Unidentified Police Officials

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United States police officers arrest more than ten million people each year. All of these arrests involve some level of force, and many of them involve multiple officers. Victims of excessive force may bring a § 1983 civil rights claim against all of the officers who were present, but too often plaintiffs with meritorious cases lose because they cannot prove causation. It is not enough to show that "the police" violated the Constitution; rather, to prevail against a defendant, a § 1983 plaintiff must show how that specific defendant "subjected or caused the plaintiff to be subjected" to the deprivation of a constitutional right. Unfortunately, plaintiffs often are not positioned to know what happened, and police officials have strong incentives to stay silent. Not only do police norms, like the "blue wall of silence," prevent police officials from "ratting out" their fellow officers, but § 1983 jurisprudence incentivizes silence—if all officers stay silent, they can all avoid liability.

Since George Floyd's killing and the arrest and injury of hundreds of protestors, legal scholars and legislators have offered sweeping proposals to make police more accountable for their misconduct. Yet, they have overlooked the subtle solution that tort law theories of res ipsa loquitur and joint liability offer and that this Article advances. This Article counteracts the incentives toward police silence by proposing a causa per se *theory of liability in § 1983 cases against police officials: when a § 1983 plaintiff offers evidence of a constitutional violation and evidence that an officer was present for the violation, the burden of production shifts to the defendants to exculpate themselves. If the officers cannot or do not explain what happened, they may be jointly liable for the plaintiff's injury. By redistributing burdens of production in § 1983 causation disputes, courts can expose police misconduct, increase police accountability, and increase the likelihood plaintiffs will be compensated for their injuries.*

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Introduction

Police use force. Police and civil plaintiffs frequently dispute whether the force used was excessive. When a court finds the force was reasonable, plaintiffs will lose their § 1983 excessive force claims. This is not surprising.[1] What is surprising is that even when the defendants do not dispute that the police used excessive force, § 1983 plaintiffs may still lose their Fourth Amendment claims. Imagine the following:

> *Four police officers arrive to arrest you. They are not wearing body cameras, and no one is around to record the interaction. You are pinned on the ground, and one of the officers kicks you in the face, causing severe injury. With your face to the floor you, obviously, have no idea which one kicked you. So, you bring a § 1983 action against all of them. No one disputes that you were kicked and injured. But no one admits to kicking you, and each officer claims they don't know what happened. Without their testimony, you cannot prove who "caused" the constitutional violation, so you lose your Fourth Amendment claim on summary judgment and don't even get to present your case to a jury.*[2]

Your loss is a consequence of § 1983's "personal responsibility" requirement. Under this rule, a § 1983 plaintiff cannot win by just showing "the police" violated the Constitution. To prevail against a defendant in a § 1983 action, plaintiffs must prove that they were deprived of a constitutional right and that that *specific defendant* caused the deprivation. In the usual § 1983 case, the parties dispute whether the conduct amounted to a constitutional violation, and there is no real question that the defendant "caused" the constitutional deprivation. But in cases like *Jutrowski v. Township of Riverdale*,[3] the case upon which the hypothetical is based, plaintiffs encounter the opposite problem. There is no real dispute that there was a constitutional violation. However, the plaintiff is unable to establish which defendants caused the constitutional violation, and the dispute centers on the question of causation. And while courts recognize the "'potential tension' between the individual-responsibility requirement of § 1983 and

1. A § 1983 plaintiff must show a deprivation of a federally protected right. Dennis v. Higgins, 498 U.S. 439, 445 (1991) (citing Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 700–01 (1978)). The Fourth Amendment guarantees the right for persons to be free from unreasonable seizures. U.S. CONST. amend IV. When a court finds police officials' use of force during a seizure was reasonable, there is no Fourth Amendment violation. Graham v. Connor, 490 U.S 386, 388 (1989).

2. *See, e.g.*, Jutrowski v. Township of Riverdale, 904 F.3d 280, 284–85 (3d Cir. 2018) (determining that the plaintiff's "inability to identify his attacker was fatal to his claims" and granting summary judgment in the defendants' favor).

3. 904 F.3d 280 (3d Cir. 2018).

'factual scenarios'" of the kind created here,[4] they have failed to provide a viable solution.

Most circuits hold that officials "cause" a constitutional deprivation if they fail to intervene, even if they did not actually use excessive force against the plaintiff. Nevertheless, these same courts require plaintiffs to prove specifically how each defendant caused the injury—which defendants used force and which defendants failed to intervene.[5] In situations like this, requiring the § 1983 plaintiff to identify who amongst a group of defendants used excessive force and who observed the use of force has the potential to "effectively immunize" defendants from liability.[6] Too frequently, plaintiffs are not in a position to know this information, and the "blue wall of silence" prevents them from learning it. In short, many plaintiffs have an evidentiary problem—they know they were injured, they may even know who was present, but they do not know how each defendant contributed to the injury.

Legal scholars who recognize the evidentiary challenges faced by victims of police violence reach for solutions like reforming municipal liability and other broad legal changes.[7] Yet, they fail to recognize that the puzzle is as old as a barrel falling out of the window of a flour shop and landing on someone's head.[8]

This Article borrows from tort theories of res ipsa loquitur and joint and several liability to offer a straightforward solution: a theory of *causa per se*, a Latin phrase that roughly translates to "causation in itself." Under this theory, when § 1983 plaintiffs present evidence of excessive force and that the defendant was present at the scene, courts should infer causation from the plaintiff's circumstantial evidence and shift the burden to defendants to explain what happened. Combining theories of res ipsa loquitur and joint

4. *Id.* at 291 (quoting Colbert v. City of Chicago, 851 F.3d 649, 657–58 (7th Cir. 2017)).

5. *See, e.g.*, *Colbert*, 851 F.3d at 660 ("Here, [the plaintiff] does not specifically identify any officer who was responsible for the alleged damage, or any who turned a blind eye to other officers' allegedly illegal actions.").

6. *Id.* at 657–58 ("There can be acceptable reasons for officers to clear a search area (*e.g.*, officer and citizen safety, evidence preservation), but doing so can risk effectively immunizing officers from property-damage claims by preventing a plaintiff from observing the person responsible for the damage.").

7. Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 791 (1999) (discussing how vicarious liability would best serve the purpose of § 1983 to prevent constitutional violations); Charles A. Rothfeld, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935, 954 (1979) (stating that applying traditional respondeat superior would still require the plaintiff to establish a constitutional violation, but the plaintiff would only need to show that the individual wrongdoer was a municipal employee, rather than actually identifying the individual wrongdoer).

8. Byrne v. Boadle, 159 Eng. Rep. 299, 301 (1863) (applying the doctrine of res ipsa loquitor by holding that, after a barrel of flour fell out of a window and onto the plaintiff's head, the plaintiff was not required to prove the elements of negligence because the barrel's "falling [was] primâ facie evidence of negligence"); *see also infra* notes 240–46 and accompanying text.

liability in this way creates a powerful incentive for defendants to come forward with information about causation.[9]

To prove this point, this Article pulls from three different legal fields that, in the past, courts and scholars typically have viewed discreetly: civil procedure, civil rights, and tort law. Part I discusses how the Federal Rules of Civil Procedure governing discovery and pleading often combine with the blue wall of silence to insulate police officials from liability.[10] Part II explains how courts have interpreted § 1983's causation requirement. Courts recognize that a defendant may cause a constitutional deprivation without directly participating. This Part considers how courts have dealt with the issue of multiple defendants in § 1983 litigation. I conclude that while their solutions may be substantively sound, they do not account for the evidentiary difficulties many plaintiffs are likely to encounter, rendering claims largely unwinnable. Part III considers how tort law has addressed evidentiary issues and asymmetrical information when there are multiple tortfeasors involved. Specifically, Part III discusses res ipsa loquitur, joint and several liability, and the principles underlying these theories. Part III also argues that these concepts should be adapted and applied to create a *causa per se* theory in § 1983 litigation involving multiple police officials.[11]

I. Who Did What?

The challenge of identifying defendants in police misconduct cases arises on two levels: (1) who was present at the scene and (2) who is "personally responsible" for the constitutional deprivation.

A. Pre-Complaint Discovery

Technically, federal civil litigation begins when a plaintiff files a complaint.[12] However, before filing a complaint, a plaintiff needs to resolve some very basic, but necessary, issues—like deciding who to sue. This may be easier said than done. Immediately following an injury, many victims of police excessive force will not know who was there and how each officer contributed to the injury. Yet, they need to figure this out to draft and file a complaint. But how? Unlike some state rules, the Federal Rules of Civil

9. *See* Kenneth S. Abraham, *Self-Proving Causation*, 99 VA. L. REV. 1811, 1842–43 (2013) ("In some cases, however, the function of res ipsa is instead, or in addition, to 'smoke out' evidence from the defendant that would not otherwise be produced.").

10. The "blue wall of silence" is law enforcement officials' custom to remain silent about misconduct. For a fuller discussion, see *infra* subpart I(E).

11. While the *causa per se* theory proposed herein may very well apply beyond the Fourth Amendment context, this Article is limited to § 1983 Fourth Amendment claims.

12. FED. R. CIV. P. 3.

Procedure offer very little in the way of pre-complaint discovery.[13] Consequently, when plaintiffs sue in federal court, there is no formal rule for them to learn the identity of unknown defendants before filing a complaint.

Nevertheless, there are several methods for putative plaintiffs to obtain information about their case before they formally file their claim. Currently, thirty-three states allow for some form of pre-complaint discovery.[14] The rules of civil procedure permitting this discovery vary by state but, generally, provide a formal method to discover the identities of defendants before plaintiffs file their complaint.[15] This, theoretically, should reduce the need to use the John Doe designee.

Video evidence also decreases the likelihood that § 1983 plaintiffs will need to rely on fictional defendants. As discussed in subpart I(D), many police departments have outfitted police vehicles and officers with video cameras. State freedom of information laws offer one pre-complaint mechanism for plaintiffs to obtain video evidence. Each state has enacted their own freedom of information laws.[16] These laws allow a person to request documents and records not generally prepared for distribution and

13. Rule 27, which allows a person to take depositions "before an action is filed," only applies in a special category of cases where testimony must be preserved. FED. R. CIV. P. 27. Under Rule 27, in making a verified application to the court, the petitioner seeking to take the deposition must set forth five things: (1) that the petitioner expects to bring a cause of action, but is presently unable to bring it; (2) the subject matter of the expected action and the petitioner's interest therein; (3) the facts that the petitioner seeks to establish through the deposition; (4) the names and addresses of the expected adverse parties; and (5) the names and addresses of the people sought to be deposed along with the subject matter of the proposed testimony. *Id.*

14. *See* ALA. R. CIV. P. 27(a)(1) (Alabama); ARIZ. R. CIV. P. 27 (Arizona); ARK. R. CIV. P. 27 (Arkansas); CAL. CIV. PROC. CODE § 2035.010 (West 2017) (California); COLO. R. CIV. P. 27 (Colorado); CONN. GEN. STAT. ANN. § 52-156(a) (West) (Connecticut); FLA. R. CIV. P. 1.290(a)(1) (Florida); GA. CODE ANN. § 9-11-27 (West) (Georgia); HAW. R. CIV. P. 27 (Hawaii); 735 ILL. COMP. STAT. ANN. 5/2-402 (West) (Illinois); IND. TRIAL R. 27 (Indiana); KY. R. CIV. P. 27.01(1) (Kentucky); M.R. CIV. P. 27(a) (Maine); MASS. R. CIV. P. 27(a) (Massachusetts); MCR 2.303(A) (Michigan); MINN. R. CIV. P. 27.01 (Minnesota); MISS. R. CIV. P. 27(a) (Mississippi); N.J. CT. R. 4:11-1 (New Jersey); NMRA 1-027 (New Mexico); N.Y. C.P.L.R. § 3201 (McKinney 2015) (New York); N.C. R. CIV. PROC. GEN. STAT. ANN. 1A-1, 27(a)(1) (North Carolina); N.D. R. CIV. P. 27(a)(1) (North Dakota); OHIO CIV. R. 34(D)(1) (Ohio); OKLA. STAT. ANN. TIT. 12, § 3227(A)(1) (West) (Oklahoma); OR. R. CIV. P. 37(A)(1) (Oregon); PA. R. CIV. P. 4001(c) (Pennsylvania); R.I. SUPER. R. CIV. P. 27 (Rhode Island); S.C. R. CIV. P. 27(a)(1) (South Carolina); TENN. R. CIV. P. 27.01 (Tennessee); TEX. R. CIV. P. 202 (Texas); UTAH R. CIV. P. 27(a)(1) (Utah); VT. R. CIV. P. 27 (Vermont); W. VA. R. CIV. P. 27 (West Virginia).

15. *Compare* PA. R. CIV. P. 4003.8(a) (allowing a "plaintiff [to] obtain pre-complaint discovery where the information sought is material and necessary to the filing of the complaint and the discovery will not cause unreasonable annoyance, embarrassment, oppression, burden, or expense to any person or party"), *with* TEX. R. CIV. P. 202 (granting broad power to investigate claims prior to filing), *and* ILL. COMP. STAT. ANN. 5/2-402 (only allowing discovery in order to identify potential defendants). Most commonly, states allow for pre-complaint depositions after a request for such is granted by a court. These depositions can be used to compile the facts necessary to file a complaint.

16. 132 AM. JUR. 3D *Proof of Facts* § 1, Westlaw (database updated September 2021).

dissemination to the public.[17] Generally, disclosure under state freedom of information laws "are subject to statutory exemptions, common-law limitations, or an overriding public interest in keeping the record confidential."[18] However, certain states, like Illinois and Pennsylvania, have created exceptions that severely limit the information that can be released to the public.[19] These exceptions include barring the use of police video and audio recordings when their contents relate to pending criminal investigations.[20] On the other hand, states such as Arizona and New Jersey have limited municipalities' ability to withhold security and dashboard camera footage, which makes it easier for individuals to obtain footage.[21]

Currently, twenty-three states and the District of Columbia have enacted legislation specifying separate procedures for requesting body-camera footage under open records law and detailing which footage can and cannot be released to the public.[22] State statutes differ regarding public access to police recordings.[23] Oregon is an example of a broad state in regard to gaining access to body-camera footage.[24] Oregon excludes body-worn camera footage from open record laws; however, the state provides an exception that allows the public to access the video in current situations.[25] The statute in Oregon allows for body-camera footage to be released if releasing it serves

17. *Id.*

18. *Id.* § 15.

19. *See* 65 PA. STAT. AND CONS. STAT. ANN. § 67.708(b)(16)–(17) (West 2009) (stating that information relating to criminal and non-criminal investigations are exempt from disclosure under the Pennsylvania Right to Know Act); 5 ILL. COMP. STAT. ANN. § 140/7(1)(c) (West 2021) (exempting personal information from public records that would constitute a "clearly unwarranted invasion of personal privacy" from materials that can be obtained through the Illinois Freedom of Information Act).

20. 42 PA. STAT. AND CONS. STAT. ANN. § 67A02(b) (West 2017) ("Nothing in this chapter nor the Right-to-Know Law shall establish a right to production of an audio recording or video recording made inside a facility owned or operated by a law enforcement agency or to any communications between or within law enforcement agencies concerning an audio or video recording."); ILL. COMP. STAT. ANN. § 140/7.5(k), (cc) (West 2021) (exempting law enforcement identification information compiled by law enforcement agencies as well as "[r]ecordings made under the Law Enforcement Officer-Worn Body Camera Act" from inspection and copying).

21. Chris Pagliarella, *Police Body-Worn Camera Footage: A Question of Access*, 34 YALE L. & POL'Y REV. 533, 540 (2016).

22. Bridget M. Synan, *Police Body Camera Footage: It's Just Evidence*, 57 DUQ. L. REV. 351, 373 (2019).

23. David Trausch, *Real Transparency: Increased Public Access to Police Body-Camera Footage in Texas*, 60 S. TEX. L. REV. 373, 389 (2019); *see Body-Worn Camera Laws Database*, NAT'L CONF. STATE LEGISLATURES (Feb. 28, 2018), https://www.ncsl.org/research/civil-and-criminal-justice/body-worn-cameras-interactive-graphic.aspx#/ [https://perma.cc/RVD8-GJGQ] (providing a state-by-state overview of body-worn camera laws); *see also* 42 PA. STAT. AND CONS. STAT. ANN. § 67A02 (West 2017) (stating that the Right-to-Know Law does not apply to any audio recording or video recording made by a law enforcement agency).

24. NAT'L CONF. STATE LEGISLATURES, *supra* note 23.

25. *Id.*

the public interest with the caveat that the persons' faces are unidentifiable.[26] Similarly, Georgia allows access to body-camera footage to "those who believe the video would be relevant to a pending criminal case or civil action."[27] In Florida and South Carolina, persons who are the subject of a body-worn camera recording may request the video.[28] Oddly enough, states such as Connecticut include body-camera footage as public record; however, Connecticut's policy has exceptions that make it difficult to obtain this footage.[29] If civil plaintiffs are unable to identify the defendant, they do have another option—file a claim against a Doe defendant.

B. Meet John Doe

"John Doe" is perhaps the best-known pseudonym for a person whose identity is unknown.[30] One might appropriately describe him as a shadow—he assumes the shape of a person but lacks many of the details necessary to identify him, and he appears time and time again. In practice, "he" is merely a placeholder and will be replaced by actual defendants once the plaintiff learns their real legal identities. As one might intuit, John Doe cases usually involve informational asymmetry, and this asymmetry may be traced back to the absence of a pre-existing relationship. The following offers empirical evidence to support this intuition, categorizing civil cases filed against Doe defendants in federal courts in Georgia, Illinois, Pennsylvania, and Washington from January 1, 2019, until January 1, 2020, based upon case types.[31]

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*; *see also* CONN. GEN. STAT. ANN. § 1-210(b)(3) (West 2018) (listing situations in which disclosure is prohibited even when the public interest is concerned).

30. *See John Doe*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("John Doe" is a "fictitious name used in a legal proceeding to designate a person whose identity is unknown").

31. I selected these four states because they have relatively similar population numbers yet are situated in different geographical areas of the country. Arizona initially was included but ultimately was eliminated because just six Doe cases were filed in federal courts in Arizona during the relevant period. The almost complete absence of Doe cases in Arizona is, in and of itself, both surprising and interesting and very well may become the basis for a future article. The categories used are based on the federal nature of suit categories. When filing a civil complaint in federal court, plaintiffs must complete a "civil cover sheet," which includes selecting from a list of categories the nature of their suit. The categories listed on the civil cover sheet are the categories we have used in compiling our data. Plaintiffs filed a total of 1,180 cases against Doe defendants during the relevant time period. Categories where fewer than 12 cases were filed have been aggregated into an "other" category.

	GA.		ILL.		PENN.		WASH.		TOTAL	
	# Doe cases	% Doe cases	# Doe cases	% Doe cases	# Doe cases	% Doe cases	# Doe cases	% Doe cases	# Doe cases	% Doe cases
Copyright (Property Rights)	0	0	156	25	106	22.27	1	0.71	263	22.29
Civil Rights (non-specific)	47	18.73	35	5.61	106	22.27	27	19.28	215	18.22
Personal Injury	101	40	5	0.80	63	13.23	32	22.86	202	17.11
Civil Rights (Prisoner Habeas Petition)	40	15.94	116	18.59	80	16.81	24	17.14	158	13.39
Prison Conditions (Prisoner Suits)	22	8.76	237	37.98	62	13.03	4	2.86	115	9.75
Trademark (Property Rights)	1	0.40	39	6.25	0	0	2	1.43	42	3.56
Contract (Insurance)	7	2.79	1	0.16	3	0.63	18	12.86	29	2.46
Labor (Fair Labor Standards Act)	1	0.40	0	0	15	3.15	0	0	16	1.4
Contract (other)	2	0.80	2	0.32	6	1.26	3	2.14	13	1.10
"Other" Statutory Action	3	1.20	5	0.8	4	0.84	1	0.71	13	1.10
All other Doe cases	27	10.75	28	4.49	31	7.77	28	20	114	9.6
TOTAL	251		624		476		140		1180	

Plaintiffs filed a total of 1,180 claims against Doe defendants in federal courts in Georgia, Illinois, Pennsylvania, and Washington during the relevant time frame. Of these cases, more than 80% fall into one of five categories: copyright claims,[32] civil rights claims, personal injury claims, prisoner habeas petitions, and prisoner condition claims.

32. All 106 copyright claims in Pennsylvania stem from two plaintiffs. These two plaintiffs own adult films which can be accessed online. They have brought 106 claims against defendants who have illegally downloaded or distributed their adult films. They are brought against Doe defendants as the technology used to track down an illegal download only supplies the plaintiffs with the IP

When one considers the underlying substantive nature of these five categories of cases, it is not especially surprising that plaintiffs are more likely to file suits against John Doe defendants in these five categories of cases than they are in other types of cases.[33] Under an extremely rudimentary scheme of legal taxonomy, civil cases might be sorted into one of two binary categories: those in which the parties have a pre-existing legal relationship (e.g., contract claims) and those in which the parties do not have a specific pre-existing legal relationship (e.g., negligence tort claims).[34] As a practical matter, in the former, a plaintiff will often know the identity of the defendant as a consequence of their pre-existing relationship and, accordingly, is less likely to need to rely on John Doe pleadings. In contrast, in the absence of a pre-existing relationship, the plaintiff is less likely to have the information necessary to identify the defendant. A plaintiff is unlikely to have a pre-existing relationship with the defendants in either copyright claims or § 1983 actions. And while a prisoner may have some pre-existing relationship with potential defendants, it may be distant and impersonal, which makes it difficult for the plaintiff to identify the offender. When plaintiffs cannot name the defendant, the best option is often to bring suit against a Doe defendant.

C. Suing Officer Doe

Doe defendants complicate federal pleadings. The Federal Rules of Civil Procedure are silent as to the use of Doe defendants.[35] Although Doe

address of the computer used to complete the download, rather than the name of the individual who downloaded the media. This forces the copyright owners to file claims against Doe defendants until the IP addresses can be linked with their users through the process of discovery. The plaintiffs had no clear relationship with the defendants prior to the breach. Similarly, the large number of Copyright cases in Illinois are also the result of the online-illegal download of multi-media content. As with Pennsylvania, corporations who own movies, such as "Angel Has Fallen" in one Illinois case, sued individuals who illegally downloaded their copyrighted content. All 156 Illinois cases were brought by just seven plaintiffs, two of which were the same plaintiffs who brought all 106 of Pennsylvania's claims.

33. *See* Howard M. Wasserman, *Civil Rights Plaintiffs and John Doe Defendants: A Study in Section 1983 Procedure*, 25 CARDOZO L. REV. 793, 797–98 (2003) (noting the "special problem" of John Doe defendants in § 1983 actions). Wasserman explains that the use of a John Doe or Unknown Officer defendant is "most common and most necessary in these cases, in light of 1) the conduct that gives rise to much constitutional litigation, and 2) substantive § 1983 law, which emphasizes the liability of the individual officer and de-emphasizes or eliminates the liability of the government entity." *Id.* (footnotes omitted).

34. By using the term "specific," I wish to signal the exclusion of general legal obligations, like the general duty of care owed to others that has been recognized in tort cases.

35. STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE AND FEDERAL COURTS *Pleading—Doe defendants* § 8:5 Westlaw (database updated Oct. 2021). In *Bivens*, however, the Supreme Court permitted (without discussion) the use of fictitious defendants. *Id.* (citing Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)). Here is an example of a complaint using the John Doe designation:

defendants regularly appear in federal civil cases, federal courts continue to grapple with their use in federal civil litigation and are split on whether a civil plaintiff may even sue Doe defendants.[36]

Assuming they can, the question becomes: "How does one properly state a claim against a Doe defendant?" Pleading under the Federal Rules of Civil Procedure seems fairly straightforward—claimants only need to make a short and plain statement showing they are entitled to relief.[37] However, since its adoption, federal courts have debated how a claimant meets this requirement.[38] *Bell Atlantic Corp. v. Twombly*[39] and *Ashcroft v. Iqbal*[40] have only further complicated this issue.[41] In *Twombly*, the Court held for a complaint to state a claim upon which relief can be granted the "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[42] Initially, many scholars argued that *Twombly* was a fluke and its pleading requirements should only apply in antitrust

> Defendant JOHN DOE and others not presently known to the plaintiff were, at all times material to this Complaint, duly appointed police officers of the City of *[name of city]*. At all times material to this Complaint, these defendants acted toward plaintiff under color of the statutes, ordinances, customs and usage of the State of *[name of state]*, City of *[name of city]*, and the *[name of police department]* Police Department.

SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 app. B-8 (4th ed. 2020).

36. Whether Doe defendants are acceptable in federal civil cases is largely dependent on jurisdiction. The Ninth Circuit, for example, had long held that the inclusion of a Doe defendant defeated diversity jurisdiction, thus removing the federal court's standing to hear the case. *See* Bryant v. Ford Motor Co., 844 F.2d 602, 605 (9th Cir. 1987) (articulating the new rule that the presence of Doe defendants no longer destroys diversity jurisdiction, thus precluding removal). Contrary to the Ninth Circuit, the Eleventh Circuit has recognized that naming a defendant may not always be possible and has held that the court may hear the case if the complaint describes the defendant well enough so that their name is mere "surplusage" and the defendant can readily be identified through the discovery process. Dean v. Barber, 951 F.2d 1210, 1215–16 & n.6 (11th Cir. 1992). One primary reason for this split is whether the circuit views a Doe defendant as a fictitious party, which is not permitted, or whether the circuit views them as a "real party sued under a fictitious name." *See id.* at 1215 ("It is important to distinguish suing fictitious parties from real parties sued under a fictitious name." (citing Bryant v. Ford Motor Co., 832 F.2d 1080, 1096 n.19 (9th Cir. 1987) (Kozinski, J., dissenting))). This question—whether a plaintiff can actually sue a Doe defendant—has escaped the careful consideration of legal scholars.

37. Rule Eight simply requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8.

38. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (4th ed.), Westlaw (database updated Oct. 2021).

39. 550 U.S. 544 (2007).

40. 556 U.S. 662 (2009).

41. *See* WRIGHT & MILLER, *supra* note 39, at § 1216 ("[T]he Iqbal Court sought to address many of the questions Twombly had raised. . . . [But,] the Court's holding appears to have presented further issues for the federal courts to address.").

42. *Twombly*, 550 U.S. at 555 (citation omitted).

cases.[43] However, two years later in *Ashcroft v. Iqbal* the Court reiterated *Twombly*'s holding and held that all other federal court civil complaints must contain *factual* allegations, not merely legal conclusions, constituting a "plausible" claim for relief.[44] To complicate matters further, neither *Twombly* nor *Iqbal* explicitly overruled the Court's prior precedents concerning pleading standards for federal court civil rights claims.[45]

Iqbal's higher pleading requirements may have a greater impact on cases against John Doe defendants. Under *Iqbal*, parties seeking relief must meet two standards: their pleading must assert "sufficient factual matter" to state a claim and those factual statements must lead a court to plausibly infer the defendant is liable.[46] These two requirements may pose an especial problem to plaintiffs who bring claims against Doe defendants. First, the presence of John Doe defendants is often symptomatic of a larger problem—a lack of knowledge regarding the facts surrounding the alleged injury, which in turn may make it difficult for plaintiffs to state a claim with the requisite degree of specificity. Additionally, it is unclear how courts are to determine plausibility even when a plaintiff has knowledge to allege "sufficient factual matter" in her complaint but is uncertain of the defendant's identity.[47] Arguably, whether the plaintiff has stated a plausible claim depends in part on who the claim is against. For example, in *Iqbal*, the majority was careful to differentiate between the high-level cabinet officials named in the suit—Ashcroft and Mueller—and low-level executive defendants and held that the plaintiff had failed to allege facts that, if true, would make Ashcroft and Mueller liable.[48] Interestingly, Iqbal sued multiple Doe defendants, but the Court did not consider how a plaintiff states a claim against an unknown

43. *See, e.g.*, Andrew F. Halaby, *Pleading Analysis Under* Iqbal*: Once More Onto the Breach!*, ARIZ. ATT'Y MAG., Dec. 2009, at 34–36 ("[I]t is difficult to go further and conclude from *Iqbal* that its standards apply uniformly in all civil cases.").

44. MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 13 (Kris Markarian ed., 3d ed. 2014).

45. Lucas F. Tesoriero, *Pre*-Twombly *Precedent: Have* Leatherman *and* Swierkiewicz *Earned Retirement Too?*, 65 DUKE L. REV. 1521, 1522 (2016) (finding that since *Iqbal* does not overrule pre-*Twombly* pleading requirements, circuit and district courts are left to decide which case to apply to § 1983 pleadings).

46. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

47. *See id.* at 684 (limiting its decision only "to the determination that respondent's complaint does not entitle him to relief from petitioners"). *Iqbal* explains that for a claim to be facially plausible the court must be able to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678. A court might interpret this to require the plaintiff to prove a particular defendant is liable for the misconduct alleged. Interestingly, the majority was careful to note, "we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us," a group that included several "John Does." *Id.* at 684.

48. *Id.* at 666, 677.

defendant.[49] Thus, the question of plausibility determinations for Doe defendants remains an open question.[50]

Most lower federal courts allow Doe designees under special circumstances.[51] Circuit courts vary regarding the precise requirements; however, at least some require that a complaint against a Doe defendant provide sufficient information such that the true identity of an unnamed party can be determined through discovery or by intervention by the court.[52] The court will determine whether the plaintiff has met this threshold.[53] If so, the plaintiff should be able to use formal discovery methods to identify the defendants.[54] If they fail, their complaint will be dismissed.[55]

D. Identifying Officer Doe Through Discovery

Discovery is a pretrial process that allows both parties to obtain evidence from the opposing party. The purpose of discovery is to allow litigants to obtain the information they need to establish their case or defense

49. The Doe defendants were not before the court and the court explicitly chose not to address the sufficiency of the complaint against them. *Id.* at 684.

50. David M. Epstein, Annotation, *Propriety of Use of Fictitious Name of Defendant in Federal District Court*, 139 A.L.R. Fed. 553 § 3[a] (1997) (explaining that plaintiffs must plead specific facts to aid in identifying the defendant in order to bring forth a claim).

51. *Id.* § 2[a]. Interestingly, some courts believe that the decision to allow for Doe designees should be left up to the court's discretion. *See, e.g.*, Doe v. Blue Cross & Blue Shield United of Wis., 112 F.3d 869, 872 (7th Cir. 1997) (noting that courts should not automatically grant the privilege of suing or defending under a fictitious name "even if the opposing party does not object[,] [because] [t]he use of fictitious names is disfavored, and the judge has an independent duty to determine whether exceptional circumstances justify such a departure from the normal method of proceeding in federal courts").

52. *See, e.g.*, Dean v. Barber, 951 F.2d 1210, 1215 & n.6, 1216 (11th Cir. 1992) (allowing the use of a Doe defendant where it was clear that discovery would uncover the defendant's identity); *cf.* Price v. Marsh, Civ. No. 2:12–cv–05442, 2013 WL 5409811, at *5 (S.D. W. Va. Sept. 25, 2013) (holding that it is not possible for a plaintiff to allege enough facts with sufficient specificity against an unknown defendant to satisfy the standards set in *Twombly* and *Iqbal*).

53. As such, plaintiffs should be as specific as possible when describing John Doe defendants and should include specific facts tying each Doe defendant to the alleged constitutional violation. *See* Perez v. Does 1-10, 931 F.3d 641, 646 (8th Cir. 2019) (dismissing a claim that failed to tie any of the officer defendants to a constitutional deprivation). For example, identifying the date, time, or location of an alleged incident, or the police department of an arresting officer, will be sufficient to identify a John Doe defendant in discovery. *See* Bowens v. Superintendent of Mia. S. Beach Police Dept., 557 F. App'x 857, 862 (11th Cir. 2014) (holding that the plaintiff's identification of the "Arresting Officer(s) of Miami South Beach Police Department" was sufficient to demonstrate that the defendants' identities were discoverable). Some circuits are more flexible with this requirement, allowing plaintiffs to express facts regarding the Doe defendants as "best as possible" at the time of filing. *E.g.*, Estate of Osuna v. County of Stanislaus, 392 F. Supp. 3d 1162, 1169 (E.D. Cal. 2019).

54. *Osuna*, 392 F. Supp. 3d at 1169.

55. *See* Solomon v. City of Rochester, 449 F. Supp. 3d 104, 110–11 (W.D.N.Y. 2020) (granting summary judgment for the Doe defendants because the plaintiff failed to identify them during discovery).

of the lawsuit prior to going to trial.[56] While the timing of discovery can vary, it generally happens after the pleading stage.[57] Rules 26 through 37 of the Federal Rules of Civil Procedure govern the discovery process in federal civil litigation.[58] Assuming they make it past the pleadings, plaintiffs can use these rules to discover the identity of an unknown defendant.[59]

Discovery generally begins with initial disclosures. The initial disclosure requirement of Rule 26(a)(1) allows both parties to obtain preliminary discovery from the opposing party without making any discovery requests.[60] However, a party's duty to disclose under this rule only extends to information that is available at the time the disclosure is made, and the disclosing party only has to provide information that it may use *in support of* its claims or defenses.[61] Accordingly, Rule 26(a)(1) does not necessarily require the defendant to reveal the identity of the officers on the scene. Police departments are notorious for not turning over records unless directed to by the court.[62] And there is an even more practical obstacle preventing plaintiffs from obtaining this information—you cannot get discovery from an unknown defendant. Accordingly, the plaintiff needs to name at least one defendant who will have discoverable information about the identity of the police officials present.

Because the identity of Officer Doe is still unknown, it is important that victims of police excessive force sue the municipality (i.e., the police department) in addition to John Doe police officials.[63] Even if the municipality is ultimately dismissed from the action, it is likely to have discoverable information about who was present when the plaintiff was

56. Yelp Inc. v. Superior Court, 224 Cal. Rptr. 3d 887, 902 (Cal. Ct. App. 2017).

57. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

58. As in most federal civil litigation cases, the primary discovery tools in a § 1983 civil rights action include initial disclosures, interrogatories, requests for production of documents, requests for admissions, and depositions. *See* FED. R. CIV. P. 26–37 (stating the discovery rules).

59. Wasserman, *supra* note 33, at 797–800.

60. FED. R. CIV. P. 26(a)(1)(A).

61. FED. R. CIV. P. 26(a)(1)(A), (E).

62. *See* Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 896 (1996) ("He cannot get the court's help in identifying the officer until he files suit . . . ."); *see also* FED. R. CIV. P. 26(d)(1) (providing that, generally, parties must confer before seeking discovery).

63. *See, e.g.*, Alvarez v. City of New York, 134 A.D.3d 599, 605 (N.Y. App. Div. 2015) (holding that a plaintiff must, at minimum, name a "John Doe" as a defendant along with a municipality).

injured.[64] Typically, plaintiffs will serve the municipality with interrogatories to uncover relevant information about the incident.[65]

Plaintiffs may also use Rule 34 to obtain documents and other "tangible things."[66] In excessive force cases, these include medical records, physical evidence of a crime, video recordings of the incident, and documents regarding the defendants' employment and disciplinary history.[67] However, videos captured by police-vehicle dashboard cameras and officer body cameras perhaps offer the most promising "tangible" evidence of who was on the scene and what exactly happened.

Recently, there has been an increase in video evidence in police brutality cases.[68] Some of this is due to increased use of police body cameras.[69] As of

64. In *Monell*, the U.S. Supreme Court reversed its precedent and held that municipalities were subject to suit. However, it also provided the limitation that municipalities could not be held liable under the doctrine of respondeat superior. Monell v. Dep't of Soc. Servs. of N.Y.C., 436 U.S. 658, 690–91 (1978); *see also* Mike Jilka, *Municipal Government Liability Under Section 1983*, 22 J. KAN. B. ASS'N 23 (1998) (describing the "four situations in which a municipality can be said to have violated the constitutional rights of an individual because of its policy or custom"). This holding makes it difficult to prove municipal liability. However, it is still beneficial to list the municipality in the original complaint because they will have information about the officers who were present and may reveal this information in the initial disclosures. *See* Wasserman, *supra* note 33, at 796 (recounting how a municipal defendant identified John Doe officers in its response to the plaintiff's interrogatories); *see also* FED. R. CIV. P. 26(a)(1)(A) (providing for mandatory initial disclosures by each party of, *inter alia*, the "name . . . of each individual likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses"). However, if the municipality is dismissed before the discovery, then it will be extremely difficult to identify the officers without outside evidence, such as cell phone videos.

65. An example interrogatory question is: State the full name, badge, or identification number, rank or title, date of birth, and present height and weight of all officers or employees of the municipality who participated in the arrest of the plaintiff. Another example question is: Describe in detail the events leading up to and following the arrest, injury, and detention of the plaintiff.

66. FED. R. CIV. P. 34.

67. For example, many police departments require a use-of-force report to be filed any time an officer uses force against a civilian in the line of duty. The report describes the circumstances of the event and the nature of the force that was used. U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., USE OF FORCE BY POLICE: OVERVIEW OF NATIONAL AND LOCAL DATA 65 (1999). Obtaining this information during discovery often will allow the plaintiff's attorney to build affirmative support for the allegations in the complaint.

68. As an example, on April 4, 2015, a police officer, Michael T. Slager, shot Walter Scott, an unarmed Black man. Slager initially radioed that Scott had attacked him with his own taser and that he had shot Scott in self-defense. However, a bystander caught the incident on his cellphone camera, and it revealed that Scott was shot in the back while running away from the officer. Michael S. Schmidt & Matt Apuzzo, *South Carolina Officer Is Charged with Murder of Walter Scott*, N.Y. TIMES (Apr. 7, 2015), http://www.nytimes.com/2015/04/08/us/south-carolina-officer-is-charged-with-murder-in-black-mans-death.html [https://perma.cc/KF44-PZW6].

69. As defined in a U.S. Department of Justice bulletin, body-worn cameras "are small, transportable devices worn by officers to record interactions with the public. The cameras can be attached to an officer's clothing, sunglasses, or helmet. [Body-worn cameras] can produce video and audio recordings. The footage is saved on a local storage device or uploaded to a web-based storage platform." SHELBY S. HYLAND, U.S. DEP'T OF JUST., BODY-WORN CAMERAS IN LAW

2016, "nearly half (47%) of the 15,328 general-purpose law enforcement agencies in the United States had acquired body-worn cameras."[70] Of that, about 80% of the largest local police departments (employing 500 or more full-time sworn officers) had acquired body cameras.[71] Moreover, about 95% of agencies that had acquired body cameras had placed at least one camera in service.[72]

Video evidence can be crucial in prosecuting and litigating police misconduct cases. For example, in 2014, a Chicago officer shot Laquan McDonald, a seventeen-year old Black male, sixteen times.[73] The officers claimed in their account of the events that McDonald was the aggressor and that the shooter, Jason Van Dyke, was actually the victim.[74] In a statement issued the day after the shooting, the Chicago Police Department said that McDonald "refused to comply with orders to drop the knife and continued to approach the officers."[75] The other officers on the scene repeated the same false account.[76] Video evidence surfaced over a year later that showed what truly occurred that night.[77] Van Dyke shot McDonald sixteen times as McDonald walked *away* from him with a knife.[78] Van Dyke was later found guilty of second-degree murder and sentenced to six years, largely due to the

ENFORCEMENT AGENCIES, 2016, at 2 (2018), https://www.bjs.gov/content/pub/pdf/bwclea16.pdf [https://perma.cc/44VB-C97Z]. For a discussion of the potential advantages and limitations of body-worn cameras, see generally Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363 (2018).

70. HYLAND, *supra* note 69, at 1.

71. *Id.* at 2.

72. *Id.*

73. Eliott C. McLaughlin, *Chicago Officer Had History of Complaints Before Laquan McDonald Shooting*, CNN (Nov. 26, 2015, 5:45 PM), http://www.cnn.com/2015/11/25/us/jason-van-dyke-previous-complaints-lawsuits/index.html [https://perma.cc/U6SJ-3HVT].

74. Tristan Montaque, *Policing the Police: Analyzing the Legal Implications of the Sequestration of Cellphone Video Footage*, 22 J. TECH. L. & POL'Y 1, 11 (2018).

75. Mark Berman, *Why Did Authorities Say Laquan McDonald Lunged at Chicago Police Officers?*, WASH. POST (Nov. 25, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/11/25/why-did-authorities-say-laquan-mcdonald-lunged-at-chicago-police-officers/ [https://perma.cc/GZ95-E822] (quoting statement released by the CPD).

76. Annie Sweeney, Jeremy Gorner & Dan Hinkel, *Top Cop Seeks to Fire 7 Officers for Lying About Laquan McDonald Shooting*, CHI. TRIB. (Aug. 18, 2016), http://www.chicagotribune.com/news/laquanmcdonald/ct-laquan-mcdonald-police-punished-met-20160818-story.html [https://perma.cc/E6YC-MMQM].

77. McLaughlan, *supra* note 73. *See also* Locke E. Bowman, *Delays in Laquan McDonald Case Foster Despair in Chicago*, CHI. TRIB. (July 15, 2016), https://www.chicagotribune.com/opinion/commentary/ct-laquan-mcdonald-prosecutor-van-dyke-perspec-0718-md-20160715-story.html [https://perma.cc/T6MX-8FSD] (discussing the delay in releasing the video).

78. Kori Rumore & Chad Yoder, *Minute by Minute: How Jason Van Dyke Shot Laquan McDonald*, CHI. TRIB. (Jan. 18, 2019, 7:32 PM), https://www.chicagotribune.com/news/laquan-mcdonald/ct-jason-vandyke-laquan-mcdonald-timeline-htmlstory.html [https://perma.cc/H25M-T4YA].

video evidence.[79] Prior to the family filing a civil suit, the city agreed to pay the family $5 million, which the family accepted.[80] Unfortunately, only a handful of excessive force cases are caught on video.[81]

In the absence of body camera footage, § 1983 plaintiffs may still be able to learn what happened through depositions. This, of course, supposes they are able to identify who was present on the scene to depose those officers.[82] Deposing an officer allows a plaintiff's attorney to directly question the officer about what occurred.[83] However, just because the plaintiff has an opportunity to ask questions does not necessarily mean that the plaintiff will get straight or honest answers.

E. Hitting the Blue Wall of Silence

The blue wall of silence has the potential to block plaintiffs from the information they need to litigate their case. Gabriel Chin and Scott Wells define the blue wall of silence as "an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow

79. Jeffrey Robinson, *Judges Prove Laquan McDonald's Life Didn't Matter Very Much to the System*, ACLU (Jan. 23, 2019, 5:15 PM), https://www.aclu.org/blog/criminal-law-reform/reforming-police/judges-prove-laquan-mcdonalds-life-didnt-matter-very-much [https://perma.cc/4648-HF7Z]. No officers were convicted for conspiring and lying about what originally occurred. The police officers Joseph Walsh, Thomas Gaffney, and Detective David March were charged with obstruction of justice, official misconduct, and conspiracy for lying in statements and police reports to protect Van Dyke, but they were found not guilty by a judge in a trial without a jury. *Id.*

80. Monica Davey, *Chicago Pays $5 Million to Family of Black Teenager Killed by Officer*, N.Y. TIMES (Apr. 15, 2015), https://www.nytimes.com/2015/04/16/us/chicago-pays-5-million-to-family-of-black-teenager-killed-by-officer.html [https://perma.cc/82PE-G5LM].

81. *See* Iesha S. Nunes, *"Hands Up, Don't Shoot": Police Misconduct and the Need for Body Cameras*, 67 FLA. L. REV. 1811, 1833 (2015) ("[O]fficers that *did* use force were twice as likely to have gone *without* body cameras during that shift."). Body-worn cameras suffer from practical limitations. An officer's arm may get in the way, or a drop of rain could land on the lens. Furthermore, cameras have a limited field of view, which is narrower than the human eye. Since the camera is attached to the body the footage does not reflect everything an officer sees when they turn their head. Stoughton, *supra* note 69, at 1402–03.

82. Depositions are used to gather relevant information, nail down the deponent's testimony on particular issues, and obtain favorable testimony for later use in the case. *See* DAVID M. MALONE & PETER T. HOFFMAN, THE EFFECTIVE DEPOSITION: TECHNIQUES AND STRATEGIES THAT WORK 27 (2d ed. 1996) ("Depositions are the most powerful discovery device available to a litigator . . . ."); Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Depositions are the factual battleground where the vast majority of litigation actually takes place."); *see also* 7 James Wm. Moore, Moore's Federal Practice ¶ 30.02[2], at 30-13 (3d ed. 1997) ("The importance of depositions to modern civil litigation was well (if perhaps cynically) captured by [the Hall] court."). Attorneys usually delay depositions until they have received interrogatory responses and completed the document production process. 4 AM. JUR. *Trials* § 3 (1966).

83. The deponent is questioned under oath and usually will have their lawyer present. FED. R. CIV. P. 30(b)(5). This conversation is recorded by the court and is used at the trial if the case goes to trial. During a deposition, it can become apparent if the officers were coached into their answers.

officer."[84] As one former FBI agent put it: "Cops don't rat on cops."[85] Ironically, the nature of this particular code—a code of silence—makes it difficult to assess its breadth. Nevertheless, it is a well-documented trend.[86]

The blue wall of silence has been traced back to the 1840s, when the first organized police forces were developed in larger cities.[87] As Professor Gilles explains: "Historically, the code of silence protected the traditional corruption racket. Today, the code of silence protects officers who violate civil rights through violence and other misconduct."[88] Additionally, the blue wall sometimes requires that officers not just stand mute, but that they lie to protect their fellow officers.[89]

The blue wall is constructed from a combination of loyalty and fear. Police officials are intensely loyal to one another.[90] Trust and loyalty are critical to their effectiveness.[91] "Without loyalty and camaraderie, law enforcement personnel would be ineffective as they would likely be reluctant to put themselves in harm's way."[92] An officer who chooses to report a peer's

84. Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998).

85. Philip Hayden, *Why an Ex-FBI Agent Decided to Break Through the Blue Wall of Silence*, USA TODAY (Jan. 31, 2019, 12:28 PM), https://www.usatoday.com/story/opinion/policing/2019/01/31/blue-wall-of-silence-policing-the-usa-cops-community/2604929002/ [https://perma.cc/JHX8-M2MV].

86. Chin & Wells, *supra* note 84, at 237–40 ("The existence of some form of a police code of silence in many police departments across the nation is well documented in court opinions, scholarly literature, news reports, and police investigatory commission reports examining the subject." (footnotes omitted)).

87. Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17, 64 (2000).

88. *Id.* at 65 (footnote omitted).

89. Police perjury, the act of a police officer giving a false testimony, is also known as "testilying." One of the reasons police perjure themselves is to protect fellow officers. Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040 (1996); *see also* COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION & ANTI-CORRUPTION PROCS. OF POLICE DEP'T, COMMISSION REPORT 36 (1994) [hereinafter MOLLEN REPORT] ("[T]he practice of police falsification in connection with such arrests is so common in certain precincts that it has spawned its own word: 'testilying.'").

90. *See* STEVE MCCARTNEY & RICK PARENT, ETHICS IN LAW ENFORCEMENT 130 (2015) (noting that most law enforcement environments are characterized by "loyalty and camaraderie: loyalty to other members of the agency, loyalty to the system of rank structure, and loyalty to the values possessed by the agency").

91. *Id.* ("[L]aw enforcement personnel work most of their careers in an unsafe environment, in which they have to rely on one another for their safety.").

92. *Id.*

misdeeds will likely be viewed as disloyal by fellow officers.[93] In short, loyalty can lead to silence.[94]

And if loyalty is not incentive enough for officers to remain silent, fear also provides a powerful motivation. Professor Magee offers the following explanation:

> Police organizations impose severe consequences on those officers who violate the code. "They are ostracized and harassed; become targets of complaints and even physical threats; and fear that they will be left on their own when they most need help on the street." Because of the severity of the possible repercussions for violating this code, many officers ignore wrongdoing within their departments and among their fellow officers. The code governs the low-level officers, supervisors, and even permeates internal affairs units that have been specifically charged with exposing police corruption.[95]

The blue wall can obstruct truth and justice. In 1991, the Independent Commission on the Los Angeles Police Department summarized the depth of the problem: "Perhaps the greatest single barrier to effective investigation and adjudication of complaints is the officer's unwritten 'code of silence.' . . . [The code] consists of one simple rule: an officer does not provide adverse information against a fellow officer."[96]

Equally important, police officials are rarely sanctioned for participating in the blue wall of silence. For example, when Ray Tensing shot and killed Samuel DuBose in 2015, he claimed that he was being dragged by the vehicle and had to fire his weapon.[97] His fellow officer, Phillip Kidd, corroborated his story.[98] Kidd reported that he saw Tensing being dragged by the victim's car and that, in response, Tensing fired a single shot.[99] Tensing's body camera

93. *Id.* at 131 ("The reporting officer will inevitably have his or her loyalty questioned by other officers in the agency . . . .").

94. When Jason Van Dyke shot Laquan McDonald in 2014, Joseph Walsh, Thomas Gaffney, and Detective David March were some of the officers that covered for him. Nausheen Husain, *Laquan McDonald Timeline: The Shooting, the Video and the Fallout*, CHI. TRIB. (Jan. 18, 2019, 7:22 PM), http://www.chicagotribune.com/news/laquanmcdonald/ct-graphics-laquan-mcdonald-officers-fired-timeline-htmlstory.html [https://perma.cc/VAB7-USPA]. They signed off on false reports and provided fabricated accounts of the shooting. *Id.*

95. Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 203–04 (1994) (footnotes omitted) (quoting MOLLEN REPORT, *supra* note 89, 6 exhibit 6).

96. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPARTMENT 168 (1991).

97. Richard Pérez-Peña, *University of Cincinnati Officer Indicted in Shooting Death of Samuel Dubose*, N.Y. TIMES (July 29, 2015), http://www.nytimes.com/2015/07/30/us/university-of-cincinnati-officer-indicted-in-shooting-death-of-motorist.html [https://perma.cc/G6WN-FLUP].

98. Elisha Fieldstadt*, Samuel DuBose Shooting: No Charges for Two Officers Who Responded*, NBC NEWS (July 31, 2015, 4:11 PM), https://www.nbcnews.com/news/us-news/cincinnati-traffic-stop-shooting-no-charges-two-officers-who-responded-n401971 [https://perma.cc/4EN7-CRYC].

99. *Id.*

documented the incident, and it showed that DuBose neither threatened nor harmed the officer.[100] Eleven days after the shooting, the Hamilton County prosecutor indicted Tensing on murder charges, explaining that Tensing's initial account had been fabricated.[101] The officers who corroborated Tensing's false account were not indicted. They, apparently, remain on active duty.[102] Too frequently complicit officers are not sanctioned or disciplined when they perjure themselves or impede an investigation.

Furthermore, the problem is not limited to police officials. Police *departments* have been known to cover up police misconduct.[103] For example, following Rodney King's brutal beating by the LAPD,[104] George Holliday, the man who filmed the beating, and Paul King, Rodney King's brother, went to police to file a police-brutality report and to turn over the video.[105] It was only after they largely were ignored by police officials that they decided to take the tape to the media.[106] Around the time of King's beating, the city of Los Angeles had a weak record of prosecutions for police brutality, as only 42 out of 2,152 allegations were sustained, and citizens were actively discouraged to file complaints.[107] This departmental behavior is simply another way in which the blue wall of silence manifests itself.

In fact, *courts* are aware of police lying and ignore these misbehaviors.[108] Alan Dershowitz once commented:

100. Pérez-Peña, *supra* note 97.

101. *Id.*

102. *See* Zak Cheney-Rice, *Student Activists Fight to Restrict Officers Who Covered for Sam Dubose's Killer*, MIC (Nov. 16, 2015), https://www.mic.com/articles/128622/sam-dubose-killer-university-of-cincinnati-student-activists-fight-to-restrict-officers-who-covered-for-officer-ray-tensing [https://perma.cc/2HBB-GFFW] (stating that the other officers remained on active duty even after Tensing was indicted for murder and was awaiting trial); Fieldstadt, *supra* note 98 (stating that the officers did not face charges and were instead placed on paid administrative leave).

103. *See* JEROME H. SKOLNICK & JAMES J. FYFE, ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE 6, 26, 34–36, 42 (1993) (indicating that the LAPD had a history of dismissing civilian complaints and concluding that, without videotape evidence, King's complaint might not have been sustained).

104. Rodney King was struck "over fifty-three times" and kicked seven times by LAPD officers Lawrence Powell, Timothy Wind, and Theodore Briseno while Sgt. Stacey Koon observed. Laurie L. Levenson, *The Future of State and Federal Civil Rights Prosecutions: The Lessons of the Rodney King Trial*, 41 UCLA L. REV. 509, 516 (1994).

105. Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 220 (2000).

106. *Id.*

107. INDEP. COMM'N ON THE L.A. POLICE DEP'T, *supra* note 96, at xix; *see also* CHARLES J. OGLETREE, JR., MARY PROSSER, ABBE SMITH & WILLIAM TALLEY, JR., BEYOND THE RODNEY KING STORY: AN INVESTIGATION OF POLICE MISCONDUCT IN MINORITY COMMUNITIES 55–56 (1995) (noting examples of police pressing criminal or civil complaints as retaliation against victims who report police misconduct).

108. *See, e.g.*, Nat Hentoff, *When Police Commit Perjury*, WASH. POST (Sept. 5, 1985), https://www.washingtonpost.com/archive/politics/1985/09/05/when-police-commit-perjury/3155925b-3

> I have seen trial judges pretend to believe officers whose testimony is contradicted by common sense, documentary evidence and even unambiguous tape recordings. . . . Some judges refuse to close their eyes to perjury, but they are the rare exception to the rule of blindness, deafness and muteness that guides the vast majority of judges and prosecutors.[109]

In short, the blue wall of silence is a deeply engrained norm. Its consequences extend beyond the walls of police precincts; they extend to courtrooms and our judicial processes.

II. Section 1983 Causation

Section 1983 provides a federal civil remedy to persons deprived of a federally protected right.[110] Frequently, courts will describe § 1983 claims as consisting of two elements: (1) deprivation of a federal right (2) by a person acting "under color of state law."[111] However, based upon the statutory language and surrounding litigation, it is probably more appropriate to divide § 1983 claims into the following four separate elements[112]: First, the defendant is a person. Second, the defendant acted under color of law. Third, the plaintiff was deprived of a federally protected right. Fourth, the defendant subjected or caused the plaintiff to be subjected to the constitutional deprivation.[113]

Causation is not an issue in most § 1983 cases. As I previously have explained, "[w]hen a plaintiff proves that the defendant engaged in the conduct and that the conduct violated the constitution, there is no real

ce4-4d6b-8c62-d8a11790e478/ [https://perma.cc/VP5H-C5H3] (describing the view of Michael Avery that prosecutors and judges do nothing about obvious police perjury); David Rudovsky, Opinion, *Why It Was Hands Off on the Police*, PHILA. INQUIRER, Aug. 28, 1995, at A7 (describing instances in which prosecutors and judges ignored "hard evidence" of false warrant applications, false police reports, and perjury in a series of Philadelphia cases).

109. Alan M. Dershowitz, *Controlling the Cops; Accomplices to Perjury*, N.Y. TIMES, May 2, 1994, at A17, https://www.nytimes.com/1994/05/02/opinion/controlling-the-cops-accomplices-to-perjury.html [https://perma.cc/5MEA-5L79].

110. 42 U.S.C. § 1983.

111. *See* Blessing v. Firestone, 520 U.S. 329, 340 (1997) (explaining that a § 1983 plaintiff must prove a "violation of a federal *right*, not merely a violation of federal *law*").

112. 42 U.S.C. § 1983 reads 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 . . . .

Id.

113. Additionally, plaintiffs seeking monetary damages must demonstrate they suffered an "actual injury" and that the constitutional deprivation caused the "actual injury." Farrar v. Hobby, 506 U.S. 103, 112 (1992).

question [that] the statutory causation element has been met."[114] For example, when an identified official kicks a suspect during the course of an arrest, the question is not whether the official "caused" the plaintiff to be deprived of a constitutional right; rather, the question is whether the kick amounted to a constitutional violation at all. However, questions of § 1983 causation do arise when the plaintiff is unable to identify who is "directly responsible" for the constitutional deprivation or when the plaintiff sues someone who did not physically inflict the injury.

Causation questions frequently occur when § 1983 plaintiffs sue municipalities, supervisors, or bystanding officials. As the Court explained in *Monell*, the statutory language of § 1983 "specifically provide[d] that A's tort became B's liability if B 'caused' A to subject another to a tort."[115] In other words, B is liable if B caused A to violate the Constitution. The challenge, of course, is determining whether B caused another to subject the plaintiff to a constitutional deprivation.[116] On one hand, "[i]ntangible legal entities, like municipalities and corporations, at least from a practical standpoint, are incapable of action. Instead, a person must act on their behalf."[117] On the other hand, technically, every constitutional deprivation may be traced back to a municipal decision: if the municipality had not hired the tortfeasor, then the plaintiff would not have been deprived of a constitutional right.[118] Similarly, plaintiffs can argue that had the tortfeasor's supervisor or peer intervened, they would not have suffered the constitutional deprivation. The Court, however, has been careful not to extend § 1983 liability based solely on "but for" causation.[119] Accordingly, a § 1983 defendant cannot be liable simply because it employs, supervises, or works with a tortfeasor. The question, of course, is how to distinguish among these various categories of causation cases.[120]

114. Teressa E. Ravenell, *Cause and Conviction: The Role of Causation in § 1983 Wrongful Conviction Claims*, 81 TEMP. L. REV. 689, 710 (2008).

115. Monell v. Dep't of Soc. Servs. of N.Y., 436 U.S. 658, 692 (1978).

116. *See* Jilka, *supra* note 64, at 26 (discussing how courts "carefully examine the causal connection between the plaintiff's injury and the alleged unconstitutional policy or custom" and describing the case law governing municipal liability under § 1983).

117. Teressa E. Ravenell, *Blame It on the Man: Theorizing the Relationship Between § 1983 Municipal Liability and the Qualified Immunity Defense*, 41 SETON HALL L. REV. 153, 160 (2011).

118. Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 410 (1997) ("Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury.").

119. *See* City of Canton v. Harris, 489 U.S. 378, 393 (1989) (O'Connor, J., concurring in part) (concurring with the Court's upholding of a higher standard than "but for" causation for § 1983 plaintiffs bringing "failure to train" claims against municipalities).

120. There can be up to three separate causation questions in § 1983 litigation: due process causation, statutory causation, and damages causation. To establish deprivation of a substantive due

Part II examines the doctrinal challenges of establishing causation in § 1983 cases.

A. The Personal Responsibility Requirement

The Supreme Court has never explicitly acknowledged that § 1983 contains a personal or individual responsibility requirement. Nevertheless, all but one circuit has recognized some variation of a personal responsibility requirement for § 1983 liability.[121] The personal responsibility requirement is, in essence, another enunciation of a causation requirement.

The Third Circuit provides perhaps the most detailed explanation of the personal responsibility requirement. In *Jutrowski v. Township of Riverdale*,[122] the plaintiff sued four police officials for depriving him of his

process right, a plaintiff must prove that the defendant caused them to be deprived of a Fourteenth Amendment interest. Specifically, for Fourteenth Amendment cases, the State is only liable when it has taken an affirmative act to restrain a victim's liberty. *See* Ravenell, *supra* note 116, at 708–10 (describing causation requirements in § 1983 litigation). Additionally, as discussed in Part I, § 1983 plaintiffs must prove that each individual defendant subjected or caused them to be deprived of a constitutional right. Finally, a plaintiff seeking compensatory damages must prove that the defendant's constitutional violation caused the plaintiff to suffer an actual injury. *Id.*

121. *See, e.g.*, Duncan v. Duckworth, 644 F.2d 653, 655 (1st Cir.1980) ("It is true that a defendant's direct personal responsibility for the claimed deprivation of a constitutional right must be established in order for liability to arise under 42 U.S.C. § 1983."); McKinnon v. Patterson, 568 F.2d 930, 934 (2d Cir. 1977) ("In this Circuit personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983."); O'Neill v. Krzeminski, 839 F.2d 9, 11 (2d Cir. 1988) ("A law enforcement officer has an affirmative duty to intercede on the behalf of a citizen whose constitutional rights are being violated in his presence by other officers."); Jutrowski v. Township of Riverdale, 904 F.3d 280, 285 (3d Cir. 2018) (requiring § 1983 plaintiffs to prove each defendant's "personal involvement" to establish Fourth Amendment liability); Randall v. Prince George's County, 302 F.3d 188, 204 (4th Cir. 2002) (requiring personal involvement but recognizing the theory of "bystander liability"); Melear v. Spears, 862 F.2d 1177, 1186 (5th Cir. 1989) (requiring plaintiff to prove that each defendant was an "integral participant"); Grandstaff v. City of Borger, 767 F.2d 161, 168 (5th Cir. 1985) (holding that when officers act in concert with one another they are jointly and severally liable); Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010) (requiring a § 1983 plaintiff to prove that the defendant was not only present when the injury occurred but was also personally responsible for the injury); Colbert v. City of Chicago, 851 F.3d 649, 657 (7th Cir. 2017) (holding that "individual liability under § 1983 . . . requires personal involvement in the alleged constitutional deprivation"); Jackson v. Nixon, 747 F.3d 537, 543 (8th Cir. 2014) ("To state a claim under § 1983, the plaintiff must plead that a government official has personally violated the plaintiff's constitutional rights."); Jones v. Williams, 297 F.3d 930, 936 (9th Cir. 2002) (affirming the district court's refusal to instruct the jury on theory of "group responsibility" and holding that individual liability requires that a defendant be an "integral participant[] in the alleged unlawful act" and "not simply present" at the scene); Coleman v. Turpen, 697 F.2d 1341, 1346 n.7 (10th Cir. 1982) (holding a defendant cannot be liable under § 1983 without personal involvement in the deprivation); Trujillo v. Williams, 465 F.3d 1210, 1227 (10th Cir. 2006) ("In order for liability to arise under § 1983, a defendant's direct personal responsibility for the claimed deprivation of a constitutional right must be established."); Elkins v. District of Columbia, 610 F. Supp. 2d 52, 64 (D.C Cir. 2009) (stating that to find a supervisor liable under § 1983, "[t]he supervisor must know about the conduct and facilitate, approve, or condone it").

122. 904 F.3d 280 (3d Cir. 2018).

Fourth Amendment right to be free from excessive force after he was kicked in the face during an arrest.[123] The court granted all four defendants summary judgment, explaining that "a § 1983 plaintiff must produce evidence supporting each individual defendant's personal involvement in the alleged violation to bring that defendant to trial."[124] It is not enough to have "narrowed the potential universe of actors to those that were in his immediate vicinity."[125] The court distinguished this case from *Smith v. Mensinger*,[126] an early case where the plaintiff had claimed that *each* of the defendants had participated in the alleged beating.[127] The court explained that "*Smith* ultimately involved nothing more than a dispute about the *extent* of each officer's participation" while the plaintiff in *Jutrowski* did "not purport to raise a dispute about the extent of each officer's participation, but rather the *possibility* of it."[128] In short, a § 1983 plaintiff clearly can satisfy the "personal responsibility" requirement by establishing the defendant directly participated in the excessive force; however, the more difficult question is whether the plaintiff may prevail on less.

The Supreme Court faced a similar question of causation in *Ashcroft v. Iqbal*. Although *Iqbal* discusses supervisory liability, it illuminates the courts' view of causation in constitutional litigation. In *Iqbal*, Javaid Iqbal, a Pakistan citizen sued more than fifty federal officials alleging they deprived him of constitutional rights while he was in custody following the 9/11 terrorist attacks.[129] John Ashcroft, the former Attorney General, and Robert Mueller, the former FBI director, were included in Iqbal's list of defendants.[130] Importantly, Iqbal did not allege that either Ashcroft or Mueller "kicked him in the stomach [or] punched him in the face."[131] Rather, he claimed they "knew of, condoned, and willfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy"[132] and that "Ashcroft was the 'principal architect' of this invidious policy, and that Mueller was 'instrumental' in its adoption and execution."[133] In their petition for certiorari, the defendants asked the Court to consider whether supervisors are liable when they have "constructive notice" of their

123. *Id.* at 280 (finding no personal responsibility for the police defendants after one of them kicked the plaintiff in the face while they were arresting him when the plaintiff was unable to identify which of the four officers on the scene inflicted the blow).

124. *Id.* at 291.

125. *Id.* at 291–92.

126. 293 F.3d 641 (3d Cir. 2002).

127. *Id.* at 646.

128. *Jutrowski*, 904 F.3d at 291, 293.

129. Ashcroft v. Iqbal, 556 U.S 662, 666 (2009).

130. *Id.*

131. *Id.* at 668.

132. *Id.* at 669 (internal quotation marks omitted).

133. *Id.* (citations omitted).

subordinates' discriminatory conduct.[134] In essence, the question in *Iqbal* is how supervisory officials cause their subordinates to commit a constitutional deprivation.

Theoretically, supervisors frequently (if not always) will be the but for cause of a subordinate's constitutional violation. A supervisor's job is to oversee the conduct of his or her subordinates. When an unsupervised subordinate commits a constitutional violation, arguably this is a consequence of the supervisor's misconduct—but for the supervisor's inaction, the constitutional deprivation would not have occurred. Federal courts have never embraced a straightforward "but for" approach to supervisory liability.[135] Nevertheless, prior to *Iqbal*, at least some circuit courts held that supervisors could be liable when they had constructive knowledge of their subordinates' unconstitutional behavior but failed to take steps to stop it.[136] Additionally, most circuits held that supervisory officials could be liable if they participated in the unconstitutional behavior[137] or directed a subordinate to engage in the illegal conduct.[138] However, *Iqbal* makes it more difficult for § 1983 plaintiffs to prove supervisory liability.[139]

Iqbal holds that a civil rights plaintiff must plead and prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[140] Furthermore, the Court explains, that at least where the constitutional provision alleged requires intentional discrimination, a plaintiff may not establish a supervisor's liability by "mere

134. *Id.* at 689 (citing Petition for a Writ of Certiorari at I, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015)). Specifically, they asked the Court to consider the following question: "Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Petition for a Writ of Certiorari, *supra*, at I.

135. *See, e.g.*, *Iqbal*, 556 U.S. at 683 (finding that petitioners could not be held liable under respondeat superior unless they acted on account of a constitutionally protected characteristic); Morgan v. Dzurenda, 956 F.3d. 84, 89 (2d Cir. 2020) (stating that, generally, "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*"); Briscoe v. County of St. Louis, 690 F.3d 1004, 1011 (8th Cir. 2012) (stating that "[i]n a § 1983 case an official is only liable for his own misconduct and is not 'accountable for the misdeeds of his agents' under a theory such as respondeat superior or supervisor liability" (quoting Nelson v. Correctional Med. Servs., 583 F.3d 522, 534–35 (8th Cir. 2009))).

136. *See, e.g.*, Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990) ("The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so.").

137. *See, e.g.*, Ybarra v. Reno Thunderbird Mobile Home Vill., 723 F.2d 675, 680 (9th Cir. 1984) (stating that respondeat superior liability arises only if the defendant personally participated in the violation some way).

138. *See, e.g.*, Jetter v. Beard, 183 F. App'x 178, 181 (3d Cir. 2006) ("Personal involvement must be alleged and is only present where the supervisor directed the actions of supervisees or actually knew of the actions and acquiesced in them.").

139. *Iqbal*, 556 U.S. at 677.

140. *Id.* at 676.

knowledge of his subordinate's discriminatory purpose."[141] Professor Nahmod offers the following example to differentiate between supervisory liability and non-liability before and after *Iqbal*:

> Suppose that employees in a state or local government licensing office regularly discriminate on racial grounds in the awarding of licenses. Suppose further that their supervisors are actually aware of this racial discrimination but are deliberately indifferent to it and therefore do little or nothing to stop it.[142]

As he explains, there is little question that there has been a constitutional violation—this plaintiff has been deprived of his Fourteenth Amendment Equal Protection rights. But did the supervisors "cause" the deprivation? Pre-*Iqbal*, the supervisors' actual awareness of their subordinates' unconstitutional behavior would be enough to make them liable under § 1983.[143] After *Iqbal*, supervisors can only be liable if they personally violated the Constitution. And for a Fourteenth Amendment Equal Protection claim, this means that the supervisor must act with discriminatory purpose.[144] As such, after *Iqbal* supervisory officials will not be dubbed the "cause" of the constitutional deprivation unless the plaintiff can prove that they too acted with discriminatory intent.

Iqbal, however, fails to explain what it looks like for a supervisor or peer to violate the Constitution in the context of Fourth Amendment excessive force claims. Courts analyze these claims under an "objective reasonableness standard."[145] Thus, applying *Iqbal*, any defendant—whether the defendant directly or indirectly physically injured the plaintiff—causes a Fourth Amendment deprivation when the defendant acts unreasonably.[146]

141. *Id.* at 677 (noting that "the term 'supervisory liability' is a misnomer" and that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct").

142. Sheldon Nahmod, *Constitutional Torts, Over-Deterrence and Supervisory Liability after* Iqbal, 14 LEWIS & CLARK L. REV. 279, 281 (2010).

143. *Id.* at 282.

144. *Iqbal*, 556 U.S. at 676. Importantly, the Court does note that "[t]he factors necessary to establish a [civil rights claim] will vary with the constitutional provision at issue." *Id.*

145. *See* Graham v. Connor, 490 U.S 386, 388 (1989) (stating that claims involving law enforcement officers using excessive force while making an arrest, stop, or seizure are analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard).

146. While negligence or unreasonableness is usually not enough to state a constitutional violation, there is no question that the Fourth Amendment is governed by an "objective reasonableness" standard. *Id.* This is markedly different from an equal protection violation, which requires proof of discriminatory intent. *See* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post*-Iqbal/Connick *World*, 47 HARV. C.R.-C.L. L. REV. 273, 290 (2012) (noting that many courts have applied the objective reasonableness standard in Fourth Amendment cases and the deliberate indifference standard in Eighth Amendment and substantive due process cases). Professor Levinson has identified several flaws in *Iqbal*'s "constitutional approach":

Yet, lower courts largely have failed to consider whether a supervisory official has behaved "unreasonably."[147] For example, in the Second Circuit, a "supervisor may be held liable if he or she was personally a 'direct participant' in the constitutional violation. . . . [A] 'direct participant' includes a person who authorizes, orders, or helps others to do the unlawful acts, even if he or she does not commit the acts personally."[148] This is just a narrower version of the standard courts used pre-*Iqbal* to determine whether a supervisor had "caused" the constitutional deprivation.[149] In short, *Iqbal* does not seem to have changed much in the context of Fourth Amendment supervisory liability claims. Appellate courts do not consider whether the supervisor was objectively unreasonable.[150] Instead, they continue to consider whether the supervisor caused the constitutional violation by

> Under the "constitutional" approach, plaintiffs presumably will be most likely to establish supervisory liability where subordinates violate the Fourth Amendment. These claims are adjudicated under an objective unreasonableness test that is more lenient than the deliberate indifference test that governed pre-*Iqbal* supervisory liability cases. However, applying a reasonableness standard to establish Fourth Amendment supervisory liability conflicts with the Supreme Court's interpretation of § 1983's causation language in the context of municipal liability claims. In those cases, the Court ruled that policymaking officials must act with deliberate indifference towards their subordinates' deprivation of constitutional rights.

Id. at 295–96.

147. Terebesi v. Torreso, 764 F.3d 217, 234 (2d Cir. 2014); Williams v. Papi, 714 F. App'x 128, 133–34 (3d Cir. 2017); *see also* Levinson, *supra* note 146, at 288–89 (stating that *Iqbal* resulted in some federal courts requiring "personal participation by the supervisor in a subordinate's wrongdoing, either by ordering or directly participating in the constitutional violation, or by creating a policy or custom under which the unconstitutional practices occurred" and that "[m]any have relied on *Iqbal* to reject supervisory claims based on a failure to train or supervise").

148. *Terebesi*, 764 F.3d at 234.

149. *See, e.g.*, Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995) (stating that supervisors who "exhibited deliberate indifference to the rights of [plaintiffs] by failing to act on information that unconstitutional acts were occurring" may be held liable for those violations); *Terebesi*, 764 F.3d at 234–35 ("A defendant who plans or directs an unreasonable use of force is liable for the *resulting* constitutional violation." (emphasis added)); Estate of Keenan v. Hoffman-Rosenfeld, No. 16-cv-0149, 2019 WL 3416374, at *18 n.12 (E.D.N.Y. July 29, 2019) (noting that "while '*Iqbal* implicitly abrogated, at least in part, the test for supervisory liability the Second Circuit articulated in *Colon* . . . , the Second Circuit has yet to resolve this issue'" (omission in original) (quoting Ojo v. United States, No. 15-cv-6089, 2018 WL 3863441, at *9 (E.D.N.Y. Aug. 8, 2018))). However, although "'the weight of authority among the district courts in the Eastern District of New York suggests that only two of the *Colon*-factors—direct participation and the creation of a policy or custom—survive *Iqbal*,' there remains a 'certain degree of "conflict" among district courts about exactly how *Iqbal* affects *Colon.*'" *Id.* (first quoting Butler v. Suffolk County, 289 F.R.D. 80, 94 n.8 (E.D.N.Y. 2013); then quoting *Ojo*, 2018 WL 3863441 at *9. *See also* Levinson, *supra* note 146, at 293 ("Much of the lower courts' confusion arises because the Supreme Court has conflated 'causation' with 'state of mind.'").

150. *See, e.g.*, *Terebesi*, 764 F.3d at 234–35 (analyzing whether a supervisor was liable for directing individuals to use unreasonable force).

authorizing, ordering, taking part, or helping others commit the unlawful acts.[151]

If nothing else, *Iqbal* has complicated an already convoluted area of law.[152] *Iqbal* leaves courts with a range of options. On one end of the spectrum, courts can apply *Iqbal* literally and require § 1983 plaintiffs to prove "that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[153] For a Fourth Amendment claim, this requires plaintiffs to establish the defendant was objectively unreasonable.[154] On the other end of the spectrum, courts can limit *Iqbal*'s holding to § 1983 discrimination claims.[155] If courts take *Iqbal* literally and hold that the term "supervisory liability is a 'misnomer,'"[156] there is no distinction between tortfeasors' peers and their supervisors. As such, *Iqbal* may eliminate supervisory liability, but it does not mean that a supervisor will never be personally responsible for a subordinate's constitutional violation.

This brings us full circle, back to the question of personal responsibility. There is no question that government officials are liable under § 1983 for Fourth Amendment excessive force claims when plaintiffs can prove they directly participated in the application of force. Those are the easy cases. The more difficult questions are: (1) whether plaintiffs may prevail against defendants who did not directly participate, or (2) whether plaintiffs may prevail when they are able to establish *some* police official used excessive force but are not able to prove who did so. Subpart II(B) considers these questions.

151. The Fourth Amendment objective reasonableness standard is *less* onerous than the pre-*Iqbal* standard for causation, which required, at a minimum, deliberate indifference or acquiescence. Levinson, *supra* note 146, at 295. One might reconcile these two seemingly contradictory standards by concluding that a supervisor is objectively unreasonable (and violates the Constitution) when he or she is deliberately indifferent to a subordinate's Fourth Amendment violation. Yet, this multi-layered approach does not seem to align with the Court's intent in *Iqbal*—to eliminate supervisory liability.

152. *Id.* at 292 ("*Iqbal* left the question of supervisory liability in a state of disarray, and it led many lower courts to ratchet up the standard for holding supervisors liable under § 1983, and to question supervisory liability in 'failure to' cases.").

153. Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

154. *See, e.g.*, Pauly v. White, 874 F.3d 1197, 1207 (10th Cir. 2017) (finding that the plaintiff provided sufficient evidence to show an officer's use of deadly force was unreasonable); Rogoz v. City of Hartford, 796 F.3d 236, 246 (2d. Cir. 2015) ("[I]t is also well established that law enforcement officers violate the Fourth Amendment if the amount of force they use is 'objectively [un]reasonable' in light of the facts and circumstances confronting them." (quoting Graham v. Connor, 490 U.S. 386, 397 (1989))).

155. Levinson, *supra* note 146, at 291.

156. *Id.* at 291–92.

B. Proving Personal Responsibility

Among other things, the personal responsibility requirement means that § 1983 plaintiffs may not simply prove "the police" deprived the plaintiff of a federally protected right. Instead, the plaintiff must prove how each individual defendant caused (or at least contributed to) the constitutional deprivation.[157] In many cases, this is easier said than done. Courts have recognized this challenge when multiple government officials are present during a constitutional violation. Their ways for dealing with these situations fall into three broad categories: (1) joint and several liability, (2) failure to intervene, and (3) conspiracy of silence.

1. Joint Liability.—The Fifth Circuit has relied on the theory of joint liability to establish "personal responsibility" in § 1983 excessive force claims. In *Grandstaff v. City of Borger*,[158] police officials shot and killed James Grandstaff while in pursuit of a fugitive.[159] The plaintiffs brought a § 1983 claim and state tort claims against four of the six officers who were present, as well as against the city. A jury found that the defendants violated the Fourteenth Amendment Due Process Clause because "the defendant officers consciously disregarded a substantial risk to innocent persons, and that their use of deadly force was maliciously, wantonly or oppressively done."[160] On appeal, "[t]he officers argue[d] that without evidence and a finding that a particular defendant fired the shot that actually struck and killed Grandstaff, there can be no constitutional deprivation laid at the feet of any officer."[161] The court rejected the defendants' argument, noting that the defendants acted "in concert"—"[t]he firestorm that killed James Grandstaff was in all respects a joint operation: the same recklessness, the same

157. *See supra* Part I. As a general rule of tort law, "the plaintiff has the burden at the trial of establishing by a preponderance of the credible evidence that a particular defendant was actually guilty of some negligent act or omission which was the proximate cause of injuries: it is not enough to prove merely that an accident occurred and that one of the defendants must have caused it." Centrone v. C. Schmidt & Sons, 114 Misc. 2d 840, 842–48 (N.Y. Sup. Ct. 1982) (citing Bonheur v. Ramada Haulage, Inc., 72 A.D.2d 801, 802 (N.Y. App. Div. 1979)).

158. 767 F.2d 161 (5th Cir. 1985).

159. *Id.* at 164–65. After trying unsuccessfully to execute a traffic stop, police pursued Lonnie Cox to the ranch where decedent was a foreman. Grandstaff drove towards police to help when "officers opened fire upon him from two sides." He died shortly thereafter.

160. *Id.* at 167. Specifically, the court noted the following facts:

> [T]he officers knew that third parties lived in the home from which the Grandstaff pickup came. They were aware of the possibility that an innocent resident of the house could have been in the pickup . . . [and] without awaiting any hostile act or sound, they poured their gunfire at the truck and into the person of James Grandstaff. They showed no inclination to avoid inflicting unnecessary harm upon innocent people. They simply saw a target and fired.

Id. at 167–68.

161. *Id.* at 168.

circumstances, and the same object."[162] And while the court held the defendants acted jointly, it is also important to note that each defendant, individually, acted reckless and, as such, violated the Fourteenth Amendment Due Process Clause.

2. Failure to Intervene.—Most jurisdictions have held that law enforcement officials may be liable under § 1983 for not intervening to prevent another officer from depriving a suspect of a constitutional right.[163] This "failure to intervene" doctrine makes law enforcement officials liable even if they do not hold a supervisory position.[164] Under this theory, the official has "an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence."[165]

162. *Id.* In a sharply worded opinion, the Fifth Circuit noted, "[the defendants] may as well argue that no one on a firing squad is responsible for the victim's death unless we know whose bullet first struck the heart." *Id.*

163. *See, e.g.*, Sanchez v. City of Chicago, 700 F.3d 919, 926 (7th Cir. 2012) (stating that "it is possible to hold a named defendant liable for his failure to intervene vis-à-vis the excessive force employed by another officer, even if the plaintiff cannot identify the officer(s) who used excessive force on him").

164. *See* Walker v. Jackson, 952 F. Supp. 2d 343, 351 (D. Mass. 2013) ("Liability for failure to act has most often been found when the defendant is in a supervisory position over the parties whose conduct plaintiff complains of. Even absent supervisory authority, however, a party's position of responsibility may impose on him a duty to intervene to prevent a constitutional violation." (quoting Clark v. Taylor, 710 F.2d 4, 9 (1st Cir. 1983))).

165. Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994) (citations omitted); *see also* Jackson v. Mastrangelo, 405 F. Supp. 3d 488, 493 (W.D.N.Y. 2019) ("A police officer therefore can be held liable for his failure to intervene if he or she observes the use of excessive force and has sufficient time to act but takes no steps to prevent it." (quoting Merril v. Schell, 279 F. Supp. 3d 438, 444 (W.D.N.Y. 2017))); *Branen*, 17 F.3d at 556 (agreeing with the Plaintiffs-Appellants that "the district court erred in refusing to include in its charge to the jury . . . [an] instruction that a law enforcement official has a duty to intervene when fellow officers are committing constitutional violations in his presence"). In *Anderson v. Branen*, the plaintiff alleged that two DEA agents, without provocation and without identifying themselves, approached him, "dragged him down the sidewalk and beat him" shouting "homophobic epithets" and that another DEA agent watched the whole incident without intervening. *Id.* at 555. The Second Circuit held that "the district court erred in refusing to include in its charge to the jury their proffered instruction that a law enforcement official has a duty to intervene when fellow officers are committing constitutional violations in his presence." *Id.* at 556. The "failure to intervene" doctrine, in many respects, sounds like a *DeShaney* claim. However, these claims are not the same. In *DeShaney v. Winnebago County Department of Social Services*, four-year-old boy Joshua and his mother brought a § 1983 claim arguing that the Winnebago County Department of Social Services "had deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." 489 U.S. 189, 193 (1989). The Supreme Court found that the State only owed a duty to act and intervene in certain limited situations. *Id.* at 200. Under a failure to train theory, a plaintiff may allege deprivation of any constitutional right. *E.g.*, City of Canton v. Harris, 489 U.S. 378, 378 (1989). A *DeShaney* claim is specific to the Fourteenth Amendment and involves the plaintiff alleging that the defendant's inaction resulted in a deprivation of their liberty interest. *DeShaney*, 489 U.S. at 191.

Importantly, appellate courts have continued to hold that "failure to intervene" claims are a viable basis for § 1983 liability post-*Iqbal*. There is, however, an important distinction between pre-*Iqbal* supervisory liability claims, which might be based on constructive knowledge of a subordinate's constitutional conduct, and failure to intervene claims: the latter is limited to circumstances in which the official is physically present and has a realistic opportunity to prevent the plaintiff's injury. By limiting liability to those situations in which an officer has "a realistic opportunity to intervene to prevent the harm from occurring" to the plaintiff, courts identify a clear causal link between the defendant's conduct and the plaintiff's constitutional deprivation: but for the defendant's failure to intervene there would not have been a constitutional deprivation.[166] In short, the defendant, in failing to act, is "personally responsible" for the injury. Accordingly, in the circumstances in which multiple officers are present, one commits a constitutional violation, and the others do nothing, it would seem that all of the officers potentially are liable—the former for the action and the others for their inaction (or their failure to intervene).

Liability, of course, depends on the plaintiff's ability to specify the role of each defendant. For example, in *Bruner v. Dunaway*[167] the plaintiff brought a § 1983 action against several police officials in the Eastern District of Tennessee after officers severely beat him.[168] Bruner sued eight officers based on two different theories of liability: direct participation and failure to intervene.[169] Only two officers admitted to using force. The others each arrived during different stages of the pursuit and arrest and denied using any force.[170] A jury returned a verdict for the plaintiff; however, the judge found that there was insufficient evidence to prove that five of the defendants "were personally involved in injuring plaintiff" and set the verdict aside.[171]

The case eventually reached the Sixth Circuit. On appeal, the plaintiff argued "that even assuming *arguendo* the evidence did not demonstrate personal involvement in the administering of the beatings, the inaction of the 'non-participating' officers while . . . [the plaintiff] was being assaulted subjects those officers to liability."[172] Importantly, the Sixth Circuit acknowledged that "it is not necessary, in order to hold a police officer liable

Both claims involve questions of causation, but the relevant causation questions come from different sources. The causation question in a failure to intervene claim stems from the "subjects or causes to be subjected" language in § 1983. In contrast, the causation issue in *DeShaney* claims arises from the "shall deprive" language in the Fourteenth Amendment.

166. *Branen*, 17 F.3d at 557.

167. 684 F.2d 422 (6th Cir. 1982).

168. *Id.* at 423–24.

169. *Id.* at 423–25.

170. *Id.* at 424.

171. *Id.* at 424–25.

172. *Id.* at 425.

under § 1983, to demonstrate that the officer actively participated in striking a plaintiff."[173] However, to prevail on a failure to intervene theory, the plaintiff must prove the defendant had an opportunity to intervene. Because "the plaintiff was unable to identify the officers present during the time he was beaten" he could not prove they could have stopped the beating.[174] It is not enough to show that "the police" caused the injury.[175] Nor is it enough to show that a particular officer was present when the plaintiff was injured. To prevail against a bystander official, a § 1983 plaintiff must prove the defendant was present *and* had an opportunity to intercede but failed to do so.

3. Conspiracy of Silence.—Section 1983 excessive force victims have a different, but related, problem with police officials who simply refuse to talk. One of the most basic reasons § 1983 plaintiffs are unable to detail how each individual defendant contributed to their injuries is that the defendants are not forthcoming with the information.[176] Both the Seventh and Third Circuits have suggested a somewhat convoluted solution to this problem: a conspiracy of silence theory of liability.

In *Colbert v. City of Chicago*,[177] the plaintiff filed a § 1983 action against several police officials alleging they deprived him of his Fourth Amendment right to be free from an unreasonable search when they ransacked his home.[178] However, because the plaintiff was confined to his living room when the police searched his home, he was unable to identify which specific officers were responsible for the damage.[179] The defendants moved for summary judgment, arguing that the plaintiff failed "to establish

173. *Id.* at 426.

174. *Id.* at 426–27.

175. *See id.* at 426 (noting that a failure to intervene claim requires, at a minimum, proof that the "defendants were present while the assault or other wrongs were being committed"); Colbert v. City of Chicago, 851 F.3d 649, 659–60 (7th Cir. 2017) (noting that under a failure to intervene theory "a plaintiff still must make an individual identification of the officers who failed to act").

176. *See Colbert*, 851 F.3d at 658 (noting that the plaintiff could have alleged that the officers had conspired "to conceal the identities of those responsible for the damage"); *see also* Hessel v. O'Hearn*,* 977 F.2d 299, 305 (7th Cir. 1992) (recognizing that "plaintiffs are in a bind" because "each of the defendants can plausibly deny guilt").

177. 851 F.3d 649 (7th Cir. 2017).

178. *Id.* at 656–57. Police received a tip that Jai Crutcher, who was living with the plaintiff, was in possession of firearms, in violation of the conditions of his supervised release. *Id.* at 652 & n.1. On March 31, 2011, ten officials went to Colbert's home to conduct a "parole check." The police handcuffed Crutcher and Colbert and began to search the kitchen, bedrooms, and basement while neither were permitted to observe. Colbert alleged that the officers caused substantial damage to his house during the search including putting holes in walls, ripping out installation, destroying furniture, and tracking fecal matter throughout the house. *Id.* at 652. Unfortunately, for Colbert, he was unable to identify any of the officers who carried out the damage. *Id.* at 657. The civil rights allegations included violations of Colbert's Fourth Amendment rights as well as false arrest. Both sides moved for summary judgment; the district court granted the defendants' motion on all claims and dismissed the case altogether. The plaintiff then appealed to the Court of Appeals. *Id.* at 654.

179. *Id.* at 657.

that [the defendants] played any role in the alleged property damage."[180] The trial court granted the defendants' motion for summary judgment, concluding that the plaintiff had "not provided any evidence linking any individual Defendant to any of the damage in question."[181]

On appeal, the Seventh Circuit, like the trial court, emphasized § 1983's "individual-responsibility requirement."[182] Although the court recognized the impossible nature of requiring Colbert to link each individual defendant to the property damage,[183] the court refused, as plaintiff suggested, to shift the burden of proof to the defendants.[184] Instead, the court suggested the plaintiff should have sued all ten officers who were on the scene and alleged a conspiracy of silence.[185] Yet, beyond this, the Seventh Circuit has not provided much guidance about how a plaintiff pleads and proves this theory.[186]

The Third Circuit has engaged in much more thorough discussion of the conspiracy of silence theory. At the outset, it is important to point out that the conspiracy of silence theory is not a way for the plaintiff to prove that an individual defendant is personally responsible for the Fourth Amendment violation; rather, it creates an entirely different constitutional claim—a Fourteenth Amendment Due Process claim. The Fourteenth Amendment Due

180. Colbert v. Willingham, No. 13-CV-2397, 2015 WL 3397035, at *12 (N.D. Ill. May 26, 2015), *aff'd sub nom.* Colbert v. City of Chicago, 851 F.3d 649 (7th Cir. 2017).

181. *Id.* at *13. Interestingly, Colbert only sued four of the ten officers who were present at the search. The trial court specifically noted that "we may assume that the property damage was caused by one or more of the 10 or more officers who searched Mr. Colbert's home" but that assumption "is not good enough to fend off summary judgment." *Id.* This leaves one to wonder whether the court would have reached a different result if the plaintiff had sued all ten of the police officials who were present on the scene.

182. *Colbert*, 851 F.3d at 657–58.

183. *See id.* at 657 ("We recognize the potential tension between § 1983's individual-responsibility requirement and factual scenarios of the kind present here: It may be problematic to require plaintiffs to specifically identify which officers caused property damage when officers commonly remove these individuals from the search area.").

184. *Id.* at 659.

185. *See id.* at 658 (indicating that "plaintiffs may allege that the named officers participated in something akin to a 'conspiracy of silence among the officers'" in order to satisfy § 1983's personal-responsibility requirement (quoting Molina *ex rel*. Molina v. Cooper, 325 F.3d 963, 974 (7th Cir. 2003))). The Third Restatement of Torts notes that a plaintiff must sue all of the tortfeasors who might have caused the injury. Comment h to § 28 explains:

> Courts have insisted that all persons whose tortious acts exposed the plaintiff to a risk of harm be joined as defendants as a condition for alternative liability. When fewer than all such persons are joined in the case, the person who actually caused the plaintiff's harm may escape liability. In addition, when fewer than all such persons are sued, a much weaker case exists for joint and several liability in those jurisdictions that retain it.

RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 28 cmt. h (AM. L. INST. 2010).

186. *See, e.g.*, *Colbert*, 851 F.3d at 658 (noting that plaintiffs "have not alleged a conspiracy of silence among the officers"); *Molina*, 325 F.3d at 974 (same).

Process Clause includes "the right of access to the courts."[187] As the Third Circuit explains in *Jutrowski*, a "'conspiracy of silence' among officers is actionable as a § 1983 conspiracy because the coordinated officer conduct 'impede[s] an individual's access to courts' and renders 'hollow' a victim's right to redress in a court of law."[188] In short, an agreement to cover up excessive violence may prevent § 1983 plaintiffs from establishing their Fourth Amendment claim but may simultaneously create a Fourteenth Amendment claim.

However, plaintiffs still face enormous hurdles to prove liability. "'[T]he rule is clear that' the plaintiff 'must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action.'"[189] The plaintiff can show agreement (or a meeting of the minds) through direct or circumstantial evidence.[190] To prevail, plaintiffs need a more straightforward way to establish causation. Tort law provides a roadmap.

III. *Causa Per Se*—Causation in Itself

A. The Relationship Between Torts and Constitutional Torts

Courts frequently import tort theories of liability into § 1983 jurisprudence; yet § 1983 is not simply a "font of tort law" and there are important differences between the two.[191] To establish a negligence claim, a plaintiff must prove duty, breach, causation, and harm. In contrast, to establish a § 1983 claim, a plaintiff must prove the following elements: a person, acting under state law, subjected or caused the plaintiff to be subjected, to a deprivation of a federally protected right. There is a good argument for "matching" traditional tort elements and § 1983 elements as follows:

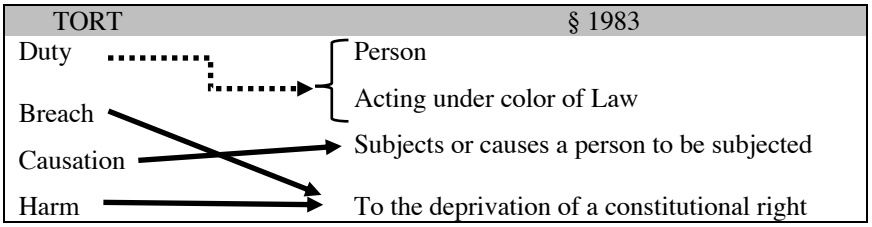
187. Jutrowski v. Township of Riverdale, 904 F.3d 280, 294 (3d Cir. 2018) (quoting Monroe v. Beard, 536 F.3d 198, 205 (3d Cir. 2008)).

188. *Id.* at 291 (alteration in original) (quoting Vasquez v. Hernandez, 60 F.3d 325, 328–29 (7th Cir. 1995)).

189. *Id.* at 295 (quoting Capogrosso v. Supreme Court of N.J., 588 F.3d 180, 84–85 (3d Cir. 2009)).

190. *Id.* (noting evidence of a conspiracy includes discussions among officers about the incident, conflicting stories, irregularities in the investigation, and material omissions in police reports).

191. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 701 (1976) (refusing to make the Fourteenth Amendment "a font for tort law").



Of all the elements in § 1983 and tort cases, the causation requirement tracks most closely from one to the other. In torts, the relevant question is whether the breach of duty caused the harm.[192] In § 1983 litigation, the relevant question is whether the individual defendant caused the constitutional deprivation. Although there is a distinction between these inquiries, courts rely on similar concepts of causation to resolve both. In fact, when it comes to questions of causation, the Supreme Court has stated (more than once) that "§ 1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.'"[193] From this, appellate courts have held that, like their common law tort counterparts, § 1983 plaintiffs must prove both cause-in-fact and proximate cause.[194] In short, when it comes to causation, § 1983 already borrows heavily from common law tort doctrine.

There is also a clear correlation between § 1983's statutory deprivation requirement and tort concepts of breach and harm. By proving the defendant deprived them of a constitutional right, § 1983 plaintiffs establish breach—the breach of a constitutional right—*and* harm.[195] The injury is the constitutional deprivation. However, it is important to note that plaintiffs prove "breach" differently in common law tort cases and § 1983 cases. Generally speaking, "breach" simply means "[a] violation or infraction of a law, obligation, or agreement."[196] Under the common law of torts, "breach"

192. *E.g.*, Ryder v. Mitchell, 54 P.3d 885, 889 (Colo. 2002).

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

194. *E.g.*, Lamont v. New Jersey, 637 F.3d 177, 185 (3d Cir. 2011) ("Like a tort plaintiff, a § 1983 plaintiff must establish both causation in fact and proximate causation."); Harper v. City of Los Angeles, 533 F.3d 1010, 1026 (9th Cir. 2008) ("To meet this causation requirement, the plaintiff must establish both causation-in-fact and proximate causation." (citing Van Ort v. Estate of Stanewich, 92 F.3d 831, 837 (9th Cir. 1996))).

195. To prevail, § 1983 plaintiffs do not need to prove an injury separate and distinct from the constitutional deprivation. *See* Carey v. Piphus, 435 U.S. 247, 266 (1978) ("[E]ven if [the plaintiffs] did not suffer any other actual injury, the fact remains that they were deprived of their right to procedural due process."). However, they must prove an "actual injury" to receive more than nominal damages. *See id.* ("[S]ubstantial damages should be awarded only to compensate actual injury . . . .").

196. *Breach*, BLACK'S LAW DICTIONARY (11th ed. 2019).

refers to a "breach of a duty."[197] In tort law, every person has a general duty to exercise reasonable care.[198] A person breaches this duty of care by acting negligently (i.e., by not exercising reasonable care),[199] which courts often judge using the "objective reasonable person standard."[200] In contrast, in § 1983 litigation the relevant breach is the constitutional breach.[201] The standard courts will use to determine whether there has been a constitutional breach depends upon what provision the plaintiff alleges the defendant violated.[202] For example, the Fourth Amendment standard is "objective reasonableness."[203] In contrast, the legal standard required to establish a Fourteenth Amendment substantive due process claim is "shocks the conscience," and the Court has been clear that "negligently inflicted harm is categorically beneath the threshold of constitutional due process."[204] Both § 1983 and negligence actions require a breach, but in tort cases, the relevant question is whether the defendant breached a duty, while the pertinent

197. *Breach*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

198. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, LAW OF TORTS § 251 (2d ed. 2000) ("[W]here the defendant by some action on his part, creates, maintains, or continues a risk of physical harm, the general standard or duty is the duty of reasonable care . . . .").

199. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL AND EMOTIONAL HARM § 3 (AM. L. INST. 2010) ("A person acts negligently if the person does not exercise reasonable care under all the circumstances.").

200. The Wolters Kluwer Blouvier Law Dictionary defines the "reasonable person" standard as:

> A standard of behavior based on the likely conduct of a typical, but thoughtful person. . . . The primary function of the reasonable person is to attempt to assess the actual conduct of a party who is accused of negligence, or a breach of duty or foresight, by comparing what the person did in fact to what a different person, who would not be negligent or knowingly in breach of a duty, would have done.

Reasonable Person (Reasonable Man or Reasonable Woman), THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

201. *See, e.g.*, Samson v. City of Bainbridge Island, 683 F.3d 1051, 1060 (9th Cir. 2012) ("Unless there is a breach of constitutional rights, . . . § 1983 does not provide redress in federal court for violations of state law." (quoting Schlette v. Burdick, 633 F.2d 920, 922 n.3 (9th Cir. 1980))).

202. *See* Albright v. Oliver, 510 U.S. 266, 273 (1994) ("Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing' such a claim." (quoting Graham v. Connor, 490 U.S. 386, 395 (1989))); *see also* United States v. Lanier, 520 U.S. 259, 272 n.7 (1997) ("[I]f a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

203. *Graham*, 490 U.S. at 388.

204. County of Sacramento v. Lewis, 523 U.S. 833, 846, 849 (1998).

standard in § 1983 cases is whether the defendant breached a constitutional right.[205]

The concepts of duty in tort law and duty in § 1983 jurisprudence are related, but their relationship is a bit convoluted. Arguably, there are a few ways tort concepts of duty arise in § 1983 jurisprudence. The Supreme Court has explicitly used concepts of affirmative duty from tort law's duty element in Fourteenth Amendment substantive due process cases.[206] Furthermore, as discussed in subpart II(B), most circuit courts have held that a police official may be liable for failing to prevent another officer from violating the Constitution. In these circumstances, some circuits have explicitly tied liability to duty. For example, the Fourth Circuit has explained, "[t]he concept of bystander liability is premised on a law officer's duty to uphold the law and protect the public from illegal acts, regardless of who commits them."[207] One might also understand "acting under color of law" as imposing a duty not to violate the laws—in much the same way that tort law imposes a general duty of care.[208] Alternatively, one might see "acting under color of law" as creating a special relationship between government officials and the communities for whom they work. Tort law, generally, has recognized duty based upon special relationships.[209] Thus, imagining duty concepts in § 1983 claims in this way is not inconsistent with tort law, albeit the relationship is more general in nature.

205. To defend against a classic negligence claim, the defendant must show that they acted in accordance with how a "reasonable person" in their position would have acted. This is an objective standard that the court utilizes, based on a typical thoughtful person. *See Reasonable Person*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) (defining this term and providing additional legal context). Similarly, the Fourth Amendment standard for a § 1983 claim based on excessive force would require the defense to show that the police officer's actions were "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham*, 490 U.S. at 397. In both instances, the court would use an objective standard to fairly determine whether the defendant's conduct met the standard of conduct that society would typically expect from a person in their position.

206. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989) ("[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."). The Supreme Court's reasoning here is that the state's affirmative duty to protect the person arises from the fact that they have placed limitations on the person's freedom to act on his own behalf and care for himself. Since the person can no longer care for himself due to the state's actions, it is now the state's duty to care for that person. The Court expressly states that this duty arises only when the individual has been restrained by and is in the care of the state, not at any other time.

207. Randall v. Prince George's County, 302 F.3d 188, 203 (4th Cir. 2002).

208. 42 U.S.C. § 1983. The wording of § 1983 places civil liability on any person who, acting under the color of law, deprives an individual within the jurisdiction of the United States of any "rights, privileges, or immunities secured by the constitution and laws." *Id.* A logical rephrasing of this would be that a person acting under the color of law has a duty not to deprive individuals of constitutionally, or federally, guaranteed rights, privileges, or immunities.

209. RESTATEMENT (SECOND) OF TORTS § 315 (AM. L. INST. 1979).

Because there are differences between tort law and constitutional tort law, courts should not impose tort concepts onto § 1983 litigation carte blanche. Nevertheless, given their similarities, it is appropriate for courts adjudicating § 1983 cases to import some concepts from common law torts. As noted at the outset, in many § 1983 cases in which "individual responsibility" emerges as an issue, the question is not *whether* there was a constitutional violation. Rather, the issue is whether a particular defendant *caused* the constitutional violation. As noted in Part I, when plaintiffs survive pleading and make it to discovery, they often learn who was at the scene. Yet, absent video documentation or officer testimony, they still will not be able to prove who did what and so will lose, since § 1983 plaintiffs must prove that each defendant was personally responsible for the injury. This is essential for liability.

Courts might solve this evidentiary problem by expanding liability. Courts could hold that municipalities are vicariously liable for the acts of their employees. This approach would require a complete overhaul of the current doctrine. The Court has explicitly and "consistently refused to hold municipalities liable under a theory of *respondeat superior*."[210]

I offer a more restrained solution. I propose borrowing from tort principles to allow for *causa per se*, which translates to "cause in itself." Under this theory, a plaintiff bringing a § 1983 claim alleging excessive force makes a prima facie case for causation when the plaintiff establishes: (1) a Fourth Amendment deprivation and (2) that the defendant was present when it occurred. This then shifts the burden to the defendant to produce evidence that he or she did not cause the constitutional violation. If the police official does not produce exculpatory evidence, that official would be jointly liable with the other officers on the scene. Combining theories of res ipsa loquitur and joint liability in this way would create a powerful incentive for defendants to come forward with information about causation.[211] The remainder of this section explores these various concepts and the *causa per se* proposal in detail.

B. Joint Torts and Joint and Several Liability

Joint and several liability is a longstanding doctrine. Broadly speaking, courts have applied the principle, which addresses both questions of causation and allocation of damages, in two different circumstances. They have applied it when an employer is vicariously liable for the acts of its

210. Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 403 (1997).

211. *See* Kenneth S. Abraham, *Self-Proving Causation*, 99 VA. L. REV. 1811, 1842–43 (2013) (noting that "[i]n some cases, however, the function of res ipsa is instead, or in addition, to 'smoke out' evidence from the defendant that would not otherwise be produced").

employees and in cases where the defendants are tortfeasors engaged in a common enterprise.[212]

Initially, joint liability was a narrow doctrine. "The original meaning of a 'joint tort' was that of vicarious liability for concerted action."[213] In these cases, the defendants had a shared purpose and worked together to carry it out.[214] Consequently, each defendant was liable for the entire harm[215] and plaintiffs could select which of the potential defendants they wanted to sue.[216]

Eventually, the law evolved to allow application of joint liability against tortfeasors who acted independently of one another.[217] For example, in *Summers v. Tice*,[218] the plaintiff was injured when two members of his hunting party negligently fired in his direction. One hunter shot the plaintiff in the eye, but it was unclear which hunter had done so. The plaintiff sued both hunters. However, they countered that "they were not acting in concert, and that there [was] not sufficient evidence to show which defendant was guilty of the negligence which caused the injuries."[219] The court held that "each defendant is liable for the whole damage whether they are deemed to be acting in concert or independently."[220] The Second Restatement of Torts later adopted this "alternative liability" rule.[221] The court reasoned that where both defendants are negligent and it is impossible to apportion the damages between them, "the innocent wronged party should not be deprived of his right to redress" and "[t]he wrongdoers should be left to work out between

212. DOBBS, *supra* note 198, § 170, at 413; *see, e.g.*, FTC v. WV Universal Mgmt., LLC, 877 F.3d 1234, 1240 (11th Cir. 2017) (discussing the "well established torts concept" that aiding and abetting in a tort can result in joint and several liability and holding that the district court did not err in determining that the defendant was jointly and severally liable with the other members of a fraudulent telemarketing scheme).

213. W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 46 (5th ed. 1984).

214. *Id.* at 322–23. For example, in *Wrabek v. Suchomel*, the plaintiff alleged that the defendants coordinated their efforts when they assaulted him at a political meeting. 177 N.W. 764, 764–66 (Minn. 1920). Specifically, he alleged several defendants punched him, another snatched his political pin from his coat, and that at some point "it was proposed that he be made to kiss the American flag. One was produced, and he kissed it, and said it was his flag, and was then told to go home, which he did." *Id.*

215. KEETON, *supra* note 213, § 52.

216. Smith v. Tiffany, 799 S.E.2d 479, 490 (S.C. 2017) (Pleicones, J., dissenting) (stating that pure joint and several liability allows a plaintiff to decide which defendant to seek payment damages from).

217. *See* RESTATEMENT (SECOND) OF TORTS § 433B(3) (AM. L. INST. 1965) ("Where the conduct of two or more actors is tortious, and . . . there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.").

218. 199 P.2d 1 (Cal. 1948).

219. *Id.* at 1–2.

220. *Id.* at 5.

221. RESTATEMENT (SECOND) OF TORTS § 433B (AM. L. INST. 1965).

themselves any apportionment."[222] Similarly, the Third Restatement of Torts offers the following rationale for alternative liability:

> The rationale for shifting the burden of proof to defendants whose tortious conduct exposed the plaintiff to a risk of harm is that, as between two culpable defendants and an innocent plaintiff, it is preferable to put the risk of error on the culpable defendants. In at least some cases, it appears that the defendants' better access to proof and doubts about the plaintiff's ability to extract that evidence from the defendants, even with modern discovery, have influenced the courts to employ burden shifting.[223]

Arguably, the Court's holding in *Summers v. Tice* is justifiable because both defendants were negligent and there was a 50% chance that each defendant caused the injury.[224]

Yet, courts expanded "joint liability" to make multiple defendants liable. The "market share" theory of liability was first articulated by the California Supreme Court in 1980. This theory of collective liability states that when there are multiple manufacturers of a fungible good named in a negligence suit, and the plaintiff cannot prove which manufacturer produced the specific item that harmed them, the court may hold the manufacturers liable proportionate to their share of the market of the good that caused the injury, unless the manufacturer can prove they did not produce the good that caused injury to the plaintiff.[225] This theory of liability was inspired by the

222. *Summers*, 199 P.2d at 5.

223. RESTATEMENT (THIRD) OF TORTS § 28 cmt. g (AM. L. INST. 2010) (citations omitted).

224. Liability in a civil case typically requires that the plaintiff prove an element by a preponderance of the evidence (i.e., that it is more likely than not). However, as Professor Zipursky offers the following explanation for *Summers*:

> *Summers* works because the defendant's right is a right to be free of liability where he did not cause the plaintiff's injury, and respecting that right is inconsistent with imposing liability where it is more likely than not that the defendant caused no injury to the plaintiff. But that leaves open the question, we argued, of what should happen in equipoise, where the probability is exactly fifty percent. It is therefore permissible for the court to adopt rebuttable joint and several liability in the two-person *Summers* (the real *Summers*), but not in any more extended version.

Benjamin C. Zipursky, *Evidence, Unfairness, and Market-Share Liability: A Comment on Geistfeld*, 156 U. PA. L. REV. PENNUMBRA 126, 134 (2007). Similarly, when independent forces combine to injure the plaintiff, but both alone would have been sufficient to cause the injury, the defendant is liable, even if the plaintiff fails to identify who, if anyone, is responsible for the additional forces. For example, in *Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co.*, the court held that where two fires combine to destroy property, the defendant is liable, even though "either fire independently of the other would have destroyed it" and the source of the second fire is unknown. 179 N.W. 45, 49 (Minn. 1921). Again, under the doctrine of joint and several liability, a negligent defendant may be liable for a plaintiff's entire injury even if he or she is not the sole cause. *Id.*

225. Sindell v. Abbott Lab'ys, 607 P.2d 924, 937 (Cal. 1980) (holding that when multiple manufacturers make the same drug with the same ingredients, the plaintiff is injured as a result of the drug, and there is no way for the plaintiff to determine which manufacturer produced the specific

court's holding in *Summers v. Tice* and their conclusion that when a court is trying to decide between "an innocent plaintiff and negligent defendants, the latter should bear the costs of the injury."[226]

Joint and several liability is a related but distinct concept concerning the apportionment of damages. Courts use the doctrine to hold liable each person who helped to cause either part, or all, of the harm the plaintiff suffered.[227] Each defendant is liable for the entirety of the harm. Meaning, the plaintiff can recover up to 100% of the judgment from any single defendant. However, if the plaintiff collects more than the share of the injury that was ultimately apportioned to that defendant, then it would be up to that defendant to seek contribution from their co-defendants.[228] Joint and several liability ensures defendants, rather than the innocent plaintiff, are responsible for the shortfall.[229]

One integral point in joint tort, market share liability, and joint and several liability is that the plaintiff must prove that each of the defendants committed a "breach." As noted in subpart III(A), plaintiffs prove breach differently in common law tort cases and § 1983 cases. In § 1983 litigation, the relevant breach is the constitutional breach.[230] Furthermore, in many of these cases the plaintiff is not alleging that each defendant violated the Constitution. Rather, he or she alleges that each defendant *caused* the constitutional violation. Consider the example discussed in the Introduction: There are four officers on the scene. The plaintiff alleges one, and only one, officer, kicked him. Based on these facts, a § 1983 plaintiff would argue that the officer who kicked him deprived him of his Fourth Amendment right to be free from an unreasonable seizure. While only one officer violated the Constitution, the other three officers *caused* the constitutional deprivation by failing to intervene.[231]

This subtle, but important, distinction aligns with how the Supreme Court describes municipal liability. A municipality is not liable simply for failing to train its employees. Failure to train, in and of itself, is not a

pill she took, then the manufacturers will be held proportionately liable in accordance with their share of the market).

226. *Id.* at 936.

227. *Joint and Several Liability,* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012).

228. *Id.*

229. McDermott, Inc. v. Amclyde, 511 U.S. 202, 221 (1994).

230. *See, e.g.*, Samson v. City of Bainbridge Island, 683 F.3d 1051, 1060 (9th Cir. 2012) ("Unless there is a breach of constitutional rights, . . . § 1983 does not provide redress in federal court for violations of state law." (quoting Schlette v. Burdick, 633 F.2d 920, 922 n.3 (9th Cir. 1980))).

231. *See* Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) (holding that when an individual is given the authority of being a police officer, he may not ignore the duties of his office by failing to stop other officers who harm someone in his presence); *see also, e.g.*, Whirl v. Kern, 407 F.2d 781, 788–89 (5th Cir. 1968) (holding that improper motive is not a prerequisite for tort liability under § 1983).

constitutional violation.[232] A municipality cannot be held liable under § 1983 without an underlying constitutional violation by one of its employees.[233] A municipality is liable when (1) the municipality fails to train its employees, (2) the employee violates the Constitution, and (3) the court finds the municipality's failure caused the violation. Similarly, absent an underlying Fourth Amendment claim, a § 1983 plaintiff cannot win a § 1983 claim against an official for failure to intervene.[234] Traditional joint liability only applies when *each* of the defendants violates the Constitution. This simply is not what happens in most § 1983 cases involving multiple defendants.

When a § 1983 plaintiff is suing multiple police officers for a Fourth Amendment violation, there are, generally speaking, two paths for holding all of the officers liable. First, the plaintiff might allege that *all* of the defendants violated the Constitution. For example, in *Grandstaff v. City of Borger*,[235] the plaintiff claimed that all four defendants deprived the decedent of his Fourteenth Amendment substantive due process rights.[236] Joint liability works well in these cases because the plaintiff is alleging that each of the defendants breached the Constitution. Alternatively, in cases like *Jutrowski*, where the plaintiff suggests only one official inflicted the blow, or *Colbert*, where the plaintiff is not sure who damaged his property, joint liability, at least in its traditional form, is inapplicable. Joint liability very much depends on the plaintiff being able to prove that all defendants were engaged in the same misconduct. This is a problem for § 1983 plaintiffs pursuing a "failure to intervene theory of liability" because they are alleging two types of misconduct: some are violating the Constitution while others are failing to stop the constitutional violation.[237] Equally, if not more problematic, absent an admission by the defendant, the plaintiff may not even be able to prove which defendants violated the Constitution and which defendants were "mere bystanders." In short, joint tort liability does not work well in cases where

232. *See* City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that a municipality can only be held liable under § 1983 for failing to train their employees, if that failure to train reflects a deliberate indifference on the part of the municipality toward the constitutional rights of its citizens).

233. *See, e.g.*, Ellis *ex rel.* Estate of Ellis v. Ogden City, 589 F.3d 1099, 1104 (10th Cir. 2009) (concluding that there is no municipal liability "where there was no underlying constitutional violation by any of [the municipality's] officers" (alteration in original) (quoting Graves v. Thomas, 450 F.3d 1215, 1218 (10th Cir. 2006))).

234. One might theorize that an official personally violates the Fourth Amendment by failing to intervene. This isn't illogical. After all, it seems reasonable to argue that, in and of itself, the failure to intervene makes a seizure unreasonable, and, accordingly, a bystanding official personally violates the Constitution by doing nothing. This, however, is not the approach courts have adopted.

235. 767 F.2d 161 (5th Cir. 1985).

236. *Id.* at 165.

237. And in terms of § 1983's elements, this means that the former deprived the plaintiff of a constitutional right while the latter caused the plaintiff to be deprived of a constitutional right.

the plaintiff pursues a failure to intervene theory of liability or the plaintiff is uncertain how each individual defendant "caused" her injury.[238]

C. Res Ipsa Loquitur—The Thing Speaks for Itself

Res ipsa loquitur allows a plaintiff to rely on circumstantial evidence to establish negligence and causation.[239] *Byrne v. Boadle*[240] is the first case to articulate this theory.[241] In that case, the plaintiff was walking past the defendant's shop when he was struck by a barrel of flour.[242] Two witnesses testified that they saw the barrel fall from the window and did not hear or see any type of warning but, beyond that, they were not sure what happened.[243] Similarly, the plaintiff claimed that when he approached the defendant's shop: "I lost all recollection. I felt no blow. I saw nothing to warn me of danger."[244] The defendant argued that there was no evidence that he was negligent.[245] The court opined as follows:

> There are certain cases of which it may be said res ipsa loquitur, and this seems one of them. . . . Suppose in this case the barrel had rolled out of the warehouse and fallen on the plaintiff, how could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford primâ facie evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff who is injured by it must call witnesses from the warehouse to prove negligence seems to me preposterous.[246]

The plaintiff may establish a prima facie case by proving: "(1) the character of the accident is such that it would not ordinarily occur in the absence of negligence, and (2) the instrumentality causing the injury is shown

238. This might also be understood in terms of causation. When § 1983 plaintiffs seek compensatory damages they must prove: (1) "statutory causation"—that the defendants subjected or caused the plaintiffs to be subjected to a constitutional deprivation—and (2) "damages causation"—that the constitutional deprivation caused the plaintiffs to suffer an actual injury. *See* Ravenell, *supra* note 114, at 710, 713 (discussing statutory causation and damages causation in § 1983 cases). Joint liability offers plaintiffs a great solution when they are able to prove statutory causation but unable to prove damages causation. *See, e.g.*, *Grandstaff*, 767 F.2d at 168.

239. RESTATEMENT (THIRD) OF TORTS § 17 cmt. a (AM. L. INST. 1999).

240. 159 Eng. Rep. 299 (Ex. 1863).

241. *Id.* at 300.

242. *Id.* at 299.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 300–01.

to have been under the management and control of the defendant."[247] Combined, proof of these elements creates an inference that the defendant caused the accident.[248] The first element is indicative of negligence.[249] The second links the defendant to the negligence.[250] The burden of production then shifts to the defendant to prove that he or she was *not* negligent.[251]

One important rationale underlying the doctrine of res ipsa loquitur is information asymmetry.[252] Plaintiffs will know they have suffered an injury, and each plaintiff will be fairly certain that the injury was caused by the defendant's negligence. However, as the court noted in *Byrne*, the plaintiff is often not in a position to know the details of the accident.[253] By shifting the burden onto the defendant, the court places the burden on the party better positioned to know or learn what happened.

247. Traut v. Beaty, 75 S.W.3d 661, 664 (Tex. App. 2002); *see also* Colemenares Vivas v. Sun Alliance Ins. Co., 807 F.2d 1102, 1105–06 (1st Cir. 1986) (holding that negligence on the part of a defendant may be presumed when the character of the incident is one in which it would typically not occur absent negligence, and the instrumentality causing the injury was within the exclusive control of the defendant; and noting that the instrumentality does not need to be in the physical control of the defendant, the control just must be such that the defendant has enough control to eliminate the possibility that the injury was caused by a third party). "Once the plaintiff has met the burden of demonstrating the control and due care prongs of res ipsa loquitur, the doctrine operates to permit an inference of negligence based upon the circumstantial evidence." Maroules v. Jumbo, Inc., 452 F.3d 639, 642 (7th Cir. 2006).

248. Brewster v. United States, 542 N.W.2d 524, 528 (Iowa 1996).

249. *Id.* (noting that the character of the accident is a requirement to qualify as circumstantial evidence of negligence and that the circumstances of the accident must point to negligence on the part of the defendant).

250. *Id.* ("The purpose of the 'under the management of defendant' requirement is 'to link the defendant with the probability, already established, that the accident was negligently caused.'" (quoting *Byrne*, 159 Eng. Rep. at 248)).

251. *Byrne*, 159 Eng. Rep. at 301 ("[B]ut if there are any facts inconsistent with negligence it is for the defendant to prove them."). "In the beginning, res ipsa loquitur 'was nothing more than a reasonable conclusion, from the circumstances of an unusual accident, that it was probably the defendant's fault.'" *Brewster*, 542 N.W.2d at 528 (citations omitted) (quoting KEETON, *supra* note 213, at 243). However, "res ipsa loquitur grew to cover two principles: one was concerned with the sufficiency of circumstantial evidence; the other was concerned with the burden of proof. From this fusion, the 'doctrine' of res ipsa loquitur developed." *Id.*

252. Information asymmetry occurs when one party to a dispute or transaction lacks critical information that the other party has. *See, e.g.*, Ybarra v. Spangard, 154 P. 2d. 687, 689 (Cal. 1944) (stating that "the particular force and justice of the rule, regarded as a presumption throwing upon the party charged the duty of producing evidence, consists in the circumstance that the chief evidence of the true cause, whether culpable or innocent, is practically accessible to him but inaccessible to the injured person").

253. *Byrne*, 159 Eng. Rep. at 301. For this reason, it is not surprising that res ipsa loquitur has also found its way into medical malpractice cases. For example, in *Ales v. Ryan*, the plaintiff alleged that Rose Carauddo died after the defendant, the operating surgeon, left a large sponge in the cavity of her abdomen following gallbladder surgery. 64 P.2d 409, 415 (Cal. 1936). The plaintiff argued that the discovery of the sponge during a later surgery was prima facie evidence of the defendant's negligence. *Id.* Holding that the doctrine applied in this particular context, the court noted that its affirmance will provide "to the surgeon all of the protection the law intended [and] will also give to a helpless unconscious patient an assurance of the laws solicited in his behalf." *Id.* at 417.

Victims of police excessive force at the hands of multiple police officials, like tort plaintiffs relying on res ipsa loquitur, often know they were injured but cannot provide much in the way of details—they may know who was present and little else. They are, however, able to offer circumstantial evidence that one or more of the defendants caused the constitutional deprivation.[254]

However, there is an important distinction between these police misconduct cases and traditional res ipsa loquitur cases. In the early cases, res ipsa loquitur often worked in tandem with vicarious liability. For example, in *Byrne*, several workers were present when the barrel rolled out of the flour shop and injured the plaintiff. However, the defendant, because of vicarious liability, was liable for their misconduct, even if he was not directly involved—the court attributed his employees' actions to him. Thus, at least legally, he had exclusive control over the instrumentality that caused the plaintiff's injury.[255] As one Note explains:

> The usual res ipsa loquitur requirement that the defendant have been in "exclusive control" of the instrumentality causing plaintiff's injury does not necessarily preclude application of the doctrine where multiple defendants are involved. If the plaintiff can show that all defendants were in concurrent joint control, or can use vicarious liability or some other rule of law to identify all other defendants with the one in control, he may invoke res ipsa against all. . . . If, however, he can neither show joint responsibility or identification of one with the others, nor single out the defendant in control, the general rule is that the plaintiff may not reach the jury by means of res ipsa loquitur.[256]

The tort law of res ipsa loquitur and joint tort liability, at least narrowly construed, simply does not work for these police misconduct cases. Joint tort liability in its traditional form is a poor fit because the defendants are not necessarily joint tortfeasors. As detailed in subpart III(A), not every defendant has breached the constitution—some are liable for their inaction rather than their action. Equally problematic, res ipsa loquitur, in its narrow form, does not work because these police misconduct cases involve multiple defendants who are not bound by vicarious liability or some other special relationship.

254. *See, e.g.*, Jutrowski v. Township of Riverdale, 904 F.3d 280, 297–98 (3d Cir. 2018) (noting that the plaintiff offered testimony of a medical expert "who averred that Jutrowski's injury most likely resulted from 'either a kick or punch of significant force'").

255. *Byrne*, 159 Eng. Rep. at 299.

256. Cases Noted, *Res Ipsa Loquitur Against Multiple Defendants*, 52 COLUM. L. REV. 537, 537–38 (1952).

D. The Evolution of Res Ipsa Loquitur

Res ipsa loquitur allows plaintiffs to establish a prima facie case without showing how, exactly, they were injured. Once a plaintiff establishes each of the defendants was negligent, the burden shifts to the defendants to parse out questions of causation and damages.[257] As discussed in the previous subpart, initially, res ipsa loquitur only applied to multiple defendants in very limited circumstances.

In 1944, the California Supreme Court extended res ipsa loquitur in *Ybarra v. Spangard*.[258] In *Ybarra*, the plaintiff went into the hospital for an appendectomy but left surgery with a sharp pain in his right shoulder. He argued that this "present[ed] a proper case for the application of the doctrine of res ipsa loquitur" and sued multiple defendants involved in his care.[259] Defendants argued that even if he was injured in the hospital "there [was] no showing that the act of any particular defendant, nor any particular instrumentality, was the cause thereof."[260] The court concluded that res ipsa loquitur was applicable in this case and offered the following reasoning:

> The present case is of a type which comes within the reason and spirit of the doctrine more fully perhaps than any other. . . . [I]t is difficult to see how the doctrine can, with any justification, be so restricted in its statement as to become inapplicable to a patient who submits himself to the care and custody of doctors and nurses, is rendered unconscious, and receives some injury from instrumentalities used in his treatment. Without the aid of the doctrine a patient who received permanent injuries of a serious character, obviously the result of some one's negligence, would be entirely unable to recover unless the doctors and nurses in attendance voluntarily chose to disclose the identity of the negligent person and the facts establishing liability.[261]

Ybarra illustrates how the doctrine has evolved beyond the single-defendant case. The defendants argued, in essence, that they could not all be at fault and, accordingly, should not all be held liable.[262] The court rejected this argument, holding that "all those defendants who had any control over

257. RESTATEMENT (SECOND) OF TORTS § 433B(3) (AM. L. INST. 1965).

258. 154 P.2d 687 (Cal. 1944).

259. *Id.* at 688. Plaintiff sued the surgeon, anesthetist, and several nurses. *Id.* at 689.

260. *Id.* at 688.

261. *Id.* at 689.

262. *Id.* The defendants' argument was simply that the plaintiff had not shown an injury caused by an instrumentality under one of the defendant's control because he had not shown which of the several instrumentalities that he came in contact with while in the hospital had caused the injury, and he had not shown that any one defendant or his servants had exclusive control over any particular instrumentality. The defendants asserted that some of them were not employees of the other defendants, that some did not stand in any permanent relationship from which liability in tort would follow, and that in view of the nature of the injury, the number of defendants, and the different functions performed by each, they could not all be liable for the wrong, if any.

his body or the instrumentalities which might have caused the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct."[263] In effect, *Ybarra* combines theories of res ipsa loquitur and joint liability to hold several actors liable when the plaintiff's case relied entirely on circumstantial evidence of negligence and causation.[264] While most courts have refused to follow *Ybarra*,[265] the case importantly illustrates how the two doctrines can merge. As the Law of Torts explains:

> In some of the multiple actor cases, courts have not only dropped the exclusive control requirement but have sometimes imposed liability upon defendants who are not likely to have been the wrongdoers. In doing so, they have sometimes said that joint control of those in a group is enough to make all in the group liable for the negligence of some member whose identity is unknown, or that two or more defendants owed a "joint duty" to the plaintiff.[266]

Res ipsa loquitur has evolved to impose liability on multiple defendants when one, but not all, defendants were the direct cause of the injury.

E. Causa Per Se

Typically, when torts plaintiffs rely on res ipsa loquitur, it is because they have an evidentiary problem: they know they have been injured; they are certain the injury was caused by someone's negligence, but they cannot offer specific details about that negligence, and they may be uncertain about whom amongst several defendants caused the injury. Similarly, victims of police excessive force know that there was a constitutional violation, but they cannot offer specific details about the police misconduct, and they are unable to specify whom among the officers present deprived them of their constitutional right and who failed to intervene to stop the deprivation.

Ybarra's expanded version of res ipsa loquitur seems to offer the § 1983 plaintiffs discussed herein a viable path to liability. There are clear similarities between tort plaintiffs who rely on res ipsa loquitur and § 1983 plaintiffs who are unable to prove who amongst a group of government

263. *Id.* at 691.

264. *See* Harris v. Cleveland, 294 S.W.2d 235, 242 (Tex. App. 1956) ("In *Ybarra v. Spangard*, the court applied the doctrine of res ipsa loquitur to establish prima facie joint liability on the part of all doctors, nurses, attendants, etc., having contact with a patient undergoing operative procedure, who sustained a traumatic injury while under anesthesia.").

265. *See, e.g.*, Barrett v. Emanuel Hosp., 669 P.2d 835, 839 (Or. Ct. App. 1983) (stating that the Oregon Supreme Court prefers to use a res ipsa loquitur inference of negligence only when the plaintiff can show that the injury was probably caused by some negligent conduct of a particular defendant and rejecting the theory in *Ybarra* that negligent conduct can be presumed completely inferentially).

266. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 174 (2d ed. 2000).

officials caused them to be deprived of a constitutional right. Nevertheless, courts largely have refused to apply expanded res ipsa loquitur theories into § 1983 litigation.[267] Some have reasoned that res ipsa loquitur only applies in cases alleging negligence and that most constitutional torts require higher levels of mens rea.[268] Others have held that it is only appropriate if the plaintiff sues every person who may have been responsible for the injury.[269]

As the previous two subparts observe, there are real differences between torts liability and liability under § 1983, and neither res ipsa loquitur nor joint tort liability, at least in their traditional forms, should apply in § 1983 litigation. Interestingly, at least in some respects, many § 1983 plaintiffs who are suing multiple officers for excessive force are better positioned than tort plaintiffs who are relying on res ipsa loquitur or joint tort theories of liability. Tort plaintiffs often use res ipsa to establish both negligence and causation.[270] In § 1983 "personal responsibility" cases, there is often no dispute that there was a constitutional violation—the focus is mostly, if not entirely, on the question of causation. In short, tort res ipsa loquitur plaintiffs have more to prove than § 1983 plaintiffs.

Instead of trying to shoehorn § 1983 cases into res ipsa loquitur's framework, I propose creating a new rule—*causa per se*—to establish causation in § 1983 cases involving multiple defendants. This theory borrows

267. Bard v. Brown County, No. 1:15-CV-643, 2019 WL 590357, at *15 (S.D. Ohio Feb. 13, 2019) ("[A] *res ipsa loquitur*-type theory is not a basis for imposing liability under § 1983.").

268. *See, e.g.*, Clark–Murphy v. Foreback, 439 F.3d 280, 286 (6th Cir. 2006) (finding the res ipsa loquitur rationale insufficient to establish deliberate indifference); English v. Murphy, No. 1:09-CV-866, 2013 WL 1465321, at *5 (M.D.N.C. Apr. 11, 2013) (same); Hunt *ex rel.* Chiovari v. Dart, 754 F. Supp. 2d 962, 977 (N.D. Ill. 2010) ("[T]he [res ipsa loquitur] doctrine is confined to negligence cases . . . and this is a constitutional tort case in which the plaintiff must prove intent."); Harvey v. City of South Lake Tahoe, No. 2:10-CV-1653-KJM-EFB PS, 2013 WL 4543965, at *8 (E.D. Cal. Aug. 27, 2013) ("[T]he doctrine of *res ipsa loquitur* cannot be used to prove 'deliberate indifference.'").

269. *See, e.g.*, Colbert v. City of Chicago, 851 F.3d 649, 659 (7th Cir. 2017) (holding that a plaintiff suing only "four of the ten" suspect officers could not "satisfy § 1983's individual-responsibility requirement"). In *Colbert*, the court rejected plaintiff's request to apply res ipsa loquitur principles and offered the following rationale:

> We have previously observed that § 1983 claims and accompanying "burden-shift" arguments like those we now confront all sound in res ipsa loquitur tort liability. To succeed on this theory of liability in Illinois, plaintiffs must join "all parties who could have been the cause of the plaintiff's injuries . . . as defendants." Doing so ensures that "liability will surely fall on the actual wrongdoer." Otherwise, "there is a real possibility that the defendant actually responsible for the injuries is not before the court."

Id. (citations omitted) (quoting Smith v. Eli Lilly & Co., 560 N.E.2d 324, 339–40 (Ill. 1990)). *See, e.g.*, Priest v. Holbrook, No. 2:17-CV-133-RMP, 2020 WL 733884, at *6 (E.D. Wash. Feb. 13, 2020) (concluding that "[e]ven if it is appropriate to apply res ipsa loquitur to Section 1983 claims, uncontroverted facts on the record show that the named Defendants in this matter were not the only people who [could have deprived the plaintiff of his constitutional right]").

270. Tillman v. Menard, Inc., No. 1:17-CV-61-ACL, 2018 WL 5786270, at *4 (E.D. Mo. Nov. 5, 2018).

from theories of res ipsa loquitur and joint and several liability and, consequently, closely resembles *Ybarra*'s expanded version of res ipsa.

Liability under § 1983 requires proof of causation. Yet, procedural rules and police practices often make it difficult for plaintiffs to prove who caused their injuries. As noted in Part I, police norms that encourage silence and inefficacious discovery rules make it difficult for plaintiffs to identify who injured them. Yet, when a § 1983 plaintiff is able to offer evidence of a Fourth Amendment deprivation, courts should adopt a theory of *causa per se*. That is, when a § 1983 plaintiff presents evidence of excessive force and proves that the defendant was present at the scene, the plaintiff has established *causa per se*, which translates from Latin to "cause in itself." Under this theory, all defendants who are present during the constitutional violation are equally liable, and the burden shifts to each individual defendant to prove that he or she did not cause the violation.[271]

Insisting that a § 1983 plaintiff who is the victim of excessive force identify the tortfeasor is like asking a plaintiff "rendered unconscious for the purpose of undergoing surgical treatment by the defendants"[272] to identify who caused the plaintiff's injury. "[I]t is manifestly unreasonable."[273] Both the unconscious defendant and the victim of police violence should not be expected to know and identify who injured them.[274] Furthermore, plaintiffs are in this position because of the defendants' conduct. *Causa per se*, like res ipsa loquitur, "places a strong incentive on the party with superior knowledge to explain the cause of an accident and to come forward with evidence in its defense."[275]

However, it is important to note that *causa per se* does not necessarily result in joint liability. When a plaintiff offers evidence of a constitutional violation and that the defendant was present around the time of the violation, a fact finder could infer causation. This shifts the burden of production to the defendants.[276] Defendants may avoid liability by coming forward with

271. *See* Jerista v. Murray, 883 A.2d 350, 360 (N.J. 2005) (discussing the "strong incentive" of res ipsa loquitur on defendants to produce evidence that stops short of directly shifting the burden of proof to defendants).

272. Ybarra v. Spangard, 154 P.2d 687, 690 (Cal. 1944).

273. *Id.*

274. Stone v. Courtyard Mgmt. Corp., 353 F.3d 155, 160 (2d Cir. 2003) ("It is impossible for the plaintiff to say which of these two defendants was at fault in this case (if either), but that is precisely why New York law allows plaintiff to employ the *res ipsa loquitur* inference against each defendant and let them explain what happened.").

275. *Jerista*, 883 A.2d at 360.

276. Of course, ultimately, to prevail, the plaintiff would also have to prove that each of the officers acted under the color of law. This, however, is not usually an issue when officers are on duty. *See* Teressa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 VILL. L. REV. 839, 849 (2017) (explaining that the "under color of law" requirement depends, in part, on whether a defendant officer was acting "within the scope of his duties or office").

evidence that shows they did not inflict the injury and could not have prevented the injury from being inflicted. More often than not, they will accomplish this by testifying about what happened. If defendants fail to offer evidence that they did not cause the constitutional deprivation, then the plaintiff has established a prima facie case, and the defendants may be jointly liable for the plaintiff's damages.

Conclusion

Courts have debated the phrase "subjects or causes to be subjected" since at least 1961.[277] And its ambiguity gives courts the leeway to incorporate their own normative concepts of causation and liability. A narrow interpretation will limit liability to the most proximate cause—the police official who kicks the defendant in the face. A broad interpretation guarantees that municipalities will be liable for their employees' malfeasances. Viewed solely in the context of § 1983 substantive law, it appears that courts have landed somewhere in the middle of the spectrum.

Yet, police misconduct is not judged in the vacuum of § 1983 substantive law. It is filtered through procedural rules and police customs. Combined, § 1983 law, procedural rules, and police norms conceal misconduct and shield police from liability and accountability. Courts can shift this narrative by adopting *causa per se* and shifting the burden of producing evidence of causation on the defendants.

Causa per se is not per se liability. Section 1983 plaintiffs will still have significant obstacles to overcome. However, *causa per se* will change the balance in these multiple-defendant police misconduct cases by placing the burden of production on those most able to bear its onus—the police officials who know what happened. And in so doing, *causa per se* breaks down the blue wall of silence, increases police accountability, and increases the chances that victims of police violence will be compensated.

277. *See, e.g.*, Monroe v. Pape, 365 U.S. 167, 168 (1961) (referring to the interpretation of the language of § 1983 as "an important question").