magistrate, but instead on the unreviewed discretion of law enforcement officers. The police would indirectly be empowered to perform that which the Constitution prohibits if done directly-conduct residential searches and seizures without a valid warrant issued by a magistrate with knowledge of the underlying information believed to justify the invasion. In such cases, "the provisions of the Fourth Amendment would become empty phrases and the ***457** protections it affords largely nullified." [66]

In short, a law enforcement officer who files a warrant affidavit that contains intentionally or recklessly false statements of fact usurps the constitutionally mandated role of the magistrate. The officer deprives the magistrate of the truthful information necessary to make an independent and informed decision regarding probable cause. The nature of the assessment of whether probable cause exists further emphasizes the harm done to the targets of such police intrusions, many of whom are entirely innocent, and to the Fourth Amendment itself. [67]

B. Perjury and Probable Cause

"Articulating precisely what . . . 'probable cause' mean[s] is not possible." [68] The United States Supreme Court has repeatedly held that "probable cause is a fluid concept--turning on the assessment of probabilities in particular factual contexts--not readily, or even usefully, reduced to a neat set of legal rules." [69] The magistrate acts as an ordinary, reasonably prudent and cautious person when making the determination whether the facts, as presented in the affidavit, are sufficient to constitute probable cause. She merely makes a reasonable factual prediction that the object of the search will be found at the targeted location. [70] The Supreme Court recognizes that "the probable-cause standard is a practical, nontechnical conception that deals with the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians, act." [71] The magistrate acts not as a legally trained jurist because "many warrants are-- quite properly--issued on the basis of nontechnical, common-sense judgments of laymen." [72] Indeed, the lay magistrate makes not only the initial, but essentially the final, assessment of whether the facts are sufficient to constitute probable cause because the "standard for review of an issuing magistrate's probable cause determination . . . [is] that so long as the magistrate had a substantial basis for . . . conclud[ing] that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." [73] ***458** Even with this extremely deferential standard of review, however, established legal doctrine provides that a magistrate's finding of probable cause, later found to have been based on a perjured affidavit, receives no deference, and thereby demonstrates the gravity of the harm caused by warrant affidavits containing intentionally or recklessly false statements. [74]

"The essential protection of the warrant requirement of the Fourth Amendment . . . is in 'requiring that [the usual inferences which reasonable men draw from evidence] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" [75] Perjurious warrant affidavits contravene this crucial Fourth Amendment principle of an independent ex ante assessment of the existence of probable cause by a truthfully informed neutral and detached magistrate. [76] In many cases, the harm caused by the Fourth Amendment violation can never be undone since it is impossible to know for certain what a truthfully informed magistrate would have decided at that moment in history. This is especially true because "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause." [77]

IV. The Franks Decision

The United States Supreme Court directly confronted the issue of perjurious statements in search warrant affidavits only once, in the 1978 case of Franks v. Delaware. [78] In Franks, the United States Supreme Court granted certiorari to decide the limited question: "Does a defendant in a criminal proceeding ever have the right, under the Fourth and Fourteenth Amendments subsequent to the ex parte issuance of a search warrant, to challenge the truthfulness of factual statements made in an

affidavit supporting the warrant." [79] All but one of the federal circuit courts of appeals had already answered this question affirmatively. [80] The courts of appeals then proceeded to consider the separate and distinct issue of the circumstances under which such a challenge to the veracity of a warrant affidavit could be made by a criminal defendant in a ***459** subsequent suppression hearing. This latter question of when, as opposed to whether, a successful challenge could be made seriously divided the federal circuit courts of appeals. [81]

Justice Blackmun, writing for the majority, resolved the pure Fourth Amendment issue upon which the Court granted certiorari with dispatch, reasoning simply, "Because it is the magistrate who must determine independently whether there is probable cause[,] . . . it would be an unthinkable imposition upon his authority if a warrant affidavit, revealed after the fact to contain a deliberately or reckless false statement, were to stand beyond impeachment." [82] Justice Blackmun then quickly diverted attention away from the Fourth Amendment question presented by subtly restating the issue: "[w]hether the Fourth and Fourteenth amendments, and the derivative exclusionary rule . . . ever mandate that a defendant be permitted to attack the veracity of a warrant affidavit after the warrant has been issued and executed." [83]

This shift in concern, from the guarantee against unreasonable searches and seizures contained in the Fourth Amendment to the exclusionary rule and the criminal justice process of adjudicating the guilt or innocence of persons accused of committing criminal acts, was understandable given the facts of Franks. Jerome Franks became the prime suspect in a rape case when he made an incriminating statement while in custody for allegedly assaulting another female. [84] Thereafter, the two police officers investigating the matter submitted a sworn affidavit to a Justice of the Peace in support of an application for a warrant to search Franks's apartment. This affidavit included the statement that "your affiant contacted Mr. James Williams and Mr. Wesley Lucas . . . where Jerome Franks is employed and did have personal conversation with both these people" and that each of them "revealed to your affiant that the normal dress of Jerome Franks" matched the description given by the victim. [85] The Justice of the Peace issued the warrant, and as a result of the search, police seized clothing and a knife fitting a description provided by the victim. [86] Franks's ***460** defense counsel filed a motion to suppress the seized items and asserted, without any supporting affidavits from the witnesses, that the warrant affidavit contained false statements made in "bad faith" by the law enforcement affiants. [87] Specifically, Franks's defense counsel asserted "that Lucas and [Williams] would testify that neither had been personally interviewed by the warrant affiants, and that . . . any information given by them to [another] officer was 'somewhat different' from what was recited in the affidavit." [88] The trial court denied the motion to suppress, and Franks was convicted after the prosecution introduced a knife into evidence to rebut Franks's sole defense that the sexual relations had been consensual. [89] Thus, it is likely that the Court viewed Franks as a case in which the defendant had a weak factual claim of a Fourth Amendment violation while the evidence discovered in the challenged search was central to the guilty verdict.

Moreover, by 1978, when the Supreme Court decided Franks, the Court was seriously engaged in the enterprise of imposing limitations on the exclusionary rule. [90] Indeed, in their dissent, Justice Rehnquist and Chief Justice Burger used the occasion of Franks to mount a frontal challenge on the very existence of the exclusionary rule:

> The warrant issued on impeachable testimony has, by hypothesis, turned up incriminating and admissible evidence to be considered by the jury at the trial. The fact that it was obtained by reason of an impeachable warrant bears not at all on the innocence or guilt of the accused. The only conceivable harm done by such evidence is to the accused's rights under the Fourth and Fourteenth Amendments, which have nothing to do with his guilt or innocence of the crime with which he is charged . . . .
>
> Since once the warrant is issued and the search is made, the privacy interest protected by the Fourth and Fourteenth Amendments is breached, a subsequent determination that it was wrongfully breached cannot possibly restore the privacy interest. . . . [T]he only purpose served by suppression of such evidence is deterrence of falsified testimony on the part of affiant in the future. . . . I simply do not think the game is worth the candle in this situation. [91]

The dissenting opinion's attack on the exclusionary rule was far more radical ***461** than the traditional criticism embodied in Justice (then Judge) Cardozo's famous statement that the exclusionary rule permits "the criminal . . . to go free because the constable has blundered." [92] This latter criticism is entirely misplaced in the case of perjurious warrant affidavits:

> Cardozo's masterful imagery calls to mind a dull-witted but honest servant of the law, floundering in a sea of emergent and sophisticated jurisprudential choices while a crafty criminal squirms away through a constitutional loophole . . . . But what do "blunders" have to do with perjurious affidavits . . . deliberately employed to enlist the courts as "accomplices in the willful disobedience of a Constitution they are sworn to uphold?" [93]

The Franks majority, after an extended discussion of the opposing arguments, ultimately rejected the dissenters' challenge to the exclusionary rule and adhered to the traditional doctrine that the rule should be applied where, as in the case of perjured warrant affidavits, "the Fourth Amendment violation [is] substantial and deliberate." [94] The majority nevertheless held that concerns about the scope of the exclusionary rule and the practicalities of the criminal process rendered the issue of perjurious warrant affidavits one of "competing values that lead us to impose limitations" on the Fourth Amendment right. [95]

Justice Blackmun's majority opinion in Franks stated cavalierly and in "generalized language" the limitations which the Court deemed necessary by the exclusionary rule and by the practicalities of the criminal justice process:

> [W]e hold that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the alleged false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded. [96]

The superficial nature of the Court's holding is clear from its failure to even acknowledge the conflicting decisions in the lower courts on some of these ***462** issues [97] and its uncritical reliance on tactical concessions made by counsel for Franks at oral argument. [98] In the end, Franks left many critical issues unresolved. The Court did not define what it meant by "a false statement [made] knowingly and intentionally, or with reckless disregard for the truth." [99] The standard for determining when "the affidavit's remaining content is insufficient to establish probable cause" also lacks clarity. [100] Finally, the Court never fully explicated the nature of the "substantial preliminary showing" required by Franks. [101]

The lower courts, in the course of adjudicating numerous challenges against allegedly perjurious warrant affidavits, have filled this vacuum with conflicting and often unjustifiably restrictive decisions. In addition, many lower courts have applied these unduly restrictive doctrines to civil rights actions brought pursuant to 42 U.S.C. § 1983, where the "competing values" relied upon by the Supreme Court in Franks have no applicability. [102]

V. The Twin Barriers of Substantial Preliminary Showing and Informant Privilege

As interpreted by lower courts, the requirement of a substantial preliminary showing prior to a Franks hearing, [103] as well as the government's privilege to avoid disclosure of the identity of a confidential informant, [104] both operate as significant barriers to the discovery and exposure of perjured warrant affidavits in criminal cases. Thus, Professor Alschuler has concluded:

> When a defense attorney can question neither the police officer who filed an affidavit nor the unnamed informant described in the affidavit, he usually has no way to determine whether the informant made the statements attributed to him or even whether the informant existed. Unless perjurious police officers lie in artless, obvious ways or attend religious meetings, repent their misconduct, and confess their dishonesty to defense attorneys, Franks's

> requirement of a substantial preliminary showing becomes an insurmountable "Catch 22"--a defense attorney cannot develop the facts until he secures a ***463** hearing and he cannot secure a hearing until he develops the facts. [105]

Even in the context of a criminal defendant's motion to suppress, these two legal doctrines, properly interpreted, should not impose insuperable obstacles to meritorious Fourth Amendment claims. More importantly, neither the requirement of a substantial preliminary hearing nor the government's informant privilege has any basis in the Fourth Amendment itself. The practical considerations upon which each doctrine is founded are unique to the context of a motion to suppress in a criminal case and have no applicability in civil actions brought pursuant to 42 U.S.C. § 1983.

A. The Substantial Preliminary Showing

In Franks, the Supreme Court set forth that a criminal defendant must establish a substantial preliminary showing:

> To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. [106]

The Franks Court clearly intended for the substantial preliminary showing requirement to act as a procedural mechanism to weed out frivolous claims unworthy of evidentiary hearings, reserved for serious allegations of police perjury in warrant affidavits. [107]

The practical realities inherent in the criminal justice system create the need for such a procedural device. Criminal defendants lose nothing by filing even non-meritorious pre-trial motions because the criminal justice system fails to provide any disincentive to the filing of frivolous Franks claims. Additionally, the criminal justice system perversely encourages criminal defendants to file such a claim in every case no matter how baseless the assertion. A criminal defendant has no constitutional right to discovery of the prosecutor's evidence in a criminal case, except to the very limited extent required by Brady v. Maryland [108] and its progeny. [109] Therefore, some preliminary screening ***464** mechanism is necessary to prevent criminal defense attorneys from routinely filing a Franks motion in every case "as a convenient source of discovery," including the "revelation of the identity of informants." [110]

Many lower courts have elevated the substantial preliminary showing requirement into a virtually insurmountable barrier by misconstruing the requirement as an authorization to determine the factual merits of the criminal defendant's claim before the evidentiary hearing mandated by Franks. [111] The very notion that a court may properly decide questions of fact before conducting an evidentiary hearing is contrary to the American system of justice. The only two arguments one could conceivably make to support this position are entirely implausible. The first such argument seizes upon the Court's statement in Franks that "[t]here is, of course, a presumption of validity with respect to the affidavit supporting the search warrant." [112] It is clear, however, from the Court's placement of this sentence--after its discussion of the rationales for the preliminary showing requirement and immediately before its exposition of the specifics of that requirement--that this "presumption of validity" was simply a reason for the requirement itself and nothing more. [113] This conclusion also follows from the fact that the majority in Franks explicitly required that courts determine the factual sufficiency of a challenge to the truthfulness of a warrant affidavit at the evidentiary hearing. At such hearings, the criminal defendant bears the burden of proof "by a preponderance of the evidence." [114]

The second argument is even less convincing. It assumes that the Supreme Court, by mandating the proof by a preponderance of the evidence standard at the evidentiary hearing, requires a criminal defendant to prove the facts of his claim by some lesser

evidentiary standard as a prerequisite to entitlement to an evidentiary hearing. [115] This argument is belied by the fact that the Supreme Court in Franks did not suggest any lesser evidentiary standard of factual proof ***465** for the preliminary showing and that no such lesser standard readily comes to mind. Finally, it is revealing that the lower courts, which do make factual determinations at the preliminary showing stage, never specify this lesser standard of factual proof but instead merely conclude that the defendant failed to meet the standard. [116]

The majority opinion in Franks makes clear that the substantial preliminary showing requirement is intended to measure the legal sufficiency of the criminal defendant's allegations, not the factual question of whether the defendant can prove these allegations by a preponderance of the evidence at an evidentiary hearing. Precisely for this reason, the Supreme Court repeatedly used the word "allegations" to describe the burden imposed upon criminal defendants at the preliminary showing stage of the proceedings. [117]

Some lower federal courts have unthinkingly transplanted the substantial preliminary showing requirement to civil actions brought pursuant to § 1983. [118] In doing so, these courts have ignored the fact that the rationales enunciated by the Supreme Court in Franks have no applicability to civil actions because they are based entirely on practical considerations unique to criminal cases. [119] In a criminal case, the success of the search establishes some indicia of the truthfulness of the warrant affidavit of the law enforcement officer. In contrast, in a § 1983 action, where the search failed to uncover any contraband or other evidence of criminal wrongdoing, [120] the defendant police officer affiant should ***466** not receive any presumption of truthfulness. Thus, in a § 1983 civil action, the individual plaintiff and the law enforcement defendant stand on an equal footing before the court. [121] Furthermore, § 1983 plaintiffs do not have any incentive to file non-meritorious actions, and they may not seek more discovery than is expressly authorized by the Federal Rules of Civil Procedure.

The substantial preliminary showing requirement has no place in civil § 1983 actions for another even more fundamental reason. If the requirement is intended to serve an analytical purpose in a civil action, rather than merely expressing an unjustifiable judicial hostility to the plaintiff's substantive cause of action, then it must function as a heightened pleading or proof requirement. The United States Supreme Court, however, has expressly repudiated the efforts of lower federal courts to impose heightened pleading or proof requirements on disfavored civil claims, including those brought pursuant to § 1983. [122] A § 1983 plaintiff prevails at the summary judgment stage of the civil action unless "no genuine issue as to any material fact" exists and the defendant is "entitled to judgment as a matter of law." [123] In Crawford-El v. Britton, [124] the Supreme Court expressly held that a court may not impose any heightened proof requirement in civil actions brought pursuant to § 1983. [125] The substantial preliminary showing requirement is simply inapplicable to civil actions challenging the truthfulness of affidavits underlying search warrants.

B. The Informant Privilege

Some lower federal courts have also inappropriately elevated the government's informant privilege into an unassailable obstacle for a criminal defendant. These courts have concluded that the defendant has not satisfied the substantial preliminary showing requirement, even if the warrant affidavit ***467** contains a material falsehood, absent proof that the law enforcement affiant made the falsehood and not the alleged confidential informant. [126] The lower courts correctly hold that only an intentionally or recklessly false statement in a warrant affidavit by a law enforcement officer, not by a non-governmental confidential informant, violates the Fourth Amendment. [127] This position, however, ignores the fact that if the alleged falsehood in the affidavit sufficiently satisfies the substantial preliminary showing requirement, then the very purpose of an evidentiary hearing is to determine the source responsible for that falsehood. [128]

Further, assessing legal culpability is more complex than simply an either/or determination of the original source of the perjurious falsehood in the affidavit. Even if the confidential informant is the original source of the perjurious falsehood, an evidentiary hearing remains necessary to resolve the factual issue of whether the law enforcement affiant had knowledge of or recklessly disregarded the informant's false statement, or wrongfully vouched for the informant's reliability, veracity, or basis of knowledge. [129] An evidentiary hearing does not necessarily require the disclosure of the informant's identity to the defendant or her counsel. At an evidentiary hearing, the court possesses many tools to assist in making accurate and just factual conclusions

without jeopardizing the informant's identity, including cross-examination of the law enforcement affiant and production of the confidential informant for in camera examination by the court. [130]

While an evidentiary hearing does not necessarily entail the compelled disclosure of the informant's identity, the question remains whether a criminal defendant may be entitled to such disclosure once he establishes a substantial ***468** preliminary showing of falsehood contained within the warrant. The Supreme Court addressed this question prior to Franks, in McCray v. Illinois. [131] In McCray, the Court held that, even in the context of a suppression hearing in a criminal case, the government's informant privilege is not absolute and the decision whether to recognize the privilege remains in the sound discretion of the trial court. [132] The judiciary acknowledges that "[b]y definition[,] criminal informants are cut from untrustworthy cloth." [133] Nevertheless, many courts fail to exercise the sound discretion contemplated by the Supreme Court in McCray. When the criminal defendant independently discovers the identity of the informant, courts routinely approve of the law enforcement affiant's affirmative misrepresentation of the informant's reliability. [134] Lower courts have even endorsed the common police practice of manufacturing reliability by characterizing anonymous callers and first-time informants as persons who have "not given false information in the past." [135]

The reluctance of the courts to require disclosure of a confidential informant in an appropriate case, or at least to ensure the truthfulness of the law enforcement affiant's representation of the informant's reliability, is entirely the product of the practicalities of the criminal justice system. Aside from the fact that the criminal process encourages the misuse of preliminary motions by defendants for ulterior purposes, the reality is that "[t]he very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand." [136]

The government's informant privilege will rarely, if ever, be an appropriate obstacle to a § 1983 plaintiff's ability to remedy an alleged Franks violation of the Fourth Amendment. The Supreme Court has repeatedly held that evidentiary privileges must be strictly construed for the simple reason that ***469** "they are in derogation of the search for truth." [137] In a civil action, where the law enforcement officer defends against a claim of a constitutional violation, any assertion of an informant's privilege to prevent disclosure of relevant evidence must be treated with special disfavor. [138] In McCray, the Supreme Court sharply distinguished the assertion of the privilege at a suppression hearing from the entirely different context of a criminal trial. [139] When the government attempts to assert the informant's privilege during a criminal trial, in order to keep relevant information out of the hands of the trier of fact, success is far from absolute. As the Supreme Court explains, "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." [140] In a § 1983 civil action, the defendant affiant cannot assert the informant's privilege precisely because disclosure is necessary to achieve a fair resolution of the merits of the plaintiff's claim. "If [the law enforcement affiant] did not have an informant, or his informant did not provide the information contained in the affidavit, or the informant was unreliable, the validity of the warrant would be in jeopardy and plaintiff's Fourth Amendment violation claims would be strengthened." [141] In those rare, truly extraordinary civil cases, in which the government can demonstrate a particularized compelling need for confidentiality, the trial court has ample authority to accommodate all of the parties under the Federal Rules of Civil Procedure, including the use of protective orders. [142]

***470 VI. "Reckless Disregard for the Truth"**

In Franks, the United States Supreme Court held that in order to establish a violation of the Fourth Amendment, a defendant must prove by a preponderance of the evidence "that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth." [143] The federal courts of appeals have generally concluded that "[t]he Supreme Court in 'Franks gave no guidance concerning what constitutes a reckless disregard for the truth in fourth amendment cases, except to state that "negligence or innocent mistake [is] insufficient."'" [144] On the basis of this erroneous premise, [145] these federal courts of appeals have either abdicated their responsibility to locate the meaning of the phrase "reckless disregard for the truth" within the Fourth Amendment or developed an interpretation inconsistent with Fourth Amendment values.

A. The Inappropriate Analogy to First Amendment Doctrine

The federal courts of appeals erroneously borrow their definition of "reckless disregard for the truth" from the Supreme Court's definition of actual malice in its First Amendment jurisprudence. [146] In this regard, the Supreme Court held in New York Times Co. v. Sullivan [147] that a public official or public figure cannot recover damages for defamatory statements absent proof that the speaker made the statement with actual malice. [148] Actual malice means that the allegedly defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." [149] In other words, the First Amendment prohibits the imposition of liability under the actual malice standard, absent proof that the statement was made "with a 'high degree of awareness of [its] probable falsity.'" [150]

The federal courts of appeals have imported this First Amendment definition ***471** of reckless disregard for the truth into its Fourth Amendment analysis of perjured warrant affidavits. In the First Amendment context of confidential informants, reckless disregard for the truth means that the law officer affiant had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports" or "in fact entertained serious doubts as to the truth" of the statement. [151] Lower courts imported this heightened standard into the Fourth Amendment and held that no Franks violation exists absent proof that the law enforcement affiant had "obvious reasons to doubt the truth" of the statement(s) in the warrant affidavit. [152] In doing so, the courts have offered no rationale other than the unhappy coincidence that the Supreme Court used the same phrase of "reckless disregard for the truth" in Franks that it had previously used in Sullivan.

Upon analysis, the Sullivan Court's "reckless disregard for the truth" standard is entirely inconsistent with the important Fourth Amendment principles that Franks sought to protect. The First Amendment freedom of speech clause preserves the free, democratic character of our society by guaranteeing the right of ordinary persons, and their media representatives, to engage in "uninhibited, robust, and wide-open . . . debate on public issues." [153] The Supreme Court has recognized the inevitability of exaggerations, distortions, vilifications, falsehoods, mischaracterizations, and unsupported conclusory statements in the public discussion of public persons and public affairs by which a free people governs itself in a democracy. [154] Under the First Amendment, the reckless disregard standard seeks to prevent government officials, as well as those who wield great power and influence, from enlisting the coercive power of the government to silence their critics except in extraordinary cases. [155]

The Fourth Amendment is also intended to protect the people from the tyranny of the government. Here, however, the warrant clause guarantees individual freedom and security by prohibiting government agents from forcibly invading the sanctity of a person's home. Absent both probable cause and a valid warrant issued by a neutral and detached magistrate, based on the demonstration of sufficient specific facts, and sworn to under oath by the law enforcement officer, the government has no right to breach one's individual security. The neutral and detached magistrate must then draw the independent ***472** conclusion that the invasion is justified. [156] Under the Fourth Amendment, there exists no countervailing value in exaggerations, distortions, vilifications, mischaracterizations, unsupported conclusory statements, or even reckless falsehoods. These exemplify poor, sloppy police work that threaten the security and liberty of law-abiding citizens and should therefore be minimized as much as possible.

Contrasting standards of proof and appellate review reflect the differing meaning of the term "reckless disregard for the truth" under the First and Fourth Amendments. In First Amendment jurisprudence, a party must prove reckless disregard by clear and convincing evidence. An appellate court then applies de novo review to the trial judge's determination in order to ensure the protection of the private individual from the coercive power of the government. [157] On the other hand, the Fourth Amendment protects individual liberty by treating reckless disregard as a pure question of fact, provable by a preponderance of the evidence, and only subject to appellate review for clear error. [158]

Substantive First Amendment interpretations of the reckless disregard for the truth standard are also directly contrary to established Fourth Amendment doctrine. One important purpose of the reckless disregard standard is to protect the right of private speakers to make broad, conclusory general statements and even adopt "one of a number of possible rational interpretations" of an ambiguous event. [159] In contrast, bedrock Fourth Amendment doctrine dictates that under the warrant clause, the law enforcement affiant must accurately report the specific facts. Only the neutral and detached magistrate may draw any inferences or conclusions from the facts contained in the warrant affidavit. A warrant based on the mere conclusions or interpretations of the events by the law enforcement officer is clearly invalid. [160] Indeed, a law enforcement officer who conducts a search on the basis of such a warrant cannot even claim the benefit of the "good faith" exception to the exclusionary

rule. [161] While under First Amendment principles, the reckless disregard standard seeks to free public debate from the rigid standards of provable truthfulness which govern testimony given in a legal proceeding, a warrant affidavit is a legal document, the truthfulness of which is sworn to under oath by the affiant. [162] Allowing a ***473** law enforcement officer to swear to the truth of a fact simply because she did not have a "high degree of awareness of [its] probable falsity" would make a mockery of the very purpose of the Fourth Amendment. [163]

Even the Supreme Court has recognized that its First Amendment standard "puts a premium on ignorance." [164] Under the First Amendment, a publisher has no duty to investigate before making a defamatory statement about a public official or public figure. [165] Whatever the wisdom of tolerating ignorance in First Amendment jurisprudence, it is certainly terrible public policy to accept statements made in ignorance by trained law enforcement officers. The obligation of a person swearing an oath to tell the truth is entirely different from remarks made in the public discourse.

Most fundamentally, the First Amendment reckless disregard standard directly contradicts both the text and any rational interpretation of the Fourth Amendment. Unlike the First Amendment, which operates to prohibit certain government actions, the Fourth Amendment imposes an affirmative obligation on the government, including its law enforcement officers, not to invade the security of individuals and their homes absent the demonstrated existence of probable cause. Contrary to First Amendment doctrine, a Fourth Amendment duty to investigate is widely accepted in the case law. [166] Under the First Amendment a publisher has no duty to ascertain the reliability, veracity, or accuracy of an informant or of the information received. A finding of reckless disregard for the truth requires proof that the publisher had "obvious reasons to doubt the veracity of the informant or the accuracy of his reports." [167] In contrast, the Fourth Amendment requires the warrant affidavit to establish facts sufficient to demonstrate the reliability, credibility, and veracity of the informant in the absence of other evidence of probable cause. [168]

B. A Return to the Language of the Fourth Amendment

Rather than employing First Amendment jurisprudence to define the reckless ***474** disregard standard in the Fourth Amendment context, courts should look instead to the language of the Franks majority. There, the Supreme Court explicitly stated that a false statement in a warrant affidavit exists when a law enforcement officer affiant "knowingly and intentionally, or with reckless disregard for the truth," makes a statement which is not "believed or appropriately accepted by the affiant as true." [169] This Fourth Amendment definition is virtually the polar opposite of the First Amendment standard of statements published "with 'a high degree of awareness of [their] probable falsity.'" [170]

The Court in Franks also explained that it based its holding on the "oath or affirmation" provision of the Fourth Amendment stating, "[W]e derive our ground from the language of the Warrant Clause itself, which surely takes the affiant's good faith as its premise: '[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .'" [171] The oath or affirmation clause of the Fourth Amendment deals not with the objective accuracy of the warrant affidavit, but with the "integrity of the warrant," [172] which in turn depends entirely on the subjective "state of mind of the affiant." [173]

The proper source of the Supreme Court's interpretation of the oath or affirmation provision of the Fourth Amendment is not found in the Court's First Amendment jurisprudence. Instead, one finds its source in the law of perjury. Under the law of perjury, "when one makes an unqualified statement of a fact as true which he does not know to be true, . . . such unqualified statement will itself constitute perjury." [174] Under the Fourth Amendment, as under the law of perjury, when a law enforcement officer swears an oath, she must know or believe that the contents of the affidavit are actually true, not merely that there is "a possibility that they might be true." [175]

***475** In every area of the law, including perjury, [176] a person's subjective state of mind, including knowledge, belief, and intent, is a pure issue of fact for the trier of fact to resolve. [177] This is proper because such questions depend on "[c]redibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts," all of which ordinarily lie within the exclusive province of the trier of fact. [178]

VII. Probable Cause and Perjured Affidavits

In Franks, the Supreme Court held that in addition to proving that a warrant affidavit contains one or more intentionally or recklessly false statements, the individual challenging the warrant also must establish that, "with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause" in order to suppress the evidence obtained as a result of the warrant. [179] In subsequent cases, the Supreme Court has explained that neither the good faith exception to the exclusionary rule nor the immunity doctrines, which ordinarily protect law enforcement officers from liability under 42 U.S.C. § 1983, are applicable if a warrant affidavit contains perjurious statements. [180] Thus, the remainder of the affidavit must establish actual, not merely arguable, probable cause. This probable cause determination is an issue of fact to be resolved by the trier of fact. Unfortunately, the federal courts of appeals have subverted these doctrinal principles.

*476 A. The Flawed "Corrected Affidavits" Approach

The Court of Appeals for the Second Circuit, with no stated rationale for its deviation from Franks, has adopted what it calls a "corrected affidavits doctrine." [181] Pursuant to this doctrine, the Second Circuit "examine[s] all of the information the officers possessed when they applied for the . . . warrant." [182] Most of the other federal courts of appeals have rejected the Second Circuit's mode of analysis. [183]

As a practical matter, the "corrected affidavits doctrine" proposes that courts should embark on an unpromising factual quest to determine what information the law enforcement affiant knew or believed to be true at the time they subscribed the warrant affidavit. [184] The doctrine proceeds on the dubious premise that the law enforcement affiant deliberately chose to omit truthful information known at the time and instead inserted intentional or reckless falsehoods into the affidavit. The more likely scenario is that a law enforcement officer willing to commit perjury in a sworn affidavit will have little reluctance to fabricate these omitted facts when questioned later. [185]

Indeed, the Second Circuit's "corrected affidavits approach" encourages police officers to file intentionally or recklessly false warrant affidavits because they can never end in a worse situation for doing so. Law enforcement affiants' intentional or reckless falsehoods serve only one conceivable purpose: securing the issuance of a warrant, which the magistrate might otherwise have denied. The police officer knows that a defendant might never challenge the affidavit, but if she does, a successful search will place the facts allegedly known earlier in a more favorable light at the subsequent suppression hearing. Thus, the "corrected affidavits approach" "not only . . . infus[es] extraneous information into the probable cause determination, but . . . also allow[s] the *477 Government to receive the benefit of its misconduct. [186]

The Second Circuit's "corrected affidavits doctrine" is also fatally flawed as a matter of Fourth Amendment jurisprudence. The extraneous information offered in later testimony does not, and does not even attempt to, make the false statements in the affidavit truthful. Thus, in no way does the extraneous information correct or retroactively cure the invalidity of the warrant. It is fundamental doctrine that the Fourth Amendment requires both probable cause and a valid warrant. [187] The fact that the police officer could have obtained a valid warrant never excuses the failure to have done so. [188] Accordingly, the Supreme Court has held that "an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate . . . [because a] contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless." [189]

The United States Supreme Court correctly held in Franks that once a warrant affidavit is found to contain intentionally or recklessly false statements of fact, those falsehoods must be redacted. The decision of whether to suppress the evidence found in the resulting search must be based solely on the "remaining content" of the affidavit. [190] Judicial consideration of any information not contained in the original affidavit runs contrary to both the requirement of ex ante review by a neutral and detached magistrate as well as the probable cause requirement of the Fourth Amendment. [191]

*478 B. Actual Versus Arguable Probable Cause

The federal courts of appeals have found especially troublesome the question of whether the remainder of the warrant affidavit must establish actual, or merely arguable, probable cause. Some courts have erroneously permitted arguable probable cause to validate a warrant affidavit containing one or more perjurious statements by holding that no Franks violation exists unless a magistrate "could not have found probable cause" on the basis of the truthful remainder of the affidavit. [192] The use of this test for evaluating the truthful remainder of the affidavit has the untoward effect of encouraging police perjury. The judge conducts the later review of the affidavit under a more lenient standard than that applied by the original magistrate who initially determined whether actual probable cause existed in the affidavit.

The proper standard a court should apply, once it has determined that a warrant affidavit contains intentionally or recklessly false statements, is actual probable cause. The fact-finder steps into the role of the original magistrate and simply repeats the probable cause inquiry. The reviewing judge should not give any deference to the magistrate's prior determination for the fundamental reason that the magistrate never reviewed the untainted facts. [193] In other words, the fact-finder "cannot defer to a magistrate's consideration of an application for a search warrant that the magistrate in effect did not review." [194] Any standard less than de novo review is inappropriate because the original magistrate was unaware of the affiant's perjury and therefore could not make an informed determination of the affiant's credibility. [195] Stated another way, the issue is whether "[t]he force of the lies on the mind of the magistrate can be bleached out." [196]

Much of the confusion surrounding the subsequent determination of whether probable cause exists is due to the failure of courts and commentators to analyze its proper role in constitutional jurisprudence. The presence of probable cause in the truthful remainder of an affidavit does not negate the fact that perjured affidavits violate the Fourth Amendment. Even when probable cause is present, "[t]he search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws." [197]

***479** When the warrant affidavit contains perjurious statements, one cannot fairly say that the magistrate ever determined ex ante the sufficiency of the remaining content. Rather, the magistrate based her ex ante determination on the totality of the facts and circumstances set forth in the original affidavit, not on the basis of some then-unspecified portion of that affidavit. [198] The Fourth Amendment violation inherent in any warrant based on a perjured affidavit is not a merely technical one because "[r]easonable minds frequently may differ on the question whether a particular affidavit establishes probable cause . . . ." [199]

The foregoing paragraphs suggest the correct answer to the question of the proper role of probable cause in the Franks analysis. The probable cause issue in Franks should be framed not as a question of whether a Fourth Amendment violation occurred, but whether the law should grant a remedy for such a violation. As the Supreme Court held in Hudson v. Michigan, [200] "[w]hether the exclusionary remedy is appropriately imposed in a particular case . . . is 'an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct.'" [201] The Hudson Court reasoned that the remedy of exclusion is only appropriate when the Fourth Amendment violation has caused constitutionally cognizable harm. [202] Thus, probable cause in this context is a causation issue.

Causation's centrality to the exclusionary remedy's existence and scope explains both the Supreme Court's "independent source" doctrine [203] and its close relative, the "inevitable discovery" rule. [204] Both doctrines have their foundation in the causal distinction identified by Justice Holmes as "knowledge . . . gained from an independent source," which is not subject to exclusion, and "knowledge gained by the Government's own wrong," which is not admissible in a criminal proceeding. [205] The probable cause element of Franks is simply an application of the "independent source" doctrine. In Franks, the truthful content of the original warrant affidavit, which remains after redaction of the intentional or reckless falsehoods, constitutes the asserted "independent source." If the magistrate would have issued the requested warrant solely on the basis of the truthful content of the affidavit, then, under ***480** the "independent source" doctrine, no causal connection exists between the intentional or reckless falsehoods in the affidavit and the issuance of the warrant by the magistrate. [206]

Similarly, causation is an essential element of any civil action brought pursuant to 42 U.S.C. § 1983 for a constitutional violation. [207] In order to establish liability, the civil plaintiff must prove that the presence of the intentional or reckless falsehoods in the affidavit was a "substantial" or "motivating factor" in the magistrate's decision to issue the warrant. [208] Courts also routinely use this standard of causation in analogous areas of the law. For example, in TSC Industries, Inc. v. Northway, Inc., [209] the Supreme Court stated the test of materiality for actionable omissions from proxy statements as follows:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. [210]

This causation standard is also analogous to the materiality test used to determine criminal liability for perjury. A person commits perjury if she makes an intentionally or recklessly false statement under oath that has "a natural tendency to influence, or [be] capable of influencing, the decision of the decision making body to which it was addressed." [211] In order to sustain a conviction for perjury, the prosecution need not prove "that the perjured testimony actually influenced the relevant decision-making body." [212] Thus, ***481** such a standard of causation, founded on whether an intentionally or recklessly false statement in a warrant affidavit materially affected the magistrate's determination of probable cause, would result in a violation of the Fourth Amendment only when the law enforcement officer committed the crime of perjury. One cannot persuasively argue that this standard, textually grounded in the "oath or affirmation" provision of the Fourth Amendment warrant clause, over-protects fundamental constitutional values. Nor is such a causation standard insensitive to the legitimate needs of law enforcement because it fully protects all police affiants, except those who rightfully should be imprisoned.

The Supreme Court has granted governmental defendants in § 1983 actions the added benefit of an affirmative defense whereby they may "defeat liability by demonstrating that [the magistrate] would have made the same decision absent the forbidden consideration." [213] Thus, under the Supreme Court's causation doctrine, a plaintiff in a § 1983 action may only succeed if the magistrate would not have issued the requested warrant based solely on the remaining content of the affidavit. [214] The trier of fact must resolve this causation issue. [215]

This analysis is consistent with the Supreme Court's recent decision in Hartman v. Moore, [216] in which the Court held that where a prosecutor and grand jury continue a criminal prosecution based on truthful information from law enforcement officers, probable cause serves as a surrogate for proof of causation. [217] Although Hartman is distinguishable precisely because the information provided by the law enforcement officers was entirely truthful, its significance is three-fold. [218] First, it recognizes that probable cause constitutes ***482** a causation, rather than a Fourth Amendment, issue. Second, Hartman treated the relevant standard as actual, not merely arguable, probable cause. [219] Finally, the Court recognized that when probable cause is used as a test of causation, it is an issue of fact for the trier of fact to resolve. [220]

Even prior to Hartman, lower courts generally agreed that in civil cases asserting Franks claims, a jury should decide the issue of causation or probable cause. [221] This is the case even if the underlying facts are not in dispute and the issue is whether the facts constitute probable cause. [222] While this latter inquiry is technically a mixed question of law and fact, it is precisely the type of mixed question, as in cases of negligence, [223] materiality in perjury, [224] securities fraud, [225] and the issue of community standards in obscenity cases, [226] which the jury properly resolves. [227] The United States Supreme Court emphasized that probable cause determinations, made in the first instance by lay magistrates, are inherently issues of fact. [228] Finally, it is significant, and perhaps dispositive, that the framers of the Fourth Amendment never thought of probable cause as a technical legal concept. [229] Instead, they intended that a jury would decide the factual question of probable cause in each particular case. [230]

*483 C. Qualified Immunity and Perjured Warrant Affidavits

There remains only the issue of whether a law enforcement officer who violates the Fourth Amendment by filing a search or arrest warrant affidavit containing one or more false statements of fact should be able to assert a qualified immunity defense to avoid civil liability in a § 1983 action. As a general rule, the qualified immunity doctrine protects a government official from civil liability, absent the violation of a constitutional right which was "clearly established" at the time. [231] Under this

standard, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right." [232] This qualified immunity doctrine is intended to protect all government officials except those who "are plainly incompetent or knowingly violate the law." [233]

Some courts, relying on the objective reasonableness standard, which generally governs the issue of qualified immunity in § 1983 actions, [234] have held that a law enforcement officer who files a perjurious warrant affidavit has "obviously failed to observe a right that [is] clearly established," and, therefore, "is not entitled to qualified immunity." [235] In contrast, other federal appellate courts have held that qualified immunity protects a police officer who violates the Fourth Amendment by filing a perjurious warrant affidavit, so long as the remainder of the affidavit is sufficient to establish arguable probable cause. [236]

Properly understood, the objective reasonableness standard of qualified immunity is entirely inapplicable when a law enforcement officer has violated the Fourth Amendment by filing a warrant affidavit containing intentional or reckless falsehoods. In Malley v. Briggs, [237] the Supreme Court held that a government official who "knowingly violate[s] the law" forfeits any claim to qualified immunity without regard to the objective reasonableness standard. [238] ***484** Similarly, in Crawford-El v. Britton, [239] the Court expressly rejected the dissenting argument of Justice Scalia that the "'objective reasonableness' test of Harlow [should be extended] to qualified immunity in so far as it relates to intent-based constitutional torts." [240] Finally, the use of the objective reasonableness standard to uphold perjurious warrants lacking actual, not merely arguable, probable cause directly flies in the face of Supreme Court precedent. In United States v. Leon, [241] the Court held "good faith" immunity inapplicable in cases where Franks has been violated. [242] Whether a law enforcement officer has filed a perjurious warrant affidavit depends entirely on the knowledge and intent of that officer, and "should a fact-finder find against an official on this state-of-mind question, qualified immunity would not be available as a defense." [243]

VIII. Conclusion

Today, Fourth Amendment issues are ordinarily subordinated to concerns about the proper scope of the exclusionary rule as well as the role of qualified immunity in constitutional adjudication. These mediating doctrines protect dutiful and honest law enforcement officials who act in good faith and with objective reasonableness. Neither doctrine was designed to protect dishonest police officers who file perjurious warrant affidavits. Unfortunately, in the absence of clear guidance from either the United States Supreme Court or legal scholars, lower courts have erected inappropriate legal barriers to the eradication of perjurious warrant affidavits.

Properly interpreted, Franks v. Delaware and other Supreme Court precedent hold that a law enforcement officer violates the Fourth Amendment when the trier of fact finds that the officer made intentionally or recklessly false statements in a warrant affidavit. In such cases, the officer is not entitled to benefit from the good faith doctrine or qualified immunity. The trier of fact exclusively determines whether the truthful remainder of the affidavit sufficiently establishes actual, not merely arguable, probable cause.

Unlike much of the Supreme Court's Fourth Amendment jurisprudence, this interpretation approximates the Founding Father's original vision. [244] It offers realistic protection from unjustified police intrusions into the home. It also recognizes that intentionally or recklessly false statements in warrant affidavits serve no legitimate law enforcement purpose. Rather, they are destructive of ***485** competent, professional police work. Finally, this interpretation recognizes that false warrant affidavits constitute an "offense against the justice system" [245] itself because "perjury tends to contaminate the very fountains of justice." [246]

Footnotes

[1] Professor of Law, Cleveland-Marshall College of Law.

2 Exodus 20:16 (King James).

3 Georgia v. Randolph, 547 U.S. 103, 115 (2006); see also Kyllo v. United States, 533 U.S. 27, 40 (2001); Wilson v. Layne, 526 U.S. 603, 610 (1999); United States v. U.S. Dist. Court for the E.D. of Mich., 407 U.S. 297, 313 (1972).

4 See, e.g., Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (consent overrides Fourth Amendment prohibition against warrantless searches); United States v. Matlock, 415 U.S. 164, 170-71 (1974) (stating warrantless search valid when consent given by one who controls premises even if not defendant); Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973) (holding search authorized by consent as valid).

5 See Arizona v. Hicks, 480 U.S. 321, 325 (1987); Mincey v. Arizona, 437 U.S. 385, 392 (1978).

6 See, e.g., Groh v. Ramirez, 540 U.S. 551, 560 (2004); Steagald v. United States, 451 U.S. 204, 214 (1981); Payton v. New York, 445 U.S. 573, 588-89 (1980). The Fourth Amendment requires a valid warrant in a limited number of situations outside the context of residential dwellings. See, e.g., G.M. Leasing Corp. v. United States, 429 U.S. 338, 358-59 (1977) (searching private office); Katz v. United States, 389 U.S. 347, 353 (1967) (using electronic interception of telephone communications); United States v. Jeffers, 342 U.S. 48, 51-52 (1951) (searching hotel room). The discussion herein applies to all warrant-based searches and arrests, although particularly focuses on residential searches.

7 Baldwin v. Placer County, 418 F.3d 966, 970 (9th Cir. 2005).

8 438 U.S. 154 (1978).

9 Since the Franks decision, there have been two articles which focus on warrant affidavits in a state law criminal context. See generally, Edward Gregory Mascolo, Controverting an Informant's Factual Basis for a Search Warrant: Franks v. Delaware Revisited and Rejected Under Connecticut Law, 15 Quinnipiac L. Rev. 65 (1995); Peter William Mickelson, Comment, Good Riddance to Good Faith?: Deciphering Montana's New Test for Subfacial Challenges to Search Warrant Affidavits, 62 Mont. L. Rev. 175 (2001). A few articles on the topic, again from a criminal procedure perspective, were published prior to the Franks decision. See generally, e.g., Joseph D. Grano, A Dilemma for Defense Counsel: Spinelli-Harris Search Warrants and the Possibility of Police Perjury, 1971 U. Ill. L. Rev. 405 (1971); Lawrence Herman, Warrants for Arrest or Search: Impeaching the Allegations of a Facially Sufficient Affidavit, 36 Ohio St. L.J. 721 (1975); Charles M. Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L. Rev. 839 (1974). Until now, the problem of false warrant applications has never been addressed in the context of civil rights actions brought pursuant to 42 U.S.C. § 1983.

10 Most significantly, Franks pre-dates Illinois v. Gates, 462 U.S. 213 (1983), which now governs the determination of whether a warrant affidavit sufficiently establishes probable cause for a search or arreSt. See generally Louis D. Bilionis, Conservative Reformation, Popularization, and the Lessons of Reading Criminal Justice as Constitutional Law, 52 UCLA L. Rev. 979 (2005).

11 The Supreme Court decided virtually all major cases interpreting 42 U.S.C. § 1983 after Franks. See generally, e.g., Crawford-El v. Britton, 523 U.S. 574 (1998); Siegert v. Gilley, 500 U.S. 226 (1991); Anderson v. Creighton, 483 U.S. 635 (1987); Malley v. Briggs, 475 U.S. 335 (1986). But see Monroe v. Pape, 365 U.S. 806 (1961) (unleashing full potential of § 1983 lawsuits).

12 42 U.S.C. § 1983 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, suit in equity, or other proper proceeding for redress.

13 See, e.g., Morgan Cloud, The Dirty Little Secret, 43 Emory L.J. 1311, 1347 (1994); Carol S. Steiker, Second Thoughts About First Principles, 107 Harv. L. Rev. 820, 853-54 (1994); William J. Stuntz, Warrants and Fourth Amendment Remedies, 77 Va. L. Rev. 881, 915 (1991) [hereinafter Stuntz, Remedies].

14 See, e.g., Craig M. Bradley, The "Good Faith Exception" Cases: Reasonable Exercise in Futility, 60 Ind. L.J. 287, 292 (1985); Steiker, supra note 13, at 854; Stuntz, Remedies, supra note 13, at 915.

15 See Stuntz, Remedies, supra note 13, at 915. The larger argument made by Professor Stuntz, that the warrant requirement disproportionately protects upper and middle class Americans, is contradicted by the empirical reality that the poor (except for the truly homeless) are targeted disproportionately by law enforcement officers for warrant-based residential searches. Compare William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 Geo. Wash. L. Rev. 1265 (1999) [hereinafter Stuntz, Privacy] (discussing Fourth Amendment law's effects on police targeting minority and poorer neighborhoods), with Laurence A. Benner, Racial Disparity in Narcotics Search Warrants, 6 J. Gender Race & Just. 183 (2002) (statistics indicate police over-target minorities in warrant-based home searches in San Diego).

16 See generally Gary T. Marx, Undercover: Police Surveillance In America (1988); Katherine Goldwasser, After ABSCAM: An examination of Congressional Proposals to Limit Targeting Discretion in Federal Undercover Investigations, 36 Emory L.J. 75 (1987); Richard A. Leo & Welsh S. White, Adapting to Miranda: Modern Interrogators' Strategies for Dealing with the Obstacles Posed by Miranda, 84 Minn. L. Rev. 397 (1999) (explaining undercover investigations and sting operations rely on falsehoods and deception for success); see also Deborah Young, Unnecessary Evil, Police Lying in Interrogation, 28 Conn. L. Rev. 425, 427-29 (1996) (describing how lies and deceit have replaced physical coercion as proper interrogation practice).

17 See Stanley Z. Fisher, "Just the Facts, Ma'am": Lying and the Omission of Exculpatory Evidence in Police Reports, 28 New Eng. L. Rev. 1, 13-14 (1993); see also Samuel R. Gross & Katherine Y. Barnes, Road Work: Racial Profiling and Drug Interdiction on the Highway, 101 Mich. L. Rev. 651, 678-79 (2002).

18 See Michael Goldsmith, Reforming the Civil Rights Act of 1871: The Problem of Police Perjury, 80 Notre Dame L. Rev. 1259, 1266 (2005) (noting widespread anecdotal evidence of police perjury during suppression hearings).

19 See Alan M. Dershowitz, Reasonable Doubts 49-64 (1996); Gabriel J. Chin & Scott C. Wells, The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury, 59 U. Pitt. L. Rev. 233, 246 (1998); Morgan Cloud, Judges, "Testilying," and the Constitution, 69 S. Cal. L. Rev. 1341, 1355-56 (1996) [hereinafter Cloud, Testilying]; David N. Dorfman, Proving the Lie: Litigating Police Credibility, 26 Am. J. Crim. L. 455 (1999); Donald A. Dripps, Police, Plus Perjury, Equals Polygraphy, 86 J. Crim. L. & Criminology 693 (1996); Andrew J. McClurg, Good Cop, Bad Cop: Using Cognitive Dissonance Theory to Reduce Police Lying, 32 U.C. Davis L. Rev. 389, 398 (1999); Myron W. Orfield, Jr., Deterrence, Perjury, and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 97 (1992); Christopher Slobogin, Deceit, Pretext, and Trickery: Investigative Lies by the Police, 76 Or. L. Rev. 775 (1997). See generally Jonathan Rubinstein, City Police (1973); H. Richard Uviller, Tempered Zeal (1988).

20 Jerome H. Skolnick, Deception by Police, 1 Crim. Just. Ethics, Summer/Fall 1982, at 40, 42-43, available at http://www.lib.jjay.cuny.edu/cje/html/sample1.html; see also Chin & Wells, supra note 19, at 246; Carl B. Klockars, Blue Lies and Police Placebos: The Moralities of Police Lying, 27 Am. Behav. Sci. 529, 543 (1984).

21 See generally U.S. Dept. of Justice, Office of the Inspector General, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct In Explosives-Related and Other Cases (1997), available at http://www.usdoj.gov/oig/special/9704a/index.htm; New York (N.Y.), City Commission on Human Rights, Breaking the Us

vs. Them Barrier: A Report On Police/Community Relations (1993); The City of New York, Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dept., Commission Report: Anatomy of Failure: A Path for Success (1994), available at http://www.parc.info/client_files/Special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf; Report of the Independent Commission on the L.A. Police Dep't (1991), available at http://www.parc.info/client_ files/Special%20Reports/1%20-%20Chistopher%20Commision.pdf; Commission to Investigate Allegations of Police Corruption and the City's Anti-Corruption Procedures, The Knapp Commission Report on Police Corruption (1972); United States, President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society: A Report (1967); Estes Kefauver, Crime in America (1968); U.S. Wickersham Commission Reports, U.S. National Commission on Law Observance and Enforcement: Report on Police Vol. 14 (1931); Report and Proceedings of the Senate Committee Appointed to Investigate the Police Department of the City of New York Vol. V (1895). In addition, widespread perjury by police officers in Atlanta, Detroit, DuPage County, Illinois, Los Angeles, Minneapolis, New Orleans, New York City, upstate New York, and Philadelphia has been reported. See Chin & Wells, supra note 19, at 234-35 nn.4 & 11 (sources omitted).

22 In re All Matters Submitted to the Foreign Intelligence Surveillance Ct., 218 F. Supp. 2d 611, 620 (FISA Ct. 2002), abrogated by In Re Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

23 Id. at 621.

24 Id.

25 Id. FBI agents have also filed affidavits, which included intentionally or recklessly false statements of fact, in support of "material witness" arrests and search warrants related to the war on terror. See Ricardo J. Bascuas, The Unconstitutionality of "Hold Until Cleared": Reexamining Material Witness Detentions in the Wake of the September 11th Dragnet, 58 Vand. L. Rev. 677, 678-80, 720-25 (2005).

26 See generally Francis A. Cavanagh, Comment, Probable Cause in a World of Pure Imagination: Why the Candyman Warrants Should Not Have Been Golden Tickets to Search, 80 St. John's L. Rev. 1091 (2006); see also United States v. Martin, 426 F.3d 68, 70-71 (2d Cir. 2005). The Second Circuit affirmed the denial of the defendant's motion to suppress on the ground that the remaining content of the affidavits, after the court redacted the perjured statement, sufficiently established probable cause for the search. Martin, 426 F.3d at 73. Judge Pooler's dissenting opinion questioned the dubious character of the majority's reasoning. Id. at 79 (Pooler, J., dissenting).

27 See David B. Kopel & Paul H. Blackman, The Unwarranted Warrant: The Waco Search Warrant and the Decline of the Fourth Amendment, 18 Hamline J. Pub. L. & Pol'y 1, 8-9 (1996).

28 Kopel & Blackman, supra note 27, at 8-9. In truth, the accuracy of this database has been as low as fifty percent. Id. at 9. Law enforcement officers also routinely present the results of DNA testing, fingerprint analysis, and other laboratory procedures as entirely accurate in affidavits for search and arrest warrants despite their actual knowledge that the reliability and integrity of the crime laboratories are open to serious doubt. See, e.g., J. Herbie Difonzo, The Crimes of Crime Labs, 34 Hofstra L. Rev. 1, 8-9 (2005); Laurel P. Gorman, Comment, The Brady Solution: A Due Process Remedy for Those Convicted with Evidence from Faulty Crime Labs, 39 U.S.F. L. Rev. 725, 728-29 (2005).

29 See generally, e.g., United States v. Martin, 426 F.3d 68 (2d Cir. 2005); United States v. Mick, 263 F.3d 553 (6th Cir. 2001); Sythe v. City of Eureka, 78 F. Supp. 2d 1050 (N.D. Cal. 1999). One of the most notorious examples of this type of police perjury occurred in the O.J. Simpson murder case, in which the judge found that the affidavit for the search of the Simpson residence contained numerous falsehoods made in reckless disregard of the truth. See Cloud, Testilying, supra note 19, at 1357-61 & n.90; Christopher Slobogin, Testilying: Police Perjury and What To Do About It, 67 U. Colo. L. Rev. 1037, 1037-39 (1996).

30 See generally Commonwealth v. Lewin, 542 N.E.2d 275 (Mass. 1989) (detailing perjurious statements of the Boston Drug Control Unit); Larry Wentworth, Comment, The XYZ Affair of Massachusetts Prosecutorial Misconduct: The Curious Case of Commonwealth v. Lewin --Was Dismissal Warranted?, 25 New Eng. L. Rev. 1019 (1991). The practice of law enforcement officers using imaginary informants is not limited to Boston, Massachusetts. See Albright v. Oliver, 510 U.S. 266, 293 n.3 (1994) (Stevens, J., dissenting) (noting problem in Illinois); Riley v. City of Montgomery, 104 F.3d 1247, 1250 (11th Cir. 1997) (detailing state investigation revealing Montgomery Police knowingly relying on false information from informants); McClurg, supra note 19, at 401-02 & n.71 (discussing prevalence of problem in New York).

31 See, e.g., United States v. Brown, 298 F.3d 392, 396 (5th Cir. 2002); United States v. Allen, 297 F.3d 790, 795 (8th Cir. 2002) (detailing allegations of omitting criminal history and drug addiction of informant); United States v. Vigeant, 176 F.3d 565, 573 (1st Cir. 1999) (holding as material error omission of informant's criminal history from affidavit); United States v. Meling, 47 F.3d 1546, 1553 (9th Cir. 1995) (reasoning FBI misled court by omitting informant's criminal history). In Brown, for example, the FBI agent swore in the affidavit that "[s]ince his cooperation with the FBI [the informant] has never been known to provide false or misleading information." Brown, 298 F.3d at 396. In fact, the FBI agent knew that the informant was "thoroughly dishonest." Id. at 409. Moreover, the Assistant U.S. Attorney who filed the affidavit testified in a contemporaneous legal proceeding that "the things that we're not able to independently corroborate, we believe are lies." Id. at 397.

32 See supra notes 13, 15 and accompanying text (detailing conventional wisdom among scholars).

33 See generally Abraham S. Goldstein, The Search Warrant, the Magistrate, and Judicial Review, 62 N.Y.U. L. Rev. 1173 (1987).

34 See, e.g., United States v. Davis, 471 U.S. 938, 946-47 & n.6 (8th Cir. 2006); United States v. Whitley, 249 F.3d 614, 616-18 (7th Cir. 2001); United States v. Kennedy, 131 F.3d 1371, 1376-77 (10th Cir. 1997).

35 See, e.g., Illinois v. Gates, 462 U.S. 213, 241-42 (1983); Jones v. United States, 362 U.S. 257, 269 (1960); Draper v. United States, 358 U.S. 307, 313-14 (1959).

36 Franks v. Delaware, 438 U.S. 154, 171 (1978).

37 William J. Cuddihy & B. Carmon Hardy, A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution, 37 Wm. & Mary Q. 371, 372 (1980).

38 See, e.g., Groh v. Ramirez, 540 U.S. 551, 556 (2004) (detailing what warrant clause necessitates). In its entirety, the Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

39 The Fourth Amendment particularity requirement relates to and buttresses the probable cause requirement because it too is intended to prevent "the issue of warrants on loose, vague or doubtful bases of fact." Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). Therefore, the discussion herein of the effect of perjurious warrant affidavits on the probable cause requirement is equally applicable to the particularity requirement. In addition, another purpose of the particularity requirement is to limit the scope and intensity of the execution of the warrant. See, e.g., Lo-Ji Sales,

Inc. v. New York, 442 U.S. 319, 325 (1979); Andresen v. Maryland, 427 U.S. 463, 480 (1976); Marron v. United States, 275 U.S. 192, 196 (1927). Perjured warrant affidavits similarly defeat this purpose of the particularity requirement.

40 Ornelas v. United States, 517 U.S. 690, 696 (1996); see also United States v. Grubbs, 547 U.S. 90, 95 (2006); Illinois v. Gates, 462 U.S. 213, 238 (1983).

41 See Gates, 462 U.S. at 238 (abandoning two-pronged Aguilar-Spinelli test in favor of totality of circumstances test for determining probable cause in confidential informant situations).

42 Ornelas, 517 U.S. at 696; see also Henry v. United States, 361 U.S. 98, 102 (1959); Draper v. United States, 358 U.S. 307, 313 (1959); Brinegar v. United States, 338 U.S. 160, 175-76 (1949).

43 Franks v. Delaware, 438 U.S. 154, 165 (1978). It is clearly established law that probable cause may be based on hearsay. See, e.g., Gates, 462 U.S. at 238;Jones v. United States, 362 U.S. 257, 271 (1960); Draper, 358 U.S. at 312-13.

44 See Gates, 462 U.S. at 243 n.13.

45 Ornelas, 517 U.S. at 699-700. "For example, what may not amount to reasonable suspicion [or probable cause] at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee." Id.

46 Franks, 438 U.S. at 165. In contrast, no requirement exists mandating that the law enforcement official subjectively believe that the facts, truthfully recounted, are sufficient to constitute probable cause. Florida v. Royer, 460 U.S. 491, 497-98 (1983). The probable cause standard is objective and depends upon the conclusion of an ordinary reasonable and prudent person. See, e.g., Beck v. Ohio, 379 U.S. 89, 91 (1964); Henry v. United States, 361 U.S. 98, 102 (1959); Brinegar, 338 U.S. at 175-76.

47 As used herein, an affidavit statement is intentionally or recklessly false if it is perjurious in character, which in turn is defined as a statement which the affiant did not believe or appropriately accept as being true.

48 See, e.g., Thomas K. Clancy, The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 U. Mem. L. Rev. 483, 533-37 (1995); David A. Harris, Using Race Or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No, 73 Miss. L.J. 423, 438-42 (2003); Scott E. Sundby, "Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?, 94 Colum. L. Rev. 1751, 1766-68 (1994).

49 See Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 Mich. L. Rev. 547, 576-77, 589 (1999). It is impossible to assess the effectiveness of the warrant clause in preventing unjustified searches and seizures. See Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("The probable-cause standard is incapable of precise definition or quantification into percentages...."). A recent study of the success rate of warrant-based narcotics searches, conducted in the San Diego Judicial District, found that the success rates of warrant-based searches for methamphetamine was sixty-three percent and twenty-eight percent for rock cocaine. Benner, supra note 15, at 205 tbl.16. When the target of the warrant-based search is African-American or Hispanic the success rate declines precipitously. Benner, supra note 15, at 204-05 tbls. 13, 14, 15. Perjured warrant affidavits surely increase the rate of unsuccessful searches.

50 See, e.g., United States v. Grubbs, 547 U.S. 90, 99 (2006) ("The Constitution protects property owners... by interposing, ex ante, the 'deliberate, impartial judgment of a judicial officer... between the citizen and the police.'" (quoting Wong Sun v. United States, 371 U.S. 471, 481-82 (1963))); Katz v. United States, 389 U.S. 347, 359 (1967) ("[T]he procedure of antecedent justification... is central to the Fourth Amendment"); Trupiano v. United States, 334 U.S. 699, 709-10 (1948).

The Supreme Court has noted the deep historical roots of the warrant clause's requirement of ex ante authorization by a magistrate. Quoting Lord Mansfield, the Court wrote, "It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer." United States v. U.S. Dist. Court for the E.D. of Mich., 407 U.S. 297, 316 (1972) (quoting Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1027 (1765)).

51 See, e.g., Groh v. Ramirez, 540 U.S. 551, 558-63 (2004); Payton v. New York, 445 U.S. 573, 587-88 (1980); Agnello v. United States, 269 U.S. 20, 33-34 (1925).

52 See Illinois v Gates, 462 U.S. 213, 236 (1983) ("[S]o long as the magistrate had a 'substantial basis for... [concluding]' that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more." (quoting Jones v. United States, 362 U.S. 257, 271 (1960))). In actual practice, a warrant-based search lacking even a "substantial basis" for finding probable cause ordinarily will be insulated from any remedy provided that the police officer acted in "good faith." See generally Massachusetts v. Sheppard, 468 U.S. 981 (1984); United States v. Leon, 468 U.S. 897 (1984); see also Malley v. Briggs, 475 U.S. 335, 344 (1986) (qualified immunity standard mirrors Leon "good faith" standard).

53 Agnello, 269 U.S. at 32 (emphasis added); see also Kyllo v. United States, 533 U.S. 27, 31 (2001) (noting a warrantless search of the home unconstitutional with few exceptions).

54 See, e.g., Malley, 475 U.S. at 352 (Powell, J., concurring in part and dissenting in part); U.S. Dist. Court, 407 U.S. at 316-17;McDonald v. United States, 335 U.S. 451, 455-56 (1948).

55 See, e.g., South Dakota v. Opperman, 428 U.S. 364, 381 (1976) (Powell, J., concurring); Whiteley v. Warden, 401 U.S. 560, 564 (1971); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963).

56 See, e.g., Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979) (town justice stepped outside role of neutral and detached magistrate when he led search party and conducted search of store); Coolidge v. New Hampshire, 403 U.S. 443, 453 (1971) (probable cause determination for warrant made by state Attorney General, who later prosecuted the case); Mancusi v. DeForte, 392 U.S. 364, 370-71 (1968) (subpoena duces tecum for documents in office issued by New York District Attorney not a valid search under Fourth Amendment).

57 Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972); see also United States v. U.S. Dist. Court for the E.D. of Mich., 407 U.S. 297, 317 (1972); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

58 United States v. Lefkowitz, 285 U.S. 452, 464 (1932); see also Coolidge, 403 U.S. at 450;Johnson, 333 U.S. at 13-14.

59 See, e.g., Illinois v. Gates, 462 U.S. 213, 239 (1983); United States v. Ventresca, 380 U.S. 102, 108-09 (1965); Wong Sun, 371 U.S. at 481-82.

60 McDonald v. United States, 335 U.S. 451, 455-56 (1948).

61 Ventresca, 380 U.S. at 108-09 (stating magistrate must look at underlying circumstances upon which affiant bases his or her belief that probable cause exists).

62 See, e.g., Aguilar v. Texas, 378 U.S. 108*l*, 112-13 (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958); Nathanson v. United States, 290 U.S. 41, 47 (1933).

63 United States v. Leon, 468 U.S. 897, 915 (1984) (quoting Illinois v. Gates, 462 U.S. 213, 239 (1983)); see also Aguilar, 378 U.S. at 112-13.

64 See, e.g., Florida v. J.L., 529 U.S. 266, 271 (2000) (search predicated on anonymous tip with no basis of knowledge invalid even though information suspect carried gun proved true); Wong Sun v. United States, 371 U.S. 471, 481-82 (1963) (officer's entry into home upon invalid search warrant not righted by suspect's suspicious flight from officer); United States v. Di Re, 332 U.S. 581, 595 (1948) ("[A] search is not to be made legal by what turns up").

65 Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 565 n.8 (1971); see also Aguilar, 378 U.S. at 109 n.1;Agnello v. United States, 269 U.S. 20, 33 (1925). Thus, only that information properly presented to the magistrate, either in the sworn affidavit or in verbal testimony given under oath, may be considered. See Aguilar, 378 U.S. at 109 n.1 (noting fact that police conducted surveillance was irrelevant because officers failed to mention to magistrate when applying for warrant). In a few States, a magistrate, in making his probable cause determination, may consider only that contained in the written affidavit as a result of statute or rule. See generally Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991) (explaining under Pennsylvania State Constitution, no "good faith" exception to exclusionary rule exists as under Fourth Amendment of Federal Constitution).

66 Jones v. United States, 357 U.S. 493, 498 (1958).

67 See supra note 49 and accompanying text.

68 Ornelas v. United States, 517 U.S. 690, 695 (1996); see also Maryland v. Pringle, 540 U.S. 366, 370-71 (2003); Illinois v. Gates, 462 U.S. 213, 232 (1983).

69 Gates, 462 U.S. at 232; see also Pringle, 540 U.S. at 370-71;Ornelas, 517 U.S. at 696.

70 See United States v. Grubbs, 547 U.S. 90, 95 (2006) ("Because the probable-cause requirement looks to whether evidence will be found when the search is conducted, all warrants are, in a sense, 'anticipatory'").

71 Brinegar v. United States, 338 U.S. 160, 175-76 (1949); see also Ornelas, 517 U.S at 695;Wong Sun v. United States, 371 U.S. 471, 479 (1963).

72 Gates, 462 U.S. at 235-36 (citation omitted); see also Shadwick v. City of Tampa, 407 U.S. 345, 350 (1972).

73 Gates, 462 U.S. at 236 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)); cf. Ornelas, 517 U.S. at 698-99 (creating a dual standard of review). Ornelas imposed a de novo standard of review on appeals from probable cause determinations made in suppression hearings involving warrantless searches and seizures, and at the same time, reaffirmed that lower courts should uphold magistrates' determinations whether warrants should issue if a substantial basis exists. Ornelas, 517 U.S. at 704-05 (Scalia, J., dissenting) (explaining majority's dual standard of review). Even appeals from probable cause determinations made in suppression hearings, involving warrantless searches and seizures, are reviewable only for clear error and deference must be given to the inferences drawn by the trial court judge. Id. at 699 (majority opinion).

74 See United States v. Leon, 468 U.S. 897, 914, 923 (1984).

75 Illinois v. Gates, 462 U.S. 213, 240 (1983) (quoting Johnson v. United, 333 U.S. 10, 13-14 (1948)).

76 See United States v. Grubbs, 547 U.S. 90, 98-99 (2006); Payton v. New York, 445 U.S. 573, 582 (1980); United States v. U.S. Dist. Court for the E.D. of Mich., 407 U.S. 297, 316 (1972).

77 Leon, 468 U.S at 914.

78 438 U.S. 154 (1978).

79 Id. at 155 (emphasis added).

80 See id. at 160. A clear majority of the state courts which had addressed the issue also permitted such veracity challenges to warrant applications. Id. at 159 n.3, 176-80.

81 Compare United States v. Belculfine, 508 F.2d 58, 63 (1st Cir. 1974) (holding warrant invalidated only if false statement was both intentional and "non-trivial" to the issue of probable cause), and United States v. Thomas, 489 F.2d 664, 669 (5th Cir. 1973) (false statement made with "intent to deceive the magistrate" results in suppression without regard to materiality of the statement, but non-intentional falsehood invalidates warrant only if material to probable cause), with Carmichael v. United States, 489 F.2d 983, 988-89 (7th Cir. 1973) (en banc) (invalidating warrants containing intentional falsehoods regardless of materiality or reckless falsehoods, only if material; but stating negligent falsehoods would never invalidate the warrant), and United States v. Marihart, 492 F.2d 897, 900 (8th Cir. 1974) (same).

82 Franks, 438 U.S. at 165. The dissenting opinion, written by Justice Rehnquist for himself and Chief Justice Burger, did not disagree with this fundamental interpretation of the warrant clause of the Fourth Amendment. See id. at 181 (Rehnquist, J., dissenting).

83 Franks, 438 U.S. at 164 (emphasis added).

84 Franks v. Delaware, 438 U.S. 154, 156 (1978).

85 Id. at 157, 174-76.

86 Id. at 157.

87 Id. at 157-58.

88 Franks, 438 U.S. at 158. The affidavit made reference to James Williams; however, the officers meant to have referenced James Morrison. Id. at 158 n.2.

89 Id. at 160, 162.

90 See, e.g., Stone v. Powell, 428 U.S. 465, 494-95 (1976) (exclusionary rule not available on habeas corpus); United States v. Janis 428 U.S. 433, 447, 454, 459-60 (1976) (exclusionary rule not available in civil actions); United States v. Calandra, 414 U.S. 338, 351-52 (1974) (same as to grand jury proceedings). The process of restricting the exclusionary remedy continued, and in 1984, the Court adopted the "good faith" exception to the exclusionary rule. See United States v. Leon, 468 U.S. 897, 922 (1984).

91 Franks v. Delaware, 438 U.S. 154, 184, 186 (1978) (Rehnquist, J., dissenting).

92 People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

93 People v. Cook, 583 P.2d 130, 141 n.11 (Cal. 1978) (en banc) (quoting United States ex reL. Petillo v. New Jersey, 418 F. Supp. 686, 689 n.4 (D. N.J. 1976)).

94 Franks, 438 U.S. at 171.

95 Id. at 165.

96 Id. at 155-56, 171-72.

97 See supra note 81 (citing conflicting approaches of circuit courts of appeals).

98 Franks v. Delaware, 438 U.S. 154, 172 n.8 (1978). "[Franks] conceded that if what is left is sufficient to sustain probable cause, the inaccuracies are irrelevant. [Franks] also conceded that if the warrant affiant had no reason to believe the information was false, there was no violation of the Fourth Amendment." Id. (citations omitted).

99 Id. at 155.

100 Id. at 156.

101 Id. at 155.

102 Franks, 438 U.S. at 165.

103 See id. at 155-56, 171-72.

104 See McCray v. Illinois, 386 U.S. 300, 313-14 (1967) (holding devoid of merit, petitioner's claim Sixth Amendment rights violated by state's refusal to produce confidential informant).

105 Arthur W. Alschuler, "Close Enough for Government Work": The Exclusionary Rule After Leon, 1984 Sup. Ct. Rev. 309, 319 (1984).

106 Franks v. Delaware, 438 U.S. 154, 171 (1978).

107 See id. at 170.

108 373 U.S. 83 (1963).

109 See, e.g., Kyles v. Whitley, 514 U.S. 419, 435 (1995); United States v. Bagley, 473 U.S. 667, 682 (1985); United States v. Agurs, 427 U.S. 97, 103-07 (1976).

110 Franks, 438 U.S. at 167.

111 See infra note 116. In keeping with their interpretation of Franks as authorizing a factual evaluation of the merits of the criminal defendant's claim of a perjured warrant affidavit, most lower courts review the denial of a Franks evidentiary hearing under the clearly erroneous standard, appropriately reserved for appellate review of lower court findings of fact. See, e.g., Zambrella v. United States, 327 F.3d 634, 638 (7th Cir. 2003); United States v. Castillo, 287 F.3d 21, 25 (1st Cir. 2002); United States v. Graham, 275 F.3d 490, 505 (6th Cir. 2001). But see United States v. Brown, 298 F.3d 392, 396 (5th Cir. 2002) (employing de novo standard of review, alone among circuit courts of appeals).

112 Franks v. Delaware, 438 U.S. 154, 171 (1978).

113 Id.

114 Id. at 155-56.

115 See People v. Lucente, 506 N.E.2d 1269, 1276-77 (Ill. 1987) (holding substantial preliminary showing somewhere between mere denials and proof by a preponderance of the evidence); see also State v. Hamel, 634 A.2d 1272, 1274-75 (Me. 1993) (holding unwarranted requirement of criminal defendant to establish preliminary showing by preponderance of the evidence); Commonwealth v. Ramirez, 617 N.E.2d 983, 987-88 (Mass. 1993) (adopting Lucente standard of substantial preliminary showing).

116 See, e.g., United States v. Amerson, 185 F.3d 676, 688 (7th Cir. 1999) (holding alibi affidavits insufficient to establish hearing where they failed to account for twenty-five minutes of seventy-two hour period); United States v. Mueller, 902 F.2d 336, 343 (5th Cir. 1990) (expert affidavit that declares affidavit statement was scientifically "unlikely" held insufficient upon reasoning that some unlikely events probably do occur); Johnson v. State, 472 N.E.2d 892, 902 (Ind. 1985) (informant's denial that he made statements attributed to him in warrant affidavit insufficient because it "merely raises the question of credibility").

117 Franks, 438 U.S. at 171. "[A]llegations of negligence or innocent mistake are insufficient;" rather they must be of deliberate or reckless falsehoods "accompanied by an offer of proof." Id.

118 See, e.g., Mason v. Lowndes County Sheriff's Dep't, 106 F. App'x 203, 206-07 (5th Cir. 2004); Vakilian v. Shaw, 335 F.3d 509, 517 (6th Cir. 2003); Hunter v. Namanny, 219 F.3d 825, 830 (8th Cir. 2000).

119 See supra notes 107-109 and accompanying text (detailing purpose behind substantial preliminary showing requirement in criminal justice system).

120 It is highly unlikely that a § 1983 action can be maintained if the search was successful because preclusion doctrines ordinarily prohibit the re-litigation of issues decided favorably to the government in a preliminary hearing, suppression hearing, or criminal trial. See, e.g., Allen v. McCurry, 449 U.S. 90, 97-98, 103-04 (1980) (concluding Congress did not intend § 1983 "to restrict the normal doctrines of preclusion); Jiron v. City of Lakewood, 392 F.3d 410, 417 (10th Cir. 2004) (holding defendant who plead guilty in state criminal court cannot re-litigate elements of the crime in civil court); Sappington v. Bartee, 195 F.3d 234, 235 (5th Cir. 1999) (ruling civil suit barred where litigation would call into question validity of criminal conviction). In addition, most courts have held that Heck v. Humphrey, 512 U.S. 477 (1994), would bar any such § 1983 actions by a person convicted on the basis of evidence discovered in such a search unless or until the conviction has been reversed or vacated on direct appeal or habeas corpus. See, e.g., Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892, 899 (7th Cir. 2001) (§ 1983 suit barred if challenging the validity of a search warrant while conviction still stands); Harvey v. Waldron, 210 F.3d 1008, 1015 (9th Cir. 2000) (adopting approach of Second and Sixth Circuits barring § 1983 suits for illegal searches until criminal charges dismissed or overturned);

Covington v. City of New York, 171 F.3d 117, 124 (2d Cir. 1999) (holding plaintiff's § 1983 claim not time-barred if unable to bring suit until conviction overturned because doing so would undermine conviction). But see Beck v. City of Muskogee, 195 F.3d 553, 588 n.3 (10th Cir. 1999) (interpreting footnote 7 of Heck to allow § 1983 suits regarding the search leading to arrest and/or conviction). In any event, as a practical matter, a § 1983 claim would not be worth pursuing if the search was successful. See Hector v. Watt, 235 F.3d 154 (3d Cir. 2001); Townes v. City of New York, 176 F.3d 138, 148 (2d Cir. 1999) ("The evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.").

121 See 3 Kevin F. O'Malley, Jay E. Grenig & William C. Lee, Federal Jury Practice and Instructions § 103.11 (5th ed. 2000). In federal courts, the standard jury instruction reads: "This case should be considered and decided by you as a dispute between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be treated as equals." Id.

122 See, e.g., Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515 (2002); Crawford-El v. Britton, 523 U.S. 574, 594 (1998); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993). Those cases, applying the substantial preliminary showing requirement to civil § 1983 actions, were either decided prior to Swierkiewicz and Crawford-El or simply failed to consider their import. See supra note 118 (citing cases).

123 Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 243 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 153 (1970).

124 523 U.S. 574 (1998).

125 See id. at 594.

126 See generally United States v. Rodriguez-Suazo, 346 F.3d 637 (6th Cir. 2003); United States v. Brown, 3 F.3d 673 (3d Cir. 1993); United States v. Schauble, 647 F.2d 113 (10th Cir. 1981).

127 See, e.g., Rugendorf v. United States, 376 U.S. 528, 532-33 (1964) (holding warrant valid where statements were not made by affiant); United States v. Calisto, 838 F.2d 711, 714 n.2 (3d Cir. 1988) (citing multiple federal case decisions); State v. Glenn, 740 A.2d 856, 861 (Conn. 1999) (citing multiple state case decisions). On the other hand, the Fourth Amendment is violated if the intentionally or recklessly false statement is made by a law enforcement officer and then relied upon, even if innocently, by the police officer affiant. See, e.g., United States v. Whitley, 249 F.3d 614, 621 (7th Cir. 2001); United States v. Kennedy, 131 F.3d 1371, 1376 (10th Cir. 1997); Hart v. O'Brien, 127 F.3d 424, 448 (5th Cir. 1997). Even if the person providing the false information to the affiant is a private citizen, the Fourth Amendment may still be violated if he or she is "in fact acting as a government agent." United States v. Hollis, 245 F.3d 671, 674 (8th Cir. 2001); see also United States v. McAllister, 18 F.3d 1412, 1417-19 (7th Cir. 1994); State v. Thetford, 745 P.2d 496, 496 (Wash. 1987) (en banc).

128 See generally United States v. Kiser, 716 F.2d 1268 (9th Cir. 1983); People v. Lucente, 506 N.E.2d 1269 (Ill. 1987); State v. Wolken, 700 P.2d 319 (Wash. 1985) (en banc).

129 See, e.g., United States v. Bennett, 219 F.3d 1117, 1124 (9th Cir. 2000); United States v. Roth, 201 F.3d 888, 892 (7th Cir. 2000); Brown, 3 F.3d at 677-78.

130 See, e.g., United States v. Valerio, 48 F.3d 58, 62 (1st Cir. 1995) (holding no abuse of discretion of lower court not conducting in camera review); United States v. Giacalone, 853 F.2d 470, 477 n.l (6th Cir. 1988) (holding the power to conduct in camera review of confidential informant within lower court's discretion); Kiser, 716 F.2d at 1273-74 (remanding for in camera review of affiant and questioning of local police officers).

131 386 U.S. 300 (1967).

132 Id. at 307-08 (noting judge may request production of informant if he deems it necessary).

133 United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993); see also United States v. Anty, 203 F.3d 305, 311-12 (4th Cir. 2000); Easton v. City of Boulder, 776 F.2d 1441, 1449 (10th Cir. 1985). See generally Aaron M. Clemens, Removing the Market for Lying Snitches: Reforms to Prevent Unjust Convictions, 23 Quinnipiac. L. Rev. 151 (2004).

134 See, e.g., United States v. Allen, 297 F.3d 790, 795 (8th Cir. 2002) (holding omission of "reliable" informant's three previous felony convictions and fact he was "under the influence of methamphetamine at the time he gave the information" did not necessitate Franks hearing); United States v. Bennett, 219 F.3d 1117, 1124 (9th Cir. 2000) (upholding lower court's decision denying suppression motion where affidavit omitted times informant had perjured himself); United States v. Meling, 47 F.3d 1546, 1553-54 (9th Cir. 1995) (affidavit upheld where affiant knew informant's desire to collect $100,000 award, his documented commitment to mental institutions, and legal history for dishonest crimes). But see, e.g., United States v. Reinholz, 245 F.3d 765, 774 (8th Cir. 2001) (upholding district court's determination of officer's reckless misrepresentation of informant's credibility); United States v. Vigeant, 176 F.3d 565, 573 (1st Cir. 1999) (noting affiant's omission of informant's long criminal record, numerous aliases, and recent plea bargain agreement); United States v. Hall, 113 F.3d 157, 160-61 (9th Cir. 1997) (recognizing FBI's knowledge of, and failure to disclose, information that impugned informant).

135 United States v. Johnson, 78 F.3d 1258, 1262 (8th Cir. 1996); see also United States v. Underwood, 364 F.3d 956, 964 (8th Cir. 2004); United States v. Gibson, 123 F.3d 1121, 1124 (8th Cir. 1997).

136 McCray, 386 U.S. at 306-07 (quoting State v. Burnett, 201 A.2d 39, 44 (N.J. 1964)).

137 United States v. Nixon, 418 U.S. 683, 710 (1974); see also Trammel v. United States, 445 U.S. 40 (1980); Herbert v. Lando, 441 U.S. 153, 176 (1974).

138 See, e.g., Hampton v. Hanrahan, 600 F.2d 600, 638 (7th Cir. 1979); Skibo v. City of New York, 109 F.R.D. 58, 61 (S.D.N.Y. 1985); Socialist Workers Party v. Attorney General, 458 F. Supp. 895, 899 (S.D.N.Y. 1978), rev'd in part sub nom., In re Attorney General, 596 F.2d 58 (2d Cir. 1979).

139 McCray v. Illinois, 386 U.S. 300, 309-11 (1967) (noting strength of informant's privilege weaker at trial where issue is of guilt or innocence).

140 Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

141 Hampton, 600 F.2d at 636; see also Roviaro, 353 U.S. at 64-65. Rovario represented "a case where the Government's informer was the sole participant, other than the accused, in the transaction charged.... [U]nder these circumstances, the trial court committed prejudicial error in permitting the government to withhold the identity...." Roviaro, 353 U.S. at 64-65. In a civil § 1983 action, the law enforcement officer, now a defendant, often seeks to rely on information allegedly received from a confidential informant to prove the truthfulness of the challenged statements contained in the search warrant affidavit. In such situations, the court cannot permit the law enforcement officer to testify concerning the existence or reliability of the informant while, at the same time, assert a privilege to avoid disclosure of the identity of that informant. Cf. Desai v. Hersh, 954 F.2d 1408, 1412 (7th Cir. 1992) (refusing to uphold reporter's privilege in defamation action, where privilege would effectively make establishing prima facie case impossible); Laxalt v. McClathchy, 116 F.R.D. 438, 452-53 (D. Nev. 1987) (holding reporter must refuse to answer question of reliability at trial if he wishes to

keep source confidential); Dowd v. Calabrese, 577 F. Supp. 238, 244 (D.D.C. 1983) (concluding defendant could retain confidentiality of its sources but had to forgo reliance on those sources for its defense).

142 Crawford-El v. Britton, 523 U.S. 574, 597-99 (1998) (noting availability of several procedures for trial judge to reduce burden on any party).

143 Franks v. Delaware, 438 U.S. 154, 155-56 (1978).

144 United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006) (quoting Wilson v. Russo, 212 F.3d 781, 787 (3d Cir. 2000)).

145 See infra Part VI.B.

146 See, e.g., United States v. Clapp, 46 F.3d 795, 800-01 (8th Cir. 1995); DeLoach v. Bevers, 922 F.2d 618, 621-22 (10th Cir. 1990); United States v. Williams, 737 F.2d 594, 602 (7th Cir. 1984).

147 376 U.S. 254 (1964).

148 See id. at 270 (explaining public officials expected to be verbally attacked during public debates); Curtis Pub. Co. v. Butts, 388 U.S. 130, 162 (1967) (Warren, C.J., concurring) (acknowledging showing of malice requirement exists for public figure as it exists for public official). The Supreme Court has emphasized the limited nature of the public figure category. See generally, e.g., Hutchison v. Proxmire, 443 U.S. 111 (1979); Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). Furthermore, a plaintiff need not prove actual malice, or even negligence, if the allegedly defamatory statement does not involve a matter of public concern. Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 757-58 (1985).

149 New York Times, 376 U.S at 280.

150 St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

151 Id. at 731-32.

152 See, e.g., United States v. Yusuf, 461 F.3d 374, 383 (3d Cir. 2006); Burke v. Town of Walpole, 405 F.3d 66, 81 (1st Cir. 2005); United States v. Davis, 617 F.2d 677, 694 (D.C. Cir. 1979); see also supra note 146 (detailing reckless disregard of the truth standard).

153 New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). See generally Harry Kalven, Jr., The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191 (1964).

154 See New York Times, 376 U.S. at 270.

155 See id. at 270-72; see also Time, Inc. v. Pape, 401 U.S. 279, 291 (1971); Greenbelt Cooperative Pub. Ass'n. v. Bresler, 398 U.S. 6, 10-11 (1970); Cantwell v. Connecticut, 310 U.S. 296, 306-07 (1940).

156 See supra Part III.A (explaining role of neutral and detached magistrate).

157 See, e.g., Bose Corp. v. Consumers Union, 466 U.S. 485, 492 (1984); St. Amant v. Thompson, 390 U.S. 727, 732-33 (1968); New York Times, 376 U.S. at 285-86.

158 See, e.g., Ornelas v. United States, 517 U.S. 690, 699-700 (1996); United States v. Awadallah, 349 F.3d 43, 65 (2d Cir. 2003); United States v. Elliott, 322 F.3d 710, 714 (9th Cir. 2003).

159 Bose Corp., 466 U.S. at 512 (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)); see also Bresler, 398 U.S. at 6;New York Times Co. v. Sullivan, 376 U.S. 254, 285-288 (1964).

160 See, e.g., Illinois v. Gates, 462 U.S. 213, 239 (1983); Aguilar v. Texas, 378 U.S. 108, 113 (1964); Giordenello v. United States, 357 U.S. 480, 486 (1958); Nathanson v. United States, 290 U.S. 41, 47 (1933).

161 See United States v. Leon, 468 U.S. 897, 915, 923 (1984).

162 See New York Times, 376 U.S. at 278-79.

163 St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

164 Id. at 731.

165 See id. at 732-33;New York Times Co. v. Sullivan, 376 U.S. 254, 287-88 (1964) (explaining undercover investigations and sting operations rely on falsehoods and deception for success).

166 See Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999) (explaining "law enforcement officers have a duty to conduct a reasonably thorough investigation prior to arresting a suspect...."); see also Cortez v. McCauley, 438 F.3d 980, 990 (10th Cir. 2006); Sornberger v. City of Knoxville, 434 F.3d 1006, 1014-15 (7th Cir. 2006); Kingsland v. City of Miami, 382 F.3d 1220, 1229 (11th Cir. 2004). Of course, a law enforcement officer's duty to investigate is not limitless. See Baker v. McCollan, 443 U.S. 137, 143-147 (1979) (finding no duty to investigate claim of innocence of person incarcerated on basis of properly issued arrest warrant).

167 St. Amant, 390 U.S. at 732.

168 See Illinois v. Gates, 462 U.S. 213, 233 (1983). Compare Florida v. J.L., 529 U.S. 266, 270 (2000) (anonymous tip providing no indicia of reliability or predictive information for the officers to corroborate), with Alabama v. White, 496 U.S. 325, 332 (1990) (anonymous tip which informed officers of location, type of car involved, time of movement, and presence of cocaine allowed officers to independently verify information).

169 See Franks v. Delaware, 438 U.S. 154, 165 (1978).

170 St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

171 Franks, 438 U.S. at 164 (quoting U.S. Const. Amend. IV.); see also Rugendorf v. United States, 376 U.S. 528, 533 (1964).

172 Rugendorf, 376 U.S. at 532; see also Franks, 438 U.S. at 164-65.

173 State v. Anderson, 406 N.W.2d 398, 404 (Wis. 1987); see also United States v. Cican, 63 F. App'x 832, 835-37 (6th Cir. 2003); Turner v. Lotspeich, No. 95-1063, 1996 WL 23195, at *1 (10th Cir. Jan. 23, 1996); United States v. Pritchard, 745 F.2d 1112, 1119 (7th Cir. 1984).

174 People v. Cook, 583 P.2d 130, 143 (Cal. 1978) (en banc) (quoting People v. Von Tiedeman, 52 P.2d 155, 158 (Cal. 1898)); see also Bronston v. United States, 409 U.S. 352, 359 (1973); Butler v. State, 429 S.W.2d 497, 502 (Tex. Crim. App. 1968).

175 State v. Claxton, 594 P.2d 112, 114 (Ariz. App. 1979); see also Cook, 583 P.2d at 143;Commonwealth v. Nine Hundred and Ninety-Two Dollars, 422 N.E.2d 767, 769 (Mass. 1981); State v. Little, 560 S.W.2d 403, 407 (Tenn. 1978). In Olson v. Tyler, the court, believing that qualified immunity required an objective standard, stated the test as whether the information in the affidavit "was not reasonably believed by defendants to be true." 771 F.2d 277, 281 (7th Cir. 1985). In Crawford-El v. Britton, the Supreme Court rejected the notion that objective reasonableness will immunize a government official when the constitutional violation is one based on subjective intent. 523 U.S. 574, 593-94 (1998). In Mason v. Lowndes County Sheriff's Dep't, 106 F. App'x 203, 206-07 (5th Cir. 2004), the Fifth Circuit added that a § 1983 plaintiff must also prove that the law enforcement affiant engaged in a "deliberate attempt to mislead the magistrate judge" as to the existence of probable cause. Every other court to consider the issue properly rejected this additional element. See, e.g., Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000); United States v. Vigeant, 176 F.3d 565, 572-73 n.8 (1st Cir. 1999); Lombardi v. City of El Cajon, 117 F.3d 1117, 1124 (9th Cir. 1997). The Supreme Court also rejected this additional element in its construction of the federal perjury statute, 18 U.S.C. § 1621. See Bronston v. United States, 409 U.S. 352, 359 (1973). Mason inappropriately ignores the fact that affiants may make falsehoods recklessly; "even if they involve minor details--recklessness is measured not by the relevance of the information, but by the demonstration of willingness to affirmatively distort the truth." Mason, 106 F. App'x at 207 (quoting Wilson v. Russo, 212 F.3d 781, 788 (3d Cir. 2000)).

176 See, e.g., Bronston, 409 U.S. at 359;United States v. Ronda, 455 F.3d 1273, 1294-96 (11th Cir. 2006); United States v. Lee, 359 F.3d 412, 417 (6th Cir. 2004).

177 See, e.g., Crawford-El, 523 U.S. at 589;United States Postal Service Bd. v. Aikens, 460 U.S. 711, 716-17 (1983) ("The state of a man's mind is as much a fact as the state of his digestion." (quoting Eddington v. Fitzmaurice, 29 Ch.D. 459, 483 (1885))); Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982) ("Treating issues of intent as factual matters for the trier of fact is commonplace"); Commissioner v. Duberstein, 363 U.S. 278, 289 (1960).

178 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

179 Franks v. Delaware, 438 U.S. 154, 156 (1978).

180 See United States v. Leon, 468 U.S. 897, 922 (1984) (holding no good faith exception to exclusionary rule where affidavits contain perjurious statements); see also Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004) (reasoning no qualified immunity if good faith exception not applicable); Kalina v. Fletcher, 522 U.S. 118 (1997) (finding no absolute immunity in § 1983 suits for prosecutor who certified an affidavit containing perjurious statements).

181 Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004).

182 Id. at 744; see also Loria v. Gorman, 306 F.3d 1271, 1289-90 (2d Cir. 2002); Martinez v. City of Schenectady, 115 F.3d 111, 115 (2d Cir. 1997). The Second Circuit originated its "corrected affidavits doctrine" in cases involving claims of omissions of exculpatory information in warrant affidavits. See Escalera, 361 F.3d at 743-44;Smith v. Edwards, 175 F.3d 99, 105 (2d Cir. 1999); Soares v. Connecticut, 8 F.3d 917, 920 (2d Cir. 1993). In Smith and Soares, the Second Circuit responded to the claim of an omission of exculpatory information in the affidavit by "correcting" the affidavit

through the insertion of the omitted exculpatory information, not by adding inculpatory information. Smith, 175 F.3d at 105;Soares, 8 F.3d at 920.

183 See, e.g., Kohler v. Englade, 470 F.3d 1104, 1111-12 (5th Cir. 2006) (rejecting information not provided in affidavit to original magistrate making probable cause determination); United States v. Harris, 464 F.3d 733, 739 (7th Cir. 2006) (limiting consideration of exculpatory information only in affidavit review); United States v. Yusuf, 461 F.3d 374, 388-89, 388 n.12 (3d Cir. 2006) (limiting probable cause determination to information contained in affidavit).

184 See Escalera, 361 F.3d at 743-44. But see United States v. Laughton, 409 F.3d 744, 751-52 (6th Cir. 2005) (identifying difficulties arising from subjective inquiry into officer's knowledge outside four corners of affidavit).

185 The problem of police perjury in suppression hearings is well documented. See supra notes 19-21 and accompanying text.

186 Yusuf, 461 F.3d at 388 n.12.

187 See, e.g., Payton v. New York, 445 U.S. 573, 587 n.25 (1980); Agnello v. United States, 269 U.S. 20, 32 (1925) ("The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws").

188 See Coolidge v. New Hampshire, 403 U.S. 443, 450-51 (1971) (citing Agnello v. United States, 269 U.S. 20, 33 (1925)).

189 Whiteley v. Warden, Wyo. State Penitentiary, 401 U.S. 560, 565 n.8 (1971) (citing Aguilar v. Texas, 378 U.S. 108, 109 n.1 (1964)); see also Agnello, 269 U.S. at 33.

190 Franks v. Delaware, 438 U.S. 154, 156 (1978).

191 The probable cause test as set forth in Gates requires that the magistrate base his determination of probable cause on the "totality of circumstances" set forth in the affidavit. Illinois v. Gates, 462 U.S. 213, 230 (1983). Gates presupposes that the underlying affidavit sets forth all the facts comprising the totality of the circumstances then known to the affiant. In contrast, the "corrected affidavits doctrine" affirmatively encourages law enforcement affiants to omit known, relevant information from the affidavit by permitting the later supplementation of the affidavit with after-the-fact testimony. See Escalera v. Lunn, 361 F.3d 737, 743 (2d Cir. 2004). Judicial acceptance of a police policy or practice of omitting important, usually exculpatory, information from warrant affidavits institutionalizes the issuance of warrants by magistrates who never know the totality of the circumstances as required by Gates. See, e.g., Golino v. City of New Hower, 950 F.2d 864, 867 (2d Cir. 1991) (police affiant testified it was his general practice to omit exculpatory information from affidavit); Salmon v. Schwarz, 948 F.2d 1131, 1138 (10th Cir. 1991) (police practice to include only information pertinent to objective of securing warrant and not exculpatory information); Forest v. Pawtucket Police Dep't, 290 F. Supp. 2d 215, 229 (D. R.I. 2003) (same).

192 United States v. Meling, 47 F.3d 1546, 1554 (9th Cir. 1995) (emphasis added); see also United States v. Mindreci, 163 F. App'x 690, 693 (10th Cir. 2006) (upholding warrant if "magistrate had a substantial basis for concluding that the probable cause existed") (citation omitted); United States v. Perdomo, 800 F.2d 916, 920 (9th Cir. 1986) (upholding warrant unless falsehood "necessary to find probable cause").

193 See, e.g., Burke v. Town of Walpole, 405 F.3d 66, 82 (1st Cir. 2005); United States v. Kolodziej, 712 F.2d 975, 977 (5th Cir. 1983); United States v. Namer, 680 F.2d 1088, 1095 n.12 (5th Cir. 1982) (holding no presumption of validity attaches to original magistrate's probable cause determination).

194 State v. Kuneff, 970 P.2d 556, 559 (Mont. 1998).

195 See People v. Cook, 583 P.2d 130, 140-41 (Cal. 1978).

196 Baldwin v. Placer County, 418 F.3d 966, 970 (9th Cir. 2005).

197 Agnello v. United States, 269 U.S. 20, 32 (1925); see also Payton v. New York, 445 U.S. 573, 587-88 (1980) (discussing warrantless search of defendant's home and associated Fourth Amendment violation).

198 See Illinois v. Gates, 462 U.S. 213, 238-39 (1983).

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

200 547 U.S. 586 (2006).

201 Id. at 591 (quoting United States v. Leon, 468 U.S. 897, 906 (1984); Illinois v. Gates, 462 U.S. 213, 223 (1983)).

202 Id. at 591-93. The Court was unanimous on this point. See id. at 602-04 (Kennedy, J., concurring in part and concurring in judgment); id. at 614-22 (Breyer, J., dissenting) (accepting causation standard but disagreeing as to its proper application). The majority opinion treats pragmatic concerns as a separate consideration as to whether the exclusionary remedy should be applied. Id. at 593-99 (majority opinion). The issue whether pragmatic concerns are a separate consideration or encompassed within a proper causation analysis is much more difficult and controversial.

203 See Murray v. United States, 487 U.S. 533, 537-39 (1988).

204 Nix v. Williams, 467 U.S. 431, 443-44 (1984).

205 Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

206 See Murray, 487 U.S. at 537-39. The causation-based "independent source" doctrine does not, under any circumstances, excuse the absence of a warrant when one is required by the Fourth Amendment. Id. Indeed, in Hudson, all Justices agreed on the necessity of a warrant to justify the police invasion. Unlike the majority, which distinguished the knock-and-announce violation from the warrant itself, the dissent viewed the violation of the knock-and-announce requirement as a factor which voided the warrant itself. Compare Hudson, 547 U.S. at 600 (majority opinion), with id. at 614 (Breyer, J., dissenting). This further explains why the "remaining content" constituting the "independent source" must be contained within the original warrant affidavit. Franks v. Delaware, 438 U.S. 154, 156 (1978).

207 See Malley v. Briggs, 475 U.S. 335, 344-45 n.7 (1986); Baker v. McCollan, 443 U.S. 137, 142 (1979).

208 Cf. Mt. Healthy Ind. Sch. Dist. v. Doyle, 429 U.S. 274, 287 (1977); see also Texas v. Lesage, 528 U.S. 18, 22 (1999); Crawford-El v. Britton, 523 U.S. 574, 593 (1998).

209 426 U.S. 438 (1976).

210 Id. at 449.

211 United States v. Gaudin, 515 U.S. 506, 509 (1995) (quoting Kungys v. United States, 485 U.S. 759, 770 (1988)) (interpreting 18 U.S.C. § 1001).

212 United States v. Lee, 359 F.3d 412, 416 (6th Cir. 2004); see also Kungys v. United States, 485 U.S. 759, 771 (1988) (explaining materiality test for misrepresentation and concealment); United States v. Ronda, 455 F.3d 1273, 1295 n.29 (11th Cir. 2006) (deeming false statement sufficiently material because capable of influencing tribunal).

213 Lesage, 528 U.S. at 20-21; see Crawford-El, 523 U.S. at 593 (noting employer prevails if constitutional violation determinative in decision); Mt. Healthy, 429 U.S. at 287 (criticizing lower court for not analyzing if absence of protected conduct determinative in decision).

214 Some courts of appeals have applied this causation standard in § 1983 cases based on an alleged Franks violation of the Fourth Amendment. See, e.g., Mason v. Lowndes County Sheriff's Dep't, 106 F. App'x 203, 207 (5th Cir. 2004) (stating after plaintiff proves intentional or reckless falsity, the fact-finder decides whether it is determinative); Velardi v. Walsh, 40 F.3d 569, 574 & n.1 (2d Cir. 1994) (explaining magistrate must have found probable cause based on truthful information to be valid); Hill v. McIntyre, 884 F.2d 271, 275-76 (6th Cir. 1989) (noting jury determines whether false statement determinative in issuance of warrant); see also Clanton v. Cooper, 129 F.3d 1147, 1155-56 (10th Cir. 1997) (analyzing whether plaintiff would have been released on bond absent false statements by law enforcement officer).

215 See, e.g., Rodgers v. Banks, 344 F.3d 587, 602-03 (6th Cir. 2003); Baldasrare v. New Jersey, 250 F.3d 188, 195 (3d Cir. 2001); Dill v. City of Edmond, 155 F.3d 1193, 1201-02 (10th Cir. 1998). Similarly, in the common law of torts, causation is held to be "peculiarly a question for the jury." W. Page Keeton et al., Prosser and Keeton on the Law of Torts 264-65 (5th ed. 1984).

216 547 U.S. 250 (2006).

217 Id. at 258-65.

218 See id. at 255-56 (assuming truthfulness of information provided by officials). When the information provided by the law enforcement officer contains intentional or reckless falsehoods, the chain of causation is broken and no deference is due to the prosecutor, grand jury, or judge in the underlying criminal case. See generally, e.g., Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004); Townes v. City of New York, 176 F.3d 138 (2d Cir. 1999); Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988).

219 Hartman, 547 U.S. at 256-57 & n.5.

220 See id.

221 See, e.g., Mason v. Lowndes County Sheriff's Dep't, 106 F. App'x 203, 207 (5th Cir. 2004); DeLoach v. Bevers, 922 F.2d 618, 623 (10th Cir. 1990); Hill v. McIntyre, 884 F.2d 271, 275-76 (6th Cir. 1989).

222 See, e.g., Gregory v. City of Louisville, 444 F.3d 725, 758-59 & n.14 (6th Cir. 2006); Velardi v. Walsh, 40 F.3d 569, 574 & n.1 (2d Cir. 1994); DeLoach, 922 F.2d at 623. But see Hale v. Kart, 396 F.3d 721, 728-29 (6th Cir. 2005) (holding probable cause issue of law when underlying facts undisputed). Ornelas provides no support for the unjustifiable result in Hale. Ornelas only decided the issue of the standard of review in criminal cases, where probable cause is necessarily decided by judges. Ornelas, 517 U.S. 690, 697-99 (1996). Furthermore, Ornelas emphasized the inherently factual nature

of the inference of probable cause from the facts at hand. Id. at 695-96, 699-700; see also id. at 700-05 (Scalia, J., dissenting).

223 Restatement (Second) of Torts § 328C (1965). Legal scholars have frequently noted the analogy of probable cause to negligence, albeit without reference to the specific issue of the proper role of the jury in § 1983 cases. See, e.g., Donald A. Dripps, Living With Leon, 95 Yale L.J. 906, 941 (1986); Craig S. Lerner, The Reasonableness of Probable Cause, 81 Tex. L. Rev. 951, 1014-15, 1019 (2003); Tracey Maclin, The Pringle Case's New Notion of Probable Cause: An Assault on Di Re and the Fourth Amendment, 2004 Cato Sup. Ct. Rev. 395, 408 (2004).

224 United States v. Gaudin, 515 U.S. 506 (1995).

225 TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 450 (1976).

226 Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

227 See Gaudin, 515 U.S. at 521. Even in criminal cases, the jury must make any inference of probable cause, except that in motions to suppress, judges make these determinations. Id.

228 See supra notes 68-73 and accompanying text.

229 See Ronald J. Bacigal, Making the Right Gamble: The Odds on Probable Cause, 74 Miss. L.J. 279, 285 (2004) (citing David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1792 (2000)).

230 See generally William John Cuddihy, The Fourth Amendment: Origins and Original Meaning 602-1791 (1990) (unpublished Ph.D dissertation, Claremont Graduate School) (on file with Claremont Graduate School); Akhil Reed Amar, Fourth Amendment First Principles, 107 Harv. L. Rev. 757 (1994).

231 Anderson v. Creighton, 483 U.S. 635, 640 (1987).

232 Id. at 640.

233 Malley v. Briggs, 475 U.S. 335, 341 (1986).

234 See, e.g., Creighton, 483 U.S. at 641;Briggs, 475 U.S. at 339-41;Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

235 Lippay v. Christos, 996 F.2d 1490, 1504 (3d Cir. 1993); see also Burke v. Town of Walpole, 403 F.3d 66, 82 (1st Cir. 2005); Liston v. County of Riverside, 120 F.3d 965, 972-73 (9th Cir. 1997); Velardi v. Walsh, 40 F.3d 569, 573-74 (2d Cir. 1994). Indeed, some courts, strictly adhering to the objective reasonableness test, ask whether a hypothetical reasonable officer would have known that the statement(s) in the affidavit was (were) intentionally or recklessly false. See, e.g., Holmes v. Kucynda, 321 F.3d 1069, 1083 (11th Cir. 2003); Burk v. Beene, 948 F.2d 489, 494-95 (8th Cir. 1991); Olson v. Tyler, 771 F.2d 277, 281-82 (7th Cir. 1985). For the reasons set forth herein, this mode of analysis is erroneous. See infra notes 237-242.

236 See, e.g., Escalera v. Lunn, 361 F.3d 737, 743-45 (2d Cir. 2005); Martinez v. City of Schenectady, 115 F.3d 111, 115-16 (2d Cir. 1997); Smith v. Reddy, 101 F.3d 351, 355 (4th Cir. 1996). In Kohler v. Englade, 470 F.3d 1104, 1113-14 (5th Cir. 2006), the Fifth Circuit reached a similar result by holding that Franks does not apply to facially invalid warrants and

then remanding to the lower court for a determination whether the warrant contained arguable probable cause, thereby entitling the officer to qualified immunity under the Malley v. Briggs objective reasonableness standard.

237 475 U.S. 335 (1986).

238 Id. at 341.

239 523 U.S. 574 (1998).

240 Compare id. at 612 (Scalia, J., dissenting), with id. at 592-94 (majority opinion).

241 468 U.S. 897 (1984).

242 See id. 923; see also Groh v. Ramirez, 540 U.S. 551, 565 n.8 (2004) (asserting no qualified immunity if good faith exception unavailable).

243 Butler v. Elle, 281 F.3d 1014, 1024 (2002); see also Mason v. Lowndes County Sheriff's Dept., 106 F. App'x 203, 207 (5th Cir. 2004); Sherwood v. Mulvihill, 113 F.3d 396, 399-401 & n.4 (3d Cir. 1997).

244 See generally Amar, supra note 230.

245 United States v. Cortina, 630 F.2d 1207, 1213 (7th Cir. 1980).

246 Chappel v. State, 71 Ala. 322, 324 (1882).

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