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Cause and Conviction: The Role of Causation in Section 1983 Wrongful Conviction Claims

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CAUSE AND CONVICTION: THE ROLE OF CAUSATION IN § 1983 WRONGFUL CONVICTION CLAIMS

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On December 15, 1984, William O'Dell Harris, a talented athlete in Rand, West Virginia, had the same concerns as most teenagers. Harris had been offered several college scholarships and was deciding where to attend college.[1] *Six months later, after being falsely accused of sexually assaulting a young woman, Harris was dealing with issues that would confound most adults.*[2]

On December 16, 1984, a young woman who lived near Harris was sexually assaulted outside of her home.[3] *Harris was arrested and charged with first-degree sexual assault approximately seven months later.*[4] *Although Harris was a juvenile at the time of the assault, prosecutors opted to try him as an adult.*[5] *At trial, the victim identified Harris as her attacker,*[6] *the deputy sheriff "emphatically supported her testimony,"*[7] *and Fred Zain, a police serologist, "testified that the genetic markers in the semen left by the assailant matched those of Harris and only 5.9 percent of the population."*[8] *Despite Harris's alibi*[9] *and repeated proclamations of his innocence, the jury returned with a guilty verdict. The jury convicted Harris*

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1. George Castelle & Elizabeth F. Loftus, *Misinformation and Wrongful Convictions*, *in* WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE 17, 20 (Saundra D. Westervelt & John A. Humphrey eds., 2001).

2. *See id.* (noting imminent collapse of Harris's promising future as false accusations of rape would soon lead to his wrongful conviction).

3. EDWARD CONNORS ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL 55–56 (June 1996), *available at* http://www.ncjrs.gov/pdffiles/dnaevid.pdf (describing undisputed facts of assault and rape).

4. *Id.*

5. *Id.* at 56. The government moved to have the case transferred from juvenile to adult status. *Id.* The court granted the motion on May 16, 1986. *Id.*

6. CONNORS ET AL., *supra* note 3, at 56 (identifying Harris both in police lineup and at trial).

7. Castelle & Loftus, *supra* note 1, at 20.

8. CONNORS ET AL., *supra* note 3, at 56.

9. Harris's girlfriend at the time of the crime testified that he was with her when the assault occurred. *Id.* Unfortunately, Harris's girlfriend was the only one who could corroborate the alibi. *Id.*

of second degree sexual assault after less than four hours of deliberation.[10] *On October 18, 1987, Harris was sentenced to ten to twenty years in prison.*[11]

Six years after his conviction, in November of 1993, Harris filed a petition for postconviction habeas corpus wherein he consented to DNA testing of any remaining evidence.[12] *After failing to comply with three court orders to release the trial evidence for DNA analysis, the sheriff's department finally claimed that all the evidence from Harris's trial had been lost.*[13] *An investigator for the defense later found semen evidence taken from the victim during her medical examination after the 1984 attack.*[14] *After two tests, both of which "showed that Harris was not the donor of the semen on the evidence slide, the district attorney held a press conference on August 1, 1995, to state that Harris was innocent."*[15] *In October, the court vacated his conviction, and "[o]ne month later, the court also dismissed the underlying indictment. Harris had served 7 years of his sentence and an additional year of home confinement."*[16]

The detective who testified at Harris's trial was later convicted of perjury.[17] *Additionally, a report by the American Society of Crime Laboratory Directors concluded that Fred Zain, the police serologist who testified at Harris's trial, had engaged in numerous acts of misconduct*[18] *and that "this misconduct was 'the*

10. *Id.*

11. *Id.* Harris was credited seventy-five days for time already served. CONNORS ET AL., *supra* note 3, at 56.

12. *Id.* On November 10, 1993, the West Virginia Supreme Court of Appeals allowed special habeas corpus proceedings for any case in which the testimony of Fred Zain, the police serologist who testified at Harris's trial, was used. *Id.* Harris therefore filed a petition for writ of habeas corpus and "consent[ed] to DNA testing . . . as a condition of relief." *Id.*

13. *Id.* On December 29, 1993, a circuit court judge ordered the prosecutors to release the evidence from Harris's trial. CONNORS ET AL., *supra* note 3, at 56. This order was repeated more than a month later, after the prosecutors failed to comply. *Id.* At a hearing where Harris was moved to home confinement, the order was repeated yet again. *Id.* The sheriff's department then told the court that the trial evidence had been lost. *Id.*

14. *Id.* at 56–57. After finding the sample, Harris's attorney sought the release of the sample to undergo DNA testing. CONNORS ET AL., *supra* note 3, at 57. The judge issued a fourth order to release the evidence and the police finally complied. *Id.* Harris's attorney also filed a contempt of court motion against the prosecutors for not turning over the samples as previously ordered by the court. *Id.* The district attorney argued that the victim had been uncooperative and that the sample had since been submitted for DNA testing. *Id.*

15. *Id.*

16. CONNORS ET AL., *supra* note 3, at 57.

17. *Id.*

18. *In re* Investigation of W. Va. State Police Crime Lab., Serology Div., 438 S.E.2d 501, 516 (W. Va. 1993). The court summarized Zain's acts of misconduct as follows:

> The acts of misconduct on the part of Zain included (1) overstating the strength of results; (2) overstating the frequency of genetic matches on individual pieces of evidence; (3) misreporting the frequency of genetic matches on multiple pieces of evidence; (4) reporting that multiple items had been tested, when only a single item had been tested; (5) reporting inconclusive results as conclusive; (6) repeatedly altering laboratory records; (7) grouping results to create the erroneous impression that genetic markers had been obtained from all samples tested; (8) failing to report conflicting results; (9) failing to conduct or to report conducting additional testing to resolve conflicting results; (10) implying a match with a

result of systematic practice rather than an occasional inadvertent error.'"[19] *There is also evidence to suggest that the victim was repeatedly exposed to suggestive interviewing techniques and that the prosecutor failed to disclose exculpatory evidence to the defense.*[20]

I. INTRODUCTION

As William Harris's case demonstrates, the United States criminal justice system can erroneously convict persons of crimes. Recent statistics on wrongful convictions confirm that the United States criminal justice system convicts, incarcerates, and, in some instances, executes people for crimes of which they are innocent.[21] Although wrongful convictions may be an inevitable consequence of our criminal justice system, it would seem that a person wrongly deprived of his liberty is entitled to a civil remedy to compensate for the mistakes of the criminal system.[22] Yet persons wrongly convicted of crimes who bring actions under 42 U.S.C. § 1983 for an erroneous arrest, detention, or conviction are often denied monetary compensation.[23]

> suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

Id. Despite the numerous allegations of wrongdoing, Zain died of colon cancer before he could be convicted of perjury. Craig M. Cooley & Brent E. Turvey, *Observer Effects and Examiner Bias: Psychological Influences on the Forensic Examiner*, *in* CRIME RECONSTRUCTION 51, 67 (W. Jerry Chisum & Brent E. Turvey eds., 2007).

19. *In re W. Va. State Police Crime Lab.*, 438 S.E.2d at 516 (quoting report by American Society of Crime Laboratory Directors).

20. *See* Castelle & Loftus, *supra* note 1, at 22–23 (outlining how victim finally came to identify Harris). George Castelle, the attorney who represented Harris in his postconviction appeals, noted the following problems with the police investigation of Harris. First, a police report,

> which Castelle said had been concealed for over a decade, indicated the victim initially said she knew Harris and he wasn't the man who attacked her.
>
> [Second, h]e said it's possible the victim was told of Zain's evidence, and based on that, she may have believed she was mistaken when she initially said he wasn't the rapist.

Kay Michael, *Dead Wrong Zain Case Reinforces Public Defender's Fierce Opposition to the Death Penalty*, CHARLESTON GAZETTE (W. Va.), Nov. 18, 1998, at P1C.

21. *See generally* BARRY SCHECK & PETER NEUFELD, INNOCENCE PROJECT, 200 EXONERATED: TOO MANY WRONGFULLY CONVICTED 43 n.1 (2007), *available at* http://www.innocenceproject.org/200/ip_200.pdf (citing calculations of various wrongful conviction experts). The Innocence Project report cites recent work by Professor Samuel Gross, who "calculated that 2.3% of all prisoners sentenced to death between 1973 and 1989 were exonerated and freed." *Id.* Professor Michael Risinger estimated that between 3.3% and 5% of defendants were wrongly convicted and sentenced to death for murders involving rape between 1982 and 1989. *Id.* The report contends that if there are some two million inmates and as few as one percent (a conservative estimate) are innocent, then there are more than 20,000 people in jail who were wrongly convicted. *Id.*

22. *See* Carey v. Piphus, 435 U.S. 247, 254–55 (1978) ("The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty." (quoting 2 F. HARPER & F. JAMES, LAW OF TORTS § 25.1, at 1299 (1956))).

23. SCHECK & NEUFELD, *supra* note 21, at 34–35 (finding less than half of exonerees were able to recover compensation). Only forty-five percent of the 200 exonerees who had been cleared through the use of DNA evidence were able to collect through either state compensation statutes or civil lawsuits. *Id.* at 34.

There are a number of bases for courts to deny exonerees a § 1983 monetary remedy for their erroneous convictions. First, although such convictions may be factually wrong, they may not be legally wrong. To establish liability under § 1983, a plaintiff must prove that the defendant caused him to be deprived of a constitutional right.[24] Furthermore, even in cases where the plaintiff is able to prove a constitutional violation, the persons responsible for the deprivation are often immune from suit.[25]

Legal scholarship discussing § 1983 actions for wrongful convictions typically focuses on (1) whether wrongful conviction or prosecution violates the Constitution, and (2) the role of absolute and qualified immunity in these cases.[26] Furthermore, legal scholars who do discuss civil remedies for wrongful convictions only focus on one or two actors in the criminal justice process who might be civilly liable.[27] Yet, as Harris's case suggests, "wrongful convictions do not result from a single flaw or mistake; many factors can be at the root of a wrongful conviction."[28] Such factors may include biased police lineups, mistaken eyewitness identification, faulty forensic science, coerced false confessions, and unreliable informants.[29] Accordingly, one person is seldom the "cause" of a wrongful conviction. This severely complicates questions of causation in § 1983 litigation, which requires a plaintiff to prove that each individual defendant

24. *Carey*, 435 U.S. at 254–55.

25. O'Neal v. Miss. Bd. of Nursing, 113 F.3d 62, 65 (5th Cir. 1997) (citing Forrester v. White, 484 U.S. 219, 224 (1988)) (illustrating Supreme Court's narrow understanding of absolute immunity). Judges, while performing judicial acts within their jurisdiction, and prosecutors, while performing their duties, are granted absolute immunity from monetary damages. *Id.* Witnesses are similarly granted absolute immunity. Briscoe v. LaHue, 460 U.S. 325, 337 (1983) (finding no indication of legislative intent to abrogate common law witness immunity in § 1983 cases). Other state actors, such as the police officers who investigated and arrested the plaintiff and forensic scientists who may have analyzed evidence in the case, are also often shielded by qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.").

26. *See, e.g.*, Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 GEO. L.J. 1441, 1441–42 (1989) (noting confusion that § 1983 litigation has brought to constitutional law debates); Mark R. Brown, C*orrelating Municipal Liability and Official Immunity under Section 1983*, 1989 U. ILL. L. REV. 625, 673 (finding that immunities may offer municipalities too much protection from liability); Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 IOWA L. REV. 1, 4 (1982) (opining mental requirements similar to that required for Fourteenth Amendment violation are necessary for liability to attach under § 1983); Barbara Rook Snyder, *The Final Authority Analysis: A Unified Approach to Municipal Liability under Section 1983*, 1986 WIS. L. REV. 633, 675–76 (discussing trends in absolute and qualified immunity defenses).

27. Castelle & Loftus, *supra* note 1, at 18 (finding that wrongful convictions are often result of single mistake that taints entire case); *see, e.g.*, Michael Avery, *Paying for Silence: The Liability of Police Officers Under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMP. POL. & CIV. RTS. L. REV. 1, 30 (2003) (discussing difficulties in demonstrating police officer liability under § 1983); John Williams, *False Arrest, Malicious Prosecution, and Abuse of Process in § 1983 Litigation*, 20 TOURO L. REV. 705, 715–22 (2004) (exploring possible liability for prosecutors under § 1983).

28. John A. Humphrey & Saundra D. Westervelt, *Introduction* to WRONGLY CONVICTED: PERSPECTIVES ON FAILED JUSTICE, *supra* note 1, at 1, 9–10.

29. *Id.* at 9.

deprived him of a specific constitutional right and that the deprivation of this constitutional right, in turn, caused his injuries.[30]

This Article discusses the availability of a § 1983 civil remedy for persons wrongly convicted, but it approaches the issue from a very different angle from previous articles on the subject. The primary focus of this Article is not whether wrongful convictions violate the Constitution, nor whether certain immunities shield government officials from monetary liability; instead, I consider the role of causation in § 1983 wrongful conviction cases.

Although causation is seldom mentioned as an element of a § 1983 claim, it plays two roles in § 1983 litigation. First, causation is an inherent part of the deprivation element of a § 1983 claim.[31] Additionally, causation serves as a link between the defendant's breach and the plaintiff's damages, which I refer to as "damages causation." Courts have used this second form of causation to limit liability in § 1983 wrongful conviction claims. I argue that courts' approaches to damages causation in § 1983 claims unnecessarily and improperly limit defendants' liability in wrongful conviction cases.

This Article proceeds as follows. Part II begins with a brief overview of the most common reasons persons are convicted of crimes of which they are innocent. These reasons include eyewitness misidentification, police and prosecutorial misconduct, and ineffective defense counsel. Part II.B explains that while the number of persons exonerated from their convictions has increased in recent years, there has not been a corresponding rise in the availability of civil remedies to persons wrongly convicted of a crime. This section concludes that the absence of alternative civil remedies has led to a surge in the number of § 1983 wrongful conviction cases.

Part III considers how plaintiffs and courts have attempted to fit wrongful conviction claims into the § 1983 rubric. To do so, an exoneree must prove that the alleged conduct deprived him of a federally protected right. In other words, he must translate the basic facts leading to his conviction into the language of a federal statutory violation. I suggest that most § 1983 wrongful conviction claims are cast as a Fourth Amendment or a Fourteenth Amendment substantive due process claim. This portion of the Article concludes that the Court's method of distinguishing Fourth and Fourteenth Amendment substantive due process rights often makes it difficult to categorize the acts that lead to wrongful convictions as a deprivation of a federal right, as required for a viable § 1983 claim.

Part IV expands upon Part III's discussion of § 1983 jurisprudence. This Part, however, examines the role of causation in wrongful conviction cases in which the plaintiff seeks monetary damages. I argue that causation plays two roles in § 1983 litigation for compensatory damages. First, the plaintiff must

30. See *infra* Part IV for a discussion of how causation plays two separate roles in § 1983 litigation, "statutory causation" and "damages causation."

31. 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983, § 3:108 (4th ed. 1997 & Supp. 2007) (noting, based on Supreme Court precedent, that defendant's actions must be causally related to plaintiff's constitutional injury under § 1983).

prove that the defendant caused him to be deprived of a constitutional right. Furthermore, as previously mentioned, there must be a causal link between this constitutional breach and the plaintiff's actual injury. This Part goes on to describe how courts have approached these questions in § 1983 litigation and consider the policy arguments that courts have advanced to support their varying approaches to causation in § 1983 wrongful conviction cases.

Part V suggests that § 1983 jurisprudence has developed in such a way that the purpose of legal causation (or proximate cause)—to limit liability to those situations where it is justifiable—has already been satisfied by other elements, rendering the role of proximate cause in § 1983 redundant and largely unnecessary. Part V.A provides a brief overview of the history of legal causation in the common law of torts, focusing primarily on the policy reasons for limiting liability in tort negligence actions. Part V.B then discusses the role of qualified immunity in § 1983 litigation and compares the policy concerns underlying the availability of qualified immunity and those that legal theorists and courts use to rationalize proximate cause in negligence cases. This Part concludes that proximate cause is not only an unnecessary limit on liability in § 1983 cases, but it is actually unjustified in those cases where the defendant has been denied a qualified immunity defense.

II. WRONGFUL CONVICTIONS

With a few exceptions, scholars have only recently begun tracking the number of persons who have been exonerated of crimes they did not commit.[32] In 1998, the National Institute of Justice issued a report profiling twenty-eight cases in which DNA evidence proved that convicted persons had not actually committed the crime.[33] More recently, Samuel L. Gross studied the cases of 340 persons who were exonerated of the crimes of which they were convicted.[34]

32. *See, e.g.*, Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction*, 6 U. CHI. L. SCH. ROUNDTABLE 73, 75–80 (1999). In 1932, Edwin M. Borchard published *Convicting the Innocent: Errors of Criminal Justice*, the first modern case study of the wrongfully convicted. *Id.* at 76. Borchard followed the cases of sixty-five individuals in the United States and England the author believed to be "completely innocent" of the crimes for which they were convicted. *Id.* Based upon his research, Borchard concluded that all criminal justice systems should enact legislation to indemnify the wrongly convicted. *Id.* at 76–77; *see also* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 23–24, 31–39 (1987). The authors compiled 350 cases of wrongful convictions for capital or potentially capital crimes handed down between 1900 and 1985. Bedau & Radelet, *supra*, at 23–24, 27. Of these crimes, 200 were first-degree murder convictions, 73 second-degree murder, 14 other homicide, 39 unspecified, and 24 rape convictions. *Id.* at 36. In 350 case studies, forty percent of the criminal defendants were sentenced to death and twenty-three criminal defendants were executed for crimes they did not commit. *Id.*

33. CONNORS ET AL., *supra* note 3, at 33–76.

34. Samuel R. Gross et al., *Exonerations in the United States: 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 523–24 (2005). According to Gross, the average number of exonerations grew from twelve per year in 1989 to forty-two per year in 2003. *Id.* at 527. Although DNA played a role in most of the exonerations Gross studied, he noted a rise in the number of exonerations that did not depend upon DNA evidence. *Id.*

These case studies and William Harris's case prove that wrongful convictions do occur. It is difficult, however, to determine exactly how many people have been convicted of crimes that they did not commit because neither the federal government nor individual state governments track these numbers.[35] In the absence of more reliable data, many scholars attempt to estimate the number of persons convicted of crimes that they did not commit by focusing on the common causes of wrongful convictions and the frequency of these errors, and then extrapolating estimates on the basis of this data.[36]

A. Causes of Wrongful Convictions

Wrongful convictions are usually the product of a combination of many factors. The most common are eyewitness misidentification,[37] police and prosecutorial misconduct,[38] flawed analysis of forensic evidence,[39] and ineffective defense counsel.[40]

35. Bedau & Radelet, *supra* note 32, at 28 (noting lack of public records of erroneous convictions and hesitancy of criminal justice officials to discuss such statistics); Gross et al., *supra* note 34, at 525 (discussing difficulty of finding innocence-based dismissals in official records and noting lack of national database). Nevertheless, some have placed the number of wrongfully incarcerated citizens in the thousands, if not tens of thousands. Gross et al., *supra* note 34, at 551.

36. *See generally* CONNORS ET AL., *supra* note 3, at 12–21, 34–76 (citing twenty-eight cases in support of government report); Bedau & Radelet, *supra* note 32, at 34–39, 56–64 (comparing 350 cases of capital or potentially capital offenses); Gross et al., *supra* note 34, at 527–53 (profiling 340 exonerations between 1989 and 2003).

37. SCHECK & NEUFELD, *supra* note 21, at 18–19 (2007) (finding seventy-seven percent of wrongful convictions were result of eyewitness misidentification); Bernhard, *supra* note 32, at 81–85 (presenting case of Coakley v. State, 571 N.Y.S.2d 867 (N.Y. Ct. Cl. 1991), *aff'd*, 640 N.Y.S.2d 500 (N.Y. App. Div. 1996)); Gross et al., *supra* note 34, at 529–31 (discussing eyewitness misidentification in rape and robbery cases). In *Coakley*, a combination of genuine misidentification by a traumatized victim and biased police investigation techniques lead to a wrongful conviction. Bernhard, *supra* note 32, at 80. Olga Delgado was raped by a man whose description's most salient details were a dark complexion, an "afro" haircut, and a Jamaican accent. *Id.* at 81–82. The police selected a photo of Mr. Coakley and presented it in a photo array to Ms. Delgado and another witness, who both identified Mr. Coakley as the assailant. *Id.* at 81. Mr. Coakley was arrested two days later and was eventually convicted of rape. *Id.* at 81–82. After the trial, several parts of the identification began to unravel. *Id.* at 82. Ms. Delgado later admitted that the only light in the room came from a television screen, that her face had been covered for much of the attack, and that she had been too scared to look directly at the attacker when she had the opportunity. Bernhard, *supra* note 32, at 82–83. It also came out that the police had pursued no other suspects and failed to present contradictory evidence offered by another witness. *Id.* at 83–84.

38. Innocence Project, Understand the Causes: Government Misconduct, http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Mar. 26, 2009) (offering statistics on government misconduct). In the Innocence Project's first seventy-four cases of exoneration, it found that police misconduct played a role in thirty-seven of the cases, while prosecutorial misconduct was a factor in thirty-three cases. Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 47 (citing postconviction admissions by witnesses that they had been coerced by police); Innocence Project, *supra*. Garrett goes on to describe the police's ability to mold a witness's memory and perception to make it fall in line with the case theory. Garrett, *supra*, at 80–81; *see also* Andrew E. Taslitz, *Eyewitness Identification, Democratic Deliberation, and the Politics of Science*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 271, 273 (2006) (describing sometimes adversarial but often cooperative relationship between police and

Eyewitness misidentification represents the single most common factor contributing to wrongful convictions in the United States.[41] There are few things more compelling in a trial than a witness who points out the accused to the jury as the perpetrator of the crime.[42] Barry Scheck, founder of the Innocence Project at Benjamin N. Cardozo School of Law at Yeshiva University, documented at least one case where five separate eyewitnesses misidentified the defendant.[43] In fact, the criminal cases most likely to result in convictions are those cases where the prosecution is able to offer eyewitness testimony, confessions, or forensic evidence.[44]

Given the dispositive nature of these forms of evidence, it seems logical that police and prosecutors would wish to have this type of evidence when they proceed to trial. Unfortunately, in many cases where witnesses have misidentified suspects, the police or prosecution are a contributing cause of the

prosecutors). Taslitz also suggests that measures taken to prevent wrongful convictions must be aimed at both police and prosecutors. Taslitz, *supra*, at 272–73.

39. *See* SCHECK & NEUFELD, *supra* note 21, at 22–23 (finding sixty-five percent of wrongful convictions were due at least in part to flawed forensic science).

40. Defense counsel must diligently examine and question eyewitness accounts and the procurement of evidence to combat these causes of wrongful conviction. Unfortunately, attorneys are often not up to the task, making ineffective defense counsel another systemic cause of wrongful conviction. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1045–1103 (2006) (discussing deficiencies in training, supervision, evaluation, and resources in state-run defense organizations).

41. Innocence Project, Understand the Causes: Eyewitness Misidentification, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 27, 2009) (stating eyewitness misidentification played role in seventy-five percent of exonerations Innocence Project followed). Eyewitnesses' misidentifications play a role in about half of the cases where a defendant is convicted of a murder that he did not commit. Gross et al., *supra* note 34, at 542. Witness misidentification is not as prevalent in cases where the defendant is accused of murder as compared to other criminal cases. *Id.* Because of the nature of the crime, often there are only two eyewitnesses to a murder: the victim and the perpetrator. *Id.* Absent some hearsay exception, the victim's identification will not be introduced at trial. Accordingly, the same opportunity for misidentification does not exist in murder cases as in other cases. *Id.* In contrast, in a recent study, Samuel Gross found that nearly ninety percent of sexual assault exonerations involved misidentification by at least one witness. *Id.* at 529–30, 542.

42. Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 675 (2002) ("[T]here is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant, and says, 'That's the one!'" (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979) (internal quotation marks omitted)).

43. BARRY SCHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 265 (2000) (charting various causes of wrongful convictions uncovered by authors' case studies). A person's recollection of total strangers, especially those of other races, is far from perfect. Garrett, *supra* note 38, at 80. These difficulties are often compounded by the emotional stress of the crime. Lopez, *supra* note 42, at 675, 680.

44. Julie A. Singer et al., *The Impact of DNA and Other Technology on the Criminal Justice System: Improvements and Complications*, 17 ALB. L.J. SCI. & TECH. 87, 96–98 (2007) (noting that physical evidence, defendant's admission, and eyewitness testimony are three ways in which prosecution can tie suspect to crime).

misidentification because they have employed techniques that make it more likely that the witness will identify the particular suspect.[45]

Additionally, evidence suggests that police coerce confessions from at least some suspects. According to one study, one quarter of all wrongful convictions can be attributed to either a suspect's false confession or an informant's false claim that the suspect confessed to him.[46] The credibility afforded forensic science also creates an incentive for police, prosecutors, and lab technicians to present evidence procured through questionable scientific practices.[47] In the 200 cases of wrongful imprisonment studied by the Innocence Project, sixty-five percent were attributed, at least in part, to "fraudulent, unreliable or limited forensic science."[48]

Clearly, not every wrongful conviction is the result of manufactured or fabricated evidence. Nevertheless, even in those cases where the police and prosecutors do not "doctor" the evidence, it does not necessarily mean that the police and prosecutors are without fault. More than one-third of exoneration cases involve suppression of exculpatory evidence by the police or the prosecution.[49]

Ideally, defense attorneys provide a check against police and prosecution abuses. In reality, however, due to a number of factors, court-appointed attorneys may fail to provide their clients with the most effective counsel possible. According to some statistics, bad lawyering is a contributing factor in almost a quarter of wrongful convictions in which DNA later proves the defendant's innocence.[50] And while *egregious* conduct by attorneys can form the

45. *See* SCHECK ET AL., *supra* note 43, at 265 (finding that allegations of suggestive identification procedures account for one-third of police misconduct claims). One such suggestive technique involves weighting photo arrays. When police have a suspect who they perceive to be the perpetrator, they will repeatedly include the suspect's photograph in lineup arrays presented to witnesses, which eventually makes the face of the suspect seem familiar to the witness. *See, e.g.*, United States v. Dowling, 855 F.2d 114, 117 (3d Cir. 1988) (addressing defendant's claims that second photo array was suggestive where only defendant's photo was repeated). Even if the witness has never physically encountered the suspect, the sense of familiarity in a sea of unknown faces often leads to a false identification. *See* Jake Sussman, *Suspect Choices: Lineup Procedures and the Abdication of Judicial and Prosecutorial Responsibility for Improving the Criminal Justice System*, 27 N.Y.U. REV. L. & SOC. CHANGE 507, 514–15 (2002) (recognizing that pretrial procedures such as weighted photo array can distort witness's memory); Innocence Project, *supra* note 41 (finding multiple photo arrays factor in witness misidentification).

46. SCHECK & NEUFELD, *supra* note 21, at 26–27, 32–33 (finding twenty-five percent of exonerees were convicted, at least in part, by false confessions and fifteen percent of exonerees were convicted, at least in part, by testimony from informants and snitches).

47. *See* Garrett, *supra* note 38, at 95 (discussing increasing trend of police officers falsely claiming that physical evidence matches samples taken from defendants); Lopez, *supra* note 42, at 685 (discussing jurors' perception of forensic science as infallible).

48. SCHECK & NEUFELD, *supra* note 21, at 22–23.

49. Garrett, *supra* note 38, at 70 n.173 (discussing study in which thirty-seven percent of wrongful conviction cases indicated suppression of evidence by prosecutor and thirty-four percent indicated suppression of evidence by police).

50. *Id.* at 75.

basis for a new trial,[51] in most cases, the defense counsel's conduct is not sufficiently egregious to justify a new trial, but is sufficiently poor to cause an innocent person to be convicted.[52] With poor Americans constituting eighty percent of defendants, public defenders are overworked.[53] Chronic underfunding leads to crushing workloads and limited investigatory resources.[54] Public defenders often have little time and limited resources.[55] Unfortunately, this means that they are sometimes unable to devote the time necessary to investigate the prosecution's case and uncover evidence essential to challenging the state's evidence, resulting in errors such as incomplete cross-examination of witnesses and the failure to uncover and investigate weaknesses in the prosecution's argument.[56]

B. Remedies and Compensation

Although wrongful criminal convictions are often the result of many "wrongs," there are few civil remedies available to exonerees to compensate them for the injuries suffered as a result of their conviction and incarceration. Only twenty-five states and the District of Columbia have enacted legislation designed to compensate the wrongly convicted.[57] Compensation amounts vary,

51. *See* Griffin v. Winans, 684 F.2d 686, 690 (10th Cir. 1982) (affirming lower court ruling that trial attorney was intoxicated and therefore ineffective); Lopez, *supra* note 42, at 689 (citing case where defense counsel was personally under investigation and, by his own admission, too stressed to "think straight").

52. *See* Garrett, *supra* note 38, at 75–76 (discussing high rate of ineffective assistance of counsel in wrongful conviction cases and likelihood that cases are still upheld regardless of counsel's poor lawyering). Garrett notes the following regarding egregious attorney conduct, convictions, and the ability of criminal defendants to obtain a new trial:

> Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA. Although criminal defendants have a right to counsel, the Supreme Court has so watered down the standard for ineffectiveness that even death sentences have been upheld in notorious cases where attorneys slept through trial, were drunk, used heroin and cocaine during trial, did not interview witnesses, or were absent for lead prosecution witnesses.

Id. (footnotes omitted).

53. *See* Backus & Marcus, *supra* note 40, at 1034 (describing effect of caseload on public defenders).

54. *See id.* at 1034–36 (citing systemic failures in Georgia, Virginia, Louisiana, Pennsylvania, and North Dakota). Lawyers were known for proceeding to trial without interviewing alibi witnesses and, in some cases, the defendants themselves. *Id.* at 1035.

55. *See id.* (discussing caseload of public defenders). *But see generally* Inga L. Parsons, *"Making It a Federal Case": A Model for Indigent Representation*, 1997 ANN. SURV. AM. L. 837 (finding federal public defenders generally have lighter workloads and more resources than state public defenders, affording them more time to investigate each case).

56. *See* Backus & Marcus, *supra* note 40, at 1036 (discussing Attorney General Janet Reno's conception of proper defense attorney conduct).

57. Innocence Project, Know the Cases: After Exoneration, http://www.innocenceproject.org/know/After-Exoneration.php (last visited Mar. 27, 2009) (noting some states offer some form of compensation, though not necessarily at level advocates would deem sufficient).

as do caps on total compensation available.[58] In states without compensation statutes, exonerees are often provided the same aid, in some cases less, as parolees.[59]

With no general statutory system in place to provide compensation, exonerees must try to obtain personal compensation through legislative or legal means. While personal legislation is technically an option in some states, few exonerees are able to lobby the legislature for a private bill granting them compensation.[60] Some state constitutions forbid the passing of personalized legislation entirely.[61] Even when a personal compensation bill is a legal possibility, the political connections and economic resources needed to sustain a lengthy lobbying process make private legislation implausible for most exonerees.[62]

Further, recent case surveys suggest that more and more exonerees are filing § 1983 suits to recover for the injuries they sustained as a result of their wrongful conviction and incarceration.[63] In 2006, nearly 50,000 federal civil rights actions commenced.[64] Because the Justice Department groups § 1983 cases with all other federal civil rights claims, it is virtually impossible to ascertain the exact number of wrongful conviction § 1983 cases that have been filed. Nevertheless,

58. *Compare* CAL. PENAL CODE § 4904 (West 2000 & Supp. 2008) (calling for compensation of $100 per day of wrongful incarceration), *with* MONT. CODE ANN. § 53-1-214 (2007) (offering only educational aid), *and* N.Y. CT. CL. ACT § 8-b(6) (McKinney 1989 & Supp. 2008) (stating clearly that there is no maximum amount that pardoned or exonerated person may collect). Some states do not place numerical limits on compensation; rather, they invoke legal ideas of actual damages and reasonableness. *See* MD. CODE ANN., STATE FIN. & PROC. § 10-501(a)(1) (LexisNexis 2006) (providing compensation for actual damages to wrongly incarcerated individual); W. VA. CODE ANN. § 14-2-13a(g) (LexisNexis 2004) (allowing courts to "fairly and reasonably" compensate wrongly convicted person).

59. *See* Lopez, *supra* note 42, at 669 (discussing Louisiana policy of giving all released prisoners, including those wrongfully convicted, "ten dollars and a denim jacket"); AFTER INNOCENCE (American Film Foundation 2005) (interviewing exonerees who were not given job training, job placement, or health care coverage that parolees received).

60. *See* Bernhard, *supra* note 32, at 94 (discussing reasons why private legislation is inadequate solution).

61. *Id.*

62. *See id.* (noting need for political connections and favorable political climate for success of private bill).

63. *See* Garrett, *supra* note 38, at 42 (attributing rise in § 1983 cases to new developments in constitutional law and forensic science). The availability of DNA testing since the mid-1990s has transformed evidence originally thought to implicate the defendant under more primitive scientific techniques into scientifically certain exculpatory evidence. *See id.* (discussing increase in DNA exonerations). Large verdicts against municipal officials have been more common with the influx of DNA evidence, thereby enticing defendants to bring suits and push ideas of constitutional protection in the criminal justice system. *See id.* at 43–44 (noting increase in civil suits resulting in multimillion dollar verdicts).

64. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 149 (2008), *available at* http://www.uscourts.gov/judbus2007/JudicialBusinespdfversion.pdf (reporting all cases commenced in U.S. District Courts over past five years). This number consists of both general federal civil rights claims as well as civil rights petitions filed by prisoners. *Id.*

experts in the field estimate that § 1983 claims make up between one-third and one-half of these claims.[65] Thus, even if one were to accept the low end of this estimation and assume that § 1983 cases comprise only thirty-three percent of all federal civil rights claims, this means that in 2006 alone, nearly 17,000 § 1983 claims were filed.[66] Furthermore, although exonerees' "wrongful conviction" claims currently account for only a small percentage of these § 1983 claims, in the absence of other forms of relief, scholars predict a rise in the number of § 1983 "wrongful conviction" cases as DNA evidence exonerates more individuals.[67]

III. SECTION 1983 JURISPRUDENCE: CONSTITUTIONAL WRONGS

As discussed in Part II, there are a number of reasons *why* a person might be convicted of a crime of which he is innocent. From this, one might surmise that there is no shortage of potential defendants against whom an exoneree can bring a federal civil suit. For example, in the case of the teenager discussed in the vignette at the beginning of this piece, William Harris filed a civil suit against, inter alia, the Kanawha County Sheriff's Department; Fred Zain, the blood serologist who testified against him at trial (and an employee of the West Virginia State Police Crime Laboratory); and Deputy John W. Johnson, a sheriff in the Kanawha County Sheriff's Department who testified before Harris's grand jury about the strength of the victim's eyewitness testimony.[68] And while several people often contribute to a single wrongful conviction, to prevail in a § 1983 claim an exoneree must prove that at least one of the named defendants deprived him of a federally protected right.[69] As illustrated in the following pages, this is not always an easy task because of the ongoing nature of many wrongful convictions.

Section 1983 was enacted to give plaintiffs a federal form of relief against a person, acting under the color of state law, who deprives the plaintiff of a protected right.[70] It reads in pertinent part:

> Every person who, under color of [state law] subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[71]

65. Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 533 (1982).

66. *See* DUFF, *supra* note 64, at 149 (reporting that 50,000 federal civil rights claims were filed in 2006); Eisenberg, supra note 65, at 533 (estimating that § 1983 claims account for one-third to one-half of all federal civil rights claims).

67. *See* Garrett, *supra* note 38, at 42 (citing DNA evidence as predominant reason for rise in exonerations).

68. Complaint at 1–3, 5–6, Harris v. Zain, No. 2:95-cv-01121 (S.D.W.Va. Dec. 15, 1995).

69. Carey v. Piphus, 435 U.S. 247, 255 (1978).

70. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982) (noting that providing damages remedy is important to protecting citizens' rights).

71. 42 U.S.C. § 1983 (2006).

To obtain relief, a plaintiff must prove (1) that she has been deprived of a constitutional or federal statutory right and (2) that the person who deprived her of that right was acting under the color of state law.[72] Typically, exonerees seeking a § 1983 remedy for their arrest and conviction allege a deprivation of a Fourth Amendment right, a violation of the Fourteenth Amendment substantive Due Process Clause, or both.[73] As discussed in the previous Part, most erroneous convictions result from a series of actions that begin before the plaintiff is arrested and continue through (and sometimes well past) the criminal trial.[74] This portion of the Article argues that the serial nature of constitutional injuries in wrongful conviction cases often makes it difficult to fit these claims into the Supreme Court's § 1983 rubric.

As the Court explained in *Baker v. McCollan*,[75] § 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes."[76] Accordingly, it is improper for a plaintiff to allege that a defendant "violated § 1983."[77] Section 1983 only provides the remedy—the plaintiff must find his "right" elsewhere.[78] Furthermore, in *Graham v. Connor*,[79] the Court took the requirement that plaintiffs identify the right of which they were deprived one step further. There, the Court held that where a particular Amendment "provides an explicit textual source of constitutional protection against [a particular sort of government behavior], that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[80] In short, a plaintiff must identify the specific right of which he was deprived and should only cast his argument as a Fourteenth Amendment substantive due process violation when the Bill of Rights does not provide protection from the alleged conduct.

Again, most § 1983 claims for wrongful convictions and incarcerations allege that the defendant violated the plaintiff's Fourth Amendment or Fourteenth Amendment substantive due process rights.[81] Nevertheless, it is not

72. Gomez v. Toledo, 446 U.S. 635, 640 (1980). As discussed in Part IV, *infra*, claims for monetary relief require additional showings.

73. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) (stating that plaintiff sought damages for wrongful conviction under First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments); Washington v. Buraker, 322 F. Supp. 2d 702, 707 (W.D. Va. 2004) (alleging cause of action for due process violations under Fourteenth Amendment).

74. See *supra* Part II.A for a discussion of how Harris's case illustrates this exact point. See *supra* notes 6–13 and accompanying text for a discussion of how the "causes" of Harris's conviction and incarceration began before Harris was even arrested, when police questioned the victim using suggestive techniques, and continued well after Harris's incarceration, when the prosecution repeatedly failed to turn over the remaining DNA evidence for additional testing.

75. 443 U.S. 137 (1979).

76. *Baker*, 443 U.S. at 144 n.3.

77. *See id.* (noting that § 1983 provides remedies but does not confer substantive rights).

78. *Id.*

79. 490 U.S. 386 (1989).

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

81. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) (alleging damages for

always easy to determine whether a specific act implicates the Fourth or Fourteenth Amendment.

In *Albright v. Oliver*,[82] the plaintiff, Kevin Albright, was arrested for selling a substance that "looked like" cocaine.[83] Illinois officials' decision to arrest Albright was problematic in several respects. First, the state's primary witness against Albright, Veda Moore, a paid undercover informant, was especially unreliable.[84] The "drugs" she reportedly bought were merely baking powder.[85] Furthermore, the person she identified as the alleged drug dealer, John Albright Jr., a retired pharmacist in his sixties, did not match the description Moore had provided to Officer Oliver.[86] Nevertheless, when Oliver realized that Moore had been mistaken and he had obtained an arrest warrant for the wrong person, rather than obtaining a new warrant, he simply scratched out the name on the warrant and replaced it with the "right" name.[87] Even more problematic, the offense for which Albright was eventually arrested—selling a look-a-like substance—was not even a crime under the applicable state law.[88]

Eventually, "the court dismissed the criminal action . . . on the ground that the charge did not state an offense."[89] Although Albright was never tried and convicted, he was arrested, required to post bond,[90] and presumably incurred

wrongful conviction under First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments); Washington v. Buraker, 322 F. Supp. 2d 702, 707 (W.D. Va. 2004) (alleging cause of action for due process violations under Fourteenth Amendment). There are two categories of Fourth Amendment claims. First, the plaintiff may allege that the seizure was unreasonable because police officers used excessive force during the course of the seizure. *See, e.g.*, *Graham*, 490 U.S. at 392–95 (discussing excessive force claims made under § 1983). Second, exonerees may allege that the seizure was unreasonable because the arresting officers did not have probable cause. *See, e.g.*, Willingham v. Crooke, 412 F.3d 553, 555 (4th Cir. 2005) (alleging arrest without probable cause in § 1983 action). This Article focuses on the causal relationship between a constitutional breach and a wrongful conviction. In cases in which police officers use excessive force during arrest or seizure to coerce a suspect's confession, a Fourth Amendment excessive force claim could result in a wrongful conviction. Nevertheless, the "actual injury" alleged in most excessive force claims are bodily injuries, not the types of damages stemming from a wrongful conviction and incarceration. As such, Fourth Amendment excessive force claims are beyond the scope of this Article.

82. 510 U.S. 266 (1994).

83. *Albright*, 510 U.S. at 268 (plurality opinion).

84. *Id.* at 292–93, 292 n.3 (Stevens, J., dissenting). In 1987, after being released from drug rehabilitation, Officer Oliver and Veda Moore entered into a deal in which Oliver would protect Moore from a cocaine dealer so long as she acted as an undercover informant. *Id.* at 292 n.3. According to the civil record, Moore was to make deals with drug dealers and Officer Oliver "gave Moore money with which to make the purchases and agreed to pay her $50 to $75 for each purchase of a controlled substance that she reported." Brief for the Petitioner at 4, *Albright*, 510 U.S. 266 (No. 92-833). According to the record, none of the fifty drug transactions that Moore claimed to participate in resulted in a conviction. *Id.* at 3–4.

85. *Albright*, 510 U.S. at 268–69 n.1 (plurality opinion).

86. *Id.*

87. Albright v. Oliver, 975 F.2d 343, 344 (7th Cir. 1992). Officer Oliver scratched out one name before procuring a new warrant naming Kevin Albright. *Id.*

88. *Albright*, 510 U.S. at 268 (plurality opinion).

89. *Id.* at 269.

90. *Albright*, 975 F.2d at 344.

legal fees. Approximately two years after the charges against him were dismissed, Albright filed a § 1983 claim alleging that the respondents deprived him of substantive rights secured by the Due Process Clause of the Fourteenth Amendment by initiating a criminal prosecution against him without probable cause or an objectively reasonable belief that probable cause existed.[91] The trial court granted Officer Oliver's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted.[92] Albright appealed and the appellate court affirmed the decision.[93]

On certiorari, the Supreme Court affirmed the circuit court's opinion on different grounds—specifically, that "the Fourth Amendment, and not substantive due process, [was the appropriate amendment] under which petitioner Albright's claim must be judged."[94] Furthermore, in his concurring opinion, Justice Scalia concluded that, in the absence of a criminal sentence, "the only deprivation of life, liberty or property, if any, consisted of petitioner's pretrial arrest" and, as such, the only procedures "due" to Albright were those specified under the Fourth Amendment.[95] In short, the plurality rejected petitioner Albright's § 1983 claim because he presented it as a substantive due process deprivation rather than a Fourth Amendment violation, and initiating and pursuing a criminal prosecution "without probable cause" implicates the Fourth Amendment, not the Fourteenth Amendment Substantive Due Process Clause.[96]

Nevertheless, the Court has held that certain actions that occur in the later phases of the criminal justice process implicate the Substantive Due Process Clause of the Fourteenth Amendment.[97] Most of the acts that courts have analyzed under the Fourteenth Amendment Substantive Due Process Clause occurred within the scope of the trial.[98] For example, in *Miller v. Pate*,[99] the

91. *See id.* at 344–45 (alleging "constitutional tort" of malicious prosecution).

92. *Albright*, 510 U.S. at 269 (plurality opinion).

93. *Id.*

94. *Id.* at 271.

95. *Id.* at 275 (Scalia, J., concurring). The Fourth Amendment states:

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

U.S. CONST. amend. IV.

96. *Albright*, 510 U.S. at 271, 274–75 (plurality opinion).

97. The criminal justice process consists of several different stages. *See* Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674 (1996) (reviewing MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995)) (noting that various stages in criminal process include "arrest, prosecution, trial, and sentencing"); Niki Kuckes, *Civil Due Process, Criminal Due Process*, 25 YALE L. & POL'Y REV. 1, 22–23 (2006) (explaining that early stages of criminal cases include, inter alia, issuance of arrest warrant, arrest, arraignment, and bail hearing).

98. *See, e.g.*, *Albright*, 510 U.S. at 299 & n.15 (Stevens, J., dissenting) (noting that "the Due Process Clause is violated by the knowing use of perjured testimony").

99. 386 U.S. 1 (1967).

prosecution continually referred to a pair of bloody shorts as it described the defendant's brutal murder of a young girl.[100] It was later determined, however, that the prosecution knew the shorts were actually stained with paint.[101] Subsequently, the Court held that a prosecutor who knowingly presents false evidence at trial deprives the criminal defendant of his Fourteenth Amendment substantive due process rights.[102] Similarly, the Fifth Circuit has held that a prosecutor's reference to a criminal defendant's prior conviction during the sentencing phase of the defendant's criminal trial violates the defendant's substantive due process rights.[103]

Combined, the Courts' opinions in *Albright* and *Miller* seem to indicate that the decision to initiate and pursue a criminal prosecution implicates the Fourth Amendment while decisions and acts that occur during trial implicate the Substantive Due Process Clause. Yet, obviously, at least some of the acts that contribute to wrongful convictions, such as unduly suggestive lineups and coerced confessions, occur after the criminal defendant has been arrested but before his trial. Furthermore, most substantive due process violations that occur at trial involve at least some misconduct prior to trial.[104] It remains unclear whether these acts should be analyzed under the Substantive Due Process Clause of the Fourteenth Amendment or the Fourth Amendment.

Following the rationale of *Albright*, this conclusion should depend on the Court's definition of seizure. If the act occurred during the seizure phase of the process, the claim should be treated as a Fourth Amendment question; otherwise, the Due Process Clause governs. The difficulty with this approach, as one might surmise, is how to determine when a seizure begins and ends.[105]

100. *Miller*, 386 U.S. at 3–4.

101. *See id.* at 4–7 (finding prosecutorial conduct created due process violation). The Court noted that even though all parties knew the shorts were stained with paint, not blood, it was the repeated mischaracterization of the shorts by the prosecutor that violated due process under the Fourteenth Amendment. *Id.* at 6–7.

102. *See id.* at 7 ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.").

103. *See* Rogers v. Lynaugh, 848 F.2d 606, 610 (5th Cir. 1988) (reasoning that prosecution's mention of prior convictions unfairly shifted jury's focus away from facts of case and toward impermissible assessment of defendant himself even though, under Texas law, prior convictions may be relevant to sentencing).

104. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) (discussing liability in § 1983 wrongful conviction case in which plaintiff alleged defendants fabricated evidence before his arrest and perjured themselves regarding evidence at trial); Washington v. Buraker, 322 F. Supp. 2d 692, 696–98 (W.D. Va. 2004) (discussing allegation that defendants deprived plaintiff of his constitutional rights when they coerced his confession before arrest and later testified as to reliability of that confession at trial).

105. In many ways, this is an old argument in a new context. For years, courts have debated whether excessive force that occurs after a person is arrested, but before he is arraigned, should be treated as a Fourth or Fourteenth Amendment violation. *See* Tiffany Ritchie, Comment, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Protection Is Afforded a Pretrial Detainee?*, 27 S. ILL. U. L.J. 613, 613 (2003) (referencing circuit split regarding whether excessive force pretrial, but postarrest, is analyzed under Fourth or Fourteenth Amendment). In *Graham v. Connor*, the Court held that where "the excessive force claim arises in the context of an

Justice Ginsburg's concurrence in *Albright* highlights the struggle to parse out at what point one's detention stops being merely an unlawful seizure and becomes a more general deprivation of liberty.[106] Justice Ginsburg traced the history of bailment at common law and concluded that although bailees may leave the custody of the police, they are by no means free of restraint.[107] Ginsburg reasoned that, because criminal defendants awaiting trial outside of a correctional institution are required to appear in court, they remain under the jurisdiction, carry with them the burdens of pending prosecution and accordingly, remain "seized" as defined by the Fourth Amendment.[108]

Rather than wrestling with the definition of seizure, the Seventh Circuit has distinguished Fourth and Fourteenth Amendment malicious prosecution and wrongful conviction claims from one another by focusing on whether "the situation [is one] in which a person is being held pursuant to a judicial determination . . . [or is one] in which he is being held without such a determination."[109] In the former, the Due Process Clause applies, while the Fourth Amendment continues to govern the latter.[110] Moreover, in *Reed v. City of Chicago*,[111] the Seventh Circuit distinguished between "wrongful arrest claim[s]" and "malicious prosecution claim[s]."[112] There, the court concluded that wrongful arrest and detention claims occur when a person is arrested without probable cause and are governed by the Fourth Amendment.[113] In contrast, malicious prosecution claims concern the government's treatment of a

arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment." 490 U.S. 386, 394 (1989). Nevertheless, circuit courts remain split as to how to determine when the arrest or seizure ends. *See, e.g.*, Wilson v. Spain, 209 F.3d 713, 715–16 (8th Cir. 2000) (applying Fourth Amendment between arrest and sentencing); Barrie v. Grand County, 119 F.3d 862, 866 (10th Cir. 1997) (stating that Fourth Amendment bars excessive force during detention but before accused is taken before judicial officer); Riley v. Dorton, 115 F.3d 1159, 1164 (4th Cir. 1997) (applying Fourteenth Amendment after arrest ends); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (finding Fourteenth Amendment governs claims involving pretrial detainees); Pierce v. Multnomah County, 76 F.3d 1032, 1042–43 (9th Cir. 1996) (holding that Fourth Amendment covers treatment of detainee after arrest but before release or judicial action).

106. *See* Albright v. Oliver, 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring) (agreeing that arrest should be analyzed under Fourth Amendment, but discussing possible later abuse).

107. *Id.*

108. *Id.*

109. Villanova v. Abrams, 972 F.2d 792, 797 (7th Cir. 1992). In *Villanova*, the plaintiff was civilly committed against his will and brought a § 1983 action against the state psychiatrist. *Id.* at 794. The plaintiff claimed that his Fourth Amendment rights were violated because the seizure was unreasonable and that his Fourteenth Amendment due process rights were violated when he was held for an unnecessarily long period. *Id.* Eventually, the court concluded that the plaintiff had been deprived of neither his Fourth nor Fourteenth Amendment rights. *Id.* at 795, 798.

110. *Id.* at 797.

111. 77 F.3d 1049 (7th Cir. 1996).

112. *Reed*, 77 F.3d at 1051–52 (discussing circuit's understanding of custody prior to *Albright* and noting that *Albright* "cast considerable doubt" as to which constitutional amendments govern malicious prosecution claims). Reed brought a § 1983 suit when he was acquitted on murder charges after being held for twenty-three months. *Id.* at 1050–52.

113. *Id.* at 1051–53.

suspect between the time of the suspect's probable cause hearing and his acquittal or detention and are governed by the Due Process Clause.[114]

While these approaches may be more nuanced than the Court's approach in *Albright*, they still fail to account for conduct that begins during one phase of the criminal process and spills into subsequent phases, e.g., where, as in the Harris case, a forensic scientist manufactures evidence before a suspect is arrested and then testifies as to the reliability of that evidence at trial.[115] Presumably, under the Seventh Circuit's approach in *Villanova v. Abrams*[116] and *Reed*, the Fourth Amendment would govern conduct that occurred before there was a judicial determination of probable cause, but the scientist's testimony regarding the reliability of the evidence would be adjudged under the Fourteenth Amendment.[117]

As discussed in greater detail in Part IV, this complicates questions of causation because, to prevail in a § 1983 claim for monetary damages, the plaintiff must prove that a constitutional deprivation caused his injury. However, where the court treats continuous actions as separate violations, the defendant can argue that the plaintiff's incarceration was not a result of the evidence fabricated before trial (a Fourth Amendment violation), but was caused by the introduction of the evidence at trial (a due process violation).[118] Accordingly, in the absence of a causal link, the defendant is not liable (at least for monetary damages) for his Fourth Amendment (pretrial) violation.

114. *See id.* at 1052 (recognizing court's belief that Due Process Clause governed between arrest and judicial action). The Seventh Circuit's approach in *Reed*, however, does not seem to account for those cases in which the arrest was made with an arrest warrant. *See id.* at 1050, 1053 (discussing *Reed* in context of warrantless arrest allegedly lacking probable cause).

115. See *supra* notes 8, 18–19 and accompanying text for discussion of misconduct that occurs in one phase but holds over into another.

116. 972 F.2d 792 (7th Cir. 1992).

117. *See Reed*, 77 F.3d at 1051–52 (distinguishing between "wrongful arrest" claims and "malicious prosecution" claims); *Villanova*, 972 F.2d at 797 (stating that Fourth Amendment governs conduct prior to judicial determination of probable cause and due process governs conduct thereafter). Depending on how a court chooses to distinguish between Fourth Amendment and due process violations, a similar problem might emerge when the alleged violation concerns an omission, for example, when the plaintiff alleges that the prosecution has failed to turn over evidence favorable to the defense. *See, e.g.*, Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding suppression of any material evidence favorable to defendant violates due process). Were the court to apply Justice Ginsburg's concurring opinion in *Albright*, then the Fourth Amendment would seem to govern. *See* Albright v. Oliver, 510 U.S. 266, 277–79 (1994) (Ginsburg, J., concurring) (finding seizure continues after custody ends). Nevertheless, regardless of when the supposed omission occurred, courts have consistently treated this as a due process violation. *See, e.g.*, Washington v. Wilmore, 407 F.3d 274, 282–84 (4th Cir. 2005) (finding that plaintiff's due process rights were violated when officer failed to disclose exculpatory information during investigation and at trial); McDowell v. Dixon, 858 F.2d 945, 946–51 (4th Cir. 1988) (holding prisoner's due process rights violated when, based on evidence gathered at crime scene and surviving victim's account of attack, prosecution permitted witnesses to give false testimony at trial); State v. Spurlock, 874 S.W.2d 602, 617 (Tenn. Crim. App. 1993) (noting that providing false testimony, like omitting exculpatory evidence, is violation of Fourteenth Amendment).

118. *See, e.g.*, Castellano v. Fragozo, 352 F.3d 939, 959 (5th Cir. 2003) (noting that plaintiff's arrest and indictment "did not lead inevitably to his trial and wrongful conviction and the damages flowing therefrom").

At least one case has dealt with the problem of causation and multiple constitutional violations by simply focusing on the due process violation—i.e., the conduct occurring at trial. In *Washington v. Wilmore*,[119] the plaintiff, Earl Washington, Jr., sought monetary damages for his conviction and incarceration after DNA proved that he had not committed the crime of which he was convicted.[120] Washington alleged that the investigating officer, Special Agent Wilmore, coerced his confession and falsely testified as to the accuracy of the confession at trial.[121] Given the way in which the plaintiff pled his case, the court might have treated the confession and testimony as two separate events.[122] Instead, the court focused on the conclusion that Wilmore presented fabricated evidence at trial when he testified to the accuracy of Washington's confession.[123] Furthermore, the court used evidence of the coercion to conclude that Wilmore knew the evidence was fabricated.[124] From this, the court concluded that Wilmore had knowingly presented fabricated evidence at trial in violation of the Fourteenth Amendment Substantive Due Process Clause.[125]

This approach, however, is not without its problems. As a general rule, a § 1983 defendant is immune from damages that stem from his role in the judicial process. This includes judges,[126] prosecutors,[127] and witnesses.[128] Thus, police officers who introduce fabricated evidence at trial by testifying to the accuracy of scientific tests, or the reliability of a witness's identification or a suspect's confession, are shielded from liability.[129]

In the end, courts' recent approaches to § 1983's "constitutional deprivation" requirement force exonerees to classify the alleged conduct as a specific constitutional violation. This may comport with the statutory language of § 1983 but it tends to place an exoneree on the horns of a dilemma. If the plaintiff focuses on the defendant's conduct at trial, he is unlikely to recover damages from the defendant because, again, most participants in the judicial process are shielded from monetary liability by some form of judicial immunity.[130] On the other hand, as discussed in the next Part, if the plaintiff

119. 407 F.3d 274 (4th Cir. 2005).

120. *Washington*, 407 F.3d at 277–78.

121. *Id.* at 276–77, 278–79.

122. *See, e.g.*, *Castellano*, 352 F.3d at 959 (discussing how perjury and manufactured evidence denied criminal defendant due process once during his arrest and again at his trial).

123. *Washington*, 407 F.3d at 282.

124. *Id.* at 283.

125. *Id.* at 283–84.

126. *See* Pierson v. Ray, 386 U.S. 547, 553–54 (1967) (emphasizing immunity of judges from liability for misconduct committed in their "judicial jurisdiction").

127. *See* Imbler v. Pachtman, 424 U.S. 409, 410, 422–424 (1976) (holding that "a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution" was not amenable to suit under § 1983).

128. *See* Briscoe v. LaHue, 460 U.S. 325, 326 (1983) (holding that "witnesses are absolutely immune from damages liability" under § 1983, even when witness has perjured himself).

129. *Id.*

130. See *supra* notes 126–28 for a description of different categories of immunity from damages for § 1983 violations.

attempts to classify his claim as a Fourth Amendment violation—i.e., he focuses on the defendant's pretrial conduct—the court may not permit damages incurred after the trial begins, which, clearly, is where most injuries are sustained in wrongful conviction cases.

IV. THE TWO FACES OF CAUSATION

Even if an exoneree is able to navigate through the maze that divides Fourth and Fourteenth Amendment violations and proves that a state official (or a person acting under the color of state law) deprived him of a federally protected right, he is not necessarily entitled to relief under § 1983. In § 1983 claims for monetary damages, the fact-finder must still determine that the defendant caused the plaintiff to be deprived of a constitutional right and that that deprivation, in turn, caused the plaintiff to suffer an actual injury.[131]

The first portion of this Part briefly explains why, under current § 1983 jurisprudence, most § 1983 claims actually consist of more than two elements despite the oft-repeated admonishment that "[b]y the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute."[132] Part IV.A goes on to explain that causation plays two separate roles in § 1983 litigation, which, as explained below, I refer to as "statutory causation" and "damages causation." Part IV.B provides an overview of the form of causation most often discussed in § 1983 litigation—that of statutory causation. As I explain in this section, in most § 1983 litigation, it is almost intuitive that the government official being sued caused the plaintiff to be deprived of a federally protected right. Statutory causation only becomes a point

131. Technically, a § 1983 claim consists of just two elements: (1) that a person acting under the color of state law (2) deprived the plaintiff (or caused the plaintiff to be deprived) of a federally protected right. Gomez v. Toledo, 446 U.S. 635, 640 (1980). Nevertheless, if a plaintiff establishes both of these elements, he is simply entitled to declaratory judgment or nominal monetary damages. See *supra* Part III for a discussion of the requirements of a successful § 1983 claim. Obviously, most § 1983 plaintiffs sue for a specific remedy and, as one might imagine, the majority of § 1983 litigants seek monetary compensation. *See, e.g.*, Heck v. Humphrey, 512 U.S. 477, 479, 480 n.2 (1994) (seeking compensatory and punitive damages for unlawful conviction claim); Albright v. Oliver, 510 U.S. 266, 308 n.26 (1994) (Stevens, J., dissenting) (seeking damages and injunctive relief for malicious prosecution claim); Monell v. Dep't of Soc. Servs., 436 U.S. 658, 661 (1978) (seeking back pay and injunctive relief from defendants for compelling pregnant employees to take unpaid leaves of absence); Carey v. Piphus, 435 U.S. 247, 254 (1978) (noting that compensation is "basic purpose of a § 1983 damages award"); Pierce v. Gilchrist, 359 F.3d 1279, 1281–82 (10th Cir. 2004) (seeking compensatory and punitive damages against forensic chemist who "fabricated inculpatory evidence and disregarded exculpatory evidence"); Singer v. Fulton County Sheriff, 63 F.3d 110, 113–14, 116 (2d Cir. 1995) (seeking damages for malicious prosecution, and sanctions and attorneys' fees for false arrest, malicious prosecution, and conspiracy to violate civil rights); Sanders v. English, 950 F.2d 1152, 1163–64 (5th Cir. 1992) (seeking damages for malicious prosecution claim); Jones v. City of Chicago, 856 F.2d 985, 988 (7th Cir. 1988) (seeking compensatory and punitive damages for malicious prosecution claim); Nieves v. McSweeney, 73 F. Supp. 2d 98, 101 (D. Mass. 1999) (seeking damages for wrongful arrest and malicious prosecution claims), *aff'd*, 241 F.3d 46 (1st Cir. 2001). So while, on its face, § 1983 only requires the plaintiff to prove two elements, with the exception of declaratory judgments, in most § 1983 cases the plaintiff is actually required to prove additional elements.

132. *Gomez*, 446 U.S. at 640.

of contention in the few cases where the plaintiff alleges that a municipality or supervisor *caused* the plaintiff to be deprived of a federally protected right. Part IV.B, which is the focus of this piece, discusses how courts have treated damages causation in § 1983 wrongful conviction claims for monetary damages.

A. The Elements of § 1983 Actions for Monetary Damages

In *Carey v. Piphus*,[133] the Supreme Court held that a plaintiff who alleges a deprivation of a procedural due process constitutional right must prove that the deprivation resulted in an actual injury if he is to receive more than nominal monetary damages.[134] Shortly thereafter, the Court extended *Carey's* holding to all § 1983 cases for monetary damages, regardless of the alleged underlying constitutional deprivation.[135] Thus, to receive monetary damages, all § 1983 plaintiffs must prove that they suffered an actual injury.

Explicitly, the *Carey* line of cases only adds one additional element, namely, that plaintiffs seeking monetary damages pursuant to § 1983 violations prove an actual injury. Implicitly, however, these holdings also insert a causation element into constitutional tort cases for monetary relief. A careful examination of *Carey* reveals that, to recover significant monetary damages under § 1983, a plaintiff must prove (1) an actual injury and (2) that the defendant's constitutional violation *caused* this injury.[136] Thus, a plaintiff seeking monetary damages under § 1983 must prove four elements: (1) that a person acting under the color of state law (2) deprived or caused the plaintiff to be deprived of a constitutional or federally protected statutory right, and (3) this deprivation was the proximate cause (4) of the plaintiff's actual injury.[137]

Most legal scholarship discussing the role of causation in § 1983 litigation focuses on municipal liability and the requirement that the defendant *cause* the plaintiff to be deprived of a federally protected right.[138] Given the basic statutory language of § 1983, this is clearly a necessary element for liability. Because of its statutory origin, I refer to this element as "statutory causation." Nevertheless, I argue that, after *Carey*, causation plays two important roles in § 1983 litigation for monetary damages.[139] In addition to the causation element established in the plain language of the statute, plaintiffs seeking a monetary remedy (beyond

133. 435 U.S. 247 (1978).

134. *Carey*, 435 U.S. at 264–67. Under a narrow interpretation of the Court's holding, a plaintiff must only establish "actual injury" when he alleges that he was deprived of a procedural due process right. *Id.*

135. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 309–10 (1986).

136. *See Carey*, 435 U.S. at 266 (requiring showing that defendant caused actual injury in order to receive more than nominal damages); Lockhart-Bembery v. Town of Wayland Police Dep't, 447 F. Supp. 2d. 11, 15 (D. Mass. 2006) (stating defendant's actions must be proximate cause of actual injury), *rev'd sub nom*. Lockhart-Bembery v. Sauro, 498 F.3d 69 (1st Cir. 2007).

137. *Lockhart-Bembery*, 447 F. Supp. 2d at 15.

138. *See, e.g.*, Barbara Kritchevsky, *"Or Causes to Be Subjected": The Role of Causation in Section 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187 (1988).

139. Which party is responsible for proving or disproving causation is a different, albeit important, question.

nominal damages) must also prove that the alleged constitutional deprivation caused an actual injury.[140] In short, monetary compensation also requires a causal link between the constitutional deprivation and the actual injury. Given its nature, I refer to this form of causation as "damages causation."

B. Statutory Causation: "Subjects or Causes to Be Subjected"

As the statutory language makes plain, causation is an inherent part of the deprivation element of a § 1983 claim—the defendant must "subject[], or cause[] [another] to be subjected" to the deprivation of a federally protected right.[141] In most cases, the plaintiff establishes statutory causation by simply proving that the defendant engaged in conduct that violated the constitution.[142] When a plaintiff proves that the defendant engaged in the conduct and that the conduct violated the constitution, there is no real question whether the statutory causation element has been met. For example, in the Harris case referenced at the beginning of this Article, there is little question that Zain, the forensic scientist who analyzed the blood and semen evidence in the case, *caused* Harris to be deprived of a constitutional right.[143] Rather, the legal debate would likely focus on (1) whether Zain "doctored" the evidence and, if so, (2) whether such conduct amounts to a constitutional violation. Similarly, statutory causation is relatively clear when, through policy or custom, a municipality orders its employees to engage in conduct that violates the Constitution.[144] The most difficult questions of "statutory causation" arise when the plaintiff alleges that a municipality or supervisor did not command or compel another's conduct but,

140. *See Carey*, 435 U.S. at 266–67 (requiring actual injury for monetary damages).

141. 42 U.S.C. § 1983 (2006). In *Monell v. Department of Social Services*, the Court concluded:

> [T]he language of § 1983, read against the background of [the statute's] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor . . . .
>
> . . . .
>
> . . . Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B "caused" A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent.

436 U.S. 658, 691–92 (1978).

142. *See* Kritchevsky, *supra* note 138, at 1211 (providing insight that most § 1983 claims involve violations of facially constitutional policies).

143. *See* Castelle & Loftus, *supra* note 1, at 20 (stating that Zain's falsified evidence and testimony were essential pieces of evidence).

144. *See* Bd. of County Comm'rs v. Brown, 520 U.S. 397, 405 (1997) ("[T]he conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains."); Barbara Kritchevsky, *Making Sense of State of Mind: Determining Responsibility in Section 1983 Municipal Liability Litigation*, 60 GEO. WASH. L. REV. 417, 422 (1992) (stating, when liability is at stake, need to examine whether policies and customs of municipality caused injury).

nevertheless, through inaction, caused the plaintiff to be deprived of a constitutional right.

In *Monell v. Department of Social Services*,[145] the Court held that a municipality would be liable when "official municipal policy of some nature caused a constitutional tort."[146] It is important to understand that these are two separate elements. Section 1983 municipal liability requires a plaintiff to prove that (1) official municipal policy (2) caused the plaintiff to be deprived of a constitutional right.[147]

There are essentially four ways that a plaintiff may establish municipal liability based upon a municipal "policy."[148] A municipality is clearly liable when it promulgates a policy that compels its officials to violate the Constitution.[149] A municipality may also be liable when an employee commits an unconstitutional act pursuant to a longstanding practice or custom—i.e., when the act is compelled by an unofficial municipal policy.[150] Similarly, municipal liability is triggered when a plaintiff establishes that the constitutional tort was committed, compelled, or ratified by an official with final policymaking authority.[151] Finally, the court has held that a municipality may be liable for a facially constitutional policy custom or practice when the policy or custom evidences a deliberate indifference to the constitutional rights of its residents.[152] The deliberate indifference standard requires the plaintiff to prove a strong causal connection between the policy, or lack thereof, and the constitutional deprivation. To demonstrate that the municipality's *omission* (i.e., failure to train or failure to

145. 436 U.S. 658 (1978).

146. *Monell*, 436 U.S. at 691.

147. *Id.*

148. I use the term "policy" loosely. As the court explained in *City of Canton v. Harris*, "[i]t may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees." 489 U.S. 378, 390 (1989). Nevertheless, "where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality," it may be considered a "policy" for § 1983 municipal liability purposes. *Id.* at 389.

149. *Monell*, 436 U.S. at 694–95. Although it is clear that a municipality is liable for constitutional deprivations resulting from unconstitutional policies, it is far less clear *what* evidence a plaintiff must offer to establish the presence of a policy. *See, e.g.*, Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (addressing whether decision by municipal policymakers on single occasion amounts to policy capable of triggering § 1983 municipal liability).

150. *Monell*, 436 U.S. at 690–91 (holding that municipality "may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels").

151. *See* City of St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (observing that only decisions made by those officials who have final policymaking authority may be attributed to municipality, thereby rendering municipality liable for "its" conduct); *Pembaur*, 475 U.S. at 480–81 (emphasizing that officials whose actions constitute official policy may subject municipality to liability under § 1983); City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–63 (1981) (illustrating that if decision to adopt particular course of action is properly made by that government's authorized decision makers, it surely represents act of official government "policy" as that term is commonly understood).

152. *See City of Canton*, 489 U.S. at 388 ("[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.").

screen employees) amounts to a municipal policy, the plaintiff must demonstrate that the municipality's failure to act evidences a "deliberate indifference to the rights of persons with whom the [governmental officials] come into contact."[153] In other words (and somewhat counterintuitively), "no policy" can equal a policy when the failure to adopt a new or different policy reflects a deliberate indifference to the rights of citizens and inhabitants. Arguably, when a plaintiff successfully proves that "no policy" equals "policy," "statutory causation" may be assumed because the deliberate indifference standard incorporates the proximate cause test.[154]

Most circuit courts also have recognized supervisor liability in § 1983 actions.[155] As noted in the previous section, a defendant who "subjects or causes to be subjected" another to the deprivation of his constitutional rights is liable. As worded, § 1983 does not expressly require personal participation as a predicate for § 1983 liability. The Seventh Circuit has reasoned that "[a] causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."[156] The causation inquiry must be individualized and examine the duties and responsibilities of each individual defendant whose acts or omissions are alleged to have caused a constitutional deprivation.[157]

153. *Id.*

154. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 409 (1997). In *Board of County Commissioners*, the Court explained the relationship between the deliberate indifference standard and causation as follows:

> The likelihood that the situation will recur and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights could justify a finding that policymakers' decision not to train the officer reflected "deliberate indifference" to the obvious consequence of the policymakers' choice—namely, a violation of a specific constitutional or statutory right. The high degree of predictability may also support an inference of causation—that the municipality's indifference led directly to the very consequence that was so predictable.

Id. at 409–10; *see also* Kritchevsky, *supra* note 138, at 1226 (noting courts applying "fault model" "are able to avoid conducting a causation analysis in each case because they have required the plaintiffs to prove municipal toleration or encouragement of unconstitutional conduct in order to establish existence of a policy or custom").

155. *See, e.g.*, Belcher v. City of Foley, 30 F.3d 1390, 1396–97 (11th Cir. 1994) (noting chief of police can be held individually liable if his actions caused constitutional deprivation); Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987) (holding that supervisory official can be held liable if official was personally involved in constitutional deprivation and there was "sufficient causal connection" between official's conduct and deprivation). The Second Circuit has stated that "supervisor liability in a § 1983 action depends on a showing of some personal responsibility, and cannot rest on *respondeat superior*." Hernandez v. Keane, 341 F.3d 137, 144 (2d Cir. 2003). The Eleventh Circuit has also recognized that "[i]t is axiomatic, in section 1983 actions, that liability must be based on something more than a theory of respondeat superior." H.C. *ex rel* Hewett v. Jarrard, 786 F.2d 1080, 1086 (11th Cir. 1986) (citing *Monell*, 436 U.S. at 691); *see also* Polk County v. Dodson, 454 U.S. 312, 325–26 (1981) (indicating official policy must be driving force behind constitutional violation for governmental body to incur liability). *But see* Johnson v. Duffy, 588 F.2d 740, 744 (9th Cir. 1978) (stating public official may incur vicarious liability under § 1983 if state law imposes liability for acts of subordinates).

156. Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983) (citing Rizzo v. Goode, 423 U.S. 362, 371 (1976)).

157. *Wolf-Lillie*, 699 F.2d at 869; Sims v. Adams, 537 F.2d 829, 831 (5th Cir. 1976) (requiring

Circuit courts, with mild variations, recognize that the causal connection can be established by direct personal participation in the deprivation or by other culpable behavior, such as setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.[158]

C. "Damages Causation": Causation as a Link Between the Defendant's Constitutional Breach and the Plaintiff's Actual Injury

With the exception of cases in which the defendant is a supervisor or municipality, statutory causation generally can be assumed so long as the plaintiff proves that the defendant engaged, or through policy or custom ordered another to engage, in conduct that violated the Constitution.[159] As examined below, damages causation, however, may not be so easily assumed. This is particularly true in wrongful conviction claims.

Legal scholars discussing *Carey* typically focus on the "actual injury" aspect of the decision;[160] yet, I argue *Carey's* holding also has important implications regarding the role of damages causation in § 1983 cases. In *Carey*, several school students sued their school board, alleging the board suspended them from school without due process, in violation of their Fourteenth Amendment rights.[161] At trial, the district court concluded that the students had, in fact, been deprived of their due process rights.[162] However, the court held that the plaintiffs were only entitled to nominal damages because they had failed to prove they suffered actual injuries as a result of the deprivations.[163] On appeal, the circuit court reversed and held "even if the District Court found on remand that respondents' suspensions were justified, they would be entitled to recover substantial 'nonpunitive' damages simply because they had been denied procedural due process."[164] The Supreme Court granted certiorari to determine "whether, in an action under § 1983 for the deprivation of procedural due process, a plaintiff must prove that he actually was injured by the deprivation before he may recover substantial 'nonpunitive' damages."[165]

causal connection between supervisory defendant's actions and constitutional violation in order to hold supervisor individually liable).

158. *See* Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (noting link to chain of command alone is insufficient to implicate supervisor in § 1983 claim); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (describing different ways to establish supervisor's personal involvement); McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977) (refusing to impose liability on supervisor in absence of evidence that he participated directly in hearings that were root cause of plaintiff's constitutional deprivation).

159. *See* Kritchevsky, *supra* note 138, at 1196–1202 (discussing municipal liability and causation).

160. *See, e.g.*, Note, *Damage Awards for Constitutional Torts: A Reconsideration After* Carey v. Piphus, 93 HARV. L. REV. 966, 972 (1980) (analyzing role of actual injury requirement).

161. Carey v. Piphus, 435 U.S. 247, 248 (1978).

162. *Id.* at 251.

163. *Id.* at 251–52.

164. *Id.* at 252.

165. *Id.* at 253.

Quoting from Law of Torts, the Court noted, "[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty."[166] From this, the Court concluded that § 1983 damages awards should be based upon compensation and "substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."[167] Furthermore, the Court stated the following regarding the relationship between the damages award and the constitutional deprivation:

> In order to further the purpose of § 1983, the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question—just as the common-law rules of damages themselves were defined by the interests protected in the various branches of tort law.[168]

In other words, there must be a causal connection between the injuries sustained and the constitutional deprivation—what I refer to as damages causation. This causal connection mirrors common law tort principles of causation and, accordingly, requires proof of both legal and factual causation.[169]

The damages causation requirement set forth in *Carey*, as well as the importation of tort common law causation principles, has important implications in § 1983 cases, particularly those cases in which the plaintiff claims he was convicted and incarcerated as a result of a pretrial constitutional breach. Courts have used both factual causation and legal causation as a way to limit defendants' liability in § 1983 wrongful conviction cases.

1. Factual Causation

As the name implies, factual causation, or cause in fact, is the evidentiary link between the defendant's breach and the plaintiff's injury.[170] "The most widely accepted test for making that inquiry is the but-for test. The but-for test asks whether the injury in suit would have occurred if the defendant had not engaged in the wrongful conduct at issue."[171]

166. *Carey*, 435 U.S. at 254–55.

167. *Id.* at 266.

168. *Id.* at 258–59.

169. *Id.* at 254–59.

170. *See* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1759–60 (1985) (describing difference between evaluating defendant's conduct in its entirety versus evaluating tortious aspect of defendant's conduct). Although some legal scholars have argued that courts should consider the defendant's overall conduct when making the cause-in-fact inquiry, "the courts follow the tortious-aspect approach" and, accordingly, "focus the causal inquiry on the tortious aspect of the defendant's conduct." *Id.*

171. David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1768 (1997) (footnote omitted). Robertson explains that the but-for test is a five-step process:

> (a) identify the injuries in suit; (b) identify the wrongful conduct; (c) mentally correct the wrongful conduct to the extent necessary to make it lawful, leaving everything else the same; (d) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (e) answer the question.

The but-for test is a fair indication of factual causation in many cases. Yet, as one might intuit, the but-for test presents both practical and conceptual difficulties in some cases because it requires the fact-finder to hypothesize whether the plaintiff would have been harmed absent the defendant's conduct.[172] Several problems may arise in this "imagine if" analysis, most of which are variations on the classic problem of multiple actors.[173]

As indicated in Part II, when a person is convicted of and incarcerated for a crime of which he was innocent, it is often the result of a culmination of factors. Accordingly, in the hypothetical world of "but-for" causation, it may not be clear that, absent the defendant's constitutional violation, the plaintiff would not have been convicted.[174] A careful study of the Harris case (discussed at the beginning of this Article) demonstrates that Harris's conviction was the result of many factors:

> Four primary components led to the wrongful conviction of William Harris . . . . First, the victim appears to have been repeatedly exposed to suggestive interviewing techniques . . . . Second, whether intentionally or not, the police or the prosecutors appear to have withheld from the defense, and from the jury, crucial information that was favorable to the defense and necessary to ensure fairness at trial. Third, erroneous or exaggerated forensic science was communicated to the jury in a manner that gave a false aura of scientific expertise to the prosecution's case. Finally, the false scientific testimony and the erroneous eyewitness identification appear to have affected one another, resulting in cross-contamination and a false reinforcement that enhanced the errors and blinded police, prosecutors, judges, and jurors to the true weaknesses in the prosecution's case.[175]

Id. at 1771.

172. *See id.* at 1768 ("In a rigorous philosophical sense we can never know the answer to the but-for question, because it asks about a state of affairs that never existed . . . .").

173. First, the plaintiff might clearly have been injured as the result of a breach but is unable to establish which of several defendants breached a duty owed to the plaintiff. *See, e.g.*, Ybarra v. Spangard, 208 P.2d 445, 445–47 (Cal. Ct. App. 1949) (applying doctrine of res ipsa loquitor where plaintiff suffered injury during surgical procedure and was unable to identify which particular defendant caused injury). Additionally, a plaintiff may be able to prove that several actors breached a duty, but may not be able to prove which actor caused his particular injury. *See, e.g.*, Sindell v. Abbott Labs., 607 P.2d 924, 936–37 (Cal. 1980) (applying market share theory of liability where multiple manufacturers produced product that resulted in birth defects when ingested by pregnant women). In some cases, the plaintiff will be able to prove that both actors committed a breach but, alone, each breach would have resulted in the plaintiff's injury; consequently, neither defendant is the "but-for" cause of the plaintiff's injury. *See, e.g.*, Anderson v. Minneapolis, St. Paul & Sault St. Marie Ry. Co., 179 N.W. 45, 46, 49 (Minn. 1920) (applying "material or substantial" factor test where multiple fires, only one started by defendant, combined to burn plaintiff's property). Finally, the plaintiff may be able to prove that multiple defendants committed multiple breaches of duty and that he suffered multiple injuries, but unable to prove which defendant caused which particular injury. *See, e.g.*, Campione v. Soden, 695 A.2d 1364, 1374–75 (N.J. 1997) (discussing apportionment of liability in "double impact" cases).

174. Castelle & Loftus, *supra* note 1, at 18–19.

175. *Id.* at 23–24.

Even assuming the forensic scientist deprived Harris of his Fourteenth Amendment due process rights when he "doctored" the forensic evidence pretrial,[176] it will be difficult for Harris to prove that "but for" the forensic evidence, he would not have been convicted and incarcerated—a fact-finder could conclude that the testimony of the eyewitnesses provided enough evidence for a jury to convict Harris.[177]

For example, in *Castellano v. Fragozo*[178] the plaintiff was convicted and incarcerated.[179] Shortly after his third habeas petition was granted and the charges against him were dismissed, Castellano filed a § 1983 suit against, inter alia, a police officer who testified against him at trial and fabricated evidence at pretrial that was introduced during his criminal trial.[180] The plaintiff claimed that "defendants were guilty of malicious prosecution and had denied him rights secured by the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments."[181]

Although all of the plaintiff's constitutional arguments but his Fourth Amendment claim were dismissed before trial, a jury found that two of the defendants were liable for "malicious prosecution" and awarded Castellano $3 million in compensatory damages for his conviction and injuries stemming from that conviction and $500,000 in punitive damages against the two defendants.[182] The defendants appealed the verdict, arguing that "the judgment against them rest[ed] on an impermissible blend of state tort and constitutional rights and that Castellano at best ha[d] only a Fourth Amendment claim."[183] In response, plaintiff "urge[d] that all damages flow from the initial wrongful arrest and seizure in violation of the Fourth Amendment."[184]

176. See *supra* Part III for a discussion regarding how the forensic examiner will likely have absolute immunity for the testimony he offered at trial and will therefore only be liable for unconstitutional acts occurring outside of the courtroom.

177. The preponderance of evidence standard applicable in civil cases is clearly less onerous than the harmless error standard applied in criminal appeals. *See* Garrett, *supra* note 38, at 90–91 (noting difficulty in satisfying harmless error standard). Nevertheless, to establish the necessary factual link between the unconstitutional conduct and the plaintiff's incarceration, a jury must conclude that, absent the erroneous forensic evidence, it is more likely than not that the plaintiff would not have been convicted and incarcerated.

178. 352 F.3d 939 (5th Cir. 2003).

179. *Castellano*, 352 F.3d at 943. The defendants, a police officer with the City of San Antonio and his girlfriend, Castellano's former employee, fabricated evidence and falsely testified in Castellano's criminal trial for arson. *Id.* The state court hearing the plaintiff's habeas petition concluded that the defendants "collaborated together and without their testimony and the altered tapes, there [was] insufficient evidence to sustain a finding of guilt in this case." *Ex parte* Castellano, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993).

180. *Castellano*, 352 F.3d at 942–44.

181. *Id.* at 944.

182. *Id.*

183. *Id.*

184. *Id.* Plaintiff's First, Fifth, Sixth, and Eighth Amendment claims were all dismissed relatively early in the case. *Castellano*, 352 F.3d at 944. Additionally, the magistrate judge assigned the task of resolving the parties' pretrial motions held that the plaintiff could only pursue his "malicious

On appeal, the Fifth Circuit held that the magistrate judge misinterpreted *Albright* when he concluded that the plaintiff's claims only implicated the Fourth Amendment.[185] The circuit court reasoned that the Fourth Amendment "casts its protection solely over the pretrial events of a prosecution" and that "[t]he manufacturing of evidence and the state's use of that evidence along with perjured testimony to obtain Castellano's wrongful conviction indisputably denied him rights secured by the Due Process Clause."[186] Thus, on remand, the plaintiff could pursue both his Fourth and Fourteenth Amendment claims.

Nevertheless, the court noted that causation could prove an impossible hurdle to compensatory damages even if the plaintiff proved the defendants deprived him of his Fourth Amendment rights.[187] More specifically, the court held that the defendant's pretrial actions—the conduct which deprived plaintiff of his Fourth Amendment rights—did not necessarily cause plaintiff's subsequent conviction and incarceration.[188] The court offered the following reasoning for its conclusion:

> [T]he prosecution of this case relied on the continued cooperation of [the defendants] at each of its subsequent phases. . . .
>
> . . . Without the perjury at trial there would have been no conviction, yet the perjury at trial did not violate the Fourth Amendment. That is, unless these events at trial are somehow found to be a violation of Castellano's Fourth Amendment rights, there is no constitutional footing for a claim seeking recovery for damages arising from the trial and wrongful conviction, as opposed to his arrest and pretrial detention, given the dismissal of all but Fourth Amendment claims.[189]

In short, the defendant's pretrial actions did not necessarily cause the plaintiff's conviction—the plaintiff would not have been convicted if the defendants had not perjured themselves at trial.

Although the court did not approach it as such, but-for causation may be viewed as a five-step analysis. Professor Robertson explains these five steps as follows:

> (a) identify the injuries in suit; (b) identify the wrongful conduct; (c) mentally correct the wrongful conduct to the extent necessary to make it lawful, leaving everything else the same; (d) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (e) answer the question."[190]

Applying these five steps to the facts of *Castellano*, it would seem that the defendants' Fourth Amendment violation is the cause in fact of plaintiff's subsequent conviction and sentence. Castellano was convicted and sentenced for

prosecution" claim under the Fourth Amendment, not the Fourteenth. Accordingly, only the plaintiff's Fourth Amendment claim went to the jury. *Id.*

185. *Id.* at 955.

186. *Id.* at 955, 959.

187. *Id.* at 959.

188. *Castellano*, 352 F.3d at 959.

189. *Id.*

190. Robertson, *supra* note 171, at 1771.

committing arson.[191] The defendants fabricated evidence to make it appear that Castellano confessed to the crime and perjured themselves when they signed affidavits.[192] Based upon this information, a judge issued a warrant and Castellano was arrested and indicted.[193] In the absence of probable cause (as would seem to be the case here), arresting the plaintiff was unreasonable and in violation of his Fourth Amendment rights.[194] Had the defendants not fabricated evidence and perjured themselves, the plaintiff would not have been arrested and, consequently, would not have been convicted and sentenced for arson. In short, the defendants' prearrest actions began a chain of events that ended with the plaintiff being sentenced to five years probation.[195] If the defendants did not fabricate evidence and perjure themselves to obtain the arrest warrant, Castellano would never have been sentenced.[196] Therefore, despite the court's conclusion to the contrary, it would seem that the but-for test establishes the requisite cause-in-fact connection between the defendant's Fourth Amendment violation and the plaintiff's injuries.[197]

In contrast, applying the but-for test to the William Harris example would not necessarily lead to the conclusion that a particular defendant was the factual cause of Harris's conviction and incarceration, even though it is relatively clear that each defendant at least *contributed* to the harm.[198] As explained in the preceding paragraphs, Harris's conviction was the result of at least four factors, including witness misidentification, suggestive interviewing techniques, and faulty forensic evidence. Stated slightly differently, the harm may have occurred even in the absence of one constitutional violation (e.g., the presentation of fabricated evidence at trial), thereby negating but-for causation. Nevertheless, it is relatively clear the defendant's actions either enhanced the plaintiff's injury or increased the likelihood that such injury would occur.[199]

191. *Castellano*, 352 F.3d at 943.

192. *Id.*

193. *Id.*

194. *See* Albright v. Oliver, 510 U.S. 266, 274 (1994) (noting that arrest without probable cause violates Fourth Amendment).

195. *Castellano*, 352 F.3d at 943.

196. *See id.* (stating investigation leading to Castellano was based on defendant's testimony and tape recording).

197. *Id.* at 959 (noting that plaintiff's conviction did not necessarily flow from his arrest and indictment). "The plaintiff has the burden of proving the causal link [between defendant's wrongful conduct and plaintiff's injuries] by a preponderance of the evidence. This means the evidence should convince the trier of fact that more probably than not defendant's conduct was a [cause in fact of] plaintiff's harm." Robertson, *supra* note 171, at 1773–74 (alteration in original) (quoting Joe W. Sanders, *The Anatomy of Proof in Civil Actions*, 28 LA. L. REV. 297, 306 (1968)). "The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 269–70 (5th ed. 1984). "If as a matter of ordinary experience a particular act or omission might be expected, under the circumstances, to produce a particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists." *Id.* at 270.

198. See *supra* notes 1–20 and accompanying text for a discussion of the facts of the Harris case.

199. Cases such as this are sometimes referred to as overdetermined causation cases. *See, e.g.*,

In such situations, a "substantial factor" test may resolve the problem of establishing causation when there are multiple causes contributing to the plaintiff's injury. The "substantial factor" test stands for "[t]he principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries."[200] Nevertheless, it is not at all clear that this test is permissible under current § 1983 jurisprudence. In *Mt. Healthy City School District Board of Education v. Doyle*,[201] the Court held that a § 1983 plaintiff who alleges that the defendant's decision not to rehire him deprived him of his First Amendment rights must prove that his conduct was protected under the First Amendment and "that this conduct was a 'substantial factor' . . . or . . . a 'motivating factor' in the Board's decision not to rehire him."[202] The burden then shifts to the defendant to show "that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."[203]

As I discuss in Part IV of this Article, to obtain substantial monetary damages, the court must find, inter alia, that the plaintiff was deprived of a constitutional right and that the constitutional deprivation caused the plaintiff to suffer an actual injury (i.e., there is a causal link between the plaintiff's deprivation and the plaintiff's injury). In *Mt. Healthy*, the court failed to make it clear whether the substantial factor burden-shifting rule goes to the question of remedy or liability.[204] However, approximately twenty years later, in *Texas v. Lesage*,[205] the court explicitly relied on *Mt. Healthy's* "well-established framework" when determining whether the University of Texas's race-conscious admissions policy deprived plaintiff of his Fourteenth Amendment right to equal protection.[206] And while this does not necessarily mean that the substantial factor test may not be used to determine causation, it does suggest the Court only intended it to be used to determine whether the defendant had even violated the Constitution.[207] Stated slightly differently, the purpose of applying the substantial factor test in *Mt. Healthy* was not to determine whether the constitutional deprivation was the factual cause of the plaintiff's injury. Rather, *Lesage* indicates that it was used to determine whether there was even a

Wright, *supra* note 170, at 1775 (defining overdetermined causation cases as those "cases in which a factor other than the specified act would have been sufficient to produce the injury in the absence of the specified act, but its effects either (1) were preempted by the more immediately operative effects of the specified act or (2) combined with or duplicated those of the specified act to jointly produce the injury").

200. BLACK'S LAW DICTIONARY 1470 (8th ed. 2004).

201. 429 U.S. 274 (1977).

202. *Mt. Healthy*, 429 U.S. at 287 (footnote omitted).

203. *Id.*

204. *See* Sheldon Nahmod, Mt. Healthy *and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 607 (2000) ("Before *Lesage* the argument that *Mt. Healthy*'s burden-shift should go to remedy and not to liability derived considerable support from *Carey*, which the Court decided one year after Mt. Healthy.").

205. 528 U.S. 18 (1999) (per curiam).

206. *Lesage*, 528 U.S. at 20.

207. *Id.*; *see also* Nahmod, *supra* note 204, at 609 (arguing that *Texas v. Lesage* clearly indicates that *Mt. Healthy*'s substantial factor burden-shifting rules address question of liability).

constitutional violation.[208] Accordingly, it is far from clear that courts may rely on this test as a means by which to establish factual causation when the traditional but-for test fails.

Furthermore, the substantial factor test may be inapplicable in this context if courts adopt a narrow interpretation of the test. Under some interpretations, this test is only applicable when there are multiple acts but each act, alone, could have resulted in the injury.[209] This interpretation, however, does not account for situations in which no single cause would have resulted in the plaintiff's injury but the causes, when combined, form the "perfect storm" necessary to bring about the plaintiff's injury.[210] For example, on its own, the victim's testimony misidentifying Harris as her attacker may have been insufficient for a jury to find Harris guilty. However, when this testimony is combined with forensic evidence that exaggerates the likelihood that the criminal defendant is guilty and police testimony that overstates the certainty with which the victim identified the criminal defendant, the jury has sufficient evidence to find the defendant guilty. "In this situation, no candidate is a but-for cause, and none is a sufficient cause."[211]

2. Legal Causation

a. Legal Causation in the Common Law of Torts

As previously noted, courts have imported both elements of causation—factual causation and legal causation—into § 1983 litigation. Accordingly, even if a court concludes that the defendant is a factual cause of the plaintiff's injury, the defendant will not be liable if the court determines that he was not the legal cause of the plaintiff's injury.[212] Nevertheless, there are marked differences between legal causation in the common law of torts and legal causation in § 1983 damages analysis.

Because there is no clear definition of legal causation,[213] it perhaps is best described by what it does rather than what it is. Legal causation is a policy decision to limit liability even where the defendant is determined to be the

208. Nahmod, *supra* note 204, at 618–19.

209. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 (Proposed Final Draft No. 1, 2005) ("If multiple acts exist, each of which alone would have been a factual cause . . . of the physical harm . . . each act is regarded as a factual cause of the harm.").

210. Because wrongful convictions are often the result of many factors, this situation often arises in this context. *See* Castelle & Loftus, *supra* note 1, at 23–31 (describing various factors that may bring about wrongful convictions).

211. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 27 cmt. i.

212. *See, e.g.*, Olsen v. Correiro, 189 F.3d 52, 66–67, 70 (1st Cir. 1999) (noting that causation in § 1983 analysis consists of two separate inquiries, factual causation and legal causation).

213. *See* KEETON ET AL., *supra* note 197, § 43, at 300 (describing proximate cause as "something that is difficult, if not impossible, to put into words"); Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471 (1950) (noting proximate cause has "chameleon quality" and can be substituted for other negligence elements).

factual cause of the plaintiff's injury.[214] Of course, this raises the question as to the basis of that limitation.

Legal scholars have advocated a number of different tests to determine whether a defendant is the "legal cause" of the plaintiff's injury.[215] Although the "substantial factor" test is often understood as a test for factual causation, the Restatement (Second) of Torts also uses the substantial factor test to determine whether a particular act is the legal or proximate cause of the plaintiff's injury.[216] The Second Restatement explains the test in this context as follows:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent. . . . The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility . . . .[217]

Other tests for legal causation include the test of foreseeability, which resolves questions of proximate cause "by asking whether any ordinarily prudent man would have foreseen that damage would probably result from his act"[218] and the "average sense of justice" test, which balances "competing individual and social interests."[219]

b. Legal Causation in § 1983 Jurisprudence

The Supreme Court has stated on several occasions that "§ 1983 'should be read against the background of tort liability that makes a man responsible for the

214. KEETON ET AL., *supra* note 197, § 41, at 264 (defining proximate cause as "merely the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct").

215. David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1682–83 (2007). Owen makes the following observations regarding attempts to determine proximate or legal causation:

> [L]awyers, courts, and juries invariably seek guidance in unraveling the mysteries of [proximate causation], which has led to an eternal search for a proper "test" for deciding whether a plaintiff's injury in any particular case was a proximate result of the defendant's wrong. Over the years, courts have applied a number of tests that still sometimes inform judicial decisions, at least to some extent. A prominent early test turned on whether a harmful result was a "direct consequence" of the defendant's negligence. Under this test, a cause is proximate which, in natural and continuous sequence, unbroken by any efficient, intervening cause, produces the plaintiff's harm.
>
> Today, the concept of "foreseeability," in one formulation or another, is the cornerstone of proximate cause.

Id. (footnote omitted).

216. RESTATEMENT (SECOND) OF TORTS § 431 (1965).

217. *Id.* at cmt. a.

218. 8 W. S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (1926).

219. Henry W. Edgerton, *Legal Cause* (pt. 2), 72 U. PA. L. REV. 343, 343, 373 (1924).

natural consequences of his actions.'"[220] Nevertheless, many federal courts have adopted a far more stringent approach to legal causation in § 1983 litigation than that applied in most common law tort cases. The remainder of this section discusses how courts have approached the question of proximate cause in § 1983 wrongful conviction cases. The first approach discussed mirrors one approach applied in common law tort cases—the defendant is deemed to be the proximate cause of the plaintiff's injuries if his constitutional breach is a "substantial factor" in bringing about the injury (herein referred to as the "tort-based approach").[221] The second approach requires that the plaintiff's harm be related to the risk the constitutional amendment was intended to protect.[222] In other words, under this second approach, the question is not whether the defendant should have foreseen that his conduct would result in the plaintiff's injury; rather, the question is whether the constitutional provision the defendant violated was intended to protect the plaintiff from the injury suffered.[223] Given its relation to the alleged constitutional violation, I refer to this approach as the "constitutional approach" to legal causation. The section goes on to demonstrate that the approach a court adopts to determine whether the defendant's constitutional violation is the legal cause of the plaintiff's injury can determine the outcome of a wrongful conviction claim. This section concludes with a discussion of the policy justifications for each approach.

Earl Washington, Jr. is one of a handful of § 1983 plaintiffs to receive significant monetary damages for injuries suffered as a result of his postconviction incarceration when a large portion of the defendant's unconstitutional conduct occurred pretrial.[224] In *Washington*, the court made the following observations regarding the defendant's pretrial conduct (before trial, Officer Wilmore drafted a police report falsely claiming that Washington had voluntarily provided officers with nonpublic knowledge of the crime):

> [A]lthough it does not appear that the police report influenced the decision to bring charges, it is unquestionable that Washington's apparent nonpublic knowledge influenced the way in which [the

220. Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

221. See *infra* text following note 234 for a discussion of the tort-based approach.

222. See *infra* text following note 232 for a discussion of an approach based on the violation of a constitutional amendment.

223. See *infra* text following note 232 for a discussion of the reasoning behind a constitution-based approach.

224. *See* Alan Cooper, *Federal Jury in Charlottesville Awards Man $2.25M for Fabricated Confession*, VA. LAW. WKLY., May 15, 2006. In May of 1983 Earl Washington, Jr. confessed to the rape and murder of a woman in Culpeper, Virginia that had occurred one year prior. Washington v. Buraker, 322 F. Supp. 2d 702, 706 (W.D. Va. 2004). He was subsequently tried, convicted, and sentenced to death. *Id.* at 707. Approximately ten years later, DNA evidence proved that Washington could not have committed the crime of which he was convicted. *Id.* According to recent accounts, Washington, who is mildly mentally retarded, only confessed to the crime after a series of leading questions in which interrogating officers disclosed information to Washington that was not available to the public. *Id.* at 709. The police report detailing Washington's confession, however, indicated that Washington voluntarily divulged nonpublic information about the murder. *Id.* at 709–10.

> district attorney] prosecuted the case. [His] arguments to the jury placed great emphasis on Washington's knowledge of the details of the crime scene. . . .
>
> . . . .
>
> There is also sufficient evidence for a jury to find that the fabrication of evidence influenced not just the conduct of the prosecution, but the jury's decision. The main evidence presented at Washington's trial linking him to the crime was his confession and the shirt found at the scene. [The district attorney's] emphatic arguments to the jury and the misleading nature of the confession itself make Washington appear more culpable than he would otherwise have, had it been clear to the jury that he had no prior knowledge of the crime.[225]

Again, it is important to note that the prosecution obtained this "fabricated" evidence before Washington's trial.[226] Nevertheless, the court concluded that Wilmore's constitutional violation was the legal cause of Washington's conviction because it was a substantial factor in the jury's decision to convict him and in his subsequent incarceration.[227] I refer to this as the "tort-based approach" to legal causation.

In contrast, the court in *Castellano* adopted a more limited view of legal causation.[228] Like Earl Washington's conviction, Castellano's conviction was due, in large part, to evidence that was fabricated pretrial and introduced at trial.[229] The Fifth Circuit's analysis of legal causation, however, did not focus on the defendant's pretrial conduct, but rather on the nature of the constitutional violation.[230] In other words, the court framed the approach to legal causation around the question of whether the drafters of the Fourth Amendment intended it to protect against the types of harms for which the plaintiff sought damages.[231] And, in short, the court's answer was "no."[232] In the court's view, "the umbrella of the Fourth Amendment, broad and powerful as it is, casts its protection solely over the pretrial events of a prosecution" and thus, "will not support

225. Washington v. Buraker, No. CIV A302CV00106, 2006 WL 759675, at *7–8 (W.D. Va. Mar. 23, 2006).

226. *Id.* at *1, *5–6.

227. *Id.* at *7–8. Presumably, the defendant drafted the report detailing Earl Washington's confession before the charges against Washington were even filed. *Id.* at *5. Similarly, much of the defendant's bad conduct occurred pretrial. *Id.* Nevertheless, the trial court focused on the effect that this evidence had at trial. *Buraker*, 2006 WL 759675, at *8.

228. *See* Castellano v. Fragozo, 352 F.3d 939, 959 (5th Cir. 2003) (noting that "perjury and manufactured evidence" that led to Castellano's arrest "did not lead inevitably to his trial and wrongful conviction").

229. *See Ex parte* Castellano, 863 S.W.2d 476, 479 (Tex. Crim. App. 1993) (concluding that defendants "collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt").

230. *See Castellano*, 352 F.3d 957–61 (basing decision largely on whether there was loss of Fourth or Fourteenth Amendment rights).

231. *See id.* at 942, 945 (stating that violations must be linked to constitutional rights).

232. *See id.* at 945 (stating that there is no "freestanding constitutional right to be free of malicious prosecution").

[Castellano's] damages arising from events at trial and his wrongful conviction."[233] I refer to this as the "constitutional approach" to legal causation.

If one applies the "constitutional approach" to legal causation in the *Washington* case and the "tort-based approach" to the issue of legal causation in *Castellano* it is difficult to deny the limiting effect that the constitutional approach has on the availability of damages in § 1983 cases. Under the constitutional approach to legal causation, the effect the fabricated evidence had at the trial stage of the criminal prosecution is beyond the scope of the legal causation inquiry because it does not violate the Fourth Amendment.[234] In effect, under this view, the start of the criminal trial bars liability for subsequent damages incurred even when those damages were a foreseeable result of the defendant's pretrial conduct.[235] Stated slightly differently, a constitutional approach to legal causation does not allow a § 1983 plaintiff who has been deprived of his Fourth Amendment rights to recover damages for harms suffered once the seizure has ended. In short, had the court approached legal causation from a constitutional angle, Washington would not be entitled to damages stemming from the years he spent incarcerated during and after his trial.

On the other hand, under a "tort-based" (i.e., substantial factor) approach to legal causation the damages would not seem to impose a bar on the damages Castellano sought. Again, under this approach, the applicable question is whether the defendant's constitutional breach was a substantial factor in his subsequent conviction. Where, as here, there are two key pieces of evidence

233. *Id.* at 959; *cf.* Hector v. Watt, 235 F.3d 154, 157–60 (3d Cir. 2000) (requiring close relation between § 1983 liability and constitutional violation). In *Hector*, the Third Circuit applied an even more limited constitutional approach to legal causation. There, the plaintiff was detained in violation of his Fourth Amendment rights against unreasonable seizure while officers obtained a warrant to search his airplane. *Hector*, 235 F.3d at 162 (Nygaard, J., concurring). After obtaining a warrant, officers searched the plane and found over eighty pounds of hallucinogenic mushrooms. *Id.* The plaintiff was charged and indicted, however, the criminal trial court suppressed the drugs because officers violated the Fourth Amendment when they detained him. *Id.* Eventually, the prosecution dismissed the charges. *Id.* Hector then filed a § 1983 suit against the four officers who detained him seeking compensation for the costs he incurred in his defense of the criminal case. *Id.* The court noted that "'[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all.'" *Hector*, 235 F.3d at 157 (majority opinion) (quoting Townes v. City of New York, 176 F.3d 138, 148 (2d Cir. 1999)). From this, the court concluded that "damages for an unlawful search should not extend to post-indictment legal process, for the damages incurred in that process are too unrelated to the Fourth Amendment's privacy concerns." *Id.*

234. The Court has stated that the Fourth Amendment only applies to conduct occurring during search and seizure. County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998). Furthermore, while it remains unclear precisely when seizure ends, courts uniformly agree that the Fourth Amendment definition of "seizure" has ended once the trial begins. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (applying Fourteenth Amendment Due Process Clause to determine constitutionality of pretrial detainees' punishment); Torres v. McLaughlin, 163 F.3d 169, 174 (3d Cir. 1998) (observing that Fourth Amendment protections against unlawful seizures are limited to time between arrest and pretrial detention); Taylor v. Waters, 81 F.3d 429, 436 (4th Cir. 1996) (concluding that Fourth Amendment requirements are satisfied once probable cause determination has been made).

235. The Fifth Circuit notes that there may be a case in which a plaintiff recovers "damages arising from the trial and wrongful conviction, as opposed to his arrest and pretrial detention, given the dismissal of all but Fourth Amendment claims." *Castellano*, 352 F.3d at 959.

presented at trial—evidence that the defendant fabricated pretrial and the defendant's perjured testimony—it seems fair to conclude that the defendant's pretrial act of fabricating evidence was a substantial factor leading to the plaintiff's conviction. As such, the defendant would be liable for damages Castellano suffered postseizure under this tort-based approach.

Clearly, the constitutional approach to legal causation and the tort-based approach to legal causation can have markedly different effects on the damages available in § 1983 cases, which, in turn, raises the following question: why have courts adopted such varied approaches to legal causation determinations in § 1983 wrongful conviction cases?

Questions of liability and compensation in § 1983 cases often turn on policy arguments. From a policy perspective, § 1983, like all civil actions for monetary damages, forces judges to consider which party should bear the costs of the plaintiff's injuries—the plaintiff or the defendant.

The constitutional approach limits liability to the risk against which the constitutional provision was intended to protect.[236] Professor Jeffries explains the merits of limiting damages liability to the constitutional risk involved as follows:

> Sometimes, conduct violative of a constitutional right will cause injury unrelated to the kinds of risks that constitutional prohibitions were designed to avoid. In such cases, there is a disjunction between the reason the act is wrongful and the specific injury that results from its commission. When this occurs, "but for" causation lacks moral significance. Whatever considerations of deterrence may suggest, the noninstrumental case for compensation for constitutional torts reaches only those injuries caused by the wrongful—i.e., unconstitutional—aspect of the government's behavior. Injury outside the constitutionally relevant risks is morally indistinguishable from the very broad range of injury caused by lawful government action. Unless a contrary answer is indicated by consideration of incentive effects, such injury is appropriately noncompensable.[237]

In comparison, the tort-based substantial factor approach tends to emphasize the importance of compensating the "innocent victim."[238] This is perhaps most evident in *Malley v. Briggs*.[239] In *Malley*, the respondents filed a § 1983 claim against State Trooper Malley alleging that he violated their Fourth and Fourteenth Amendment rights by applying for an arrest warrant in the absence of probable cause.[240] At trial, the judge directed the verdict for the

236. *See generally* John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 VA. L. REV. 1461, 1461, 1470–84 (1989) (examining idea that compensatory damages in constitutional torts cases "should encompass only constitutionally relevant injuries").

237. *Id.* at 1470.

238. Malley v. Briggs, 475 U.S. 335, 344 (1986) (noting that person "most deserving of a remedy" in § 1983 action is "person who in fact has done no wrong, and has been arrested for no reason, or a bad reason").

239. 475 U.S. 335 (1986).

240. *Malley*, 475 U.S. at 338.

defendant because the magistrate judge's act of issuing the arrest warrants "broke the causal chain between petitioner's filing of a complaint and respondents' arrest."[241] Although the defendant did not pursue the "no causation" argument on his appeal, the Court took care to note that "the District Court's 'no causation' rationale in this case is inconsistent with our interpretation of § 1983"; instead, § 1983 "'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'"[242] The Court recognized that where a § 1983 plaintiff "has done no wrong, and has been arrested for no reason, or a bad reason," he is "most deserving" of § 1983 relief.[243] This argument seems to reflect the belief that litigants should not use causation as a tool to deflect costs from a negligent or malicious defendant onto an "innocent" plaintiff.

As *Castellano* evidences, in the context of § 1983 wrongful conviction claims, at least some courts have ignored the Supreme Court's admonition in *Malley* that questions of causation in § 1983 litigation "should be read against the background of tort liability"[244] and have instead approached questions of legal causation in a far more restrictive way.[245] Setting aside the basic doctrinal problems with such an approach, there remain normative problems with the constitutional approach to questions of legal causation in § 1983 wrongful conviction actions. Viewed within a normative framework, this question of how courts should approach questions of causation in these actions becomes a question of policy—on what basis should courts limit defendants' monetary liability in § 1983 actions? The constitutional approach limits a § 1983 defendant's liability to the specific harms against which the alleged constitutional violation was intended to protect. In contrast, the tort-based approach limits liability to injuries that were a substantial factor.

V. THE BIGGER PICTURE: THE RELATIONSHIP AMONG CONSTITUTIONAL DEPRIVATIONS, CAUSATION, AND LIABILITY IN § 1983 ACTIONS

While simplicity is often appealing, particularly in the context of difficult legal questions, it is a mistake to approach the normative issues raised by causation in § 1983 wrongful conviction claims as if they only arise in the context of legal causation. At first blush, the policy rationales for requiring proximate cause in negligence actions may seem equally applicable in § 1983 litigation. Nevertheless, as this Part argues, § 1983 jurisprudence has developed in such a way that the role of proximate cause in negligence actions—to limit liability to those situations in which it is justifiable—has already been satisfied by other elements, rendering the role of proximate cause in § 1983 redundant and largely unnecessary. Part V.A provides a brief overview of the history of legal causation

241. *Id.* at 339.

242. *Id.* at 344–45 n.7 (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)).

243. *Id.* at 344.

244. *Id.* at 344–45 n.7 (quoting *Monroe*, 365 U.S. at 187).

245. *See* Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) (stating that § 1983 claims must result from denial of constitutional rights).

in the common law of torts, focusing primarily on the policy reasons for limiting liability in tort negligence actions. Part V.B then discusses the role of qualified immunity in § 1983 litigation and compares the policy concerns underlying the availability of qualified immunity with those that legal theorists and courts use to rationalize proximate cause in negligence cases. This Part concludes that proximate cause is not only an unnecessary limit on liability in § 1983 cases, but that it is actually unjustified in those cases in which the court has denied the defendant a qualified immunity defense.

A. The History of Legal Causation

It has been almost a century since legal scholars began to approach causation as two separate inquiries—factual causation and legal, or proximate, cause.[246] The development of legal causation as a separate element in tort actions was driven by "the practical need to draw the line somewhere so that liability will not crush those on whom it is put."[247] While legal causation is only half of the inquiry, to truly assess the role it should play in § 1983 litigation it is imperative that we view legal causation in a more general context.

Strictly applied, but-for causation has the potential to result in endless liability.[248] Consequently, the purpose of legal causation is to limit liability to the cases in which the defendant "should" be liable.[249] As such, a conclusion that the defendant is the "legal cause" of the plaintiff's injury requires some conclusion that the defendant is to blame for the plaintiff's injury.[250] In short, legal causation is intended to limit the defendant's liability to those situations in which the defendant has acted wrongfully.[251]

246. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 777 (Tex. 1995) (Cornyn, J., concurring) (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 63 (1992)) (noting that distinction between but-for causation and proximate causation had developed in American law by 1930s).

247. Fleming James Jr. & Roger F. Perry, *Legal Cause*, 60 YALE L.J. 761, 784 (1951); *see, e.g.*, Bouriez v. Carnegie Mellon Univ., No. 02CV2104, 2007 U.S. Dist. LEXIS 64271, at *19 (W.D. Pa. Aug. 30, 2007) (explaining "[l]egal or proximate causation involves a determination that the nexus between the wrongful acts or omissions and the injury sustained is of such a nature that it is socially and economically desirable to hold the wrongdoer liable").

248. The chaos theory states that something as small as the flutter of a butterfly's wings can ultimately cause a typhoon halfway around the world. Similarly, it would seem that under a theory of but-for causation, one negligent act can result in a harm revealed several years in the future.

249. *See* LEON GREEN, JUDGE AND JURY 196 (1930) (explaining that proximate cause deals with problems involving legal rights and duties).

250. Joseph W. Bingham, *Some Suggestions Concerning "Legal Cause" at Common Law*, 9 COLUM. L. REV. 16, 34–35 (1909) (arguing that question is really whether defendant's conduct was "legally blamable" cause of plaintiff's damage). Bingham stressed that the "task is to determine whether defendant's wrongful act or omission was . . . a cause under such circumstances as to render him legally responsible to plaintiff for the specific consequence[s]." *Id.* at 25.

251. *See* Nielson v. Eisenhower & Carlson, 999 P.2d 42, 46 (Wash. Ct. App. 2000) (citing City of Seattle v. Blume, 947 P.2d 223, 227 (Wash. 1997)) (concluding that legal causation requires policy considerations including whether legal liability should be imposed when cause in fact is proven); KEETON ET AL., *supra* note 197, § 41, at 264 (finding that legal liability should apply when justified by closeness and significance of cause).

Obviously, whether a particular act should be considered "wrongful" is subject to debate. It is precisely this reason that, despite a hundred-year discussion of its meaning, "legal causation" remains undefined. Accordingly, the determination of a "wrongful" act will necessarily depend upon the policy considerations that one wishes to advance.[252] Tort cases discussing policy reasons for legal causation often cite "justice and fairness" as a means to establish or absolve liability.[253] Clearly, however, one's view of justice and fairness will depend upon whether one is the plaintiff or defendant in a particular case. For example, if one's primary policy concern is compensation for harm suffered, a lenient test of legal causation is the best way to further this goal. Under this approach, so long as the plaintiff is able to link the defendant's conduct to the harm suffered, he should be able to recover for that harm. If, on the other hand, one's primary policy goal is deterrence, then legal causation should be based upon the foreseeability of the harm because, arguably, if a reasonable person could not predict that his conduct would result in harm to another, then liability will not deter similar future conduct. Still, if one adopts an economic view of blameworthiness, then, generally, a defendant's conduct will only be deemed wrong if the monetary costs of his act outweigh its monetary benefits.[254]

Regardless of the arguments favoring one approach over another, in the end, given its policy-based foundation, legal causation is likely to remain a worthy discussion point. Rather than debate the merits and shortcomings inherent in each policy consideration, I feel it is more appropriate to consider *why* both academics and scholars deem it necessary to dissect causation into factual and policy-based inquiries.

The rise of legal cause as a limitation on liability directly coincides with the rise of negligence as a theory of tort law. In the grand scheme of the law, negligence is relatively "young."[255] The theory of negligence liability emerged

252. *See* KEETON ET AL., *supra* note 197, § 41, at 273 (discussing "whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred").

253. *See, e.g.*, Sumpter v. City of Moulton, 519 N.W.2d 427, 435 (Iowa Ct. App. 1994) (reasoning that proximate cause is based on fairness and justice, and restricts liability to causes linked closely enough to outcome to justify imposing liability); Wilkerson v. Michael, 657 A.2d 818, 821 (Md. Ct. Spec. App. 1995) (noting that "'considerations of public policy and fairness [may] militate against [liability]'" (quoting Allstate Ins. Co. v. Atwood, 572 A.2d 154, 161 (Md. 1995))); Seidel v. Greenberg, 260 A.2d 863, 874 (N.J. Super. Ct. Law Div. 1969) ("[O]nce the matter of causation in fact has been established, the matter is largely one of policy, justice and fairness.").

254. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (applying economic formula to determine liability). Interestingly, when it comes to questions of legal causation, American courts uniformly adopt the defendant's viewpoint—i.e., whether it would be just and fair to dub the defendant the legal cause of the plaintiff's injury. Consequently, "[t]he test of proximate cause which has been stated and applied more often than any other is that which determines an injury to be the proximate result of negligence only where the injury is the natural or reasonable and probable consequence of the wrongful act or omission." 57A AM. JUR. 2D *Negligence* § 485 (2004) (footnote omitted).

255. *See* Patrick J. Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 WASH U. L.Q. 49, 61 (1991) ("Negligence as a legal conceptual category was a late-blooming plant, the result of an historical process that culminated in the modern law of negligence in the early nineteenth century and was not really finished until around 1840.").

from two older forms of action—trespass and trespass on the case.[256] Under the theory of trespass, "any litigant who could show that he had sustained a physical contact on his person or property, due to the activity of another," was able to recover for the harms suffered as a result of that contact.[257] Trespass on the case, which grew out of the theory of trespass, expanded liability by allowing litigants to recover for injuries to self or property that were not the result of "direct or immediate force or violence."[258] One commentator explains the relationship among trespass, trespass on the case and negligence as follows:

> [B]ecause [those who sued in the case] could not show a trespassory contact, [they] had to submit some item of illegality or fault to take the place of the missing element of trespass in order to establish liability. In actions on the case for inadvertently caused harm to person or property, this new item of illegality or fault ultimately became what we now speak of as negligence.[259]

Unlike trespass, which required some proof of direct contact, trespass on the case allowed a plaintiff to recover when he was able to prove that, as a result of some fault of the defendant, he suffered an injury.[260] As such, trespass on the case extended the basis for liability so long as the plaintiff could prove fault. Additionally, as trespass on the case gradually transformed into the substantive law of negligence, proximate cause (or legal causation, as it is now referred) emerged as one of the devices by which courts could act to limit a defendant's liability.[261] These limitations, as previously mentioned, stemmed from policy considerations as to when a defendant should be liable for injuries resulting from his careless or negligent acts.[262] Despite the many debates about what policy considerations should govern proximate cause determinations, scholarship discussing the history of the doctrine seems to agree, at least tacitly, that proximate cause only emerged as an element of tort law as the law of negligence took root.[263]

B. Qualified Immunity and Proximate Cause: A Comparison

Much like proximate cause, qualified immunity is also intended to limit liability to those situations in which it is justified. The Supreme Court initially

256. *Id.* at 57; Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361–62 (1951).

257. Gregory, *supra* note 256, at 361–62.

258. EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 7 (2d ed. 1899).

259. Gregory, *supra* note 256, at 363.

260. *Id.*; *see also id.* at 362–63 (providing useful example to distinguish between liability under writ of trespass and liability under writ of trespass on case).

261. Kelley, *supra* note 255, at 89–90.

262. *See* Jerry J. Phillips, *Thinking*, 72 TENN. L. REV. 697, 741 (2005) (noting that proximate cause is "bound up in doctrinal and policy considerations").

263. *See, e.g.*, Kelley, *supra* note 255, at 56–57, 89 (concluding "[m]odern proximate cause doctrine intort [sic] law seemed to spring up, without identifiable tort law antecedents, in the middle of the nineteenth century").

recognized the "good faith" or qualified immunity defense[264] in *Pierson v. Ray*.[265] In *Pierson*, a group of ministers, arrested after participating in "Freedom Rides," filed a § 1983 claim against a local judge and police officers, alleging that their arrests and convictions were in violation of the Constitution.[266] The ministers' arrest, however, occurred four years before the statute they allegedly violated was declared "unconstitutional as applied to similar facts."[267] The Court noted that holding a defendant police officer civilly liable for arresting the plaintiffs would place the officer in an impossible situation of "being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does."[268] From this the Court concluded, "the defense of good faith and probable cause . . . is also available to [officers] in [an] action under § 1983."[269] Specifically, the Court held that "[the officers] should not be liable if they acted in good faith and with probable cause in making an arrest under a statute that they believed to be valid."[270] The Court continued to refine the good faith qualified immunity defense throughout the 1970s and made it clear that so long as the government official acted in "good faith," liability would not be imposed for conduct that deprived another of a federally protected right.[271]

Although *this* good faith qualified immunity defense protected officials from monetary liability, it did not shield most defendants from the burdens of the civil litigation process. Most courts viewed the question of "good faith" as a factual issue, and because questions of fact were to be determined by a jury, most defendants still had to advance to trial to prove they were entitled to qualified immunity.[272] This, of course, required defendants to participate in the pretrial process, which includes, among other things, filing an answer, answering interrogatories, and appearing for depositions.

To allow the more efficient resolution of "insubstantial" § 1983 claims, in *Harlow v. Fitzgerald*[273] the Court revamped the "good faith qualified immunity" test by eliminating the "good faith" or subjective prong.[274] More precisely, the

264. The Court did not actually use the phrase "qualified immunity" until 1974. *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (concluding that "in varying scope, a qualified immunity is available to officers of the executive branch of government").

265. 386 U.S. 547 (1967).

266. *Pierson*, 386 U.S. at 549–50.

267. *Id.* at 550.

268. *Id.* at 555.

269. *Id.* at 557.

270. *Id.* at 555.

271. *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) (concluding that school officials are not immune if their actions are not in good faith).

272. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982) (explaining that subjective element of good faith is factual question for jury).

273. 457 U.S. 800 (1982).

274. *See Harlow*, 457 U.S. at 816–18 (concluding that allowing subjective element of good faith defense goes against principle of preventing insubstantial claims in litigation and "bare allegations of malice" do not justify subjecting government officials to cost of litigation (citing Butz v. Economou, 438 U.S. 478 (1978))).

Court held that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[275] It went on to elaborate on the defense as follows:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. . . . If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct. Nevertheless, if the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again, the defense would turn primarily on objective factors.[276]

The Court's subsequent interpretations of *Harlow* and the qualified immunity doctrine indicate that qualified immunity protects officials from conduct that is not, at the least, reckless or malicious. For example, in *Malley v. Briggs*,[277] the Court noted, "[a]s the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law."[278] As Professor Armacost argues, "[a]nother important rationale for qualified immunity . . . is that it would be unfair to hold governmental officials to constitutional rules they could not reasonably have known."[279] Armacost explains that "[o]fficials who make reasonable legal judgments that are later adjudicated unconstitutional may not be sufficiently blameworthy to warrant the imposition of constitutional damages liability."[280] In short, qualified immunity limits liability to those situations in which the defendant was somehow "blameworthy" and, like proximate cause, acts as a limitation on liability.

Furthermore, once qualified immunity is introduced as a determining factor, liability under § 1983 becomes markedly different from liability under the negligence regime. As the Court has explained, "qualified immunity seeks to ensure that defendants 'reasonably can anticipate when their conduct may give rise to liability.'"[281] In other words, qualified immunity ensures that only those officials who should *know* their conduct is illegal are liable.

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275. *Id.* at 818.

276. *Id.* at 818–19.

277. 475 U.S. 335 (1986).

278. *Malley*, 475 U.S. at 341. Although decided before *Harlow*, in *Scheuer v. Rhodes* the Court made a similar observation, noting "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

279. Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 588–89 (1998) (emphasis omitted).

280. *Id.* at 590.

281. United States v. Lanier, 520 U.S. 259, 270 (1997) (quoting Davis v. Scherer, 468 U.S. 183, 195 (1983)).

As such, culpability may be viewed as a spectrum, with negligent behavior at the low end (least culpable) and purposeful conduct at the high end (most culpable). The Model Penal Code divides levels of culpability into four categories: (1) purposely,[282] (2) knowingly,[283] (3) recklessly,[284] and (4) negligently.[285] Moreover, under the common law of torts, "no fault" may be considered a fifth category of culpability.[286] Thus, when a court determines that a defendant has deprived another of his constitutional rights and is not entitled to qualified immunity, it may fairly be assumed that the defendant has acted with a higher degree of culpability than that required under the common law of negligence.

On its face, § 1983 does not impose any specific culpability requirement.[287] Nevertheless, qualified immunity, which shields government officials from monetary liability even in cases in which there has been a statutory deprivation, does introduce a state of mind requirement—it ensures that only those persons who recklessly or intentionally disregard plaintiffs' rights are liable for monetary damages.[288] This, in turn, means that government officials are not liable for merely negligent conduct under § 1983. Thus, the level of culpability required for § 1983 monetary liability is higher than that required for a tort negligence claim.

Given this fundamental difference, the Court's decision to limit § 1983 liability based upon policy arguments that support limiting liability in negligence cases seems ill-conceived. Defendants who have been denied qualified immunity in § 1983 cases are not simply negligent actors—they have acted, at a minimum, recklessly, and in many cases, their acts are intentional. This is particularly true of those defendants in wrongful conviction cases. In each of the three cases detailed in this Article, *West Virginia v. Harris*,[289] *Washington v. Wilmore*,[290] and *Castellano v. Fragozo*,[291] the defendants intentionally manipulated evidence so

282. MODEL PENAL CODE § 2.02(2)(a) (1962).

283. *Id.* § 2.02(2)(b).

284. *Id.* § 2.02(2)(c).

285. *Id.* § 2.02(2)(d).

286. Products liability is based on the idea of no fault, or strict, liability. The plaintiff, of course, is required to prove that the product was defective. *See, e.g.*, Greenman v. Yuba Power Prods., Inc., 377 P.2d 897, 900 (Cal. 1963) ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.").

287. *See* John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 98 (1989) ("Technically, section 1983 does not require culpability. That is to say, the cause of action for money damages under section 1983 does not require proof of any state of mind apart from that which may be required by the definition of the underlying right.").

288. *See* Jeffries, *supra* note 287, at 98 (noting that qualified immunity will preclude damages when "a government officer reasonably believes in the lawfulness of action that the courts subsequently disapprove").

289. No. 86-F-442 (Cir. Court, Kanawha County, W. Va. 1987).

290. 407 F.3d 274 (4th Cir. 2005).

291. 352 F.3d 939 (5th Cir. 2003).

that the suspects would appear guilty in their criminal trials.[292] There is little question that the use of fabricated evidence at trial deprives a criminal defendant of his right to due process,[293] yet each of these §1983 defendants fabricated evidence that was subsequently introduced at trial. Furthermore, where, as here, the defendant has violated a clearly established constitutional rule, he should not be entitled to a qualified immunity defense.[294] Yet, despite the extent of a defendant's culpability in such circumstances, some courts continue to use causation as a tool to limit liability.

VI. CONCLUSION

As alluded to in the previous pages, the "wrong" of a wrongful conviction does not end upon sentencing and incarceration, but continues into the civil process for determining § 1983 monetary awards. The approaches of many courts to questions of legal causation in § 1983 wrongful conviction claims are deeply flawed. In those cases, the defendant has clearly acted "wrongly" at the expense of an "innocent" person. And innocence, in this context, has dual meanings. Not only are these exonorees innocent of the criminal trespass of which they have been convicted, they are innocent of any civil wrong. Nevertheless, courts have used causation as a basis to deny exonerees' monetary compensation for their wrongful convictions.

Often questions of liability, regardless of their context, involve complicated questions of causation, fault, and policy. This is no less true in § 1983 wrongful conviction cases. However, the way in which courts have approached questions of causation in § 1983 wrongful conviction cases suggests that they have not adequately considered the way in which fault and policy might influence causation determinations.

As discussed in Part IV, the Supreme Court has instructed lower courts that questions of causation in § 1983 litigation "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[295] Applying the common law of torts' negligence approach to causation determinations in § 1983 wrongful conviction claims can, in many cases, result in a finding of no liability.[296] Wrongful convictions almost never happen for one reason but, instead, are usually the result of several different acts.[297] Hence, they are not easily amenable to the but-for test for factual causation. The Court, however, has failed to offer any other test for

292. See *supra* notes 1–20, 119–25, 178–89 and accompanying text for discussion of the three cases, respectively.

293. *See* Miller v. Pate, 386 U.S. 1, 7 (1967) ("[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.").

294. See *supra* note 273–76 and accompanying text for a discussion of the inapplicability of qualified immunity when the defendant violates a clear rule.

295. Monroe v. Pape, 365 U.S. 167, 187 (1961).

296. See *supra* Part IV.C.1 for a discussion of the tort-based approach to determinations of factual causation.

297. Castelle & Loftus, *supra* note 1, at 9–10.

factual causation in § 1983 claims. Additionally, lower courts have employed legal causation to deny exonerees a monetary remedy against constitutional tortfeasors whose actions caused (or at least increased the likelihood of) their convictions.[298] As Part IV details, courts typically apply one of two tests to determine whether a defendant is the legal cause of an exoneree's conviction and ensuing damages. Under the tort-based approach, the defendant is deemed to be the legal cause of the plaintiff's injuries if his constitutional breach is a substantial factor in bringing about the injury.[299] In contrast, the constitutional approach requires that plaintiff's harm be related to the risk the constitutional amendment was intended to protect.[300]

This causal relationship required under the constitutional approach is more rigorous than that required under the tort-based approach and is problematic in two respects. First, from a doctrinal perspective, it ignores the Supreme Court's admonition that causation in § 1983 actions should "be read against the backdrop of tort liability."[301] Second, and even more problematic, there are few normative justifications for limiting the liability of these constitutional tortfeasors. Proximate cause emerged as a way to limit liability in cases in which the defendant merely acted negligently but, nonetheless, "but-for" causation exposed him to tremendous liability. However, in cases in which the defendant has violated the Constitution—which, in many cases, he has sworn to uphold—the defendant has not simply engaged in a "negligent" act. Instead, he has acted with a much higher degree of culpability.

Unfortunately, judicial determinations regarding causation in § 1983 wrongful conviction cases have failed to consider how other determinations—such as a conclusion that the defendant has violated the Constitution and is not entitled to qualified immunity—might affect the policy considerations that underlie causation determinations. Legal causation is a policy question; yet, given the effect of a "no qualified immunity" determination, neither the tort-based model nor the constitutional model are justifiable approaches to questions of causation in wrongful conviction claims.

This is not to suggest that causation has no role in § 1983 litigation—causation is an important element in any legal action. Rather, courts should reconsider the way in which questions of causation are approached in § 1983 wrongful conviction cases and § 1983 litigation in general. Because § 1983 is a conglomeration of so many different legal areas, causation determinations need not mirror those applied in common law negligence actions. The tests for causation employed in other legal contexts, such as criminal evidentiary suppression motions and intentional torts actions, from a normative perspective, may be more appropriate tests for causation in § 1983 claims. And, from a

298. See *supra* notes 228–33 and accompanying text for a discussion of one court's reliance on legal causation in the § 1983 context.

299. See *supra* note 221 and accompanying text for a discussion of the tort-based approach.

300. See *supra* notes 233–34 and accompanying text for a discussion of the "limiting effect" of the constitutional approach.

301. Monroe v. Pape, 365 U.S. 167, 187 (1961).

practical perspective, by applying these tests in § 1983 litigation, the "wrong" in wrongful convictions might be corrected, at least to some degree, through compensatory damages.