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INNOCENCE, HARMLESS ERROR, AND FEDERAL WRONGFUL CONVICTION LAW

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INTRODUCTION

Our criminal justice system now faces an opportunity to reexamine its fundamental underlying assumptions by learning from its worst miscarriages of justice. As DNA brings to light a growing number of cases in which innocent people were convicted, exonerees increasingly pursue civil rights lawsuits alleging that government misconduct caused the flawed convictions. These novel civil actions draw together civil rights, tort, and criminal law; upend longstanding limitations on criminal procedure remedies; and most importantly, point toward concrete solutions that can prevent such failures from recurring. The result promises to provide a catalyst for wide-ranging institutional reform, transforming the practices of law enforcement, prosecutors, defenders, and courts in the future.

Until recently, civil rights law offered little recourse for one of the worst deprivations the state can impose—the conviction and incarceration of an innocent person. Instead, in criminal law, landmark Warren Court decisions incorporated certain due process rights in order to secure a "fair trial" for the accused.[1] In the last several decades, however, the U.S. Supreme Court has stepped away from that commitment. The unpopularity of criminal procedure rights has grown due to the truth-defeating nature of their remedies, which exclude probative evidence of guilt or reverse otherwise reliable convictions. The Court proceeded to limit remedies with harmless error rules grounded in the notion that convictions deserve finality, because in general, convicted criminal defendants are actually guilty.[2] Such rules permitted, if not encouraged, appellate courts to hold constitutional error "harmless" by finding that other evidence before the jury could support its finding of the defendant's guilt.[3]

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1. *See infra* Part I.D.

2. *See infra* Part II.B; *see also* JOSEPH F. LAWLESS, PROSECUTORIAL MISCONDUCT: LAW, PROCEDURE, FORMS, at xii–xiii (2d ed. 1999) (characterizing modern harmless error doctrine as "basically a judicial assurance that nearly anything will be tolerated in regard to an obviously guilty defendant"); Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 VA. L. REV. 1, 7 (2002) (providing empirical evidence that harmless error "create[s] a firewall between constitutional rights and remedies"); Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2470 (1996) ("[T]he Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional 'rights' while waging counter-revolutionary war against the Warren Court's constitutional 'remedies' of evidentiary exclusion and its federal review and reversal of convictions.").

3. *See infra* Part II (discussing the U.S. Supreme Court's guilt-based focus in developing its harmless error doctrine, which originated in *Chapman v. California*, 386 U.S. 18 (1967)).

Over the past decade, DNA technology challenged the Court's assumption of guilt with the postconviction exoneration of mounting numbers of innocent people.[4] Those exonerees increasingly have filed federal actions seeking compensation from their former law enforcement accusers. The first wave of these actions nationwide has resulted in substantial judgments and settlements.[5]

Federal wrongful conviction actions share a novel construction—they incorporate criminal procedure rights as an element in a civil lawsuit. Such suits raise thorny questions of how due process rights designed to function in criminal trials translate to a civil rights action, questions which courts[6] and scholars[7] have not yet unpacked. Nor have scholars examined what larger impact such civil cases may have on criminal procedure.[8]

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4. *See infra* Part I.C.

5. For example, in *Newsome v. McCabe*, plaintiff James Newsome spent fifteen years in prison and presented no expert testimony on damages or any evidence of economic injury, and the jury awarded him $15 million in damages, an award affirmed by the U.S. Court of Appeals for the Seventh Circuit. *See* 319 F.3d 301, 302–03, 307 (7th Cir. 2003); *see also infra* note 32 (discussing recent significant settlement awards in wrongful conviction cases). A series of additional lawsuits are pending nationwide. *See* cases cited *infra* notes 30, 32.

6. One reason that courts had not dwelled on these issues is that wrongful conviction cases were rarely brought before DNA evidence was available. *See* discussion *infra* Part I.B.

7. No scholarship suggests any overarching theory accounting for how such hybrid claims function. A few writers have mentioned civil rights remedies for criminal procedure violations in passing, but not with any theory for translating criminal rights to civil rights. *See, e.g.*, John R. Williams, *Beyond Police Misconduct and False Arrest: Expanding the Scope of 42 U.S.C. § 1983 Litigation*, 8 SUFFOLK J. TRIAL & APP. ADVOC. 39, 61 (2003) (providing an excellent guide to malicious prosecution law, but as to due process claims, noting only in the conclusion that "other fair trial denials" may result in liability); Mitchell P. Schwartz, Comment, *Compensating Victims of Police-Fabricated Confessions*, 70 U. CHI. L. REV. 1119, 1125 (2003) (discussing the causation requirement in the context of claims for fabrication of confessions). The exeeption is Michael Avery, who discusses constitutional theory for civil claims based on *Brady v. Maryland*, 373 U.S. 83 (1963), and contends that civil due process law should provide the standard for such claims. *See* 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, 5–6 (2003). This Article takes a very different approach, asking how criminal due process fair trial rights translate in a civil rights action, where civil standards are relevant only as to the requirements of 42 U.S.C. § 1983 ("Section 1983"), and in particular, the causation requirement.

8. Most commentators who have considered Section 1983 lawsuits have expressed pessimism that such claims could provide recourse for the wrongfully convicted. *See, e.g.*, Adele Bernhard, *Justice Still Fails: A Review of Recent Efforts to Compensate Individuals Who Have Been Unjustly Convicted and Later Exonerated*, 52 DRAKE L. REV. 703, 708–25 (2004) (advocating compensatory legislation and describing barriers to civil suits in the law of immunity); Alberto B. Lopez, *$10 and a Denim Jacket? A Model Statute for Compensating the Wrongly Convicted*, 36 GA. L. REV. 665, 691–93 (2002) (concluding that "making a section 1983 claim against police officers

This Article suggests that the way to look at fair trial claims in a civil case is through the looking glass. Exonerations reverse the operation of the criminal procedure rights, not their remedies. In a civil case, constitutional error no longer appears as a procedural technicality asserted by a probably *guilty* convict. Instead, fair trial rights vindicate the truth, while government misconduct is revealed as having concealed evidence of a person's *innocence*, leading to a gross miscarriage of justice.

This reversal of the fundamental remedial paradigm leads to a doctrinal result that harmless error rules, which all but bar relief in criminal appeals, do not pose an obstacle in a civil case.[9] Unlike in a criminal appeal, where appellate judges have focused on whether evidence of guilt could excuse constitutional error, in a civil case, the tort law requirement of causation applies.[10] A jury decides whether unconstitutional official conduct *caused* the unfair trial of an innocent person.[11] Federal wrongful conviction cases also reveal that, in its enthusiasm for harmless error rules, the Court has shifted the evidentiary burden of proving error *not* harmless to criminal defendants by incorporating harmless error rules into the context of fair trial rights. Examples include the "materiality and prejudice" prong of the *Brady v. Maryland* right,[12] the right to effective assistance of counsel, the rule that unduly suggestive eyewitness identifications can be nevertheless reliable, and the totality of the circumstances test for coerced confessions.[13] In civil actions, where a plaintiff must simply satisfy the tort requirement of causation, those rules lose their harmful effect.

As a result, the underlying, substantive constitutional rights the Supreme Court carefully insulated in the criminal context are exposed for the first time. Criminal procedure rights, developed from the 1930s through the Warren Court era, are not just underenforced constitutional

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based upon a wrongful conviction is a daunting task with little chance of success"); Stephen M. Ryals, *Analysis of a Civil Rights Cause of Action: A Wrong in Search of a Constitutional Remedy*, *in* 2 18TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION 163, 165 (George C. Pratt & Martin A. Schwartz eds., 2002) (stating that, among other practical obstacles, "immunities, collateral estoppel, and the statute of limitations are all potential land mines" that may impede wrongfully convicted individuals from bringing civil suits to recover for their incarceration). However, these authors overdiagnose immunity as an obstacle. *See infra* Part V.D. Many scholars focus exclusively on weaker malicious prosecution claims. *See infra* Part I.B. There are an increasing number of viable cases raising fair trial claims as discussed in this Article. Further, enough of those cases exist nationwide, with large potential verdicts and political repercussions, that the deterrent effect may be substantial. *See infra* Parts I.A, V.

9. *See* discussion *infra* Part III.
10. *See* discussion *infra* Part III.
11. *See* discussion *infra* Part III.B.
12. 373 U.S. at 87.
13. *See* discussion *infra* Part I.V.

norms.[14] Rather, these constitutional norms have not been enforced or developed substantively except in the sense that criminal procedure exclusionary rules serve substantive goals. The deterrent effect of the exclusionary rules, however, remains equivocal, especially because the harmless error doctrine often prevents substantive vindication of even the modest goals of such rules.[15] That is, until now. With most avenues for substantive development of criminal procedure closed off, a new field of constitutional law awaits judicial definition.

This Article lays the groundwork for a larger project examining systemic institutional repercussions of exonerations and wrongful conviction suits.[16] In the years to come, federal wrongful conviction cases may spearhead wide-ranging reform of our criminal justice system. The criminal justice system has long been largely insulated from tort liability. Nor has the Supreme Court required as a matter of due process law protections shown to facilitate more reliable results, such as: double-blind lineups, sequential lineups, videotaping of confessions, enhanced discovery obligations of police and prosecutors, adequate representation and funding for indigent defense, and auditing of forensic crime laboratories.[17] After all, courts rarely reach violations of the relevant rights, instead finding error harmless. Civil cases may finally lead to the adoption of long needed structural safeguards, particularly given a convergence of interests: each reform is inexpensive and provides law enforcement, prosecutors, and courts with the information they urgently need to convict people reliably.

Comparatively, a few wrongful conviction cases may have a dramatic effect because they represent the most egregious failures of our criminal justice system. DNA permits scientific certainty in a few cases that innocent people were wrongly convicted. Unlike run-of-the-mill

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14. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1220–24 (1978); *see also* Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436, 440 (1980).

15. *See* discussion *infra* Part II.

16. Future work will examine how wrongful conviction suits may serve as a catalyst for systemic reform, by examining more deeply the institutional responses to exonerations and civil suits, and comparing such structures to innocence commissions and other administrative and legislative alternatives. This project mirrors prior work examining how systemic reform arose against all expectations and despite a lack of clarity in underlying legal rules in the context of racial profiling. *See generally* Brandon Garrett, *Remedying Racial Profiling*, 33 COLUM. HUM. RTS. L. REV. 1 (2001) [hereinafter Garrett, *Remedying Racial Profiling*]; Brandon Garrett, Note, *Standing While Black: Distinguishing* Lyons *in Racial Profiling Cases*, 100 COLUM. L. REV. 1815 (2000). For additional work developing an "experimentalist" approach to civil rights remedies, *see* Brandon L. Garrett & James S. Liebman, *Experimentalist Equal Protection*, 22 YALE L. & POL'Y REV. 261 (2004).

17. *See* discussion *infra* Part V.

tort cases or even civil rights cases, both of which are commonly thought to often not effectively deter constitutional violations,[18] exoneration itself self-selects the most serious cases best-suited to illuminate and redress systemic problems. For that reason, wrongful conviction cases have already provided a catalyst for structural remedies altering the practices and relationships between law enforcement, prosecutors, and the courts, and in the process, defied conventional and pessimistic appraisals of the effectiveness of civil rights remedies.[19] Further, civil cases uncover patterns and practices of violations through broad federal discovery, resulting in municipal entities being held liable for failing to remedy systemic deficiencies. The effect of suits will be bolstered by the Federal Innocence Protection Act, which provides financial incentives for reform, including monitoring of forensic crime laboratories, best practices review, and effective assistance of counsel in capital cases.[20]

Remedies from wrongful conviction suits may also feed back to influence criminal procedure law and encourage judges to consider adopting protections to prevent such miscarriages. During pretrial suppression hearings, trial judges could consider systemic evidence regarding the predictable causes of wrongful convictions, and also at trial provide jurors instructions or expert testimony regarding reliability of evidence based on such data. Appellate judges could target their

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18. *See* discussion *infra* Part V.C.

19. In part, the remedial result, as will be elaborated in Part V.A, illustrates the argument that Professor Daryl Levinson and others have used to counter "rights essentialists": rights are defined by their remedies and vice versa. *See* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857, 860 (1999). More importantly, the result moves beyond such debates as well as the creeping pessimism over the past several decades about the effectiveness of civil rights remedies in the face of judicial retrenchment, to show how robust rights and remedies can evolve institutionally and independent of narrow judicial definition. *See* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 1425, 1427 (1987).

20. The Justice for All Act of 2004 was signed into law on October 30, 2004, and provides a series of grants to states that provide positive incentives for reform. Pub. L. No. 108-405, 118 Stat. 2260 (codified in scattered sections of 18 U.S.C. and 42 U.S.C.). Sections 421 and 424 of the law set out requirements for capital representation improvement grants, particularly during trials, reporting on maintaining requirements for qualified attorneys and specialized training. *Id.* §§ 421, 424, 118 Stat. at 2286, 2289. Section 413 provides incentive grants to implement "reasonable" measures to preserve biological evidence and provides for postconviction access to testing. *Id.* § 413, 118 Stat. at 2285. The statute also provides in Section 411 a right to postconviction DNA testing in federal criminal cases, together with requirements to preserve biological evidence. *Id.* § 411, 118 Stat. at 2278. Section 431 provides for an increase in compensation for the wrongfully convicted. *Id.* § 431, 118 Stat. at 2293. Section 306 creates a National Forensic Science Commission to make recommendations and disseminate best practices. *Id.* § 306, 118 Stat. at 2274. Section 303 provides grant money for training programs and local forensic testing demonstration projects. *Id.* § 303, 118 Stat. at 2273.

review toward violations raising dangers of wrongful convictions, rather than simply rubberstamping error as harmless. The civil remedies described may also evolve to provide more refined information about what procedures supply reliable evidence.

Federal wrongful conviction claims thus upset a longstanding academic and judicial understanding of constitutional criminal procedure cases as a "world unto themselves" with no relationship to civil constitutional law.[21] Criminal procedure has long lacked a focus on systemic and institutional causes of error.[22] Although civil and criminal constitutional law share common constitutional provisions, the Court separated them at birth and they developed apart.[23] Both critics and fans of the Court's constitutional criminal procedure decisions have long advocated that "the Constitution needs to be put back into criminal procedure,"[24] yet such intersections have rarely been explored by scholarship on either side of the divide.[25] This Article is intended to illuminate the deep connections between civil and criminal law rights, and the pressing need to develop them in order to bring a substantive focus to criminal procedure. The impact of these divergent bodies of constitutional law may fundamentally alter the landscape of the underlying constitutional rights and lead to reform of our criminal justice system.

Part I provides an overview of the rise of federal wrongful conviction cases, from common law roots to federal cases involving fair

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21. *See* Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down That Wrong Road Again"*, 74 N.C. L. REV. 1559, 1561 (1996) [hereinafter Dripps, *Amar on Criminal Procedure*](contending that criminal procedure decisions employ arbitrary rules that could not be maintained in civil constitutional cases, and explaining that "[t]he academy has followed the Court and ratified this dissociation of legal sensibility"); *see also* DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 175 (2003) [hereinafter DRIPPS, ABOUT GUILT AND INNOCENCE] (arguing that values of substantive constitutional law should inform criminal procedure); Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 219 n.56 (1997) (noting that the Association of American Law Schools lists constitutional law as a separate specialty from criminal procedure, and that "most academics consider these distinct fields"); Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 476 (1997) (calling criminal procedure "peripheral to core constitutional law").

22. *See infra* Part V.

23. *See infra* Part I.D. Even the Fourth Amendment, which provides both civil remedies for violations and criminal procedure protections, has had its civil dimension largely ignored by the academy. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 758 (1994) ("The Fourth Amendment is part of the Constitution yet is rarely taught as part of Constitutional Law. Rather, it unfolds as a course unto itself, or is crammed into Criminal Procedure.").

24. *See* Dripps, *Amar on Criminal Procedure*, *supra* note 21, at 1561.

25. *See* sources cited *supra* note 21.

trial claims, followed by a dramatic surge in exonerations due to DNA technology. Part II discusses the Supreme Court's harmless error doctrine, its guilt-based focus, and its extension to other rules in the context of specific constitutional rights. Part III explains that, in a civil action, the effect of exoneration and the 42 U.S.C. § 1983 ("Section 1983") requirement of causation reverses harmless error's guilt-based remedial focus.[26] Part IV applies this theory to emerging federal wrongful conviction claims based on (1) the *Brady v. Maryland* right to have exculpatory evidence disclosed, (2) ineffective assistance of counsel, (3) the right to be free from suggestive eyewitness identification procedures, (4) coerced confessions, and (5) police fabrication of evidence. Part V concludes by reflecting on the likely impact of wrongful conviction cases on both law enforcement practices and substantive development of constitutional criminal procedure protections.

I. THE RISE OF FEDERAL WRONGFUL CONVICTION ACTIONS

Federal wrongful conviction actions arose out of a combination of recent developments in forensic science and constitutional law. The existence of wrongful conviction actions may be news to many. Front page headlines have for some time brought home the deep changes that science is working in our criminal justice system—from the arrest and exoneration of a Portland, Oregon lawyer on terror charges based on fingerprints,[27] to the fabrication of ink evidence in the Martha Stewart trial,[28] to the steady increase in DNA exonerations of convicts across the country.[29] What is less widely appreciated is that science has also exposed not just the factual innocence of persons wrongly convicted, but the *causes*, revealing that such injustices could have easily been prevented, and worse, that in a surprisingly large number of cases, wrongful convictions were caused by police misconduct. Such police misconduct, more often than thought, supports a federal civil rights action.

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26. 42 U.S.C. § 1983 (2000).

27. Sarah Kershaw, *Spain and U.S. at Odds on Mistaken Terror Arrest*, N.Y. TIMES, June 5, 2004, at A1 (describing how the Federal Bureau of Investigation (FBI) pressed ahead with the prosecution of a Portland lawyer after Spanish authorities made clear that their examination of fingerprint evidence found no match).

28. Jonathan D. Glater, *Stewart Stock Case Is Jolted by Charge that an Agent Lied*, N.Y. TIMES, May 22, 2004, at A1 (describing how the government charged the FBI's ink expert in the Martha Stewart trial with two counts of perjuring himself on the stand).

29. *See generally* The Innocence Project, *at* http://www.innocenceproject.org/ (last visited Mar. 28, 2005).

A wave of civil suits arising out of exonerations have already resulted in landmark, multimillion dollar jury verdicts that should have police departments, crime laboratories, and prosecutors concerned.[30]

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30. *See infra* note 32. Cases pending in federal courts nationwide, and involving police misconduct resulting in wrongful convictions include: Pierce v. Gilchrist, 359 F.3d 1279, 1301 (10th Cir. 2004) (discussing claims of fabrication and malicious prosecution); Gauger v. Hendle, 349 F.3d 354, 363 (7th Cir. 2003) (addressing allegations of false arrest and police perjury at trial); Patterson v. Burge, 328 F. Supp. 2d 878, 882, 903–04 (N.D. Ill. 2004) (denying the defendant's motion to dismiss against the plaintiff, who spent thirteen years on death row until pardoned by Illinois Governor George Ryan, and later claimed that the police coerced his confession, fabricated evidence, maliciously prosecuted him, and suppressed police misconduct in violation of *Brady*); Salaam v. City of New York, No. 02 Civ. 9685 (S.D.N.Y. filed Dec. 19, 2003) (alleging fabrieated and coerced inculpatory statements, *Brady* violations, and prosecutorial misconduct in the arrests of five teens exonerated by DNA thirteen years after their convictions in the "Central Park Jogger" case). In addition, Cochran Neufeld & Scheck, LLP is currently litigating a number of wrongful conviction cases nationwide. *See, e.g.*, Lowery v. County of Riley, No. 5:04-CV-03101-JTM (D. Kan. filed Mar. 25, 2004) (alleging that two officers nicknamed "Mad Dog" and "Dirty Harry" coerced the plaintiff's confession, fabricated the confession by feeding facts, and violated *Brady* and *Monell*, thereby resulting in the plaintiff's wrongful incarceration); Bibbins v. City of Baton Rouge, No. 04-CV122-D-M1 (M.D. La. filed Feb. 24, 2004) (alleging claims of fabrication of evidence, including a falsified arrest warrant, *Brady* violations, and suggestive identification procedures in a case where a prisoner was exonerated by DNA testing after spending sixteen years at Angola Prison); Godschalk v. Castor, No. 02-6745 (E.D. Pa. filed Oct. 8, 2003) (alleging coerced and fabricated false confession claims and *Brady* violations in a case where the plaintiff was incarcerated for fifteen years for two sexual assaults before being exonerated by DNA testing; the District Attorney settled for $740,000 in October of 2003, and the township for $1.6 million in April of 2004); Green v. City of Cleveland, No. 1:03CV0906 (N.D. Ohio filed Aug. 7, 2003) (alleging the fabrication of a confession and serology evidence, along with supervisory claims based on *Monell v. Department of Social Services of New York*, 436 U.S. 658, 699 (1978), in a case where the plaintiff was exonerated by DNA testing after thirtcen years of inearceration); Long v. City of New York, CV-03-1495 (E.D.N.Y. filed June 18, 2003) (alleging suggestive identification procedures, failure to investigate, and *Brady* violations, and raising *Monell* supervisory claims in a case where the plaintiff was exonerated after six years of incarceration); Miller v. City of Boston, No. 03-10805-JLT (D. Mass filed May 1, 2003) (alleging false arrest, fabrication of serological evidence by the police and crime lab, suggestive identification procedures, and raising supervisory and *Monell* claims in a case in which the plaintiff was exonerated by DNA testing after being incarcerated for more than ten years); Burrell v. Adkins, No. 3:01CV 2679 (W.D. La. filed Dec. 26, 2001) (alleging that Albert Ronnie Burrell and Michael Graham each spent thirtcen years on death row at Angola Prison for a crime they did not commit due to the fabrication of forensic evidence, witness coercion, fabricated testimony of a jailhouse snitch nicknamed "Lyin'" Wayne Brantley, and *Brady* violations); Blake v. Race, No. CV-01-6954 (E.D.N.Y. filed Oct. 18, 2001) (alleging fabrieation of evidence, *Brady* violations, failure to investigate, and supervisory liability in a case where the plaintiff was exonerated after spending eight years inearcerated in the seventy-fifth precinct in Brooklyn, which had a practice of framing innocent people using fabricated testimony of informants); Gregory v. City of Louisville, No. 3:01CV-535-R, 2004 U.S. Dist. LEXIS 7046 (W.D. Ky. filed Aug. 24, 2001) (alleging suggestive identification procedures, fabrication of hair comparison

The size of the verdicts and settlements can be explained both by the dramatic facts in such cases and the substantial damages years of wrongful imprisonment can cause. The jury in James Newsome's case, discussed below, for example, saw a life-size model of the eight-by-ten-foot jail cell that he spent fifteen years in, and did not need to hear damage experts to award him $15 million in compensatory damages.[31] For this reason, municipalities have agreed to substantial settlements in order to avoid judgments or decisions that would create future legal exposure.[32]

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evidence, and *Brady* violations in a case where the plaintiff was exonerated by DNA testing after being incarcerated for eight years for a sexual assault); Lloyd v. City of Detroit, No. 04-70823 (Mich. Cir. Ct. filed Mar. 4, 2004) (alleging that Eddie Joe Lloyd, who was incarcerated for over seventeen years until he was exonerated by DNA, was deceived by police into "confessing" to a sexual assault and murder he did not commit while in a delusional state, on psychotropic medication, and legally committed to a mental hospital, then violating *Brady* and fabricating evidence by concealing that they fed him the details of that "confession"; also alleging the county grossly underfunded defense counsel who never sought experts as to Lloyd's mental condition or to test biological evidence); *See also* Peter Schworm, *City Prepares Defense vs. Wrongly Imprisoned Man*, BOSTON GLOBE, Dec. 7, 2003, at 10 (describing a $10 million lawsuit on behalf of Eric Sarsfield, who was exonerated through DNA testing after spending ten years incarcerated for a sexual assault he did not commit, bringing *Brady*, fabrication, and suggestive identification claims, and raising supervisory and *Monell* claims). The author had the privilege to work on the *Blake*, *Burrell*, *Long*, *Lowery*, *Miller*, and *Salaam* cases described above.

31. *See* Steve Warmbir, *$15 Million for Unjust Prison Term*, CHI. SUN-TIMES, Oct. 30, 2001, at 2; *see also infra* Part I.A.

32. Recently, there have been many significant settlements in wrongful imprisonment and conviction cases. *See* Jones v. City of Chicago, 856 F.2d 985, 988, 996 (7th Cir. 1988) (upholding an $801,000 award where police suppressed exculpatory evidence); Reasonover v. St. Louis County, 4:01 CV 01210 (CEJ) (E.D. Mo. 2004) (settlement for $7.5 million in a case where the plaintiff was wrongfully imprisoned for sixteen years, and law enforcement concealed evidence including an exculpatory tape recording); Martinez v. Brink's, Inc., No. CL0103469AH (S.D. Fla. Oct. 2, 2003) (resulting in a $8.26 million verdict for malicious prosecution where the plaintiff spent six months in pretrial detention), *available at* 2003 WL 22490171; Munoz v. County of Fresno, No. CIV-F0206286 (E.D. Cal. 2003) (resulting in a $625,000 verdict for a plaintiff who was falsely arrested and detained for fourteen hours); Gipson v. Aragon, 2002 No. CV-00-7212LGB (C.D. Cal. Apr. 12, 2002) (settlement for $275,000 for two plaintiffs falsely arrested for four days), *available at* 2002 WL 32105285. Many of these verdicts have been sustained on appeal. For state court settlements and verdicts, see for example, Gayles v. City of Detroit, 16 MICH. TRIAL RPTR., No. 01-CV-60038 (Mich. Cir. Ct. June 11, 2003) (resulting in a settlement of $800,000 for nineteen days in jail on first degree murder charges based on a coerced false confession by an eighteen-year-old mentally disabled man to the sexual assault and murder of a twelve-year-old girl); Bravo v. Giblin, No. B1225242, 2002 WL 31547001, at *24 (Cal. Ct. App. Nov. 18, 2002) (approving an award of $3,925,976, including $3,537,000 to compensate for 1179 days of incarceration at the rate of $3000 per day, and $1 million to compensate him for emotional distress suffered between the date of the incident and the date of his sentencing; the total award to the plaintiff, including interest, was $7,075,000 in a case involving violations of *Brady* and fabrication of evidence,); Kotler

More significant than large compensatory awards, these lawsuits represent miscarriages of justice that have attracted the attention of actors on all sides: law enforcement, prosecutors, municipalities, and civil rights organizations. In a short period of time, civil suits suggest possibilities for bringing diverse actors together to collaborate on systemic change in our criminal justice system. Many federal wrongful conviction lawsuits focus on reform by including claims alleging a pattern and practice of misconduct against crime labs for shoddy or fraudulent forensic work, district attorney's offices for suppressing exculpatory evidence, and police departments for permitting practices of fabricating evidence, coercing confessions, suppressing evidence, or conducting suggestive eyewitness identifications.[33] Lawsuits have

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v. State, 255 A.D.2d 429 (N.Y. App. Div. 1998) (affirming plaintiff Kerry Kotler's $1.5 million verdict for almost eleven years of wrongful imprisonment); Coakley v. State, 255 A.D.2d 477 (N.Y. App. Div. 1996) (affirming plaintiff Marion Coakley's $450,000 verdict for spending two years and three months wrongfully incarcerated). These settlements and verdicts have received heavy media coverage. *See, e.g.*, Robert Becker, *Ford Heights Four to Get Their Settlement from County*, CHI. TRIB., Mar. 16, 1999, § 2, at 3 (describing the $36 million settlement between Cook County, Illinois and four men wrongly convicted of a 1978 murder, three of whom were exonerated by DNA testing); Andrea Elliott, *City Gives $5 Million to Man Wrongly Imprisoned in Child's Rape*, N.Y. TIMES, Dec. 16, 2003, at B3 (describing the largest false conviction award in New York City history in a case involving prosecution suppression of exculpatory evidence); Karen Farkas, *Wrongly Imprisoned Man Dreams of Fun, Helping Kids*, CLEVELAND PLAIN DEALER, Sept. 24, 2003, at B1 (describing the settlement of $750,000 for Jimmy Williams, who was released when the victim admitted she had not seen the face of her attacker and her identification of him was false, after he spent ten years incarcerated); Sean Gardiner, *Detectives Sued in Murder Frame-Up*, NEWSDAY, Jan. 15, 2005, at A05, *available at* 2005 WLNR 471948 (reporting that Jeffrey Blake, who was wrongly convicted based on false informant testimony, settled his New York state unjust conviction claim for $1.3 million after serving eight years, and is currently initiating a civil action against the individual detectives who elicited the false testimony, *see supra* note 30); *see also* Thao Hua, *$4 Million Goes to Man Wrongly Convicted of Rape*, L.A. TIMES, Apr. 30, 1998, at A3; Natasha Korecki, *Jury Finds FBI Railroaded Ex-Cop; Verdict Holds Agents Liable for $6.6 Million in Death Row Case*, CHI. SUN-TIMES, Jan. 25, 2005, at 3 (reporting that plaintiff Steve Manning won a $6.6 million jury award for his fourteen years wrongly spent on death row because FBI agents fabricated the testimony of a jailhouse snitch); Joel Landau, *Former Death Row Inmate Collects $5 M*, NAT'L L.J., July 19, 2004, at 6 (describing the settlement of $5 million between Roberto Miranda and police detectives and the public defender's office that had a practice of using lie detector tests to decide whether to vigorously defend clients); Stephen Scheibal, *City Settlement: $5.3 Million to Exonerated Man*, AUSTIN AM. STATESMAN, Nov. 21, 2003, at A1 (describing the $5.3 million settlement to Christopher Ochoa, who spent almost eleven years wrongfully incarcerated where police coerced his confession to a sexual assault and murder; the city in July approved a $9 million settlement for Richard Danziger, whose conviction was secured by coercing Ochoa to implicate him). In other cases, legislatures enacted private bills to compensate victims of wrongful conviction. *See infra* note 63.

33. *See supra* note 30 (discussing the *Burrell*, *Green*, *Gregory*, *Godshalk*, *Miller*, *Sarsfield* and *Salaam* cases).

already resulted in settlements to reform such practices, including relief in the form of internal audits and other accountability measures that not only prevent wrongful convictions, but also benefit law enforcement by providing more reliable investigative tools.[34]

A. The Case of James Newsome

James Newsome's case provides a dramatic illustration of how a typical wrongful conviction case unfolds in one of the first such cases to go to trial. Newsome spent fifteen years in prison in Illinois for the 1979 murder of a seventy-two-year-old grocery store owner, Mickey Cohen, which occurred during an armed robbery.[35] The Chicago police stopped Newsome near Wrigley Field and took him to the police station to question him about another armed robbery.[36] Satisfied with his alibi to that armed robbery, the officers nevertheless decided to hold him for lineups in the Cohen murder, because they noticed some resemblance to a composite sketch drawn by one of the witnesses.[37] In 1980, Newsome was convicted of Cohen's murder and sentenced to life in prison.[38]

The primary evidence of his guilt was the testimony of two eyewitnesses, a grocery store employee and a frequent customer, who identified Newsome at the lineup and then again at trial.[39] The jury apparently disregarded the alibi testimony of three witnesses who stated that, at the time of the robbery, Newsome was watching TV soap operas with them.[40] One can infer that race played a role in Newsome's conviction; the jury was all white, the victim was white, and Newsome is black.[41] Newsome's direct appeals were denied,[42] and the Supreme Court denied certiorari.[43]

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34. *See* Connie Schultz, *City to Pay $1.6 Million for Man's Prison Time, Cleveland Also Agrees to Review Old Cases*, PLAIN DEALER, June 8, 2004, at A1 (describing the $1.6 million settlement for the thirteen years Michael Green spent in prison for a sexual assault he did not commit, and noting that the city agreed to conduct a forensic audit to reopen more than 100 cases that included testimony from the same forensics lab worker who falsely testified in Green's trial and to randomly reexamine other cases in which the city's laboratory conducted serology or hair analysis); *see also* discussion *infra* Part V; *infra* note 291 (discussing the range of reforms adopted in Boston).

35. *See* Newsome v. McCabe, 256 F.3d 747, 748–49 (7th Cir. 2001).

36. Rob Warden, *Police Deceit and Erroneous ID Testimony Led to 15 Years of Wrongful Imprisonment*, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Newsome.htm (last modified Mar. 10, 2003).

37. *Newsome*, 256 F.3d at 748.

38. People v. Newsome, 443 N.E.2d 634, 634 (Ill. App. Ct. 1982).

39. *Id.* at 635–36.

40. *Id.* at 636.

41. *Id.* at 637.

42. *Id.* at 637–38.

43. Newsome v. Illinois, 464 U.S. 934 (1983).

In 1989, University of Chicago Law Professor Norval Morris assisted Newsome in obtaining a court order requiring the Chicago Police Department to run unidentified fingerprints from objects at the murder scene handled by the killer through a new computerized state fingerprint database.[44] The police officer who ran the search lied that there was no match to the prints. It was not until five years later that the Chicago police finally admitted that, in fact, the prints matched those of an African American man named Dennis Emerson, who was on death row for another murder.[45] Emerson was also wanted in 1979 for a robbery and murder that occurred less than two miles from the scene of the Cohen murder, of which Newsome was convicted.[46] It was also discovered that, prior to Newsome's arrest in 1979, police had suppressed their reports, which concluded that the fingerprints found on objects handled by the killer at the scene did not match Newsome's fingerprints.[47]

In 1994, the state appellate court vacated Newsome's conviction, and after the prosecutor declined to retry him, the governor pardoned him on the ground that he was innocent.[48] Newsome had spent fifteen years in prison for a murder he did not commit.[49] While in prison, his ailing mother had to raise his daughter, his life was threatened, and his jail cell was set on fire because he refused to join a gang.[50]

Newsome filed a federal civil rights action, alleging that the police suppressed evidence in violation of *Brady*.[51] After the federal civil rights case was filed, additional misconduct surfaced. In 1999, it was uncovered that the eyewitnesses who misidentified Newsome did not simply make an honest mistake.[52] One eyewitness came forward and testified that he was repeatedly threatened and coerced by two police officers into identifying Newsome, who he knew was not the murderer he observed, and that the officers warned him not to tell prosecutors about this coaching.[53] The officers were also observed pointing out Newsome in the lineup to a second eyewitness.[54] In 2002, a federal jury, faced with such dramatic evidence of police misconduct, awarded

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44. Warden, *supra* note 36.
45. *Id.*
46. Newsome v. James, No. 96-C-7680, 2000 WL 528475, at *4 (N.D. Ill. Apr. 26, 2000); Warden, *supra* note 36.
47. *Newsome*, 2000 WL 528475, at *9 & n.11.
48. *Newsome*, 256 F.3d at 749.
49. *Id.*
50. Warmbir, *supra* note 31, at A2.
51. *Newsome*, 256 F.3d at 749, 752.
52. *Newsome*, 319 F.3d at 303.
53. *See id.*; Editorial, *When Believing Isn't Seeing*, CHI. TRIB., Sept. 30, 2002, § 1, at 16.
54. *See Newsome*, 319 F.3d at 303.

Newsome a total of $15 million for the fifteen years he spent wrongfully convicted.[55] The U.S. Court of Appeals for the Seventh Circuit affirmed the verdict and award on appeal.[56]

Newsome, like a surprising number of exonerees, is concerned about the systemic failures that led to his wrongful conviction.[57] He now works as a director at the Chicago Center for Wrongful Convictions.[58]

B. Avenues for Compensation Before the DNA Era

In Newsome's case, forensic evidence (though not DNA testing) provided some of the critical evidence of innocence that, in turn, spurred a reinvestigation uncovering further police misconduct.[59] In the era before such forensic testing was widespread, however, little redress or compensation was available to the exonerated for the years they lost. Typically, when a person like Newsome is found innocent, he or she is released without the state providing even the most minimal supportive services available to convicts released on parole and whose convictions were never vacated. In Louisiana, for example, a released prisoner, guilty or innocent, receives "ten dollars and a denim jacket."[60] Newsome first obtained some compensation three years after his release under an Illinois statute, prior to filing his federal civil rights action.[61] Few states have such statutes, and the compensation is often paltry.[62]

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55. *Id.* at 302–03.

56. *Id.* at 301.

57. *See* Michael Perlstein, *Freedom No Cure All for Those Wrongly Convicted: Jobs and Respect Often Remain Elusive*, NEW ORLEANS TIMES PICAYANE, Mar. 30, 2003, http://www.truthinjustice.org/no-cureall.htm.

58. *Id.*

59. Warden, *supra* note 36.

60. Michael Ray Graham, Jr., on whose civil case I have been privileged to assist, received nothing more than that for his fourteen years and 129 days in prison along with fellow exoneree Ronnie Burrell; the ten dollars did not cover his transportation home to Virginia. *See Protecting the Innocent: Ensuring Competent Counsel in Death Penalty Cases: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 40–41 (2001) (statement of Michael Graham); Sara Rimer, *Two Death-Row Inmates Exonerated in Louisiana*, N.Y. TIMES, Jan. 6, 2001, at A8.

61. 705 ILL. COMP. STAT. ANN. 505/8(c) (1999) (enacted 1945).

62. *See* CAL. PENAL CODE §§ 4900–4906 (West 2000) (enacted 1941); 705 ILL. COMP. STAT. ANN. 505/8(c); IOWA CODE ANN. § 663A.1 (West 1998) (enacted 1997); ME. REV. STAT. ANN. tit. 14, §§ 8241–8244 (West 2003) (enacted 1993); MD. ANN. CODE art. 78A, § 16A (2003) (enacted 1963); N.H. REV. STAT. ANN. § 541-B:14(II) (1997) (enacted 1977); N.J. STAT. ANN. §§ 52:4C-1 to :4C-6 (West 2001) (enacted 1997); N.Y. JUD. CT. ACTS LAW § 8-b (McKinney 1989) (enacted 1984); N.C. GEN. STAT. § 148-82 (2003) (enacted 1947); OHIO REV. CODE ANN. §§ 2305.02, 2743.48 (Lexis Supp. 2003) (enacted 1986); TENN. CODE ANN. § 9-8-108(a)(7) (Lexis Supp. 2004) (enacted 1984); TEX. CIV. PRAC. & REM. CODE ANN. §§ 103.001–.007 (Vernon 1997) (enacted 1965); W. VA. CODE ANN. § 14-2-13a (Michie 2000) (enacted 1987);

Legislatures have occasionally enacted special bills compensating individuals for the hardships they endured.[63] According to a study by the Innocence Project, only thirty-four percent of exonerees have ever received any kind of compensation, and that more fortunate third often receives very little.[64] Scholars have long advocated for the social and moral need for statutory schemes by which the government would compensate the innocent,[65] but they have met with little success.[66]

WIS. STAT. § 775.05 (2003–2004) (enacted 1979). The federal government and the District of Columbia have each enacted a wrongful conviction statute. 28 U.S.C. §§ 1495, 2513 (enacted 1948) (amended by Innocence Protection Act section 431); D.C. CODE ANN. §§ 2-421 to -425 (2001) (enacted 1981); *see also* JIM DWYER ET AL., ACTUAL INNOCENCE: WHEN JUSTICE GOES WRONG AND HOW TO MAKE IT RIGHT 297–99 (2003) (describing how most such schemes provide very little compensation, and how in states like New York that have fairer statutes, in practice, as litigated by defendants and handled by courts, few concededly wrongfully convicted people see any meaningful compensation).

63. *See, e.g.*, S.B. 572, 2004 Leg. (Va. 2004) (proposing the payment of $1,237,000 to Beverly Anne Monroe, who was wrongfully convicted and imprisoned for ten years for murder due to the suppression of exculpatory evidence), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+SB572; DWYER ET AL., *supra* note 62, at 138–40 (describing the $1 million settlement to Glen Dale Woodall in West Virginia, who was wrongly convicted based on fabricated testimony of the person in charge of the state's serology laboratory); *Bill Asks for Wrongful Conviction Payments to Prisoner*, ASSOCIATED PRESS, Dec. 28, 2003 (describing a $1.2 million settlement approved by the legislature for Marvin Anderson, who spent fifteen years in prison for a sexual assault he did not commit); *Va. to Pay Exonerated Prisoner $1.2 M*, ASSOCIATED PRESS, Mar. 12, 2004 (describing the approval of a $1.2 million payment to James Earl Ruffin who was released after twenty-one years in prison when DNA evidence exonerated him.). Now that the size of municipalities' exposure in federal wrongful conviction actions is becoming clear, perhaps more legislatures will now consider compensation statutes.

64. *See* DWYER ET AL., *supra* note 62, at 298.

65. *See, e.g.*, Edwin Borchard, *State Indemnity for Errors of Criminal Justice*, 21 B.U. L. REV. 201, 207 (1941) (arguing that the state should be strictly responsible for compensating the wrongly convicted).

66. *See* Adele Bernhard, *Exonerations Change Judicial Views on Ineffective Assistance of Counsel*, CRIM. JUST., Fall 2003, at 37, 41–42. In contrast, we have no qualms about setting up comprehensive compensation schemes for victims of crimes; almost all of the states and the federal government have such schemes. DALE G. PARENT ET AL., U.S. DEP'T OF JUSTICE, COMPENSATING CRIME VICTIMS: A SUMMARY OF POLICIES AND PRACTICES (1992). The Victims of Crime Act of 1994 ("VOCA"), 42 U.S.C. §§ 10601–10602, provides federal grants to supplement state funding of victim compensation programs, and the Federal Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 1514, 3555–3556, provides crime victims restitution, a right to a statement at sentencing in federal cases, and victim and witness protection. In contrast, the federal government pays a maximum of $5000 to a person wrongly convicted under federal law, regardless of how many years they were incarcerated. DWYER ET AL., *supra* note 62, at 298. A new nonprofit that aims to "support exonerated persons in rebuilding their lives" is the Life After Exoneration Program. *See* The Life After Exoneration Program, http://www.exonerated.org/index.html (last visited Mar. 28, 2005).

In the past, the exonerated also faced significant obstacles to bringing lawsuits seeking compensation. Before DNA and other forensic technology became available, it was very difficult for a person to prove innocence.[67] The traditional common law claim of malicious prosecution arose out of the same common law tradition from which the Fourth Amendment warrant requirement emerged—that when the police act on a person, they must at all times have probable cause.[68] The common law claim had three elements: (1) the individual was prosecuted without probable cause by law enforcement officers,[69] (2) the prosecution occurred with malice, or recklessness to the lack of probable cause, and (3) the prosecution ultimately terminated in favor of the accused.[70] Although termination of the criminal proceeding did not have to be because of innocence,[71] the plaintiff would typically have to rebut a defense of guilt, which the state could prove by a preponderance of the evidence.[72]

By virtue of the simplicity of malicious prosecution, it sweeps together all conduct officers engage in—anything that should lead an

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67. *See* DWYER ET AL., *supra* note 62, at 309–28 (discussing obstacles to exoneration, and how in countless cases because the "magic bullet" (evidence capable of DNA testing) is lacking, innocents remain behind bars).

68. *See* Snyder v. City of Alexandria, 870 F. Supp. 672, 675, 678–79, 681 (E.D. Va. 1994) (explaining that the governor's pardon, of a plaintiff exonerated of rape charges, constituted favorable termination such that the plaintiff could pursue a malicious prosecution claim). At common law, a tort case for wrongful conviction could include more general causes of action such as claims of intentional or reckless infliction of emotional distress, negligent supervision, negligence, civil conspiracy, or torts such as false arrest and abuse of process. *See* Limone v. United States, 271 F.Supp.2d 345, 359 n.13 (D. Mass. 2003) (address whether "favorable termination" is required for a plaintiff to recover under tort claims, such as intentional infliction of emotional distress, negligent supervision, and civil conspiracy). Common law did not provide additional causes for relief if police engaged in particular egregious acts, such as subordination of perjury or fabrication of evidence. Cases held that perjury and subordination of perjury were not separate from an underlying lack of probable cause in torts under state law. *See* Phelps v. Stearns, 70 Mass. (4 Grey) 105, 105–06 (1855) (holding that there is no common law cause of action for perjury).

Although the circuits are divided, several U.S. Courts of Appeals permit federal malicious prosecution claims. *See* Leon Friedman, *New Developments in Civil Rights Litigation and Trends in Section 1983 Actions*, *in* 2 18TH ANNUAL SECTION 1983 CIVIL RIGHTS LITIGATION, *supra* note 8, 231, 236–43 (providing an overview of the split among the circuits). This Article expresses no view as to whether malicious prosecution should stand alone as a constitutional claim; however, courts have not understood the distinction between due process fair trial claims and a malicious prosecution claim. *See infra* notes 309–10.

69. Generally, only police can be sued in malicious prosecution actions; judges and prosecutors are almost entirely immune for their roles in wrongful convictions. *See* discussion of immunity doctrine *infra* Part V.D.

70. 3 RESTATEMENT (SECOND) OF TORTS § 653 (1977).

71. *See* 3 *id.* § 659.

72. 3 *id.* § 657 & cmts. a–b.

officer to believe that they lack probable cause provides evidence of malice. On the other hand, malicious prosecution's breadth is also its weakness—an often fatal weakness. So long as police can credibly show that they had probable cause, any violation of a suspect's rights are rendered nonactionable. The effect is not even a "no harm no foul" rule.

C. The Role of DNA in Wrongful Conviction Actions

The recent wave of wrongful conviction lawsuits was made possible by DNA testing technology, which can compare biological evidence left at the scene of a crime with the genetic markers of a convict, thereby providing conclusive evidence of innocence, and a powerful case for compensating the exonerated.[73] DNA testing was first used in 1989 to exonerate an innocent man, Gary Dotson, who had been wrongly incarcerated for ten years in Illinois.[74] Since then, there have been steady increases in both the numbers and the rate of DNA exonerations, as DNA testing has become increasingly sophisticated.[75]

DNA testing has its limits: it may never provide an avenue for broad identification and compensation of the wrongly convicted. Moreover, DNA testing can be used only in a limited number of cases: when biological evidence may have been left by the perpetrator at the scene of the crime, that evidence was collected by law enforcement, that evidence was preserved, and the state permits access to such testing. Making matters worse, our criminal justice system remains unconducive to claims of innocence and requests for DNA testing. It is not entirely clear that a petitioner may raise a cognizable claim of "factual innocence" in federal habeas corpus.[76] Claims to secure access to

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73. Many of the recent federal wrongful conviction cases have been filed by DNA exonerees. *See* cases cited *supra* notes 30 and 32.

74. Rob Warden, *The Rape that Wasn't: The First DNA Exoneration in Illinois, Center on Wrongful Convictions*, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/exonerations/Dotson.htm (last modified September 8, 2003).

75. Sam Gross's comprehensive survey of 328 exonerations from 1989 through 2003 covers the period during which DNA testing on forensic evidence became available, and concludes that roughly half of all exonerations were due to DNA testing. SAMUEL R. GROSS ET AL., EXONERATIONS IN THE UNITED STATES, 1989 THROUGH 2003 (2004), *available at* http://www.law.umich.edu/newsandinfo/exonerations-in-us.pdf. The study found "a steady increase in the number of DNA exonerations, from one or two a year in 1989 to 1991, to an average of 6 a year from 1992 through 1995, to an average of 21 a year since 2001." *Id.* at 4.

76. *See* Schlup v. Delo, 513 U.S. 298, 316 (1995) (stating that a remedy would exist only when the evidence is so strong as to make the sentence "constitutionally intolerable"); Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming that, for the sake of argument, a persuasive demonstration of actual innocence would render a conviction unconstitutional, and stating that if such a federal habeas claim existed, the threshold would be "extraordiuarily" high); Burton v. Dormire, 295 F.3d 839, 848 (8th Cir.

postconviction DNA also face legal hurdles in federal courts,[77] and local law enforcement often vigorously resists DNA testing, for example, as in the case of Roger Coleman.[78]

Despite these formidable obstacles, the number of DNA exonerations continues to grow,[79] raising difficult questions as to how many innocent convicts languish in our prisons undetected, and how much error we are willing to tolerate in the criminal justice system, especially when life and death may be at stake.[80]

2002) (holding that a state prisoner was not entitled to federal habeas relief based on his claims of factual innocence); *see also* Judge Josephine Linker Hart & Guilford F. Dudley, *Available Post-Trial Relief After a State Criminal Conviction when Newly Discovered Evidence Established "Actual Innocence"*, 22 U. ARK. LITTLE ROCK L. REV. 629, 640 (2000) ("The opportunity for a state prisoner to obtain review of a claim of actual innocence is also limited in federal court."); Bruce Ledewitz, *Habeas Corpus as a Safety Valve for Innocence*, 18 N.Y.U. REV. L. & SOC. CHANGE 415, 430 (1990–1991) (discussing the views of some Supreme Court justices that one purpose of habeas corpus is to provide a "safety valve" for factually innocent defendants).

77. *See* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 552 n.21 (2002) (discussing cases representative of the "legal struggles over claims to access to DNA for post-conviction testing"); *see also* Hart & Dudley, *supra* note 76, at 640–41 (discussing the limited circumstances under which federal postconviction relief is available to state prisoners).

The Innocence Protection Act, adopted as part of the Justice for All Act, provides a right to postconviction testing in federal cases and grants to encourage states to do the same. *See supra* note 20. The Innocence Protection Act does not provide a right to file for habeas corpus, as it states that "[a]n application under this section shall not be considered an application for a writ of habeas corpus." Innocence Protection Act of 2002, S. 486, 107th Cong. § 103(a)(2)(d) (2002); Innocence Protection Act of 2002, H.R. 912, 107th Cong. § 103(a)(2)(d) (2002).

78. *See* Laurence Hammack, *Dispute Arises over Possible DNA Test*, ROANOKE TIMES, June 5, 2004, at A1 (describing Virginia Governor Mark Warner's impending decision as to whether he should order a new DNA test in the case in which Roger Coleman was convicted, sentenced to death, and ultimately executed, based on sperm recovered from a woman who was sexually assaulted and murdered in 1990).

79. The Innocence Project, founded by Peter Neufeld and Barry Scheck, keeps count of the number of exonerations nationwide on its website. The number on March 27, 2005, was 157. Innocence Project, *supra* note 29; *see* DWYER ET AL., *supra* note 62, at 246 (recounting the factors that were present in sixty-two wrongful convictions); Sharon Cohen & Deborah Hastings, *Stolen Lives in Prison: DNA Evidence Is Setting Free the Wrongfully Convicted. But What Happens to Them Then?*, CONN. L. TRIB., June 24, 2002, at 1 (discussing an Associated Press study of 110 inmates exonerated by postconviction DNA testing); *see also* EDWIN M. BORCHARD, CONVICTING THE INNOCENT: SIXTY-FIVE ACTUAL ERRORS OF CRIMINAL JUSTICE, at v–vi (1932).

80. *See* Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 36 (1987) (discussing the landmark Hugo Adam Bedau and Michael L. Radelet study which concluded that twenty-three innocent people have been executed in the United States in the last century); *see also* RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 282–356 (1992) (updating Bedau and Radelet's 1987 study); Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 LAW & CONTEMP. PROBS. 125, 125

In addition to changing factual assumptions about error rates in the system and the guilt of those we convict,[81] DNA exonerations expose fundamental legal assumptions in our criminal justice system: that guilty jury verdicts are sound and should be preserved in the interest of finality, and deference should be afforded to state courts, juries, and law enforcement. Deferential harmless error review is grounded in the substantive notion that convictions should not be disturbed where there was sufficient evidence of guilt.[82] Once DNA shows that the defendant is in fact innocent, however, constitutional error does not look so harmless, especially in cases where the police and prosecutors engaged in egregious misconduct, such as destroying evidence, coercing witnesses, and fabricating and suppressing evidence of innocence.[83] Innocence calls into question the judgment of state and federal appellate courts, and sometimes even the Supreme Court, because all levels of courts have denied reversal of convictions based on harmless error. Exonerations thus provide the ideal social and moral backdrop for legal challenges in civil rights lawsuits.

D. Fair Trial Claims Brought in Section 1983 Wrongful Conviction Actions

Vacatur of the conviction is a *prerequisite* to filing a federal wrongful conviction case as a result of the Supreme Court's 1994 decision in *Heck v. Humphrey*.[84] Roy Heck filed an action seeking damages while still in prison and while his direct appeals in state court were still pending.[85] Following the traditional malicious prosecution requirement that there be an ultimate termination in favor of the accused, the Supreme Court held that a plaintiff can file a federal case

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(1998) (arguing that erroneous convictions of innocent people result from "systematic consequences of the nature of homicide prosecution in general and capital prosecution in particular"); Robert E. Pierre & Kari Lyderson, *Illinois Death Row Emptied*, WASH. POST, Jan. 12, 2003, at A1 (quoting Illinois Governor George Ryan, who stated that "'[t]he capital punishment system was haunted by the demon of error'"). Anthony Porter came within forty-eight hours of his scheduled execution date before being exonerated because of the investigative work of journalism students, who obtained a confession from the actual murderer. REPORT OF THE GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT 1 (2002) [hereinafter GOVERNOR'S REPORT].

81. *See* Death Penalty Poll (2004) (discussing a 2003 poll where ninety-five percent of the participants thought that innocent people are "sometimes" convicted of murder), *at* http://www.pollingreport.com/crime.htm.

82. *See* discussion of harmless error doctrine *infra* Part II.B.

83. DWYER ET AL., *supra* note 62, at 265 (discussing the different ways that prosecutors and police engage in misconduct).

84. 512 U.S. 477, 477 (1994).

85. *Id.* at 478–79.

challenging unconstitutional conduct resulting in a conviction only after that conviction is either vacated or pardoned.[86]

Nor can every person whose conviction has been vacated successfully bring a civil rights action. A wrongful conviction, like any injury, is actionable under civil rights law only if it was the result of official misconduct, and not only coincidence, mistake, or negligence.[87] Police officers must have acted in a way no reasonable officer would have acted,[88] and in many cases, there will be no evidence of misconduct. For example, in a case where an eyewitness identified an assailant, and DNA later proved that the eyewitness was mistaken, there may be no evidence that the police unreasonably relied on that eyewitness. A great surprise, however, has been the degree to which official misconduct has played a significant role. According to an Innocence Project study in 1999, in sixty-two percent of the cases where the convicted individual has been exonerated, police or prosecutorial misconduct was a significant factor.[89] Further, although smaller numbers of wrongful conviction suits can be brought than the number of run-of-the-mill civil rights actions, the lawsuits that can be maintained involve the most egregious miscarriages of justice in which a conviction was vacated. Thus, through that filter, the cases brought may disproportionately involve misconduct implicating systemic failures.

Similarly, the claims brought in wrongful conviction cases are relatively few in number, but each focuses on systemic procedural issues. The most common fair trial claims are: (1) *Brady* claims, alleging that officials suppressed evidence that was exculpatory;[90] (2) ineffective assistance of counsel;[91] (3) use of suggestive eyewitness identification procedures;[92] (4) a coerced confession;[93] and (5)

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86. *Id.* at 486. The Court held that, because Section 1983 creates a type of tort recovery, it makes sense to look to the common law of torts as a starting point. *Id.*

87. *See* Daniels v. Williams, 474 U.S. 327, 333 (1986) ("In support of his claim that negligent conduct can give rise to a due process 'deprivation,' petitioner makes several arguments, none of which we find persuasive.").

88. *See* Saucier v. Katz, 533 U.S. 194, 200–07 (2001) (setting out the Court's latest qualified immunity test, an objective reasonableness standard).

89. *See* DWYER ET AL., *supra* note 62, at 246 (explaining that "prosecutorial misconduct played a part in 42 percent, and police misconduct in 50 percent" of wrongful conviction cases).

90. 373 U.S. at 87. Such lawsuits are discussed *infra* Part IV.A. Examples include the *Atkins*, *Bibbins*, *Blake*, *Graham*, *Gregory*, *Green*, *Lowery*, *Long*, *Miller*, and *Sarsfield* cases, *see supra* note 30, and the *Newsome* case, *see supra* Part I.B.

91. *See infra* Part IV.B (discussing the *Miranda* and *Lloyd* cases raising such claims).

92. *See supra* note 30 (discussing the *Atkins*, *Bibbins*, *Long*, *Miller*, *Newsome*, and *Sarsfield* cases).

93. *See supra* note 30 (discussing the *Atkins*, *Ochoa*, *Lloyd*, *Lowery*, and *Washington* cases).

fabrication of evidence, such as blood evidence, hair evidence, or witness statements.[94] Each of these claims is developed in Part IV.[95]

Each fair trial claim must be brought under Section 1983, which authorizes actions for violation of a federal right.[96] The underlying purposes of the statute are to compensate a civil rights violation and to deter future wrongful government conduct.[97] There is no dispute that criminal procedure rights are "secured by the Constitution" under Section 1983, but until recently, courts have had little occasion to consider how such rights apply in a civil case. Fair trial rights are designed to prevent conviction of the innocent,[98] and the Court has

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94. *See supra* note 30 (discussing the *Atkins*, *Gregory*, *Lowery*, *Long*, *Miller*, and *Sarsfield* cases).

95. In addition to civil claims for violation of constitutional rights, it is possible that rights-protecting prophylactics will provide civil recovery. In dicta, the Supreme Court stated in its plurality opinion in *Chavez v. Martinez* that "[r]ules designed to safeguard a constitutional right, however, do not extend the scope of the constitutional right itself, just as violations of judicially crafted prophylactic rules do not violate the constitutional rights of any person." 538 U.S. 760, 772 (2003). The Court added that an appropriate remedy could be found in the Due Process Clause of the Fourteenth Amendment. *Id.* at 773. On the other hand, Justice Antonin Scalia added in his concurring opinion that "Section 1983 does not provide remedies for violations of judicially created prophylactic rules, such as the rule of *Miranda v. Arizona*, as the Court today holds . . . . Rather, a plaintiff seeking redress through § 1983 must establish the violation of a federal constitutional or statutory right." *Id.* at 780 (Scalia, J., concurring in part). This does not provide a firm indication of how the Court would rule on the question of whether such rules can supply a Section 1983 cause of action. Perhaps the Due Process Clause, as the plurality opinion suggests, could provide a civil right of action. *See* Susan R. Klein, Miranda *Deconstitutionalized: When the Self-Incrimination Clause and the Civil Rights Act Collide*, 143 U. PA. L. REV. 417, 440–41 (1994) (discussing the due process approach, but also noting that courts have rejected it). Even if such rules do not provide independent civil causes of action, they would serve an evidentiary purpose in a civil case. For example, the failure to provide *Miranda* warnings and a waiver, though it may not in and of itself support a claim, would be strong evidence that police officers were bent on coercion, especially where the confession was later shown to be false.

96. 42 U.S.C. § 1983; Albright v. Oliver, 510 U.S. 266, 271 (1994) (plurality opinion) ("Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'") (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). Section 1983, which was enacted because of growing abuses in the southern criminal justice system, proves particularly apposite in a wrongful conviction case where the claim is that state courts failed to prevent an innocent person from being wrongly incarcerated. In doing so, Section 1983 can "interpose the federal courts between the States and the people, as guardians of the people's federal rights." Mitchum v. Foster, 407 U.S. 225, 242 (1972).

97. Owen v. City of Independence, 445 U.S. 622, 651 (1980). Section 1983 took on its modern shape in *Monroe v. Pape*, 365 U.S. 167, 167 (1961), a case involving an unlawful search and police detention without probable cause or warrant.

98. Justice William Brennan's opinion in *In re Winship* expressed the centrality of the presumption of innocence to our criminal justice system, calling it a "bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law." 397 U.S. 358, 361–63 (1970) (citations omitted).

barred trial practices that "'offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'"[99] Yet, the Court remains reluctant to impose other safeguards, stating that "[d]ue process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person."[100] A shifting balance between innocence and the risk of wrongful conviction, and efficient prosecution and conviction of the guilty, defines the Court's fair trial jurisprudence. It is that balance which may be fundamentally altered by emergence of civil suits seeking compensation for denial of a fair trial.[101]

II. THE COURT'S GUILT-BASED HARMLESS ERROR RULES

A. The Chapman *Rule*

A natural question to ask about the increasing number of wrongfully convicted individuals is why criminal and appellate courts did not remedy constitutional errors long before innocent people languished in prison. The answer in many cases is the doctrine of harmless error. The fair trial rights described above were each established during the Supreme Court's criminal procedure revolution,

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The Court embraced notions of fundamental fairness in *Brady* as well, stating that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair." 373 U.S. at 87.

99. Medina v. California, 505 U.S. 437, 446 (1992) (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)); *see also Schlup*, 513 U.S. at 325 (noting that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system"); *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); Berger v. United States, 295 U.S. 78, 88 (1935) ("[T]he twofold aim of [the law] is that guilt shall not escape or innocence suffer.").

100. *Patterson*, 432 U.S. at 208.

101. See *infra* Part II.B and accompanying text for criticism of the Court's increasing emphasis on guilt and not on due process values. One example is *Manson v. Brathwaite*, which ended the per se exclusion of unconstitutionally suggestive identifications for the reason that doing so "may result, on occasion, in the guilty going free." 432 U.S. 98, 112 (1977). The Court has increasingly narrowed its focus by examining each constitutional provision in light of its common law antecedents, rather than underlying purpose, policy, or due process values. *See* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 227–28 (2003) (discussing how the Court is now concerned more with the context of the Fourth and Fifth Amendments, rather than broader due process considerations); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000) (addressing the Supreme Court's increasing reliance on common law history in interpreting the meaning of Fourth Amendment protections).

dating from pre-World War II through the Warren Court.[102] On the heels of that revolution, the Burger and Rehnquist Courts provided a second, quiet revolution. The typical account is that the Burger and Rehnquist Courts weakened the Warren Court's criminal procedure decisions by distinguishing them and creating exceptions to their rules.[103] Contrary to that account, in the case of fair trial rights, the Rehnquist Court assiduously preserved those landmark rulings as a constitutional matter,[104] while weakening the rights in an indirect way by limiting the *remedies* for their violation, by ratcheting the strength of the doctrine of harmless error.[105]

Harmless error rules, first adopted by state courts in the nineteenth century,[106] became a matter of federal law in the Supreme Court case of *Chapman v. California*, a homicide case in which the prosecutor commented extensively during closing arguments on Chapman's failure to testify in her own defense, thereby violating her Fifth Amendment rights.[107] The California Supreme Court concluded that, under the state constitution, the violation was harmless because it did not result in a "miscarriage of justice."[108] The Supreme Court ruled that federal law governs whether federal constitutional error is harmless, and ruled that

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102. The first six criminal procedure decisions predate the Warren Court and established several basic due process rights. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 48–49 (2000). All of these cases were egregious and four involved African American defendants from the South. *See id.*

103. *See generally* FRED P. GRAHAM, THE DUE PROCESS REVOLUTION: THE WARREN COURT'S IMPACT ON CRIMINAL LAW (1970); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 187 (1983).

104. *See* Steiker, *supra* note 2, at 2469. For criticism, see Klein, *supra* note 95, at 482–83 (arguing that it is the Court's obligation under the Constitution to create remedies to safeguard constitutional rights).

105. Why has the Supreme Court fashioned limitations on due process criminal procedure in this covert manner? One reason may be stare decisis, especially where many of the cases establishing fair trial rights are considered landmark decisions protecting the accused, that could not be casually undone. Another reason, described below, is a focus on guilt and on granting discretion to preserve jury verdicts finding defendants guilty. For an account of how the Court's approach in other contexts can be understood as proceeding in a layered fashion, see generally Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998).

106. All states now have harmless error rules. *Chapman*, 386 U.S. at 22 (noting that, in 1967, every state had harmless error rules). Harmless error rules did not exist at common law, but gradually developed in the nineteenth century in both England and America in response to the perception of an increase in unnecessary reversals of otherwise sound jury verdicts for "technical" errors. *See* ROGER J. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 6–8 (1970); Charles J. Ogletree, Jr., Arizona v. Fulminante*: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152, 156 (1991).

107. 386 U.S. at 19–20, 23–24.

108. *Id.* at 20 (citations omitted).

error may be found harmless only if the court can conclude beyond a reasonable doubt that the error contributed to the defendant's conviction.[109] *Chapman*'s harmless error rule applies on appeal. The remedy at trial for a violation of a right is exclusion of evidence or a curative instruction.[110] On appeal, however, in order to determine whether the denial of a remedy at trial deserves a "do-over," the appellate court examines whether the constitutional violation "contributed" to the conviction.[111] The state had the burden of proving error harmless beyond a reasonable doubt, a fairly high standard.[112]

On its face, the *Chapman* harmless error standard seems uncontroversial, even given the inherent difficulty of an appellate court speculating what actually contributed to a jury's decision to find guilt. Granting a new trial where it appears the jury could not have relied on the unconstitutionally admitted evidence seems intuitively wasteful. After all, *Chapman* initially functioned as protective common law in order to insulate federal rights from state law unduly permissive of constitutional violations.[113]

B. Harmless Error's Focus on Guilt

From those fairly innocuous origins, harmless error rules expanded to substantially undercut constitutional protections. Two developments changed the nature of harmless error. First, without changing the standard on its face, the Court has shifted the evidentiary burden by asking whether error can be excused by other evidence of *guilt*. Second, the Court has incorporated harmless error rules into the context of fair trial rights.

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109. *Id.* at 26. *Chapman* held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24. This rule is similar to the nineteenth century rule that an error would require a new trial if the "improper evidence . . . had an effect on the minds of the jury." Rex v. Ball, 168 Eng. Rep. 721, 722 (K.B. 1807); *see* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1418–19 (2001) (recounting the history of harmless error doctrine at English common law, and describing that, in many respects, the English rule became more forgiving of criminal trial error during the nineteenth century).

110. *See, e.g.*, Watkins v. Sowders, 449 U.S. 341, 346–47 (1981) (holding that, in the context of witness identifications, either curative instructions or a suppression hearing may remedy constitutional error).

111. *Chapman*, 386 U.S. at 26.

112. "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless." *Id.* at 24.

113. *See id.* at 21 ("[W]e cannot leave to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights.").

Federal lower courts have followed the Supreme Court's suggestion that a court may find error harmless based on an assumption that defendants are generally *guilty*. The Supreme Court reframed the *Chapman* inquiry into an explicitly guilt-based inquiry in *Rose v. Clark*, asking whether "a reviewing court can find that the record developed at trial establishes *guilt* beyond a reasonable doubt."[114] The Court has not intervened as lower courts continue to cite the *Rose* formulation and ask whether other evidence of guilt *could* support the jury's verdict.[115] Rather than properly follow the *Chapman* standard and looking to whether an error actually "contributed" to the jury's actual verdict, the courts broadly search the record by asking whether independent evidence of guilt taken alone *could* support the conviction. In effect, the court is asking whether a hypothetical jury may have still found the defendant guilty by imagining the constitutional violation never happened.[116] Even if the most powerful evidence in a criminal case, like a confession or forensic evidence, was coerced or tainted, an appellate court can uphold the guilty verdict by finding that a jury could have relied on untainted evidence peripheral to the state's actual case.[117] In effect, the inquiry reverses the evidentiary burden. Rather than the

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114. Rose v. Clark, 478 U.S. 570, 579 (1986) (emphasis added). The Court had earlier held that other evidence of guilt was relevant only to the harmless error inquiry. *See, e.g.*, Milton v. Wainwright, 407 U.S. 371, 372–73 (1972); Harrington v. California, 395 U.S. 250, 254 (1969) (stating that constitutional errors "affecting the substantial rights" of the convicted are not harmless errors).

115. The Court did note in *Brecht v. Abrahamson* that *Chapman* requires courts to ask whether "there is a 'reasonable possibility' that trial error contributed to the verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting *Chapman*, 386 U.S. at 24). Some lower courts, however, continue to follow the *Rose* test. *See, e.g.*, United States v. Worthon, 315 F.3d 980, 984 (8th Cir. 2003) (finding the admission of prior bad act evidence harmless "in light of the overwhelming evidence" of guilt); United States v. Guzman, 167 F.3d 1350, 1353 (11th Cir. 1999) ("Overwhelming evidence of guilt is one factor that may be considered in finding harmless error."); United States v. Casoni, 950 F.2d 893, 917–18 (3d Cir. 1991); Clark v. Moran, 942 F.2d 24, 27 (1st Cir. 1991) (describing the proper question as "whether the properly admitted evidence presented such overwhelming evidence of guilt that we can conclude, beyond a reasonable doubt, that the jury would have returned a verdict of guilty without having received the tainted evidence"); Hunter v. Clark, 934 F.2d 856, 860 (7th Cir. 1991) (finding that "any error was harmless in view of the overpowering evidence of . . . guilt").

116. A second doctrine, the independent evidence doctrine, provides that, if police obtain evidence in violation of the Fourth Amendment, that evidence may nevertheless be used if police independently had knowledge of those facts from a legal source. *See, e.g.*, Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). The important difference is all in the timing—the rule is retrospective and it permits police to cure the error by finding the evidence from a legal source. The harmless error doctrine, on the other hand, is based on the evidence presented at trial.

117. *See* United States v. Manganellis, 864 F.2d 528, 539 (7th Cir. 1988) (citation omitted).

government having the burden to show harmless error beyond a reasonable doubt, it can instead avoid the question of error entirely. The inquiry is the opposite of what *Chapman* requires, that is, a narrow examination whether there is a "reasonable possibility" that the error "contributed" to the jury's actual decision.[118]

Nevertheless, "the guilt based approach to harmless error has taken hold in our courts," working a "dramatic expansion of the doctrine."[119] In many cases, guilt is the "the sole criterion by which harmlessness is gauged."[120] Making matters worse, the Court made the rule on habeas review far more deferential,[121] based on "the State's interest in the finality of convictions," and noted that convictions are not just "final" but "presumptively correct."[122] For example, defendants once found guilty by jury are presumed guilty.[123] At the same time, the Court extended the harmless error doctrine to the full range of criminal procedure rights.[124] Prior to *Chapman*, constitutional errors could not be harmless,[125] but now only the rare case is not subject to harmless error analysis, a doctrine of "almost universal application."[126] Even

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118. *See* Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963). Part of the problem is that the *Chapman* rule is indeterminate. *See* Kamin, *supra* note 2, at 17-18. Harmless error is a malleable doctrine. *Id.* at 62 (providing an empirical study demonstrating the malleability of the doctrine).

119. Harry T. Edwards, *To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1171-72 (1995). "I believe that, more often than not, we review the record to determine how we might have decided the case; the judgment as to whether an error is harmless is therefore dependent on our judgment about the factual guilt of the defendant." *Id.* at 1171.

120. *Id.* at 1187.

121. *Brecht*, 507 U.S. at 623 (setting a new standard on habeas review that the error must have had a "substantial and injurious effect or influence in determining the jury's verdict") (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

122. *Id.* at 635, 637. The Court also noted "the frustration of 'society's interest in the prompt administration of justice'" as a reason for a higher standard. *Id.* at 637 (quoting United States v. Mechanik, 475 U.S. 66, 72 (1986)). For criticism of *Brecht*, see James S. Liebman & Randy Hertz, Brecht v. Abrahamson*: Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109 (1994).

123. Such deference is also distinct from the truth-seeking function of criminal procedure. The Court stated that there is a "public interest in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." Lego v. Twomey, 404 U.S. 477, 489 (1972). Here, the Court defers to jury verdicts even where unreliable, nonprohative evidence was before the jury. *Id.* at 489-90.

124. *Id.* at 490.

125. *See* YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 1569 (10th ed. 2002) ("Prior to the 1960's, it generally was assumed that constitutional violations could never be regarded as harmless error. Aside from one ambiguous ruling at the turn of the century, a Supreme Court finding of constitutional error had always resulted in a reversal of the defendant's conviction.").

126. *Brecht*, 507 U.S. at 651-52 (O'Connor, J., dissenting) ("[T]here are few errors that may not be forgiven as harmless.") (citing Arizona v. Fulminante, 499 U.S. 279, 306-07 (1991)); *see* Sullivan v. Louisiana, 508 U.S. 275, 282 (1993) (Rehnquist,

coerced confessions may be found harmless in light of other evidence of guilt, despite the devastating iinpact of a confession.[127]

The application of harmless error in practice has made vindication of constitutional rights prohibitively difficult during criminal appeals. Harmless error doctrine erodes the deterrent effect of exclusion—violations can be excused based on a discretionary, flexible, and broad examination of all of the evidence before the jury, taking account of any general perception of the guilt of the defendant.[128] Worth distinguishing from harmless error rules are bright line rules that constitute *exceptions* to the definition of the constitutional right in the first place.[129] Bright line rules also underprotect constitutional rights, but they clearly define permissible bounds of police behavior. Harmless error provides no guidance to law enforcement or prosecutors, but instead defers only to guilty jury verdicts.[130] The message to prosecutors is that, if there is some other reliable evidence of guilt, even a constitutional violation may be excused.[131] The message to law enforcement officers is that unconstitutional ends justify the means to obtain evidence of guilt.[132]

C.J., concurring) ("[I]t is the rare case in which a constitutional violation will not be subject to harmless-error analysis."); United States v. Hasting, 461 U.S. 499, 509 (1983) ("Since *Chapman*, the Court has consistently made clear that it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations.").

127. *Fulminante*, 499 U.S. at 289 (stating that a confession was coerced, yet finding the constitutional violation to be harmless error). For a criticisni of this inethod, see Ogletree, *supra* note 106, at 161–72, and John Paul Stevens, *The Bill of Rights: A Century of Progress*, 59 U. CHI. L. REV. 13, 16 & n.9 (1992).

128. Justice Felix Frankfurter famously wrote: "it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they . . . may be invoked by those morally unworthy." Brown v. Allen, 344 U.S. 443, 498 (1953). Judge Harry Edwards, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit, wrote in 1995: "[w]e commit just such an abuse when we hold errors harmless in a criminal case based solely on our own perceptions of a defendant's guilt." Edwards, *supra* note 119, at 1195; *see also* United States v. Jackson, 429 F.2d 1368, 1373 (7th Cir. 1970) (Clark, J., sitting by designation) ("'Harmless error' is swarming around the 7th Circuit like bees.").

129. Such exceptions have been crafted in the Fourth Amendment context in circumstances aiding law enforcement's investigatory functions, such as the automobile inventory search exception. *See, e.g.*, South Dakota v. Opperman, 428 U.S. 364, 364–72 (1976).

130. *See* Daniel J. Meltzer, *Harmless Error and Constitutional Remedies*, 61 U. CHI. L. REV. 1, 28 (1994) ("Determining whether an error is harmless under any standard is not likely to create clear rules that will be helpful in future cases.").

131. *See Rose*, 478 U.S. at 588–89 (Stevens, J., concurring) ("An automatic application of harmless error review in case after case, and for error after error, can only encourage prosecutors to subordinate the interest in respecting the Constitution to the ever-present and always pewerful interest in obtaining a conviction in a particnlar case.").

132. Thus, harmless error is not an example of courts underenforcing constitutional norms for reasons of institutional deference. *See* Sager, *supra* note 14, at

The result undermines precisely those rights designed to prevent the wrongful conviction of the *innocent*.[133]

C. *A Second Layer of Harmless Error Rules*

Expanding the reach of its guilt-based approach, the Court incorporated a second set of harmless error rules in the context of several fair trial rights.[134] One would think it redundant to do so where the general doctrine now covers all constitutional violations. The additional layer, however, undercuts defendants' rights far more severely. The *Chapman* standard places the burden of showing harmless error on the state. The guilt-based approach has the effect of reversing that burden. By embedding harmless error in the context of particular constitutional rights, the Court explicitly makes it the criminal defendant's burden to show that a violation was *not* harmless.[135]

One example of this burden reversal is the standard for ineffective assistance of counsel. The Supreme Court held in *Strickland v. Washington* that a conviction may only be overturned if the performance of counsel affected the *outcome* at trial, and again, the focus is on whether evidence of guilt taken alone could support that outcome.[136] This "camouflaged harmless error doctrine"[137] creates a higher, often prohibitively difficult, outcome-determinative standard. As the subsequent Parts will discuss, the *Brady* right to have exculpatory evidence disclosed and the right to be free from suggestive identification procedures each contain individualized harmless error rules, which place harsher burdens on defendants.

1219–20 (arguing that, while judicial underenforcement of structural constitutional values often makes sense, criminal procedural guarantees must be enforced vigilantly).

133. Unlike "constitutional common law"—prophylactic rules that *protect* rights—harmless error *limits* the deterrent effect of constitutional rights even when they are violated, and it operates to undercut prophylactic remedies as well.

134. Commentators have noted the Court's incorporation of harmless error in the ineffective assistance of counsel area. *See infra* note 137. Commentators have not noted such incorporation in the area of suggestive identifications.

135. *See* Edwards, *supra* note 119, at 1178.

136. 466 U.S. 668, 690–92 (1984).

137. *See* David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 LA. L. REV. 1105, 1159–61 (1999) (calling such a rule in the ineffective assistance of counsel context a "camouflaged harmless error doctrine"); *see also* Kamin, *supra* note 2, at 51–52 ("Ineffective assistance claims, therefore, appear to incorporate harmless error analysis into the substantive standard.").

III. REVERSING THE GUILT PARADIGM IN A CIVIL ACTION

A. Why Harmless Error Does Not Apply in a Civil Case

Courts have found it intuitively obvious that harmless error rules do not apply in civil cases.[138] The reasons *why* harmless error does not apply have remained undeveloped by courts and commentators, but they follow from the application of the elements of Section 1983 and the principles of res judicata. Where harmless error operates during criminal appellate review, it serves no function once the criminal process has terminated in a vacatur of the conviction. Appellate decisions upholding the conviction or finding error harmless have *necessarily* been vacated by the time a person can bring a Section 1983 action. In *Heck*, the Supreme Court required that "a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal."[139] The vacatur of the underlying conviction deprives the res judicata or collateral estoppel effect of any prior appellate decisions finding constitutional error harmless.[140]

Further, the issues relevant to civil rights claims are different. For example, when new evidence is available in a civil case regarding error at the criminal trial, such evidence is especially relevant when the civil claim is that officials concealed or fabricated evidence during the

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138. *See, e.g.*, *Newsome*, 319 F.3d at 303 (upholding a jury verdict where jury instructions did not reference harmless error). Dozens of other federal decisions involving wrongful conviction claims discuss causation, but none discuss harmless error. *See, e.g.*, *supra* notes 30, 32.

139. 512 U.S. at 486–87. The conviction may also be "expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 487.

140. "[A] judgment which is vacated, for whatever reason, is deprived of its conclusive effect as collateral estoppel." Dodrill v. Lundt, 764 F.2d 442, 444 (6th Cir. 1985). This must be so, because

> Any other rule would needlessly and astronomically proliferate the number of issues raised on appeal. If a judgment could be entirely vacated yet preclusive effect still given to issues determined at trial but not specifically appealed, appellants generally would feel compelled to appeal every contrary factual determination. Such inefficiency neither lawyers nor judges ought to court.

Id.; *see also* Bagley v. CMC Real Estate Corp., 923 F.2d 758, 762 (9th Cir. 1991) ("Once [plaintiff's] conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims."); Spurlock v. Whitley, 971 F. Supp. 1166, 1177 (M.D. Tenn. 1997) ("Plaintiffs allege that Plaintiff Marshall's guilty plea conviction was subsequently vacated, and therefore, it can have no preclusive effect in this action."); *Snyder*, 870 F. Supp. at 690 (stating that a criminal conviction in Virginia, vacated pursuant to a DNA exoneration, "'would not be given preclusive effect in a § 1983 action with respect to any issues, including issues that were actually and necessarily decided'") (quoting Haring v. Prosise, 462 U.S. 306, 316 (1983)).

criminal process.[141] For that reason, the Supreme Court has indicated[142] that, following a vacatur, any decisions during a criminal appeal lack collateral estoppel effect; this notion is well-settled among the lower courts.[143]

Second, the tort elements of Section 1983 require a violation of a federal right, breach, causation, and damages.[144] According to the language of Section 1983, no law limits those elements.[145] While a criminal appellate court may deem harmless an error too minor to justify a do-over of the trial, Section 1983's harm element assesses the economic and emotional damages caused by the wrongful conviction of an innocent person, as well as the possibility of added punitive damages.[146] The remaining Section 1983 element does raise issues relevant to harmless error—the requirement of causation.

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141. As the U.S. Court of Appeals for the Ninth Circuit has recognized,

> if a successful state prosecution, based upon the use of information obtained by violating the defendant's constitutional rights, could bar a civil rights action against the police for violating his rights . . . on theories of *res judicata* or estoppel by judgment, the Civil Rights Act would, in many cases, be a dead letter.

Ney v. California, 439 F.2d 1285, 1288 (9th Cir. 1971); *see also* Darrah v. City of Oak Park, 255 F.3d 301, 311 (6th Cir. 2001) (holding that different issues were litigated in a case in which the plaintiff alleged that officers made material misstatements of fact at probable cause hearing, rather than at trial).

142. The Supreme Court, without reaching the question, noted on an analogous issue in *Heck*, that harmless error would be irrelevant to a Section 1983 action regarding unfair trial-related search and seizure violations. 512 U.S. at 487 n.7.

143. *See* Harris v. Roderick, 126 F.3d 1189, 1198 (9th Cir. 1997) (pretrial finding of probable cause not dispositive in subsequent § 1983 action where the original finding was "'tainted by the malicious actions of the government officials [involved]'") (alteration in original) (quoting source omitted); *Bagley*, 923 F.2d at 762 (finding as a general proposition independent of any state's law that "[o]nce his conviction was reversed, there could have been no collateral estoppel effect of any kind on his civil rights claims"); White v. Frank, 855 F.2d 956, 961–62 (2d Cir. 1988) ("[T]hough an indictment by a grand jury is generally considered *prima facie* evidence of probable cause in a subsequent civil action for malicious prosecution, this presumption may be rebutted by proof that the defendant misrepresented, withheld, or falsified evidence."); *Snyder*, 870 F. Supp. at 689 ("[T]he claim [plaintiff] now presents is that other police misconduct tainted the victim's identification, a claim that was neither litigated nor decided in the original proceedings.").

144. Carey v. Piphus, 435 U.S. 247, 266 (1978) ([I]t remains true . . . that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.").

145. Section 1983 "was intended to '[create] a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution." *Id.* at 253 (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

146. Smith v. Wade, 461 U.S. 30, 56 (1983).

B. Exoneration and Causation

The civil standard to determine whether a constitutional error sufficiently contributed to a wrongful verdict is not the criminal appeals standard of harmless error. Instead, Section 1983's requirement of *causation* applies and a civil jury decides whether that requirement is met.[147] The difference may often result in relief being granted where it would be denied in a criminal appeal governed by harmless error.[148] The discussion that follows sheds light on the differences between the two standards.

The exoneration itself provides the first substantial difference between tort causation and harmless error standards. Innocence sheds a harsh light on the question of what caused a conviction. So much of the toothlessness of the harmless error rule comes from courts' departure from doctrine, where, rather than following *Chapman*, courts isolate untainted evidence of guilt and ask if it could support a verdict. In part, courts may be captured—repeat players unwilling to take on the onerous burden of reviewing constitutional error in so many seemingly meritless cases where defendants appear guilty despite some unfairness at trial.[149] A civil case can only be brought after a vacatur and, in practice, an exoneration, which selects in advance the most egregious violations, those involving the conviction of an innocent person. Any evidence of guilt is revealed as faulty, if not false, and constitutional error was likely terribly harmful. Only in an unusual case would conduct so egregious as to violate the Constitution nevertheless not be significant enough to cause a wrongful conviction.[150] In a civil case, a plaintiff is also entitled to rebut insinuations that error was harmless because of likely guilt by providing evidence of innocence to the jury.[151]

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147. No court has discussed this issue. The only commentator on the issue concluded that the test should be that "[i]f other evidence is sufficient, there is no but-for causation, and hence the officer should not be held liable under Section 1983." Schwartz, *supra* note 7, at 1137.

148. In addition, in a civil case, unlike a criminal case, a constitutional issue is usually decided first. *See, e.g.*, *Milton*, 407 U.S. at 372.

149. Courts have ratcheted the harmless error doctrine in a manner that several federal judges have found troubling. *See supra* Part II.B.

150. The sorts of cases where causation would be an obstacle would be those in which there is intervening causation, where the person was not tried, or in Fourth Amendment cases, because they may be brought at the time of arrest, not at the time of conviction.

151. Courts have found evidence of innocence relevant to damages and to rebut an insinuation by civil defendants that a plaintiff was guilty and the violations were harmless. *See, e.g.*, Newsome v. McCabe, 2002 WL 548725, at *6 (affirming that evidence of innocence and pardon was properly presented to the jury; excluding that evidence "would have invited the jurors to draw the impermissible inference that he was actually guilty, and, thus, absolve defendants of any misconduct").

Unlike harmless error, which is a decision for deferential appellate judges, a Section 1983 case involves the question of whether causation existed; this is a mixed question of law and fact and thus, a question for a civil *jury* to decide.[152] This difference is profound. Civil juries are not repeat players, and therefore will not presume guilt when they know to a scientific certainty that an innocent person was convicted.

The civil tort requirement of causation is also more relaxed than the Court's guilt-based formulations of harmless error. Section 1983's requirement of causation has two parts. First, as to showing a cause-in-fact, a plaintiff must be able to state a "but for" causal connection between the actionable conduct and the wrongful conviction.[153] Second, the proximate causation requirement of Section 1983 asks that a jury decide whether the injury was a "foreseeable" consequence of events that the government official set into motion.[154]

Given a mixture of evidence admitted properly and improperly at trial, the question is whether official misconduct sufficiently tainted the trial. Tort law provides a standard for examining such joint causation questions that relaxes the "but for" causation requirement—official misconduct need not be the sole cause-in-fact, so long as it was a *substantial factor*.[155] That standard comes from the traditional tort law rule regarding multiple sufficient causes of a harm.[156] A wrongful conviction in which a jury may have before it many pieces of evidence, which taken alone could support a conviction, seems a paradigmatic case

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152. *Cf.* United States v. Gaudin, 515 U.S. 506, 512 (1995) (explaining that the "materiality" question on summary judgment is typically one for the jury).

153. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41, at 265 (5th ed. 1984) ("An act or an omission is not regarded as a cause of an event if the particular event would have occurred without it.").

154. *See, e.g.*, Martinez v. California, 444 U.S. 277, 285 (1980). Unlike harmless error rules that defer to jury guilty verdicts, Section 1983's emphasis is on deterring civil rights violations and holding officials responsible. The Court instructs that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986) (quoting Monroe v. Pape, 365 U.S. 167, 187 (1961)). The language of Section 1983 suggests as much: the statute states that liability is imposed on "[e]very person" who, under color of law, "subjects, or causes to be subjected," a person to a constitutional violation. 42 U.S.C. § 1983.

155. *See* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. J [hereinafter RESTATEMENT (THIRD) OF TORTS].

156. *See id.* § 27 reporter's note a ("There is near-universal support recognizing the inappropriateness of the but-for standard for factual causation when multiple sufficient causal sets exist."); David A. Fischer, *Successive Causes and the Enigma of Duplicated Harm*, 66 TENN. L. REV. 1127, 1129 (1999) ("In multiple sufficient cause cases, the 'but for' test cannot identify which event caused an injury because each of the multiple forces alone was sufficient to cause the injury."). For an excellent in-depth discussion and advocacy of a substantial factor approach to harmless error, see JASON M. SOLOMON, CAUSING CONSTITUTIONAL HARM (manuscript at 28–34, on file with author).

of "overdetermined causation" for which such a "substantial factor" test applies.[157] Under such approaches, the defendant faces a high burden to maintain an affirmative defense that the official misconduct was not a substantial cause of the harm.[158]

Tort law standards undo the Supreme Court's guilt-based harmless error inquiry. While under a guilt-based harmless error rule, the appellate court can rule that the criminal jury *could* have still come out the same way, in a tort case, a civil jury can find liability so long as the tainted evidence was a "substantial factor" at trial.

The tort standard makes all the difference in the typical "overdetermined" wrongful conviction case where several pieces of evidence alone could have supported the jury's verdict. For example, in *Pierce v. Gilchrist*, there was outright police fabrication of hair and blood evidence, but there was also an initial eyewitness identification of the defendant that was erroneous, but not the result of any misconduct or police suggestion.[159] Although those two pieces of evidence each provided powerful evidence of guilt, the identification did not excuse forensic fraud.[160] Similarly, in Newsome's case, the jury concluded that

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157. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 155, § 26 cmt. j (explaining that the "primary function" of the substantial factor test was to permit the "factfinder to decide that factual cause existed when there were overdetermined causes—each of two separate causal chains sufficient to bring about the plaintiff's harm, thereby rendering neither a but-for cause"); *see also* 2 RESTATEMENT (SECOND) OF TORTS § 432(2) (1965) (stating the traditional rule on joint causation, that if one cause is due to misconduct, a second natural or innocent cause does not affect "but for" causation, but "the actor's negligence may be found to be a substantial factor in bringing it about").

158. The Supreme Court has addressed a somewhat analogous standard of causation in employment cases. In *Mt. Healthy City School District Board of Education v. Doyle*, the Court set forth that a plaintiff need only show by a preponderance of the evidence that relying on unconstitutional evidence (there, speech protected by the First Amendment) was a "motivating factor" in the decision-maker's action (there, a school board decision not to rehire plaintiff). 429 U.S. 274, 287 (1977). The defendant then had an affirmative defense to show by a preponderance of the evidence that it would have reached the same decision absent reliance on improper evidence. *Id.* The Court adopted the same reasoning under Title VII in *Price Waterhouse v. Hopkins*. 490 U.S. 228, 246 (1989). However, Congress then legislated that, under Title VII, a plaintiff is entitled to some relief even if a defendant meets its affirmative defense. 42 U.S.C. § 2000e-5(g)(2)(B) (2000 & Supp. 2003). In a wrongful conviction case, unlike in an employment case, the defendant's own motive is not mixed, nor is intent an element under Section 1983. Regardless, under either traditional tort law or *Mt. Healthy*, the plaintiff has a minimal burden while the defendant faces a high burden to maintain a defense that the official misconduct was not a cause of the harm.

159. 359 F.3d 1279, 1282 (10th Cir. 2004).

160. *See id.* at 1300–01 (holding that a fabrication claim survives a motion to dismiss). In *Pierce*, the victim initially told police that Pierce was not the rapist, but later, according to a police affidavit, she identified him in a photo lineup. *Id.* at 1282. Defendant Dr. Joyce Gilchrist then concluded that his hair was consistent with thirty-three hairs found at the crime scene; however, Pierce alleged that Gilchrist's findings were fabricated. *Id.* Pierce also alleged that Gilchrist concealed that his blood

the witness's identification during a lineup identification was coerced by the police.[161] There was no evidence of impropriety as to another witness who identified Newsome as the person he saw making a getaway.[162] The jury concluded that there was "a reasonable probability that the result of the criminal proceedings would have been different if the evidence had been disclosed to the defense," and the court affirmed that due to the police coercion of one witness, "the integrity . . . of the entire investigation, is called into question."[163]

This is not to say that the causation standard is not rigorous. In many cases, violations may be of a minor nature so that a jury could fairly conclude that they did not cause the wrongful conviction.[164]

Proximate causation raises one issue unique to wrongful conviction cases where police conduct investigatory work, but then pass their case on to a district attorney to prosecute. If police provide fabricated evidence to prosecutors, then police cannot "hide behind the officials whom they have defrauded" and claim that the prosecutors' reliance was an intervening cause.[165] For example, the deputy sheriff in *Burge v.*

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contained an enzyme, PGM-2-1, which conclusively precluded him from being the attacker. *Id.* An FBI reexamination in 2001 found that, in fact, none of those hairs matched Pierce's and that Gilchrist fabricated false inculpatory evidence in other cases. *Id.* at 1283. The court rejected Gilchrist's argument on a motion to dismiss that the lineup created probable cause and thus her conduct did not contribute to a malicious prosecution. *Id.* at 1300.

161. *Newsome*, 2002 WL 548725, at *3.

162. *Id.*

163. *Id.*

164. For example, a police report indicating a minor inconsistency in one eyewitnesses' description that was suppressed might not be found to be a "but for" cause where there was other much more powerful (though false) evidence such as eyewitness identification testimony. Nor would such failure to provide what at the time appeared to be innocuous information be a foreseeable cause of the conviction, even if later it turned out to be highly exculpatory based on testimony at trial.

165. See, for example, *Jones v. City of Chicago*, where the Court stated:

> [A] prosecutor's decision to charge, a grand jury's decision to indict, a prosecutor's decision not to drop charges but to proceed to trial—none of these decisions will shield a police officer who deliberately supplied misleading information that influenced the decision. . . .
>
> . . . If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escapo liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him. They cannot hide behind the officials whom they have defrauded.

856 F.2d at 994; *see also Newsome*, 256 F.3d at 752; Sanders v. English, 950 F.2d 1152, 1163 (5th Cir. 1992); Robinson v. Maruffi, 895 F.2d 649, 655 (10th Cir. 1990); Goodwin v. Metts, 885 F.2d 157, 162 (4th Cir. 1989); Smiddy v. Varney, 803 F.2d 1469, 1471 (9th Cir. 1986); Anthony v. Baker, 767 F.2d 657, 660–62 (10th Cir. 1985). The Supreme Court has held that a coercive interrogation by police may violate the Fifth Amendment and cause harm if it is later used against that person by the prosecution in a criminal case. *Chavez*, 538 U.S. at 765–66.

Parish of St. Tammany admitted that he hid police reports that "'could probably make [them] lose the case'" if disclosed during the criminal investigation of a suspect who was subsequently wrongly convicted.[166] A plaintiff is compensated for all fruit an official casts down from the poisonous tree.[167] It is a different matter if there is a break in the causal chain, such as when police fabricate evidence, but that evidence was not admitted at trial, there was no trial,[168] or the defendant was charged with a different crime.[169] In those instances, superceding events make the causal connection too tenuous.[170]

To summarize, while harmless error has become a guilt-based inquiry permitting appellate courts to excuse error based on other evidence of guilt, in a civil case, a jury asks whether misconduct itself was a significant contributing cause—after an exoneration. This Article next examines each fair trial right in turn.

IV. INCORPORATING FAIR TRIAL RIGHTS IN A CIVIL ACTION

A. Brady v. Maryland

The *Brady* right provides a cornerstone of federal wrongful conviction law. This watershed case requires prosecutors to provide the defense with all material favorable evidence,[171] and also prohibits police from misrepresenting, failing to document, or hiding evidence from the defense.[172] Suppression of exculpatory evidence has long caused

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166. 187 F.3d 452, 461 (5th Cir. 1999).

167. Schwartz, *supra* note 7, at 1137.

168. *See* Buckley v. Fitzsimmons, 20 F.3d 789, 795 (7th Cir. 1994) (explaining that there is no Section 1983 claim for fabricating evidence where that evidence is merely kept "in a drawer, or framed . . . and hung . . . on the wall").

169. *See, e.g.*, Kelly v. Curtis, 21 F.3d 1544, 1547–48 (11th Cir. 1994) (demonstrating a situation in which the plaintiff had also been charged and properly incarcerated based on a second crime).

170. For example, if the unconstitutional conduct was false testimony in front of the grand jury, the grand jury indictment may break the causal chain when that testimony was not presented at trial; however, if the police officer uses that false testimony to then mislead a prosecutor, there is causation under Section 1983. *See* Jones v. Cannon, 174 F.3d 1271, 1286–87, 1289 (11th Cir. 1999); Taylor v. Meacham, 82 F.3d 1556, 1564 (10th Cir. 1996); Reed v. City of Chicago, 77 F.3d 1049, 1053 (7th Cir. 1996).

171. 373 U.S. at 87; *see also* Mooney v. Holohan, 294 U.S. 103, 110–12 (1935) (holding that the use of perjured testimony and suppression of exculpatory evidence amounted to a denial of due process).

172. *Kyles v. Whitley* extended *Brady* to information held by police investigators but unknown to prosecutors. Kyles v. Whitley, 514 U.S. 419, 437–38 (1995); *see also* Jean v. Collins, 221 F.3d 656, 663 (4th Cir. 2000) (en banc) (agreeing that police who deliberately withhold exculpatory evidence and prevent prosecutors from complying with

wrongful convictions.[173] Law enforcement has little incentive not to "bury" exculpatory evidence as the defense may never discover the existence of the evidence; if the defense does, at most the remedy is reversal; and in most cases, any violation will be deemed "harmless."

Yet, once a person is exonerated, a civil claim can capture the revelatory impact of an exoneration—that government misconduct concealed evidence probative of a person's innocence. *Brady* provides a particularly powerful civil claim when officials concealed the unreliability of evidence, such as forensic evidence, confession evidence, or eyewitness identification evidence. In doing so, *Brady* provides an umbrella under which other fair trial claims may lie[174]—the harm resulting from suggestive witness identification procedures, a coerced confession, or fabricated evidence arises also because police and prosecutors concealed those violations from the defense.

Over the past two decades, Section 1983 cases in a majority of the circuits have upheld civil claims and verdicts against police officers for *Brady* violations.[175] The thorny issue of translation from criminal claims

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Brady violate the Due Process Clause); Spurlock v. Satterfield, 167 F.3d 995, 1005 & n.17 (6th Cir. 1999); Fero v. Kirby, 39 F.3d 1462, 1462 (10th Cir. 1994); Walker v. City of New York, 974 F.2d 293, 299 (2d Cir. 1992); *Jones*, 856 F.2d at 995; *cf. Newsome*, 256 F.3d at 752 ("[Defendant] does have a due process claim in the original sense of that phrase—he did not receive a fair trial if the prosecutors withheld material exculpatory details.").

173. According to an Innocence Project study, in thirty-four percent of all exonerations, police suppressed exculpatory evidence, and prosecutors did so in thirty-seven percent of all exonerations. Innocence Project, Police and Prosecutorial Misconduct [hereinafter Innocence Project Study], *at* http://www.innocenceproject.org/causes/policemisconduct.php (last visited Mar. 28, 2005). Further work analyzing data on official misconduct is needed; the study does not break the data down into categories of misconduct, although the methodological task of defining what counts as misconduct would be difficult (for example, would misconduct necessarily require a judicial finding, and if so, would findings in a vacatur, on habeas review, verdicts in civil cases, or perhaps a press or investigative report suffice?). Sam Gross's study did not analyze how many exonerations resulted from police misconduct, but its findings provide some strong indication of the degree of misconduct, because perjury and false confession cases account for forty-four percent and fifteen percent of exonerations respectively; in each such case, there is a *Brady* violation. *See* GROSS ET AL., *supra* note 75, at 139–41.

174. *Brady* often provides a "piggyback" cause of action taking on the traditional function of malicious prosecution; examples of this include the *Long*, *Miller*, and *Sarsfield* cases. *See supra* note 30.

175. *See, e.g.*, Manning v. Miller, 355 F.3d 1028–29, 1031 (7th Cir. 2004) (denying FBI agents' absolute and qualified immunity motions as to a Section 1983 *Brady* claim); *Newsome*, 256 F.3d at 747, 753 (rejecting the defendants' qualified immunity defense in a case involving wrongful conviction, imprisonment, and prosecutorial withholding of evidence); Daniels v. United States, 254 F.3d 1180 (10th Cir. 2001); Gonzales v. McKune, 247 F.3d 1066, 1075 (10th Cir. 2001) (explaining that the prosecution's withholding of potentially exculpatory DNA evidence resulted in a *Brady* violation); Nuckols v. Gibson, 233 F.3d 1261, 1267 (10th Cir. 2000) (holding that a *Brady* violation occurred when the prosecution withheld evidence that would have

to civil claims arises because a *Brady* claim exists only if one can show "materiality" and "prejudice," that is "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[176] This type of requirement should sound familiar from the preceding discussions—it is an internalized harmless error requirement. Indeed, the Supreme Court in *Kyles v. Whitley* recognized it as a harmless error requirement, but characterized it somewhat more stringently;[177] lower federal courts have done the same.[178] On its face, the materiality and prejudice requirement is not so different from the civil standard. Whether a defendant can show a "reasonable probability" that a jury would have had a reasonable doubt concerning guilt is like a "substantial factor" test, and more lenient than "but for" causation, where the question is whether a different outcome was "more likely than not."[179] The difference is in

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enabled the defense to test the credibility of a witness on cross-examination); McMillian v. Johnson, 88 F.3d 1554, 1567, 1568 (11th Cir. 1996) (holding that a *Brady* violation occurred when investigators failed to turn over exculpatory evidence to the prosecutor); Smith v. Sec'y of N.M. Dept. of Corr., 50 F.3d 801, 835 (10th Cir. 1995) (holding that a *Brady* violation occurred when there was a "reasonable probability the result of the proceeding would have been different" had certain evidence been disclosed); United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989) (holding that a *Brady* violation occurred when government agents had knowledge of false testimony evidence and when the disclosure of the false testimony had a reasonable likelihood of affecting the jury's verdict); *Jones*, 856 F.2d at 995 (holding that a *Brady* violation occurred when investigators concealed evidence from prosecutors in order to circumvent the *Brady* rule that investigators do not have to keep records of all investigative activities); Boone v. Paderick, 541 F.2d 447, 453 (4th Cir. 1976) (holding that a *Brady* violation occurred when there was a "reasonable likelihood" that the jury's decision would have been affected had it known that the defendant was promised favorable treatment contrary to the prosecutor's representations to the jury that no such promise was made); Hilliard v. Williams, 516 F.2d 1344, 1350 (6th Cir. 1975) (holding that a *Brady* violation occurred when the prosecution offered false and misleading testimony during the defendant's trial).

176. United States v. Bagley, 473 U.S. 667, 682 (1985).

177. 514 U.S. at 435–36. In *Kyles*, the Court explained that "once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review" because the standard for materiality is more stringent than the *Brecht* standard, requiring a "substantial and injurious effect or influence in determining the jury's verdict." *Id.*; *see also Bagley*, 473 U.S. at 679–80. The standard adopted was one of "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682.

178. Federal courts sometimes describe the issue of prejudice to the defendant as a question of harmless error. *See, e.g.*, United States v. Ramirez, 174 F.3d 584, 588 (5th Cir. 1999); United States v. Bruck, 152 F.3d 40, 47 (1st Cir. 1998); United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997); United States v. Sasser, 971 F.2d 470, 481 (10th Cir. 1992); United States v. Carr, 965 F.2d 408, 412 (7th Cir. 1992); United States v. Sanchez, 963 F.2d 152, 156 (8th Cir. 1992).

179. The Court stated in *Kyles* that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but

application, as the *Brady* standard permits a court to examine the "reasonable probability" by broadly asking whether suppression "undermines confidence" in the outcome, and it permits courts to ask whether evidence of guilt taken alone could support a guilty verdict.[180]

Innocence upsets that deferential framework. If the *Brady* "materiality and prejudice" requirement exists as a harmless error limitation, then guilt-based deference disappears in a civil rights lawsuit where one knows an innocent person was convicted. In a civil case, the question whether evidence sufficiently contributed to a conviction is a *causation* question for a jury. It would not make sense to ask two separate parallel questions, namely, whether "materiality and prejudice" is met and whether causation it met. Regardless, the inquiry changes when a civil jury knows that the defendant was innocent and any evidence of guilt was unreliable or false.[181] Most significant is the effect of exoneration—causation will not be a hard question for a jury to answer when an exoneration involves concealment of powerful evidence of guilt, such as an eyewitness identification, a confession, or forensic evidence. For that reason, in *Newsome*, although the civil jury was instructed to decide whether there was "a reasonable probability that the result of the criminal proceedings would have been different if the evidence had been disclosed to the defense,"[182] the jury found that the evidence satisfied that standard because police concealed that they had threatened witnesses into identifying a man they knew they did not recognize from the crime scene.[183] More difficult cases may arise as to concealed evidence more peripheral to the jury's verdict, which could not fairly be characterized as a "substantial factor." Such cases would also not raise the possibilities for systemic reform discussed below.

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whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." 514 U.S. at 434.

180. *Id.* (citing *Bagley*, 473 U.S. at 678).

181. The U.S. Court of Appeals for the Third Circuit dismissed a Section 1983 *Brady* claim, improperly stating that the plaintiff did not show a "reasonable probability" of a different outcome. Smith v. Holtz, 210 F.3d 186, 187, 196 (3d Cir. 2000) (dismissing a *Brady* claim on the basis that the suppressed evidence was not material and not sufficient "to [undermine] confidence in the outcome") (citing *Bagley*, 473 U.S. at 678).

182. 2002 WL 548725, at *3 (citations omitted). The requirement of a "reasonable probability" of a different outcome is inapposite, though also easily satisfied. One knows that a trial did not result in a "verdict worthy of confidence" despite the suppression of evidence, once the conviction is vacated. When a person has been found innocent, and police hid violations of constitutional rights or evidence of innocence from prosecutors, causation should be clear.

183. *Newsome*, 319 F.3d at 302–03.

Illustrating confusion in courts over transposing criminal law rights claims to civil rights claims,[184] two federal circuit courts of appeals have added heightened requirements to civil *Brady* claims that appear nowhere else in civil rights law, because the courts likely perceived that only the most willful suppression of evidence should be actionable. The U.S. Court of Appeals for the Fourth Circuit added a "bad faith" component to the Section 1983 claim based on a *Brady* violation.[185] The U.S. Court of Appeals for the Eighth Circuit recently followed suit by ruling that law enforcement can only be liable for an "intentional" violation of *Brady*.[186] Yet, intent is not an element of the *Brady* test; *Brady* made clear "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or to punishment, *irrespective of the good faith or bad faith of the prosecution.*"[187] A "bad faith" subjective component has no legal basis,[188] but that minority rule illustrates how far some courts have gone to insulate malicious conduct that resulted in an innocent person's conviction.

Civil *Brady* suits point in the direction of lasting structural reform, that is, they target concealment of violations that prevented substantial evidence of innocence from coming to light before the criminal trial, particularly coerced confessions, eyewitness identifications, and fabrication. One simple remedy for such violations remains inexpensive, but not widely adopted—open file policies for criminal discovery. *Brady* violations become crystal clear given full access to

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184. An example of a court confused in the opposite way is the district court in *Kittler v. City of Chicago*; the *Kittler* court strangely suggested in dicta that a *Brady* claim is the *only* fair trial claim that may be brought. No. 03-C-6992, 2004 WL 1698997, at *5 (N.D. Ill. July 27, 2004). The court based this misapprehension on the *Newsome* case which the court stated "makes no provision for a denial of a fair trial claim based on a fabrication of evidence as [the plaintiff] suggests." *Id.* at *5 A fabrication claim is independently viable based on longstanding precedent. *See infra* Part IV.E.

185. Jean v. Collins, 221 F.3d 656, 656 (4th Cir. 2000) (en banc) (holding that police may be liable under Section 1983 for violating *Brady*, but that a plaintiff must show an actual "bad faith deprivation of . . . due process rights"); *see also* Reid v. Simmons, 163 F. Supp. 2d 81, 84, 91 (D.N.H. 2001) (citing to *Jean*, but then holding that the officer must act with "bad faith").

186. Villasana v. Wilhoit, 368 F.3d 976, 980 (8th Cir. 2004).

187. 373 U.S. at 87 (emphasis added).

188. Such a rule is found nowhere else in civil rights law or the law of official immunity. The Due Process Clause itself contains no state of mind requirement, except that the Court has indicated that, in certain instances, more than negligence may be required. Davidson v. Cannon, 474 U.S. 344, 347 (1986); Daniels v. Williams, 474 U.S. 327, 330 (1986). Qualified immunity provides an "objective" standard. *See* Anderson v. Creighton, 83 U.S. 635, 641 (1987) (adding to the immunity inquiry the question of whether a reasonably well-trained officer would know that the conduct would violate constitutional rights).

police and district attorney's files, which plaintiffs receive under federal civil discovery rules. Although the Supreme Court has not been willing to require this type of discovery as a constitutional matter in criminal cases in order to prevent suppression of exculpatory evidence,[189] federal courts have routinely ordered prosecutors to produce this evidence in civil rights cases filed by exonerees.[190] The only way to know if evidence was suppressed by police is to examine what the prosecutors had in their files and to depose them about what they knew. That kind of scrutiny of suppressed information that led to a wrongful conviction, and an examination of whether police engaged in a pattern of such suppression, will at a minimum, put pressure on police departments to adopt policies aimed at preventing suppression of exculpatory evidence.[191]

When officers conceal evidence of innocence in violation of *Brady* obligations, training and discipline can encourage officers not to engage in such constitutional violations. Focusing on systemic reform,

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189. United States v. Agurs, 427 U.S. 97, 104, 109 (1976). The Court in *Agurs* stated:

> If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice.
>
> Whether or not procedural rules authorizing such broad discovery might be desirable, the Constitution surely does not demand that much.

Id.

190. *See, e.g.*, Ostrowski v. Holem, No. 02-C-50281, 2002 WL 31956039, at *3-4 (N.D. Ill. Jan. 21, 2002) ("[M]any courts have found the work-product privilege unavailable when a prosecutor in a prior criminal investigation later objects to discovery by a litigant in a related and subsequent civil lawsuit."); Schultz v. Talley, 152 F.R.D. 181, 184 (W.D. Mo. 1993) (explaining that nonparty assistant attorneys general may not assert the work-product privilege for an investigative file); Doubleday v. Ruh, 149 F.R.D. 601, 606 (E.D. Cal. 1993). The *Doubleday* court stated that:

> "we have not been directed to, nor have we found, any authority holding that a public prosecutor—having completed his investigation and having announced, after failing to obtain an indictment, that no further action would be taken by him—is entitled to rely upon the work product doctrine when the fruits of [the] investigation become relevant to civil litigation to which he is not a party."

149 F.R.D. at 606 (quoting Shepard v. Superior Court of Alameda County, 550 P.2d 161, 169 (1976)).

191. *See* GOVERNOR'S REPORT, *supra* note 80, at 22. The *Report of the Governor's Commission on Capital Punishment* recommended that

> (a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location.
>
> (b) Record-keeping obligations must be assigned to specific police officers or employees, who must certify their compliance to the prosecutor.
>
> . . . .
>
> (d) The police must give the prosecutor access to all investigatory materials in their possession.

Id.

plaintiffs have brought systemic claims under *Monell v. Department of Social Services of New York*,[192] for maintaining a custom, policy, or practice of permitting *Brady* violations against law enforcement, and more interestingly, against prosecutors who, absent such a *Monell* claim, would remain absolutely immune.[193] Such claims, especially given the size of verdicts like that in *Newsome*, may for the first time deter institutions from permitting repeat violations and failing to ensure through policy or training that material evidence is produced to defense counsel.

Change may also arise where exonerations illuminate the serious consequences of the government's errors, thereby convincing law enforcement and prosecutors that it is in their best interest to institute bright-line open file policies and training designed to prevent suppression of evidence.[194] Only such structural reform can lead to lasting protection against wrongful convictions.

B. Ineffective Assistance of Counsel

Civil claims alleging ineffective assistance of counsel provide an opportunity to remedy one of the most intractable causes for wrongful convictions—the gross inadequacy of counsel provided to indigent defendants, even in capital cases. Poor lawyering was a major cause in almost a quarter of the cases in which innocent people were exonerated by DNA.[195] Although criminal defendants have a right to counsel,[196] the Supreme Court has so watered down the standard for ineffectiveness that even death sentences have been upheld in notorious cases where attorneys slept through trial, were drunk, used heroin and cocaine during trial, did not interview witnesses, or were absent for lead

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192. 436 U.S. at 699.

193. Count VIII of the complaint in *Burrell* alleged that "Union Parish District Attorney Adkins, in his official policymaking capacity, created and maintained a custom, policy and/or practice within his office of withholding exculpatory evidence from opposing defense counsel and presenting perjured testimony and false evidence and argument to the jury." Complaint ¶ 25, *Burrell* (No. 3:01CV 2679) [hereinafter Burrell Complaint]. Also, Count VI of the complaint in *Miller* alleged that failure to train and supervise employees resulted in a constitutional violation. Complaint ¶¶ 106–08, *Miller* (No. 03-10805-JLT); *see also* Andrea Elliott & Benjamin Weiser, *When Prosecutors Err, Others Pay the Price; Disciplinary Action Is Rare After Misconduct or Mistakes*, N.Y. TIMES, Mar. 21, 2004, at 25 (describing evidence uncovered in a wrongful conviction case after a pattern of *Brady* violations in the Bronx district attorney's office).

194. For example, in response to a high profile exoneration where exculpatory witnesses' statements were suppressed, North Carolina Attorney General Roy Cooper has called for statewide adoption of open file policies. Andrea Weigl, *Lawyers Debate Openness*, NEWS & OBSERVER, Mar. 15, 2004, at B1.

195. *See* Innocence Project Study, *supra* note 173 (finding that twenty-three percent of all DNA exonerations were due to bad lawyering).

196. Gideon v. Wainwright, 372 U.S. 335, 339–40 (1963).

prosecution witnesses.[197] As a result of the Court's toothless test for ineffectiveness, municipalities often provide grossly inadequate representation, providing few funds and retaining incompetent lawyers.[198] Individual lawyers may lack malpractice insurance and it may be difficult to collect compensation from them, but the municipalities responsible for their assignment to criminal cases may now, for the first time, be held liable.[199]

Harmless error again plays a central role in this turnabout. The Supreme Court held in *Strickland v. Washington* that a conviction may only be overturned if the performance of counsel was so ineffective that it affected the *outcome* at trial.[200] The "prejudice" prong may be decided without even reaching the question of whether counsel was ineffective,[201] and courts generally base their decisions on the "totality of the evidence before the judge or jury," that is, whether there was strong evidence of guilt.[202] The Court also underscored the "strong presumption of reliability" of jury verdicts.[203] Courts applying the doctrine on appeal commonly conclude that, due to sufficient evidence of guilt presented at trial, any ineffective assistance did not affect the outcome.[204] The *Strickland* test, then, is a harmless error rule; as commentators have noted, the *Strickland* rule thus creates a "[c]amouflaged [h]armless [e]rror [d]octrine."[205] The Supreme Court acknowledged as much in *Kyles*, quoting an Eighth Circuit case for the proposition that "'it is unnecessary to add a separate layer of harmless error analysis to an evaluation of whether a petitioner in a habeas case

197. *See* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 76–81 (1999).

198. *See id.*; *see also* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1870 (1994).

199. *See* Bernhard, *supra* note 66, at 40–41 (describing obstacles to the pursuit of a malpractice action).

200. 466 U.S. at 691.

201. *Id.* at 695, 697 (recommending that courts not reach the merits of ineffectiveness claims, stating that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed").

202. *Id.* at 695.

203. *Id.* at 696. The Court further stated that "the entire criminal justice system" should not have to suffer by being burdened with ineffective assistance of counsel claims. *Id.*

204. *See* Darrin Hurwitz & Sarah K. Eddy, *Thirty-First Annual Review of Criminal Procedure, Right to Counsel*, 90 GEO. L.J. 1579 & nn.1460–63, 1594–95 n.1513 (2002) (discussing generally the ineffective assistance of counsel standard and collecting cases setting out the "deficient performance" resulting in a "fundamentally unfair outcome" standard applicable to an ineffective assistance of counsel claim).

205. *See* Kamin, *supra* note 2, at 51–52 ("Ineffective assistance claims, therefore, appear to incorporate harmless error analysis into the substantive standard."); McCord, *supra* note 137, at 1159–62.

has presented a constitutionally significant claim for ineffective assistance of counsel.'"[206] The *Strickland* Court similarly explained that it was adopting the *Brady* "materiality" standard, which it called a harmless error rule.[207] As with other internalized harmless error rules, the rule enhances the harmless error standard because although the "reasonable probability" standard does not depart from civil causation, in application, courts isolate evidence of guilt and strongly presume the verdict was reliable.[208]

While most, if not all, public defender systems remain chronically underfunded and overworked,[209] the situation is exacerbated in many public defender systems in which the same county or city governmental entity both runs the police department and makes decisions to underfund indigent defense. A municipality can be liable for wrongful conviction of an innocent person when it fails to provide effective counsel the same way it can be liable if it fails to supervise its police officers or forensic analysts. In the past, systemic challenges to indigent defense funding schemes faced severe hurdles in federal court, where it was difficult to show prejudice under *Strickland* in the absence of an individual plaintiff who was innocent, convicted due to poor representation, and subsequently exonerated.[210] The wave of exonerations over the past

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206. 514 U.S. at 436 n.9 (quoting Hill v. Lockhart, 28 F.3d 832, 839 (8th Cir. 1994)). The Court added, "[i]n sum, once there has been *Bagley* error as claimed in this case, it cannot subsequently be found harmless." *Id.* at 436. The Court had earlier disclaimed in dicta that the "prejudice" prong is a harmless error rule by stating that "[h]armless-error analysis is triggered only *after* the reviewing court discovers that an error has been committed. And under *Strickland* . . . an error of constitutional magnitude occurs in the Sixth Amendment context only if the defendant demonstrates (1) deficient performance and (2) prejudice." Lockhart v. Fretwell, 506 U.S. 364, 369 n.2 (1993); *see also* William S. Geimer, *A Decade of* Strickland*'s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91, 131 (1995) ("In spite of the Court's recent pronouncement [in *Lockhart v. Fretwell*] that *Strickland*'s application does not involve harmless error analysis, the contrary is obviously true.") (footnotes omitted).

207. *Strickland*, 466 U.S. at 693.

208. *See infra* note 224.

209. Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 WIS. L. REV. 473, 483 & n.50 ("[A]lmost every study made of defender programs has noted very serious shortcomings that are traceable directly to lack of funds."); *see* Charles J. Ogletree, Jr. & Yoav Sapir, *Keeping* Gideon*'s Promise: A Comparison of the American and Israeli Public Defender Experiences*, 29 N.Y.U. REV. L. & SOC. CHANGE 203, 210 (2004) (describing systems for public defender funding).

210. *See generally* Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203 (1986); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Note, Gideon*'s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L.

decade has changed that, and thus, the first cases alleging such claims are being successfully brought in federal court.[211]

The most notable case is *Miranda v. Clark County*, a case brought by Roberto Miranda, who was sentenced to death and spent fourteen years on death row until his conviction was vacated based on ineffective assistance of counsel.[212] Miranda's public defender, who was one year out of law school and had never tried a murder case, let alone a capital case, interviewed just three of the forty witnesses Miranda told him could prove his innocence and who had information about the actual perpetrator.[213] To make matters worse, Clark County assigned its least experienced attorneys to capital cases as a matter of *policy*; the county also had a policy of allocating fewer resources to cases where they believed their client was guilty based on the client failing a polygraph test, as Miranda did.[214] In 2002, the U.S. Court of Appeals for the Ninth Circuit, sitting en banc, concluded that Miranda did have a *Monell* claim against the county for maintaining policies that, as alleged, all but guaranteed him ineffective assistance.[215]

In civil ineffective assistance cases, the *Strickland* standard should lose its harmless error "prejudice" prong. In a Section 1983 case, following the rubric proposed, the jury should be instructed to decide whether the ineffective assistance or inadequate funding scheme *caused* a wrongful conviction. An additional instruction on "prejudice" would serve no purpose. Regardless of what instructions are given, however,

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REV. 2062 (2000). Efforts in state court were more successful. *See, e.g.*, N.Y. County Lawyers' Ass'n v. Pataki, 727 N.Y.S.2d 851 (Sup. Ct. 2001).

211. One egregious case is that of Eddie Joe Lloyd, who filed a civil rights case in 2004. Lloyd was exonerated by DNA evidence after spending seventeen years in prison for sexual assault and murder. *See* Complaint & Demand for Jury ¶¶ 1–3, *Lloyd* (No. 04-70823). Lloyd was a delusional patient on psychotropic medications in a mental institution, and was coerced by police into repeating facts they fed to him in a "confession." *Id.* ¶¶ 1, 69–83. Lloyd's attorneys were provided only $150 by the county to investigate and conducted no meaningful investigation; they conducted no forensic testing that could have proved his innocence, and they did not retain a psychiatrist to evaluate him despite his highly delusional condition and his commitment to a mental hospital. *Id.* ¶¶ 85–87, 92. Lloyd's attorney did not present any defense witnesses, did minimal cross-examinations, and delivered a five-minute closing, although the stakes were high because it was a capital case. *Id.* ¶ 93. The complaint alleged that Wayne County's policy and practice of providing inadequate funding for defending the indigent and appointing grossly incompetent attorneys resulted in Lloyd's conviction. *Id.* ¶¶ 121–26.

212. 319 F.3d 465, 467 (9th Cir. 2003).

213. *Id.*

214. *Id.*

215. *Id.* at 470–71 (finding that "the complaint states claims against Harris and the County for the policy of allocating resources on the basis of apparent guilt or innocence" maintaining a "deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys").

innocence reverses the *Strickland* equation. The kind of overwhelming evidence of guilt that appellate criminal courts typically cite to can no longer excuse grossly inadequate counsel. Once a defendant is found innocent, a jury is likely to conclude, given evidence of systemic disregard for representation, that counsel's inadequacies violated due process.

Two years after the Ninth Circuit decision, Clark County, its public defender's office, and police department settled with Miranda for $5 million.[216] If municipalities adequately fund and supervise public defenders, they will not be vulnerable to policy and practice claims like those brought by Miranda.[217] For most municipalities that grossly underfund and undersupervise counsel for indigent clients and that never before faced any consequences under the Supreme Court's *Strickland* test, wrongful conviction actions and the possibility for verdicts as large as Miranda's should provide ample incentive for systemic change. Perhaps equally useful, civil cases and discovery shed light on the degree to which inadequate funding and supervision caused such egregious miscarriages. Future settlements should encourage institutions to take advantage of that information and target resources toward defending those indigent defendants who face a special risk of a wrongful conviction.

C. Suggestive Eyewitness Identification Procedures

Of all the due process rights in the criminal context, the law of suggestive identifications is the most confused. One thing is clear, however, and that is the Supreme Court's doctrinal progression toward admitting even unconstitutional eyewitness identifications. Civil cases may return the Court's focus to preventing mistaken identifications, an area where adoption of simple procedures can prevent grave harms. Incentives for reform are urgently needed, as mistaken eyewitness identifications have long been the leading cause of wrongful convictions, implicated in more than two-thirds of exonerations.[218] Police use three sorts of eyewitness identification procedures—lineups, showups, and

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216. Carri Geer Thevenot, *Settlement Ends Ex-Inmate's Saga*, LAS VEGAS REV. J., June 30, 2004, at 1A.

217. *See* discussion of *Monell* standards *infra* Part V.C.

218. *See* GROSS ET AL, *supra* note 75, at 3, 7–8, 19 (finding that eighty-eight percent of wrongful convictions in rape cases were due to eyewitness misidentifications, and forty-nine percent of wrongful convictions in murder cases were due to eyewitness misidentifications; the figure across all wrongful convictions is seventy-two percent).

photo arrays.[219] Each is fraught with the well-known danger of misidentifying of the innocent.[220]

The Supreme Court has stated that "[t]he vagaries of eyewitness identification are well known" and "the annals of criminal law are rife with instances of mistaken identification."[221] Perception and memory itself are inherently not just incomplete, but also unreliable; not only do people have difficulty remembering more than a few characteristics of a person,[222] but expectations tend to conflate incidents, and witnesses have particular difficulty identifying members of another race.[223] Moreover, "the witness must testify about an encounter with a total stranger under circumstances of emergency or emotional stress. "The witness's recollection of the stranger can be distorted easily by the circumstances or by later actions by the police."[224] Further, witnesses are unlikely to change their mind later if the police have suggested to them that the

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219. Nathan R. Sobel, *Assailing the Impermissible Suggestion: Evolving Limitations on the Abuse of Pre-Trial Criminal Identification Methods*, 38 BROOK. L. REV. 261, 263–64 (1971).

220. *See* Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 WM. & MARY L. REV. 235, 238 (1970) ("The vagaries of visual identification evidence have traditionally been of great concern to those involved in the administration of criminal law."); Gary Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 603 (1998) (explaining that empirical evidence demonstrates that "false eyewitness identification" is the leading cause of convicting innocent people); Gary L. Wells & Eric P. Seelau, *Eyewitness Identification: Psychological Research and Legal Policy on Lineups*, 1 PSYCHOL. PUB. POL'Y & L. 765, 785 (1995) (discussing the diminished value of the criteria used in eyewitness identifications). *See generally* DWYER ET AL., *supra* note 62, at 53–100 (discussing mistaken eyewitness identifications).

221. United States v. Wade, 388 U.S. 219, 228 (1966). Justice Frankfurter wrote that "[t]he identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." FELIX FRANKFURTER, THE CASE OF SACCO AND VANZETTI: A CRITICAL ANALYSIS FOR LAWYERS AND LAYMEN 30 (1927). Professor Elizabeth Loftus cites a 1983 Ohio State University doctoral dissertation estimating that over half of wrongful convictions per year are due to mistaken eyewitness identification. Elizabeth F. Loftus, *Ten Years in the Life of an Expert Witness*, 10 LAW & HUM. BEHAV. 241, 242–43 (1986).

222. *See* ELIZABETH E. LOFTUS, EYEWITNESS TESTIMONY 35–39 (7th prtg. 1996).

223. *Id.* at 36–39. Indeed, police need not go so far as to instruct the witness who to identify; subtler cues may lead to misidentification, given the fragile state a witness may be in. *See* Wells & Seelau, *supra* note 220, at 767–68, 773–78. Witnesses may also choose a person that looks most like the perpetrator, and may not realize that they can say that no one looks like the perpetrator. *See* Roy S. Malpass & Patricia G. Devine, *Eyewitness Identification: Lineup Instructions and the Absence of the Offender*, 66 J. APPLIED PSYCHOL. 482, 483 (1981); Gary L. Wells & Elizabeth A. Olson, *The Other-Race Effect In Eyewitness Identification: What Do We Do About It?* 7 PSYCHOL. PUB. POL'Y & L. 230 (2001).

224. *Manson*, 432 U.S. at 112.

defendant is the person they saw because they now remember it that way.[225] Meanwhile, the issue of identity may practically dispose of the entire criminal trial.[226] A jury will tend to place special trust in the reliability of an eyewitness, especially the victim of a crime; "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!'"[227]

Effective, inexpensive solutions have long been available to help solve this problem. Social science research indicates that double-blind procedures, which simply ensure that the officers conducting the identification do not know the suspect, substantially reduce mistaken identifications because even well-meaning police can unconsciously make suggestions to the witness through physical cues.[228] Yet, few departments have adopted such procedures, perhaps out of lack of awareness of the consequences of failing to do so.[229] For decades the Court has taken a hands-off approach, remaining unwilling to act on such data and unwilling to rule out any police procedure as per se suggestive.

Instead, the legal response to this problem has been schizophrenic—divided between constitutional rights and guilt-based harmless error rules that limit remedies for those rights. The Supreme Court began by establishing a due process right to be free from unduly suggestive procedures. The first case dealing with suggestion was *Stovall v. Denno*, which involved a show up procedure in which the suspect was taken to the hospital where the murder victim's wife, also injured in the assault, was recovering.[230] The Court concluded that, although one-on-

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225. *See* Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969, 970 (1977).

226. *Wade*, 388 U.S. at 229 (explaining that, once a witness has chosen someone out of a lineup, the witness is unlikely to change his mind later, resulting in termination of the identity issue before trial).

227. Watkins v. Sowders, 449 U.S. 341, 352 (1981) (Brennan, J., dissenting) (footnotes omitted); *Manson*, 432 U.S. at 120 (Marshall, J., dissenting) (stating that "juries unfortunately are often unduly receptive to [eyewitness identification] evidence"). Empirical studies have also shown that much of what is known about the factors affecting eyewitness identification is not "within the jury's common knowledge." Roger B. Handberg, *Expert Testimony on Eyewitness Identification: A New Pair of Glasses for the Jury*, 32 AM. CRIM. L. REV. 1013, 1035 (1994).

228. *See* ROBERT ROSENTHAL, EXPERIMENTER EFFECTS IN BEHAVIORAL RESEARCH 286–87 (1966) (discussing the use of "unintended cues"); Wells & Seelau, *supra* note 220, at 775–78.

229. *See infra* notes 262, 364.

230. 388 U.S. 293, 295 (1967). *Stovall* is part of the *United States v. Wade* trilogy decided on the same day. *Wade* recognized the "high incidence of miscarriage of justice" resulting from the admission of mistaken eyewitness identification evidence at criminal trials. 388 U.S. 218, 228 (1967). *Wade* created a new prophylactic remedy, holding that an out-of-court, postindictment identification would not be admissible unless

one show up procedures are "widely condemned" as improper,[231] under limited circumstances, a prompt show up could be necessary and appropriate.[232] The due process rule was strict in that if the procedure used was "unnecessarily" suggestive, the identification would be excluded.[233]

The Court began to back away from that due process rule in the years that followed by adding a layer of harmless error.[234] In *Manson v. Brathwaite*, the Court adopted a two-step test, asking first whether the procedure was unduly suggestive, and second whether it was otherwise "reliable."[235] The reliability prong is based on several factors first established in *Niel v. Biggers*,[236] including the witnesses' opportunity to view the suspect, the witnesses' level of certainty, and the time that elapsed between the observation and the eyewitness identification procedure.[237] The *Manson* rule thus gives a court broad discretion to survey the record to determine whether, despite suggestive conduct so serious as to violate due process, the witnesses' identifications were "reliable."

The *Manson* Court thus all but invited lower courts to focus on guilt and not on the requirements of due process. In *Manson*, the Court emphasized the same guilt-based interests motivating the expansion of harmless error doctrine, that is, deferring to a jury's "reliable" determination of guilt. The Court noted a general concern with the efficient "administration of justice," which would be undermined by reversal of convictions.[238] The Court also cited to a more explicit concern with a guilt-based interest in preserving convictions, stating that the prior per se approach could exclude not just reliable evidence but

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defendant's counsel was present. *Id.* at 235–36. *Gilbert v. California* was also part of the *Wade* trilogy, and "present[ed] the same alleged constitutional error in the admission in evidence of in-court identifications . . . considered [in *Wade*]." 388 U.S. 263, 264 (1967).

231. *Stovall*, 388 U.S. at 302.

232. *See id.*

233. *Id.* at 301–02. Prior to *Stovall*, suggestiveness was a factor for the jury to weigh; it was a purely evidentiary issue as to the probative value of the evidence. *See, e.g.*, United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 406–08 (7th Cir. 1975).

234. In *Neil v. Biggers*, the Court suggested a new test: "whether under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive." 409 U.S. 188, 199 (1972).

235. 432 U.S. at 114.

236. 409 U.S. at 199.

237. *Manson*, 432 U.S. at 114.

238. *Id.* at 112. Indeed, the Court cited Justice John Paul Stevens. "Mr. Justice Stevens, in writing for the Seventh Circuit in *Kirby* . . . observed: 'There is surprising unanimity among scholars in regarding such a rule [the per se approach] as essential to avoid [the] serious risk of miscarriage of justice.'" *Id.* at 111 (first alteration in original) (citation omitted).

also "may result, on occasion, in the guilty going free."[239] It would be a "[d]raconian sanction" on the prosecution to reverse and grant a new trial when the unconstitutionally suggestive identification was reliable.[240]

The *Manson* Court clearly preserved, as a matter of principle, the due process standard as set out in the *Wade* trilogy, emphasizing that "[t]he standard, after all, is that of fairness as required by the Due Process Clause of the Fourteenth Amendment."[241] Thus, the due process rule set out in *Stovall* remains good law and the "reliability factors" limited only the exclusionary remedy and not the due process right. Like the harmless error rule, the *Manson* rule focuses on independent evidence of reliability: "reliability is the linchpin in determining the admissibility of identification testimony."[242]

One important difference between the harmless error rule and the *Manson* rule, is that the *Manson* reliability analysis determines admissibility of identification evidence at trial, typically at a pretrial *Wade* hearing, rather than on appeal, when the general harmless error rule applies.[243] On balance, however, the *Manson* rule, as characterized by the Court, asks even a trial court to conduct a harmlessness inquiry by looking at other evidence to determine whether constitutional error should be excused.

Providing further evidence that the reliability factors functionally, if not nominally, act as a harmless error rule, *Manson* invited courts to engage in a sweeping, guilt-based analysis in order to excuse suggestive police procedures. After recounting all of the evidence of Brathwaite's guilt, describing in detail how he admitted he had visited the apartment

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239. *Id.* at 112.

240. *Id.* at 112–13. The rule "serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact." *Id.* at 110.

241. *Id.* at 113. Only one other passage suggests otherwise. The Court explained that Judge Harold Leventhal "correctly has described *Stovall* as protecting an *evidentiary* interest and, at the same time, as recognizing the limited extent of that interest in our adversary system." *Id.* (citing Clemons v. United States, 408 F.2d 1230, 1251 (D.C. Cir. 1968)). This again does not suggest that the due process rule is not constitutional; it is a fair trial right, which protects due process at trial. Judge Leventhal called the right the "*Stovall* due process right." *Clemons*, 408 F.2d at 1251.

The Court noted the rejection of rigid exclusionary rules in cases fashioning exceptions to the exclusionary rule. *See Manson*, 432 U.S. at 113. Unlike in the Fourth Amendment context, the Court did not set out any bright-line exception to the rule that admission at trial of unduly suggestive procedures violates due process. The analogy indicates that the Court instead achieved the desired flexibility using a harmless error rule. The Court also noted that, "[u]nlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest." *Id.* at 113 n.13. This is because the due process right is violated only upon introduction at trial.

242. 432 U.S. at 114.

243. *Id.*

where the eyewitness identified him as having sold drugs "[l]ots of times," the Court offered a tepid caveat—that the evidence of his guilt "play[ed] no part in our analysis."[244] Justice John Paul Stevens, in his dissenting opinion, cautioned that "in evaluating the admissibility of particular identification testimony it is sometimes difficult to put other evidence of guilt entirely to one side," but believed the majority sufficiently avoided that "pitfall."[245]

Justice Thurgood Marshall, in his dissenting opinion, warned that it might prove to be difficult for judges to resist relying on other evidence of guilt while determining whether a constitutional violation in identification is harmless.[246] "[T]he Court seems to be ascertaining whether the defendant was probably guilty."[247] Justice Marshall's prediction came to pass. The Supreme Court has not intervened as many of the circuits, taking the hint from *Manson*, have made no secret of their holdings that corroborating evidence of guilt can render an eyewitness identification "reliable," some even calling such independent evidence of guilt a "sixth factor" as to reliability.[248] There are troubling implications of this approach, not the least of which is that the apparent

244. *Id.* at 110 & n.4, 116.

245. *Id.* at 118 (Stevens, J., dissenting).

246. *See id.* at 128 (Marshall, J., dissenting).

247. *Id.* (Marshall, J., dissenting).

248. Several circuits have followed this "sixth factor" test and held that the admission of an impermissibly suggestive identification may amount to harmless error based specifically on other evidence of guilt. *See, e.g.*, United States v. Diaz, 248 F.3d 1065, 1103 & n.48 (11th Cir. 2001) (finding a suggestive in-court identification to be harmless error due to other overwhelming evidence of guilt); Evans v. Lock, 193 F.3d 1000, 1003 (8th Cir. 1999) (same); Johnson v. McCaughtry, 92 F.3d 585, 597 (7th Cir. 1996) (same); United States v. Wilkerson, 84 F.3d 692, 695 (4th Cir. 1996) (holding that a court "may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification"); United States v. Rogers, 73 F.3d 774, 778 (8th Cir. 1996) (finding a witness identification reliable where two other witnesses similarly identified the defendant); Gilday v. Callahan, 59 F.3d 257, 270 (1st Cir. 1995) (finding an eyewitness identification properly admitted where the defendant had confessed to significant facts); United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993); United States v. Napoli, 814 F.2d 1151, 1156–57 (7th Cir. 1987) (considering the fact that the defendant drove a car similar to what witnesses described in determining whether identifications of the defendant were reliable); Meadows v. Kuhlmann, 812 F.2d 72, 76 (2d Cir. 1987) (considering "overwhelming evidence of guilt").

Other circuits reject this "sixth factor" guilt-based approach as improper and instead follow the general harmless error approach. *See, e.g.*, United States v. Emanuele, 51 F.3d 1123, 1128 (3d Cir. 1995). As a separate harmless error approach, courts have held that admission of an impermissibly suggestive identification does not call for reversal where the defects in the identification were presented to the jury. *See, e.g.*, Hornbuckle v. Groose, 106 F.3d 253, 257 (8th Cir. 1997).

guilt of a defendant means that the defendant has less in the way of constitutional rights.[249]

The harmless error rule looks very different once a court knows suggestive procedures contributed to an eyewitness falsely identifying an innocent person—the legal doctrine folds in on itself. In a civil rights case, different standards apply, even to the same underlying facts and rights. The issue is not whether a criminal jury reliably reached a guilty verdict, but whether objectively unreasonable or unduly suggestive identification procedures employed by police foreseeably contributed to mistaken and unreliable identifications and thus, deprived the accused of a fair trial. A civil jury decides this question.

Moreover, few courts have dealt with civil suggestion claims thus far, but a series of cases pending nationwide raise them.[250] Several courts have properly recognized that the core constitutional violation occurs when the procedures employed are suggestive.[251] If so, the factors crucial to the finding of "reliability" in the criminal inquiry become completely irrelevant. Once the person is exonerated, the court knows the witness's identification was false, if not unreliable. The only question is whether police suggestion caused a misidentification. That will rarely be a difficult causation question for a jury to decide. The harms of suggestive conduct during eyewitness identification procedures, while not intuitive to the layperson, can be easily explained. The Supreme Court explicitly warned of the dangers of suggestive procedures and ruled that they "increase the likelihood of misidentification."[252]

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249. For criticism of these decisions, see Rudolf Koch, Note, *Process v. Outcome: The Proper Role of Corroborative Evidence in Due Process Analysis of Eyewitness Identification Testimony*, 88 CORNELL L. REV. 1097, 1102 (2003) (discussing the "importance of considering only corroborative evidence that is directly related to whether the witness independently identified the defendant"). As Judge Amalya Kearse explained in *Raheem v. Kelly* when rejecting such an approach: "proper inquiry seeks to fathom whether the witness's identification is worthy of reliance, that is, whether it provides a foundation on which the factfinder can reasonably depend." 257 F.3d 122, 140 (2d Cir. 2001).

250. *See, e.g.*, *supra* note 30 (discussing the *Atkins*, *Long*, *Miller*, and *Sarsfield* cases); *see also* cases cited *infra* notes 251–54.

251. Geter v. Fortenberry, 882 F.2d 167, 170–71 (5th Cir. 1989) (reversing summary judgment as to a claim of suggestive line-up procedures); Geter v. Fortenberry, 849 F.2d 1550, 1559 (5th Cir. 1988) ("[A] police officer cannot avail himself of a qualified immunity defense if he procures false identification by unlawful means . . . for such activity violates clearly established constitutional principles."); Solomon v. Smith, 645 F.2d 1179, 1185 (2d Cir. 1981) (holding that a defendant's right to due process of law includes the right not to be the object of suggestive police identification procedures that create a "substantial likelihood of irreparable misidentification") (internal quotations omitted).

252. *Biggers*, 409 U.S. at 198 ("[I]t is the likelihood of misidentification which violates a defendant's right to due process.").

The evidence the plaintiff may put on in such a case will reveal the irrelevance of the *Biggers* reliability factors. In each case, criminal courts had admitted suspect identifications as reliable, when victims later came forward and described how police told them who to identify.[253] In *Newsome*, the jury delivered its $15 million verdict likely crediting both the testimony of one of the eyewitnesses that police coerced him into choosing Newsome, and an officer's admission that they improperly showed witnesses photographs of Newsome to increase the chances the witnesses would identify him.[254]

Further illustrating unreliability in the *Newsome* case, an expert witness, Professor Gary Wells, a leading authority on witness misidentification,[255] conducted an analysis of reliability far more sophisticated than the Supreme Court's list of factors. Wells ran tests with subjects using photographs of the real murderer and then of Newsome to determine the likelihood (which was less than 1 in 1000) that, absent suggestion, three eyewitness could independently choose an innocent man.[256] One important feedback effect of civil cases could be an increased willingness of criminal courts to admit such expert testimony into evidence in order to educate juries on the unreliability of eyewitness identifications.

Other courts misunderstand the harmless error nature of the "reliability" factors that the Court set out in *Manson* and conflate harmless error with the constitutional rule. Some courts state that, because the right is a due process right to a fair trial, it provides no remedy in a civil case; rather, it is only an evidentiary prophylactic rule.[257] These courts simply have misconstrued the Supreme Court's

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253. *See supra* note 30 (citing the *Long* and *Sarsfield* cases).

254. 319 F.3d at 303. There, the plaintiffs did not bring suggestive identification claims, but instead brought malicious prosecution and *Brady* violation claims, alleging that the police concealed evidence and used suggestive line-up procedures. *Newsome*, 256 F.3d at 749, 753; *see also supra* note 174 (discussing the use of *Brady* as an umbrella for such claims).

255. The Seventh Circuit upheld the district court's denial of a challenge to his expert testimony based on Federal Rule of Evidence 702, which in effect codifies the holding of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 580 (1993). *Newsome*, 319 F.3d at 306.

256. *Newsome*, 319 F.3d at 305–06. The Seventh Circuit, interestingly, did not reach the issue of whether such conduct violates the due process rule against suggestive identification procedures, but instead ruled that officers suppressed the evidence that demonstrated that they used suggestive procedures to secure false eyewitness identifications violating *Brady*. *Id.* at 305 ("[T]he constitutional violation justifying an award of damages is not the conduct of the lineups but the concealment of evidence about them.").

257. *See* Pace v. City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000) ("The jurisprudential doctrine described in *Manson v. Brathwaite* . . . against the admission of unduly suggestive lineups is only a procedural safeguard, and does not establish a constitutional right to be free of suggestive lineups."); Hutsell v. Sayre, 5

undoubtedly confusing ruling in *Manson*, which added "reliability" factors that go to the question of whether unconstitutional identification procedures were "harmless."[258] Reliability factors should not apply in a civil suit, where the procedure is known to have been false and a jury could conclude that an innocent person was wrongly convicted because the police used suggestive, unconstitutional techniques to obtain an incorrect eyewitness identification.

Civil rights lawsuits encourage the adoption of reliable eyewitness procedures, grounded in solid social science data, by shedding light on the miscarriages that result from failure to adopt simple, inexpensive procedures. For thirty years, the Court has been unwilling to require the police to reform eyewitness identification practices *known* to result in easily avoidable wrongful convictions of innocent people.[259] While the Court has long stated that police departments may adopt such procedures for their own interests—"[t]he interest in obtaining convictions of the guilty also urges the police to adopt procedures that show the resulting identification to be accurate"[260]—that weak invitation has largely been ignored. Additionally, the Court's confused harmless error based reliability test provides little or no meaningful incentive to adopt better procedures. Civil cases may change the current state of affairs. Even assuming that innocent people will be exonerated based on biological evidence in only a few cases, one $15 million verdict, as in *Newsome*, is enough for a police department to reconsider a decision not to pay, for example, the nominal cost of conducting double-blind lineup procedures that dramatically reduce the possibility of suggestion.[261]

The information that civil suits bring to light may further encourage actors to come together to adopt solutions. Such reform already occurred in Boston, Massachusetts, as the city is facing several high

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F.3d 996, 1004–05 (6th Cir. 1993) (describing suggestive identification as an evidentiary interest). In *Hensley v. Carey*, however, the Section 1983 claim was for conducting a suggestive lineup not introduced in a trial, and therefore, the court properly found no fair trial right implicated. 818 F.2d 646, 649 (7th Cir. 1987). Several courts have similarly properly denied a civil remedy when there was no introduction of the identification at trial. Cerbone v. County of Westchester, 508 F. Supp. 780, 786 (S.D.N.Y. 1981); Pyles v. Keane, 418 F. Supp. 269, 275 (S.D.N.Y. 1976).

258. The Court is careful to say so when it reluctantly adopts a prophylactic rule; indeed, the Court now appears to have taken back its prophylactic rationale for *Miranda*. *See* Dickerson v. United States, 530 U.S. 428, 437–38, 440 n.5 (2000) (stating that the *Miranda* rule has constitutional underpinnings, where in the past the Court "repeatedly referred to the *Miranda* warnings as 'prophylactic'").

259. *See supra* notes 228–29.

260. *Manson*, 432 U.S. at 112 n.12.

261. *See* THOMAS P. SULLIVAN, POLICE EXPERIENCES WITH RECORDING CUSTODIAL INTERROGATION (2004) *at* http://www.law.northwestern.edu/depts/clinic/wrongful/documents/SullivanReport.pdf (last modified June 9, 2004) (discussing the nominal cost of videotaping and its great savings, particularly in contesting interrogation procedures).

profile wrongful conviction lawsuits alleging the use of suggestive eyewitness identification procedures. Recently unveiled reforms, adopted through a joint study by the district attorney and the police department, include the use of double-blind lineups, asking eyewitnesses to sign statements regarding their level of confidence in the identification, offering eyewitnesses a "none of the above" option, and recording all statements by suspects.[262]

The effect of these reforms may, in the end, erode the harmful effects of the *Manson* test and render it defunct. Criminal courts may increasingly instruct juries regarding scientific evidence of the unreliability of eyewitness identifications, order double-blind lineups to be conducted, and permit expert testimony, particularly when law enforcement fails to adopt the remedies described.[263] Thus, public information regarding the worst cases involving exonerations may generate remedies in which institutions collect a range of useful data that assists actors on all sides to prevent future mistakes.

D. Coerced Confessions

Innocence also transforms the right to be free from a coerced confession when an exoneration shows to a scientific certainty that a confession is false, and thus, likely the product of coercion or fabrication.

The area is ripe for reform; the criminal law remains hostile to scrutiny of false confessions. While courts have long examined confessions to assess voluntariness,[264] the Supreme Court has been

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262. *See* Maggie Mulvihille, *A Big Push for Justice; City to Make Sweeping Changes to Prevent Wrongful Imprisonment*, BOSTON HERALD, July 20, 2004, at 2. After the Suffolk County District Attorney's Office took the lead and convened a "Task Force on Eyewitness Evidence," the city responded by adopting the suggested reforms, and thus, Boston became first major city to adopt such sweeping reforms. *Id.* The *Miller* and *Sarsfield* cases discussed above are both Boston cases alleging the use of suggestive eyewitness identification procedures. *See supra* note 30. The State of New Jersey and Madison, Wisconsin, currently employ such measures, as does St. Paul, Minnesota, in a pilot program. Suzanne Smalley, *Police Update Evidence Gathering: Suspect Identification Is Focus of Changes*, BOSTON GLOBE, July 20, 2004, at B1. Boston will also require certification of its forensic crime laboratory. *Id.*

263. Barry C. Scheck, *Mistaken Eyewitness Identification: Three Roads to Reform*, CHAMPION, Dec. 2004, at 4.

264. *See, e.g.*, Lego v. Twomey, 404 U.S. 477, 485 (1972) ("The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles.") (citations omitted); Bram v. United States, 168 U.S. 532, 561–63 (1897) (holding a confession inadmissible where the accused was forced to remove his clothes during an interrogation and made to believe that his silence would implicate him). As the Court stated in *Spano v. New York*:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-

reluctant to exclude confessions because they are so powerfully probative of guilt. Coercion remains very difficult to prove in a criminal case under the deferential "totality of the circumstances" test.[265] As Professor Charles Ogletree has written: "[o]nce a suspect confesses . . . to police, the subsequent trial is often merely a formality; the suspect bears the almost impossible burden of countering the statement and establishing her innocence."[266]

While it is difficult for laypeople to imagine, people of sound mind can, admit to crimes they did not commit, after sufficient pressure from police.[267] DNA evidence has uncovered mounting numbers of cases in which factually innocent people confessed to crimes.[268] For example, Eddie James Lowery, who spent ten years in prison for a sexual assault that he did not commit, filed a federal civil rights action in Kansas after being exonerated by DNA evidence.[269] He was a twenty-one-year-old in the U.S. Army when he was involved in a minor auto accident near the home where a sexual assault occurred that same night.[270] The police officers, nicknamed by their coworkers "Dirty Harry" and "Mad Dog," had no suspects for the crime.[271] The elderly victim could not describe her attacker at all, so they decided to coerce a confession from Lowery.[272] Over a two-day period, after refusing Lowery an attorney and food, threatening him that he could not leave until he admitted to committing the sexual assault, and having him repeat after them the details they gave of how the crime was committed,[273] Lowery broke down and cooperated. He may have assumed he could prove his

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> rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

360 U.S. 315, 320–21 (1959).

265. *Dickerson*, 530 U.S. at 434 ("The due process test [for coercion] takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'") (quoting Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973)).

266. Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1844–45 (1987).

267. *See* DWYER ET AL., *supra* note 62, at 92 (stating that "[m]ost jurors can't swallow the idea that people would admit to crimes they had not committed" and describing cases of innocent people confessing to crimes they did not commit).

268. *See* Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004) (analyzing 125 recent cases involving false confessions).

269. *See* Complaint ¶ 1, *Lowery* (No. 5:04-CV-03101-JTM) [hereinafter Lowery Complaint]. The author helped draft Lowery's complaint.

270. *Id.* ¶ 21.

271. *Id.* ¶ 66.

272. *Id.* ¶¶ 23–49.

273. *Id.* ¶¶ 2–3.

innocence once he retained a lawyer, but he was wrong. The jury convicted him based only on the two officers' testimony that he confessed, and it was not until the rape kit was found twenty years later that DNA evidence conclusively cleared his name.[274]

Exoneration shows conclusively that a confession was *false*, but to violate due process, a plaintiff must show that the police officers engaged in unconstitutional coercion. The Supreme Court's due process test looks to the "circumstances" of a confession to determine whether it appears voluntary. As in harmless error analysis, the Court not only looks to the reliability of the confession itself, but more broadly to "the surrounding circumstances" in terms of how the interrogation was conducted, "the characteristics of the accused," and also perhaps to independent evidence of guilt, that is, "the details of the interrogation."[275] The Court has also relaxed the standard by which the prosecution must show that the confession is voluntary (only by a preponderance of the evidence) for the stated guilt-based purpose of placing before the jury "probative evidence."[276]

The Court held early on that evidence of whether the confession is reliable has nothing to do with the question of whether a defendant's will was overborne.[277] More recently, however, in a controversial decision in *Arizona v. Fulminante*, the Supreme Court undid the practical significance of that ruling, and held that an involuntary confession may be harmless error based on other evidence indicating guilt.[278] Lower courts have commonly found *Miranda* violations harmless,[279] but a few have gone further and found involuntary confessions to be harmless.[280]

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274. *Id.* ¶¶ 4–7.

275. *Id.*

276. *See* Colorado v. Connelly, 479 U.S. 157, 168 (1986); *Lego*, 404 U.S. at 489.

277. *See* Rogers v. Richmond, 365 U.S. 534, 544 (1961); Doby v. S.C. Dep't of Corr., 741 F.2d 76, 76, 78 (4th Cir. 1984) (reversing because the trial court erred in considering the truthfulness of a confession while determining voluntariness of the confession).

278. *See* 499 U.S. at 296, 306–12. The Court held that because "an involuntary confession may have a more dramatic effect on the course of a trial than do other trial errors . . . this simply means that a reviewing court will conclude in such a case that its admission was not harmless error." *Id.* at 312. Earlier, the Court even held that, "[w]here the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of an error," the admission of a coerced confession is not harmless. O'Neal v. McAninch, 513 U.S. 432, 437 (1995). The Court also previously held in *Jackson v. Denno* that, when the state obtained a coerced or involuntary statement, it cannot argue for its admissibility on the ground that other evidence demonstrates its truthfulness. 378 U.S. 368, 391 (1964).

279. *See, e.g.*, Tankleff v. Senkowski, 135 F.3d 235, 245 (2d Cir. 1998) (finding the admission of incriminating pre-*Miranda* statements harmless error because a subsequent "Mirandized" confession was admissible); Cooper v. Taylor, 103 F.3d 366, 370–71 (4th Cir. 1996) (finding the admission of a third confession harmless error based

Exoneration casts doubt upon each of these deferential doctrines by upsetting their grounding in determinations as to the reliability of a confession. Once a person's conviction is vacated or a person is pardoned, a false confession cannot be viewed as harmless error or as reliable, probative evidence the jury should hear, nor can it easily be presumed "voluntary." First, as to harmless error, after an exoneration, by definition, there cannot have been overwhelming *reliable* evidence of guilt. It is unlikely there will be confession cases in which there is not scientific evidence of innocence, because confession evidence is so strong, that the confession itself would likely have to be proven false to a moral certainty for a court to agree to a vacatur.[281] Similarly, one cannot presume a confession voluntary based on the totality of circumstances surrounding the confession, and a court cannot consider such a confession probative of guilt once the conviction is vacated or a person is actually found to be innocent. At that point, one knows to a moral certainty that the confession is false.

Exoneration also provides powerful evidence of a civil rights violation because, if the person was innocent, why would he or she confess and how could he or she possibly know what to confess to? Lowery, for example, could not possibly have known, as only the police and the actual perpetrator knew, that the victim was attacked with a silver table knife from her kitchen, and that the perpetrator broke in by tearing the screen door.[282] If the plaintiff was innocent and could not have known anything about how the crime actually occurred, where could the details of the confession come from—the very details that make the confession seem reliable and probative—except from the police? A jury can conclude—and the false confession will speak for

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on two valid confessions and other evidence); Killebrew v. Endicott, 992 F.2d 660, 663–64 (7th Cir. 1993) (finding a statement obtained in violation of *Miranda* based on in-court identification and bank videotapes of the robbery to be harmless error); Rollins v. Leonardo, 938 F.2d 380, 382 (2d Cir. 1991) (applying the harmless error doctrine to a *Miranda* violation); United States v. Maguire, 918 F.2d 254, 262 (1st Cir. 1990) (holding that an incriminating statement taken in violation of *Miranda* was harmless error because the gun involved in the crime could have been properly seized under the automobile exception to the warrant requirement).

280. *See, e.g.*, Hopkins v. Cockrell, 325 F.3d 579, 584 (5th Cir. 2003) (finding that portions of a confession were not voluntary, but finding the coercion to be harmless due to "overwhelming" evidence of guilt); United States v. Thompson, 286 F.3d 950, 962 (7th Cir. 2002) (finding harmless error where "the government presented overwhelming evidence of the defendants' guilt," and where "to the extent the statements were important, they were cumulative"). A court may sidestep the question whether a confession was coerced by finding any error harmless. *See, e.g.*, United States *ex rel.* Smith v. Walls, 208 F. Supp. 2d 884, 889 (N.D. Ill. 2002).

281. For example, in *Patterson*, the court concluded that "Patterson's conviction rested almost entirely on his involuntary confession, and at most on his involuntary confession plus the coerced testimony of a 16 year-old girl." 328 F. Supp. 2d at 897.

282. *See* Lowery Complaint, *supra* note 269, ¶ 53.

itself, *res ipsa loquitur*—that any facts offered that indicate a voluntary and credible confession instead had to have been "fed" to the plaintiff by police officers (thus a fabrication claim also exists, and a *Brady* claim for concealing this misconduct).[283] Because no sane person would purposely confess to a crime they did not commit, two possibilities exist: (1) that the police took advantage of a person who was mentally incompetent to secure a confession; or (2) that the person was coerced into allowing police to feed facts to him or her in order to obtain a false confession. The third possibility, that the suspect was of a pliable nature and the police did not realize it, seems unlikely because to actually obtain a false confession, police must do more than secure cooperation. They must then secure details of how the crime was committed from a person who does not know any such details.

This Article contends that a jury should not be instructed in a civil rights case to examine the "totality of the circumstances," at least not in order to excuse coercion based on other evidence of guilt. Instead, the jury should ask whether coercion or fabrication of a confession caused the unfair trial. Juries would likely conclude that coercing a confession foreseeably causes a wrongful conviction, given that a confession is "probably the most probative and damaging evidence that can be admitted"[284] at a criminal trial: "a confession is like no other evidence."[285] A civil rights case thus provides a deterrent against serious police misconduct that under criminal law has no consequence for police officers, as any violation is typically found harmless, and at best, the confession would simply be excluded.

Several cases have raised civil confession claims, and by and large, courts have treated them properly as independent Section 1983 claims based on the Fifth Amendment.[286] Some courts have also based these

283. *See supra* note 30; *infra* notes 286–87 (discussing civil cases bringing such claims); *see also* Walker v. Lockhart, 763 F.2d 942, 958 (8th Cir. 1985) (finding a *Brady* violation on habeas review when a state ballistics expert suppressed the transcript of the inmate's confession); *Patterson*, 328 F. Supp. 2d at 897 (denying a motion to dismiss on a claim that officers suppressed evidence, and that they coerced and fabricated a confession). Bringing fabrication claims will often make more sense when, in addition to coercive means, it is the fabrication and the false nature of the evidence that caused the harm.

284. Bruton v. United States, 391 U.S. 123, 139 (1968) (White, J., dissenting).

285. *Fulminante*, 499 U.S. at 296.

286. Wilson v. Lawrence County, 260 F.3d 946, 952 (8th Cir. 2001) ("Fundamental to our system of justice is the principle that a person's rights are violated if police coerce an involuntary confession from him, truthful or otherwise, through physical or psychological methods designed to overbear his will."); *see also* Griffin v. Strong, 983 F.2d 1540, 1542 (10th Cir. 1993); Bradt v. Smith, 634 F.2d 796, 800 (5th Cir. Unit A Jan. 1981) ("[T]he fifth amendment privilege against compulsory self-incrimination *is* a creature of federal law secured by the Constitution of the United States, and if abridged under appropriate circumstances it may indeed support a claim under section 1983."); Lewis v. Brautigam, 227 F.2d 124, 128 (5th Cir. 1955).

claims on substantive due process, when the coercive techniques were so egregious as to shock the judicial conscience.[287] A civil claim based solely on a *Miranda* violation is another story. The Supreme Court held that the failure to provide *Miranda* warnings may only be remedied at the criminal trial,[288] not in a civil suit,[289] because *Miranda* is not a federal right but rather, a prophylactic protection against the underlying right to self-incrimination.[290] Nevertheless, the fact that *Miranda* warnings were not given or were improperly given can serve a powerful evidentiary purpose in a civil rights lawsuit under a theory of coercion.[291]

Civil claims return the focus to what can deter coercive confessions in the first place. Civil suits have focused on not just individual bad actors, but on systemic allegations that inadequate supervision, training, and policies caused officers to engage in such coercion; several civil suits have alleged widespread toleration of coercing, torturing, and fabricating confessions from suspects.[292] Structural protections like videotaping interrogations and confessions can reduce the likelihood that coercion will occur by providing in every case the kind of information that DNA provides by happenstance in a few egregious cases. Given the

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287. DeShawn v. Safir, 156 F.3d 340, 348 (2d Cir. 1998) (noting that "[t]he due process clause of the Fourteenth Amendment prohibits self-incrimination based on fear, torture, or any other type of coercion"); Willkins v. May, 872 F.2d 190, 195 (7th Cir. 1989) (finding a viable Section 1983 substantive due process claim based on the right to "freedom from severe bodily or mental harm inflicted in the course of an interrogation" where the suspect was interrogated at gunpoint).

Not all courts have handled such claims properly. One district court strangely held that a claim of a coerced confession did not challenge the conviction, and thus, misunderstood the nature of a fair trial claim, which alleges police misconduct that caused an unfair trial and a faulty conviction, and which under *Heck* may be brought *only* when a conviction is reversed or there is a pardon. Swopes v. Snyder, No. 02-C-1868, 2002 WL 731775, at *2 (N.D. Ill. Apr. 22, 2002). For a case rejeeting that approach, see *Patterson*, 328 F. Supp. 2d at 889.

288. United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990). A separate issue is whether a coerced confession might give rise to damages for a person not brought to trial. The Court indicated there would be no civil remedy for such a person in *Chavez*, 538 U.S. at 766–67.

289. For criticism of this result, see Steven D. Clymer, *Are Police Free to Disregard* Miranda*?*, 112 YALE L.J. 447, 452 (2002), and Klein, *supra* note 95, at 417–21.

290. *See supra* notes 95, 258.

291. *See supra* note 95.

292. *See supra* note 30 (discussing the *Lowery*, *Salaam*, and *Ochoa* cases); *see also Kittler*, 2004 WL 1698997, at *7 (upholding *Monell* claims on the hasis that "'[t]he City of Chicago deliberately ahides a culture of coercion in the Chicago Police Department'") (alteration in original) (quoting the complaint); *Patterson*, 328 F. Supp. 2d at 898–99, 903 (denying a motion to dismiss as to a *Monell* claim alleging, among other violations, failure to supervise officers engaging in a pattern of using torture to coerce and fabricate confessions).

nominal costs of such safeguards, the benefits to law enforcement and prosecutors, as well as to courts and defense lawyers, civil suits may lead to more widespread adoption of videotaping and other policies and protections.[293]

E. Fabrication of Evidence

In the years to come, fabrication of evidence claims may be at the forefront of efforts to reform shoddy scientific practices used by forensic crime labs responsible for many wrongful convictions. Fabricating evidence by manufacturing it during investigation, or through perjury during judicial proceedings, is illegal and has violated due process dating back to the Court's early decisions in *Napue v. Illinois*[294] and *Mooney v. Holohan*.[295] As the U.S. Court of Appeals for the First Circuit recently put it, "if any concept is fundamental to our American system of justice, it is that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit."[296] Yet, such grave misconduct has occurred with surprising frequency, by one account in almost half of all exonerations,[297] and has led to a series of civil rights lawsuits that may provide a deterrent in the future.[298]

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293. *See infra* note 333. For a discussion on law enforcement justifications for videotaping, see GOVERNOR'S REPORT, *supra* note 80, at 24 ("[I]nterrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process."). As Profesorr Richard Leo has written:

> Videotaping improves the quality of interrogation practices and lends greater credibility and legitimacy to police work. And videotaping memorializes the details of the interrogation and confession for future review, details that may become indispensable in the process of convicting guilty defendants and acquitting innocent ones. These are all unqualified social goods. It is therefore not surprising that both liberal *and* conservative legal scholars have recommended the use of videotaping inside the interrogation room.

Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 692 (1996).

294. 360 U.S. 264, 269 (1959).

295. 294 U.S. 103, 112 (1935).

296. *Limone*, 372 F.3d at 44–45.

297. *See* GROSS ET AL., *supra* note 75, at 18 ("Overall, in 44% of all exonerations (145/328) at least one sort of perjury is reported—including 57% of murder exonerations (114/199), and 24% of rape exonerations (29/120).").

298. *See infra* notes 305–09 (discussing civil fabrication cases); *see also* Paine v. City of Lompoc, 265 F.3d 975, 982 (9th Cir. 2001) (denying absolute immunity for the fabrication of evidence); *Wilson*, 260 F.3d at 952–54 (denying a grant of summary judgment to the defendant officers, who coerced a confession, and describing the law on coercion and why the plaintiff's rights were violated); *Jones*, 174 F.3d at 1279, 1289–90

Harmless error has not been incorporated into the claim for fabrication of evidence as with the preceding fair trial claims; fabrication claims are, however, commonly brought in wrongful conviction actions and raise overlapping issues.

Fabrication of evidence claims may be brought when officers falsify evidence, either physical or testimonial.[299] Officers may fabricate physical evidence by altering that evidence, or more commonly, by lying about its characteristics.[300] Increasingly common are cases where law enforcement officers claim that physical evidence matches the defendant's blood, hair, etc., when it does not, often by employing "junk science" to lend credence to false testimony.[301] Forensic laboratory technicians often work alongside law enforcement during criminal investigations and may share liability. Such laboratories have increasingly come under public scrutiny for lack of independence, questionable scientific standards, lack of outside auditing, and instances of outright fraud in forensic testing, reports, and testimony.[302]

(denying summary judgment to an officer who fabricated a bootprint); *Spurlock*, 167 F.3d at 1005 (finding that the right to be free from police fabrication of evidence is clearly established). For a discussion on the lack of deterrence in criminal procedure, see Schwartz, *supra* note 7, at 1125 ("Even if they do get caught, the police do not lose much, since the only work they put into the fabricated confession was creating it, and the case against the defendant is not harmed beyond the exclusion of the confession.").

299. *See infra* note 301.

300. The Court has held that destruction of potentially exculpatory evidence, on the other hand, does not violate due process absent a showing of bad faith. Arizona v. Youngblood, 488 U.S. 51, 57–58 (1988). Thus, such a claim would be difficult to bring in the typical civil case. Problematically, such a rule provides law enforcement an incentive to fail to preserve evidence rather than merely suppress it (although to garner a conviction they must have some evidence of guilt, so the officer bent on securing a wrongful conviction would have a contrary incentive to fabricate it). A work in progress will criticize the *Youngblood* rule, which stands alone among fair trial rights in requiring fault, as part of a larger discussion of the role that tort law conceptions of fault play in civil versus criminal procedure constitutional rights.

301. *See, e.g.*, *Pierce*, 359 F.3d at 1281–83 (denying motions to dismiss by a defendant forensic laboratory criminologist on fabrication and malicious prosecution claims); *Jones*, 174 F.3d at 1289–90 (denying summary judgment to an officer who fabricated a bootprint); *Gregory*, 2004 U.S. Dist. LEXIS 7046, at *6, *33–43 (denying absolute immunity to the hair examiner who fabrieated hair results in false reports and testimony, and to the offieers who allegedly created a false police report accusing the plaintiff of describing objects taken from the victim's apartment); DWYER ET AL., *supra* note 62, at 115–25, 161–71 (describing "white coat fraud" that so often leads to wrongful convictions, and addressing shoddy "junk science," especially with regard to hair evidence that is routinely tolerated in courtrooms and forensic crime laboratories); *supra* note 30 (discussing the *Atkins*, *Green*, *Miller*, and *Sarsfield* complaints which each contained fabrication claims); *see also* D. Michael Risinger & Michael J. Saks, *Science and Nonscience in the Courts:* Daubert *Meets Handwriting Identification Expertise*, 82 IOWA L. REV. 21, 21–22 (1996) (discussing the validity of handwriting identification).

302. The Montana, Cleveland, Houston, and Virginia crime labs are among those that have come under scrutiny. *See* Kris Axtman, *Bungles in Texas Crime Lab Stir*

Officers fabricate testimony by testifying falsely, coercing a confession, or eliciting perjury from a witness in order to secure an arrest warrant or an indictment of a suspect.[303] In a wrinkle that seems

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Doubt over DNA; Botched Tests Cast Inmates' Guilt into Question—An Error that May Be an Anomaly, or an Indicator of a Wider Problem, CHRISTIAN SCI. MONITOR, Apr. 18, 2003, at 3 (describing the "shoddy scientific practices" performed at the Houston Police Department crime laboratory that resulted in the announcement that over one hundred DNA cases would be subject to retesting); Editorial, *Experts Blister State's DNA Results*, VIRGINIAN-PILOT, June 20, 2004, at J4 (discussing a critique of three nationally recognized DNA experts which raised "alarming questions about the integrity of the [Virginia] state lab's work" after Earl Washington, Jr. was pardoned because DNA evidence unplicated another man already in prison for sexual assault); Adam Liptak & Ralph Blumenthal, *New Doubt Cast on Testing in Houston Police Crime Lab*, N.Y. TIMES, Aug. 5, 2004, at A19 (discussing an expert report concluding that the Houston crime lab's chief of serology, and later chief of DNA, falsified or used unsound DNA evidence leading to Gcorge Rodriguez's wrongful conviction and seventeen-year imprisoument, and calling for the reexamination of thousands of closed cases); William C. Thompson & Michele Nethercott, *The Challenge of Forensic Evidence*, CHAMPION, Oct. 2004, at 50 (describing crime lab malfeasance in Houston, Cleveland, and Montana); *see also* Burrell Complaint, *supra* note 193, ¶¶ 62–69 (naming as defendants employees of the North Louisiana Criminalistics Laboratory); Complaint ¶¶ 88–101, *Gregory* (No. 3:01CV-535-R) (alleging fabrication of hair evidence and naming as defendants members of the Kentucky State Police Crime Laboratory); *supra* note 262 (addressing reforms put in place by the City of Boston requiring certification of their crime lab).

303. *See, e.g.*, Zahrey v. Coffey, 221 F.3d 342, 344 (2d Cir. 2000) ("We hold that there is a constitutional right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigatory capacity."); Whiting v. Traylor, 85 F.3d 581, 585 n.5 (11th Cir. 1996) (alleging that an officer made "inaterial misstatements of fact in support of the prosecution"); Robinson v. Maruffi, 895 F.2d 649, 650–51, 655 (10th Cir. 1990) (denying a defendant's appeal for summary judgment based on "the testimony the defendants manufactured for . . . the state's key witnesses"); *Jones*, 856 F.2d at 993 (finding that poliee officers were liable under Section 1983 for the suppression and fabrication of material facts to the prosecutor); Anthony v. Baker, 767 F.2d 657, 662 (10th Cir. 1985) (finding that a Section 1983 action may be pursued for fabricated evidence or perjurious testimony). There is no absolute immunity for such actions; officials "[o]bviously' enjoy no immunity for 'non-testiniomial acts such as fabricating evidence." *Paine*, 265 F.3d at 981 (internal quotations omitted); *see also* Buckley v. Fitzsimmons, 509 U.S. 259, 274 & n.5 (1993) (stating that absolute immunity for fabricating evidence would not be granted, because absolute immunity did not exist at common law); Ienco v. City of Chieago, 286 F.3d 994, 1000 (7th Cir. 2002) ("Neither the withholding of exculpatory information nor the initiation of constitutionally infirm criminal proceedings is protected by absolute immunity.").

Police officers or prosecutors may be cloaked with testimonial immunity if they testify about fabricated evidence. Briscoe v. LaHue, 460 U.S. 325, 335–36 (1983). This will not follow if they act as a "complaining witness" providing crucial evidence of probable cause or the impetus behind prosecution. Kalina v. Fletcher, 522 U.S. 118, 129, 131 (1997); Gauger v. Hendle, 349 F.3d 354, 358 (7th Cir. 2003) ("There is an exception for 'complaining witnesses'—the instigators of the prosecution—and it might embrace police officers who pushed aggressively for a prosecution."); Vakilian v. Shaw, 335 F.3d 509, 516 (6th Cir. 2003) (discussing absolute immunity and the "complaining

to confuse courts, evidence can be fabricated by police officers acting through others as intermediaries. Perhaps the most common source of false testimony leading to wrongful convictions is the testimony of a third party who has something to gain by lying, typically a "jailhouse snitch."[304] Other cases, like *Newsome*, involve witnesses through which law enforcement secures perjured testimony by coercion.[305] Fabricated confessions can fall into this category. The obvious case is where the police fabricate the confession by writing a false report after the fact or doctoring tapes.[306] Police can also fabricate a confession in a more devious way—by coercing the suspect or witnesses and by "feeding" details of the crime to make the "confession" sound plausible.[307]

A majority of the circuits have upheld Section 1983 claims for fabricated confessions.[308] However, several courts somewhat confuse the issue by treating fabrication as part of a malicious prosecution claim, and then holding that if police had probable cause to arrest, their fabrication of evidence is rendered, in effect, "harmless."[309] Doing so

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witness" exception); Cervantes v. Jones, 188 F.3d 805, 809–10 (7th Cir. 1999) (same). Further, testimonial immunity poses no obstacle to a *Brady* claim. *Manning*, 355 F.3d at 1031.

304. *See* GROSS ET AL., *supra* note 75, at 18 (finding that "in at least 94 cases a civilian witness who did not claim to be directly involved in the crime committed perjury—usually a jailhouse snitch or another witness who stood to gain from the false testimony").

305. *See supra* note 30 (discussing the *Blake* and *Burrell* complaint allegations regarding the use of informants). *Blake* involves allegations that officers repeatedly relied on a neighborhood informant who they fed facts to in order to clear homicide cases. Complaint & Jury Demand ¶¶ 17–18, *Blake* (No. CV-01-6954). The *Burrell* case involves the use of a jailhouse snitch and the coercion of the ex-wife of a suspect by threatening to take away custody of her children. Burrell Complaint, *supra* note 193, ¶¶ 48–51, 88–99. On the use of jailhouse informants, see DWYER ET AL., *supra* note 62, at 156–57.

306. *See, e.g.*, Castellano v. Fragozo, 311 F.3d 689, 704–05 (5th Cir. 2002) (finding that a due process claim had been stated where a police officer and witness had altered tapes of a defendant's interrogation to make it sound as though he had confessed, although he had not), *rev'd on other grounds*, 352 F.3d 939, 943, 959 (5th Cir. 2003). "[P]lainly, the perjury and manufactured evidence that tainted Castellano's arrest also denied him due process when used again at trial to convict him." *Castellano*, 352 F.3d at 959.

307. *See* Devereaux v. Abbey, 263 F.3d 1070, 1074–76 (9th Cir. 2001) (construing allegations that police interrogated children to elicit falsely inculpatory evidence as invoking "a clearly established constitutional due process right not to be subjected to criminal charges on the basis of false evidence that was deliberately fabricated by the government"); *see also supra* note 30 (discussing the *Lowery* and *Ochoa* cases). In this situation, a plaintiff may also bring a *Brady* claim; not only is the evidence fabricated, but police claimed that the evidence was accurate and suppressed the fact that it was manufactured. *See, e.g. Manning*, 355 F.3d at 1031 & n.1.

308. *See supra* notes 301, 303, 306–07.

309. *See* Mahoney v. Kesery, 976 F.2d 1054, 1061 (7th Cir. 1992) ("[A] police officer who procures a prosecution by lying to the prosecutor or to the grand jury can be

misunderstands Section 1983, as fabrication is a separate, freestanding constitutional due process claim long recognized by the Supreme Court.[310] As with other claims discussed, the jury answers whether fabricating evidence *caused* an unfair trial and wrongful conviction.

Fabrication of evidence claims point in the direction of simple inexpensive reforms designed to prevent the recurrence of such misconduct. A recent settlement of a civil case in Cleveland, Ohio, sets an example for other lawsuits and for law enforcement—it calls for an audit into the work of a forensic scientist who fabricated false inculpatory hair and serology evidence, as well as for random testing of other scientists' laboratory work.[311] The result provides a permanent, independent scientific monitor that can provide more reliable scientific evidence for law enforcement and detect errors that lead to wrongful convictions.

Lawsuits may then push local government to operate independent, up-to-date, and peer-reviewed forensic science agencies that are far less

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sued for the consequences of the prosecution."); *Sanders*, 950 F.2d at 1163 (stating that "'maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none . . . can be grounds for a § 1983 action'") (quoting Wheeler v. Cosdin Oil & Chemical Co., 734 F.2d 254, 260 (5th Cir. 1984)); Smith v. Springer, 859 F.2d 31, 34 (7th Cir. 1988) (finding a proper claim for fabrication of evidence leading to an arrest, which could be brought without challenging the legality of a conviction where damages were sought only for a Fourth Amendment violation); *Jones*, 856 F.2d at 992–95 (upholding a jury verdict on the claim that a police officer signed "a deceitful report for use by the prosecution" in a case bringing only malicious prosecution and false arrest claims); *Geter*, 849 F.2d at 1559 (permitting a cause of action based on fabrication as to procuring false eyewitness identifications); *see also* Douglas J. McNamara, Buckley, Imbler *and Stare Decisis: The Present Predicament of Prosecutorial Immunity and an End to Its Absolute Means*, 59 ALB. L. REV. 1135, 1194 (1996) ("[T]he status of malicious prosecution and fabricated evidence remain unclear.").

310. *See Napue*, 360 U.S. at 269 (recognizing that this right is "implicit in any concept of ordered liberty"); Pyle v. Kansas, 317 U.S. 213, 216 (1942) (holding that the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction violates the Constitution); Mooney v. Holohan, 294 U.S. 103, 112 (1935) (stating that due process is not satisfied "if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured"). In contrast to a malicious prosecution claim, "[n]o arrest, no matter how lawful or objectively reasonable, gives an arresting officer or his fellow officers license to deliberately manufacture false evidence against an arrestee." Ricciuti v. N.Y.C. Transit Auth., 124 F.3d 123, 129–30 (2d Cir. 1997) (rejecting an argument that "so long as there was probable cause for Alfred Ricciuti's arrest—independent of the allegedly fabricated evidence—the fabrication of evidence is legally irrelevant").

311. *See supra* note 34 (discussing *Green*); *see also* GOVERNOR'S REPORT, *supra* note 80, at 22 (recommending that "[a]n independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision" and recommending adoption of minimal standards for DNA evidence).

likely to permit shoddy science or fabrication. As evidence of shoddy forensic science practices mounts, perhaps states will consider adopting, not just auditing, and also undertake the additional structural reform of creating truly independent regional crime laboratories that would have less of an incentive to fabricate evidence in particular cases.[312] Again, the remedies focus on data gathering, here in the form of audits, and rather than intruding on law enforcement prerogatives, they empower all sides by providing them with more reliable investigative tools and results.

V. RETURNING THE CONSTITUTION TO CRIMINAL PROCEDURE

A. Deterrence and Section 1983 Suits as Structural Catalysts

Despite no change in the underlying law, we are likely to see more far-reaching criminal procedure reform in the years to come than we have seen in the last several decades. The recent wave of exonerations demonstrates how starkly outdated and unreliable criminal procedure protections remain. New evidence suggests that wrongful convictions arise from shoddy science, suggestive identification procedures, and fabricated and suppressed evidence, yet nothing in our criminal procedure addresses those causes of error.[313] Criminal procedure has long failed to consider the adoption of even the most unobtrusive protections. Developing substantive values through criminal procedure has been met with hostility by the Supreme Court,[314] and indeed, the Court has restricted due process remedies based, ironically, on the deterrence rationale, citing to a lack of a need for deterrence.[315]

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312. *See* HOUSE RESEARCH ORG., TEX. HOUSE OF REPRESENTATIVES, SHOULD TEXAS DO MORE TO REGULATE CRIME LABS? 1-3 (2004) (discussing the problems and debate surrounding whether Texas crime laboratories are properly regulated and have sufficient safeguards to ensure accurate analysis), *available at* http://www.capitol.state.tx.us/hrofr/focus/crime_lab79-2.pdf.

313. *See, e.g.*, Clymer, *supra* note 289, at 551-52 (noting the Court's lack of enthusiasm for deterrence by using exclusionary remedies and recounting decisions undercutting exclusionary protections).

314. DRIPPS, ABOUT GUILT AND INNOCENCE, *supra* note 21, at 169-73; Amar, *supra* note 23, at 811.

315. The Court's discomfort may not bo surprising where exclusion, in effect, asserts the rights of others in cases where police misconduct did not result in unreliable evidence presented at trial. *See* United States v. Leon, 468 U.S. 897 (1984) (concluding that the purposes of the exclusionary rule would not be served, and therefore the rule should not be applied in cases where officers relied on an invalid search warrant unless the "officers were dishonest or reckless in preparing their affidavit or could not have harbored an objectively reasonable belief in the existence of probable cause"); *see also* Stone v. Powell, 428 U.S. 465, 494-95 (1976) (denying habeas corpus relief to a prisoner, although the evidence used to convict the prisoner was seized in violation of a state constitutional provision that provided the opportunity for the "full and fair

Supreme Court jurisprudence, thoroughly infected by harmless error, encourages courts to limit remedies for the very rights whose violation raise the greatest dangers of wrongful convictions. This hopeless state of affairs, in part, is due to the remedial context—criminal procedure remedies defer to law enforcement discretion, to state policy judgments, and most fundamentally, to the judgments of a jury that delivered a guilty verdict.

Wrongful conviction actions finally provide a mechanism to return the deterrent power of the Constitution to our criminal justice system, but in a civil forum. The deterrence rationale should have more traction in civil cases, in which damages both compensate and punish actors known to have engaged in misconduct.[316] Civil constitutional law also permits the evolution of something powerful—a civil, substantive fair trial jurisprudence.[317] Rather than focusing simply on the efficiency of procedures used in criminal trials, Section 1983 lawsuits focus on what measures could be taken to prevent official misconduct that predictably causes the wrongful convictions.

Significant reforms may arise out of a convergence of interests—the remedies for many serious wrongful convictions are inexpensive, readily available, and beneficial to law enforcement. Many of the reforms that can prevent wrongful convictions, such as double-blind lineups, videotaping, outside auditing, and open file discovery, are procedural, like the fair trial rights themselves. These reforms are also modestly

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litigation" of Fourth Amendment claims); United States v. Janis, 428 U.S. 433, 459–60 (1976) (holding that the exclusionary rule does not apply in civil cases where evidence is seized by law enforcement officials of one sovereign to be used against another sovereign); United States v. Calandra, 414 U.S. 338, 342, 354–55 (1974) (holding that the exclusionary rule does not apply in grand jury proceedings). *See generally* Meltzer, *supra* note 130.

316. *See* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1051–54 (1987) (explaining that in a survey of Chicago police officers' views of the exclusionary rule, police unanimously favored the rule over tort suits against individual officers for violations because such tort claims would overdeter officers).

317. Substantive due process claims for wrongful conviction, however, claiming that police misconduct offended basic principles of justice and not any specific constitutional guarantee, have fallen flat in the courts. *See, e.g.*, *Newsome*, 256 F.3d at 751 (rejecting the application of a substantive due process approach to a malicious prosecution claim); Taylor v. Waters, 81 F.3d 429, 436 (4th Cir. 1996) (denying a substantive due process right against prosecution absent probable cause where "there is no quantum of harm occurring between the initiation of groundless charges and the seizure"). *But see* Ahlers v. Schebil, 966 F. Supp. 518, 532 (E.D. Mich. 1997) (noting that the *Brady* right is "firmly grounded in substantive due process"); Avery, *supra* note 7, at 47 (describing the support for a procedural, rather than substantive, due process theory of the *Brady* right, but criticizing courts for failing to then adopt a civil procedural due process analysis).

expensive and unobtrusive, provide great benefits to law enforcement, and increase the reliability of investigations and prosecutions.

Preventing these worst miscarriages of justice from occurring provides great political and economic savings to government. As noted, potential jury awards and exposure in wrongful conviction cases remain particularly high where the exonerated person lost so many years of his or her life.[318] Adverse publicity imposes additional costs in cases in which innocent people are imprisoned. As Professor Daryl Levinson points out, law enforcement may sometimes respond more to political pressure than to monetary judgments; these actions should trouble law enforcement on both fronts.[319] Of great institutional concern is the loss of legitimacy to the criminal justice system. Law enforcement is tasked with apprehending the guilty, and in every wrongful conviction case, they failed, and not only was an innocent person incarcerated, but a criminal remained at large (undercutting any asserted law enforcement interest in "finality"). Police and prosecutors must constantly rely on the trust of their community—witnesses, jurors, and also defense lawyers—trust which can be shattered by the public perception that not just unfairness, but egregious miscarriages of justice can occur. That trust can only be repaired by taking public action to assume accountability and to prevent future harm.

The enhanced deterrent effect of Section 1983 litigation also arises structurally from the nature of federal litigation, particularly federal discovery rules. Unlike a defense counsel litigating a criminal trial with only bare-bones discovery and poor resources from the state, plaintiffs, once exonerated, in a federal case, have access to the district attorney's files and police files, and can individually depose each of the police officers, district attorneys, jailhouse snitches, or witnesses responsible for the wrongful conviction. Federal discovery alone may go a long way toward uncovering and providing the remedy for patterns of error

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318. *See* AVERY ET AL., POLICE MISCONDUCT: LAW AND LITIGATION §§ 13:1-:9, :13, at 597-609, 618-19 (3d ed. 2004). *Compare id.* §§ 13:15-:17, at 602-24 (describing sample wrongful death awards), *with id.* § 13:18, at 624-29 (describing awards for permanent injuries), *and supra* note 32 (citing wrongful conviction verdicts and settlements).

319. Daryl J. Levinson, *Making Government Pay: Markets, Politics, and Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 370-71, 420 (2000) ("Constitutional cost remedies make government pay dollars for constitutionally problematic conduct, but government cares not about dollars, only about votes."). *See generally* Meltzer, *supra* note 130. Additional work is needed to reexamine how law enforeement in fact responds to litigation. High profile wrongful conviction suits already have brought about systemic reform both in response to high profile cases, class actions and cases in the aggregate, suggesting that contrary to such theory on deterrence, properly targeted constitutional tort suits can have a significant deterrent and reformative effect. For an examination of the surprising structural and remedial role of civil suits to reform discriminatory policing, see Garrett, *Remedying Racial Profiling*, *supra* note 16.

in our criminal justice system. For example, in order to assess whether law enforcement engaged in a pattern of fabrication of evidence, the court could order an independent audit of several years' worth of forensic tests. The ultimate remedy would merely continue that discovery audit.

Other actors focus on reform. Many of these cases are being brought by civil rights lawyers more focused on systemic reform than the personal injury bar at large might otherwise be.[320] District attorney's offices named as defendants for the first time in these cases may, as in Boston,[321] take a special role in adopting reforms given their interest in securing reliable convictions.

The scientific community also takes on an important role in such litigation, serving as expert witnesses who can educate all sides and courts on the causes of wrongful convictions. In a federal case, there can be an analysis of forensic evidence, of identification procedures used, or of investigative missteps.[322] Such expert analysis may encourage trial judges in criminal courts to look more closely at eyewitness identifications. If experts notice systemic violations, that kind of "pattern or practice" evidence may also be introduced during suppression hearings to educate the judge as to where misconduct is systemic.

The press will continue to play a crucial role, especially given the exposure civil cases provide regarding the misconduct that leads to wrongful convictions.[323] The combination of deterrence through litigation costs, uncovering public information about the causes of wrongful convictions and the resulting public pressure, as well as the benefits to law enforcement may result in sustained institutional reform.[324]

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320. *See supra* note 32 (discussing various verdicts and settlements). Many of these cases are brought by Cochran Neufeld & Scheck, LLP and the People's Law Offices in Chicago, and emphasize the requested reforms to the criminal justice system. To a surprising degree, their clients, the exonerees, have also been supportive of settlements providing for such reform. *See supra* notes 34 (discussing the *Green* settlement).

321. *See supra* note 262.

322. *See, e.g., supra* note 256 (discussing Professor Gary Well's testimony in *Newsome*).

323. For a discussion on the role of press coverage in encouraging the adoption of videotaping of confessions in Prince George's County, Maryland, and Broward County, Florida, see Steven A. Drizin & Marissa J. Reich, *Heeding the Lessons of History: The Need for Mandatory Recording of Police Interrogations to Accurately Assess the Reliability and Voluntariness of Confessions*, 52 DRAKE L. REV. 619, 642 (2004).

324. For a discussion on the subject of structural reform, see Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 CAL. W. L. REV. 333 (2002) (proposing the creation of state and federal innocence commissions to uncover the causes of wrongful convictions); Lissa Griffin,

B. Institutional Reforms to Come

The reforms that flow from the fair trial rights previously described prove inexpensive and easy to adopt. They are largely information-driven remedies, that is, remedies designed to collect more reliable evidence. Thus, one would expect police departments to adopt these reforms in the interest of arresting the true culprits. Most departments have not done so, but civil suits provide a strong public incentive to examine such remedies. In doing so, a crisis surrounding the legitimacy of law enforcement can be redirected toward an opportunity for law enforcement to improve the reliability of criminal investigations.

One such simple reform is routine videotaping of confessions to help avoid fabricated or coerced confessions and protect against suppression of evidence in violation of *Brady*. Videotaping is cost-effective and benefits the police by providing reliable evidence against those who properly confess.[325] Yet, despite *Miranda*'s hearty invitation to adopt further safeguards against the longstanding danger of improper confessions, which the Court recently affirmed in *Dickerson*,[326] and a few state courts adopting such a requirement as a matter of state constitutional law,[327] police have made little movement to adopt videotaping.[328] Instead, civil rights litigation may finally provide the legal impetus for such safeguards. Highly publicized exonerations, information uncovered in civil discovery, and the threat of significant civil damage awards have begun to lead to the adoption of videotaping

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The Correction of Wrongful Convictions: A Comparative Perspective, 16 AM. U. INT'L L. REV. 1241, 1302–03 (2001) (proposing, in addition to legislative and judicial measures, the creation of an independent commission, modeled after the Criminal Cases Review Commission in England, to review innocence claims).

325. David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1254–62 (2002).

326. *See Dickerson*, 530 U.S. at 440 (citing with approval "the *Miranda* Court's invitation for legislative action to protect the constitutional right against coerced self-incrimination"); Michael C. Dorf & Barry Friedman, *Shared Constitutional Interpretation*, *in* THE SUPREME COURT REVIEW 61, 61–63 (Dennis Hutchinson et al. eds., 2000) (discussing the Court's affirmation of *Miranda* in *Dickerson*).

327. Stephan v. State, 711 P.2d 1156–57 (Ala. 1985) ("[A]n unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect's right to due process, under the Alaska Constitution"); *see also* State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (holding that custodial interrogation and questioning should be recorded where feasible, that they must be recorded at a place of detention, and that any violative statements are subject to suppression).

328. As Professors Michael Dorf and Barry Friedman have noted, even if Congress wanted to pass a statute requiring police to use videotaping, recent commandeering and limitations on the commerce clause might inhibit such a measure. Dorf & Friedman, *supra* note 326, at 86–96.

in a growing number of jurisdictions.[329] The City of Austin's $14.3 million settlement with two innocent men who were imprisoned as a result of police coercion would pay for years of videotaping interrogations.[330]

Similarly, in the area of suggestive identification procedures, scientific data has long shown that double-blind lineup proceedings dramatically reduce the dangers of eyewitness misidentifications and remain inexpensive to adopt.[331] Such procedures only require having a second officer present for the lineup, who does not know which person is the suspect. The Supreme Court, however, has not required double-blind procedures or other reforms, such as presenting persons sequentially rather than in a lineup, asking witnesses how certain they are after an identification, and providing witnesses with a "none of the above option," despite the known dangers of eyewitness misidentifications and the striking new evidence that eyewitness misidentifications caused three-fourths of all wrongful convictions, and the negligible cost of preventing misidentifications.[332] Each reform provides law enforcement with more reliable information regarding identifications. Perhaps for that reason, both the City of Boston and the State of Illinois have adopted a series of such protections in response to highly publicized exonerations and several wrongful conviction lawsuits.[333]

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329. For example, the *Illinois Governor's Commission Report* recommended in 2002 that police videotape interrogations from start to finish. *See* GOVERNOR'S REPORT, *supra* note 80, at 24 (discussing the Illinois legislation adopting that recommendation in homicide cases). Maine and Washington D.C. also statutorily require law enforcement agencies to adopt videotaping policies and procedures. D.C. CODE ANN. 5-133.20; ME. REV. STAT. ANN. tit. 25, § 2803-B1.k (West Supp. 2004). In addition to police departments in Alaska, where videotaping is required by the state constitution, other police departments that require videotaping include San Diego, California, Boulder, Colorado, Prince George's County, Maryland, and a scries of cities in Connecticut and Florida. *See* Jan Hoffman, *Police Refine Methods So Potent, Even the Innocent Have Confessed*, N.Y. TIMES, Mar. 30, 1998, at A1. *See generally* PRACTICES OF U.S. POLICE DEPARTMENTS REGARDING RECORDING INTERROGATIONS (2003), http://www.law.northwestern.edu/depts/clinic/wrongful/jurisdictionpractices.pdf.

330. *See supra* note 32 (discussing the *Ochoa* and *Danziger* cases).

331. *See supra* note 220–28.

332. *See supra* notes 260, 262. Canadian judges have ruled that investigators should follow double-blind procedures. *See* Canadian Judge Rules that Lineup Should Have Followed Blind Procedure!, *at* http://www.psychology.iastate.edu/faculty/gwells/canadianjudgeblindrulingwells.html (last visited Mar. 28, 2005) (presenting an account from the June 24, 2002 issue of *Law Times* detailing a Canadian judge's findings that a police lineup "should be conducted by an officer who has no knowledge of the case and does not know whether the suspect is contained in the lineup").

333. *See supra* note 262 (describing the reforms adopted in Boston). While the Illinois Governor's Commission recommended the adoption of double-blind procedures,

Nor has the Supreme Court been willing to require as a constitutional matter open file discovery in criminal cases in order to prevent *Brady* violations.[334] Requiring such discovery costs little and such a clear cut policy (permitting exceptions for confidential informants and the like) would make it easier for officials to self-police compliance with *Brady*.

In the area of fabrication of evidence, particularly forensic evidence, advocates and scientists have long called for a system of peer review of police forensic laboratories to avoid the kind of shoddy or bad faith junk science that leads to wrongful convictions.[335] Lawsuits name state or city-run crime labs and forensic criminologists for the first time as defendants for fabrication of blood, hair, and fingerprint evidence. The first such lawsuit to settle resulted in an agreement to conduct internal auditing and a review that provides a model for reform.[336]

Recent federal legislation provides grants to encourage the accreditation and independent auditing of crime laboratories and training on best practices, which should make adoption of reforms more attractive, especially when negotiating a litigation settlement.[337] Similarly, federal grants to provide effective, trained, and sufficiently compensated capital defense counsel should make it harder for local law enforcement to argue that they cannot afford reform.[338]

In each context, the remedy provides all sides with enhanced information about the reliability of investigative evidence. Exonerations and civil suits may provide the right catalyst to encourage all sides to benefit from adopting such data-driven remedies.

Going forward, as these reforms are adopted, more will be learned about what makes evidence reliable. As best practices evolve, more reliable techniques will be available to prevent scientific error or fraud. Police and prosecutors who fail to adopt them will appear increasingly remiss. Evolving remedies may eventually lead to a set of more difficult

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sequential lineups, and the videotaping of interrogations, the legislature passed Senate Bill 472, a law which only created pilot projects in jurisdictions to test the use of double-blind and sequential line-ups and videotaping. 725 ILL. COMP. STAT. ANN. 5/107A-10. The law does require asking eyewitnesses about their certainty, access to DNA testing, and reliability screening of jailhouse snitches. *See* Edwin Colfax, *Summary of the November 19, 2003 Veto Override by the Illinois Legislature*, Death Penalty Information Center, *available at* http://www.deathpenaltyinfo.org/article.php?scid=6&did=784 (last visited Mar. 28, 2005). A separate measure, Senate Bill 15, requires videotaping of interrogations in homicide cases only. *See* http://www.law.northwestern.edu/depts/clinic/wrongful/DeathPenaltyReformBill.htm.

334. *See supra* note 189.

335. *See supra* notes 301-02, 311-12.

336. *See supra* notes 30, 32, 34 (discnssing the *Green* settlement and the *Burrell*, *Gregory*, and *Miller* complaints naming forensic scientists).

337. *See supra* note 20 (describing the Justice for All Act).

338. *See supra* note 20.

choices. More finely tuned procedures may be more expensive, and unlike auditing, double-blind lineups and videotaping may appear to cause some number of "false negatives" to law enforcement—raising the hard question of whether preventing, say, five wrongful convictions is worth the cost of one hundred "guilty" suspects going free. Hopefully, the positive experience and reliable results obtained through implementing the "first order" remedies described will encourage a meaningful debate over whether such "second order" procedures should be adopted next. We will have to ask more nuanced questions as to what degree we should tolerate predictable error and grave miscarriages of justice in our criminal justice system. That is a laudable policy and values debate, and it will be more informed from the data generated by reforms. Just as exonerations provide a catalyst for the first set of reforms, adopting those structural protections in turn may generate data to provide a broader catalyst for problem-solving around the question of how to obtain reliable evidence of guilt.

C. Systemic Claims

While tort suits, even constitutional tort suits, typically target only individual bad actors, wrongful conviction suits instead focus on systemic deficiencies because of the procedural nature of the underlying fair trial right. Wrongful conviction suits thus uniquely lend themselves to *Monell* claims against municipalities for failure to provide training or supervision, or tolerance of a policy, custom, or practice which leads to predictable errors.[339]

In cases nationwide, exonerated persons have brought systemic claims against police departments, crime labs, and district attorney's offices (while individual prosecutors are often absolutely immune, an office may be liable for policies, customs, or practices causing wrongful convictions).[340] Cases have sought to hold entities liable for the failure to adopt practices that prevent *Brady* violations, the fabrication of evidence, improperly coerced or fabricated confessions, suggestive

339. *See* 436 U.S. at 699 (holding that a local government may be held liable when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly by said to represent official policy, inflicts the injury"); *see also* City of Canton v. Harris, 489 U.S. 378, 398 (1989) (establishing that "deliberate indifference," such as failure to provide training that would obviously serve to prevent likely constitutional harm, supports municipal liability).

340. *See* cases cited *supra* notes 30, 32. For a discussion on the lack of immunity of prosecutors as to official capacity *Monell* claims, see *Burge*, 187 F.3d at 466–67 (reversing the trial court's decision to grant absolute immunity to a district attorney).

identification procedures,[341] or the allocation of adequate funding for qualified counsel.[342] More often than is typical in civil rights litigation, exonerees may be able to show a custom, pattern, or practice of violations because the underlying causes of constitutional violations are procedural. The advance deterrent effect of such systemic claims will place the focus on what institutions can do to prevent wrongful convictions.[343]

Constitutional tort law, unlike our current criminal procedure regime, accounts for social science and industry practice. Preventative practices may be adopted in response to rules of decision in Section 1983 cases. One reason is that *Monell* liability can be premised on a police department's deviation from national police practices.[344] If police practices experts agree that, given the known dangers of false eyewitness identifications, double-blind procedures are the accepted police practice, then a police department may be on "notice" and liable for failure to implement them.[345] As federal courts determine that the failure to adopt obvious and accepted precautions amounts to "deliberate indifference," police and municipalities will be held in a rolling fashion to higher standards of care, with widening ripple effects throughout the policing industry.[346] Such judicial pronouncements may have a great

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341. For recent cases raising such claims, see Lowery Complaint, *supra* note 269, ¶¶ 95–100 (raising issues regarding a pattern and practice of fabricating evidence and coercing confessions in Riley County, Kansas). Similarly, identification practices that may lend themselves to suggestion, but which the Supreme Court hesitated to rule as being per se suggestive and unreliable, may lead to *Monell* liability. *See supra* notes 261–63 and accompanying text.

342. *See* discussion *supra* Part IV.B.

343. *See* Amato v. City of Saratoga Springs, 170 F.3d 311, 317–18 (2d Cir. 1999) ("A judgment against a municipality not only holds that entity responsible for its actions and inactions, but also can encourage the municipality to reform the patterns and practices that led to constitutional violations, as well as alert the municipality and its citizenry to the issue.").

344. *See, e.g.* Voutour v. Vitale, 761 F.2d 812, 821–22 (1st Cir. 1985) (recounting the testimony of police practices expert Dr. James Fyfe, who stated that the failure to provide relevant training was "violative of generally accepted police practice").

345. *See, e.g.*, *id.* (finding that effectiveness of training as compared to national practice could lead to a finding of department liability).

346. Prior work discusses civil rights remedies that explicitly utilize such rolling standards or benchmarking. *See* Garrett, *Remedying Racial Profiling*, *supra* note 16, at 81 (explaining that as compiling data regarding racial profiling becomes the norm, failure to do so may "become prima facie evidence of racial profiling, a sign of deliberate indifference to unconstitutional practices"); Garrett & Liebman, *supra* note 16, at 319–20 (explaining that experimentalist data collection and public reporting requirements place officials on notice that a group is systematically disadvantaged, creates pressure when that data is related to the public, and by comparison with benchmark remedies adopted by others, the failure to take adequate responsive action provides strong evidence of discrimination).

impact on law enforcement, which may already be considering reform in response to exonerations. For example, when the New Jersey Supreme Court carefully examined the issues relating to cross-racial identification procedures, the state's law enforcement agencies responded by voluntarily adopting both double-blind and sequential lineup procedures.[347] In that fashion, a select few wrongful conviction suits can propagate reforms nationwide.

D. Immunity

Civil doctrines that often limit civil rights may have a reduced impact in the wrongful conviction context. While the Supreme Court has repeatedly expanded qualified immunity doctrines that rule out claims against officers who acted reasonably based on clearly established case law,[348] the criminal procedure rights implicated, protection from police fabrication of evidence, suppression of evidence, coerced confessions, and suggestive identifications, were established long ago.[349] The Supreme Court has already held that absolute immunity does not apply when officials fabricate evidence, such as confessions or testify falsely about manufactured evidence.[350] Qualified immunity does not

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347. *See* State v. Cromedy, 727 A.2d 457, 458–59 (N.J. 1999) (examining social science research, and requiring that jury instructions be provided on cross-racial identifications); *see also* Jascha Hoffman, *Suspect Memories*, LEGAL AFF., Jan.–Feb. 2005, at 42.

348. *See Briscoe*, 460 U.S. at 335 ("[Section] 1983 does not authorize a damages claim . . . against judges or prosecutors in the performance of their respective duties."); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that qualified immunity protects conduct that "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known").

349. Courts would have to undo decades of substantial criminal due process jurisprudence (something the Rehnquist Court has been unwilling to do, preferring instead to preserve those constitutional rulings but adding layers of harmless error) to avoid civil liability for their violation. No court could take such an unprincipled position (except toward the margins like the Fourth Circuit did in manufacturing a "bad faith" requirement for a civil claim for a *Brady* violation). *See supra* notes 185–88 and accompanying text. For a typical decision, see *Pierce*, 359 F.3d at 1299 (denying qualified immunity, and stating that "[e]ven if there were no case directly on point imposing liability on officials whose falsification of evidence occurred at the post-arrest stage, an official in [the defendant's] position could not have labored under any misapprehension that the knowing or reckless falsification and omission of evidence was objectively reasonable").

350. *See Buckley*, 509 U.S. at 274 & n.5 (1993) (denying absolute immunity for fabricating evidence because there was no absolute immunity at common law); Milstein v. Cooley, 257 F.3d 1004, 1011 (9th Cir. 2001) (explaining that "acquiring known false statements from a witness for use in a prosecution is likewise fabricating evidence that is unprotected by absolute immunity"); Cunningham v. Gates, 229 F.3d 1271, 1291–92 (9th Cir. 2000) (evaluating for the purposes of qualified immunity whether officers fabricated evidence); *Spurlock*, 167 F.3d at 1001–02 (holding that nontestimonial acts

apply, as the U.S. Court of Appeals for the Second Circuit has put it, because there is a "right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity."[351] Similarly, with regard to *Brady*, the courts have held that the relevant law has long been established, so officials lack qualified immunity.[352]

Prosecutors for the first time may face institutional liability, both for policy and practice, and also individual liability when acting in an investigatory capacity, such as by fabricating evidence or assisting with suggestive identification procedures.[353] Interestingly, prosecutors may also be liable for making defamatory statements attempting to discredit efforts by a person, later exonerated, to appeal a conviction.[354] Thus, courts will increasingly reach the substance of constitutional criminal procedure protections[355] by limiting the discretion of law enforcement officers to adopt practices that predictably result in wrongful convictions. The result enhances the deterrent effect of wrongful conviction litigation, and further encourages the adoption of preventative remedies.

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aimed at eliciting false testimony were not entitled to absolute prosecutorial immunity); *Geter*, 882 F.2d at 169–70 (holding that a police officer was not entitled to qualified immunity for procuring a false identification by unlawful means or for concealing exculpatory evidence); Olson v. Tyler, 771 F.2d 277, 281 (7th Cir. 1985) (holding that an officer was not entitled to immunity for false statements made in an arrest warrant affidavit).

351. *Malley*, 475 U.S. at 340–41 (holding that an officer was not entitled to immunity for false statements made in an arrest warrant affidavit); *Devereaux*, 263 F.3d at 1074–75 ("[T]here is a clearly established right not to be subjected to criminal charges on the basis of false evidence."); Zahrey v. Coffey, 221 F.3d 342, 344, 349 (2d Cir. 2000); *Jones*, 174 F.3d at 1282–84 (finding that officers were not entitled to qualified immunity for a warrantless arrest when they lacked probable cause); *Ricciuti*, 124 F.3d at 130 (finding that officers were not entitled to qualified immunity for conspiring to fabricate and forward to prosecutors a known false confession).

352. *See, e.g.*, *Manning*, 355 F.3d at 1033 (holding that officers lack testimonial immunity as to a *Brady* claim that they suppressed the exculpatory fact that they engaged in perjury or fabrication); *supra* note 175.

353. *See Milstein*, 257 F.3d at 1009–10 (affirming the principle that prosecutors lack absolute immunity for fabricating evidence and conducting investigations); Houston v. Partee, 978 F.2d 362, 367 (7th Cir. 1992) (explaining that prosecutors lack absolute immunity for the failure to disclose exculpatory evidence acquired when not involved in postconviction proceedings).

354. *See Patterson*, 328 F. Supp. 2d at 902 (reasoning that a district attorney could have been liable for defamation where statements could adversely influence then pending pardon applications, prosecution, and judicial tribunals hearing criminal appeals, if the statements made were unrelated to the state's prosecution or subsequent pardon proceedings).

355. Sklansky, *supra* note 325, at 1231 (reasoning that, although "[c]ourts have often shied away from doctrinal paths in criminal procedure that seem to pose affirmative obligations on government," by recognizing the common features between the rules of constitutional criminal procedure, and the features of increasingly prevalent

E. The End of Exoneration?

Exonerations came to light as a fragile product of scientific and social serendipity. One final deterrent effect of the lawsuits described could be broader access to pretrial DNA testing that would in turn make future DNA exonerations scarce. If DNA testing does become routine pretrial, subsequent DNA exonerations may slowly disappear. Then again, while exonerating innocent people as early and often as possible would be laudable and just, access to both pretrial and post-trial DNA testing is often vigorously opposed by prosecutors.[356]

Unfortunately, DNA testing, if it were to become routine, will not be enough to make wrongful convictions or exonerations a thing of the past. In most cases, DNA testing can not be performed because there is no relevant or preserved biological evidence.[357] Even given pretrial DNA testing of biological evidence, laboratories have been scrutinized for shoddy or falsified DNA testing,[358] just as many of the exonerations to date have been due to false fingerprint comparison, blood type testing, or hair comparison, and suppressed evidence of constitutional violations.[359] The same sham evidence will continue to convict innocent people absent the sorts of systemic reforms discussed.

DNA and forensic technology continues to evolve to permit more powerful testing of evidence previously thought to lack sufficient biological material.[360] Nevertheless, if pretrial DNA testing becomes routine, the window of opportunity that exonerations provide may begin to close. This makes it particularly urgent that the cases of the wrongly convicted are used to illuminate solutions that can make such wrongful convictions a thing of the past.

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quasi-affirmative rights in constitutional criminal procedure, courts may be more willing to further develop that body of law).

356. Federal law now provides some incentives to conduct DNA testing. *See supra* note 20 (describing the new federal incentive grant program).

357. *See* Gross, *supra* note 80, at 127 (explaining that, because of the common lack of relevant or preserved biological evidence, DNA exonerations remain a "fluke").

358. *See supra* notes 301–02 (discussing the controversy regarding revelations of forensic fraud).

359. *See* Gross, *supra* note 80, at 127 (explaining that, while many wrongful convictions will continue to be difficult to prove given a lack of DNA evidence to test, postconviction DNA testing may continue to reach wrongful convictions if biological evidence that could have been tested to exclude a defendant was *suppressed* by police at the time of trial; that exonerations represent only "the tip of the iceberg"; and that efforts to apply technology or investigative efforts to other cases would likely result in a greater number of exonerations).

360. *See* NAT'L RESEARCH COUNSEL, THE EVALUATION OF FORENSIC DNA EVIDENCE (1996) (providing an overview of the development of DNA technology); *see* People v. Holtzer, 660 N.W.2d 405, 411 (Mich. Ct. App. 2003) (admitting mitochondrial DNA evidence and describing recent advances in testing).

VI. CONCLUSION

The years to come may provide the most far-reaching and effective criminal justice system reform that our country has experienced since the Warren Court's criminal procedure revolution. None will be accomplished through change in legal doctrine, but rather, through a surprising explosion in public information about the causes of the most egregious errors in our criminal justice system, this information will lead to reform through the conduit of civil rights suits. Wrongful conviction law suggests a positive illustration of the time-worn adage that for every violation of a right, there is a remedy.[361] Constitutional criminal procedure takes on a new bite in the most unexpected of all places, in federal court and in civil rights lawsuits brought by people never before thought to have existed—innocent people who were wrongly convicted.

Through a circuitous and unprecedented route, the underlying constitutional rights ultimately reassert themselves, but only after due process violations at a criminal trial occur, a wrongful conviction results, substantial obstacles imposed during criminal appeals and habeas review are overcome, access to DNA testing and exonerating results are obtained, and then finally a vacatur of the conviction is obtained. So many wrongly convicted people suffered during that arduous process and more surely languish unaided. Our civil rights regime operates only to compensate a few after the fact—but it is also able to deter injuries before the fact.[362] Although few are exonerated, and even fewer exonerees receive compensation, the small cohort of exonerees who can make out civil rights claims may disproportionately impact our criminal justice system in the years ahead.

Substantial reform in our criminal justice system may follow where the actors responsible for unfair trials, in particular, forensic scientists, prosecutors, inadequate defenders, and law enforcement officers, have until now been insulated from tort liability. Incentives to adopt corrective measures should be radically altered where in the past, even when misconduct was uncovered, error was so readily found harmless.[363] Now some of the most harmful errors in the criminal justice system are being uncovered, through an external control, DNA

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361. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *23) ("[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.").

362. As the Seventh Circuit noted in the *Newsome* case, "[r]equiring culpable officers to pay damages to the victims of their actions, however, holds out promise of both deterring and remediating violations of the Constitution." 256 F.3d at 752.

363. *See supra* Part II.B.

testing, that reveals these errors with scientific certainty. Perhaps more importantly, actors previously operated in the dark as to the causes of egregious error. Exoneration now selects the worst miscarriages in the criminal justice system, and then civil rights litigation explores the systemic causes of those miscarriages of justice, provides public data regarding predictable causes of error, and in doing so, places sustained public pressure on institutions to come together and adopt reforms.

Reforms flowing from wrongful conviction suits already point in the direction that social science research has indicated for some years, but which the recent wave of exonerations highlights with greater urgency.[364] Structural safeguards that can prevent wrongful incarceration of innocent people are often not expensive or structurally intrusive.[365] Although law enforcement has often fiercely resisted their adoption, measures improve reliability of investigations and benefit all actors: law enforcement, prosecutors, courts, and defense lawyers alike.[366] Videotaping confessions, full disclosure of police files, use of double-blind eyewitness identification procedures, and scientific peer review of forensic laboratories all provide system-wide information that we now only have through DNA in a small cohort of the worst miscarriages of justice.

Such information-driven remedies may also substantially prevent future unjust convictions by widening the outlook of institutions. Each such remedy enables ongoing problem solving by continually exposing error and unreliability during criminal investigations, which in turn will continue to suggest further reforms to address problems uncovered. New institutions such as state innocence commissions or the Federal National Forensic Science Commission may further propagate and implement reforms.[367] Future work should examine ways to foster such ongoing institutional monitoring and reform.[368]

That same problem-solving outlook may affect courts' understanding of constitutional rights, which originally evolved as procedural, but which will now be developed *substantively* for the first

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364. *See, e.g.*, Hoffman, *supra* note 347, at 42, 45 (discussing the reforms in eye-witness identification procedures, including sequential and double-blind lineups, instituted in New Jersey, Chicago, Santa Clara, California, and several Minnesota counties).

365. *See supra* Part V.B.

366. *See supra* Part V.B.

367. For a discussion on innocence commissions, see *supra* note 324; *see also* Christine C. Mumma, *The North Carolina Actual Innocence Commission: Uncommon Perspectives Joined By A Common Cause*, 52 DRAKE L. REV. 647 (2004) (deseribing the creation and work of the first state innocence commission). For a discussion of federal legislation, see *supra* note 20.

368. A work in progress will pick up where this piece leaves off by examining institutional reform arising out of wrongful conviction litigation and the possibilities for further systemic reform involving all actors in the criminal justice system.

time since their inception.[369] Our criminal procedure has long remained frozen in time.[370] The development of many due process rights has been a path dependent, a historical accident of their origin in the criminal context, which focuses on evidentiary rights at trial. Criminal trials have not been a hospitable locus for criminal justice reform. Fair trial rights and remedies balance interests to decide admissibility in the heat of short, resource-poor criminal trials and subsequently, defer to the verdict of a jury entrusted with judging credibility and finding facts. Yet, harmless error turns into a mirror image of itself after exoneration. The Supreme Court's stunted remedial paradigm, that almost without fail denies relief in criminal cases, is replaced by a robust new paradigm where fair trial rights deter government misconduct. Civil courts can magnify the focus on broad deterrence by holding institutions accountable for patterns and practices that predictably cause wrongful convictions.

Systemic reform may then feed back from civil suits to underlying constitutional criminal procedure rights. None of the reforms discussed are among those the Supreme Court has been willing to require as a matter of due process law, where the Court's paramount postverdict concern is that the guilty not go free.[371] Wrongful conviction cases may focus courts' attention on the causes of wrongful convictions and encourage a more forward-looking perspective. In particular, criminal trial judges may become more open to ordering remedies, such as requiring double-blind lineups, suppressing unreliable evidence, admitting expert testimony regarding the causes of wrongful convictions, allowing evidence of systemic violations to support claims of misconduct, or providing jury instructions regarding the reliability of evidence and the predictable causes of wrongful convictions. Appellate judges, both in state courts and on habeas review, rather than rubber-stamping error as harmless, could also employ the data that these actions and remedies provide in order to focus their review on cases raising the indicia of wrongful convictions.

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Federal cases brought by exonerees promise to return the deterrent power of the Constitution to the place it belongs—protecting the right to a fair trial. By incorporating constitutional criminal procedure rights in civil claims, wrongful conviction actions aim to cure the Supreme Court's recent preoccupation with guilt-based limits on remedies for the violation of fair trial rights. Unshackled by such myopic harmless error

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369. *See* Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 240–41 (2003).

370. Sklansky, *supra* note 325, at 1231 (developing reasons why there has been little growth in our criminal procedure).

371. *See supra* Parts II.B., V.B.

doctrines, and finally attentive to eradicating the underlying causes of convictions of the innocent, the body of law growing out of civil rights actions filed by exonerees may finally encourage the widespread adoption of meaningful protections for *Brady* rights as well as the constitutional guarantees of effective assistance of counsel, and the freedom from fabricated evidence and coerced confessions. By illuminating the worst errors that any criminal justice system can possibly make, these actions align the incentives of actors on all sides to prevent the systemic errors that cause wrongful convictions. In so doing, federal wrongful conviction cases provide a catalyst for remedies that promise to reshape our criminal justice system in the years to come.