

COMMENTS

Preserving Procedure: Requiring the Government to Disprove Causation in Procedural Due Process Claims*James M. Burnham*[†]

INTRODUCTION

A recurring problem for procedural due process plaintiffs is that although the Constitution requires process, its absence often causes no actual damages. Consider, for example, *Carey v Piphus*,¹ the Supreme Court's leading case on damages for procedural due process violations. In *Carey*, a public school violated two students' procedural due process rights by suspending them without a hearing.² The boys were unable to show, however, that the school's actions caused them any actual injury³ (probably because the school would have suspended them regardless of whether it had held a formal hearing), raising the question of what damages should be available to someone whose procedural due process rights were violated but who suffered no actual harm. The Court held that plaintiffs suing the government under 42 USC § 1983 for depriving them of procedural due process are entitled only to actual damages or nominal damages not to exceed \$1.⁴ This meant that the two boys—unable to show that a formal hearing would have altered the school's suspension decisions and thus unable to prove any actual damages—effectively recovered nothing.⁵

The circuits disagree about the mechanics of proving the causal connection between the process deprivation and the substantive result—splitting over which party bears the burden of proving causation

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¹ 435 US 247 (1978).

² *Id.* at 250–51.

³ *Id.* at 252.

⁴ *Carey*, 435 US at 266–67. Nominal damages are awarded because they are necessary to support a cause of action. *Id.* at 266.

⁵ *Id.* at 267 (“The [district court] suggested that . . . an award of damages for injuries caused by the suspensions would constitute a windfall, rather than compensation.”).

once the plaintiff establishes a due process violation.⁶ All circuits to address the issue, except the Second Circuit, have departed from “the ordinary default rule that plaintiffs bear the risk of failing to prove their claims”⁷ and have held that the government bears the burden of proving that it would have taken the same action even if it had provided the necessary process. In those circuits, once the plaintiff proves that he has been deprived of process, the burden shifts to the government to show that the deprivation did not affect the substantive result.⁸ The Second Circuit does the opposite, requiring plaintiffs to prove the causal connection as well as the procedural deprivation.⁹

This dispute has sweeping implications. It is relevant whenever a plaintiff seeks damages for a procedural due process violation and affects areas as varied as prisoner disputes,¹⁰ public education,¹¹ and even eminent domain.¹²

⁶ Compare *McClure v Independent School District No 16*, 228 F3d 1205, 1213 (10th Cir 2000) (holding that once a § 1983 plaintiff establishes a procedural due process violation, the burden shifts to the government to show that the substantive outcome was unaffected by the deprivation of process); *Brewer v Chauvin*, 938 F2d 860, 864 (8th Cir 1991) (same); *Alexander v Polk*, 750 F2d 250, 263–64 (3d Cir 1984) (same); *Kendall v Board of Education of Memphis City Schools*, 627 F2d 1, 6 n 6 (6th Cir 1980) (same); *Piphus v Carey*, 545 F2d 30, 32 (7th Cir 1976) (same), reversed on other grounds, 435 US 247 (1978), with *Graham v Baughman*, 772 F2d 441, 446 (8th Cir 1985) (requiring the plaintiff to prove each element of a § 1983 claim, including those elements relating to damages), overruled sub silentio, *Brewer*, 938 F2d at 864; *McCann v Coughlin*, 698 F2d 112, 126 (2d Cir 1993) (joining *Graham*).

⁷ *Schaffer v Weast*, 546 US 49, 56 (2005), citing John W. Strong, ed, 2 *McCormick on Evidence: Practitioner Treatise Series* § 337 at 412 (West 5th ed 1999). *Schaffer* did not alter the law on burden-shifting—it merely applied it and concluded that shifting was inappropriate in the context of Individuals with Disabilities Education Act (IDEA), Pub L No 91-230, 84 Stat 175 (1970), codified at 20 USC § 1400 et seq. See *Schaffer*, 546 US at 57–58 (“[W]hile the normal default rule does not solve all cases, it certainly solves most of them.”). The Court also noted that “[i]n numerous [] areas, we have presumed or held that the default rule applies.” *Id* at 57.

⁸ See, for example, *Alexander*, 750 F2d at 263–64 (“Thus, on remand the [government] will have the burden of demonstrating either that [the state] would not have held fair hearings upon request, or that the plaintiffs would not have prevailed at any such hearings had they been held.”).

⁹ See, for example, *McCann*, 698 F2d at 126 (“*Carey v. Piphus* [] clearly establishes that [the plaintiff] has an obligation to prove how the constitutional deprivations he suffered caused his injury.”).

¹⁰ See, for example, *id* (adjudicating a dispute between an inmate and a prison).

¹¹ See, for example, *McClure*, 228 F3d at 1213 (10th Cir 2000) (adjudicating a dispute between a school principal and a public school district).

¹² See, for example, *Brody v Village of Port Chester*, 434 F3d 121, 132 n 8 (2d Cir 2005) (adjudicating an eminent domain dispute between a property owner and a municipality). In *Brody*, the Second Circuit found that the Village of Port Chester violated Bill Brody’s right to procedural due process when it took his property with notice that was insufficient in both its “means and content.” *Id* at 123. The Second Circuit then remanded the case to the district court for a determination of what damages, if any, the government owed Brody. See *id* at 124. The Second Circuit’s allocation of the burden may well determine the outcome. See also *Lavine v Milne*, 424 US 577, 585 (1976)

Part I of this Comment outlines each circuit's reasoning for allocating the burden of proving causation. Most circuits have consistently shifted the burden of proof, while the Second Circuit's position is more complex. Part I also introduces *Mount Healthy City School District Board of Education v Doyle*,¹³ the burden-shifting circuits' primary source of support.

Part II then analyzes the primary flaw in the burden-shifting circuits' reasoning: that those circuits have not considered how relying on *Mount Healthy* implicates the entire universe of § 1983 constitutional claims.

Finally, Part III proposes a solution. Because the majority of circuits are correct to shift the burden of proof but use problematic reasoning, they should instead rely on "the ordinary rule" that a litigant generally does not have to establish facts "peculiarly within the knowledge of his adversary."¹⁴ The Second Circuit should also apply this rule and begin shifting the burden of proving causation to the government once a § 1983 plaintiff proves a procedural due process violation.

I. THE CIRCUITS ARE DIVIDED ABOUT WHICH PARTY BEARS THE BURDEN OF PROVING CAUSATION

The Supreme Court's decision in *Carey* puts causation at the center of procedural due process cases. The plaintiffs were Silas Brisco and Jarius Piphus, two students who went to trial together to challenge their hearingless suspensions from the same public school.¹⁵ The school principal had caught Piphus smoking an irregularly shaped cigarette and smelling of marijuana.¹⁶ Piphus was suspended from school for twenty days without any formal disciplinary procedure.¹⁷ Brisco had a similar experience.¹⁸ The district court found that both suspensions violated the boys' Fourteenth Amendment rights to procedural due process.¹⁹

("Where the burden of proof lies on a given issue is . . . rarely without consequence and frequently may be dispositive to the outcome of the litigation or application.").

¹³ 429 US 274 (1977).

¹⁴ *Campbell v United States*, 365 US 85, 96 (1961). For additional citations to the ordinary rule, see note 89.

¹⁵ See *Carey*, 435 at 251.

¹⁶ *Id* at 248–49.

¹⁷ *Id* at 249 (noting that although two meetings were arranged among Piphus, his mother and sister, school officials, and representatives from a legal aid clinic, "[t]he purpose of the meetings was not to determine whether Piphus was smoking marijuana, but rather to explain the reasons for the suspension").

¹⁸ *Id* at 250 (explaining that Brisco received a twenty-day suspension from school for refusing to remove a small earring, which was prohibited by school rules).

¹⁹ See *Carey*, 435 US at 251.

On appeal, the primary dispute concerned the “elements and prerequisites for recovery of damages” by a litigant who has proven a procedural due process violation.²⁰ The Court held that damages in § 1983 procedural due process cases should be compensatory and available only for actual harm.²¹ To ensure that procedural rights could be vindicated even if the victims suffered no harm, the Court also held that “the denial of procedural due process should be actionable for nominal damages without proof of actual injury.”²²

Victims of procedural due process violations can therefore recover only for harm directly caused by the denial of process (such as emotional harm)²³ or for harm caused by the substantive underlying deprivation if legally sufficient process would have prevented that underlying deprivation. In other words, because “injury caused by a justified deprivation . . . is not properly compensable under § 1983,”²⁴ the students could recover for their suspensions only if the suspensions resulted from the denial of process. By limiting damages to actual harm, *Carey* thus made the question of causation—whether the lack of process caused the deprivation—the central issue in procedural due process cases.

Carey did not, however, resolve the crucial question of which party should bear the burden of proving causation. Several circuits have grappled with this issue, with all but the Second concluding that the burden to disprove causation should shift to the government. Part I.A explains the reasoning of the burden-shifting circuits. Part I.B then outlines the Second Circuit’s reasons for leaving the burden of proving causation on plaintiffs, with a narrow exception.

²⁰ See *id.* at 248.

²¹ See *id.* at 254. The Court went on to quote a popular treatise’s statement that “[t]he cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant’s breach of duty.” *Id.* at 254–55, quoting *Fowler V. Harper and Fleming James, Jr.*, 2 *Law of Torts* § 25.1 at 1299 (Little, Brown 1956). The Court specifically distinguished this context from that of defamation, where damages are presumed. See *Carey*, 435 US at 262–63 (“[I]n contrast to the immediately distressing effect of defamation *per se*, a person may not even know that procedures *were* deficient until he enlists the aid of counsel to challenge a perceived substantive deprivation.”).

²² *Carey*, 435 US at 266, citing Dan B. Dobbs, *Handbook on the Law of Remedies* § 3.8 at 191–93 (West 1973); Restatement of Torts § 907 (1939); Charles T. McCormick, *Handbook on the Law of Damages* §§ 20–22 at 85–91 (West 1935). The Court explained that nominal damages recognize the importance of the violated rights without straying from “the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.” *Carey*, 435 US at 254–55.

²³ See, for example, the discussion in *Carey*, 435 US at 262.

²⁴ *Id.* at 263.

A. The Burden-shifting Circuits Rely on *Mount Healthy* and the Court's Opinion in *Carey* for Support

The burden-shifting circuits rely on two sources of support. Foremost, *Mount Healthy* has dominated the burden-shifting discussion in procedural due process cases. Every burden-shifting circuit interprets *Mount Healthy* to stand for the general proposition that the burden shifts to the government whenever a § 1983 plaintiff proves a constitutional violation—a general proposition that they then apply in the procedural due process context. As a secondary justification, the Third and Sixth Circuits also rely on *Carey* itself.²⁵

1. The Court's decision in *Mount Healthy*.

In *Mount Healthy*, the Supreme Court held that whenever a plaintiff shows that governmental action against him was partially motivated by an illegal consideration, the government bears the burden of proving that the illegal consideration did not cause the plaintiff's harm.²⁶ The case arose out of the Mount Healthy City Board of Education's failure to renew Fred Doyle's teaching contract.²⁷ After teaching at the school for several years, Doyle became involved in disruptive incidents that culminated with him telephoning a local radio show to criticize a new Board policy.²⁸ After the phone call, the Board declined to renew Doyle's contract.²⁹ Doyle then filed a § 1983 action against the Board. The district court found that the Board violated Doyle's First Amendment rights by terminating him partly in retaliation for his phone call.³⁰

On appeal, the Supreme Court held that once a discharged public employee proves that constitutionally protected speech was a "motivating factor" in his superiors' decision to terminate him, the burden shifts to the government to prove that it would have fired the employee

²⁵ See *Alexander v Polk*, 750 F2d 250, 264 (3d Cir 1984); *Kendall v Board of Education of Memphis City Schools*, 627 F2d 1, 6 (6th Cir 1980).

²⁶ 429 US at 287.

²⁷ See *id* at 276.

²⁸ *Id* at 281–82. These incidents included Doyle's arguing with school cafeteria employees over the (apparently insufficient) amount of spaghetti served to him and his using "obscene gestures" in response to two female students who failed to obey his directions. *Id*.

²⁹ *Id*.

³⁰ See *Mount Healthy*, 429 US at 282 ("[The District Court] concluded that respondent Doyle's telephone call to the radio station was 'clearly protected by the First Amendment,' and that because it had played a 'substantial part' in the decision of the Board not to renew Doyle's employment, he was entitled to reinstatement with backpay."). Shortly after Doyle was terminated, he "requested a statement of reasons for the Board's actions. He received a statement . . . that . . . was followed by references to the radio station incident and to the obscene-gesture incident." *Id* at 282–83.

regardless of his protected speech.³¹ As the Court explained, once Doyle showed that his conduct is constitutionally protected, “the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent’s reemployment even in the absence of the protected conduct.”³²

2. The reasoning of the burden-shifting circuits.

In the Third Circuit’s leading case on procedural due process burden-shifting, the court found that the city of Philadelphia had given insufficient process to an entire class of plaintiffs.³³ The Third Circuit held that once the plaintiffs established the procedural violation, the city assumed the burden of proving that the lack of process did not affect its decision to terminate the plaintiffs’ benefits.³⁴

The Third Circuit reasoned that its decision was “consistent with the holding in the analogous case of *Mount Healthy*.”³⁵ It explained that *Mount Healthy* stood for the principle that “the establishment of a prima facie violation of law operates to shift the burden to the defendant to show that the plaintiff would have been discharged despite the allegedly illegal act.”³⁶ This principle, the court concluded, applies in the *Carey* context as well. As a secondary rationale, the Third Circuit noted that in *Carey* itself, “the Supreme Court approved at least implicitly the Seventh Circuit’s holding that the burden of showing that the plaintiffs would not have prevailed [if given due process] is on the defendants.”³⁷

The Sixth Circuit took a similar path and adopted a broad understanding of *Mount Healthy*. It explained that the *Mount Healthy* rule was that “once the plaintiff has established a deprivation of constitutional rights, the burden of proof shifts to the defendant to demonstrate that the deprivation of constitutional rights did not cause the plaintiff’s injury.”³⁸

Like the Third Circuit, the Sixth Circuit relied partly on *Carey*. In a later case, the court quoted the Supreme Court’s statement that

³¹ See *id.* at 287.

³² *Id.*

³³ *Alexander v Polk*, 750 F.2d 250, 259–62 (3d Cir. 1984).

³⁴ *Id.* at 264 (“[O]n remand the City will have the burden of demonstrating either that the Commonwealth would not have held fair hearings upon request, or that the plaintiffs would not have prevailed at any such hearings had they been held.”).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Alexander*, 750 F.2d at 263.

³⁸ *Kendall v Board of Education of Memphis City Schools*, 627 F.2d 1, 6 n.6 (6th Cir. 1980).

“[w]e do not understand the parties to disagree with this conclusion. Nor do we.”³⁹ Interpreting the quoted language from *Carey* to refer to the lower court’s use of burden-shifting, the Sixth Circuit concluded that in *Carey* “the Supreme Court [] also implicitly approved this allocation of the burden of disproving causation.”⁴⁰

By contrast, the Eighth and Tenth Circuits rely solely on *Mount Healthy*.⁴¹ With little additional discussion, the Eighth Circuit cited *Mount Healthy* for the proposition that “the public employer carries the burden of proving that the plaintiff would have been fired even if procedural due process had been observed.”⁴² The Tenth Circuit adopted a similar understanding, explaining that “*Mt. Healthy* and *Village of Arlington Heights* make clear that once a plaintiff establishes a constitutional violation, the burden shifts to the defendant to show by a preponderance of the evidence that it would have reached the same result absent the violation.”⁴³

B. The Second Circuit Leaves the Burden of Proving Causation on the Plaintiff

The Second Circuit first considered the burden-shifting issue in a suit brought by Vincent McCann, a convicted felon incarcerated in a

³⁹ *Id.*, quoting *Carey*, 435 US at 260.

⁴⁰ *Franklin*, 795 F2d at 1264. See also *Alexander*, 750 F2d at 263 (“[T]he Supreme Court approved at least implicitly the Seventh Circuit’s holding that the burden of showing that the plaintiffs would not have prevailed [if given due process] is on the defendants.”).

⁴¹ See *McClure v Independent School District No 16*, 228 F3d 1205, 1213 (10th Cir 2000); *Brewer v Chauvin*, 938 F2d 860, 864 (8th Cir 1991).

⁴² See *Brewer*, 938 F2d at 864. *Brewer* included the following summary of *Mount Healthy*:

In a section 1983 case involving the violation of a public school teacher’s First Amendment rights, the Court held that the burden is on the defendant to show by “a preponderance of the evidence that it would have reached the same decision” even if the constitutionally protected activity had not been considered in the employment decision.

Brewer, 938 F2d at 865, quoting *Mount Healthy*, 429 US at 274. The path the Eighth Circuit followed to burden-shifting is more complex. It initially held in *Graham v Baughman*, 772 F2d 441 (8th Cir 1985), that “[i]n order for a plaintiff in a § 1983 action to be entitled to compensatory damages for a violation of procedural due process, he must prove that the violation actually was the cause of his injury or deprivation.” *Id.* at 446, citing *McCann v Coughlin*, 698 F2d 112, 126 (2d Cir 1983). But this was later overruled by *Brewer*, which does not cite or acknowledge *Graham*. See *Brewer*, 938 F2d at 865.

⁴³ *McClure*, 228 F3d at 1213. *Village of Arlington Heights v Metropolitan Housing Development Corporation*, 429 US 252 (1977), was the companion case to *Mount Healthy*. It was handed down on the same day and the two cases cite only each other for the proposition that the plaintiff’s proof of a violation triggers a burden-shift to the defendant on the issue of harm. See *Mount Healthy*, 429 US at 287 n 2; *Village of Arlington Heights*, 429 US at 270–71 n 21 (stating that proof of a racially discriminatory purpose would have shifted the burden to the defendant to establish that “the same decision would have resulted even had the impermissible purpose not been considered”).

New York state penitentiary who had been punished without a hearing.⁴⁴ The Second Circuit held that, although McCann's hearingless punishment violated his procedural due process rights,⁴⁵ he retained the burden of proving causation because "*Carey v. Phiphus* [] clearly establishes [that the plaintiff] has an obligation to prove how the constitutional deprivations he suffered caused his injury."⁴⁶

Several years later, the Second Circuit created an exception to this rule.⁴⁷ The plaintiff, Emmanuel Patterson, like McCann before him, was a convicted felon serving time in a New York state penitentiary.⁴⁸ At Patterson's trial, the defendant-prison argued that because Patterson was unable to prove that the denial of process caused him any injury, he should not recover damages.⁴⁹ But the prison prevented Patterson from calling any prisoners as trial witnesses, which effectively made it impossible for him to prove causation.⁵⁰ The court held that "even as to an issue on which the plaintiff normally has the burden of proof, it would be inappropriate to rule that the defendants should prevail where they have made proof impossible."⁵¹ Therefore, "in the present case the burden [] shifted to the state" to show that the outcome would have been unchanged if it had provided the constitutionally required process.⁵²

⁴⁴ *McCann*, 698 F2d at 116–18. After getting into a fight with a fellow inmate, Vincent McCann went to the prison doctor for medical treatment. During his examination, McCann's fighting spirit returned, leading him to kick the doctor violently. An internal prison board decided to punish him, rejecting McCann's contention that "the doctor was hurting him by moving his leg, and he accidentally kicked the doctor as he tried to pull his leg away." McCann's claim arose from the fact that "[a]t neither hearing was McCann given any reasons for the Committee's decision, nor did he receive a statement of the evidence relied upon." *Id.* at 117–18.

⁴⁵ See *id.* at 122 ("McCann had a right to basic due process protections when he was summoned before the Adjustment Committee on August 14 and 15.").

⁴⁶ *Id.* at 126, citing *Carey*, 435 US at 260. The Second Circuit's rule actually goes further than this, giving the plaintiff the burden of proving causation in all § 1983 cases. See, for example, *Quartararo v Hoy*, 113 F Supp 2d 405, 418 (EDNY 2000), citing *Miner v City of Glens Falls*, 999 F2d 655, 660 (2d Cir 1993).

⁴⁷ See *Patterson v Coughlin*, 905 F2d 564, 570 (2d Cir 1990).

⁴⁸ *Id.* at 566.

⁴⁹ *Id.* at 568.

⁵⁰ *Id.*

⁵¹ *Patterson*, 905 F2d at 569–70, citing *Memphis Community School District v Stachura*, 477 US 299, 310–11 (1986) ("When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate.").

⁵² *Patterson*, 905 F2d at 570. This holding on the burden of proof meant that Patterson prevailed in his suit. See *id.*

The State has not asked that it be permitted to go to trial on the issue of causation if we conclude that it has the burden of proof in these circumstances, undoubtedly because it could not carry that burden, given the unavailability of [the witness]. Accordingly, we agree with the district court that Patterson had done all that was required of him to establish that his con-

The Second Circuit later elaborated on the limited nature of this exception.⁵³ The exception applies, the court explained, when “the defendant prevents the plaintiff from obtaining access to evidence, and thereby makes it impossible for the plaintiff to carry the burden of proof.”⁵⁴ Only then does “the burden shift[] to the defendant to prove that the deprivation of [the] plaintiff’s liberty or property right would have occurred even if due process had been afforded.”⁵⁵

II. RELIANCE ON *MOUNT HEALTHY* FOR BURDEN-SHIFTING IS MISPLACED

This Part explains why the burden-shifting circuits’ reliance on a broad conception of *Mount Healthy* is misplaced.⁵⁶ The broad conception of *Mount Healthy* conflicts with the Supreme Court’s own understanding of the case and has unforeseen implications for all § 1983 constitutional cases.

A. The Burden-shifting Solution in *Mount Healthy* Is Limited to Cases Involving a “Mixed Motive”

Because of *Mount Healthy*’s very different factual basis, the burden-shifting courts have analogized to it at a high level of abstraction, interpreting it as a general rule applying to all § 1983 claims. But for two reasons this interpretation is precluded by the Supreme Court’s understanding of the case.

First, the Court has generally considered *Mount Healthy* to be just one of many “mixed motive” cases, even chastising a lower court for applying it outside the mixed motive domain.⁵⁷ Mixed motive cases—most prominent in the pre-1991 Title VII context⁵⁸—are those in which a defendant takes adverse action against a plaintiff that is motivated, in part, by some illegal consideration. A classic example is a case in

finement to [a special housing unit] was an injury caused by defendants’ denial of his due process right to call witnesses.

⁵³ See *Miner*, 999 F2d at 660.

⁵⁴ *Id.* at 660–61 (declining to shift the burden to the defendant because the plaintiff was able to subpoena relevant witnesses).

⁵⁵ *Id.* at 660. See also, for example, *Quartararo*, 113 F Supp 2d at 418 (“The burden shifted because the defendants essentially prevented plaintiff from proving his version of the events at issue.”).

⁵⁶ This puts aside the Second Circuit’s decisions for a moment. Part III resumes the general burden-shifting discussion.

⁵⁷ See, for example, *McKennon v Nashville Banner Publishing Co.*, 513 US 352, 359 (1995).

⁵⁸ Title VII has been amended so that now the plaintiff prevails if he or she shows discrimination played any role in the defendant’s decisionmaking. See Civil Rights Act of 1991 § 107, Pub L No 102-166, 105 Stat 1071, 1075, codified at 42 USC § 2000e-2(m).

which a terminated employee is able to prove that racial or gender bias was one of the reasons for his termination but cannot prove that the bias was the overriding or primary reason.⁵⁹ In such situations, where the defendant has a mix of legal and illegal motives, the Court has routinely held that “the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed [bias] to play [] a role.”⁶⁰

Second, just one year after deciding *Mount Healthy*, the Court expressly declined to resolve the open question of whether the burden of proving causation shifts once a § 1983 plaintiff establishes a constitutional violation.

1. The level of generality at which the burden-shifting courts rely on *Mount Healthy* conflicts with the Supreme Court’s understanding of the case.

In *McKennon v Nashville Banner Publishing Co.*,⁶¹ the Supreme Court criticized the lower court for adopting a broad understanding of *Mount Healthy*.⁶² The lower court had cited a Tenth Circuit case, which itself relied on *Mount Healthy*, for the proposition that an employee could not recover for wrongful termination under the Age Discrimination in Employment Act if any legitimate reason for firing the employee existed—even if the employer’s decision was motivated entirely by an illegal consideration.⁶³ The Court rejected this analogy, explaining that *Mount Healthy* was a mixed motive case that “was controlled by the difficulty, and what we thought was the lack of necessity, of disentangling the proper motive [of the teacher’s poor job performance and disruptive antics] from the improper one [of the teacher’s protected speech on the radio show,] where both played a part in the termination and the former motive would suffice to sustain the employer’s action.”⁶⁴ It concluded that unless “the problem confronted” is a defendant with a mixed motive then “mixed motives cases are inapposite” and “inapplicable.”⁶⁵ The Court said nothing about a connection between burden-shifting and constitutional claims.

⁵⁹ See, for example, *Price Waterhouse v Hopkins*, 490 US 228 (1989), one of the leading mixed motive cases.

⁶⁰ *Id.* at 244–45.

⁶¹ 513 US 352 (1995).

⁶² See *id.* at 359.

⁶³ See *id.*, citing *Summers v State Farm Mutual Automobile Insurance Co.*, 864 F.2d 700 (10th Cir. 1988).

⁶⁴ *McKennon*, 513 US at 359.

⁶⁵ *Id.* at 359–60.

Other cases have also made clear that burden-shifting in *Mount Healthy* was unrelated to the fact that the plaintiff was bringing a § 1983 constitutional claim. In *Price Waterhouse v Hopkins*⁶⁶—a mixed motive case not involving § 1983 or the Constitution—the Court relied on *Mount Healthy* and explained that the key to burden-shifting in that case was the defendant’s reliance on multiple motives.⁶⁷ In his concurrence, Justice White underlined that mixed motive cases such as *Mount Healthy* shift the burden because “there is no one ‘true’ motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.”⁶⁸

Each of the Court’s numerous other references to *Mount Healthy* interpreted the case narrowly.⁶⁹ The Court has cited *Mount Healthy* to support basic propositions in other cases involving defendants with mixed motives,⁷⁰ in cases involving retaliatory action for constitutionally protected speech,⁷¹ to support minor propositions,⁷² and, once, even for

⁶⁶ 490 US 228 (1989).

⁶⁷ Id at 249. The Court explained that *Mount Healthy* held that once a plaintiff shows his “constitutionally protected speech was a ‘substantial’ or ‘motivating factor’” in adverse treatment of him by his employer, then the employer has to prove that “it would have reached the same decision . . . even in the absence of the protected conduct.” Id, quoting *Mount Healthy*, 429 US at 287. Clearly, the Court saw *Mount Healthy* as applying to all mixed motive cases, § 1983 or not. Id. The *Price Waterhouse* Court also noted that “[i]n deciding as we do today, we do not traverse new ground.” Id at 248, citing *Mount Healthy*, 429 US 429, which itself cites *Village of Arlington Heights*, 429 US at 287 n 2.

⁶⁸ *Price Waterhouse*, 490 US at 260 (White concurring).

⁶⁹ Some of the burden-shifting circuits have implied that *Carey* itself adopted the perceived *Mount Healthy* rule. See, for example, *McClure*, 228 F3d at 1213 (“*Mt. Healthy* and *Village of Arlington Heights* make clear that once a plaintiff establishes a constitutional violation, the burden shifts to the defendant to show by a preponderance of the evidence that it would have reached the same result absent the violation.”), citing *Mount Healthy*, 429 US at 285–87 (once the plaintiff shows infringement of a constitutional right, the defendant must “show [] by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [constitutional violation]”); *Village of Arlington Heights*, 429 US at 271 n 21 (proof of constitutional violation shifts to defendant the “burden of establishing that the same decision would have resulted even had [the constitutional violation not occurred]”). But these parentheticals (used by the Tenth Circuit in *McClure*) are misleading and the conclusion that *Carey* implicitly extended *Mount Healthy* to all cases in which “a plaintiff establishes a constitutional violation” seems unwarranted. Although *Carey* does cite *Mount Healthy* and *Village of Arlington Heights*, it does so without explanation, only in the context of discussing the lower court’s opinion, and using the “cf.” signal. *Carey*, 435 US at 260. If the Court intended to extend *Mount Healthy*, it probably would have done so explicitly.

⁷⁰ See, for example, *Desert Palace, Inc v Costa*, 539 US 90, 93 (2003); *Crawford-El v Britton*, 523 US 574, 593 (1998); *NLRB v Transportation Management Corp*, 462 US 393, 403 (1983).

⁷¹ See, for example, *Hartman v Moore*, 547 US 250, 256 (2006) (asserting that “adverse action against government employee cannot be taken if it is in response to the employee’s ‘exercise of constitutionally protected First Amendment freedoms’”), quoting *Mount Healthy*, 429 US at 283–84; *Board of County Commissioners, Wabaunsee County v Umbehr*, 518 US 668, 699–700 (1996) (discussing public employees fired in part because of First Amendment–protected speech), citing

the opposite proposition that “we have usually assumed without comment that plaintiffs bear the burden of persuasion regarding the essential aspects of their claims.”⁷³

2. The Court has left open the burden of proof question.

Although not expressly rejecting a burden-shifting rule for all § 1983 cases, the Court has declined to embrace the general rule articulated by the burden-shifting courts. In *Regents of the University of California v Bakke*,⁷⁴ the plaintiff, Allan Bakke, had sued the University of California at Davis’s medical school for rejecting his application while using an admissions program in which 16 of the 100 positions in the class were reserved for “disadvantaged” minority students.⁷⁵ Much like the procedural due process burden-shifting courts’ analogy to *Mount Healthy*, the California Supreme Court “analogized Bakke’s situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964.”⁷⁶ The court held that once Bakke established unconstitutional discrimination, the burden was appropriately shifted to the University of California “to demonstrate that [Bakke] would not have been admitted even in the absence of the special admissions program.”⁷⁷

The Supreme Court—not mentioning *Mount Healthy* once—declined to address the issue of which party bore the burden of proving causation, explaining: “Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.”⁷⁸ The Court then went on to discuss causation, assuming without further comment that plaintiffs—not defendants, as the California Supreme Court had held below—bear the burden of proving causation in § 1983 claims.⁷⁹ This discussion is further evidence that *Mount Healthy* did not establish a general burden-shifting rule.

Mount Healthy, 429 US at 280–81. See also, for example, *Waters v Churchill*, 511 US 661, 681 (1994); *Rankin v McPherson*, 483 US 378, 383–84 (1987); *Connick v Myers*, 461 US 138, 145–46 (1983).

⁷² See, for example, *Lewis v Casey*, 518 US 343, 394 (1996) (using *Mount Healthy* to support a point about jurisdiction); *Larson v Valente*, 456 US 228, 242 (1982) (same); *Duke Power Co v Carolina Environmental Study Group, Inc.*, 438 US 59, 71 (1978) (same).

⁷³ *Schaffer*, 546 US at 57 (listing cases from different areas of the law to illustrate the breadth of the rule and citing *Mount Healthy* with the parenthetical “First Amendment”).

⁷⁴ 438 US 265 (1978).

⁷⁵ *Id.* at 280.

⁷⁶ *Id.* (“On this basis, the [lower] court initially ordered a remand for determining whether, under the newly allocated burden of proof, Bakke would have been admitted . . . in the absence of the special admissions program.”), citing Civil Rights Act of 1964, 42 USC § 2000e.

⁷⁷ *Bakke v Regents of the University of California*, 533 P2d 1152, 1172 (Cal 1976).

⁷⁸ *Bakke*, 438 US at 280 n 13.

⁷⁹ *Id.* at 281–82 n 14. It is also worth noting that nothing in *Bakke* suggests the Court was carving out an exception to a general burden-shifting rule for those particular facts, though obvious-

B. Applying *Mount Healthy* to All § 1983 Cases Would Lead to Unanticipated Results

In addition to conflicting with the Court's understanding of *Mount Healthy*, adopting the perceived *Mount Healthy* rule would have implications for many other types of § 1983 constitutional claims—implications that the burden-shifting circuits do not appear to have considered. Plaintiffs currently retain the burden of proving causation after establishing a constitutional violation in, to name a few, claims against a municipality for its agents' actions,⁸⁰ recovery for overbroad polices prohibiting speech,⁸¹ deliberate indifference claims under the Eighth Amendment,⁸² and even claims for emotional damages resulting directly from the unconstitutional deprivation of process itself.⁸³

Further, consider how the perceived *Mount Healthy* rule would have affected the well-known University of Michigan affirmative action case of *Gratz v Bollinger*.⁸⁴ *Gratz* held that the University of Michigan's

ly the unresolved question exempts *Mount Healthy* and its "mixed motive" progeny—a § 1983 context where the Court has expressly allocated the burden of proof. It seems more likely that *Mount Healthy* (and any future burden-shifting context) is itself a carve-out from the general rule that the plaintiff bears the burden of proving causation.

⁸⁰ See, for example, *Allen v Muskogee, Oklahoma*, 119 F3d 837, 841–42 (10th Cir 1997) ("To establish a city's liability under 42 USC § 1983 for inadequate training of police officers in the use of force, a plaintiff must show . . . there is a direct causal link between the constitutional deprivation and the inadequate training."), citing *City of Canton v Harris*, 489 US 378, 391 (1989) ("[I]n the case at hand, respondent must still prove that the deficiency in training actually caused the police officers' indifference to her medical needs."). See also *Board of County Commissioners of Bryan County v Brown*, 520 US 397, 405 (1997) ("Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee.").

⁸¹ See, for example, *Hickory Fire Fighters Association v City of Hickory*, 656 F2d 917, 924–25 (4th Cir 1981) ("The second unresolved factual issue is whether any of the officers have been unlawfully deterred or 'chilled' in the exercise of First Amendment freedoms because of the statement. *If an officer could show such deterrence*, he might well be entitled to relief.") (emphasis added).

⁸² See, for example, *Beers v Ballard*, 248 Fed Appx 988, 991 (10th Cir 2007) ("[T]here is no evidence here that Mr. Barnes suffered additional pain or that the prison's untimely response precluded possible life-saving treatment. . . . [L]arge leap or short hop, plaintiffs must prove causation."); *Alberson v Norris*, 458 F3d 762, 766 (8th Cir 2006) (agreeing with the district court "that Ms. Alberson's claim fails for lack of proof of causation").

⁸³ See, for example, *Gomes v Wood*, 451 F3d 1122, 1131 (10th Cir 2006) (noting that for "damages arising *not* from the deprivation of liberty or property but from the denial of procedural due process itself" the plaintiff is "still required to prove causation"), citing *Carey*, 435 US at 264. This would include, for instance, emotional harm resulting from your child being taken into protective custody without any sort of hearing. See *Gomes*, 451 F3d at 1124–26.

⁸⁴ 539 US 244 (2003). There are, of course, many other types of constitutional violations that do not free plaintiffs of the burden of proving causation. See notes 80–83 and accompanying text. Also, this Comment takes no position on the substantive merits of the decision in *Gratz*. It is

admissions policy was facially invalid and violated the § 1983 plaintiffs' rights under both the Equal Protection Clause and the Due Process Clause.⁸⁵ This meant that the University of Michigan had deprived all "individuals who applied for and were denied admission . . . for academic year 1995 and forward and who are members of racial or ethnic groups that respondents treated less favorably on the basis of race"⁸⁶ of their constitutional rights. If adopted, the perceived *Mount Healthy* rule would have required the University of Michigan to prove that every rejected applicant who filed suit would still have been denied admission regardless of the race-conscious program.⁸⁷

Whether burden-shifting is desirable in each of these contexts, such a change should be made only after considering its implications in each different constitutional context. A more contextualized analysis may lead courts to conclude that the perceived *Mount Healthy* rule is overbroad and that, although burden-shifting is appropriate for procedural due process, requiring the government to disprove causation in all § 1983 claims goes too far.

III. WHO SHOULD BEAR THE BURDEN?

PROCEDURAL DUE PROCESS AND THE ORDINARY RULE THAT A DISPARITY IN INFORMATION JUSTIFIES BURDEN-SHIFTING

It remains necessary, therefore, to determine whether shifting the burden of proving causation is appropriate in § 1983 constitutional claims. *Carey*, despite the Third and Sixth Circuits' reliance on it, declined to adopt the lower court's decision to shift the burden of proving causation to the government, limiting its approval to the lower court's conclusion that "an award of damages for injuries caused by the suspensions would constitute a windfall . . . to respondents."⁸⁸ By not resolving the burden issue, *Carey* left the responsibility of performing burden-shifting analysis to future courts.

Analysis of how to allocate the burden of proving causation in procedural due process should focus on the "ordinary rule" that a litigant

used merely as a well-known example that illustrates some of the potential consequences of a general burden-shifting rule.

⁸⁵ See *Gratz*, 539 US at 275–76. The policy was not created the year Gratz applied in 1997 but had been in effect since at least 1995 and continued until 2003, the year of the Supreme Court's decision. *Id.* at 252–53, 256–57.

⁸⁶ *Id.* at 252–53.

⁸⁷ In other words, even though most individuals would have been denied admission regardless of race, in order to establish liability, the rejected students would only have had to file suit and then hope that the University of Michigan would be unable to prove it still would have turned them away.

⁸⁸ *Carey*, 435 US at 260.

generally does not have to establish facts “peculiarly within the knowledge of his adversary.”⁸⁹ This rule is typically a loose “question of policy and fairness based on experience in the different situations.”⁹⁰ It is applied in light of three very general factors: “policy considerations, convenience, and fairness.”⁹¹ As this Part shows, each factor supports burden-shifting in the procedural due process context.

A. Policy Considerations

The “policy considerations” factor, on its own, lacks meaning. But the Supreme Court has provided some guidance.

1. The relevant policy considerations.

Schaffer v Weast,⁹² the Court’s most recent burden-shifting case, outlines the three relevant policy considerations guiding burden-shifting analysis. The plaintiff in *Schaffer* was a student suffering from learning disabilities who sued his school for providing him with an inadequate Individual Education Plan as required by the Individuals with Disabilities Education Act⁹³ (IDEA).⁹⁴ The Court declined to shift the burden of proof although it recognized that the defendant school district had a “natural advantage” in information and expertise.⁹⁵ Burden-shifting was unnecessary, the Court explained, for three reasons.

⁸⁹ *Campbell v United States*, 365 US 85, 96 (1961) (indicating that because a document was unavailable to the plaintiff, and thus the plaintiff did not know about its significance, “it saddled an unfairly severe burden” on the plaintiff to subpoena the document’s author). See also, for example, *Schaffer v Weast*, 546 US 49, 60 (2005); *Concrete Pipe and Products of Cal, Inc v Constr Laborers Pension Trust for Southern Cal*, 508 US 602, 626 (1993); *United States v New York, New Haven & Hartford Railroad Co*, 355 US 253, 256 n 5 (1957); *United States v One Parcel of Property Located at 194 Quaker Farms Road, Oxford, Conn*, 85 F3d 985, 990 (2d Cir 1996); Strong, et al, 2 *McCormick on Evidence* § 337 at 413 (cited in note 7).

⁹⁰ *Keyes v School District No 1, Denver, Colorado*, 413 US 189, 209 (1973) (holding that the defendant school district had the burden of proving school segregation was not motivated by an intent to segregate).

⁹¹ *Schaffer*, 546 US at 63 (Ginsburg dissenting), citing Strong, et al, 2 *McCormick on Evidence* at 415 (cited in note 7), John Henry Wigmore, 9 *Evidence in Trials at Common Law* § 2486 at 291 (Little, Brown rev ed 1981) (James H. Chadbourn, ed). Although Justice Ginsburg was in dissent, she was simply stating current law, not advancing a novel proposition. See also *Alaska Department of Environmental Conservation v Environmental Protection Agency*, 540 US 461, 494 n 17 (2003) (“No single principle or rule . . . solve[s] all cases and afford[s] a general test for ascertaining the incidence of proof burdens.”).

⁹² 546 US 49 (2005).

⁹³ Individuals with Disabilities Education Act (IDEA), Pub L No 91-230, 84 Stat 175 (1970), codified at 20 USC § 1400 et seq.

⁹⁴ *Id* at 54–55, citing 20 USC § 1412(a)(5)(A).

⁹⁵ *Schaffer*, 546 US at 57–60.

First, the *Schaffer* Court suggested that it is important to consider whether any tools existed to help plaintiffs overcome their informational disadvantage. According to the Court, IDEA satisfied this concern by giving parents access to “all records that the school possesses” and providing a “right to an independent educational evaluation at public expense.”⁹⁶ In other words, the Act did not leave plaintiffs to “challenge the government without a realistic opportunity to access the necessary evidence, or without an expert with the firepower to match the opposition.”⁹⁷

Second, the *Schaffer* Court considered the related issue of whether formal mechanisms existed to transfer information efficiently from the more knowledgeable party to the less knowledgeable party. IDEA satisfied this concern, the Court explained, by “requiring school districts . . . to provide parents with the reasoning behind the disputed action . . . and a description of all evaluations, reports, and other factors that the school used in coming to its decision.”⁹⁸

And third, the *Schaffer* Court considered whether plaintiffs possessed any other protection that made up for their information disadvantage. IDEA did provide sufficient extra protections, the Court concluded, by ensuring that “parents may recover attorney’s fees if they prevail.”⁹⁹

2. Applying these considerations to causation in procedural due process cases.

The first consideration—whether any other mechanisms compensate for the plaintiff’s information disadvantage—supports shifting the burden of proving causation in procedural due process cases. After

⁹⁶ *Id.* at 60.

⁹⁷ *Id.* at 61. The DC Circuit also emphasized this consideration in a case involving a dispute over an airline’s system for “bumping” passengers off flights. The court was concerned that without burden-shifting, “if the documents are difficult to discover, or if the [defendant] has not made and kept records, a plaintiff with a meritorious case would be unable to prosecute his action through no fault of his own.” *Nader v Allegheny Airlines, Inc.*, 512 F2d 527, 538 (DC Cir 1975), overruled on other grounds, 426 US 290 (1976). Concern about evidence preservation is somewhat analogous to the well-established “missing witness” rule, according to which “if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.” *Graves v United States*, 150 US 118, 121 (1893). For a recent application of this rule, see, for example, *United States v Fitz*, 317 F3d 878, 882 (8th Cir 2003) (“Perhaps most importantly, the government failed to call the confidential informant as a witness even though the confidential informant was available and known only to the government.”), citing *Graves*, 150 US at 121. Like this rule, *Nader* recognized that it is sometimes necessary—either by giving a party the burden of proof on an issue or by presuming that absent evidence is adverse—to give litigants an additional incentive to preserve and produce essential evidence that they completely control.

⁹⁸ *Schaffer*, 546 US at 61.

⁹⁹ *Id.*

Piphus, one of the students in *Carey*, was suspended, the school's only action was to hold a brief meeting in which Piphus's mother and the school administrators had an "unfruitful exchange of views."¹⁰⁰ (Brisco's mother had a similar experience, but received only a phone call.¹⁰¹) Unlike IDEA, which gives plaintiffs the right to review the school's records and retain a publicly funded expert,¹⁰² the government is not required to help § 1983 plaintiffs gather information or bear any of their costs (including the cost of hiring experts).¹⁰³

On the other hand, the information imbalance may be less acute in procedural due process than in IDEA, making less protection necessary. Unlike learning disabilities, about which public educators have not only more knowledge but also more expertise, the government is no more expert than any plaintiff about the impact of procedures on institutional decisionmaking. The government, just like the plaintiff, would have to hire experts to show whether process would have changed the outcome. Without disparities in expertise and information, imbalances might not be significant enough to necessitate either additional protections or burden-shifting.

But while it is true that the government's expertise advantage is more acute in education than in procedural due process, in the latter the government is still more expert than most plaintiffs. After all, the government is a repeat player exercising a routine power. It regularly makes the types of decisions being contested and will generally have a much better understanding of its own decisionmaking processes.

The second, related policy consideration is whether special mechanisms exist in procedural due process cases to ensure the efficient transfer of information from the government to plaintiffs. Unlike expertise, where there are arguably meaningful differences between special education and procedural due process, both *Schaffer* and *Carey* involved similar imbalances of factual information. Much as the school administrators in *Schaffer* had greater knowledge about school policies and the adequacy of the plaintiff's education plan, the school administrators in

¹⁰⁰ *Carey*, 435 US at 249. Also, much like the airline's system for dealing with passengers addressed in *Nader*, the government has sole control over its decisionmaking process, is not otherwise required to keep detailed records, and possesses all evidence relevant to proving or disproving causation. Giving the government the burden of proof ensures that records are kept and relevant evidence is produced.

¹⁰¹ *Id.*

¹⁰² See *Schaffer*, 546 US at 60.

¹⁰³ One can imagine substantial costs involved in hiring people with expertise on governmental decisionmaking and other exotic topics to prove that provision of process would have changed the substantive result.

Carey had greater knowledge of the school's internal decisionmaking process and the punishment the plaintiff would have received after a hearing. This similar information disparity suggests that, because § 1983 plaintiffs lack information-gathering protections similar to those provided in IDEA, this policy consideration supports burden-shifting.

Finally, the third policy consideration probably points in the other direction—against shifting the burden of proof. In § 1983 claims, just as in IDEA, plaintiffs may recover attorneys' fees if their litigation succeeds.¹⁰⁴ Because *Schaffer* considered this to be the “most important” protection IDEA afforded plaintiffs,¹⁰⁵ its presence in the *Carey* context is potentially significant.

This protection may be less meaningful, however, in procedural due process claims. If our overriding policy concern is—as the more specific considerations suggest—that impossible burdens of proof will frustrate meritorious claims, then providing attorneys' fees to prevailing parties misses the point. Because proof problems often make it impossible for plaintiffs with good claims to prevail, no good is done by providing attorneys' fees to winning plaintiffs. Attorneys' fees were a valuable protection in *Schaffer* only because IDEA also took several steps to erase the initial information disparity and ensure that meritorious claims could prevail. In procedural due process cases, on the other hand, these ex ante protections are absent, thereby reducing the protective value of attorneys' fees.

B. Convenience

Though no court specifically defines “convenience” in the burden-shifting context, the word's definition suggests a general preference for making litigation cheaper and more efficient by giving burdens of proof on particular issues to the parties most able to bear them.¹⁰⁶ The cases support this understanding of the term and provide some additional elements to consider. Like the other burden-shifting factors, “convenience” generally supports shifting the burden of proving causation in procedural due process.

¹⁰⁴ 42 USC § 1988(b) (“In any action or proceeding to enforce a provision of [§ 1983] . . . of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.”).

¹⁰⁵ See 546 US at 61.

¹⁰⁶ For example, one dictionary defines “convenience” as “fitness or suitability for performing an action or fulfilling a requirement.” See *Merriam-Webster's Collegiate Dictionary* 272 (Merriam-Webster 11th ed 2003). See also, for example, *The American Heritage Dictionary of the English Language* 401 (Houghton Mifflin 4th ed 2000) (defining “convenience” as “[s]omething that increases comfort or saves work”).

1. Convenience in burden-shifting cases.

Convenience typically supports giving the burden of proof to the party controlling the relevant evidence. For example, in a case involving a warrantless border search of a defendant's vehicle, the Ninth Circuit held that the defendant bore the burden of proving that "the search damaged his vehicle."¹⁰⁷ This was the convenient allocation, the court explained, because "a defendant is in the best position to know the condition of his vehicle immediately prior to the search and, therefore, is in the best position to determine whether and to what extent the search damaged his vehicle."¹⁰⁸

Similarly, convenience has led courts to shift the burden of proof on issues relating to the actions of a defendant's agents. One example is the Eleventh Circuit's decision, in a Miller Act case, to give the defendant the "burden of proving that the work it performed after December 14, 1980 was not repair work" within the meaning of the statute.¹⁰⁹ The court reasoned that because the defendant would have superior knowledge of whether its employees were performing "labor" or "repair work," burden-shifting was called for by "the common law guide that the party in the best position to present the requisite evidence should bear the burden of proof."¹¹⁰

Convenience also suggests giving the burden of proving an item's attributes to the party that produced the item. The Seventh Circuit, for example, reasoned in a breach of contract case that the defendant, a manufacturer of wrapping machines, "would have peculiar knowledge, unavailable to [the plaintiff], of whether, in the language of the statute, the machine was 'not suitable for sale to others in the ordinary course of the seller's [] business.'"¹¹¹ As a result, the court held that the "burden of proving the salability of a machine which the manufacturer deems too difficult to manufacture, [should be] on the manufacturer."¹¹²

¹⁰⁷ *United States v Cortez-Rivera*, 454 F3d 1038, 1039 (9th Cir 2006). Typically no warrant is required for a border search. But if the search will cause damage to the vehicle, then customs officers are required to "have reasonable suspicion prior to commencing the search." *Id.*

¹⁰⁸ *Id.* at 1041.

¹⁰⁹ See *United States v Continental Insurance Co*, 776 F2d 962, 964 (11th Cir 1985). In other words, the defendant had to show that its agents were performing "labor" rather than repair work. This was relevant to the Miller Act's requirement "that claims brought under it be made within one year 'after the day on which the last of the labor was performed or material was supplied.'" *Id.* at 963-64, quoting 40 USC § 270b(b), now codified at 40 USC § 3133(b)(4).

¹¹⁰ *Id.* at 964.

¹¹¹ *Erving Paper Mills v Hudson-Sharp Machine Co*, 332 F2d 674, 678 (7th Cir 1964).

¹¹² *Id.*

Finally, convenience is implicated when the contested issue relates to governmental practices or institutions. The Ninth Circuit, in a case on Eleventh Amendment sovereign immunity, explained that claims of sovereign immunity raise serious disputes only when a “relatively complex institutional arrangement makes it unclear whether a given entity ought to be treated as an arm of the state.”¹¹³ The court then held that the “public entity ought to bear the burden of proving the facts that establish its immunity under the Eleventh Amendment.”¹¹⁴ This was the convenient allocation, the court reasoned, because “the true facts as to the particulars of this arrangement will presumably lie peculiarly within the knowledge of the party claiming immunity.”¹¹⁵

2. Convenience applied to procedural due process.

These examples suggest that convenience favors giving the government the burden of disproving causation in § 1983 procedural due process cases. Much like a defendant with his car,¹¹⁶ a construction firm with its employees,¹¹⁷ or a manufacturer with its product,¹¹⁸ the government has control of its decisionmaking process and the agents making the decisions. It already possesses the relevant records and is in the best position to determine whether additional process would have affected its employees’ actions.

The obvious objection, of course, is that the law routinely requires plaintiffs to bear the burden of proof even though defendants have superior access to the relevant information and records, and where the actions of the defendant’s agents are in dispute. In many areas of tort law (medical malpractice, for example) defendants possess the business or medical records needed to prove or disprove negligence and employ the personnel whose actions are in dispute.

These other areas of tort law are readily distinguishable, however, because the information imbalance typically relates to the core issue of liability, rather than some other, secondary element of the cause of

¹¹³ *ITSI TV Productions, Inc v Agricultural Associations*, 3 F3d 1289, 1292 (9th Cir 1993).

¹¹⁴ *Id.*

¹¹⁵ *Id.* The Third Circuit, in a case involving a prosecutor’s nondisclosure of material evidence, discussed—though not directly rule on—shifting the burden of proof to the state when a prosecutor does not disclose material evidence, relying on a similar understanding of convenience. See *Slutzker v Johnson*, 393 F3d 373, 386–87 & n 13 (3d Cir 2004) (“[I]n general, the prosecution is more likely to have knowledge of the contents of its files; traditionally, the burden of proof is allocated to the party that is better able to inform itself about the issue.”).

¹¹⁶ See, for example, *Cortez-Rivera*, 454 F3d at 1039.

¹¹⁷ See, for example, *Continental Insurance Co*, 776 F2d at 964.

¹¹⁸ See, for example, *Erving Paper Mills*, 332 F2d at 678.

action (such as damages). Shifting the burden on the primary question of liability would reduce the plaintiff's initial cost of prevailing in a suit to nothing (defendants would have to rebut every suit filed), leading to frivolous litigation. By contrast, in cases involving border searches (damage to the defendant's car),¹¹⁹ contract disputes under the Miller Act¹²⁰ (that the defendant's employees were performing "labor"),¹²¹ breach of contract (whether the defendant's product was "suitable for sale to others"),¹²² and procedural due process (causation), the burden is shifted only on secondary issues. Plaintiffs using § 1983 to sue the government for procedural due process violations must first prove liability before the government is required to disprove causation. By requiring plaintiffs to carry the burden on the primary issue of liability, the procedural due process burden-shifting regime is consistent with the convenience-based goal of reducing litigation costs.

Convenience also supports shifting the burden of proof to the government on issues, such as causation in procedural due process, that turn on the inner workings of governmental institutions. Much as courts presume that "the prosecution is more likely to have knowledge of the contents of its files"¹²³ or that a defendant claiming Eleventh Amendment immunity possesses the information relevant to proving that it is part of the state's "complex institutional arrangement,"¹²⁴ it is reasonable to presume that governmental institutions, such as the school board in *Carey*, possess the information necessary to prove whether additional process would have affected their substantive decision. Convenience suggests that because the government is "the party that is better able to inform itself about the issue,"¹²⁵ it should bear the burden of disproving causation.

C. Fairness

Fairness, the third factor guiding burden-shifting analysis, primarily expresses considerations of justice and equity. Much like policy considerations and convenience, fairness suggests that it is correct to shift the burden of proving causation in procedural due process cases.

¹¹⁹ See, for example, *Cortez-Rivera*, 454 F3d at 1039.

¹²⁰ The Miller Act, 40 USC §§ 3131–34.

¹²¹ See, for example, *Continental Insurance Co*, 776 F2d at 963–64.

¹²² See, for example, *Erving Paper Mills*, 332 F2d at 678.

¹²³ *Slutzker*, 393 F3d at 386–87 n 13.

¹²⁴ *ITSI TV Productions*, 3 F3d at 1292.

¹²⁵ *Slutzker*, 393 F3d at 386–87 n 13.

1. Fairness in burden-shifting cases.

While the underlying principle in fairness (ensuring that good claims prevail) is different from the underlying principle in convenience (giving the burden to the party most able to bear it), the two principles overlap. As a result, courts frequently cite fairness as a reason to shift the burden of proof on issues—such as whether the defendant qualifies for Eleventh Amendment immunity¹²⁶ or whether the defendant's product was salable¹²⁷—for which convenience is also a central concern. But while these two factors are related, they are not identical.

The Ninth Circuit, in an appeal from a magistrate judge's recommendation that a habeas corpus petition be dismissed on the state procedural ground of untimeliness, provided an illustrative example of how "considerations of fairness" independently affect burden-shifting analysis.¹²⁸ After giving the state the burden of proving the adequacy of its procedural rules, the court concluded that not only is this placement of the burden consistent with other considerations, it "is also the most just."¹²⁹ It is the just allocation, the court explained, because habeas plaintiffs are "often appearing pro se," and because the state "has at its hands the records and authorities to prove whether its courts have regularly and consistently applied the procedural bar."¹³⁰

Fairness also played a role in the Court's declining to shift the burden of proof in *Schaffer*. "Considerations of fairness" did not require burden-shifting, the Court explained, because IDEA plaintiffs are already protected by a comprehensive statutory scheme that ensures "that the school bears no unique informational advantage."¹³¹ Essentially, it is fair for plaintiffs to retain the burden of proof, despite the school district's "natural advantage in information and expertise,"¹³² because the statutory protections substantially mitigate the effects of the information disparity.

¹²⁶ See, for example, *ITSI TV Productions*, 3 F3d at 1292 ("Considerations of fairness thus support the conclusion that the public entity ought to bear the burden of proving the facts that establish its immunity under the Eleventh Amendment.") (quotation marks omitted).

¹²⁷ See, for example, *Erving Paper Mills*, 332 F2d at 678 ("We hold, under the circumstances of this case, a rule of fairness places the burden of proving the salability of a machine which the manufacturer deems too difficult to manufacture, on the manufacturer.").

¹²⁸ See *Bennett v Mueller*, 322 F3d 573, 585 (9th Cir 2003).

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Schaffer*, 546 US at 60–61.

¹³² *Id.*

2. Fairness applied to procedural due process.

Fairness generally supports shifting the burden of disproving causation to the government. Consider, for example, the similarities between the adequacy of state procedural rules in habeas petitions¹³³ and causation in § 1983 suits for procedural due process violations. First, it seems reasonable to assume that although § 1983 procedural due process plaintiffs may not always appear pro se, they are typically people like students, prisoners, or public employees who often have few resources for litigation. Second, both habeas corpus and § 1983 are mechanisms to protect individual rights from state action—just as “the unique purpose of habeas corpus [is] to release the applicant for the writ from unlawful confinement,”¹³⁴ the “purpose of § 1983 [is] to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law.”¹³⁵ And finally, for both the adequacy of state procedural rules in habeas corpus and causation in procedural due process, the government “has at its hands the records and authorities”¹³⁶ needed to bear the burden of proof. This suggests that just as fairness favors giving states the burden of proving the adequacy of their procedural rules in habeas proceedings, fairness favors giving the government the burden of disproving causation in § 1983 procedural due process suits.

Procedural due process plaintiffs also lack the sorts of statutory protections discussed in *Schaffer*. The government is not required to give any of its records to § 1983 plaintiffs except through regular discovery, and there is no comprehensive system for mitigating the government’s “unique informational advantage.”¹³⁷ Given that a school’s information advantage is probably as substantial on issues relating to its decisionmaking process (such as causation in *Carey*) as it is on issues relating to its educational plan for a disabled child (such as the adequacy of the Individual Education Plan in *Schaffer*), the absence of

¹³³ See, for example, *Bennett*, 322 F3d at 584–86.

¹³⁴ *Allen v McCurry*, 449 US 90, 98 n 12 (1980).

¹³⁵ *Mitchum v Foster*, 407 US 225, 242 (1972). Consider also, for example, id:

Section 1983 was [] a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century . . . [a]nd this Court long ago recognized that federal injunctive relief against a state court proceeding can in some circumstances be essential to prevent great, immediate, and irreparable loss of a person’s constitutional rights.

¹³⁶ See *Bennett*, 322 F3d at 585.

¹³⁷ Compare *Schaffer*, 546 US at 61.

information disclosure requirements suggests that fairness requires burden-shifting in the *Carey* context.¹³⁸

There is, however, at least one fairness-based reason to leave the burden of proving causation on plaintiffs. If the burden is shifted, it is possible that too many plaintiffs will bring too many claims and that the government will lose too often, leading to unfair, excessive recovery.

But this objection, which would apply to all instances of burden-shifting, seems outweighed by the countervailing fairness concerns in procedural due process cases. The meager resources of most plaintiffs, the government's substantial information advantage, the lack of statutory protections for plaintiffs, and the requirement that plaintiffs first establish liability before the government must disprove anything seem to collectively outweigh this objection. Fairness thus supports burden-shifting.

D. A General Burden-shifting Rule Is Preferable to the Second Circuit's Limited Burden-shifting Exception

Courts should reject the Second Circuit's regime, which generally leaves the burden of proving causation on the plaintiff, shifting it only when the government "makes it impossible for the plaintiff to carry the burden of proof."¹³⁹ The Second Circuit has provided little explanation for this system, and the three burden-shifting factors explained previously suggest that burden-shifting at the outset is preferable.

First, policy considerations seem to favor a general burden-shifting rule over the Second Circuit's allocation. The Second Circuit does not shift the costs of experts, compel disclosure beyond regular discovery, provide flexible administrative hearings, or do anything else to mitigate plaintiffs' information disadvantage.¹⁴⁰ Further, though the possibility of applying the exception may give the government some incentive to preserve evidence,¹⁴¹ it is costly for plaintiffs to prove that the exception applies and uncertain whether the exception will apply, making the incentive somewhat weak.

Second, a general rule that leaves the burden on the plaintiff fails to address two of the core tenets of convenience: it is more efficient for the defendant to prove facts when (1) it already possesses all the rele-

¹³⁸ Of course, § 1988 does provide attorneys' fees to prevailing parties but, for reasons similar to those discussed in Part III.A.2, this protection is probably insufficient to overcome the unfair information imbalance between the government and § 1983 procedural due process plaintiffs.

¹³⁹ *Miner v City of Glens Falls*, 999 F2d 655, 660 (2d Cir 1992).

¹⁴⁰ Compare *Schaffer*, 546 US at 60 (providing a comprehensive framework for IDEA claims).

¹⁴¹ See, for example, *Nader*, 512 F2d at 538 (noting that defendants often do not keep records).

vant information;¹⁴² and (2) the information, even if it exists, is difficult to obtain and costly to discover.¹⁴³ Nor does the Second Circuit's limited exception address this argument that the burden should completely and initially shift to the party with superior information. By requiring plaintiffs to expend lots of time and energy before triggering the exception,¹⁴⁴ the Second Circuit's regime both erases the efficiency gain from having the defendant prove issues within its factual control, and retains the need for costly and inconvenient discovery. Convenience does not, therefore, support this exception-based rule.

Finally, fairness favors a general burden-shifting rule. Fairness concerns about the limited resources of plaintiffs¹⁴⁵ are not satisfied by an exception applying only after plaintiffs incur the costs of making the "truly extraordinary" showing that they were prevented "from obtaining access to evidence."¹⁴⁶ Similarly, the Second Circuit requires plaintiffs to prove causation whenever the government does not trigger the exception, even though the government still has an unfair advantage in information and expertise.¹⁴⁷ Because it does not alter the information imbalance in proving causation, the Second Circuit's burden allocation is in tension with the fairness ideal of placing § 1983 plaintiffs on equal footing with the government.

CONCLUSION

The circuits are divided on whether the plaintiff or the government should bear the burden of proving causation once the plaintiff establishes that a Fourteenth Amendment procedural due process violation occurred. They are, however, unified in one aspect: none provides a sound reason for its position.

All circuits shifting the burden of proof rely on *Mount Healthy*. But as Part II shows, *Mount Healthy* is analogous only if it is understood at an untenably high level of generality. Such a generalization would have unforeseen implications for all § 1983 claims.

¹⁴² See, for example, *Cortez-Rivera*, 454 F3d at 1041.

¹⁴³ See, for example, *Nader*, 512 F2d at 538.

¹⁴⁴ Before triggering the exception, the Second Circuit appears to require that plaintiffs incur the cost of attempting to get information from the government, the cost of being denied the information for long enough that obtaining it is "impossible," and finally the cost of proving that the government has made it "impossible" to obtain the information. See, for example, *Miner*, 999 F2d at 660.

¹⁴⁵ See, for example, *Bennett*, 322 F3d at 585.

¹⁴⁶ *Miner*, 999 F2d at 660 (refusing to shift the burden of proving causation to the defendant to avoid "effectively remov[ing] a plaintiff's burden in every case . . . whenever due process was denied").

¹⁴⁷ Compare *Schaffer*, 546 US at 60.

Yet even though the burden-shifting circuits' reasoning is flawed, their conclusion is correct. To make their positions sounder and eliminate the theoretical problems caused by their current rationales, these circuits should engage in and rely on a complete burden-shifting analysis. As explained above, each traditional burden-shifting factor—policy considerations, convenience, and fairness—generally supports their current conclusion that burden-shifting is appropriate in procedural due process cases.

The Second Circuit should also perform the burden-shifting analysis explained in Part III, which would lead it to abandon its position that the burden of proof properly remains on the plaintiff. This would unify the circuits in shifting the burden of proving causation to the government once a § 1983 plaintiff establishes a procedural due process violation.