

GHOST WARRANTS AND MISTAKEN ARRESTS: How They Haunt the Marginalized

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ABSTRACT

Shortly before America's police brutality protests of 2020, a new term emerged for an old phenomenon in the criminal legal system: ghost warrants. These warrants are the result of outdated and sometimes inaccurate or incomplete information. Yet they continue to repeatedly land innocent people in jail, sometimes for months at a time. In essence, they haunt those they affect. During their detention, victims are susceptible to losing jobs, housing, and even family. Mistaken arrests disproportionately impact marginalized communities, specifically Black, Latine, poor, mentally ill, and immigrant populations. Hurdles compound when someone belongs to more than one of these communities or when they are the unfortunate victim of mistaken AI facial recognition.

Currently, there are few paths to clearing up such warrants, nor is there a widespread awareness among those with the power to create such pathways. A major underpinning of the challenge both victims and criminal defense attorneys face is the good faith exception to the exclusionary rule, where police who believe they are executing a valid warrant are not punished for mistakes made in its execution. The Supreme Court of the United States has thus far failed to acknowledge the systemic negligence resulting in mistaken arrests and therefore not incentivized law enforcement agencies to keep their records reasonably clear of mistakes. In 2023, it also denied certiorari in *Sosa v. Martin Cnty., Fla.*, where a man named David Sosa had twice been arrested and detained on an out-of-state warrant for *another* David Sosa, despite an amicus brief from four other David Sosas. Without legal pathways to relief, victims of mistaken arrests are left with few options. But with a concerted effort between legal scholars, who bring analysis and awareness; legislators, who have the power to create change; and the judiciary, who has the power to enforce equitable measures, mistaken arrests could be drastically reduced.

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I. INTRODUCTION

In the spring of 2020, a Latino man named George Hernandez was pulled over for driving a few miles over the speed limit while he passed through a small Oklahoma town.¹ After recognizing Hernandez, the officer let him go before the county dispatch was able to confirm that he had no outstanding warrants. Shortly after Hernandez left, however, the county dispatch responded to the officer and let him know that there was at least one warrant out for someone with the same first and last name. The officer radioed ahead to the county sheriff's office to let them know Hernandez's destination: an elementary school in a nearby town where he was employed as the school's elementary principal, and where he was taking his eight-year-old son to play basketball with several of his students.

Upon being confronted by the school town's police department (who were notified by the county sheriff's office), George Hernandez provided proof of his identity and asked what information was provided on the warrant. The officers were not able to provide him with anything more than what was recorded in the warrant nearly thirty years ago: a first name, a last name, the county of offense, the offense for which the warrant was issued, and the date it was issued. The warrant provided no middle name, no date of birth, no social security number, and no other identifying information. Hernandez attempted to push back on the warrant's lack of specificity; he explained that his name is common in the Hispanic community, including among his own family. Several parents tried to intervene on Hernandez's behalf, but all of these efforts were unsuccessful. The officers arrested George Hernandez in front of his son, his students, and his students' parents. The officers stated that they were merely following established protocol.

Ultimately, the county confirmed that *this* George Hernandez was not the man that the court issued the warrant for—the intended arrestee; however, the damage had already been done. The reputation he worked so hard to create in this small Oklahoma town was damaged in just a few minutes, a fact complicated by the reality that Hernandez is a visibly Brown man in a town whose population is overwhelmingly white. Any private apology he received from the county police department could

¹ Interview with George Hernandez, in Tulsa, Okla. (Jan. 15, 2022). “George Hernandez” is a pseudonym. All other details are accurate.

not undo the image the department created of another Brown, Latino man being arrested by law enforcement.

Systemic flaws make it difficult for even good-willed law enforcement agencies to prevent the arrest of innocent people. Law enforcement officers depend heavily on the reliability of warrants, but warrant cataloging systems do not always provide the most up-to-date information.² Likewise, insufficiently specific warrants, like the one described above, can lead to the arrest of innocent community residents. While law enforcement may often act appropriately, that goodwill does not mitigate the harms caused to individuals who become entangled with the justice system due to the system's own mistakes.³ Courts have historically looked at these occurrences as isolated situations, but these instances have become common enough that they signal a significant and systemic problem that can no longer be described as mere anecdotes.⁴

Like many historical institutions in the United States, the criminal punishment system disproportionately ensnares people of color, specifically Black and Latine communities.⁵ Latine communities in particular are especially vulnerable because exposure to law enforcement and the criminal justice system can create oppressive and frightening implications in the immigration system.⁶ To complicate matters, mis-

² See, e.g., *Herring v. United States*, 555 U.S. 135, 137–38 (2009).

³ See generally *United States v. Leon*, 468 U.S. 897 (1984) (holding that there is a good faith exception to the Fourth Amendment's exclusionary rule for law enforcement).

⁴ In *Herring*, police received erroneous information which reflected that Herring had a bench warrant for his arrest, when in fact the warrant had been recalled months earlier. The error occurred because the county computer system was not yet updated to reflect that the warrant had been rescinded. As a result, Herring was arrested for items discovered during a search incident to his arrest. In response to his Fourth Amendment challenge, the Court reasoned that even though a Fourth Amendment violation was assumed, this error was “the result of isolated negligence attenuated from the arrest,” and therefore the evidence that supported his conviction was not subject to the exclusionary rule. *Herring*, 555 U.S. at 137–38. In her dissent—joined by three justices—Justice Ginsburg stated that “[t]he most serious impact of the Court’s holding will be on innocent persons wrongfully arrested based on erroneous information [carelessly maintained] in a computer data base. . . . The risk of error stemming from these [various government-run] databases is not slim.” *Id.* at 148–49, 155 (Ginsburg, J., dissenting) (internal quotations omitted).

⁵ See Aileen Qin & Kelsey Taeckens, *Latino Representation in the Criminal Justice System*, NEIGHBORHOOD DATA FOR SOC. CHANGE (July 2021), <https://la.myneighborhooddata.org/2021/07/latino-representation-in-the-criminal-justice-system> [<https://perma.cc/RJ39-GG8C>].

⁶ See generally NIK THEODORE, *INSECURE COMMUNITIES: LATINO PERCEPTIONS OF POLICE INVOLVEMENT IN IMMIGRATION ENFORCEMENT* (2013), https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF [<https://perma.cc/Q8L7-D6SQ>]

understandings across cultural divides among all racial minorities can cause legitimate misunderstandings or create biases in police encounters.⁷ Similarly, living in a low-income area or struggling with mental health issues can put people at an immediate disadvantage when coming into contact with police.⁸

Part II of this Comment provides an overview of some of the common types of warrant cataloging systems, both at the federal and local levels. Understanding warrant systems is important because law enforcement oftentimes relies on warrant record systems, particularly digital systems, to determine if someone is to be taken into custody. Part II also describes some of the most common types of warrants that an ordinary citizen might encounter when interacting with law enforcement. Finally, this Part elaborates on two types of mistakes made by record-keeping system administrators and law enforcement: the indefinite existence of ghost warrants that haunt formerly incarcerated individuals and the creation of insufficiently specific warrants that leave room for cases of mistaken identity.

Part III examines the existing legal scholarship on the topic of ghost warrants. Currently, there is little to be found. The implication of this deficiency is that lawyers, judges, and legislators have a weak academic foundation on which to build a credible argument for addressing the serious issues that this problem can cause. There are a few news articles that explore the subject, but the lack of scholarly awareness paints an alarming picture in which those who have the most power to solve the problem seem to be paying the least attention to it.

Part IV describes the reality facing legal and law enforcement professionals: that communities of color—particularly Black and

(surveying Latines has revealed that partnerships between police and immigration enforcement have significantly contributed to Latines' fears of the police and makes them less likely to contact police when they are victims of crime).

⁷ See Brianna Flavin, *Police Officers Explain Why Diversity in Law Enforcement Matters*, RASMUSSEN UNIV. (Dec. 10, 2018), <https://www.rasmussen.edu/degrees/justice-studies/blog/diversity-in-law-enforcement> [https://perma.cc/3YL9-T8DD].

⁸ See Rachel Kent & John Raphling, *Interview: How Policing in One US City Hurts Black and Poor Communities*, HUM. RTS. WATCH (Sept. 12, 2019, 12:01 AM), <https://www.hrw.org/news/2019/09/12/interview-how-policing-one-us-city-hurts-black-and-poor-communities> [https://perma.cc/47N2-MAS2]; Andrew Selsky & Leah Willingham, *How Some Encounters Between Police and People With Mental Illness Can Turn Tragic*, PBS (Sept. 2, 2022, 2:26 PM), <https://www.pbs.org/newshour/health/how-some-encounters-between-police-and-people-with-mental-illness-can-turn-tragic> [https://perma.cc/923W-5XPJ].

Latine communities—and economically marginalized communities disproportionately suffer from these mistakes. Poor, Black, and Latine communities are more likely to be over-policed, which leads to the over-representation of those populations in the criminal justice system. A thorough acknowledgment of these discrepancies is essential because it lays the foundation for the urgency that this crisis creates and emphasizes the point that awareness within the legal community is imperative.

Finally, Part V explores and proposes some possible solutions. First, this Part focuses on remedies already available or thought to be available under current law. Second, this Part investigates successful reforms that have been implemented across the country and potential remedies for mistakes that have already been made.

II. OVERVIEW OF WARRANT SYSTEMS AND RELEVANT WARRANT TYPES

A warrant is a writ permitting or directing someone to take an action, such as to make an arrest.⁹ This Part explains common practices relating to the issuance of and recording procedures for relevant warrants, as well as the most common problems that ensnare innocent people in the criminal justice system. This Part will exclude search warrants, and instead focus on the types of warrants for which an unsuspecting person is most likely to be mistakenly arrested.

While there are several types of warrants that may cause the mistaken arrest of an otherwise innocent person, warrants of all types are governed by the Fourth Amendment.¹⁰ The Fourth Amendment mandates that “[t]he right of the people to be secure in their persons . . . 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.”¹¹ The Amendment can be broken down into three requirements in the context of making an arrest: (1) the evidence presented to support the warrant is sufficient to establish “probable cause,” (2) the law enforcement officer presenting the evidence swears that the evidence is true to the best of their knowledge, and (3) the warrant specifies what persons law enforcement may look for and may arrest if

⁹ See *Warrant*, BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁰ U.S. CONST. amend. IV.

¹¹ *Id.*

found.¹² Case law has clarified the language of the Amendment to meet more specific requirements. For example, the Supreme Court has held that warrants can only be issued by a judge or magistrate who is “neutral and detached,” meaning that they are independent of law enforcement.¹³ In addition, states and localities may impose additional requirements. For example, under Oklahoma law, if the time of day that a misdemeanor warrant is to be served differs from what is statutorily allowed, then the time of day must be listed on the warrant.¹⁴

A. *Types of Warrants and Their Recording Systems*

Two of the most common types of warrants for local jurisdictions are arrest warrants and bench warrants. An arrest warrant is issued by either a judge or magistrate, depending on the jurisdiction, and it authorizes law enforcement to seize someone who has been accused of a crime into custody.¹⁵ A bench warrant is a type of arrest warrant that authorizes the arrest of a person who has either been held in contempt of court, has been indicted, has disobeyed a subpoena, or has failed to appear in court.¹⁶ Sometimes, bench warrants are issued for failure to pay court fees, fines, or prescribed child support.¹⁷ Bench warrants are like arrest warrants because in both cases these warrants temporarily deprive an individual of their liberty. The difference lies in the fact that bench warrants are more often unilaterally issued by a judge and then passed on to law enforcement.¹⁸

The ways in which warrants are issued at the state and local levels are dependent on the location and type of warrant being issued.¹⁹ For

¹² See BEN TRACHTENBERG & ANNE ALEXANDER, *CRIMINAL PROCEDURE: A FREE LAW SCHOOL CASEBOOK* 145 (2d ed. 2022). Trachtenberg and Alexander include a fourth requirement put forth by the Amendment, which requires that the warrant specifies where law enforcement can search. *See id.* Because search warrants are omitted from this analysis, this requirement is omitted from the text of this Comment.

¹³ *Id.* (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971)).

¹⁴ See OKLA. STAT. tit. 22, § 189 (1990).

¹⁵ See BLACK’S LAW DICTIONARY, *supra* note 9; *Arrest Warrant*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/arrest_warrant [perma.cc/4BGK-P2PY].

¹⁶ See BLACK’S LAW DICTIONARY, *supra* note 9; *Bench Warrant*, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/bench_warrant [perma.cc/X763-4UNJ].

¹⁷ See BLACK’S LAW DICTIONARY, *supra* note 9; *Bench Warrant*, *supra* note 16.

¹⁸ See BLACK’S LAW DICTIONARY, *supra* note 9 (comparing definitions of “arrest warrant” and “bench warrant”).

¹⁹ Interview with Judge Kasey Baldwin, Special Dist. Judge, Tulsa Cnty. Dist. Ct., in Tulsa,

arrest warrants, usually a law enforcement officer files an affidavit with the court that denotes probable cause for arresting a specific person, and a judge or magistrate signs the warrant, making it legally effective.²⁰ From there, the warrant is given to a court clerk for filing.²¹ This begins the process of digitizing the warrant, which will enable law enforcement officers to look up a specific person's criminal history when being stopped by police.²² Federal warrants are issued in a similar manner to local warrants.²³ The key distinction between the two is the federal recording system. Federal warrants are housed in the U.S. Marshal's Service Warrant Information System (WIN).²⁴ Warrants from all types of sources are then entered into the National Crime Information Center (NCIC), where they can be made available to law enforcement agencies worldwide.²⁵ There are currently over seventeen million active records in the NCIC.²⁶

B. Problems Arising from Recording Systems and Their Processes

As stated above, a warrant must meet specific requirements to be constitutionally valid and legal in its jurisdiction. But there is still room for mistakes outside of the confines mandated by the Fourth Amendment, case law, and statutes. Two of the scenarios in which this happens are ghost warrants and arrests resulting from an arrestee's mistaken identity.

While there is not yet a legally recognized definition for ghost warrants, sometimes alternatively called sticky warrants, they are largely understood to be either warrants for which someone was convicted and served out their sentence yet still linger in cataloging systems, or erroneous warrants that continue to be problematic.²⁷ In essence,

Okla. (Nov. 17, 2021). At the time of the interview, Judge Baldwin was a defense attorney with the Tulsa County Public Defender's Office.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ See FED. R. CRIM. P. 4.

²⁴ *Warrant Information System*, U.S. MARSHALS SERVICE, <https://www.usmarshals.gov/readingroom/warran.html> [perma.cc/2RCW-BHYQ].

²⁵ *National Crime Information Center (NCIC)*, FBI, <https://www.fbi.gov/services/cjis/ncic> [perma.cc/EW6T-JJPK].

²⁶ See *id.*

²⁷ See BLACK'S LAW DICTIONARY, *supra* note 9 (finding no entries for "ghost warrant" or "sticky warrant"); Search Results for Ghost Warrant, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/search/site/ghost%2520%2522warrant%2522?f%5B0%5D=bundle%3Awex_cck&retain-filters=1 [https://perma.cc/3K6M-S3BY] (searching for "ghost warrants" only returns results for search

they are warrants that haunt someone. In a telephone interview with Kelly Orians, University of Virginia law school professor and the co-founder of a re-entry services organization for the formerly incarcerated in New Orleans, she stated that the term “ghost warrants” originated from discussions regarding a reporting project between her, a colleague, *The Guardian*, and The Marshall Project.²⁸ She elaborated that while researching how far the issue of ghost warrants reached, her team could not find a succinct way to describe these lingering, incorrect warrants—so they coined the term.²⁹

These warrants can sometimes lead to someone being arrested several times over with no clear and easy legal remedy they can pursue.³⁰ Moreover, ghost warrants can be simply outdated or contain inaccurate charges.³¹ Frustratingly, some ghost warrants might influence both prosecutors and probation officers to refuse to drop minor cases against a person.³² To illustrate, Causey Davis had two different ghost warrants under his name: one for an inaccurate arrest warrant that was dismissed twenty-five years before he was arrested for it and one for a prison and probation sentence he served for a bad check conviction.³³ For the latter warrant, police arrested Davis three different times over a span of three years. After each arrest, Davis spent months in jail waiting to be released.³⁴ These arrests, in combination with minor probation violations, caused Davis to lose his employment three times.³⁵ Perhaps more tragically, these false arrests ended his seventeen-year marriage.³⁶

warrant, arrest warrant, no-knock warrant, and blanket search warrant); Search Results for Sticky Warrant, CORNELL LAW SCHOOL LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/search/site/sticky%2520%2522warrant%2522?f%5B0%5D=bundle%3Awex_cck&retain-filters=1 [<https://perma.cc/6EB9-C8P7>] (searching for “sticky warrants” yields the same results as “ghost warrants”); Eli Hager, *They’re Haunted by ‘Ghost Warrants’ Years After Their Arrests*, THE MARSHALL PROJECT, (Apr. 29, 2019, 6:00 AM), <https://www.themarshallproject.org/2019/04/29/they-re-haunted-by-ghost-warrants-years-after-their-arrests> [<https://perma.cc/B8ST-S6GM>]; Telephone Interview with Kelly Orians, Assistant Professor of L., Dir. of the Decarceration and Cmty. Reentry Clinic, Univ. of Va. Sch. of L. (Jan. 24, 2022).

²⁸ Telephone Interview with Kelly Orians, *supra* note 27.

²⁹ *Id.*

³⁰ See Hager, *supra* note 27.

³¹ See *id.*

³² See *id.*

³³ See *id.*

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*

Davis's story illustrates a common way in which a warrant fails to be sufficiently and thoroughly canceled. Generally, when someone serves their sentence for a conviction or when charges are dismissed, a judge will order that those outstanding warrants in connection with the arrest be dissolved.³⁷ But a court clerk may fail to record that judicial order or transfer the record to the sheriff's office or other warrant-issuing organization to be entered into its database.³⁸ Thus, the next time the subject of the supposedly-canceled warrant interacts with law enforcement, the warrant continues to appear, leading to a subsequent erroneous arrest for the same, now canceled, warrant.³⁹

Mistaken arrests that result from ghost warrants can cause major disruptions to a person's life. As was the case with Causey Davis, a victim might lose their job or experience irreparable harm to foundational relationships.⁴⁰ Other consequences from ghost warrants and mistaken identity warrants, described in more detail below, include the loss of student or work visas for international visitors, loss of benefits or entitlements, and loss of housing. The fallout from a mistaken arrest—no matter the cause—can turn a person's life into one that is utterly unrecognizable.

Mistaken identity arrests, particularly those resulting from insufficiently specific warrants, can cause innocent people immeasurable personal trouble. In 2017, police officers in Hawaii arrested an unhoused man named Joshua Spriestersbach.⁴¹ Spriestersbach had fallen asleep while waiting in line to enter a shelter for food.⁴² The arresting officer thought Spriestersbach looked like a man named Thomas Castleberry, who had an outstanding warrant for charges relating to drug offenses from 2006.⁴³ At the time of the arrest, Spriestersbach was not carrying

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *id.*

⁴⁰ See *id.*

⁴¹ See Alyssa Lukpat, *Man Was Held for More Than 2 Years Over Mistaken Identity, His Lawyer Says*, N.Y. TIMES (Aug. 6, 2021), <https://www.nytimes.com/2021/08/06/us/hawaii-mistaken-identity-release.html> [<https://perma.cc/PY4Z-YZN5>]. The term “homeless” is slowly being retired in favor of descriptors such as “houseless people” or “unhoused people” because these terms do not typically carry the same negative connotation that can sometimes be associated with “homeless.” These descriptors additionally serve to reinforce the reality that houseless people do maintain social connections and have community. Therefore, “unhoused” or “houseless” will be used throughout this Comment.

⁴² See *id.*

⁴³ See *id.*

any identification, which is not uncommon for unhoused individuals.⁴⁴ The Honolulu Police Department subsequently failed to examine Spriestersbach's fingerprints or visual likeness and compare them to Castleberry's records.⁴⁵ Nevertheless, Spriestersbach continued to assert to his public defender that he was not the intended arrestee.⁴⁶ Instead of more closely examining his claims, Spriestersbach received treatment for mental illness while incarcerated; the more he protested his conviction, the more he was declared "delusional and psychotic."⁴⁷ It would be over two years before a psychiatrist believed Spriestersbach and he was finally released.⁴⁸

In Spriestersbach's case, there were several parties who could have intervened or verified his identity at any stage of his arrest or during the resulting conviction and incarceration. Importantly, prior to any of these steps, a more detailed arrest warrant could have prevented the need for any of these interventions.

The same is true for George Hernandez, as discussed above. The warrant listed in the database leading to his arrest detailed no date of birth, no social security number, and no physical description for the intended arrestee—nor was it required.⁴⁹ When those identifiers are not available at the time of arrest, there is virtually no way for a suspected offender to clear their name with officers who are acting to the best of their abilities and with the knowledge they have at the time. When a warrant lacks specific information beyond a mere name—particularly if a middle name is not available—the only argument that may succeed for a person at the time of arrest would be a showing that the date of birth of the arrestee occurred after the warrant's issuing date, essentially rendering it impossible for the suspect to have committed the crime listed in the warrant. This argument would have worked for *the* Mr. Hernandez's son, who shares his name and was born after the warrant was issued, but it was not a viable path for the elder Mr. Hernandez—nor would it be for Mr. Hernandez's father or cousin who also share the name—to clear

⁴⁴ See *id.*; see also TJ Johnston, *Without ID, It's Hard for Homeless People to Prove Themselves*, INVISIBLE PEOPLE (Nov. 7, 2019), <https://invisiblepeople.tv/without-id-its-hard-for-homeless-people-to-prove-themselves> [<https://perma.cc/UJ69-3DTR>].

⁴⁵ See Lukpat, *supra* note 41.

⁴⁶ See *id.*

⁴⁷ *Id.*

⁴⁸ See *id.*

⁴⁹ See OKLA. STAT. tit. 22, § 173 (1982).

up the misunderstanding. Thus, Mr. Hernandez was forced to comply to prevent legitimate charges, call an attorney, and/or hope that someone at the county jail paid closer attention to his pleas.

III. EXISTING RECOGNITION OF GHOST WARRANTS AND INSUFFICIENTLY SPECIFIC WARRANTS IS INADEQUATE, THUS AWARENESS OF THE PROBLEM IS LACKING

Ghost warrants are a “destabilizing force that has received inadequate scholarly attention”⁵⁰ Despite the gravity of this often-recurring problem for individuals, little work has been dedicated among courts, legal scholars, and educational institutions to remedy the issue on a large scale. With that being said, mistaken identity arrests arising out of a myriad of different scenarios have been given slightly more attention. For example, in his 2013 law review article titled, *What’s in a Name?: A Case for Including Biometric Identifiers on Arrest Warrants*, Ryan Webb argued that mistaken identity arrests too often result from facially valid warrants for people who happen to share the same name and vague physical characteristics.⁵¹ These warrants are valid in the sense that they met all the constitutional criteria, but they still create problems.

Outside of legal scholarship, only a few publications exist that have addressed mistakes in warrants and warrant systems. In one of the few articles addressing this issue, David M. Bierie put forth a policy proposal for a national public registry of active warrants.⁵² In the article, Bierie details the reality that there has been no thorough research to investigate how pervasive the problem of mistaken arrests is for residents across the nation.⁵³ In illustrating the significance of the issue of mistaken arrests, Bierie looked at false arrests within both Chicago in the early 1990s due to clerical errors and Denver between 2002 and 2009 due to erroneous warrants.⁵⁴

In so doing, Bierie discovered that Chicago police made 1,271 false arrests over the 1991 calendar year, whereas Denver police arrested 500

⁵⁰ Kelly Orians & Thomas Frampton, *In Defense of Reentry: A Response to Shreya Subramani’s Productive Separations*, 47 FORDHAM URB. L.J. 993, 1002 (2020).

⁵¹ Ryan Webb, *What’s in a Name?: A Case for Including Biometric Identifiers on Arrest Warrants*, 47 LOY. L.A. L. REV. 319, 319 (2013).

⁵² David M. Bierie, *National Public Registry of Active-Warrants: A Policy Proposal*, 79 FED. PROB. J. 27 (2015).

⁵³ *Id.* at 28.

⁵⁴ *Id.*

people as the result of erroneous warrants between 2002 and 2009.⁵⁵ Bierie points out that although these mistakes are a relatively small percentage of the total arrests in each city, the cumulative effects on individuals in each city are likely incredibly significant.⁵⁶ If these numbers have stayed relatively consistent since each study was carried out, it is not out of the realm of possibility that tens of thousands of people across the United States have been affected by erroneous arrests. The mere fact that this data is so old and, at the same time, the most recent data available suggests that the scope of erroneous warrants is unknown and understudied, possibly due to marginalized community members being less likely to be able to fight mistaken arrests and more likely to have little means to contest, publicize, contract, or relay their circumstances to a person or entity categorizing or studying cases like theirs.

Ghost warrants and mistaken arrests have been historically neglected in legal literature and public discourse, although that tide is slowly changing. One potential reason for this is that the people who it is most likely to affect, such as racial minorities and the poor as detailed in Part IV, are less likely to have the resources to contest mistaken arrests. Consequently, few court opinions exist on the subject. Another reason is that many remedial measures have been shut out altogether, which makes it hard to bring a claim to court in the first place.⁵⁷ Outside of court opinions, there are very few law review materials that explore the causes of mistaken arrests and, more importantly, that propose solutions to this crisis. Legal and legislative proposals will be explored in Part V.

IV. A BREAKDOWN IN COMMUNICATION AND LACK OF SPECIFICITY DISPROPORTIONATELY AFFECTS MARGINALIZED COMMUNITIES

Three categories of people are particularly susceptible to mistakes made in executing erroneous warrants: racial or ethnic minorities, the poor, and those with diminished mental capacity. There is significant overlap between the first two groups, but each community faces its own set of challenges. These challenges are further compounded when a person belongs to a combination of any of the groups previously listed. This Part will explore each in turn.

⁵⁵ *Id.*

⁵⁶ *Id.* In Chicago, the percentage affected for these time frames is slightly over one half of a percent of all arrests in 1992 due to clerical errors, and just over one percent in 1991 due to erroneous warrants; nevertheless, the cumulative effect is not insignificant. *See id.*

⁵⁷ *See Herring v. United States*, 555 U.S. 135, 157 (2009) (Ginsburg, J., dissenting).

A. *Racial and Ethnic Minorities Suffer Disproportionately from Over-Policing and Racial Biases*

A 2019 Human Rights Watch case study about policing in Tulsa, Oklahoma, found that severe discrepancies exist in North Tulsa policing as compared to other parts of the city.⁵⁸ North Tulsa includes the location of the Tulsa Race Massacre, and it is home to forty-one percent of Tulsa’s Black population.⁵⁹ There, residents are twice as likely to live below the poverty line as compared to the rest of the city.⁶⁰ The report further found that Tulsa police stopped drivers in predominantly Black areas of the city more frequently than in other parts of the city.⁶¹ It follows logically that the more a particular population is forced to interact with law enforcement, the more likely it is that mistakes will happen.⁶² This phenomenon of more frequently being stopped, searched, and arrested—despite rates of many non-violent crimes being consistent across racial groups—is common among Black communities across the United States.⁶³

The notion that more frequent interaction with police will lead to more mistakes is further exacerbated by cultural divides between law enforcement and populations with which they are socially unfamiliar. For example, the history of naming conventions—such as the passing down of family names—may not be well understood by law enforcement officers unless they personally have a close connection with the culture of the person they are interacting with. Individual police officers may

⁵⁸ Brian Root, *Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma*, HUM. RTS. WATCH, <https://www.hrw.org/video-photos/interactive/2019/09/11/policing-poverty-and-racial-inequality-tulsa-oklahoma> [<https://perma.cc/TXH7-SM6N>].

⁵⁹ *See id.*; *1921 Tulsa Race Massacre*, TULSA HIST. SOC’Y & MUSEUM, <https://www.tulsaohistory.org/exhibit/1921-tulsa-race-massacre> [<https://perma.cc/H89R-WTXL>]. The Tulsa Race Massacre is believed to be the single worst incident of racial violence in American history, where white Tulsa residents killed potentially hundreds of Black Tulsans and burned thirty-five city blocks of Tulsa’s Greenwood District.

⁶⁰ *See* Root, *supra* note 58.

⁶¹ *Id.*

⁶² *See* Danyelle Solomon, *The Intersection of Policing and Race*, CTR. FOR AM. PROGRESS, <https://www.americanprogress.org/article/the-intersection-of-policing-and-race> [<https://perma.cc/UU3L-QLNF>]. Solomon points out that non-white people are overrepresented “at every point in the criminal justice system,” going on to say that young Black males are twenty-one times more likely to be shot when interacting with law enforcement than their white counterparts. *Id.* The consequences resulting in an interaction with law enforcement are more often more serious for people of color than white people.

⁶³ *See* SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, *RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES* 1–2 (2017).

also be unfamiliar with the frequency in which names or combinations of names appear. This is well illustrated by the story of George Hernandez in the introduction to this Comment. Mr. Hernandez tried to explain to law enforcement that his son and dad also had the same name to no avail. Further complicating matters, his name is particularly common because he has a common Hispanic last name, and his first name is a conventional way to anglicize a popular Spanish name. Many Latines and Latin American immigrants will anglicize their names upon naturalization or their children's names to avoid discrimination.⁶⁴ In fact, that was exactly the case for Mr. Hernandez's father. His father changed his name when he was naturalized to better assimilate into American culture, and he hoped that having a less Hispanic first name would lead to more opportunities and acceptance by the larger American community.

The practice of anglicizing names is common across different groups of immigrants, including Asian, Jewish, and even some European immigrants, in order to better blend into mainstream American culture.⁶⁵ However, for Hispanic and Asian immigrants in particular, these practices can cause severe difficulties when interacting with law enforcement. The 2010 United States Census found a higher density of certain names among Latines, noting in the Census Blog that "there is more surname clustering among Hispanics . . . [t]wenty-six surnames cover a quarter of the Hispanic population . . ."⁶⁶ The blog also observed that this also occurred among Asian and Black populations.⁶⁷ Among the Mexican American population in particular, their anglicized analogs are also fairly common because they are derivatives from Hebrew names or are based in the Christian bible, such as Peter, Joseph, and John.⁶⁸ Taken together, relatively large clusters of fewer surnames paired with a large

⁶⁴ See Manuel Muñoz, Opinion, *Leave Your Name at the Border*, N.Y. TIMES (Aug. 1, 2007), <https://www.nytimes.com/2007/08/01/opinion/01munoz.html> [<https://perma.cc/W8HV-TQ8R>].

⁶⁵ See Jessie Yeung, *Why Some Asian Americans Are Embracing Their Heritage by Dropping Their Anglicized Names*, CNN (Apr. 7, 2021, 4:47 AM), <https://www.cnn.com/style/article/asian-american-name-change-hyphenated-intl-hnk-dst/index.html> [<https://perma.cc/VE3V-GU2C>].

⁶⁶ *What's in a Name*, U.S. CENSUS BUREAU (Dec. 15, 2016), https://www.census.gov/newsroom/blogs/random-samplings/2016/12/what_s_in_a_name.html [<https://perma.cc/7T3B-ZFZS>].

⁶⁷ *Id.*

⁶⁸ See *The Ultimate Guide to Mexican Names*, FAM. EDUC. (Dec. 29, 2022), <https://www.familyeducation.com/the-ultimate-guide-to-mexican-names> [<https://perma.cc/H8N7-KL93>] (showing many of the top twenty names for both boys and girls have an English or English-pronunciation equivalent).

cluster of first names—whether the first name is anglicized or not—can lead to many cases of mistaken identity among Latines alone.⁶⁹

Once an adversarial interaction with law enforcement has begun, racial biases continue to play a role in how a person of color is treated by officers and the criminal justice system at large. In general, Black and Latine people are subject to more surveillance by law enforcement than white people.⁷⁰ One notorious example is New York City’s stop-and-frisk program: eighty percent of the 4.4 million people stopped on the street under this initiative between 2004 to 2012 were Black or Hispanic.⁷¹ A federal judge was unable to find a racially neutral justification for this discrepancy considering the racial composition of the neighborhoods and their relative crime rates.⁷² At large, Black drivers are three times more likely to be searched when stopped than white drivers.⁷³ Once in these predicaments, Black drivers are, on average, at a considerable disadvantage because the ongoing over-policing of Black neighborhoods means that those residents are more likely to have a criminal record, especially when it comes to offenses like drug possession.⁷⁴

The over-policing of Black communities has gained wider recognition in the years since the murder of George Floyd, but Latines have not benefited from the same spike in awareness regarding the rampant over-policing of their communities.⁷⁵ In California, Latines are more likely

⁶⁹ See Search Results for George Hernandez, HOW MANY OF ME, [howmanyofme.com/search \[https://perma.cc/5MZV-JF4U\]](https://perma.cc/5MZV-JF4U). Historically, on this site you could add your first and last name where prompted to see how many people with your same name combination were living in the United States when the database was last updated. The data only contains data as recent as the 2000 Census, so it is likely the case that Latines and other growing populations in the United States will be underrepresented in the results. For example, a search for “George Hernandez” returned 4098 results at the time of the search; however, that number could be higher since the data is old, which paints a grim picture for those who are in the same situation as Mr. Hernandez. Though the long-running website was permanently shut down around October 2022, similar sites show data for first names and surnames individually.

⁷⁰ See GROSS, POSSLEY & STEPHENS, *supra* note 63, at 19.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See Mario Koran, ‘We’re Suffering the Same Abuses’: Latinos Hear Their Stories Echoed in Police Brutality Protests, THE GUARDIAN (June 12, 2020, 6:00 AM), <https://www.theguardian.com/world/2020/jun/12/latinos-police-brutality-protests-george-floyd> [https://perma.cc/T6RL-6CMX]; Silvia Foster-Frau, *Latinos are Disproportionately Killed by Police but Often Left Out of the Debate About Police Brutality, Some Advocates Say*, WASH. POST (June 2, 2021, 6:00 AM), https://www.washingtonpost.com/national/police-killings-latinos/2021/05/31/657bb7be-b4d4-11eb-a980-a60af976ed44_story.html [https://perma.cc/A797-3ZY4].

to be stopped for a traffic violation than white drivers, and in stops that involve the California Highway Patrol, they are more likely than Black or white drivers to be searched for contraband during the stop.⁷⁶ Like Black Americans, Latines have a long and oftentimes antagonistic relationship with law enforcement agencies.⁷⁷ Police kill Latines at a higher rate than they do white Americans, and the number is rising.⁷⁸ In the last decade, the rate of Hispanic people killed by police has jumped nearly forty-five percent.⁷⁹ To make matters worse, this number is very likely underestimated, since Latines in general are underrepresented in criminal justice data.⁸⁰ This problematic recordkeeping also contributes to the erasure of Afrolatines, who in their encounters with police, are forced to navigate through two types of racial and ethnic bias.⁸¹

The effects of consistent racial profiling compound the realities that people of color face when interacting with law enforcement, as well as with bystanders who could be potential witnesses in a criminal case.⁸² Racial profiling reinforces stereotypes of different minority groups like a negative feedback loop, which in turn makes it more likely that someone

⁷⁶ See MAGNUS LOFSTROM, JOSEPH HAYES, BRANDON MARTIN & DEEPAK PREMKUMAR, RACIAL DISPARITIES IN TRAFFIC STOPS 15 (2022), <https://www.ppic.org/?show-pdf=true&docraptor=true&url=https%3A%2F%2Fwww.ppic.org%2Fpublication%2Fracial-disparities-in-traffic-stops%2F> [<https://perma.cc/7PSQ-9UDM>].

⁷⁷ See Julissa Arce, *It's Long Past Time We Recognized All the Latinos Killed at the Hands of Police*, TIME (July 21, 2020, 3:35 PM), <https://time.com/5869568/latinos-police-violence> [<https://perma.cc/97TC-8B4M>]. In speaking about the Texas Rangers, author Doug J. Swanson stated “They burned peasant villages and slaughtered innocents. They committed war crimes. Their murders of Mexicans and Mexican Americans made them as feared on the border as the Ku Klux Klan in the Deep South.” *Id.*

⁷⁸ See Russell Contreras, *Rate of Latinos Killed by Police Skyrockets*, AXIOS (May 30, 2023), <https://www.axios.com/2023/05/30/police-brutality-latino-george-floyd> [<https://perma.cc/D342-XVJ3>].

⁷⁹ See *id.*

⁸⁰ See Foster-Frau, *supra* note 75; Arce, *supra* note 77; Richard A. Webster, “If Everybody’s White, There Can’t Be Any Racial Bias”: The Disappearance of Hispanic Drivers From Traffic Records, PROPUBLICA (Nov. 22, 2021, 7:00 AM), <https://www.propublica.org/article/if-everybodys-white-there-cant-be-any-racial-bias-the-disappearance-of-hispanic-drivers-from-traffic-records> [<https://perma.cc/6LX8-NHGH>].

⁸¹ See Rachel Hatzipanagos, *Some Afro-Latinos Say the Phrase ‘Latinos for Black Lives Matter’ Makes No Sense*, WASH. POST (Aug. 28, 2020, 12:05 AM), <https://www.washingtonpost.com/nation/2020/08/28/some-afro-latinos-say-phrase-latinos-black-lives-matter-makes-no-sense> [<https://perma.cc/7JGQ-W6X5>].

⁸² See Edwin Grimsley, *What Wrongful Convictions Teach Us About Racial Inequality*, INNOCENCE PROJECT (Sept. 26, 2012), <https://innocenceproject.org/what-wrongful-convictions-teach-us-about-racial-inequality> [<https://perma.cc/J7WS-XUJ2>].

from outside of that group will not be able to distinguish one person from another.⁸³ Eyewitness identification can be incredibly unreliable, and this unreliability is heightened when it occurs across racial lines.⁸⁴ In a survey conducted investigating the role that racial factors play in wrongful convictions, the National Registry of Exonerations found that sixty-nine percent of all sexual assault exonerations in situations where the victim and perpetrator were strangers occurred because of witness misidentification.⁸⁵ Moreover, that figure greatly differed between white and Black defendants: fifty-one percent of white exonerations were due to witness misidentification, while that figure was seventy-nine percent for Black exonerates.⁸⁶ The report concluded that the most obvious explanation for the discrepancy is that white Americans are much more likely to mistake one Black person for another than to misidentify someone within their own race.⁸⁷

This misidentification is not confined to only the victims of criminal acts. In 2020, police mistook Shane Lee Brown (“Shane Lee”), a twenty-three-year-old Black man, for Shane Neal Brown, a white man who was twenty-six years his senior and several inches taller than Shane Lee.⁸⁸ The encounter began when Henderson, Nevada police officers pulled over Shane Lee. Shane Lee did not have his license but was able to produce his social security card that showed his exact name.⁸⁹ Officers then arrested Shane Lee, mistaking him for Shane Neal Brown who had

⁸³ Cf. Radley Balko, Opinion, *There’s Overwhelming Evidence That the Criminal Justice System is Racist. Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system> [https://perma.cc/F6UY-RLKM]. Balko provides a catalogue of study summaries examining racial bias in the criminal justice system. Many of these studies found that Black and Latine drivers were pulled over and searched at higher rates, despite several studies concluding that searches of white motorists were more likely to reveal contraband. Balko also pointed to a study that found that Black men were overrepresented in exonerations regarding sexual assaults of white women due to eyewitness misidentification. *Id.*

⁸⁴ See GROSS, POSSLEY & STEPHENS, *supra* note 63, at 11–12; see also Christian A. Meissner & John C. Brigham, *Thirty Years of Investigating the Own-Race Bias in Memory for Faces: A Meta-Analytic Review*, 7 PSYCHOL., PUB. POL’Y, & L. 3, 3 (2001).

⁸⁵ See GROSS, POSSLEY & STEPHENS, *supra* note 63, at 11.

⁸⁶ See *id.* at 11–12.

⁸⁷ See *id.* at 12.

⁸⁸ See Deepa Shivaram, *A Black Man Jailed Instead of a White Male Felon With a Similar Name is Suing Police*, NPR (Jan. 25, 2022, 1:31 PM), <https://www.npr.org/2022/01/25/1075552126/black-man-jailed-white-male-felon-similar-name-suing-shane-brown> [https://perma.cc/R3ZA-G5VG].

⁸⁹ See *id.*

an arrest warrant out from 2019 and, notably, a felony from 1994—at least four years before Shane Lee was born.⁹⁰ Nevertheless, Shane Lee remained in custody for six days.⁹¹ Throughout his confinement, Shane Lee consistently told officers that he was not the man the warrant was intended for.⁹² Shane Lee sued the Las Vegas and Henderson, Nevada police departments for negligence, emotional distress, false imprisonment, and violation of civil rights, and asked for a combined \$500,000 in damages.⁹³ Both departments settled with Shane Lee in July 2022 for a total of \$90,000.⁹⁴

Unfortunately, Shane Lee is far from alone. With a particular emphasis on the past ten years—since the inception of the modern Black Lives Matter movement in 2013—Black citizens and activists have been sounding the alarm that racial bias, and by extension, misidentification by law enforcement, is driving deadly encounters between law enforcement and Black people.⁹⁵ Kalief Browder died by suicide after he spent three years on Rikers Island as a teenager for being mistaken for someone who stole a backpack.⁹⁶ Police shot and killed seven-year-old Aiyana Stanley-Jones while they were searching for her uncle who lived in a different apartment, but not before lobbing a flashbang grenade into the apartment that set her blanket on fire.⁹⁷ These examples shock the conscience and convey the gravity of what can happen when not enough care is taken by law enforcement, either consciously or otherwise, to ensure that they are in pursuit of the right person.⁹⁸ They also raise the question of what implications might be made when examining

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *See* Camila Moreno-Lizarazo, *Black Man Misidentified by Police and Jailed for 6 Days Wins \$90,000 Settlement*, CNN (July 8, 2022, 11:18 AM), <https://www.cnn.com/2022/07/08/us/nevada-man-jailed-misidentified-wins-settlement/index.html> [<https://perma.cc/N5KU-8UG8>].

⁹⁵ *See* 8 Years Strong, BLACK LIVES MATTER (July 13, 2021), <https://blacklivesmatter.com/8-years-strong> [<https://perma.cc/CRS8-TR9X>].

⁹⁶ *See* Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), <https://www.newyorker.com/news/news-desk/kalief-browder-1993-2015> [<https://perma.cc/WC6P-HPMM>].

⁹⁷ *See* Rose Hackman, ‘She was Only a Baby’: Last Charge Dropped in Police Raid that Killed Sleeping Detroit Child, THE GUARDIAN (Sept. 20, 2017, 12:15 AM), <https://www.theguardian.com/us-news/2015/jan/31/detroit-aiyana-stanley-jones-police-officer-cleared> [<https://perma.cc/95RV-AJYB>]. Incredibly, a film crew for an A&E show was present. *See id.*

⁹⁸ *Cf.* Gonnerman, *supra* note 96; Hackman, *supra* note 97.

the original reporting of these crimes for a “John Doe” warrant—a warrant that specifies no name but is usually required to give an adequate physical description.⁹⁹ If a witness to or victim of a crime reports it to authorities and gives a cross-racial description of the perpetrator, is it likely that the witness or victim will give a sufficient description so that when law enforcement executes the warrant, they are likely to have the right person? Such inquiries are those for which no data currently exists; however, if data from misidentification exonerees provides any insight into these situations, the prospective findings may be troubling.

Another concerning area of mistaken arrests is the use of facial recognition in issuing warrants. Although facial recognition technology may be accurate in most cases, it has been demonstrated that such technology has a harder time making correct identifications for Black and Asian people.¹⁰⁰ In February 2019, Nijeer Parks was arrested because facial recognition technology had falsely identified him as *the* someone who shoplifted candy and then tried to hit a police officer with a car.¹⁰¹ At the time of the incident, Parks was miles away from the scene.¹⁰² The police unknowingly used inaccurate facial recognition technology to identify Parks.¹⁰³ The actual perpetrator had given the police a fake Tennessee driver’s license at the encounter, so the detective compared Parks’s picture to the driver’s license and decided it was a match.¹⁰⁴ Officers then issued a warrant for Parks’s arrest.¹⁰⁵ Parks’s case was eventually dismissed after he was able to provide proof that he had been at a Western Union thirty miles away at the time of the incident, but not before spending ten days at the county jail.¹⁰⁶ Unfortunately, Parks’s case is indicative of a pattern of unreliable facial recognition technology that ensnares innocent police in police encounters. In the Detroit area alone, two other Black men, Robert Williams, and Michael Oliver, were also arrested for crimes they had no part in, simply based on inaccurate

⁹⁹ See BLACK’S LAW DICTIONARY, *supra* note 9.

¹⁰⁰ See Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html> [<https://perma.cc/4UDF-SLVD>].

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

facial recognition matches.¹⁰⁷ All three men have sued over these burdensome mistakes.¹⁰⁸

As of August 2023, all reported arrests of innocent people due to faulty facial recognition tools were of Black people.¹⁰⁹ Until February 2023, all victims were men, but that changed with the arrest of Porcha Woodruff—an arrest which, notably, also occurred in Detroit.¹¹⁰ The vendor, contracted by the city of Detroit, runs facial recognition software that compares faces from investigations against criminal mugshots.¹¹¹ When the police department ran a face from an ongoing carjacking investigation, a human analyst provided Ms. Woodruff’s name.¹¹² The crime that landed her in the database? A nonviolent traffic infraction from 2015.¹¹³ Police subsequently arrested an eight-month pregnant Ms. Woodruff from her home after the victim inaccurately identified Ms. Woodruff as the perpetrator from a six-photo lineup.¹¹⁴ Dr. Gary Wells, a psychology professor who studies eyewitness identification reliability, stated that “[eyewitnesses] assume when you show them a six-pack [photo lineup], the real person is there,” even when that is not the case.¹¹⁵ This can result in further reliance on the misidentification, a process that Dr. Wells called “circular and dangerous,” and which Robert Williams’s attorney Phil Mayor called the “facial recognition to line-up pipeline.”¹¹⁶ While painful, it was perhaps fortunate that Ms. Woodruff was eight months pregnant, as that was likely a contributing factor to her release.¹¹⁷ But it did not come without a cost; Ms. Woodruff was stressed for the

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ See Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. TIMES (Aug. 6, 2023), <https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html> [<https://perma.cc/D4XY-3W97>]; Khari Johnson, *Face Recognition Software Led to His Arrest. It Was Dead Wrong*, WIRED (Feb. 28, 2023, 7:00 AM), <https://www.wired.com/story/face-recognition-software-led-to-his-arrest-it-was-dead-wrong> [<https://perma.cc/3DTY-8JP5>].

¹¹⁰ *See Hill, supra* note 109.

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See id.*

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *See id.*

rest of her pregnancy, her daughters traumatized, and her fiancé alone at what should have been a happy time preparing for a new baby.¹¹⁸

To further complicate police-civilian interactions, there are many instances in which police officers make conscious choices to arrest people—especially minorities—when they call for help. A former New Orleans city councilman, Oliver Thomas, who is Black, was arrested in 2018 when he was in a car accident.¹¹⁹ Although Thomas and his children were injured, the responding officers ran his information and found that he had failed to appear in court for a traffic ticket.¹²⁰ He was arrested while still in the emergency room in front of his stepdaughter and eighteen-month-old son.¹²¹ At a press conference, Thomas talked about how the wreck made him think about how his first son was killed in a car wreck and recalled that, as a result of the arrest after this accident, he was separated from his frightened children at the hospital.¹²² This episode shocked local residents so much that the policy in New Orleans now prohibits these sorts of arrests for certain types of warrants, the logic being that people should not be punished when they call for help and that law enforcement resources would be better directed in dealing with serious offenses.¹²³

Prosecution of immigrants is especially rampant, and it continues to cause fear in many immigrant communities. Such was the case with Wilson Rodriguez Macarreno when he called 911 in 2018.¹²⁴ After a

¹¹⁸ See *id.*

¹¹⁹ See Randi Rousseau, *Former New Orleans Councilman Oliver Thomas Arrested Overnight*, WDSU News (June 1, 2018, 10:07 AM), <https://www.wdsu.com/article/former-new-orleans-councilman-oliver-thomas-arrested-overnight/21049509> [https://perma.cc/7DAN-4HJZ].

¹²⁰ See *id.*; Ramon Antonio Vargas, *Former New Orleans City Councilman Oliver Thomas Arrested on Traffic Violations After Car Crash*, NOLA.COM (June 1, 2018), https://www.nola.com/news/crime_police/former-new-orleans-city-councilman-oliver-thomas-arrested-on-traffic-violations-after-car-crash/article_35c0bc27-1c7e-5ea0-89f0-4846b1608baa.html [https://perma.cc/26DC-A9QD].

¹²¹ See Vargas, *supra* note 120.

¹²² See *id.*

¹²³ Telephone Interview with Kelly Orians, *supra* note 27; See Jeff Adelson, *New Orleans Council Ends Auto Arrests for Expired, Suspended Driver's Licenses; Here's Why*, NOLA.COM (July 26, 2018), https://www.nola.com/news/new-orleans-council-ends-auto-arrests-for-expired-suspended-drivers-licenses-heres-why/article_1f6fa180-d0fd-5617-bffd-a86da8c1e71c.html [https://perma.cc/CU3H-5ZH8].

¹²⁴ See Paul P. Murphy & Deanna Hackney, *Police Answered Immigrant's Call for Help, Then Gave Him to ICE*, CNN (Feb. 26, 2018, 12:01 PM), <https://www.cnn.com/2018/02/13/us/tukwila-police-ice-detain-trnd/index.html> [https://perma.cc/5WV4-AMLK].

string of attempted break-ins to his home and car, Rodriguez called the police because he saw someone trespassing on his property and believed the person was there to steal from him.¹²⁵ Upon their arrival, the police apprehended the trespasser and then asked Rodriguez for his ID.¹²⁶ Rodriguez obliged because he thought it was for reporting purposes, but then the police also handcuffed him.¹²⁷ Instead of using his ID to write a report about the trespassing incident, police ran Rodriguez's information through the NCIC database.¹²⁸ The mistake arose, however, when officers arrested Rodriguez for what they believed to be a valid warrant but was actually an administrative warrant from Immigration and Customs Enforcement (ICE).¹²⁹ Consequently, Rodriguez was turned over to ICE.¹³⁰ The department later stated that ICE informed the department that it had been entering administrative warrants into NCIC in the same manner as criminal warrants.¹³¹

Notably, administrative immigration warrants are not signed off by a judge or magistrate, nor are they subject to independent review.¹³² When these warrants are intermingled with criminal warrants it causes significant problems, which is further compounded because the immigrant population that has an incredibly large Hispanic demographic, which as stated above, has a higher density of surname clusters. If an administrative ICE warrant is entered incorrectly or not entered with adequate specificity to tell two people with a common name apart, someone could not only be mistakenly arrested but also mistakenly deported.¹³³ To make matters worse, the databases used by immigration officers to determine an individual's status are plagued by old and inaccurate information.¹³⁴ These inaccuracies lead to an untold number of incorrect detentions of United States citizens each year.¹³⁵ ICE

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.*

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See* Joel Rubin & Paige St. John, *How a U.S. Citizen Was Mistakenly Targeted for Deportation. He's Not Alone*, L.A. TIMES (Nov. 29, 2017, 7:15 PM), <https://www.latimes.com/local/lanow/la-me-ice-citizen-arrest-20171129-story.html> [<https://perma.cc/LDB8-PVTU>].

¹³⁴ *See id.*

¹³⁵ *See id.*

has detained at least 214 American citizens due to these inaccuracies since 2002 and mistakenly identified 2,840 American citizens as possibly eligible for deportation.¹³⁶

One such person was Sergio Carrillo. Homeland Security tracked him down in a Home Depot parking lot in 2016.¹³⁷ Carrillo repeatedly informed the officials that he was a United States citizen, but they scoffed at the assertion.¹³⁸ Although Carrillo had been unexpectedly born in Mexico to parents holding permanent residency during a short trip across the border, he automatically became a citizen as a child when his mother was naturalized as a United States citizen.¹³⁹ Instead of investigating his claims, they opened a deportation case against him in immigration court.¹⁴⁰ Carrillo's son even brought Carrillo's passport and certificate of citizenship, but ICE refused to review them.¹⁴¹ Carrillo was taken to a detention center a few hours later, where he remained—despite his repeated pleas—until Carrillo's family hired an attorney to intervene.¹⁴² In 2017, the government settled a lawsuit with Carrillo that he filed over the mistaken arrest and resulting detention for \$20,000.¹⁴³ Both Carrillo's story and Spriesterbach's experience, the unhoused man explained above, represent a troubling trend across both the immigration and criminal law enforcement communities, wherein claims of mistaken identity or inaccurate information are written off as someone undeservingly trying to escape the reality they find themselves in.

B. *The Poor and People with Intellectual Disabilities Face Additional Struggles in Battling Mistaken Identity Arrests*

Mistakes in arrest are also particularly hard-hitting for the economically disadvantaged. The Human Rights Watch report also found that warrant-only arrests were concentrated in North Tulsa—the result of the over-policing of Black people and the three-step cycle of poverty that the city's criminal justice system helps perpetuate.¹⁴⁴ Step 1: when someone is given a citation or gets arrested, they are required to pay fines,

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See Root, supra* note 58.

fees, and/or court costs.¹⁴⁵ Step 2: those who are destitute struggle to pay these costs.¹⁴⁶ Step 3: when someone fails to make payments on these charges or arrange a payment plan, an arrest warrant is issued.¹⁴⁷ Repeat.

The report further found that the leading arrest charge by the police department was for warrants—as opposed to, say, an officer witnessing a crime—and that “court costs” were the third-leading booking charge in the county jail for those who were arrested by police, meaning arrests made by the sheriff’s office or those being detained for deportation proceedings were excluded.¹⁴⁸ Lastly, the report concludes that this information indicates that a large portion of the warrants resulting in arrests were for court debt.¹⁴⁹ This result was further edified by the fact that many of the original warrants were for traffic tickets or minor city violations, which may have been payable by middle-income earners but would be difficult to absorb by someone near or at the poverty level.¹⁵⁰

One exacerbating factor regarding a subset of the financially struggling population is that there is a strong overlap between those grappling with severe mental illness and houseless individuals. The National Coalition for the Homeless authored a report which stated that the third largest driver of houselessness for single adults was mental illness.¹⁵¹ Internal biases against those with mental illness also seem to have played a large part in Mr. Spriesterbach’s continued imprisonment discussed above. Because he was written off as mentally ill, many of the people who had the power to change his circumstances simply attributed his repeated pleas of innocence to his mental state.¹⁵² Additionally, his presumed lack of financial resources, both to get an identification and to afford a lawyer who may have changed the course of his case, may have led to Mr. Spriesterbach’s two-and-a-half-year incarceration.¹⁵³ But while the plight of populations who have been historically excluded from

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*; OKLA. STAT. tit. 22, § 983(F)(3), (I) (2023) (providing that failure must be *willful* to provoke imprisonment, but this might not necessarily be the case for all jurisdictions).

¹⁴⁸ *See Root, supra* note 58.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See* NAT’L COALITION FOR THE HOMELESS, MENTAL ILLNESS AND HOMELESSNESS 1 (2017), <https://nationalhomeless.org/wp-content/uploads/2017/06/Mental-Illness-and-Homelessness.pdf> [<https://perma.cc/47MC-WJC4>].

¹⁵² *See Lukpat, supra* note 41.

¹⁵³ *See id.*

the “justice” part of the criminal justice system can be disheartening, solutions abound—if we are willing to give them serious consideration.

V. THE PATH FORWARD TO A MORE EQUITABLE SYSTEM

The legal community has been slow to realize the significant harms associated with erroneous warrants and misidentification. However, their impact is deeply felt by George Hernandez, the repeat victim Causey Davis, the homeless man Joshua Spriesterbach, and the families of the deceased, young Kalief Browder and Aiyana Stanley-Jones. Individuals who become the unintended targets of these mistakes can suffer for decades and be irreparably harmed by the fallout resulting from these arrests (or worse.) It also has a large impact on families, reaching the consequential realms of forgone education, job loss, indefinitely absent parents or spouses, and even the permanent loss of a loved one. Though it may only affect one percent of all arrests in some areas,¹⁵⁴ the cumulative effects are far-reaching. Those in power—whether it be legal professionals, law enforcement, or legislators—owe our most vulnerable residents the time and effort it will take to reform our laws and procedures to mitigate such consequential mistakes.

A. *Currently Available Remedies and the Difficulties They Present*

In crafting solutions, it is important to understand what avenues of deterrence and relief are already available. In a law review note, Brandon V. Stracener lays out a framework for a different interpretation of the Warrant Clause of the Fourth Amendment.¹⁵⁵ This interpretation would allow people who have been arrested as a result of mistaken identity to obtain injunctive relief against government entities under a 42 U.S.C. § 1983 action.¹⁵⁶ This section, titled “Civil action for deprivation of rights,” provides individuals an avenue to sue state employees and representatives acting “under color of any statute, ordinance, regulation, custom, or usage” of a state, territory, or the District of Columbia for violations of their civil rights.¹⁵⁷ Under this section, Stracener argues that

¹⁵⁴ See Bierie, *supra* note 52, at 28. The percentage affected for these time frames in Chicago is slightly over one half of a percent in 1992 due to clerical errors, and just over one percent in 1991 due to erroneous warrants; nevertheless, the cumulative effect is not insignificant.

¹⁵⁵ Brandon V. Stracener, *It Wasn't Me—Unintended Targets of Arrest Warrants*, 105 CALIF. L. REV. 229, 230 (2017).

¹⁵⁶ See *id.*

¹⁵⁷ 42 U.S.C. § 1983.

a court could presently enjoin an organization to update the warrants so that mistaken arrests are not made in perpetuity for a particular person.¹⁵⁸ One problem, however, is that this is an approach that relies on victims knowing that they have a legal remedy. It also assumes that the victims have the resources to pursue that remedy. Victims will need to have time, money, and, likely, access to attorneys to follow through with this option. For people who are single parents, work more than one job, live paycheck-to-paycheck, are mentally ill, struggle with language barriers, or are otherwise marginalized, this route may be cost-prohibitive or time-prohibitive.

Several states have tried to tackle the effects of mistaken arrests on innocent parties, but little headway has been made regarding proactive solutions.¹⁵⁹ Most of the legislation passed affects the available remedies, rather than fixing the problem at its source.¹⁶⁰ Several states, including Colorado, North Carolina, and Rhode Island, have all taken steps to expunge arrests resulting from mistaken identity.¹⁶¹ Notably, Rhode Island law allows claimants to file for the sealing of records and destruction of physical evidence (fingerprints, DNA, etc.) for any purpose so long as the arrest was determined to be wrongful or without probable cause, presumably meaning that ghost warrants might be encompassed in the statute as well.¹⁶² It also commands the arresting agency to notify agencies such as the NCIC or Rhode Island's Bureau of Criminal Identification that the arrest was wrongful and that any records transmitted to them should be sealed or destroyed.¹⁶³ While these solutions are

¹⁵⁸ Stracener, *supra* note 155, at 233.

¹⁵⁹ See, e.g., COLO. REV. STAT. § 24-72-702 (2019); N.C. GEN. STAT. ANN. § 15A-147(a1) (West, Westlaw through 2023 Reg. Sess.); 12 R.I. GEN. LAWS § 12-1-12.2 (2016).

¹⁶⁰ See, e.g., STAT. § 24-72-702 (requiring that where arrests were made due to mistaken identity and no charges were subsequently filed, the arresting agency must within 90 days petition the court in the district where the person was arrested for an expungement order); ANN. § 15A-147(a1) (stating that this new law, passed in 2015 and called "expunction," requires the complainant to affirmatively file and expedites the approval process to immediate expunction); LAWS § 12-1-12.2 (stating that, similarly to Colorado, within 60 days of the determination that an arrest was wrongful in Rhode Island, the arresting agency must seal all arrest records, destroy all identifying information resulting from the arrest, and notify agencies to which this information was transmitted of the mistaken and direct them to likewise destroy or seal the records).

¹⁶¹ STAT. § 24-72-702; ANN. § 15A-147(a1), LAWS § 12-1-12.2; accord ALASKA STAT. § 12.62.180 (1994); MO. REV. STAT. § 610.145 (2017).

¹⁶² LAWS § 12-1-12.2, *supra* note 159.

¹⁶³ See *id.*

retroactive, they provide a more cost-effective solution, particularly in the case of expungements, for victims of mistaken arrests. Other states should enact similar legislation that provides avenues for easy access to remedial resources, but the problem of preventing future harm using these solutions still remains.

B. Proposed Preventative Measures are More Effective at Protecting Vulnerable Populations

Making more remedies accessible after-the-fact to those who have historically been excluded from adequate access to the courts is a substantial step in the right direction; however, solutions that eliminate the need for such remedies altogether would better protect these vulnerable populations. One proposed remedy to this problem is the creation of a mandatory centralized database for all warrants issued, similar to other government databases that house sensitive information, which would include all warrants issued by federal and local authorities. For this solution to be effective, the database would need to be the sole database for all warrants, requiring the migration of a significant amount of data. If warrants are duplicated in other ways, the potential for ghost warrants remains an active threat.

The infrastructure required for this change is potentially massive. There would likely need to be lengthy discussions about what existing entity would take charge of the initial migration of the data and its subsequent maintenance. The controlling entity could be a new governmental organization formed specifically for this purpose. It would also need to work in conjunction with the above-proposed remedial measures such as the right to petition an inaccurate warrant so that when erroneous warrants are detected, innocent citizens have an easy pathway for cancellation. Whatever the solution is to the problem of scale and infrastructure, the most important requirement for victims of mistaken arrests would be the ease with which a warrant-issuing organization can cancel or make changes to a warrant as needed.

One daunting challenge regarding a uniform database is the number of localities that still have a large amount of paper records.¹⁶⁴ In

¹⁶⁴ Cf. Justin Story, *Area Counties are Prospects to Join New eWarrant System*, BOWLING GREEN DAILY NEWS (Mar. 16, 2012), https://www.bgdailynews.com/news/area-counties-are-prospects-to-join-new-ewarrant-system/article_2663e2a2-334c-505a-bb93-3cf29b15a278.html?mode=jqm [<https://perma.cc/Q54L-A4G8>] (describing how paper warrants caused several weeks' worth of backlogs and the inability to serve warrants effectively); ELAINE

those places, data migration is not as simple as transferring data from one electronic source to another because the data from older warrants in these areas will need to be manually entered. This could put severe strain on places like rural counties, especially if local governments are not allowed a significant window of time in which to finish a project of this magnitude. One solution to this issue is to provide federal grant money to short-staffed organizations so that a contractor could be hired specifically for this project. Alternatively, paper-based warrant jurisdictions could be granted an extended window of time. While the aim should be to consolidate as quickly as responsibly allowed, slow but measurable progress is better than no progress at all.

Objections about a single-database approach are justified and should be addressed. One such objection may be the question of who has the power to update and change warrant records as needed. Once a local authority enters a warrant record into such a system, would they have the ability to change those records as they see fit? Or would they need to go through a request and review system that has the potential of creating the same problems a single-system setup was meant to avoid, such as processing delays and the additional risk of more human error? Would jurisdictions be able to easily notify another jurisdiction if they see an error in another locality's warrant? Such questions would need to be carefully considered in the development and implementation of such a system. Further, pushback may exist so far as a single database would mean a consolidation of risks such as security breaches, cyber-attacks, or data corruption. However, the government already has systems in place for several of its agencies in how to deal with sensitive records, such as with the Social Security Administration, the Department of State, or PACER.¹⁶⁵ To safeguard against the loss of information due to corruption or deletion, redundancies could—and should—be built to ensure a working copy is always available to law enforcement agencies that need it.

BORAKOVE & REY BANKS, JUST. MGMT. INST., *A GUIDE TO IMPLEMENTING ELECTRONIC WARRANTS* iv–ix, 4 (2018) (providing case studies of different eWarrant implementations, some of which required grants to get started).

¹⁶⁵ *Social Security Administration's Record Management Program*, SOC. SEC. ADMIN., <https://www.ssa.gov/records-management> [<https://perma.cc/3T2N-N5P8>]; *Get Copies of Passport Records*, TRAVEL.STATE.GOV (Dec. 12, 2022), <https://travel.state.gov/content/travel/en/passports/have-passport/passport-records.html> [<https://perma.cc/ZF9G-8G3P>]; PUBLIC ACCESS TO COURT ELECTRONIC RECORDS, <https://pacer.uscourts.gov> [<https://perma.cc/3GAP-EQRA>].

Another approach to creating a mandatory centralized database is to reappropriate an existing database: the National Criminal Information Center (NCIC).¹⁶⁶ This database enables all police agencies to enter and search warrants to see if a particular individual has an active warrant.¹⁶⁷ This, like any database, has potential pitfalls such as administrative or clerical mistakes, but these challenges can be mitigated by procedures like mandatory recurring audits or a multistep approval process when the warrant is initially entered. In an enlightening interview with Kelly Orians, she stated that ghost warrants persist in part because once a warrant is entered in a single law enforcement database, that data point gets shared and entered into several other disjointed systems, and removing it from one system does not automatically remove it from the others.¹⁶⁸ As she stated, “A more centralized system could ensure warrants are removed contemporaneously, but like with many things, the devil is in the details.”¹⁶⁹ While having a centralized system would be helpful, she went on to point out that “ultimately, police should also be issuing fewer warrants and making fewer arrests,” noting that the root of the issue is over-policing.¹⁷⁰ “Technology is simply a means to redress some of the harm caused by over-policing.”¹⁷¹

If a national mandatory warrant system is unfeasible or politically unpopular to the point that it is impossible to implement, mandatory recurring audits of federal warrants and warrants issued by localities is an especially critical reform to existing warrant cataloging systems. In this scenario, warrant-issuing organizations would comb through existing warrants to see if any do not meet the specificity criteria or if the statute of limitations has tolled. A central question when examining a warrant, especially a warrant that is particularly old, is whether there is enough information included in the warrant to support a conviction, especially for people with names that are common. For example, if a warrant is issued for John Doe, but the warrant lacks information that could distinguish one John Doe from another, the warrant should be either refined to include more specific information, if available, or canceled in

¹⁶⁶ See Bierie, *supra* note 52, at 29.

¹⁶⁷ See *id.* at 28.

¹⁶⁸ Telephone Interview with Kelly Orians, *supra* note 27.

¹⁶⁹ *Id.*

¹⁷⁰ Email Interview with Kelly Orians, Assistant Professor of L., Dir. of the Decarceration and Cmty. Reentry Clinic, Univ. of Va. Sch. of L. (Oct. 7, 2023).

¹⁷¹ *Id.*

the interest of justice for the one or several innocent John Does. This would encourage law enforcement to input sufficient information when the initial warrant is issued.

In arguing for a mandatory, recurring auditing process, it is likely that canceling warrants will be unpopular among some people, like the many Americans who perceive an increase in violent crime.¹⁷² Those who support tough-on-crime policies may be particularly difficult to convince; however, ensuring that existing warrants are dependable solidifies historical protections under the Fourth Amendment. An alternative viewpoint to this anticipated objection suggests that although canceling old or inaccurate warrants is potentially unpopular, retaining these warrants would not generate better outcomes than if the warrants were canceled. Warrants serve an incredibly important function in our justice system; however, if a warrant is essentially useless, then the warrant no longer serves any purpose except to potentially entangle innocent people with the criminal justice system. Warrants that function as such fly in the face of the Fourth Amendment, whose initial purpose was to repudiate the English and colonial practice of general searches and warrants.¹⁷³ General warrants were historically issued to enforce general searches for offenses ranging from tax evasion to printing heretical material.¹⁷⁴ As a result, officers were licensed to search and seize anything they desired.¹⁷⁵ Importantly, these general warrants could also be issued for the purposes of arresting someone without requiring the name of the person to be arrested.¹⁷⁶ Taken together, these warrants created an oppressive atmosphere that the Fourth Amendment's specificity requirement was

¹⁷² According to Ipsos's polling data from July 2021, three in five Americans correctly believe that national violent crime has increased from 2020; however, over half of Americans incorrectly believe that violent crime is worse than thirty years ago when violent crime rates were much higher. See Chris Jackson, *As Public Safety Tops the Agenda, Americans Want Both Order and Justice*, Ipsos (July 8, 2021), <https://www.ipsos.com/en-us/news-polls/usa-today-crime-and-safety-2021> [<https://perma.cc/T8US-SAVV>]. A Gallup poll, conducted in October 2021, found that nearly three quarters of Americans thought that there was more general crime in the United States than in 2020. Moreover, Gallup's findings established that ninety percent of Americans felt that the problem of crime in the United States was somewhat to extremely serious. *Crime*, GALLUP, <https://news.gallup.com/poll/1603/Crime.aspx> [<https://perma.cc/X22W-AWRR>].

¹⁷³ See Leonard W. Levy, *Origins of the Fourth Amendment*, 114 POL. SCI. Q. 79, 81–82 (1999).

¹⁷⁴ See *id.* at 81.

¹⁷⁵ See *id.* at 82.

¹⁷⁶ See *id.* at 82; *General Warrant*, BLACK'S LAW DICTIONARY (11th ed. 2019).

meant to counteract.¹⁷⁷ If the spirit of that requirement is not upheld by way of preventative methods or remedial measures, it is rendered essentially useless.

At least one state has attempted to take the initiative to implement such an auditing system. Louisiana will present a bill called the “Arrest Warrant & Detainer Registry Act.”¹⁷⁸ This bill, which contained contributors such as Kelly Orians, discussed in section II, aimed to tackle many of the problems discussed in this Comment.¹⁷⁹ The legislation proposed a state-wide warrant and detainer registry, where the burden is placed on the issuing agency to keep the warrant information up to date.¹⁸⁰ The aim, as stated in the bill, was to “eliminat[e] . . . unlawful over detentions in Louisiana, provide a clearinghouse for the records of active and closed arrest warrants and detentions, identify the agencies and individuals who have access to the registry and provide mandatory procedures . . . [and] identify the minimum required information recorded in the registry.”¹⁸¹ It also mandated that warrants be entered within seventy-two hours so that the records are kept as up-to-date and as accurately as possible.¹⁸² In her interview, Kelly Orians stated that audits across jurisdictions may get tricky because whether the statute of limitations can toll is fact-dependent;¹⁸³ however, when the burden is placed on the authority who recorded the warrant initially, it is more likely that the agency will have a record of the facts readily available.

While the state-wide registry unfortunately did not make it through the Louisiana legislature, New Orleans had already taken steps to sift through its backlog of municipal warrants. Local news station WDSU found in September 2020 that there were over 740,000 open cases in New Orleans’s municipal court.¹⁸⁴ Lauren Anderson, a supervising

¹⁷⁷ See Levy, *supra* note 173, at 79. In anticipation of the Declaration of Independence, Virginia adopted a Declaration of Rights which stated that “general warrants . . . are grievous and oppressive, and ought not to be granted.” *Id.* at 92. Other states soon followed that example, and the ideals set out in the original language became the foundation for the Fourth Amendment.

¹⁷⁸ Telephone Interview with Kelly Orians, *supra* note 27; “ARREST WARRANT & DETAINER REGISTRY” ACT (March 2022) (on file with author).

¹⁷⁹ Telephone Interview with Kelly Orians, *supra* note 27.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*; “ARREST WARRANT & DETAINER REGISTRY” ACT, *supra* note 178.

¹⁸² “ARREST WARRANT & DETAINER REGISTRY” ACT, *supra* note 178.

¹⁸³ Telephone Interview with Kelly Orians, *supra* note 27.

¹⁸⁴ Emily Lane & Greg LaRose, *WDSU Investigates: ‘Ghost warrants’ Backlog Haunts Accused in New Orleans Municipal Court*, WDSU NEWS (Sept. 28, 2020, 8:23 AM), <https://>

attorney with the Orleans Public Defender's Office, estimated that only around twenty percent of those open cases could still be prosecuted due to the statute of limitations having run or key documents going missing.¹⁸⁵ New Orleans Mayor LaToya Cantrell announced in June 2021—less than one year later since the scope of the problem was identified—that the number of open municipal cases had been reduced by an estimated 385,000.¹⁸⁶ Of those closed cases, an estimated 55,000 were ghost warrants.¹⁸⁷ Mayor Cantrell's office stated that reducing the backlog was among her initiatives to reduce racial disparities, particularly in the criminal justice system.¹⁸⁸ Prior to the purge, one in seven New Orleans adults had a warrant out for their arrest, many of which were for simply failures to appear which heavily affected the city's Black population.¹⁸⁹ This solution could (and should) be replicated in municipalities across the nation.

Next, allowing victims to sue agencies for damages resulting from a mistaken arrest would incentivize both warrant-issuing organizations to take greater care in recording warrants and law enforcement to exercise more caution in making arrests. In her *Herring v. United States* dissent, Justice Ginsburg argues that police departments need an incentive to keep their records up to date.¹⁹⁰ Monetary damages paid to victims could serve this incentive. Currently, injunctive relief is available as described in Subpart A; however, the Supreme Court has so far not allowed for damages to be collected in connection with these types of arrests.¹⁹¹This

www.wdsu.com/article/wdsu-investigates-ghost-warrants-backlog-haunts-accused-in-new-orleans-municipal-court/34184106# [<https://perma.cc/RKT5-WLZV>].

¹⁸⁵ See *id.*

¹⁸⁶ See Greg LaRose, *Mayor: Caseload Reduced by 385,000 at New Orleans Municipal and Traffic Court*, WDSU NEWS (June 16, 2021, 8:12 PM), <https://www.wdsu.com/article/mayor-caseload-reduced-by-385000-at-new-orleans-municipal-and-traffic-court/36745717> [<https://perma.cc/LG8A-XMSY>]. This figure represents over half of the outstanding open cases in September 2020.

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See Richard A. Webster, *One in 7 Adults in New Orleans Have a Warrant Out for Their Arrest, New Data Shows*, WASH. POST (Sept. 20, 2019, 1:47 PM), https://www.washingtonpost.com/national/one-in-7-adults-in-new-orleans-have-a-warrant-out-for-their-arrest-new-data-shows/2019/09/20/db85a5c8-da3d-11e9-a688-303693fb4b0b_story.html [<https://perma.cc/9KDT-RUJD>].

¹⁹⁰ *Herring v. United States*, 555 U.S. 135, 153 (2009) (Ginsburg, J., dissenting).

¹⁹¹ See *id.* at 153.

argument is edified by the fact that oftentimes mistaken arrests result in attorneys' fees and bail costs for innocent people.

Historically, the Supreme Court has denied victims the ability to have any recourse for mistaken arrests, unless the cause was flagrant abuse of constitutional rights specifically by law enforcement. In *United States v. Leon*, the Court stated that as long as a police officer was acting in good faith reliance that the warrant they were executing was valid, the exclusionary rule was not available to defendants, even where the warrant is later found defective.¹⁹² When warrants are defective, defendants have few options for relief. In *Herring v. United States*, the clerk failed for five months to rescind a canceled warrant from the digital record-keeping system.¹⁹³ The parties conceded, and the Court assumed, that this failure resulted in a Fourth Amendment violation.¹⁹⁴ Despite this, the Court refused to apply the exclusionary rule, meaning that the Court included the evidence resulting from the violation that could be used to incriminate the defendant.¹⁹⁵ The Court relied on reasoning that the error was merely a result of “isolated negligence attenuated from the arrest.”¹⁹⁶ Accordingly, it did not meet the “sufficiently deliberate” standard required to implement the exclusionary rule.¹⁹⁷ In dicta, the Court stated that “in some circumstances[,] recurring or systemic negligence,” such as recklessly maintaining a warrant system, could also trigger the exclusionary rule.¹⁹⁸ But, the Court has yet to make such a finding, reasoning that “[p]enalizing the officer for the magistrate’s error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations.”¹⁹⁹

The issue with this reasoning is that to a mistaken arrestee, it matters little whether the misconduct—whether intentional, reckless, or negligent—originated from law enforcement or another state actor. As Justice Brennan’s dissent in *United States v. Calandra* points out, the exclusionary rule also serves to “enable[e] the judiciary to avoid the taint of partnership in official lawlessness and ...assur[es] the people—all

¹⁹² *United States v. Leon*, 468 U.S. 897, 919 (1984).

¹⁹³ See *Herring*, 555 U.S. at 138.

¹⁹⁴ See *id.* at 137.

¹⁹⁵ See *id.* at 147–48.

¹⁹⁶ *Id.* at 137.

¹⁹⁷ *Id.* at 144.

¹⁹⁸ *Id.*

¹⁹⁹ *Leon*, 468 U.S. at 921.

potential victims of unlawful government conduct—that the government would not profit from its lawless behavior” and helps to maintain the people’s trust in government.²⁰⁰ To say that law enforcement officers are the only state actors who have an interest in seeking justice is absurd.²⁰¹ Law enforcement, court clerks, and other county and federal personnel are sworn into their positions and all promise to uphold the United States Constitution and the constitution of their state, if applicable. For a victim of a mistaken arrest to have no recourse against such government representatives’ errors is to let the government abuse citizens’ Fourth Amendment rights with impunity.

In its October 2023 session, the Supreme Court of the United States could have considered the issue of governmental impunity regarding mistaken arrests in *Sosa v. Martin County, Florida*, but it denied certiorari.²⁰² The plaintiff, David Sosa, a Florida resident, was twice mistakenly arrested under a 1992 warrant out of Texas for a different man with the same name.²⁰³ The first arrest occurred in 2014 during a traffic stop, and despite Sosa explaining that the intended arrestee’s birthday, height, weight, social security number, and tattoos did not match him, he was arrested.²⁰⁴ That time, Sosa was held only for a few hours.²⁰⁵ Four years later, however, Sosa was arrested again during a traffic stop, but this time his detention lasted for three days.²⁰⁶ That time he explained this type of mistaken arrest had happened before, but he was not released until someone ran his fingerprints three days after his initial arrest.²⁰⁷ During the second arrest, jail officers even went as far as telling Sosa not to talk

²⁰⁰ *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting). While it could be argued that there is no benefit conferred to the government from its lawless behavior and thus it did not profit, overlooking constitutional violations perpetuated by the government necessarily gives it more power than what the Constitution allows for.

²⁰¹ *But see Leon*, 468 U.S. at 917 (“And, to the extent that the rule is thought to operate as a ‘systemic’ deterrent on a wider audience, it clearly can have no such effect on individuals empowered to issue search warrants. Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them.”).

²⁰² *Sosa v. Martin Cnty.*, 57 F.4th 1297 (11th Cir. 2023), *cert. denied*, 2023 WL 6377898 (Oct. 2, 2023).

²⁰³ *See id.* at 1299.

²⁰⁴ *See id.*

²⁰⁵ *See id.*

²⁰⁶ *See id.*

²⁰⁷ *See id.*

to the magistrate judge during his detention hearing, and so, fearing real criminal charges for noncompliance, Sosa stayed silent.²⁰⁸

After his second arrest, Sosa initiated a civil rights action under 42 U.S.C. § 1983 against the county, the county sheriff, the arresting officer, an officer to whom he protested his arrest while he was detained, and several other deputies.²⁰⁹ The district court dismissed the action, reasoning that Sosa did not “plausibly allege” that the officers violated his rights under either the Fourth or Fourteenth Amendments.²¹⁰ It essentially reasoned that no basis for liability existed.²¹¹ On appeal, the Eleventh Circuit panel affirmed in part and reversed in part: the claims against the county and sheriff were still not viable, but Sosa did have a valid claim for violation of his “substantive due process right to be free from continued detention”²¹² The Eleventh Circuit then heard the case *en banc* and vacated the panel opinion, basing its decision on *Baker v. McCollan*, a case which denied a petitioner’s over-detention claim that a mistaken identity arrest had deprived him of liberty without due process when he was only in jail for three days.²¹³

In his appeal to the Supreme Court, Sosa asked the court to consider whether the right outlined in *Baker* against over-detention fell under the Fourteenth Amendment’s guarantee against unreasonable searches and seizures or the due process clause of the Fourteenth Amendment.²¹⁴ Sosa pointed out that there was a circuit split on whether to read *Baker* as a bright-line rule for a three-day detention, or whether to use a totality-of-the-circumstances approach.²¹⁵ The latter would allow courts some leeway in letting civil rights claims against mistaken identity detentions to move forward. Sosa illustrated that if the Supreme Court were to overlook this circuit split, the county “could arrest [him] a third, fourth, or fifth time. They could, indeed, arrest him each week if they wanted

²⁰⁸ See Petition for Writ of Certiorari at 9, *Sosa v. Martin Cnty.*, 2023 WL 6377898 (Oct. 2, 2023) (No. 22–1145).

²⁰⁹ See *Sosa v. Martin Cnty.*, 57 F.4th 1297 (11th Cir. 2023), *cert. denied*, 2023 WL 6377898 (Oct. 2, 2023).

²¹⁰ *Id.*

²¹¹ See *id.*

²¹² *Id.* (quoting *Sosa v. Martin Cnty.*, 13 F.4th 1254, 1266 (11th Cir. 2021), *reh’g en banc granted*, *op. vacated* 21 F.4th 1362 (11th Cir. 2022)).

²¹³ See *id.* at 1300; see also *Baker v. McCollan*, 443 U.S. 137 (1979).

²¹⁴ See Petition for Writ of Certiorari, *supra* note 208, at i.

²¹⁵ See *id.* at 15, 20.

to—so long as there is a single outstanding warrant for *a* David Sosa.”²¹⁶ Despite the grave risk of another detention, media attention, and even an amicus brief from four other David Sosas from around the United States, the Supreme Court denied certiorari, leaving people like David Sosa and George Hernandez out in the cold (and, potentially, in a cell).²¹⁷ But with adequate education regarding the breadth and scope of mistaken arrests, courts will eventually be forced to confront the realities of what such an arrest can bring. As the United States’s demographics start to shift, it is likely that this problem will continue to grow until it can no longer be ignored. Hopefully, if policy work fails, judicial reconsideration of this issue will one day be able to provide some protections and redress.

Finally, addressing many of the underlying issues that contribute to unconscious biases or inherent disadvantages would greatly aid in equalizing the rates at which these mistakes occur. Providing permanent shelter to unhoused people seeking a home and an easy avenue to obtain documentation decreases the risk that a person who would otherwise be living on the street will have unfavorable interactions with the police that escalate to arrests.²¹⁸ In the event that such a person does have a more adversarial interaction with law enforcement, having up-to-date identification on hand can greatly reduce the risk of a mistaken identity arrest. Likewise, for a houseless individual who commits a crime, having a valid identification greatly increases the chances that the information that ends up on a warrant is correct, which in turn protects everyone in the community.

Similarly, addressing racial and ethnic biases among both members of the community and law enforcement officers could reduce the risk of misidentification in witness statements and make law enforcement agencies more cognizant of when they might be over-policing a community. This bias continues throughout the entire criminal conviction process

²¹⁶ *Id.* at 22 (emphasis in original).

²¹⁷ See *Sosa v. Martin Cnty.*, 2023 WL 6377898 (Oct. 2, 2023); See also Sarah Esther Lageson, *Will the Real David Sossa Please Stand Up?*, WIRED (Sept. 14, 2023, 12:00 AM), <https://www.wired.com/story/data-warrants-policing-scotus> [<https://perma.cc/U5Q3-XHUT>]; Brief of *Amici Curiae* David Sosa, David Sosa, David Sosa, David Sosa, & The Institute for Justice in Support of Petitioner David Sosa, *Sosa v. Martin Cnty.*, 2023 WL 6377898 (Oct. 2, 2023) (No. 22–1145).

²¹⁸ See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, PHOTO IDENTIFICATION BARRIERS FACED BY HOMELESS PERSONS: THE IMPACT OF SEPTEMBER 11, at 4 & 16–18 (2004).

and has led to an incredible overrepresentation of people of color in American prisons.²¹⁹ The fallout from these biases is that Black people are much more likely to be convicted while innocent of violent crimes, resulting from both misidentification by witnesses and by unconscious or overt discrimination at different points in the legal process, from arrest to sentencing.²²⁰ The problem of racial and ethnic bias within the legal system and society at large can seem nebulous and daunting; however, it is nearly impossible to erase inequity from the criminal justice system without addressing this issue.²²¹

Kelly Orians relayed a story that demonstrates how police themselves can acknowledge systemic problems and exercise discretion in interactions with civilians to better protect them from the repercussions of ghost warrants. Orians had a client named Jonathan who, less than a month after being released from prison in 2019, went into the New Orleans Police Department to obtain a copy of his criminal background in order to apply for an expungement of an old drug conviction.²²² The New Orleans Police Department ended up arresting Jonathan on a twenty-year-old bench warrant for two drug possession charges in Orleans Parish from 1998—possession of paraphernalia for a crack pipe and possession of cocaine for the residue on the pipe.²²³ The problem was, the arrest leading to these 1998 charges in Orleans Parish happened before the arrest that sent Jonathan to prison, which occurred in Jefferson parish.²²⁴ When Jonathan was sent to prison by Jefferson parish, there was no record of the warrant from Orleans parish, likely because it was never recorded in the NCIC.²²⁵ If it had been, Jefferson parish would have brought him to court in Orleans parish, and his case long ago would have been resolved.²²⁶ Instead, he was arrested in 2019,

²¹⁹ See GROSS, POSSLEY & STEPHENS, *supra* note 63, at 1, 16, 20–21.

²²⁰ *See id.* at 1, 27–28.

²²¹ *But see* Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020, 5:00 AM), <https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior> [<https://perma.cc/C3LT-N69C>]. This Comment would alternatively argue that behavior may be changed over time, but it necessarily will not change if education does not occur.

²²² Email Interview with Kelly Orians, *supra* note 170. Jonathan is a pseudonym.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

more than 20 years after the charges were initially filed.²²⁷ Because of Orleans parish's failure to file, the only way for Jonathan to know about the warrant was through an interaction with law enforcement in Orleans parish.²²⁸ Opting for a quick resolution to his case rather than fighting to get it dismissed, he pled to the charge, which meant that this old warrant resulted in one jail stay, six court dates, a misdemeanor conviction, thirty days on probation, and court costs.²²⁹ Afterward, the arresting officer approached Orians and asked to apologize to Jonathan.²³⁰ The officer is now a supervisor who trains new recruits to be wary regarding drug possession cases and traffic tickets because of situations like the ghost warrant incident with Jonathan.²³¹ He told Orians that many cases go unresolved, are never removed from the system, and then haunt people for years—potentially, for decades.²³² Diverting away from over-policing, and more towards conscious policing, can help guide our criminal punishment system towards an equitable justice system.

Underlying all of these issues is one common thread: they are made infinitely worse by our system of mass incarceration in the United States. From excessive prison sentences to incredibly large fines, nearly all the functions put forth in our carceral system work to keep people behind. For example, mass incarceration works—unintentionally or otherwise—to stymie poverty reduction by the mere fact that having a criminal record makes it harder for someone to find gainful employment, particularly if they have been convicted of a felony.²³³ This is further demonstrated by the fact that formerly incarcerated people are likely to earn less over their lifetime than similarly situated people without criminal records.²³⁴

Importantly, the effects of mass incarceration do not stop at the individuals themselves. The more warrants are issued for failure to appear regarding previously non-criminal acts—such as loitering, leaving an old washing machine in your front yard, having a child miss too many days at school, missing too many days at school yourself, or having

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ See CTR. FOR CMTY. CHANGE, THE RELATIONSHIP BETWEEN POVERTY & MASS INCARCERATION, https://www.masslegalservices.org/system/files/library/The_Relationship_between_Poverty_and_Mass_Incarceration.pdf [<https://perma.cc/G6UM-WPFY>].

²³⁴ *See id.*

your dog get loose—the more likely it is that innocent people will get wrapped up in the system by accident.²³⁵ Additionally, this oftentimes takes important income earners away from their families and disrupts the social fabric of entire neighborhoods.²³⁶ As it relates to mistaken identity arrests, those who are already disadvantaged—whether from their race, economic background, or intellectual ability—face a more difficult time fighting against injustices because they will be less likely to know and/or be able to hire an attorney quickly enough to avoid some of the more serious consequences. Waiting for a preliminary hearing to clear up any misunderstandings may cause someone to lose their job, their home, or their loved ones.

CONCLUSION

Ghost warrants and mistaken identity arrests are a crisis across the nation, especially for those with common names, people of color, the poor, and those struggling with mental illness. There is insufficient scholarship to bring attention to those who have the power to alter the system, namely judges, lawyers, and legislatures. Both legal scholarship and overall public awareness are necessary to create pressure that compels these powerful groups to act for the protection of our nation's most vulnerable residents. Several common-sense reforms are possible through the creation of a mandatory singular national warrant system or the reappropriation of the National Criminal Information Center database. If this path is not viable, the digitization of rural warrant systems, the requirement of auditing of all warrant systems, and the availability of monetary remedies through the court system would incentivize warrant-issuing organizations to input correct and sufficient information that allows law enforcement officers to quickly dispose of innocent persons when attempting to carry out an arrest resulting from a warrant. Creating a viable pathway for civil rights actions or evidence exclusion motions would incentivize both law enforcement and other public servants to ensure that our criminal justice system is working to protect the rights of the public.

²³⁵ Cf. Blake Ellis & Melanie Hicken, *Shocking Small 'Crimes' That Can Land You in Jail*, CNN (Apr. 10, 2015, 12:45 PM), <https://money.cnn.com/2015/04/09/pf/arrest-warrant-jail/index.html> [<https://perma.cc/TM55-MWSM>].

²³⁶ See CTR. FOR CMTY. CHANGE, *supra* note 233.

It is imperative for the legal, legislative, and law enforcement communities to work together in solving this problem. Mistakenly involving innocent persons in the criminal justice system is morally reprehensible and often causes significant and irreparable harm to the lives of those who live through it. This is especially so because those whom it is more likely to harm are the least likely to be able to seek corrective injunctions or other forms of redress. Further, the costs to taxpayers for mistaken arrests, especially when it occurs repeatedly, and the societal danger of letting an offender continue to go free without a trial are significant enough that all stakeholders should be personally invested in finding solutions to this issue. Finally, the threat of any person's liberty being taken away, sometimes repeatedly, should appeal to everyone's instinct of self-preservation and compel them to act in protecting all of us.

