OBSTACLES TO LITIGATING CIVIL CLAIMS FOR WRONGFUL CONVICTION: AN OVERVIEW

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I. INTRODUCTION

As a result of exonerations based on DNA evidence and other reasons, there has been considerable interest in claims for compensation by innocent people who have served prison sentences.[2] Where the victims of wrongful convictions allege that their incarceration was the result of wrongdoing by law enforcement agents, there are a variety of state tort and civil rights remedies that may provide compensation.[3] This Article will focus on civil rights claims under 42 U.S.C. § 1983, with the goal of providing a brief overview of some of the problems that plaintiffs encounter in litigating such claims.[4]

The civil rights causes of action that the wrongfully convicted might theoretically allege include claims based upon:

- False Arrest or False Imprisonment
- Malicious Prosecution
- Retaliatory Prosecution
- Fabrication of Evidence

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[2] See, e.g., Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 36 (2005). For discussion of the general problem of wrongful convictions, *see* CHARLES J. OGLETREE, JR. AND AUSTIN SARAT, WHEN LAW FAILS: MAKING SENSE OF MISCARRIAGES OF JUSTICE (2009); JIM DWYER, PETER NEUFELD & BARRY SCHECK, ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED (2000).

[3] *See generally*, MICHAEL AVERY, DAVID RUDOVSKY & KAREN BLUM, POLICE MISCONDUCT: LAW AND LITIGATION §§ 2:14, 2:16, 2:30, 2:46 (3d ed. 2008) [hereinafter POLICE MISCONDUCT].

[4] 42 U.S.C. §1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

- Suppression of Exculpatory Evidence
- Suggestive Eyewitness Identification Procedures
- Coerced Confessions
- Ineffective Assistance of Counsel

I will discuss these potential claims in turn, along with the specific difficulties they pose.[5]

II. Causes of Action

A. *False Arrest, False Imprisonment*

Although there is a cause of action under § 1983 for false arrest and false imprisonment,[6] in an ordinary case, this approach will not provide a remedy for a wrongful conviction. In *Wallace v. Kato,* the plaintiff had been convicted of murder following an arrest that the state appellate court later held was made without probable cause.[7] Plaintiff alleged that officers had coerced a confession from him, and that the confession and his subsequent conviction were a product of the original arrest. Plaintiff filed a § 1983 suit based on false arrest, and claimed damages for the entire period he spent in prison following conviction. The Supreme Court held that the torts of false arrest and false imprisonment encompass wrongful detention without legal process, but that false imprisonment ends upon the issuance of legal process such as an indictment, a formal complaint, or a court decision initiating a prosecution. Ordinarily, damages for this claim are limited to the period of detention before process issues. The *Wallace* Court noted a potential argument that consequential damages may last longer, for example, the consequences of a coerced confession made during a period of false imprisonment. Whether the Court would recognize such a claim was not resolved because it would have been barred in any event in this case by the statute of limitations.[8] Other than a possible consequential damages argument, *Wallace* makes it clear that damages for detention after legal process issues would require a tort other than false arrest or imprisonment.

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[5] A principal source of difficulty with respect to these claims, as with all § 1983 claims, is the judge-made doctrine of qualified immunity. The intricacies of qualified immunity are beyond the scope of this article. In general, however, a wrongfully convicted person will be denied a civil rights remedy unless he can prove not only that his constitutional rights were violated, but that a reasonable officer would have known that his specific conduct violated clearly established constitutional rights. In the hands of conservative jurists this doctrine is a considerable hurdle for plaintiffs to overcome. *See* Police Misconduct, *supra* note 2, Ch. 3.

[6] Pierson v. Ray, 386 U.S. 547, 555-7 (1967).

[7] Wallace v. Kato, 549 U.S. 384, 389 (2007).

[8] The Court held that the statute of limitations for false arrest began to run when the false imprisonment ended, that is, when the plaintiff had appeared before the examining magistrate and was bound over for trial. *Id.* at 391.

B. *Malicious Prosecution*

The first barrier to a cause of action under § 1983 for malicious prosecution is the doctrinal question of whether there is any constitutional claim for malicious prosecution, a question that has provoked substantial controversy in the federal courts. In *Albright v. Oliver,* the Supreme Court held that substantive due process does not provide a constitutional basis for a malicious prosecution claim under § 1983, but the Court left open the question of whether such a claim might be based on the Fourth Amendment.[9] Since then, the lower federal courts have divided on the issue.[10] Most courts have held that *something* in addition to the common law elements of malicious prosecution is required to establish a Fourth Amendment violation, although there is disagreement as to precisely what is required.[11] A violation of the Fourth Amendment requires an unconstitutional "seizure," and one of the most difficult problems has been analyzing to what extent the subject of a criminal prosecution remains "seized" following his release from his initial arrest. The lower courts have divided on the question of what combination of pretrial restraints on the accused's liberty is sufficient to amount to an ongoing seizure.[12] Nonetheless, most of the federal appellate courts recognize a constitutional claim for malicious prosecution.[13]

Quite apart from the doctrinal hurdle of establishing a constitutional claim,

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[9] Albright v Oliver, 510 U.S. 266, 275 (1994) ("We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari.").

[10] Compare, for example, Pitt v. District of Columbia, 491 F.3d 494 (D.C. Cir. 2007) (police officers may be held liable under § 1983 for malicious prosecution to the extent defendants' actions caused the plaintiff to be "seized" without probable cause in violation of the Fourth Amendment, in accord with decisions from other circuits cited), with Smith v. Lanz, 321 F.3d 680, 684 (7th Cir. 2003) (plaintiff may not maintain an action under § 1983 for malicious prosecution). For a catalogue of the cases and discussion of the issues, see POLICE MISCONDUCT, *supra* note 2, § 2:14.

[11] The court discussed the problems created by insufficient attention to doctrinal clarity in Castellano v. Fragozo, 352 F.3d 939, 945-953 (5th Cir. 2003) (en banc). *Castellano* itself, however, failed to provide a workable framework for the litigation of wrongful conviction claims.

[12] *Id.*

[13] See, Pitt v. District of Columbia, supra; Britton v. Maloney, 196 F.3d 24, 30 (1st Cir. 1999) (absent evidence that plaintiff was arrested, detained, restricted in travel, or otherwise deprived of liberty, mere fact that he was required to appear in court was not sufficient to establish a Fourth Amendment seizure); Ricciuti v. N.Y.C. Transit Authority, 124 F.3d 123 (2d Cir. 1997); Johnson v. Knorr, 477 F.3d 75 (3d Cir. 2007); Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007) (recognizing claim, although noting its contours remain uncertain); Novitsky v. City of Aurora, 491 F.3d 1244 (10th Cir. 2007) (common law elements are the starting point of the analysis, but ultimate question is whether plaintiff has proved violation of a constitutional right); Wood v. Kesler, 323 F.3d 872, 881 (11th Cir. 2003) (plaintiff must prove violation of 4th Amendment right to be free from unconstitutional seizure as well as common law elements of malicious prosecution). But see, Smith v. Lanz, supra; Pace v.

malicious prosecution is not an easy claim for a plaintiff to prove against police officers. The common law elements require the plaintiff to prove that the defendant (1) initiated a criminal prosecution against him; (2) without probable cause; (3) with malice; (4) and that the prosecution ultimately terminated in the plaintiff's favor.[14]

With respect to the first element, a police officer may claim that he did not "initiate" the prosecution, but merely provided information to a prosecutor, who made the actual decision to bring charges. This defense may be overcome where the officer is more than a passive conduit for information, but the plaintiff has the burden of proving the officer's participation, and evidence of what the officer has done behind the scenes may be difficult to gather.[15]

The second element, probable cause, is a low standard, ordinarily not difficult for law enforcement to meet. For example, under Massachusetts law, establishing probable cause simply requires "such a state of facts . . . as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty."[16] In a wrongful conviction case, there may be sufficient evidence to provide probable cause for an arrest or prosecution, even though the defendant is eventually shown to be innocent. The fact that probable cause existed does not rule out that law enforcement agents might have engaged in misconduct to secure the conviction of an innocent person. Nonetheless, if malicious prosecution is a wrongfully convicted person's only claim, probable cause provides a complete defense, and thus leaves the exoneree without a civil remedy.

Probable cause is a particularly strong defense because in many jurisdictions a conviction in the underlying criminal case, even though reversed, is conclusive evidence that there was probable cause for the prosecution.[17] This conclusion can be overcome where the wrongfully convicted person demonstrates that the state obtained the conviction solely using false testimony, or where the conviction is "impeached on some ground recognized by the law, such as fraud, conspiracy, perjury, or subornation of perjury as its sole foundation."[18] This latter doctrine provides an opportunity for a malicious prosecution plaintiff to overcome the effect of a conviction, but assembling evidence of fraud or perjury and convincing the trier of fact to accept it may be extremely difficult.

City of Des Moines, 201 F.3d 1050, 1055 (8th Cir. 2000) (malicious prosecution does not state a claim for relief under § 1983).

[14] *See, e.g.,* Correllas v. Viveiros, 572 N.E.2d 7, 10 (Mass. 1991).

[15] *See* Limone v. United States, 497 F. Supp. 2d 143, 207-213 (D. Mass 2007) (analyzing the role played by FBI agents in the framing of innocent defendants in a state murder prosecution and rejecting the government's claim that the agents did not initiate the prosecution).

[16] Lincoln v. Shea, 277 N.E.2d 699, 702 (1972) (citing Bacon v. Towne, 4 Cush. 217, 238-39 (1849)).

[17] See, e.g., Harris v. Bornhorst, 513 F.3d 503, 520 (6th Cir. 2008) (Ohio law); Della Jacova v. Widett, 244 N.E.2d 580, 582 (Mass. 1969).

[18] *Della Jacova*, 244 N.E.2d at 582. *See also Harris*, 513 F.3d at 520.

The malice element is usually not difficult for the plaintiff to prove where there is an absence of probable cause,[19] and it does not require evidence of subjective ill will. If the defendant's actions are willful and done purposely, and known to him to be wrong and unlawful, malice is established.[20] The fourth element, favorable termination, requires a resolution of the case that is consistent with innocence.[21] A wrongfully convicted person who has obtained a new trial may subsequently have to accept a disposition that falls short of a proclamation of innocence in order to avoid further exposure to incarceration. The defendant in a malicious prosecution case (the government entity) may challenge such a disposition as failing to meet the standard of a favorable termination.[22]

In addition to arguing that the plaintiff failed to establish one or more of the common law elements of a malicious prosecution, police officers may claim that the intervening acts of a prosecutor, grand jury, or court, broke the causal chain between the alleged misconduct of the police and the plaintiff's incarceration.[23] The defendant might argue, for example, that the prosecutor or the grand jury made an independent decision to charge the plaintiff that relieved the police officer of any liability.[24] Where courts recognize this argument, the plaintiff must overcome it by showing that the officer deliberately misrepresented or omitted material facts to the prosecutor or the grand jury.[25]

This combination of doctrinal and practical difficulties in pleading and proving constitutional claims for malicious prosecution creates a minefield. The defendant can win simply by drawing the plaintiff into tripping one of the mines, but the plaintiff has to negotiate the entire minefield in order to win. As a result, wrongfully convicted persons are often better advised to litigate claims

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[19] *See, e.g,. Harris*, 513 F.3d at 521 (under Ohio law malice may be inferred from lack of probable cause); Seelig v. Harvard Coop. Soc'y., 246 N.E.2d 642, 646 (Mass. 1969) (lack of probable cause is a sufficient basis for an inference of malice).

[20] *Limone*, 497 F. Supp. 2d at 220.

[21] *See* cases discussed in POLICE MISCONDUCT, *supra* note 2, § 2:14, n.14.

[22] *Id*.

[23] *See*, Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999) (grand jury indictment broke causal chain); Taylor v. Meacham, 82 F.3d 1556, 1564 (10th Cir. 1996) (indictment breaks causal chain, absent allegation of pressure or influence by police, or knowing misstatements made to prosecutor).

[24] *But see* Wheeler v. Cosden Lil and Chemical Co., 744 F.2d 1131, 1132-33 (5th Cir. 1984) (break in the causal chain argument is only applicable in false arrest and imprisonment cases).

[25] For some of the best language on this point, see Judge Posner: "If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape 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." *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988) (jury could find that defendants systematically concealed from prosecutors, and misrepresented to them, facts highly material to decision whether to prosecute)

that focus more particularly on the specific misconduct of law enforcement officers that led to their incarceration.

C. *Retaliatory Prosecution*

A person whose conviction was the result of retaliation by law enforcement against the exercise of rights of free expression protected by the First Amendment has a cause of action under § 1983.[26] The plaintiff must prove that (1) her conduct was constitutionally protected; (2) was a "substantial factor" or "motivating factor" in the defendant's challenged actions; and (3) there was no probable cause for the prosecution.[27]

Whether police officers had probable cause for arresting or prosecuting the plaintiff should be irrelevant to such a claim. If the plaintiff can prove that she would not have been prosecuted in the absence of the retaliatory motive, she should be able to establish a violation of her First Amendment rights. In *Hartman v. Moore*, however, the Supreme Court held that the plaintiff must plead and prove the absence of probable cause.[28] The Court reasoned that it is difficult to prove that retaliatory animus caused a criminal charge to be brought because the charge is actually filed by a prosecutor, not the officer allegedly engaged in retaliation.[29] The Court required proof of the absence of probable cause as an element of a prima facie case to establish the link between the retaliatory animus of the officer and the prosecutor filing the charge.[30] The

[26] Hartman v. Moore, 547 U.S. 250, 256 (2006) ("the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out").

[27] *Id. See,* POLICE MISCONDUCT, *supra* note 2 at § 2:16, and cases cited therein.

[28] Hartman, 547 U.S. at 265-6.

[29] *Id.*

[30] Justice Souter wrote the decision in *Hartman,* and it is an example of the very conservative jurisprudence he crafted in the area of remedies for constitutional violations. There is no evidence of Justice Souter's much heralded drift toward liberal positions when it comes to remedies under § 1983, where he has made things substantially more difficult for civil rights plaintiffs. In *Hartman*, Justice Souter acknowledged that the presence or absence of probable cause is not dispositive of whether a prosecution was initiated for the purpose of retaliation. *Hartman*, 547 U.S. at 265. Nonetheless, he concluded that since probable cause will be *relevant* to proof of causation in most cases, the law should make it a *requirement* in all cases. *Id*. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), Justice Souter's evaluation of the liability of police officers for injuries suffered during a high speed police chase, began with the observation that "While due process protection in the substantive sense limits what the government may do in both its legislative . . . and its executive capacities, . . . criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." *Id*. at 846. With respect to executive department officials, he concluded that "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'" *Id.* In fact there is no substantial doctrinal basis for distinguishing between legislative and executive action with regard to judicial review of substantive due process violations. If anything, decisions of a democratically elected legisla-

requirement that plaintiff prove the absence of probable cause destroys the value of this cause of action in situations where officers' actions were primarily motivated by a desire to retaliate against a person's exercise of his First Amendment rights and would not have prosecuted him otherwise, even though they may have had probable cause to do so.

D. *Fabrication of Evidence*

When the fabrication of evidence by law enforcement leads to a wrongful conviction, there is a sufficient basis for a cause of action under § 1983.[31] Although the lower federal courts are not in agreement on the constitutional basis for the claim,[32] there is ample authority for the proposition that fabricating evidence does violate a criminal defendant's constitutional rights.[33] As the First Circuit said in *Limone v. Condon*:

[I]f any concept is fundamental to our American system of justice, it is

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ture deserve greater deference than the actions of a single, perhaps rogue, police officer. *See* Michael Avery, County of Sacramento v. Lewis: *Protecting Life and Liberty Under the Constitution—Reckless Indifference to Life Does Not Shock the Conscience of the Supreme Court*, *in* WE DISSENT 131 (Michael Avery, ed., 2009) [hereinafter WE DISSENT]. In *Chavez v. Martinez*, 538 U.S. 760, 777-78 (2003) (Souter, J., concurring), Justice Souter carved previous Fifth Amendment jurisprudence into a "core" protection against the introduction of compelled statements at trial, and "Fifth Amendment holdings" "outside the core" affording "complementary protection" for the "core guarantee." The result of this revisionist review of the Court's previous cases, including *Miranda*, was Justice Souter's requirement that a plaintiff make a "'powerful showing,' subject to a realistic assessment of costs and risks, necessary to expand protection of the privilege against compelled self-incrimination to the point of . . . civil liability." *Id*. at 778. It is impossible to reconcile the need for any such "powerful showing" with the simple language of § 1983: "Every person who, under color of [law] . . . subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action a law . . . ." 42 U.S.C. § 1983. For a further critique of *Chavez*, see Marjorie Cohn, Chavez v. Martinez: *The Court Fails to Hold That Interrogation by Means of Torture is Unconstitutional*, *in* WE DISSENT *supra,* at 152.

[31] Devereaux v. Abbey, 263 F.3d 1070, 1079 (9th Cir. 2001).

[32] *Compare* Wilkins v. DeReyes, 528 F.3d 790, 805 (10th Cir. 2008) (fabricating evidence by coercing false statements from witnesses and using them to support arrest and prosecution of plaintiffs would constitute malicious prosecution in violation of plaintiffs' Fourth Amendment rights not to be arrested and detained without probable cause), *with* Brown v. Miller, 519 F.3d 231, 237 (5th Cir. 2008) (finding a due process violation where a laboratory technician obtained a conviction based on information he knew was false by knowingly creating a misleading and scientifically inaccurate serology report and by suppressing exculpatory blood test results) *and* McGhee v. Pottawattamie Co., Iowa, 514 F.3d 739, 747 (8th Cir. 2008) (stating that prosecutors who obtain, manufacture, coerce and fabricate evidence before filing of charges may be held liable for violating the substantive due process rights of suspects).

[33] *See* POLICE MISCONDUCT, *supra* note 2, at § 2:30, n.14 and cases cited therein.

> that those charged with upholding the law are prohibited from deliberately fabricating evidence and framing individuals for crimes they did not commit . . . . Actions taken in contravention of this prohibition necessarily violate due process (indeed, we are unsure what due process entails if not protection against deliberate framing under color of official sanction).[34]

Although they are generally shielded by absolute immunity, prosecutors may be liable for the fabrication of evidence for actions taken prior to filing of charges.[35]

Although fabrication of evidence is a promising cause of action where it can be proven, one seldom has convincing evidence of the deliberate framing of innocent criminal defendants through manufactured evidence. It is far more common to discover the failure to disclose exculpatory evidence, but a cause of action for such misconduct, at least in the opinions of the federal courts, is shrouded in doctrinal confusion.

E. *Failure to Disclose Exculpatory Evidence*

I have analyzed the problem of a cause of action against police officers for the failure to disclose exculpatory evidence in an earlier article and continue to subscribe to that analysis.[36] My thesis is that the constitutional right at issue in such cases is procedural due process, as opposed to substantive due process, and that police officers should be held liable under § 1983 whenever they cause any deprivation of liberty as a result of their failure to furnish exculpatory evidence to prosecutors once a criminal prosecution has commenced.[37] This apparently straightforward conclusion, however, requires resolution of a number of controversies engendered by doctrinal confusion both at the Supreme Court and in the lower federal courts. Although we cannot rehearse the entire argument from *Paying for Silence* here, it is useful to set forth briefly the principal points of contention.

The Supreme Court has never resolved whether a criminal defendant's due process right to obtain exculpatory evidence in the hands of the state, protected by *Brady v. Maryland*[38] and its progeny, is bottomed on substantive or procedural due process. As a consequence, the lower federal courts are in disagreement on the issue. For reasons set forth at length in *Paying for Silence*, the better analysis is that this is a procedural due process problem.[39] Consequently, a

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[34] Limone v. Condon, 372 F.3d 39, 44-45 (1st Cir. 2004).

[35] *See Brown*, 519 F.3d at 237.

[36] Michael Avery, *Paying for Silence: The Liability of Police Officers under Section 1983 for Suppressing Exculpatory Evidence*, 13 TEMPLE POL. & CIVIL RTS. L. REV. 1 (2003) [hereinafter, *Paying for Silence*]. For additional § 1983 cases based on this claim, see POLICE MISCONDUCT, *supra* note 2, at § 2:30, n.16.

[37] *Id.* at 4.

[38] Brady v. Maryland, 373 U.S. 83 (1963).

[39] *Paying for Silence, supra* note 35, at 4.

plaintiff need not meet the high standard of the "shocks the conscience" test to establish liability, which substantive due process nearly always requires.[40] On the other hand, if state law provides a remedy for the failure of law enforcement to furnish exculpatory evidence, *Parratt v. Taylor*[41] and its progeny may bar a plaintiff's claim under § 1983.[42] In all probability, however, few states provide such remedies.

The reader should note that in my formulation of this cause of action, I impose liability on a police officer whenever his failure to furnish exculpatory evidence to the prosecutor causes *any deprivation of liberty*. These words are chosen with care. It is not to the advantage of civil rights plaintiffs to speak about the *right to a fair trial*. Many of the cases have employed the latter terminology. This may not affect the result in cases of wrongful conviction. In cases, however, where an innocent person has been prosecuted and acquitted at trial, or prosecuted and the charges dismissed before a trial is held or concluded, characterizing the right at issue as the *right to a fair trial* may deprive the accused of a remedy for deprivations of liberty that occurred prior to trial, as some courts have held.[43] The Constitution, of course, does not specifically refer to the right to a fair trial, but the Fifth and Fourteenth Amendments provide explicit and broad protection against the deprivation of liberty without due process of law.[44]

My formulation of this cause of action also omits any requirement of specific intent or a heightened state of culpability on the part of an officer to justify the imposition of liability. Some courts have required that a plaintiff prove that the officer who failed to furnish exculpatory evidence acted in "bad faith" before liability might be imposed.[45] This is completely unwarranted. There is no gen-

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[40] The Supreme Court confirmed that the standard for proof of a substantive due process violation in a suit against executive department government officials requires a showing that the officials' conduct "shocks the conscience" in *County of Sacramento v. Lewis*, 523 U.S. 833, 846-7 (1998). What suffices to shock the conscience may vary depending upon the circumstances. *Id.* at 848-850. Nonetheless, the standard is ordinarily set quite high. In *County of Sacramento v. Lewis*, for example, the Court required the plaintiff in a high speech chase case to prove that the officers conducting the chase intended to cause harm to establish a constitutional violation. *Id.* at 854. The Court specifically found that "reckless disregard for life" on the part of police officers would not be sufficient to meet the standard. *Id.*

[41] Parratt v. Taylor, 451 U.S. 527, 543 (1981) (holding that there was no federal constitutional procedural due process violation for the deprivation of property where there was an available state law remedy).

[42] *See*, POLICE MISCONDUCT, *supra* note, at § 2:46.

[43] *See, e.g.*, Becker v. Kroll, 494 F.3d 904 (10th Cir. 2007).

[44] I would determine whether the police have to furnish exculpatory evidence to the prosecutor at any given stage of criminal proceedings by employing the ordinary balancing test for the requirements of procedural due process from Mathews v. Eldridge, 424 U.S. 319, 335 (1976), as the Supreme Court did in a similar context, albeit without citing the case, in United States v. Ruiz, 536 U.S. 622, 629-31 (2002).

[45] *See, e.g.*, Villasana v. Wilhoit, 368 F.3d 976 (8th Cir. 2004).

eral requirement of specific intent or bad faith to trigger liability for constitutional violations under § 1983,[46] and no more reason to impose one for this cause of action than any other, given that there is no such requirement to find a *Brady* violation.[47]

Police officers should be held liable under § 1983 for failing to furnish exculpatory evidence to prosecutors. Where the officers have failed to provide this crucial information, the prosecutors are simply unable to fulfill their constitutional obligations under *Brady* to furnish such evidence to defense counsel, substantially increasing the risks of convicting innocent persons. Moreover, the police are the only potential parties in the system who can be held liable when the defendant is not apprised of evidence tending to establish innocence, because prosecutors are protected by the doctrine of absolute immunity.[48] Although the immediate responsibility for delivering exculpatory evidence to the defense rests with the prosecutor, § 1983 imposes liability on "every person who . . . subjects, or causes to be subjected" any person to a constitutional violation. There can be little doubt that police officers who fail to provide exculpatory evidence to prosecutors cause the eventual *Brady* violation.

F. *Suggestive Eyewitness Identification Procedures*

Mistaken eyewitness identifications are a major cause of wrongful convictions, and constitutional claims under § 1983 could provide a significant remedy. Presently, however, this cause of action has been under-utilized and remains under-theorized. As Brandon Garrett has written:

> 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.[49]

Defining the contours of a § 1983 cause of action for police misconduct that results in mistaken eyewitness identifications would require a lengthy law review article of its own, and to the best of this author's knowledge, no such article has been written. Here, I will just identify three questions that the mod-

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[46] POLICE MISCONDUCT, *supra* note 2, at § 1:8.

[47] *Brady v. Maryland*, 373 U.S.83, 87 (1963).

[48] In Van de Kamp v. Goldstein, 129 S. Ct. 855 (2009), the Supreme Court held that not only is an individual prosecutor absolutely immune for failing to turn over exculpatory evidence, but the chief prosecutor is also absolutely immune, even in his administrative capacity, for failing to establish proper systems and training to assure that exculpatory evidence is provided to criminal defendants.

[49] Garrett, *supra* note 1, at 79.

est case law to date has left unresolved.[50]

First, what is the precise constitutional right that is potentially violated in these cases? As with the failure to furnish exculpatory evidence, the lower courts have permitted § 1983 cases to go forward as due process claims, without identifying whether the issue is substantive or procedural due process. This issue must be resolved, but I do not propose to sort it out in this brief article. In addition, where a suggestive identification is made at a proceeding where an accused is entitled to have counsel present, Sixth Amendment rights are implicated.[51]

Regardless of *what* right is at issue, wrongful convictions based on a suggestive identification raise a significant question of *when* the violation takes place. Some cases have suggested that the suggestive identification procedure does not in itself violate a suspect's constitutional rights, but it is only when the identification is introduced in evidence at trial that there is a violation.[52] The argument centers on the idea that it is actually the prosecutor, or perhaps the judge, who is responsible for the constitutional violation, and not the officer. The officer may argue that the decisions to offer and admit the evidence by the prosecutor and the judge constitute superseding acts, and thus relieve the officer of liability for his actions in connection with the suggestive identification procedure. The cases are split with respect to whether the officer should be held liable in the face of these arguments.[53]

These matters deserve extended discussion beyond what is possible here. As to whether the decisions of the prosecutor and the judge should cut off the officer's liability, however, it should be sufficient to argue that § 1983 by its explicit terms imposes liability against any actor who *causes* a constitutional violation, not only those who actually *commit* violations. Whether we deem the suggestive identification procedure itself to be a constitutional violation should be irrelevant. The question should be whether it would have been foreseeable to a reasonable officer that his actions during the identification procedure

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[50] For cases in this area, see POLICE MISCONDUCT, *supra* note 2, at § 2:30.

[51] *See*, United States v. Wade, 388 U.S. 218 (1967) (holding that Sixth Amendment provides right to counsel at post-indictment lineup), and its progeny.

[52] Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007). To a similar effect is the argument that unless a civil rights plaintiff was actually placed on trial as a criminal defendant, suggestive identification procedures provide no cause of action because the right in question is a "fair trial" right. Hensley v. Carey, 818 F.2d 646 (7th Cir. 1987). This argument should be rejected for the reasons discussed in Section II E of this article in connection with claims for the failure to disclose exculpatory evidence.

[53] *Compare Wray*, 490 F.3d at 195, (finding officer is not liable absent evidence that he misled or pressured the prosecutor or trial judge), *with* Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) (rejecting intervening act argument and finding officer is liable if he reasonably should have known that use of the identification would lead to violation of criminal defendant's right to fair trial).

would lead to a deprivation of liberty as a result of a suggestive identification.[54]

The argument that the only legally culpable actors are the prosecutor and the judge at trial hardly furthers the remedial purpose of the statute, inasmuch as prosecutors and judges enjoy absolute immunity from damages for actions taken pursuant to their duties connected with trials.[55] Moreover, it suggests that a police officer is free to run about like a bull in a china shop, violating the rights of suspects throughout an investigation, but incurring no liability due to subsequent decisions by other actors in the criminal justice system. Such an argument does not further the deterrent purpose of the constitutional tort remedy provided by § 1983.

G. *Coercive Interrogation*

Where the police obtain an involuntary or coerced statement that is introduced at an innocent person's trial, resulting in a conviction, the victim of the police misconduct should have a cause of action under § 1983.[56] It is implicit in the Supreme Court's decision in *Chavez v. Martinez*[57] that the Fifth Amendment's constitutional protection against the use of coerced statements is effective only in criminal proceedings, and that when such statements are introduced in such proceedings, § 1983 provides a cause of action for the Fifth Amendment claim.[58] In addition, there is a potential substantive due process claim in such cases.[59] With respect to involuntary statements that are the result of coercion, the Supreme Court has long held that a statement is involuntary where the police have overcome a suspect's ability to exercise his free will.[60] Because this admission violates due process, § 1983 should also provide a remedy here.[61]

As with suggestive eyewitness identifications, officers may argue that the prosecutor's decisions to offer a statement in evidence, and the judge's decision to admit it, are superseding causes that strip the officer who took the statement from liability for a constitutional violation.[62] Here again the answer to this

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[54] This would encompass both wrongful convictions and deprivations of liberty in advance of trial.

[55] *See*, Stump v. Sparkman, 435 U.S. 349 (1978) (judicial immunity); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutorial immunity).

[56] Miranda v. Arizona, 384 U.S. 436 (1966); Dickerson v. United States, 530 U.S. 428 (2000). For further discussion of this cause of action, see POLICE MISCONDUCT, *supra* note 2, at § 2:29.

[57] Chavez v. Martinez, 538 U.S. 760 (2003); *See* discussion *supra* at note 29.

[58] *See*, Higazy v. Templeton, 505 F.3d 161 (2d Cir. 2007) (use of coerced statement against accused in bail hearing violated his Fifth Amendment rights and plaintiff was entitled to litigate *Bivens* constitutional cause of action).

[59] *Chavez*, 538 U.S. at 779; Martinez v. City of Oxnard, 337 F.3d 1091 (9th Cir. 2003).

[60] Haynes v. State of Washington, 373 U.S. 503 (1963).

[61] Cunningham v. City of Wenatchee, 345 F.3d 802, 810 (9th Cir. 2003).

[62] The court accepted this argument in *Murray v. Earle*, 405 F.3d 278 (5th Cir. 2005)

argument is that § 1983 imposes liability against any person who *causes* a constitutional violation, not only those who *commit* constitutional violations. As long as the use of a suggestive identification at a later trial is foreseeable, the officer who is responsible for the identification should be held liable for the constitutional violation. .

H. *Ineffective Assistance of Counsel*

The ineffective assistance provided by publicly funded lawyers might be responsible for a substantial number of wrongful convictions.[63] For the most part, however, only state tort remedies are available by way of compensation. The Supreme Court has held that public defenders do not act under color of law, and hence are not amenable to suit under § 1983.[64] Some courts, however, have held that agencies or agency administrators might be held liable under § 1983 for systematic failures of representation.[65]

III. Conclusion

This has been a very brief overview of some of the principal problems encountered by former prisoners who seek compensation for wrongful convictions through § 1983 actions for damages. It is hard to overstate the legal and practical difficulties of these cases. Even when such claims are successful, they ordinarily will not provide any compensation for years. Litigation is not a solution to the immediate problems that a newly-released person has—standing on the sidewalk outside the institution where he has been wrongfully confined for years, wearing the clothes he had on when he went to prison, with just a few dollars in his pocket. Society owes these victims of the criminal justice system much more than we are providing at present. Given what we know about the incidence of wrongful conviction, it is a scandal that we are not doing better.

(officers could only be liable for confession's admission if they had kept circumstances under which it was made from trial judge).

[63] For a critique of the current standard for assessing ineffective assistance of counsel, see Abbe Smith, Strickland v. Washington*: Gutting* Gideon *and Providing Cover for Incompetent Counsel*, in We Dissent, *supra* note 29 at 188.

[64] Polk Co. v. Dodson*,* 454 U.S. 312 (1981). *See, also,* Vermont v. Brillon, 129 S. Ct. 1283, 1291 (2009) ("assigned counsel ordinarily is not considered a state actor").

[65] *See*, Police Misconduct, *supra* note 2, at § 1:2, n.16.