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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, a jury returned with a guilty verdict. The jury convicted Harris of second-degree sexual assault after less than*

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[1] *See* GEORGE CASTELLE AND ELIZABETH F. LOFUS, MISINFORMATION AND WRONGFUL CONVICTIONS, WRONGLY CONVICTED: PERSPECTIVES OF FAILED JUSTICE 20 (Saundra D. Westervelt and John A. Humphrey eds. 2005) (describing defendant in State of West Virginia v. William O'Dell Harris, Jr., No. 86-F-442 (Circuit Court, Kanawha County, W. Va. 1987)).

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

[3] *See* Edward Connors et al., Nat'l Inst. of Justice, Convicted By Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 55-56 (1996), available at http://www.ncjrs.gov/pdffiles/dnaevid.pdf (describing undisputed facts of assault and rape).

[4] *See id.* at 55 (reporting that attack occurred on December 16, 1984 and Harris's arrest on July, 25 1985).

[5] *See id.* at 56 (describing facts of case). The government moved to have the case transferred from juvinile to adult status. *See id.* The court granted the motion on May 16, 1986. *See id*

[6] *See id.* (identifying Harris both in police lineup and at trial).

[7] CASTELLE & LOFUS, *supra* note 1, at 20.

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

[9] *See id.* (noting alibi defense). Harris's girlfriend at the time of the crime testified that he was with her when the assault occurred. See id. Unfortunately, Harris's girlfriend was the only one who could corroborate the alibi. *See id.*

four hours of deliberation.[10] *On October 18, 1987, Harris was sentenced to 10 to 20 years in prison.*[11]

Six years after his conviction, in November of 1993, Harris filed a Petition for Post-Conviction 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 1985 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] *"On October 10, 1995, Harris's conviction was vacated. One 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 in 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*

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[10] *See id.* (describing quick jury verdict).

[11] *See id.* (reporting sentence). Harris was credited 75 days for time already served. *See id.*

[12] *See* CONNORS ET AL., *supra* note 3, at 56. (describing Harris's post-conviction challenges). 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. *See id.* Harris therefore filed a writ of habeas corpus and consented to DNA testing as a condition of relief. *See id.*

[13] *See id.* (tracing police response to court orders). On December , 29 1993 a circuit court judge ordered the prosecutors to release the evidence from Harris's trial. *See id.* This order was repeated a month later after the prosecutors failed to comply. *See id.* At a hearing where Harris was moved to home confinement, the order was repeated yet again. *See id.* The sheriff's department then told the court that the trial evidence had been lost. *See id.*

[14] *See id.* (discussing discovery of preserved semen sample). After finding the sample Harris's attorney sought the release of the sample to undergo DNA testing. *See id.* The judge issued a fourth order to release the evidence and the police finally complied. *See 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. *See id.* The district attorney argued that the victim had been uncooperative and that the sample had since been submitted for DNA testing. *See id.*

[15] *Id.*

[16] *Id.*

[17] *See* CONNORS ET AL., *supra* note 3, at 56. (noting subsequent perjury conviction).

acts of misconduct[18] *and that this misconduct was "the 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*[20] *and that the prosecutor failed to disclose exculpatory evidence to the defense.*

I. INTRODUCTION

As William Harris's case demonstrates, the United States criminal justices 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]

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[18] *See Matter of Investigation of West Virginia State Police Crime Laboratory, Serology Division*, 438 S.E.2d 501, 516 (W.Va., 1993) (summarizing report by American Society of Crime Laboratory Directors). 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 suspect when testing supported only a match with the victim; and (11) reporting scientifically impossible or improbable results.

Id. Despite the numerous allegations of wrongdoings, Zain died of colon cancer before he could be convicted of perjury. *See* W. JERRY CHISUM & BRENT E. TURVEY, CRIME RECONSTRUCTION ## (2006).

[19] *Id.*

[20] See CASTELLE & LOFUS, *supra* note 1, at 22-23. (tracing repeated police interviews after vicitim asserted Harris was not the attacker). According to George Castelle, the attorney who represented Harris in his post-conviction appeals, 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. He 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." Author, *Title*, CHARLESTON GAZETTE, Nov. 18, 1998, at page.

[21] *See generally* 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, that calculated 2.3% of prisoners sentenced to death between 1973 and 1989 were exonerated and freed. *See id.* Professor Michael Risinger estimated that between 3.3% and 5% of defendants were wrongly

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 a civil remedy to compensate for the mistakes of the criminal system.[22] Yet, persons wrongly convicted of a crime who bring § 1983 actions for an erroneous arrest, detention, or conviction are often denied monetary compensation.[23]

There are a number of bases for courts to deny exonerees a § 1983 monetary remedy for their erroneous conviction. 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. 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.[24]

Legal scholarship discussing § 1983 actions for wrongful convictions typically focus on the following: (1) whether wrongful convictions and/or prosecution violates the Constitution and (2) the role of absolute and qualified immunity in these cases.[25]

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convicted and sentenced to death for murders involving rape between 1982 and 1989. *See id.* The report contends that if there some two million inmates and as few as 1% (a conservative estimate) are innocent, then there are more than 20,000 people in jail who were wrongly convicted. *See id.*

[22] *See* Carey v. Phipus, 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, p. 1299 (1956))).

[23] *See* INNOCENCE PROJECT, *supra* note 21, at 34-35 (finding less than half of exonerees were able to recover compensation). Only 45% of the 200 exonerees who had been cleared through the use of DNA evidence were able to collect either through state compensation statutes or civil lawsuits. *See id.* at 34.

[24] *See* O'Neal v. Mississippi Bd. of Nursing, 113 F.3d 63, 65 (Miss. 1997) (citing Supreme Court's narrow understanding of absolute immunity). Judges, performing judicial acts within their jurisdiction and prosecutors performing their duties are granted absolute immunity from monetary damages. *See id.* Witnesses are similarly grated absolute immunity. *See* Briscoe v. Lahue, 460 U.S. 325, 325 (1983) ("No evidence that Congress intended to abrogate the traditional common witness immunity in § 1983 actions."). Other state actors, such as the police officers who investigated and arrested the plaintiff and forensic who may have analyzed evidence in the case are often shielded by qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818) ("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.").

[25] *See, e.g.,* Sheldon H. Nahmod, *Constitutional Accountability in Section 1983 Litigation*, 68 Iowa L. Rev. 1 (1982) (opining mental requirements similar to Fourteenth Amendment are necessary for liability to attach under § 1983);

Furthermore legal scholars who do discuss civil remedies for wrongful convictions only focus one or two actors in the criminal justice process who might be civilly liable.[26] 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."[27] Such factors may include biased police lineups, mistaken eyewitness identification, faulty forensic science, coerced false confessions, and unreliable informants.[28] 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 deprived him of a specific constitutional right and the deprivation of this constitutional right, in turn, caused his injuries.

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

Although, causation is seldom mentioned as an element of a § 1983 claim, causation plays two roles in § 1983 litigation. First, causation is an inherent part of the deprivation element of a § 1983

Charles F. Abernathy, *Section 1983 and Constitutional Torts*, 77 Geo. L.J. 1441(1989) (noting confusion § 1983 litigation has brought to constitutional law debates); *see also, e.g.*, Barbra Rook Snyder, *The Final Authority Analysis: A Unified Approach To Municipal Liability Under Section 1983*, 1986 Wis. L. Rev. 633 (1986) (discussing trends in absolute and qualified immunity defenses); Mark R. Brown, C*orrelating Municipal Liability and Official Immunity Under Section 1983*, 1989 U. Ill. L. Rev. 625 (1989) (finding immunities may offer municipalities too much protection from liability).

[26] *See* CASTELLE & LOFUS, supra note 1, at 18 ("When an innocent person is convicted, that conviction is often attributed to a single mistake. . . . Indeed, much of the current research into wrongful conviction cases focuses on one mistake or one part of the criminal justice process in which a mistake occurred."). *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 (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 (2004) (exploring possible liability for prosecutors under § 1983).

[27] CASTELLE & LOFUS, *supra* note 1, at 9-10.

[28] *See id.* at 9 (describing various factors that may bring about wrongful convictions).

claim.[29] 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 limits defendants' liability in these 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 B of this section 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 exonoree 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 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 section, however, examines the role of causation in wrongful conviction cases for monetary damages. I argue that causation plays two roles in § 1983 litigation for compensatory damages. First, the plaintiff must prove that the defendant causes him to be deprived of a constitutional right. Furthermore, there must be a causal link between this constitutional breach and the plaintiff's

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[29] *See* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983 § 3:108 (4th ed. 2005) ("As emphasized in the Supreme Court's decision in *Monell v. Department of Social Services*, the very language of § 1983 requires causal relation between defendant's conduct and plaintiff's constitutional deprivation.").

actual injury. This section goes onto describe how courts have approached these questions in § 1983 litigation and considers the policy arguments courts have advanced to support their varying approaches to causation in § 1983 wrongful conviction cases.

Part V goes onto argue that § 1983 jurisprudence has developed in such a way that the role of proximate cause in negligence actions – to limit liability to those situations where it justifiable – has already been satisfied by other elements, rendering the role of proximate cause in § 1983 redundant and largely unnecessary. Part 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 B then discusses the role of qualified immunity in § 1983 litigation and compares the policy concerns underlying the availability of qualified immunity and those legal theorists and courts use to rationalize proximate cause in negligence cases. This section concludes proximate cause is not only an unnecessary limit on liability § 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.[30] In 1998, the National Institute of Justice issued a report profiling 26 cases in which DNA evidence proved that convicted person had not actually committed the crime.[31] Even more recently, Samuel L. Gross studied the cases of 340 persons

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[30] *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. *See id.* Borchard followed the cases of sixty-five of individuals in the United States and England the author believe to be "completely innocent" of the crimes for which they were convicted. *See id.* Based upon his research, Borchard concluded that all criminal justice systems should enact legislation to indemnify the wrongly convicted. *See id.*; *see also, e.g.*, Hugo Adam Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 23-24, 31-36 (1987) (compiling case studies of 350 wrongful convictions). The authors compiled 350 cases of wrongful convictions for capital or potentially capital crimes handed down between 1900 and 1985. *See id.* Of these crimes, 200 were first-degree murder convictions, 73 second-degree murder, 14 other homicide, 39 unspecified and 24 rape convictions. *See id.* 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. *See id.*

[31] *See generally* CONNORS ET AL., *supra* note 3, at 33-74 (listing facts and procedural histories of each case).

who had been exonerated of the crimes of which they were convicted.[32]

These case studies 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.[33] 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, the frequency that these errors occur, and then extrapolating on the basis of this data.[34]

1. Causes of Wrongful Convictions

Wrongful convictions are usually a combination of many factors. The most common of which are eyewitness misidentification,[35]

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[32] *See* Samuel R. Gross, et. al, *Exonerations in the United States 1989 through 2003*, 95 J. Crim. L. & Criminology 523, 528 (2005) (describing exoneration trends). According to Gross, the number of exonerations grew from twelve per year in 1989 to forty-two per year 2003. *See 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. *See id.* at 527.

[33] *See* Bedau & Radelet, *supra* note 30, at 28 ("experience taught us that no jurisdiction keeps a public list of its erroneous convictions, even in murder cases. Moreover, most state officials are apparently not eager to assist investigators in identifying such cases from whatever records they might have available."); *see also* Gross, et. al, *supra* note 32, at 525 ("There is no national registry of exonerations, or any simple way to tell from official records which dismissals, pardons, etc., are based on innocence."). Nevertheless, some have placed the number of wrongfully incarcerated citizens in the thousands, if not tens of thousands. *See id.* at 551.

[34] *See generally* Gross, *supra* note 32 (profiling 340 exonerations between 1989 and 2003); Bedau & Radelet, *supra* note 30 (comparing 350 cases of capital or possibly capital offenses); CONNORS ET AL., *supra* note 3 (citing twenty-six cases in support of government report).

[35] *See* INNOCENCE PROJECT, *supra* note 21, at 18-19 (2007) (finding 77% of wrongful convictions were result of eyewitness misidentification); *see also* Gross, *supra* note 32, at 529-31 (discussing eyewitness misidentification in rape and robbery cases); see also Bernhard, supra note 30, at 81-87 (presenting case of People v. Marion Coakley). In this case a combination of genuine misidentification by a traumatized victim and biased police investigation techniques lead to a wrongful conviction. *See id*. Olga Delgado was raped by a man she whose description's most salient details were a dark complexion, an "afro" haircut, and a Jamaican accent. *See id*. at 81-82. The police selected the 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. *See id.* at 81. Coakley was arrested two days later and eventually convicted of rape. *See id.* at 81-82. After the trial several parts of the identification began to unravel. *See id.* at 82. Ms. Delgado later admitted the only light in the room came from a television screen, her face had been covered for much of the attack and that she had been to scared to look at the victim directly when she had the opportunity.

police and prosecutorial misconduct,[36] flawed analysis of forensic evidence,[37] and ineffective defense counsel.[38]

Eyewitness misidentification represents the single most common factor contributing to wrongful convictions in the United States.[39] 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.[40]

See id. 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. *See id.* at 83-84.

[36] *See* Project Innocence, *Understand the Causes: Government Misconduct,* http://www.innocenceproject.org/understand/Government-Misconduct.php (last visited Mar. 19, 2008) (offering statistics of government conduct). In the Innocence Projects first 74 cases of exoneration it found that police misconduct played a role in 37 of the cases, while prosecutorial misconduct was a factor in 33. *See id.; see also* Brandon L. Garrett, *Innocence, Harmless Error, And Federal Wrongful Conviction Law*, 2005 Wis. L. Rev. 35, 47 (2005) (citing post-conviction admissions by witnesses that they had been coerced by police). Garrett goes on to describe the police's ability to mold a witnesses memory and perception to make it fall in line with the case theory. *See id.* 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 prosecutors). Taslitz also suggests that measures taken to prevent wrongful convictions must be aimed at both police and prosecutors. *See id.*

[37] *See* INNOCENCE PROJECT, *supra* note 21, at 22-23 (finding 65% of wrongful convictions were due at least in part to flawed forensic science).

[38] 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 and Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 Hastings L.J. 1031 (2006) (discussing deficiencies in training, supervision, evaluation and resources in state run defense organizations).

[39] *See* Innocence Project, *Understand the Causes: Eyewitness Misidentification*, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited Mar. 18, 2008) (stating eyewitness misidentification played a role in 75% of exonerations it 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. *See* Gross, *supra* note 32, at 542. Witness misidentification is not as prevalent in cases where the defendant is accused of murder as compared to other criminal cases. Because of the nature of the crime, there is often only two eyewitnesses to a murder, the victim and the perpetrator. Absent some hearsay exception, the victim's identification will not be introduced at trial. Accordingly, there is not the same opportunity for misidentification in murder cases as in other cases. In contrast, in a recent study, Samuel Gross found that nearly 90% of sexual assault exonerations involved misidentification by at least one witness. *See id.* at 529-30.

[40] *See* Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute For Compensating the Wrongly Convicted*, 36 Ga. L. Rev. 665, 675 (2002) (quoting ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 19 (1979) "there 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!'").

Barry Sheck, 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.[41] In fact, the criminal cases most likely to result in convictions are those cases where the prosecution is able to offer eyewitness testimony, confessions, and/or forensic evidence.

Therefore, it should come as little surprise that it is these types of evidence police and prosecutors wish to have when proceeding to trial. Unfortunately, in many cases where witnesses have misidentified suspects, the police and/or prosecution have employed techniques that make it more likely that the witness will identify a particular person.[42] Similarly, 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 false confession or an informant's false claim that the suspect confessed to him.[43] The credibility afforded forensic science also creates an incentive for police, prosecutors, and lab technicians to present evidence procured though questionable scientific practices.[44] In the 200 cases of wrongful imprisonment studied by the Innocence Project, 65% were attributed, at least in part, to limited, unreliable or fraudulent forensic science.[45]

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[41] *See* BARRY SHECK ET AL., ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED 64 (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. These difficulties are often compounded by the emotional stress of the crime. *See* Lopez, *supra* note 40, at 680 (noting numerous factors that lead to genuine misidentification).

[42] *See* SHECK, ET. AL., *supra* note 41, 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, this eventually makes the face of the suspect seem familiar to the witness. 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.

[43] *See* INNOCENCE PROJECT, *supra* note 21, at 26-27 (finding 25% of exonerees were convicted, at least in part, by false confessions); *see also id.* at 32-33 (finding 15% of exonerees were convicted, at least in part, by testimony from informants and snitches).

[44] *See* Lopez, *supra* note 40, at 685 (discussing jurors' perception of forensic science as infallible); *see also* Garrett, *supra* note 36, at 95 (discussing increasing trend of police officers falsely claiming physical evidence matches samples taken from defendants).

[45] *See* INNOCENCE PROJECT, *supra* note 21, at 22-23 (finding connection between forensic flawed forensic science and wrongful convictions).

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. Nearly one third of exoneration cases involve suppression of exculpatory evidence by the police or prosecution.[46]

Ideally, defense attorneys provide a check against police and prosecution abuses. In reality, however, due to a number of factors, state appointed attorneys may fail to provide their clients with the most effective counsel possible. Bad lawyering is a contributing factor in almost a quarter of wrongful convictions.[47] And while *egregious* conduct by attorneys can form the basis for a new trial,[48] 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. With poor Americans constituting 80% of defendants, public defenders are overworked.[49] Chronic under funding leads to crushing workloads and limited investigatory resources.[50] Public defenders often have little time and limited resources.[51] Unfortunately, this means that they are sometimes unable to devote the time necessary to investigate the prosecution's case and uncover evidence necessary to challenge the state's evidence, resulting in errors such as incomplete cross-examination of witnesses and the failure to

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[46] *See* Garrett, *supra* note 36, at 70 (37% of case show suppression of evidence by prosecutor, 34% show suppression of evidence by police).

[47] *See id.* at 75 (commenting on inadequacy of counsel provided to indigent defendants).

[48] *See* Lopez, *supra* note 40, at 689 (citing cases where defense counsel was personally under investigation and by their own admission too stressed to "think straight"); *see also* Griffin v. Winans, 684 F.2d 686, 690 (10th Cir. 1982) (affirming lower court ruling that trial attorney was intoxicated and therefore ineffective).

[49] *See* Backus & Marcus, *supra* note 38 at 1034 (citing Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, Daily Bus. Rev., June 6, 2005, *available at* http://www.law.com/jsp/article.jsp? id=1117789520360).

[50] *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. *See id.* at 1035.

[51] *See id*; s*ee generally*, Inga L. Parsons, *"Making It a Federal Case": A Model For Indigent Representation*, 1997 Ann. Surv. Am. L. 837 (1997) (finding federal public defenders generally have lighter workloads and more resources then state public defenders, affording them more time to investigate each case).

uncover and investigate weaknesses in the prosecution's argument.[52]

2. 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 22 states and the District of Columbia have enacted legislation designed to compensate the wrongly convicted.[53] Compensation amounts vary, as do caps on total compensation available.[54] In states without compensation statutes (the majority of states in the United States) exonerees are often provided the same aid, and is some cases less, than parolees.[55]

With no general statutory system in place to provide compensation, exonerees must try obtain personal compensation through legislative or legal means. Few exonerees are able to lobby the legislature for a private bill granting them compensation.[56] Some state constitutions forbid the passing of personalized legislation entirely.[57] Even when a personal compensation bill is a legal possibility, the political connections and economic resources

[52] *See* Backus & Marcus, *supra* note 38, at 1036 (discussing then Attorney General Jannet Reno's conception of proper defense attorney conduct and the system's failure to deliver it to all defendants).

[53] *See* Innocence Project, *Know the Cases: After Exoneration*, http://www.innocenceproject.org/know/After-Exoneration.php (last visited Mar. 18, 2008) (noting states offer some form of compensation, though not necessarily at the level advocates would deem sufficient).

[54] *Compare* CAL. PENAL CODE §§4900-4906 (West 2000) (calling for compensation of $100 per day of wrongful incarceration); *with* MONT. CODE ANN. §53-1-214 (offering only educational aid); *and* N.Y. CT. OF CLAIMS ACT §8-b (McKinney 1984) (clearly stating that there is no maximum amount that a pardoned or exonerated person may collect). Some states do not place numerical limits on compensation but rather invoke legal ideas of actual damages and reasonableness. *See* MD. CODE ANN., STATE FIN & PROC. §10-501(West 1963) (providing compensation for actual damages to an a wrongly incarcerated individual); *see also* W.VA. CODE §14-2-13(1987) (awarding "fair and reasonable" damages to the wrongly convicted).

[55] *See* Lopez, *supra* note 40, at 669 ("For [the wrongly convicted's] time and trouble in prison, the State of Louisiana gave him what every inmate receives upon being released from prison, whether guilty of the crime charged or not-ten dollars and a denim jacket"); *see also* AFTER INNOCENCE (American Film Foundation 2005) (interviewing exonerees who were not given job training, job placement or health care coverage that parolees received).

[56] *See* Bernhard, *supra* note 30, at 94 (citing first reason private legislation is often unattainable).

[57] *See id.* (citing second reason private legislation is out of reach for most criminal defendants).

needed to sustain a lengthy lobbying process make private legislation implausible for most exonerees.[58]

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.[59] Nearly 50,000 federal civil rights actions commenced in 2006.[60] Because the Justice Department simply groups § 1983 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, studies suggests that § 1983 claims make up between seventy and ninety percent of these claims. Thus, even if one were to accept the low end of this estimation, this means that 35,000 § 1983 claims were filed in 2006 alone.[61] 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.[62]

III. § 1983 JURISPRUDENCE: CONSTITUTIONAL WRONGS

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[58] *See id.* (citing third reason private legislation is not a realistic remedy for wrongful convictions).

[59] *See* Garrett, *supra* note 36, 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.* Large verdicts against municipal officials have been more common with the influx of DNA evidence, thereby enticing defendants to bring suits and push our ideas of constitutional protection in the criminal justice system. *See id.*

[60] ADMINISTRATIVE OFFICE OF U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 2007, TABLE C-2A, U.S. DISTRICT COURTS – CIVIL CASES COMMENCED, BY BASIS OF JURISDICTION AND NATURE OF SUIT, DURING THE 12 MONTH PERIOD ENDING SEPTEMBER 30, 2003 THROUGH 2007, *available* at http://www.uscourts.gov/judbus2007/appendices/C02ASep07.pdf (last visited Mar. 20, 2008) (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 filled by prisoners. Id. Nevertheless, The total number of federal civil rights cases commenced each year has steadily declined since 2002, though the number of prisoner petitions has grown. Id. and C-2 tables 2002-05.

[61] *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (4th ed. vol. 1 2008). (generating estimate of § 1983 claims based on government reports). Using estimates based on Schwartz evaluation of 1993 statistics, estimates of the total number of §1983 claims must be derived from both the "other" category of federal civil rights claims and prisoner petitions based on civil rights violations. *See id.*

[62] *See* Garrett, *supra* note 36, at 42 (citing DNA evidence as predominant reason for rise in § 1983 claims).

As discussed in Part II, there are a number of reasons *why* a person may 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 William Harris, the teenager discussed in the vignette at the beginning of this piece, 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 Department who testified at Harris's criminal trial about the strength of the victim's eyewitness testimony.[63] And while several people often contribute to a single wrongful conviction, to prevail in a § 1983, an exonoree must prove that at least one of the named defendants deprived him of a federally protected right. As discussed in the following pages, this is not always an easy task.

Title 42 U.S.C. § 1983 was enacted to give plaintiffs a federal form of relief against a person acting under color of state law who deprives the plaintiff of a protected right.[64] 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 . . .[65]

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.[66] Typically, exonerees seeking a § 1983 remedy for their arrest and conviction allege a deprivation a Fourth Amendment right and/or a violation of the Fourteenth Amendment

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[63] Complaint at ___, Harris v. Kanawha County, No. _ (filed _).

[64] See Harlow v. Fitzgerald, 457 U.S. 800, 807 (noting "the importance of a damages remedy to protect the rights of citizens . . .").

[65] 42 U.S.C. § 1983 (1996).

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

substantive due process clause.[67] As discussed in the previous section, most erroneous convictions result from a series of actions that begin before the plaintiff is arrested and continue through (and sometime well-past) the criminal trial.[68] This portion of the article argues that the serial nature of constitutional injuries in wrongful convictions cases often makes it difficult to fit these claims into the Court's § 1983 rubric.

As the Court explained in *Baker v. McCollan*, § 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."[69] Accordingly, it is improper for a plaintiff to allege that the defendants "violated § 1983."[70] § 1983 only provides the remedy – the plaintiff must find his "right" elsewhere.[71] Furthermore, in *Graham v. Connor*, the Court took the "right identification" requirement one step further.[72] There, the Court held "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."[73] In short, a plaintiff must identify a specific right of which he was deprived and he should only cast his argument as a Fourteenth 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 plaintiff's Fourth Amendment or Fourteenth Amendment substantive due process rights.[74] Nevertheless, it is not always easy to determine whether a specific act implicates the Fourth of Fourteenth Amendment.

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[67] *See, e.g.,* Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003) ("Alfred Castellano sought damages for his wrongful conviction of arson, asserting claims under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments."); Washington v. Buraker, 322 F. Supp. 2d (W. D. Va. 2004).

[68] *See, infra,* Part II. Harris's case illustrates this exact point. *See, infra,* pages 1-2 and accompanying notes. The "causes" of Harris conviction and incarceration began before Harris was even arrested when police questioned the victim using suggestive techniques and continued well after Harris incarceration when the prosecution repeatedly failed to turn over the remaining DNA evidence for additional testing. *Id.*

[69] Baker v. McCollan, 443 U.S. 137, 145 n.3 (1979).

[70] *See id.*

[71] *Id.*

[72] 490 U.S. 386, 393 (1989).

[73] *Id.*

[74] *See, e.g., Castellano,* 352 F.3d at 942; Washington v. Buraker, 322 F. Supp. 2d 692 (W. D. Va. 2004). There are two categories of Fourth Amendment

In *Albright v. Oliver*, the plaintiff, Kevin Albright, was arrested for selling a substance that "looked like" cocaine.[75] Illinois officials' decision to arrest Albright was problematic in several different respects. First, the state's primary witness against Albright Velda Moore, a paid undercover informant, was especially unreliable.[76] The "drugs" she reportedly bought was simple baking soda.[77] Furthermore, the person she identified as the alleged drug dealer, John Albright Jr., a 60-year-old retired pharmacist, did not match the description of Moore had provided to Officer Oliver.[78] 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.[79] 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.[80]

Eventually, "the court dismissed the criminal action on the ground the charge did not state an offense."[81] Although Albright was

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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 v. Connor, 490 U.S. 386, (1989). Second, exonerees may allege that the seizure was unreasonable because the arresting officers did not have probable cause. This Article focuses on the causal relationship between a constitutional breach and a wrongful conviction. In cases where 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.

[75] 510 U.S. 266, 268 (1994).

[76] *Id*. In 1987, after being released from drug rehabilitation, Officer Oliver and Velda Moore entered into a deal in which Oliver would protect Moore from a cocaine dealer so long as she acted as an undercover informant. 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." According to the record, none of the 50 drug transactions that Moore claimed to participate in resulted in a conviction. *Albright*, 510 U.S. 266 (United States Supreme Court Petitioner's Brief).

[77] *Albright*, 510 U.S. at n.1.

[78] *Id*.

[79] *Albright*, 510 U.S. 266 (United States Supreme Court Petitioner's Brief). Officer Albright scratched out two names before eventually entering in Roger Albright's name. *See id*.

[80] *Albright*, 510 U.S. at 268

[81] *Id.* at 269.

never tried and convicted, he was arrested, required to post bond, and incurred legal fees. Approximately two years after the charges against him were dismissed, Albright filed a § 1983 claim alleging that 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 in probable cause. 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. Albright appealed and the appellate court affirmed the decision.

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."[82] 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.[83] In short, the plurality rejected Petitioner Albright's § 1983 claim because he presented it as 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.

The Court, however, 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.[84] Most of the acts that courts have analyzed under the Fourteenth Amendment substantive due process clause occur within the scope

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[82] *Id.* at 271.

[83] *Id.* at 275 (J. Scalia concurring); *see also* U.S. CONST. AMEND. IV ("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.")

[84] The criminal justice process consists of several different stages. *See* Niki Kukles, *Civil Due Process, Criminal Due Process*, 25 YALE L. POL'Y REV. 1, 22-23 (explaining that early stages of a criminal case include, *inter* alia, issuance of an arrest warrant, arrest, arraignment, and bail hearing); Angela J. Davis, *Crime and Punishment Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1674 (1996) (noting that various stages the criminal process include arrest, prosecution, trial, and sentencing).

of the trial.[85] For example, In *Miller v. Pate*, the prosecution continually referred to a pair of bloody shorts as it described the brutal murder of a young girl by the defendant. It was later determined, however, that the prosecution knew that the shorts were actually stained with paint.[86] 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.[87] Similarly, the Fifth Circuit has held that prosecutor's reference to a criminal defendant's prior conviction during the sentencing phase of the defendant's criminal trial violated the defendant's substantive due process rights.[88]

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 class. 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.[89] 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 v. Oliver*, 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

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[85] *See Albright* 510 U.S. at 299 n. 15 (J. Stevens, dissenting) ("Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony . . .")

[86] *Miller v. Pate*, 386 U.S. 1 (1967) (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 4-5.

[87] *Id.* at 7 ("the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence.").

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

[89] *See, e.g., Castellano*, 352 F.3d at 942 (discussing liability in § 1983 wrongful conviction case in which plaintiff alleged defendants fabricated evidence before his arrest and perjured themselves regarding the evidence at trial); Washington v. Buraker, 322 F. Supp. 2d 692 (W. D. Va. 2004) (alleging defendants deprived plaintiff of constitutional rights when coerced confession before his arrest and testified as to the reliability of that confession at trial).

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.[90] Justice Ginsberg'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.[91] Justice Ginsberg traces the history of bailment at common law and concludes that though one may leave the custody of the police, they are by no means free of restraint.[92] Ginsberg reasons that because criminal defendants awaiting trial outside of a correctional institution are required to appear at court, they remain under the jurisdiction, carry with them the burdens of pending prosecution, and accordingly, remained "seized", as the term is used in the Fourth Amendment.[93]

Rather than wrestling with the definition of seizure, the Seventh Circuit has distinguished Fourth and Fourteenth Amendment malicious prosecution/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."[94] In the former, the Due Process clause applies while the Fourth

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[90] 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, *A Legal Twilight Zone: From the Fourth to the Fourteenth Amendment, What Constitutional Approach is Afforded a Pretrial Detainee?*, 27 S. ILL. U. L.J. 613, 613 (2003). In *Graham v. Connor*, the Court held that where "the excessive force claim arises in the context of an 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. at 393. Nevertheless, circuit courts remain split as to how determine when the arrest and/or seizure ends. *See*, Riley v. Dorton, 115 F.3d 1159, 1161-64 (4th Cir. 1997) (applying Fourteenth Amendment after arrest ends); Cottrell v. Caldwell, 85 F.3d 1480, 1490 (11th Cir. 1996) (same); *cf* Wilson v. Spain, 209 F.3d 713 (8th Cir. 2000); Barrie v. Grand Country, 119 F.3d 862, 866 (10th Cir. 1997); Pierce v. Multnomah County, 76 F.3d 1032, 1042-43 (9th Cir. 1996).

[91] *See Albright*, 510 U.S. at 277-79 (J. Ginsberg, concurring)

[92] *Id.*

[93] *Id.* (J. Ginsberg concurring) (finding seizure continues after custody ends).

[94] Villanova v. Abrams, 972 F.2d 792, 792 (7th Cir. 1992). In *Villanova*, the plaintiff was civilly committed against his will and brought an § 1983 action against the state psychiatrist. *Id*. Plaintiff claimed that his Fourth Amendment rights were violated because there was no probable cause to commit him and that his Fourteenth Amendment due process right was 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*.

Amendment continues to govern the latter.[95] Similarly, in *Reed*, the Seventh Circuit distinguished between "wrongful arrest claims" and "malicious prosecution claims."[96] 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 and that malicious prosecution claims concern the government's treatment of a suspect between the time of the suspect's probable cause hearing and his acquittal or detention and are governed by the Due Process Clause.[97]

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. For example, where, as in Harris, a forensic scientist manufactures evidence before a suspect is arrested and then testifies as to the reliability of that evidence at trial.[98] Presumably, under the Seventh Circuit's approach in *Villanova* and *Reed* conduct that occurred before there was a judicial determination of probable cause would be governed by the Fourth Amendment but the scientist's testimony regarding the reliability of the evidence would be judged under the Fourth Amendment reasonableness standard.[99]

As discussed in greater detail in Part IV, this complicates questions of causation because the plaintiff must prove that constitutional

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[95] *Id.*

[96] Reed v. City of Chicago, 77 F.3d 1049, 1051-52 (7th Cir. 1994) (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) (1994)). Reed brought a § 1983 suit when he was acquitted on murder charges after being held for twenty-three months. *Id.* at 1051-52.

[97] 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.*

[98] Harris Complaint, *supra* note 64, at __.

[99] *Reed*, 77 F.3d at 1051-52 (distinguishing between "wrongful arrest" claims and "malicious prosecution" claims). Depending on how a court chooses to distinguish between Fourth Amendment and Due Process violations, a similar problem might emerge when the alleged violated 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, 84 (1963) (holding suppression of any material evidence favorable to defendant violated due process). Was the court to apply Justice Ginsberg's concurring opinion in *Albright*, than the Fourth Amendment would seem to govern. Albright, 510 U.S. at 277-79 (J. Ginsberg, concurring) (finding seizure continues after custody ends). Nevertheless, regardless of when the supposed omission occurred courts have consistently treated this as Due Process violation. SEE E.G. INSERT STRING CITATION.

deprivation causes his injury to prevail in a § 1983 claim for monetary damages. 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). Accordingly, in the absence of a causal link, the defendant is not liable (at least for monetary damages) for his Fourth Amendment (pre-trial) violation.

In at least one case, the Fourth Circuit 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*, 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.[100] Washington alleged that the investigating officer, Special Agent Wilmore, had violated his Fourth Amendment rights by coercing his confession and had deprived him of his Fourteenth Amendment substantive due process rights by testifying as to the accuracy of the confession at trial.[101] Clearly, the court could have treated the confession and testimony as two separate events.[102] Instead, the court focused on the conclusion that Wilmore presented fabricated evidence at trial when he testified to the accuracy of Washington's confession.[103] Furthermore, the court used evidence of the coercion to conclude that Wilmore knew the evidence was fabricated. From this the court concluded that Wilmore had knowingly presented fabricated evidence at trial in violation of the Fourteenth Amendment substantive due process clause.[104]

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,[105] prosecutors,[106] and witnesses.[107] Thus, police officers who

[100] 407 F.3d 274 (4th Cir. 2005).
[101] *Id.*
[102] *See Castellano*, 352 F.3d at 959.
[103] *Washington*, 407 F.3d at 282.
[104] *Id*
[105] Pierson v. Ray, 386 U.S. 547, at 553-54 (1967) ("Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction").
[106] Imbler v. Pachtman, 424 U.S. 409, 422-423 (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).

introduce fabricated evidence at trial by testifying to the accuracy of scientific tests or the reliability of a witness's identification or suspect's confession are shielded from liability.[108]

In the end, courts' recent approaches to § 1983's "constitutional deprivation" requirement forces exonorees 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 exonoree "on the horns of a dilemma." If the plaintiff focuses on the defendants' conduct at trial he is unlikely to recovery damages from the defendant because, again, most participants in the judicial process are shielded from monetary liability by some form of judicial immunity.[109] On the other hand, as is discussed in the next section, if he 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, obviously, is where most injuries are sustained in wrongful conviction cases.

IV. THE TWO FACES OF CAUSATION

Even if an exonoree 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 a federally protected right, he is not necessarily entitled to relief under § 1983. 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.[110] Nevertheless, if a plaintiff establishes both of these elements he is simply entitled to declaratory judgment or nominal monetary damages.[111] Obviously, most § 1983 plaintiffs sue for a specific remedy[112] and, as one might imagine, the majority of § 1983 litigants seek monetary compensation.[113]

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[107] Briscoe v. LaHue, 460 U.S. 325, 326 (1983) (holding that witnesses are absolutely immune from damages liability under § 1983 when liability is premised based on their trial testimony, even when witness has perjured himself.)

[108] *See id.*

[109] *See, supra* notes 106-108.

[110] *Gomez*, 446 U.S. at 640 ("By the plain terms of § 1983, two-and only two-allegations are required in order to state a cause of action under that statute.")

[111] Carey v. Piphus, 435 U.S. 247, 266-267 (1978) ("we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury").

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So, while on it's 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. The first portion of this section briefly explains why, under current § 1983 jurisprudence, most § 1983 claims actually consist of more than two elements. Part 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 B of this Section provides an overview of 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 government official being sued caused the plaintiff to be deprived of a federally protected right. "Statutory causation" only becomes a point 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 B, which is the focus of this piece, discusses how courts have treated "damages causation" in § 1983 claims for monetary damages.

A. The Elements of § 1983 Actions for Monetary Damages

In *Carey v. Piphus*, the Supreme Court held that a plaintiff who alleges 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.[114] Shortly thereafter, the Court extended *Carey's* holding to all § 1983 cases for monetary damages, regardless of the alleged underlying constitutional deprivation.[115] 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 the plaintiff seeking monetary damages pursuant to § 1983 violation prove an actual injury. Implicitly, however, these holdings also insert a causation element into in constitutional tort cases for monetary relief. A careful examination of the case reveals that, to recover significant monetary damages

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[114] *Carey*, 435 U.S. at 266-267 (1978) ("we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury"). 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.

[115] Memphis Community School District v. Stachura, 477 U.S. 299, 309-310 (1986) (extending *Carey's* actual injury requirement to all § 1983 cases regardless of the underlying constitutional violation.).

under § 1983, a plaintiff must prove (1) an actual injury and (2) that the defendant's constitutional violation caused this injury. 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 him to be deprived of a constitutional (or federally protected statutory right) (3) that the breach was the proximate cause (4) of the plaintiff's actual injury.[116]

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.[117] 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, as suggested in the preceding paragraphs, after *Carey*, causation plays two important roles in § 1983 litigation for monetary damages.[118] In addition to the causation element established in the plain language of the statute, plaintiffs seeking a monetary remedy (beyond nominal damages) must also prove that the alleged constitutional deprivation caused an actual injury. 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.[119] In most cases, the plaintiff establishes

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[116] Lockhart-Bembery v. Town of Wayland Police Dept., 447 F.Supp.2d, 11 (D. Mass. 2006) ("[I]n order to prevail on a § 1983 claim, a plaintiff must prove, by a preponderance of the evidence, that 1) the defendant acted under color of state law, 2) the defendant deprived the plaintiff of her rights secured by the Constitution and and 3) such actions were the proximate cause of the plaintiff's injuries and damages.").

[117] *See, e.g.*, Barbara Kritchevsky, *"Or Causes to be Subjected": The Role of Causation in § 1983 Municipal Liability Analysis*, 35 UCLA L. REV. 1187 (1988).

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

[119] *See, generally*, 42 U.S.C. § 1983 (1996). In *Monell v. Department of Social Services of City of New York*, the Court concluded the following:

"statutory causation" by simply proving that the defendant engaged in conduct that violated the constitution.[120] When a plaintiff proves the defendant engaged in the conduct, 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.[121] Similarly, "statutory causation" is relative clear when, through policy or custom, a municipality orders its employees to engage in conduct that violates the Constitution.[122] 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, nevertheless, through inaction caused the plaintiff to be deprived of a constitutional right.

In *Monell*, the Court held that a municipality would be liable when "official municipal policy of some nature caused a constitutional tort."[123] It is important to understand that these are two separate elements. § 1983 municipal liability requires prove (1) official

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> [T]he language of § 1983, read against the background of the same 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.

Monell v. Department of Social Services of City of New York, 436 U.S. 658, (1978); *see also* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF § 1983 § 3:108 (4th ed. 2005) ("As emphasized in the Supreme Court's decision in *Monell v. Department of Social Services*, the very language of § 1983 requires causal relation between defendant's conduct and plaintiff's constitutional deprivation.")

[120] *See, generally,* Kritchevsky, *supra* note 118.

[121] *See, generally,* CASTELLE & LOFUS, *supra* note 1. Rather, the legal debate would likely focus on (1) whether Zain "doctored" the evidence and (2) if so, 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.

[122] Board of County Com'rs of Bryan County, Okl. v. Brown 520 U.S. 397, 405 (1997) ("the 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").

[123] *Monell*, 436 U.S. at 691.

municipal policy that (2) caused the plaintiff to be deprived of a constitutional right.

There are, essentially, four ways that a plaintiff may establish "policy"[124] A municipality is clearly liable when it promulgates a policy that compels its officials to violate the constitution.[125] 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.[126] Similarly, municipal liability is triggered when a plaintiff establishes that the constitutional tort was committed, compelled, or ratified by an official with final policy-making authority.[127] 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.[128] 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 screen employees) amounts to a municipal policy, the plaintiff must demonstrate that the municipality's failure to act evidences a "deliberate indifference to

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[124] I use the term "policy" loosely. As the court explained in *City of Canton*, "[i]t may seem contrary to common sense to assert that a municipality will actually have a policy of note taking reasonable steps to train its employees." Nevertheless, "where a failure to train reflects 'deliberate' or 'conscious' choice by a municipality" it may be considered a "policy" for § 1983 municipal liability purposes. City of Canton, Ohio v. Harris, 489 U.S. 378, 389-91 (1989).

[125] *Monell*, 436 U.S. at 694-695. 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 (1986) (addressing whether a decision by municipal policymakers on a single occasion amounts to a policy capable of triggering § 1983 municipal liability);

[126] *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 decision making channels.")

[127] St. Louis v. Praprotnik, 485 U.S. 112, 123 (1988) (holding that only decisions made by those officials who have final policymaking authority may only be attributed to the municipal, thereby triggering rendering the municipality liable for "its" conduct); City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) (If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents an act of official government "policy" as that term is commonly understood.); *Pembaur*, 475 U.S. 469 (1986).

[128] *City of Canton*, 489 U.S. at 389 ("the 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.").

the rights of persons with whom the [governmental officials] come into contact."[129] In other words, (and somewhat counter-intuitively), "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.[130]

Most circuit courts also have recognized supervisor liability in § 1983 actions.[131] 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 require personal participation to be a predicate for § 1983 liability.

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[129] *Id*. at 388.

[130] *Board of County Commissioners*, 520 U.S. at 409. 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; *see also*, Kritchevsky, *supra* note 118, at 1226-27 (noting courts applying a "fault model" "are able to avoid conducting a causation analysis in each case because they have required plaintiffs to prove municipal toleration or encouragement of unconstitutional conduct in order to establish the existence of a policy or custom.").

[131] *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1297-98 (1986) (recognizing that vicarious liability does not apply in a claim brought under § 1983). See also *Polk Co. v. Dodson*, 102 S.Ct. 445, 453 (1981); *Thibodeaux v. Arceneaux*, 768 F.2d 737, 739 (5th Cir.1985)(per curiam); *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987); *Iskander v. Village of Forest Park*, 690 F.2d 126, 128 (7th Cir.1982); *Belcher v. City of Foley*, 30 F.3d 1390, 1396 (11th Cir.1994). 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)(citation omitted). The Eleventh Circuit has recognized that, "It is axiomatic, in § 1983 actions, that liability must be based on something more than a theory of respondeat superior." *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086 (11th Cir.1986) (citing *Monell v. Department of Social Servs.*, 98 S.Ct. 2018, 2036 (1978)); See also *Polk County v. Dodson*, 102 S.Ct. 445, 453, (1981); But see *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (citing *Hesselgesser v. Reilly*, 440 F.2d 901 (9th Cir. 1971): "If state law imposes liability upon a public official for the acts of his subordinates, vicarious liability can also be imposed upon him under § 1983).

The Supreme Court has stated that, "[a] causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary."[132] 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.[133] Most 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.[134]

C. "Damages Causation" – Causation as a link between the Defendant's constitutional breach and the plaintiff's actual injury.

With the exception of cases where the defendant is a supervisor or municipality, statutory causation 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. Damages causation, however, may not be so easily assumed. Legal scholars discussing *Carey* typically focus on the "actual injury" aspect of the decision;[135] yet, *Carey's* holding 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.[136] At trial, the district court concluded that the students had, in fact, been deprived of their due process rights.[137] However, the court held

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[132] *Rizzo v. Goode*, 96 S.Ct. 598, 603-07 (1976).

[133] *See Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869 (7th Cir.1983); *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976) (citation omitted) ("The proper question is . . . whether the complaint adequately alleges the requisite causal connection between the supervisory defendants' actions and a deprivation of plaintiff's constitutional rights.").

[134] *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977) (refusing to impose liability on supervisor in the absence of evidence that he participated directly in the hearings that were the root cause of the plaintiff's constitutional deprivation); *Wright v. Smith*, 21 F.3d 496 2nd Cir. 1994; *Richardson v. Goord*, 347 F.3d 431, 435 (2nd Cir. 2003) ("Mere linkage in the prison chain of command is insufficient to implicate a state commissioner of corrections or a prison superintendent in a § 1983 claim.")

[135] *See, e.g.*, Note, *Damage Awards for Constitutional Torts: A Reconsideration after Carey v. Phipus*, 93 HARV. L. REV 966 (1980).

[136] Carey v. Piphus, 435 U.S. 247, 248 (1978).

[137] *Id*. at 251-52.

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.[138] On appeal, the circuit court reversed and held "even if the District Court found on remand that respondent's suspensions were justified, they were entitled to recover substantial nonpunitive damages simply because they had been denied procedural due process."[139] 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."[140]

Quoting from Law of Torts, the Court noted, "the cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by the defendant's breach."[141] From this, the Court concluded that § 1983 damages awards should be based upon compensation and "substantial damages should be awarded only to compensate for actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights."[142] 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 interested 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.

[143]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.

The damages causation requirement set forth in *Carey*, as well as the importation of tort common law causation principles has important implications to § 1983 cases, particularly those cases in

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[138] *Id*.
[139] *Id*. at 252.
[140] *Id*. at 253.
[141] *Id*. at 254-55.
[142] *Carey*, 435 U.S. at 266.
[143] *Id*. at 258-59.

which the plaintiff claims he was convicted and incarcerated as a result of a pre-trial constitutional breach. Courts have used both factual causation and legal causation as a way to limit defendant's 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.[144] "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 occurred if the defendant had not engaged in the wrongful conduct at issue"[145]

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. [146] Several problems may arise in this "imagine if" analysis, most of which are variations on the classic problem of multiple actors.[147]

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[144] Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1734, 1759-1760. Although some legal scholars have argued that court's should consider 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*.

[145] David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1769 (1997) (explaining 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; (e) answer the question.")

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

[147] 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, 93 Cal.App.2d 43, (applying doctrine of *res ipsa loquitor* where plaintiff suffered injury during surgical procedure and was unable to identify which particular defendant caused the 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 Laboratories, 26 Cal.3d 588 (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 (Minn. 1920) (applying "material or substantial" factor test where multiple fires, only one started by the defendant, combined to burn the plaintiff's property). Finally, the plaintiff may be able to prove that multiple defendants committed

As indicated in Section 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.[148] A careful study of the Harris case (discussed at the beginning of this Article), demonstrates that Harris' conviction was the result of many factors:

> Four components led to the wrongful conviction of William primary Harris . . . . First, the victim appears to have been repeatedly exposed to suggestive interviewing techniques . . . . Second, whether unintentionally 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 prosecutions 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 weaknesses in the prosecution's case.

[149]Even assuming the forensic scientist deprived Harris of his Fourteenth Amendment due process rights when he "doctored" the forensic evidence pre-trial,[150] 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

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multiple breaches of duty and that he suffered multiple injuries but the plaintiff is unable to prove which defendant caused which particular injury. *See, e.g.*, Campione v. Soden, 150 N.J. 163, 183 (1997) (discussing apportioning liability in "double impact" cases).

[148] CASTELLE & LOFUS, *supra* note 1 at __.

[149] *Id*. at _.

[150] As discussed in greater detail in Part II, the forensic examiner should have absolute immunity for the testimony he offered at trial. *See*, *supra* Part II (discussing witness immunity). Therefore, he will only be liable for unconstitutional acts occurring outside of the courtroom. *Id*.

testimony of the eye-witnesses provided enough evidence for a jury to convict Harris.[151]

For example, in *Castellano* the plaintiff was convicted and incarcerated for arson.[152] 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 pre-trial that was introduced during his criminal trial.[153] 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.[154]

A jury found that two of the defendants were liable for "malicious prosecution" and awarded the Castellano $3,000,000 in compensatory damages for his conviction and injuries stemming from that conviction and $500,000 in punitive damages against the two defendants.[155] The defendants appealed the verdict, arguing that "the judgment against them rests on an impermissible blend of state tort and constitutional rights and that Castellano at best has only a Fourth Amendment claim."[156] In response, plaintiff "urge[d] that all damages flow from the initial wrongful arrest and seizure in violation of the Fourth Amendment."[157]

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[151] The preponderance of evidence standard applicable in civil cases is clearly less onerous than the harmless error standard applied in criminal appeals. *See, generally*, Garrett, *supra* note 36. Nevertheless, to establish the necessary factual link between the unconstitutional conduct and 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.

[152] 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. The state court hearing plaintiff's habeas petition concluded that the defendants "collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt in this case." *Ex parte Castellano*, 863 S.W.2d 476, 479 (Tex.Crim.App.1993).

[153] Castellano v. Fragozo, 352 F.3d 939, 942 (5th Cir. 2003).

[154] *Id*.

[155] *Id*. at 944.

[156] *Id.*

[157] *Id*. Plaintiff's First, Fifth, Sixth, and Eighth Amendment claims were all dismissed relatively early in the case. *Id*. Additionally, the magistrate judge assigned the task of resolving the parties pre-trial motions held that the plaintiff could only pursue his "malicious prosecution" claim under the Fourth Amendment, not the Fourteenth. Accordingly, only plaintiff's Fourth Amendment claim went to the jury. *Id*.

On appeal, the Fifth Circuit held that magistrate judge had misinterpreted *Albright* when he concluded plaintiff's claims only implicated the Fourth Amendment.[158] The circuit court reasoned that the Fourth Amendment only "casts its protection solely over the pretrial events of a prosecution" and that "the 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." 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.[159] More specifically, the court held that the defendant's pretrial actions (i.e., the conduct which deprived plaintiff of his Fourth Amendment rights), did not necessarily cause plaintiff's subsequent conviction and incarceration.[160] The court offered the following reasoning for its conclusion:

> The 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.[161]

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

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[158] *Castellano*, 352 F.3d at 958 ("this reading of the Fourth and Fourteenth Amendments was deeply flawed. It swept too wide in two directions: simultaneously holding that Albright closed the door to any claim of a deprivation of due process and that the protections of the Fourth Amendment extended to events at trial.").
[159] *Id*. at 959.
[160] *Id*.
[161] *Id*.

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." [162] 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 committing arson.[163] The defendants fabricated evidence to make it appear that Castellano confessed to the crime and perjured themselves in signed affidavits.[164] Based upon this information, a judge issued a warrant and Castellano was arrested and indicted.[165] In the absence of probable cause (as would seem to be the case here) arresting plaintiff was unreasonable and in violation of his Fourth Amendment rights.[166] 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' pre-arrest actions began a chain of events that ended with the plaintiff being sentenced to five years probation. If the defendants did not fabricate evidence and perjure themselves to obtain the arrest warrant, the Castellano would never have been sentenced.[167] 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 defendants Fourth Amendment violation and the plaintiff's injuries.[168]

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[162] Robertson, *supra* note 148, at 1771.
[163] *Castellano*, 352 F.3d at 943.
[164] *Id*.
[165] *Id*.
[166] *Albright*, 510 U.S. at 274.
[167] *See Castellano*, 352 F.3d at 943 ("The investigation led to Castellano, largely on the testimony of Maria Sanchez and a tape recording she produced with a recorder supplied by Fragozo.")
[168] "The plaintiff has the burden of proving the causal link between the 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 the cause in fact of plaintiff's harm." Davidson, *supra* note 146, at 1773-74 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 270 (5th ed. 1984). "The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred had the defendant acted otherwise." W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 41, at 269-70 (5th ed. 1984). "If as expected, under the circumstances, to produce a

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 the Harris's conviction and incarceration even though it is relatively clear that each defendant at least *contributed* to the harm.[169] As explained in the preceding paragraphs, Harris's conviction was the result of at least four factors, including witness misidentification, suggestive interview 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) breach, 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.[170]

In such situations, a "substantial factor" test may resolve the problem of establishing causation when there are multiple causes contributing the plaintiff's injury. The "substantial factor test" stands for "the principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries."[171] 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 the Court holds that § 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."[172] 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."[173]

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particular result, and that result in fact has followed, the conclusion may be permissible that the causal relation exists." *Id*. at 270.

[169] *See supra* pages 1-2 (discussing facts of the Harris case).

[170] Cases such as this are sometimes referred to as overdetermined causation cases. *See, e.g*,. Richard W. Wright, *Causation in Tort Law*, CAL L. REV. 1735, 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 were either (1) 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.").

[171] BLACK'S LAW DICTIONARY __ (__ed. year).

[172] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

[173] *Id.*

As I discuss in section 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 fails to make it clear whether the substantial factor burden-shifting rule goes to remedy or liability.[174] Professor Nahmod argues *Lesage* clearly indicates that the substantial factor burden shifting rules addresses the question of liability.[175] In other words 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 constitutional violation. 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.[176] This interpretation, however, does not account for situations where 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.[177] 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,

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[174] *See* Sheldon Nahmod, *Mt. Healthy and Causation-in-Fact: The Court Still Doesn't Get It!*, 51 MERCER L. REV. 603, 607 (1999-2000) ("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.")

[175] *Id*. at 609 ("in November 1999 the Court in Lesage . . . declared that Mt. Healthy's burden-shift rule goes to liability in all § 1983 damages actions based on First Amendment and Equal Protection Clause violations.).

[176] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 27 (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.")

[177] Because wrongful convictions are often the result of many factors, this situation often arises in this context. *See* CASTELLE & LOFUS, *supra* note 1, at 9-10 (describing various factors that may bring about wrongful convictions).

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."[178]

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.[179] 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. 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, [180] 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 factual cause of the plaintiff's injury.[181] 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.[182] Although the "substantial factor" test is often

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[178] RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARMS § 27 (2005)

[179] *See, supra* page 32.

[180] Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEX. L. REV. 471, 471 (1950) ("Having no integrated meaning of its own, the chameleon quality of proximate cause permits it be substituted for any of the elements of a negligence case when decision on that element becomes difficult"); W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 41, at 300 (5th ed. 1984) (describing proximate cause as "something that is difficult, if not impossible, to put into words").

[181] W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 41, at ___ (5th ed. 1984) (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").

[182] 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]lawyers, 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,

understood as a test for factual causation, The Second Restatement also uses the substantial factor test to determine whether a particular act is the legal or proximate cause of the plaintiff's injury.[183] 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 . . .

[184]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"[185] and the "average sense of justice" test, which balances "competing individual and social interests."[186]

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 natural consequences of his actions'"[187] Nevertheless, many federal courts have adopted a far more

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> 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.

[183] RESTATEMENT (SECOND OF TORTS) § 431 (year)

[184] *Id.*

[185] 8 HOLDSWORTH, A HISTORY OF ENGLISH LAW 450 (2d. ed 1937).

[186] Henry W. Edgerton, *Legal Cause*, 72 U. PA. L. REV. 210, 343 (1924).

[187] Malley v. Briggs, 475 U.S. 335, 345 n.7 (1986) (citing Monroe v. Pape, 365 U.S. 167, 187 (1961)) (noting that § 1983 causation "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.").

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). The second approach requires that plaintiff's harm be related to the risk the constitutional amendment was intended to protect. 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 which the defendant violated was intended to protect the plaintiff from the injury suffered. 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 handful of § 1983 plaintiffs to receive significant monetary damages for injuries suffered as a result of his post-conviction incarceration where a large portion of the defendant's unconstitutional conduct occurred pre-trial.[188] In Washington, the Fourth Circuit makes the following observations regarding the defendant's pretrial conduct (before trial, Office Wilmore drafted a police report falsely claiming that Washington had voluntarily provided officers with non-public knowledge of the crime):

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[188] Alan Cooper, *Federal jury in Charlottesville awards man $2.25M for fabricated confession*, VIRGINIA LAWYERS WEEKLY, May 15, 2006 at ___. In May of 1983 Earl Washington Jr. confessed to the rape and murder of woman in Culpeper Virginia that had occurred one year prior. See Washington, 322 F.Supp. 2d at 706. 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 non-public information about the murder. *Id* at 709-710.

> Although 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 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. Bennett'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.[189]

Again, it is important to note that this "fabricated" evidence was obtained before Washington's trial. 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.[190]

In contrast, the court in *Castellano* adopted a more limited view of legal causation.[191] Like Earl Washington's conviction, Castellano's conviction was due, in large part, to evidence that was fabricated pre-trial and introduced at trial.[192] The Fifth Circuit's analysis of legal causation, however, did not focus on the defendant pretrial conduct but rather on the nature of the constitutional violation.[193] In other words, the court framed the approach to legal causation around the question of "whether the Fourth Amendment is intended to protect against the types of harms for which the plaintiff seeks damages." And, in short, the

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[189] Washington v. Buraker, No. CIVA302CV00106, 2006 WL 759675, at *8 (W.D. Va. 2006).

[190] Presumably, the report detailing Earl Washington's confession was drafted before the charges against him were even filed. *See* i*d*. Similarly, much of the defendant's bad conduct occurred pre-trial. *Id*. Nevertheless, the trial court focused on the effect that this evidence had at trial. *Id*.

[191] *See Castellano*, 352 F.3d at 959.

[192] *See*, *Ex parte Castellano*, 863 S.W.2d at 479 (concluding that the defendants "collaborated together and without their testimony and the altered tapes, there is insufficient evidence to sustain a finding of guilt.").

[193] *See, generally, Castellano*, 352 F.3d 939.

Court's answer was "no." 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. . . the Fourth Amendment will not support his damages arising from events at trial and his wrongful conviction."[194]

If one applies the "constitutional approach" to legal causation in the Washington case and the foreseeability 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.[195] 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 pre-trial conduct.[196] Stated slightly differently, a constitutional approach to

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[194] *Castellano*, 352 F.3d at 959. *Cf*, Hector v. Watt, 235 F.3d 154 (3rd Cir. 2000). In *Hector*, the Third Circuit applied an even more limited constitutional approach to legal causation. *Id*. There, the plaintiff was illegally detained in violation of his Fourth Amendment rights against unreasonable seizure while officers obtained a warrant to search his airplane. *Id*. at 155. After obtaining a warrant, officers searched the plane and found over 80 pounds of hallucinogenic mushrooms. *Id*. Plaintiff was charged and indicted, however, the criminal trial court suppressed the drugs because officers violated the Fourth Amendment when they detained Hector. *Id*. at 162 (J. Nygaard, concurring). 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*. Noting that, "The evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all" *Id*. at 157 (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." *Hector*, 235 F.3d at 157.

[195] The Court has stated that the Fourth Amendment only applies to conduct occurring during search and seizure. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (The Fourth Amendment covers only 'searches and seizures'"). 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., Torres v. McLaughlin*, 163 F.3d 169, 174 3d. Cir. 1988 ("We conclude that the limits of Fourth Amendment protection relate to the boundary between arrest and pretrial detention."); *Taylor v. Waters*, 81 F.3d 429, 436 (4th Cir.1996) (concluding that Fourth Amendment requirements are satisfied once a probable cause determination has been made); Bell v. Wolfish, 441 U.S. 520, 537 n.16 (1979) (applying 14th Amendment Due Process clause to determine constitutionality of pretrial detainees' punishment.).

[196] The Fifth Circuit notes that there may be a case where a plaintiff's recovers "damages arising from the trial and wrongful conviction, as opposed to his arrest

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 Fourth Circuit approached legal causation from a constitutional angle Washington would not entitled to damages stemming from the years he spent incarcerated during and after his trial.

On the other hand, 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 where the defendant's constitutional breach was a substantial factor in his subsequent conviction. Where, as here, there are two key pieces of evidence presented at trial – evidence the defendant fabricated pre-trial and the defendant's perjured testimony --- it seems fair to conclude that the defedant's pre-trial 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 post-seizure 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 begs 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 the constitutional provision was intended to protect against.[197] 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

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and pretrial detention, given the dismissal of all but Fourth Amendment claims." Castellano, 352 F.3d at 959.

[197] *See generally*, John C. Jeffries, *Damages for Constitutional Injuries: The Relation of Risk to Injury in Constitutional*, 75 VALR 1461 (1989)

> 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.[198]

In comparison, the tort-based substantial factor approach tends to emphasize the importance of compensating the "innocent victim."[199] Perhaps this is most evident in *Malley v. Briggs.*[200] In *Malley* the respondents filed a § 1983 claim against State Tropper Malley alleging that he violated their Fourth and Fourteenth Amendment rights by applying for an arrest warrant in the absence of probable cause.[201] At trial, the judge directed a verdict for the defendant because that the magistrate judge's act of issuing the arrest warrants "broke the causal chain between petitioner's filing of a complaint and respondents' arrest."[202] 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. . . § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[203] The Court recognized that where a § 1983 plaintiff "has done no wrong and has been arrested for no reason, or bad reason" he is "most deserving" of § 1983 relief.[204] This argument seems to reflect the belief that *causation* should not be used as a tool to deflect costs from a negligent or malicious defendant onto an "innocent" plaintiff.

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[198] *Id*. at 1470
[199] *Malley*, 475 U.S. at 343 (noting that person "most deserving of a remedy" in a § 1983 action is the "the person who in fact has done no wrong, and has been arrested for no reason, or a bad reason.")
[200] *Id*.
[201] *Id*. at 338.
[202] *Id*. at 339.
[203] *Id*. at 345 (quoting *Monroe* 365 U.S. at 187).
[204] *Id*. at 343.

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"[205] and have instead approached questions of legal causation in a far more restrictive way.[206] 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 that the alleged constitutional violation was intended to protect against. In contrast, the "tort based" approach limits liability to injuries that were a substantial factor.

[205] *Malley*, 475 U.S. at 343
[206] *See generally Castellano*, 352 F.3d 939.

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 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 section of the article argues, § 1983 jurisprudence has developed in such a way that the role of proximate cause in negligence actions – to limit liability to those situations where it justifiable – has already been satisfied by other elements, rendering the role of proximate cause in § 1983 redundant and largely unnecessary. Part 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 B then discusses the role of qualified immunity in § 1983 litigation and compares the policy concerns underlying the availability of qualified immunity and those legal theorists and courts use to rationalize proximate cause in negligence cases. This section concludes proximate cause is not only an unnecessary limit on liability § 1983 cases, but it is actually unjustified in those cases where the defendant has been denied a qualified immunity defense.

A. The History of Legal Causation

It has been more than a century since legal scholars began to approach causation as two separate inquiries – factual causation and legal, or proximate, cause.[207] The development of legal causation was driven by the "the practical need to draw the line somewhere so that liability will not crush those on whom it is put."[208]

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[207] *See Union Pump Co. v. Allbritton*, 898 S.W. 2d 773, 777 (Tex. 1995) (J. Cornyn, Concur) ("By the 1930s the [Legal] Realists' influence was felt in American law by the innovation of a new distinction between actual or but for causation, on the one hand, and legal or proximate causation on the other," citing Morton J. Horowitz, *The Transformation of American Law* 1870-1960, 63 (1992) (internal quotations omitted).

[208] James Fleming Jr. and Roger F. Perry; *Legal Cause*, 60 YALE L. J. 761, 784 (1951); *see also, e.g., Bouriez v. Carnegie Mellon Univ.*, 2007 U.S. Dist. LEXIS 64271, *18-*19 (W.D. Pa. Aug. 30, 2007) (Explaining "[l]egal or proximate causation involves a determination that the nexus between the

To truly assess the role legal causation should play in § 1983 litigation it is imperative that we view legal causation in a more general context. Legal causation is only one half of the causation inquiry. As discussed in greater detail in Part III, causation consists of two parts --- factual causation and legal causation.

Again, factual causation is often a "simple" inquiry – requiring only that "but for" for the defendant's breach, the plaintiff would not have suffered his injury.[209] Strictly applied, "but for" causation has the potential to result in endless liability.[210] The purpose of legal causation is to limit liability to the cases in which the defendant "should" be liable.[211] 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.[212] In short, legal causation is intended to limit defendant's liability to those situations in which the defendant has acted "wrongfully." [213]

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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.").

[209] *See Kilpatrick v. Bryant*, 868 S.W.2d 594, 598 (Tenn. 1993) ("Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct."). *See also Nielson v. Eisenhower & Carlson*, 999 P.2d 42, 46 (Wn. App. 2000) ("In a tort action, proximate cause consists of two elements: cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act, that is, the immediate connection between an act and an injury. The 'but for' test requires a plaintiff to establish that the act complained of probably caused the subsequent disability.")

[210] "It has been said that something as small as the flutter of a butterfly's wing can ultimately cause a typhoon halfway around the world." Similarly, it would seem that under a theory of "but-for" cauastion one negligent act can result in a harm several years in the future.

[211] *See* Leon Green, *Judge and Jury* 196 (1930) ("[t]he problems dealt with under 'proximate causation' involve limitations upon legal responsibility or legal protection-- the phase of legal theory concerned with rights and duties.").

[212] *See* Joseph Bingham, *Some Suggestions Concerning 'Legal Causation' at Common Law*, 9 COLUM. L. REV. 16, 35 (1909) (arguing the question is really whether defendant's conduct was a "legally blamable" cause of plaintiff's damage). Bingham stressed 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… consequences." *Id*.

[213] *See* PROSSER AND KEETON ON THE LAW OF TORTS, § 41, p. 264 (5th ed. 1984). ("As a practical matter, legal responsibility must be limited to those causes which are so closely connected with the result and of such significance that the law is justified in imposing liability. Some boundary must be set…"); *see also Nielson v. Eisenhower & Carlson*, 999 P.2d 42, 46 (Wn. App. 2000) ("Legal causation rests on policy considerations determining how far the consequences of a defendant's act should extend. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact.").

Obviously, whether a particular act should be considered "wrongful" is subject to debate. It is precisely this reason that "legal causation" remains undefined despite a hundred year discussion of its meaning. Whether a particular act is wrongful will necessarily depend upon the policy considerations that one wishes to advance.[214] Tort cases discussing the policy reasons for legal causation often cite "justice and fairness."[215] Clearly, however, one's view of justice and fairness will depend upon whether he 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 however, one's primary policy goal is deterrence, 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, liability will not deter similar future conduct. In contrast, if one adopts an economic view of blameworthiness, generally, a defendant's conduct will only be deemed wrong if the monetary costs of his act outweigh its monetary benefits.[216]

Regardless of the arguments in favor of one approach as opposed to another, in the end, given its policy-based foundation, legal causation is likely to remain a worthy discussion point. So, rather than debate the merits of one approach and shortcomings of

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[214] *See* PROSSER AND KEETON ON THE LAW OF TORTS, § 41, p. 273 (5th ed. 1984) ("whether the policy of the law will extend the responsibility for the conduct to the consequences which have in fact occurred.").

[215] *See, e.g.*, Wilkerson v. Michael, 104 Md.App. 730, 821 (1995) (noting that considerations of justice and fairness may militate against liability."); Sumpter v. City of Moulton, 519 N.W.2d 427, 435 (Iowa App.,1994) ("The policy [of proximate cause] is based on fairness and justice and seeks to restrict legal responsibility of a tort-feasor to those causes that are so closely connected with the result that our legal system is justified in imposing liability"); Seidel v. Greenberg, 260 A.2d 863, 874 (N.J. Super. L. 1969) ("once the matter of causation in fact has been established, the matter is largely one of policy justice and fairness").

[216] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (applying economic formula (PL<B) 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 AMERICAN. JURISPRUDENCE. 2D NEGLIGENCE § 485 (2008).

another, I feel it more appropriate to consider *why* both academics and scholars deemed it necessary to dissect causation into two separate inquiries – one factual and the other policy based.

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 bases for liability, negligence is relatively "young"[217] The theory of negligence liability emerged from two older forms of action – trepass and trespass on the case. Under a 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.[218] Trepass on the case, which grew out of the theory of trepass, expanded liability by allowing litigants to recover for injuries to self or property that were not the to result of "direct or immediate force or violence."[219] Gregory explains the relationship among trespass, trespass on the case, and negligence as follows:

> [B]ecause [those who sued in 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

[220]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 by some fault of the defendant he suffered an injury.[221] As such, trespass on the case extended the basis for

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[217] Patrick Kelley, *Proximate Cause in Negligence Law: History, Theory, and the Present Darkness*, 69 Wash U. L. Q. 49, 61 (1991) ("[n]egligence 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.").

[218] *See* Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 361-62

[219] *See* Edwin E. Bryant, *The Law of Pleading Under the Codes of Civil Procedure* 7 (2d ed. 1899) (explaining the writ of "trespass on the case" was analogous to the writ of trespass but allowed litigants to recover when the sustained physical contact was not the result of "direct or immediate force or violence.")

[220] Gregory, *supra* note 19, at 363.

[221] *Id.* Gregory offers the following useful example to distinguish between liability under the writ of trespass and liability under the writ of trespass on the case:

liability so long as the plaintiff could prove fault. And as trespass on the case gradually transformed into the substantive law of negligence, proximate cause emerged as one of the devices by which courts could limit a defendant's liability. These limitations were based upon policy considerations as to when a defendant should be liable for injuries resulting from his careless or negligent acts.[222] 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, proximate cause only became an element of tort law as the law of negligence took root. [223]

B. Qualified Immunity and Proximate Cause: A Comparison

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

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> Suppose the defendant in a particular instance was building a house adjacent to the highway. As he was carrying a beam along a scaffold, he stumbled and unintentionally hit a passerby named White on the head, causing him severe harm. While could easily procure a write of trespass and recover damages. It was immaterial that the defendant dropped the beam unintentionally; and it made no difference whether or not the defendant was negligent or otherwise at fault. This was a trepass under the early law; and this primitive conception of trespass implied all the fault that was necessary for liability.
>
> Shortly thereafter, let us assume, Black came walking along and stumbled over the beam, falling so that his head hit the beam, with the result that he sustained identically the same harm as that suffered by While. Suppose that the defendant had not had time to remove the beam from the sidewalk nor to post warnings; and also assume that Black neither saw the beam as he walked along nor was careless in having failed to see it. When Black sought a writ entitling him to sue the defendant, there was none available which was appropriate for his case; and he was unable to recover damages. That was because there was no trespass by the defendant against him, since the force initiated by the defendant had come to rest before Black was hurt . . . . This apparent unbalance of justice was no doubt responsible for the creation of new write, to be issued in situations where harm had occurred otherwise than by a direct or trespassory contact. This new writ was called 'trepass in a similar case.'"

[222] *See* Jerry J. Phillips, *Thinking*, 2 Tenn. L. Rev. 697, 741 (2005) (noting that proximate cause is "bound up in doctrinal and policy considerations.").

[223] *See, e.g.*, Kelley, *supra* note 218 at 56-57 (concluding "[m]odern proximate cause doctrine in [sic] tort law seemed to spring up, without identifiable tort law antecedents, in the middle of the nineteenth century.").

Court recognized the "good faith" or qualified immunity defense[224] for the first time in *Pierson v. Ray*.[225] In *Pierson*, a group of ministers participating in the "Freedom Rides" filed a § 1983 claim against local judges and police officers alleging that their arrests and convictions were in violation of the Constitution.[226] The ministers, however, were arrested four years before the Court held that the statute under which the ministers' were arrested was "unconstitutional as applied to similar facts."[227] Recognizing that holding the defendant police officers liable in such a situation would place them 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," the Court concluded that "the defense of good faith and probable cause . . . is available to [officers] in [an] action under § 1983."[228] Specifically, the Court held that "they 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."[229] As the Court continued to refine the good faith qualified immunity defense throughout the 1970's it made clear that an official would not be liable for conduct that deprived another of a federally protected right so long as she acted in "good faith."[230]

Although *Wood's* good faith qualified immunity defense protected officials from monetary liability, it did not protect 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 go to trial to prove that they were entitled to qualified

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[224] The Court does not actually use the phrase "qualified immunity" until *Scheuer v. Rhodes* in 1974. 416 U.S. 232, 247-48 (1974).

[225] Pierson v. Ray, 386 U.S. 547 (1967). The ministers, however, were arrested in 1961 – four years before the Court handed down its decision. *Id*. at 549. Because it was not clear that the statute was unconstitutional at the time of the plaintiffs' arrest, the defendants argued "they 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." *Id*. at 555 ("they 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"). Noting that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does," the Court concluded that "the defense of good faith and probable cause . . . is available to [officers] in [an] action under § 1983." *Id*. at 557 (1967).

[226] Pierson v. Ray, 352 F.2d 213, 215 (Miss. 1965).

[227] Pierson, 386 U.S. at 549, 550.

[228] *Id* at 555.

[229] *Id*.

[230] Wood v. Strickland, 420 U.S. 308, 322 (1975).

immunity.[231] This, of course, required defendants to participate in the pre-trial 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* the Court revamped the "good faith qualified immunity" test by eliminating the "good faith" or subjective prong.[232] Specifically, the 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."[233] The Court went onto 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.

[234]The Court's subsequent interpretations of *Harlow* and qualified immunity indicate that qualified immunity protects officials from conduct that is not at least reckless or malicious. For example, in *Malley v. Briggs*, the Court noted, "as the qualified immunity defense has evolved, it provides ample protection to all but the

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[231] Harlow v. Fitzgerald, 457 U.S. 800, 815-17 (1982).

[232] *See Harlow*, 457 U.S. at 815-17 ("The subjective element of the good-faith defense frequently has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial. . . . Bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."(citing Butz v. Economou, 438 U.S. 478 (1978)).

[233] *Id* at 818.

[234] *Id* at 818-19.

plainly incompetent and those who knowingly violate the law."[235] As Professor Armacost argues, "[an] important rationale for qualified immunity . . . is that it would be unfair to hold governmental officials to constitutional rules they could not reasonably have known."[236] Armacost explains, "officials who make reasonable legal judgments that are later adjudicated unconstitutional may not be sufficiently blameworthy to warrant the imposition of constitutional damages liability."[237] In short, qualified immunity limits liability to those situations where the defendant was somehow "blameworthy." As such, qualified immunity, like proximate cause acts as a limitation on liability.

Furthermore, once qualified immunity is introduced as a determining factor in § 1983 litigation, liability under § 1983 becomes markedly different from liability under a 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.'"[238] In other words, qualified immunity insures that only those officials who should *know* their conduct is illegal are liable.

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). § 2.02 of the Model Penal Code divides levels of culpability into four categories: (1) purposefully[239] (2) knowingly[240] (3) recklessly[241] and (4) negligently.[242] Under the

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[235] *Malley*, 475 U.S. at 341. Although decided before *Harlow*, in *Scherer*, 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).

[236] Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 588-89 (1998).

[237] *Id.* at 590

[238] *United States v. Lanier*, 520 U.S. 259, 270 (1997).

[239] MODEL PENAL CODE § 2.02 ("A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.").

[240] *Id*. ("A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.").

common law of torts "no fault" may be considered a fifth category of culpability.[243] 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, the § 1983 statute does not require any specific state of mind.[244] Nevertheless, qualified immunity, which shields government officials from monetary liability even in those cases where there has been statutory deprivation, does introduce a state of mind requirement – qualified immunity insures that only those persons who recklessly or intentionally disregard plaintiffs' rights are liable for monetary damages.[245] This, in turn, means that government officials are not liable under § 1983 for merely negligent conduct. As such, the level of culpability required for § 1983 monetary liability is higher than that required for a torts negligence claim.

Given the fundamental difference between the level of culpability required for § 1983 liability and that required for negligence

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[241] *Id.* ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.").

[242] *Id.* ("A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.").

[243] 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 Products, Inc., 59 Cal.2d 57, 62 (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.").

[244] 42 U.S.C. § 1983; *see* John C. Jeffries, *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 bythe definition of the underlying right.").

[245] *See id.* (noting that qualified immunity will preclude damages when "a government officer reasonably believes in the lawfulness of action that the courts subsequently disapprove.").

liability, the Court's decision to limit § 1983 liability based upon those 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 negligently 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, *Harris*, *Washington*, and *Castellano*, the defendants intentionally manipulated evidence so that the suspects would appear guilty in their criminal trials. There is little question that it is unconstitutional to fabricate evidence, as each of these defendants did. Furthermore, where, as here, the defendant has violated a clearly established constitutional rule, he will not be entitled to a qualified immunity defense. Despite all of this, some courts have used causation to limit defendants' liability in these circumstances.

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. Courts approach to causation in § 1983 is 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've been convicted --- they are innocent of any civil wrong. Nevertheless, courts have used causation as a basis to deny exonorees monetary compensation for their wrongful convictions.

Often, questions of liability, regardless of the context, involve complicated questions of caustion, 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 they have not adequately considered the way in fault and policy might influence causation determinations.

As discussed in Part IV, the Court has instructed 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."[246] Applying the common law of torts' negligence approach to causation determinations to

[246] Monroe v. Pape, 365 U.S. 167, 187 (1961).

causation determinations in § 1983 wrongful conviction claims can, in many cases result in a finding of no liability. Wrongful convictions almost never happen for one reason but instead are usually the result of several different acts. As such, they are not easily amenable to the but-for test for factual causation. The Court, however, has failed to offer any other test for factual causation in § 1983 claims. Additionally, lower courts have used legal causation to deny exonorees a monetary remedy against constitutional tortfeasors whose actions caused (or at least increased the likelihood of) their convictions. As Part IV details, courts typically apply one of tests to determine whether a defendant is the "legal cause" of an exonoree's conviction and ensuing damages. Under the "torts based" approach "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." In contrast, the "constitutional approach" "requires that plaintiff's harm be related to the risk the constitutional amendment was intended to protect."

This causal relationship required under the "constitutional appraoch" is more rigoros than that required under the "tort based approach." This 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." 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 exposes him to tremendous liability. However, in cases where the defendant has violated the constitution, which, in many cases, he has sworn to uphold, and a reasonable person in his position would *know* that his conduct was unlawful 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 casuation in § 1983 wrongful conviction cases have failed to consider how other determinations --- such as a conclusion that the defedant has violated the constitution and is not entitled to qualified immunity – might effect the policy considerations that underlie cauation 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 approach 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 --- but 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 practical perspective, by applying these tests in § 1983 litigation, the "wrong" of wrongful convictions might corrected, at least to some degree, through compensatory damages.