

COMMENTS

Stigma plus Whom? Evaluating Causation in Multiple-Actor Stigma-Plus Claims

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INTRODUCTION

Consider four different potential plaintiffs. Plaintiff A is a city resident. Believing—incorrectly—that he has a prior arrest record for larceny, federal officials place his name on a list of suspected criminals circulated to local businesses.¹ Plaintiff B is a city employee. Disliking B, B's supervisor denigrates him publicly and transfers him to an undesirable position.² Plaintiff C is also a city employee. After her coworkers publicly accuse her of putting a voodoo curse on one of them, the city manager fires her.³ Plaintiff D is a landlord of a beachfront property. The local government places a placard on the property announcing that weekend renters violated noise ordinances.⁴ D can't find new renters.

As a result of these experiences, each prospective plaintiff's reputation may have been ruined. For redress, some could rely on state tort remedies for defamation.⁵ By necessity—or strategy—others might prefer to vindicate their rights in federal court. To

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¹ See *Paul v Davis*, 424 US 693, 694–96 (1976).

² This example is strictly hypothetical.

³ See *Velez v Levy*, 401 F3d 75, 81–83 (2d Cir 2005).

⁴ See *URI Student Senate v Town of Narragansett*, 631 F3d 1, 6–7 (1st Cir 2011).

⁵ See, for example, *Byers v Snyder*, 237 P3d 1258, 1270 (Kan App 2010) (describing the elements of a defamation claim under Kansas law); *Taus v Loftus*, 151 P3d 1185, 1209 (Cal 2007) (describing the elements of a defamation claim under California law).

do so, they could bring a procedural due process challenge alleging that the government⁶ provided insufficient procedural protections before depriving them of a liberty or property interest⁷—if they could prove that reputation was such an interest.⁸

In *Paul v Davis*,⁹ the Supreme Court held that reputation alone does not qualify as a liberty interest sufficient to support a procedural due process challenge.¹⁰ But the federal courts have paved a narrow path forward for claims predicated on reputational injuries. Complainants may bring a “stigma-plus” claim by pointing to both a state actor’s defamatory statement (the “stigma”) and an accompanying loss of a liberty or property interest (the “plus”), such as state employment.¹¹

This formulation is puzzling. It is not unusual for courts to react skeptically to attempts to raise novel claims in federal court. But the hurdle the stigma-plus claim erects between injury and relief—requiring prospective plaintiffs to allege a specific additional harm—is out of the ordinary. This design choice generates novel challenges for courts seeking to determine whether the hurdle has been overcome.

This Comment draws on the design and purpose of the stigma-plus claim to investigate one of these challenges: whether plaintiffs must allege that the same actor was responsible for both the stigma and plus elements in a stigma-plus claim. Another way of asking this question is to consider which of the prospective plaintiffs introduced above has a viable claim and which does not. The holding in *Davis* renders the complaint of Plaintiff A, the pure-stigma plaintiff, dead on arrival in federal court. Plaintiff B is the archetypal stigma-plus complainant: both stigma and plus are easily attributed to a single actor. Plaintiffs C, the different-actor plaintiff, and D, the private-actor plaintiff, are less easily resolved.

⁶ Which government entities are accused of inflicting stigma plus may shape the type of claim litigants could bring. Plaintiffs may seek damages from state or city officials only through 42 USC § 1983 actions and from federal officials only through a parallel federal common-law claim. See Part I.C.

⁷ See US Const Amend V; US Const Amend XIV, § 1.

⁸ Other conceivable complaints (such as state-law contract claims) stemming from the prospective plaintiffs’ experiences are unexamined in this Comment.

⁹ 424 US 693 (1976).

¹⁰ *Id.* at 701.

¹¹ *Id.* at 710–11. See also *Sadallah v City of Utica*, 383 F3d 34, 38 (2d Cir 2004) (describing requirements of the test in detail). For discussion of which liberty interests qualify under this formulation, see Part I.D.2.

Federal circuit courts have arrived at different answers to this question, and determining where to draw the line of cognizability yields important insights about the stigma-plus claim. The First Circuit requires the same state actor to supply both elements.¹² As a result, in the First Circuit, only Plaintiff B could plead a viable stigma-plus claim. By contrast, the Second Circuit allows the two elements to derive from different sources.¹³ As a result, both Plaintiffs B and C could plead a viable stigma-plus claim. The circuit is less clear on which actor should face liability and whether both must be state actors. It appears to conclude that the source that provided the plus may be held liable.¹⁴ It also appears to require the plus itself to be supplied by a state actor.¹⁵ Without addressing this question directly, some circuits take this logic a step further, implying that even Plaintiff D could plead a stigma-plus claim under the right circumstances.¹⁶

Existing scholarship has not addressed the split between these two circuits.¹⁷ It focuses instead on criticizing the peculiarity or novelty of the stigma-plus claim.¹⁸ As a result, existing scholarship has done little to articulate the logic of the stigma-plus claim or to

¹² *URI Student Senate*, 631 F3d at 10–11.

¹³ See *Velez*, 401 F3d at 89.

¹⁴ See, for example, *id.* at 93. See also text accompanying notes 152–53.

¹⁵ See *id.* at 89 & n 12. See also notes 154–56 and accompanying text.

¹⁶ See, for example, *Gwinn v Awmiller*, 354 F3d 1211, 1216, 1222–23 (10th Cir 2004) (concluding that erroneous classification of a sex offender could support viable claims for procedural due process harms); *Dupuy v Samuels*, 397 F3d 493, 511 (7th Cir 2005) (allowing childcare workers listed on an abuse registry to plead stigma-plus injuries when their lost employment opportunities were, in part, private). The Second Circuit appears to agree on this point. See *Valmonte v Bane*, 18 F3d 992, 1001–02 (2d Cir 1994) (offering logic similar to *Dupuy*).

¹⁷ There is, however, some scholarship discussing the decisions that generated the split. See, for example, Breegan Semonelli, Comment, *Insult to Injury: A Constitutional Challenge to Rhode Island's Most Colorful Shaming*, 21 Roger Williams U L Rev 611, 626–34 (2016) (discussing *URI Student Senate*).

¹⁸ See, for example, Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 UC Davis L Rev 79, 82, 90–98, 100–06 (2009) (criticizing the stigma-plus doctrine and urging its reconsideration on the grounds that it relies on “impoverished constructions” of liberty and reputation); Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis*, 30 Stan L Rev 191, 203–09, 230–38 (1977) (criticizing the *Davis* decision and advocating a requirement of stigmatizing intent). Other scholarship merely outlines the contours of the claim without offering significant commentary. See, for example, David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 Mich L Rev 317, 346–47 (2008) (outlining the doctrinal requirements of a stigma-plus claim); Erwin Chemerinsky, *Qualified Immunity: § 1983 Litigation in the Public Employment Context*, 21 Touro L Rev 551, 558–61, 569 (2005) (discussing the stigma-plus doctrine in public employment).

supply tools for examining emerging questions like the multiple-actor problem.

This Comment fills this gap by investigating the claim in depth and advancing a framework for answering the multiple-actor problem. Part I explores the background of procedural due process, federal constitutional torts, and stigma-plus claims generally. Part II describes the circuits' competing approaches to the source-of-harm question. Part III answers the question presented by the courts' divergence in two Sections. First, Part III.A derives the purpose of the stigma-plus claim by drawing analogies between the stigma-plus claim and plus enhancements attached to other civil rights claims. It determines that the claim represents the courts' inchoate sense that stigma and plus represent additional or heightened harm in combination. The hurdle the claim imposes on plaintiffs is best thought of as a causation test rather than pure disapproval of reputational injury. Part III.A ends by investigating causally complex stigma-plus claims. It finds the causation story consistent with these approaches. Second, Part III.B draws on these insights to evaluate which circuit's approach to the multiple-actor problem best vindicates the stigma-plus claim's purpose. While both circuits' approaches appear designed to scrutinize proximate causation, both are underinclusive, raising formal barriers to a set of claims that logically seem cognizable as stigma plus. This shortcoming leads both approaches to underdeter, empowering not only violations of protected liberty interests, but also free riding by the second actor in a putative stigma-plus claim. Yet there are two reasons to be less concerned about the Second Circuit's flavor of underdeterrence. First, the Second Circuit's underdeterrence of private actors may be justified under the state-action requirement.¹⁹ Second, the Second Circuit's contextual approach to stigma-plus claims may enable the court to reach a subset of these actions. With these issues resolved, the Second Circuit provides the best resolution of the question of which actors may supply the different elements of the stigma-plus claim.

I. ORIGINS OF STIGMA PLUS

The stigma-plus claim is an outgrowth of two interrelated developments that preoccupied twentieth-century American courts. First, courts began to evaluate which types of claims were entitled

¹⁹ See Part III.B.4.

to procedural due process protection. Despite the “procedural” moniker, procedural due process claims raise the threshold substantive question whether the right or interest underlying the claim merits due process protection.²⁰ The growth of the administrative state and shifting conceptions of Americans’ rights and entitlements challenged the courts to determine which interests warranted this protection.²¹ In articulating the stigma-plus claim, the Supreme Court concluded that reputation alone does not qualify as such an interest—but that stigma *plus* something else does.²²

Second, courts began to reconsider which mechanisms plaintiffs could use to bring constitutional claims—including claims for procedural due process—into federal court.²³ The mere prospect of a constitutional violation does not create a cause of action. For this, plaintiffs turned to federal constitutional torts. Federal constitutional-tort actions are actions for damages available against state actors under 42 USC § 1983 and against federal actors under the parallel common-law claim provided by *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*.²⁴ Federal constitutional torts provide an opportunity for plaintiffs with constitutional grievances—from allegations that they were subjected to an unreasonable search and seizure in contravention of the Fourth Amendment to allegations that they were subjected to cruel and unusual punishment in contravention of the Eighth

²⁰ See, for example, *Goldberg v Kelly*, 397 US 254, 262–63 (1970) (addressing whether the deprivation of welfare benefits qualifies as a protected interest before discussing whether sufficient procedural protections were in place). See also Edward L. Rubin, *Due Process and the Administrative State*, 72 Cal L Rev 1044, 1065–69 (1984) (describing the Court’s modern approach to determining which interests warrant procedural due process protection).

²¹ Rubin, 72 Cal L Rev at 1048–52 (cited in note 20).

²² *Davis*, 424 US at 710–12.

²³ See Part I.D.

²⁴ 403 US 388, 391–92, 395–97 (1971) (inferring from the Fourth Amendment a cause of action in federal court for money damages against federal officers); *Davis v Passman*, 442 US 228, 242–44 (1979) (applying the logic of *Bivens* to the Fifth Amendment). Despite the availability of this avenue, *Bivens* actions today provide a limited path for relief. Courts have articulated significant impediments to such actions. See, for example, *Bush v Lucas*, 462 US 367, 378, 388 (1983) (rejecting a *Bivens* claim when Congress had provided an alternative remedy); *Federal Deposit Insurance Corporation v Meyer*, 510 US 471, 485–86 (1994) (rejecting a *Bivens* claim against a federal agency); *Wilkie v Robbins*, 551 US 537, 555 (2007) (rejecting a *Bivens* claim when it would be too difficult for courts to devise a “workable cause of action”). Some of *Bivens*’s influential critics have sought to overrule it altogether. See, for example, *Wilkie*, 551 US at 568 (Thomas concurring) (“*Bivens* is a relic of the heady days in which the Court assumed common-law powers to create causes of action.”).

Amendment—to seek damages and have their day in court. An innovation of the Reconstruction era, federal constitutional torts were relegated to relative obscurity until the mid-twentieth century.²⁵ Once reinvigorated, however, they resulted in an explosion of litigation in the federal courts—and provoked a counterreaction.²⁶

The stigma-plus claim was devised as these two developments—the rapid expansion of interests qualifying for procedural due process protection and the rediscovery of the federal constitutional tort as a viable means of securing this protection—came to a head. Below, Parts I.A and I.B explore the origins and contours of the modern procedural due process right, examining its operation and the requirements it imposes on putative liberty interests. Part I.C provides an abbreviated history of the federal constitutional tort, focusing on § 1983. Finally, drawing on these histories, Part I.D traces the development of the stigma-plus claim.

A. Origins of Procedural Due Process

The Due Process Clause of the Fifth Amendment provides that no person shall “be deprived of life, liberty, or property, without due process of law.”²⁷ The Fourteenth Amendment applies the same text to the states.²⁸ The due process protections supply both substantive and procedural constraints. Substantive due process involves protecting individuals from government interference with fundamental rights irrespective of the applicable procedural protections.²⁹ Procedural due process, by contrast, concerns procedural constraints on the manner in which persons may be deprived of rights or entitlements.³⁰ But procedural due process

²⁵ James J. Park, *The Constitutional Tort Action as Individual Remedy*, 38 Harv CR-CL L Rev 393, 407–18 (2003) (discussing the history of constitutional-tort actions).

²⁶ See *id.* at 416 (discussing the expansion of constitutional-tort litigation in the mid-twentieth century). For the limitations that more recent Supreme Court decisions have imposed on *Bivens* remedies, see the cases discussed in note 24.

²⁷ US Const Amend V.

²⁸ US Const Amend XIV, § 1.

²⁹ See Michael Wells and Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 Ga L Rev 201, 215 (1984). For example, the government may not forcibly sterilize “habitual criminals” or criminalize the access to or prescription of contraceptives, regardless of whether it provides procedural protections. See *Skinner v Oklahoma*, 316 US 535, 536–37, 541 (1942); *Griswold v Connecticut*, 381 US 479, 486–88 (1965) (Goldberg concurring).

³⁰ For an explanation of some of the differences between substantive and procedural due process protections, see Cynthia R. Farina, *On Misusing “Revolution” and “Reform”*: *Procedural Due Process and the New Welfare Act*, 50 Admin L Rev 591, 603 (1998).

raises its own substantive considerations in requiring courts to determine to which rights or entitlements its protection applies.

Courts' approach to procedural due process has shifted over time.³¹ Under the conventional account, the Framers conceived of the right to due process as entailing principally those protections "inherent in the trial process."³² Similarly, the property and liberty interests entitled to constitutional protection were those that "enjoy[ed] protection at common law against invasion by private parties," such as government efforts to collect a fine or tax.³³ The administrative state disrupted this framework. Its development raised the questions of what procedural protections were required in administrative rulemaking³⁴ and administrative adjudication³⁵ and provoked courts to reconsider which interests required this protection.

B. The Modern Approach to Procedural Due Process

The Court articulated the contours of the modern procedural due process right in a pair of decisions concerning whether untenured state-university professors were entitled to a hearing before

³¹ See generally Rubin, 72 Cal L Rev 1044 (cited in note 20).

³² See *id.* at 1048 (describing the British jurists' understanding of the phrase "due process," which informed the Framing). See also, for example, Stephen F. Williams, "Liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments: *The Framers' Intentions*, 53 U Colo L Rev 117, 126–27 (1981) (arguing that the Due Process Clause, other than the just compensation requirement, was intended to relate exclusively to criminal trials); Frank H. Easterbrook, *Substance and Due Process*, 1982 S Ct Rev 85, 96, 99–100 (describing the English and American origins of the Due Process Clause); Edward S. Corwin, *The Supreme Court and the Fourteenth Amendment*, 7 Mich L Rev 643, 664 (1909) (describing as "the view of the Common Law" that "liberty" in the Due Process Clause "means simply freedom from physical restraint"). Revisionists have countered that substantive conceptions of due process are in fact consistent with original conceptions of the Constitution. See, for example, Robert E. Riggs, *Substantive Due Process in 1791*, 1990 Wis L Rev 941, 941 (arguing that the "informed person in 1791" probably would have understood the Due Process Clause to include substantive protections).

³³ Richard B. Stewart, *The Reformation of American Administrative Law*, 88 Harv L Rev 1667, 1717 (1975).

³⁴ See, for example, *Londoner v City and County of Denver*, 210 US 373, 378–79 (1908) (excluding a street-paving ordinance from due process scrutiny despite irregularities in the drafting process). For further development of this doctrine over time, see *Bi-Metallic Investment Co v State Board of Equalization*, 239 US 441, 445–46 (1915); *United States v Florida East Coast Railway Co*, 410 US 224, 245–46 (1973). See also 5 USC § 551(5) (defining "rulemaking" under the Administrative Procedure Act (APA)).

³⁵ See, for example, *Ohio Valley Water Co v Ben Avon Borough*, 253 US 287, 295–97 (1920) (determining that due process required de novo review of agency decision-making). See also 5 USC § 551(7) (defining "adjudication" under the APA).

termination: *Board of Regents v Roth*³⁶ and *Perry v Sindermann*.³⁷ These decisions formally delineated a two-step procedure that inquired (1) whether an interest qualified as a liberty or property interest protected by the Due Process Clause and (2) whether the requisite procedures had been followed.³⁸

Moreover, they shifted the touchstone for whether an interest qualified for procedural due process protection from the weight of the claimant's interest³⁹ to the nature of the interest itself.⁴⁰ To claim a property interest after *Roth* and *Perry*, a person needed a "legitimate claim of entitlement" to the underlying benefit.⁴¹ Legitimate claims of property entitlement came not from the Constitution but from "existing rules or understandings that stem from an independent source such as state law."⁴² For claimed liberty interests, the Court in *Roth* provided no touchstone. It relied instead on a broad conception of liberty stretching from the right to contract to the right to "acquire useful knowledge" and the right to "enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."⁴³

The Court soon sought to reduce the asymmetry. It first determined that the existence of an independent underlying right

³⁶ 408 US 564, 566–69 (1972).

³⁷ 408 US 593, 602 & n 7 (1972).

³⁸ See *Roth*, 408 US at 569–70.

³⁹ See *Goldberg v Kelly*, 397 US 254, 262 & n 8, 263 (1970) (articulating this short-lived balancing approach in concluding that welfare benefits were entitled to an evidentiary hearing before their benefits were terminated). In contrast to the modern two-step inquiry, Professor Mark Tushnet has called the *Goldberg* approach a "unitary" analysis that folds together the questions of whether an interest qualified for protection and what protection was due. See Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 S Ct Rev 261, 262. See also generally Charles A. Reich, *The New Property*, 73 Yale L J 733 (1964).

⁴⁰ *Roth*, 408 US at 570–71.

⁴¹ *Id.* at 577. This approach is often described as "positivist" in order "to indicate that the Court requires some underlying positive law right before the due process protections apply." Rubin, 72 Cal L Rev at 1071 n 141 (cited in note 20). As Professor Edward Rubin points out, the term "positivist" is inapposite insofar as it connotes merely the requirement that true legal rules originate from an authoritative source. *Id.* The notion that a lawmaking authority could not create "purely procedural rights, unattached to underlying rights," is *in tension* with positivism. *Id.* Instead, the Court has crafted its own distinct philosophy of due process, which requires a predicate underlying right in order for procedural due process protection to attach. *Id.* Following Rubin, this Comment refers to this theory as the "underlying-rights approach." See *id.*

⁴² *Roth*, 408 US at 577. In *Roth*, no such source could be found. *Id.* By contrast, in *Perry*, the plaintiff could claim reliance on statements in the college's faculty guide that appeared to institute an informal tenure system. *Perry*, 408 US at 600.

⁴³ *Roth*, 408 US at 572 (quotation marks omitted), citing *Meyer v Nebraska*, 262 US 390, 399 (1923).

could be a *sufficient* predicate for a liberty interest to receive procedural due process protection.⁴⁴ Liberty interests could derive from revocation of state parole⁴⁵ or denial of prison good-time credit⁴⁶ even though those interests were not independently guaranteed by the Constitution.⁴⁷ Addressing the latter claim, the Court explicitly noted that the “analysis as to liberty parallels the accepted due process analysis as to property.”⁴⁸

The Court then went a step further, concluding that the existence of an independent underlying right was *necessary* as well as sufficient for due process protection to attach.⁴⁹ *Meachum v Fano*⁵⁰ represents an example of this approach.⁵¹ In *Meachum*, the Court considered whether an inmate’s involuntary transfer between prison facilities implicated interests that warranted procedural due process protection.⁵² Because transfer was entirely discretionary, there was no state-law basis for the asserted liberty interest.⁵³ This time, the Court was unwilling to mine the Constitution for the expansive concepts of liberty the *Roth* Court invoked. Instead, it refused to give the concept of liberty “any independent force.”⁵⁴ Prison transfers governed by discretionary state arrangements implicate no liberty interests cognizable under the Due Process Clause.⁵⁵

The Court’s commitment to an underlying-rights approach has not been entirely consistent over time.⁵⁶ But it is the logic the

⁴⁴ See *Wolff v McDonnell*, 418 US 539, 557 (1974) (drawing a parallel between liberty and property interests); Rubin, 72 Cal L Rev at 1073 (cited in note 20) (suggesting the Court in *Wolff* meant to indicate “that liberty interests over and above those inherent in the due process clause could be created by state law, just as property interests of all kinds were created”), citing *Wolff*, 418 US at 557. See also *Morrissey v Brewer*, 408 US 471, 481–82 (1972) (finding a liberty interest implicated by revocation of state parole based exclusively on state statutory law).

⁴⁵ See *Morrissey*, 408 US at 481–82.

⁴⁶ See *Wolff*, 418 US at 557.

⁴⁷ See *id.*; *Morrissey*, 408 US at 480–81.

⁴⁸ *Wolff*, 418 US at 557.

⁴⁹ See Rubin, 72 Cal L Rev at 1073–76 (cited in note 20).

⁵⁰ 427 US 215 (1976).

⁵¹ *Id.* at 225.

⁵² *Id.* at 223–29.

⁵³ See *id.* at 225–29.

⁵⁴ Rubin, 72 Cal L Rev at 1076 (cited in note 20).

⁵⁵ *Meachum*, 427 US at 225.

⁵⁶ In his 1984 article, Rubin characterizes this “high water mark of the underlying rights approach” as a short-lived doctrinal experiment that was subsequently “domesticated.” Rubin, 72 Cal L Rev at 1076, 1078 (cited in note 20). He points to several cases in which the Court “cast away the underlying rights requirement” in favor of finding rights inherent in the Due Process Clause with “rousing citation[s]” to sources like Blackstone and the Court’s substantive due process case law. See *id.* at 1077 (analyzing this trend over

Court deployed in *Davis* to reach the conclusion that reputational injury was not an underlying liberty interest warranting procedural due process protection,⁵⁷ paving the way for the stigma-plus claim.

C. Federal Constitutional Torts

The strength of novel procedural due process claims is necessarily limited by the vehicles through which such claims may be steered into court. Put simply, the measure of such a right is in its remedy. Perhaps the best (while not the only)⁵⁸ cause of action for vindicating constitutional rights in federal court is the 42 USC § 1983 action and its federal common-law counterpart under *Bivens*.⁵⁹ Section 1983 permits civil damages actions to be brought against those who deprived others of constitutional or statutory rights “under color” of state law.⁶⁰ Similarly, *Bivens* actions enable plaintiffs to bring civil damages actions against government

several cases). Viewed on a longer time horizon, the Court’s approach grows difficult to generalize. While the Court has generally hewed to liberty interests with a statutory hook, it occasionally diverges. See Geoffrey R. Stone, et al, *Constitutional Law* 959–62 (Wolters Kluwer 7th ed 2013) (describing the Court as generally reluctant to find liberty interests without statutory entitlements, but as more willing to do so in the liberty than property context).

⁵⁷ See *Davis*, 424 US at 711–13.

⁵⁸ Some constitutional rights may be vindicated without an independent cause of action. For example, the exclusionary rule deters violations of the protection against unreasonable searches and seizures under the Fourth Amendment without requiring a separate trial. See *Mapp v Ohio*, 367 US 643, 670 (1961) (Douglas concurring) (describing the protection against unreasonable searches and seizures as a “dead letter” without the protection of the exclusionary rule). Instead of bringing a separate civil case, a defendant may seek to exclude the impermissibly obtained evidence at her criminal trial. But the exclusionary rule itself has profound limitations, see Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U Ill L Rev 363, 368–72, and not all areas of constitutional law provide a ready-made litigation context comparable to the criminal trial.

⁵⁹ *Bivens*, 403 US at 388.

⁶⁰ Ku Klux Klan Act § 1, 17 Stat 13, 13, codified as amended at 42 USC § 1983. The modern codification—modified from the original to provide protection for deprivations of statutory rights, see US Rev Stat § 1979 (1875) (adding “and laws”)—reads in relevant part as follows:

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.

See also *Maine v Thiboutot*, 448 US 1, 7–8 (1980).

actors depriving persons of constitutional rights while acting under color of *federal law*.⁶¹

These, too, are relatively recent innovations. Section 1983 was originally a product of Reconstruction, but its reach was swiftly cabined by restrictive interpretations of the Fourteenth Amendment.⁶² It spent the better part of the following century dormant⁶³ before being revived by the Supreme Court in the mid-twentieth century.

In *Monroe v Pape*⁶⁴ and successive decisions,⁶⁵ the Supreme Court reverted to a broad interpretation of “under color” of state law and began developing a “federal common law of constitutional torts.”⁶⁶ *Bivens* actions were devised contemporaneously.⁶⁷ In *Monroe*, for example, the Court concluded that § 1983 reached actions not authorized by state law and permitted a cause of action under § 1983 even if state law provided its own tort remedy.⁶⁸ In the decades hence, § 1983 litigation increased to a “striking” degree.⁶⁹ Plaintiffs have brought successful § 1983 actions on a broad set of claims, ranging from prisoners’ First Amendment

⁶¹ *Bivens*, 403 US at 396–97.

⁶² See *Slaughter-House Cases*, 83 US 36, 73–80 (1872) (determining that the Fourteenth Amendment did not federalize substantive rights beyond those that were incidents of federal citizenship); *United States v Cruikshank*, 92 US 542, 554 (1875) (finding that private conspiracies for deprivations of civil rights lack the requisite state action). See also Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 Mich L Rev 1323, 1336–43 (1952).

⁶³ Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?*, 60 NYU L Rev 1, 9 (1985).

⁶⁴ 365 US 167 (1961). The *Monroe* Court drew on tentative early efforts to relax the state-action requirement. See generally *Shelley v Kraemer*, 334 US 1 (1948); *Screws v United States*, 325 US 91 (1945); *Smith v Allwright*, 321 US 649 (1944); *United States v Classic*, 313 US 299 (1941).

⁶⁵ See, for example, *McNeese v Board of Education*, 373 US 668, 676 (1963) (permitting plaintiffs to bring § 1983 actions before exhausting state and local administrative remedies). The reinvigorated § 1983 provoked a storm of constitutional litigation, prompting such far-reaching claims as challenges to loyalty oaths, see, for example, *Keyishan v Board of Regents*, 385 US 589, 592–93 (1967), and termination of welfare benefits, see, for example, *Goldberg*, 397 US at 255.

⁶⁶ Seth F. Kreimer, *The Source of Law in Civil Rights Actions: Some Old Light on Section 1988*, 133 U Pa L Rev 601, 604 (1985).

⁶⁷ See *Bivens*, 403 US at 396–97.

⁶⁸ *Monroe*, 365 US at 183.

⁶⁹ Note, *Developments in the Law: Section 1983 and Federalism*, 90 Harv L Rev 1133, 1172 (1977) (“In 1960 only two hundred and eighty suits were filed in federal court under all the civil rights acts; . . . in 1972 approximately eight thousand claims were filed under section 1983 alone.”). See also Christina Whitman, *Constitutional Torts*, 79 Mich L Rev 5, 6 (1980) (“In 1976, almost one out of every three ‘private’ federal question suits filed in the federal courts was a civil rights action against a state or local official.”).

claims to public employees' claims to procedural due process.⁷⁰ Regardless of the specific underlying claim, § 1983 typically requires state action: the defendant generally must be either acting on behalf of or performing duties traditionally carried out by the state.⁷¹

The modern § 1983 has been a lightning rod for criticism. Critics have leveled several primary objections. First, they point to an outsized impact on federal dockets.⁷² In addition to overburdening the courts, one critic argues that modern § 1983 litigation reduces collegiality and predictability, raising the prospect of “dilut[ing] and thus debas[ing] constitutional values.”⁷³ As Justice Harry Blackmun pointed out, this objection is strange: § 1983 is “not an independent source of constitutional or statutory rights,” but “only a vehicle for substantive claims that have their base elsewhere.”⁷⁴ As such, Blackmun argues that “[m]any complaints about § 1983’s ostensible impact . . . are complaints about the breadth of the underlying constitutional rights.”⁷⁵

Other criticisms may land a stronger punch. Critics have urged that the Court’s § 1983 jurisprudence is beset by “doctrinal confusion” and internal contradiction, inflicting on the courts not just volume but excessive complexity.⁷⁶ Critics have also raised

⁷⁰ For examples of these and similar applications, see Blackmun, 60 NYU L Rev at 20 (cited in note 63) (collecting cases).

⁷¹ See Julie K. Brown, Note, *Less Is More: Decluttering the State Action Doctrine*, 73 Mo L Rev 561, 564–68 (2008) (discussing the Supreme Court’s different state-action tests); Richard H.W. Maloy, “*Under Color Of*”—*What Does It Mean?*, 56 Mercer L Rev 565, 599–645 (2005) (same). See also *Lugar v Edmonson Oil Co*, 457 US 922, 935 n 18, 936–39 (1982).

⁷² See Ruggero J. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge’s Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L & Soc Order 557, 563–71 (describing a “deluge” of § 1983 cases in the federal courts); Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 Harv L Rev 1486, 1487 n 12 (1969) (claiming that § 1983 litigation produced more pages of reported cases in February 1969 than all but two other federal statutes); *Thiboutot*, 448 US at 34–37 (Powell dissenting) (criticizing the extension of § 1983 liability to statutory protections on the grounds that “literally hundreds of cooperative regulatory and social welfare enactments may be affected”).

⁷³ See Whitman, 79 Mich L Rev at 27 (cited in note 69).

⁷⁴ Blackmun, 60 NYU L Rev at 22 (cited in note 63).

⁷⁵ Id. One commentator flips Blackmun’s remarks around, suggesting that § 1983 may warrant as little credit as blame. See Louise Weinberg, *The Monroe Mystery Solved: Beyond the “Unhappy History” Theory of Civil Rights Litigation*, 1991 BYU L Rev 737, 747–48. Professor Louise Weinberg suggests that it was the Court’s rights revolution, and not its cause-of-action innovations, that was responsible for the impact of *Monroe*. See id at 746–50.

⁷⁶ See Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 Cornell L Rev 482, 487–91 (1982). See also Whitman, 79 Mich L Rev at 7 (cited

federalism concerns, objecting that the Court's expansive interpretations of § 1983 improperly import state-law claims into a federal context.⁷⁷

As a descriptive matter, this discomfort with the wide scope of federal constitutional torts has had a considerable effect. It has been the impetus for a wide range of doctrines structuring and constricting § 1983 and *Bivens* claims.⁷⁸ While formally a constraint on interests cognizable as procedural due process claims, stigma plus is arguably one such doctrine.

D. Arriving at the “Stigma-Plus” Doctrine

Davis emerged from these converging developments of instability in procedural due process doctrine and voluminous federal constitutional-torts litigation. As Part I.B explained, the Court was in the process of revising its approach to procedural due process, clarifying how courts could determine which interests qualified for procedural due process protection. Simultaneously, the Court faced the flood of constitutional-torts litigation—and resulting criticism—described in Part I.C. *Davis* was the product of both shifts.

In *Davis*, the Court considered whether state defamation, standing alone, stated a claim for relief under § 1983 and the Due Process Clause of the Fourteenth Amendment.⁷⁹ The Court had previously blessed several reputation-based claims for relief.⁸⁰

in note 69) (criticizing the complexity of § 1983 litigation for generating “an elaborate, and often unpredictable, game”).

⁷⁷ See, for example, Aldisert, 1973 L & Soc Order at 572–74 (cited in note 72) (disputing whether § 1983 enforcement belongs in federal courts and expressing concern that § 1983 “substitute[s] jural impressionism for fixed and uniform standards of external conduct” in the state common-law arenas of contracts or torts); Whitman, 79 Mich L Rev at 30–38 (cited in note 69) (describing § 1983's displacement of state lawmaking authority); Note, 82 Harv L Rev at 1487 (cited in note 72) (“[F]ederal jurisdiction has been extended to . . . cases . . . minor enough to raise doubts whether they belong in federal court yet which may simultaneously involve important state interests.”); Gene R. Nichol Jr., *Federalism, State Courts, and Section 1983*, 73 Va L Rev 959, 993–1000 (1987) (explaining that the scope of modern privileges and immunities yields a much more intrusive § 1983 than its drafters envisioned). But see Blackmun, 60 NYU L Rev at 21–24 (cited in note 63) (rejecting federalism critiques).

⁷⁸ See Whitman, 79 Mich L Rev at 6–7 & nn 11–19 (cited in note 69) (describing a laundry list of court-driven limitations “that, in purpose or effect, discourage section 1983 litigants and dispose of specific cases,” including standing, *res judicata*, and strict statutory construction).

⁷⁹ *Davis*, 424 US at 694.

⁸⁰ See, for example, *Wieman v Updegraff*, 344 US 183, 190–91 (1952) (finding that a loyalty oath requirement violated due process in part on the grounds that exclusion from public employment on disloyalty grounds constituted a “badge of infamy”); *Joint*

But in *Davis*, the Court reconsidered; without overturning its precedents, it constrained the types of reputational injuries it would permit.⁸¹ This move drew on its new determination to scrutinize both procedural due process and federal constitutional-tort claims for an adequate statutory or constitutional basis.⁸²

1. Initial approaches to reputational injury.

In previous cases, the Court had permitted plaintiffs to state a procedural due process claim for what were essentially reputational injuries. In *Wisconsin v Constantineau*,⁸³ for example, the Court considered whether a city's posting of a notice forbidding sales of liquors to a local resident constituted "such a stigma or badge of disgrace that procedural due process require[d] notice and an opportunity to be heard."⁸⁴ The Court concluded it did and rejected the city's procedural protections as insufficient.⁸⁵ *Roth* also suggested that reputational injury might suffice to state a claim. Its new formulation of procedural due process led it to reject the plaintiff university professor's wrongful dismissal claims.⁸⁶ But the Court stated in dicta that it would have faced "a different case" had the state made "charge[s] against [the plaintiff] that might seriously damage his standing and associations in his community" or "imposed on [the plaintiff] a stigma . . . that foreclosed his freedom to take advantage of other employment opportunities."⁸⁷

These precedents reflect the shifting sands of the Court's approach to procedural due process.⁸⁸ As a pre-*Roth* case, *Constantineau* reflected the Court's earlier and more flexible approach to what interests qualified for procedural due process protection.⁸⁹ *Roth*, meanwhile, represented an intermediate point.

Anti-Fascist Refugee Committee v McGrath, 341 US 123, 124–25, 139 (1951) (Burton) (plurality) (finding, in a splintered opinion, that the US attorney general's classification of organizations as "Communist" was impermissible without sufficient factual basis and constituted defamation). For cases closer in time to *Davis*, see *Wisconsin v Constantineau*, 400 US 433, 437 (1971); *Roth*, 408 US at 573–74.

⁸¹ *Davis*, US 424 at 701.

⁸² See Parts I.B–C.

⁸³ 400 US 433 (1971).

⁸⁴ *Id* at 434–36.

⁸⁵ *Id* at 437, 439.

⁸⁶ See notes 37–43 and accompanying text.

⁸⁷ *Roth*, 408 US at 573–74. The Court cited a long chain of precedents for these conclusions, including *Constantineau*.

⁸⁸ See Part I.B.

⁸⁹ See note 39.

While it required plaintiffs to point to an underlying right in order to invoke due process protections, it did not require that the right derive from an explicit entitlement.⁹⁰ Deploying the same logic as *Meachum*, *Davis* took this discipline a step further.

2. *Davis* and the stigma-plus claim.

Davis concerned a police department's distribution of a list of "active shoplifters" to local merchants.⁹¹ Despite the fact that he had not been found guilty of the alleged offense, the plaintiff's name and photograph appeared on the list.⁹² The plaintiff's supervisor questioned him about the incident, although he was not fired.⁹³ The plaintiff brought suit under § 1983, contending that the stigma generated by the list prevented him from patronizing the stores and limited his future employment opportunities.⁹⁴ The Court classified these claims as based only on an interest in reputation. Drawing on its recently minted underlying-rights approach to procedural due process, the Court concluded that the plaintiff had not pleaded a liberty interest that merited due process protection.⁹⁵ According to the Court, the plaintiff sought to vindicate an interest in reputation.⁹⁶ But the interest in enjoyment of a good reputation, alone, was neither enshrined in the Constitution nor "recognized and protected by state law."⁹⁷ The state could protect a person's reputation from injury using its tort law, but state tort law was not (yet) a source of liberty interests.⁹⁸

Perhaps as a result of the line of precedents acknowledging reputational injuries,⁹⁹ the Court in *Davis* did not bar recovery for reputational injury altogether. Instead, it concluded that "reputation alone, apart from some more tangible interests such as employment," fell short of "either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process

⁹⁰ See text accompanying notes 38–48.

⁹¹ *Davis*, 424 US at 694–95.

⁹² See *id.* at 695–96. After the plaintiff had pleaded not guilty to the underlying charge, the charge had been filed away with leave to reinstate and remained outstanding. *Id.*

⁹³ See *id.* at 696.

⁹⁴ *Id.* at 694–96.

⁹⁵ *Davis*, 424 US at 700–01, 711–12. See also Part I.B.

⁹⁶ *Davis*, 424 US at 711–12.

⁹⁷ *Id.* at 700–01, 710.

⁹⁸ *Id.* at 712.

⁹⁹ See text accompanying notes 83–87.

Clause.”¹⁰⁰ The Court distinguished *Davis* from its prior cases concerning reputational injury by identifying the earlier cases as instances in which plaintiffs experienced *both* an alteration of legal status *and* an injury resulting from defamation, thus justifying procedural protection.¹⁰¹

Federal circuit courts formulated this holding into the two-part stigma-plus test.¹⁰² Prospective plaintiffs must plead both (1) a stigma, that is, that a false and injurious statement has been made;¹⁰³ and (2) a plus factor, that is, that the plaintiff suffered “a material state-imposed burden or state-imposed alteration of the plaintiff’s status or rights.”¹⁰⁴

The Supreme Court has had few occasions to revisit its conclusion in *Davis* or the peculiarities of the stigma-plus test.¹⁰⁵ It has fallen instead to the circuit courts to resolve doctrinal questions. Notably, the circuits agree that the plus need not itself rise to the level of an independent violation of state or federal law.¹⁰⁶ It is enough that the factor constitutes a burden or alteration of rights.

Commentators have been sharply critical of the *Davis* decision on both substantive and precedential grounds. Substantive

¹⁰⁰ *Davis*, 424 US at 701.

¹⁰¹ *Id.* at 708–10.

¹⁰² See, for example, *Evans v Chalmers*, 703 F3d 636, 654 (4th Cir 2012); *Guttman v Khalsa*, 669 F3d 1101, 1125–26 (10th Cir 2012); *San Jacinto Savings & Loan v Kacal*, 928 F2d 697, 701 (5th Cir 1991); *Somerset House, Inc v Turnock*, 900 F2d 1012, 1015 (7th Cir 1990).

¹⁰³ See *Codd v Velger*, 429 US 624, 638 n 11 (1977). See also *Hill v Borough of Kutztown*, 455 F3d 225, 236 (3d Cir 2006); *Wenger v Monroe*, 282 F3d 1068, 1074 (9th Cir 2002).

¹⁰⁴ *Hill*, 455 F3d at 236–37; *Behrens v Regier*, 422 F3d 1255, 1259–60 (11th Cir 2005); *Sadallah v City of Utica* 383 F3d 34, 38 (2d Cir 2004). See also *Siegert v Gilley*, 500 US 226, 233–34 (1991) (discussing the required link between stigma and harm); *Davis*, 424 US at 701–02.

¹⁰⁵ *Codd* briefly discusses the falsehood requirement but does not examine the claim in any detail. See *Codd*, 429 US at 638 n 11. *Siegert*, for its part, rejected the suggestion that malice amplified defamation into a stigma-plus claim cognizable as a *Bivens* action. See *Siegert*, 500 US at 234.

¹⁰⁶ See *Dennis v S & S Consolidated Rural High School District*, 577 F2d 338, 343 (5th Cir 1978) (“It is the individual’s status as a government employee and not his property interest in continued employment which furnishes the ‘plus’ that raises reputation to the level of a constitutionally protected liberty interest.”) (emphasis added). As the Third Circuit explained in *Hill*, while the Supreme Court has never made this point explicitly, it follows straightforwardly from its precedents. *Hill*, 455 F3d at 237–38. In addition to its dicta in *Roth*, the Court has subsequently implicitly endorsed this conclusion. The Court explained that it had “no doubt” that the Eighth Circuit was correct in concluding that a stigma-plus plaintiff who lacked a property interest in continued employment was nonetheless deprived of liberty without due process of law when false accusations accompanied his discharge. *Owen v City of Independence*, 445 US 622, 633 n 13 (1980). See also *Doe v Department of Justice*, 753 F2d 1092, 1104–12 (DC Cir 1985); *Codd*, 429 US at 627.

critics argue that the decision has an unduly restrictive concept of liberty.¹⁰⁷ In addition to questioning whether the underlying-rights approach is appropriate,¹⁰⁸ critics note that after *Davis* the Court at times embraced a more expansive conception of cognizable liberty interests.¹⁰⁹ Others point out that reputational interests ought to qualify for procedural due process protection even under the Court's underlying-rights analysis.¹¹⁰ Claims based on reputational injury *do* have a basis in state law in the form of the tort of defamation.¹¹¹ It was only by classifying the interest as the right to enjoy a good reputation that the Court was able to classify the *Davis* plaintiff's claim as outside the bounds of procedural due process protection.

Other commentators are agnostic on the question whether *Davis* was unduly restrictive, but take issue with its apparent inconsistency with the Court's precedents. Professor Edward Rubin, for example, points out that prior to *Davis*, there existed an "unbroken line of cases . . . that had imposed due process requirements on government action when that action stigmatized a person."¹¹²

Thus, relying on a more appropriately expansive concept of liberty, the state tort of defamation as a predicate underlying

¹⁰⁷ See, for example, Rubin, 72 Cal L Rev at 1077 (cited in note 20) ("[I]t seems inconceivable that the Court would permit a state to establish an administrative scheme where people were restrained and beaten simply because the state legislature declared that there was no positive law right to avoid such treatment."); Mitnick, 43 UC Davis L Rev at 79, 90–98, 101–19 (cited in note 18) (claiming that stigma plus represents "impoverished conceptions of reputation and liberty"); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 Cornell L Rev 405, 423–25 (1977). But see Ronald H. Surkin, *The Status of the Private Figure's Right to Protect His Reputation under the United States Constitution*, 90 Dickinson L Rev 667, 678 (1986) (describing *Davis* as a solution to escape the "morass" of "mak[ing] of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States") (quotation marks omitted), citing *Davis*, 424 US at 701; Jeff Powell, Comment, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 Yale L J 1317, 1332–33 (1982) (complimenting *Davis* as an example of using federalism concepts to "supply[] content to constitutional terms that lack definition, such as 'liberty,' 'property,' and 'due process'" instead of resorting to justices' personal viewpoints).

¹⁰⁸ See Rubin, 72 Cal L Rev at 1077 (cited in note 20).

¹⁰⁹ See *id.* at 1074–75. See also note 56.

¹¹⁰ See Aaron H. Caplan, *Nonattainder as a Liberty Interest*, 2010 Wis L Rev 1203, 1219; Barbara E. Armacost, *Race and Reputation: The Real Legacy of Paul v. Davis*, 85 Va L Rev 569, 579 (1999).

¹¹¹ See Armacost, 85 Va L Rev at 579 (cited in note 110).

¹¹² Rubin, 72 Cal L Rev at 1074–75 (cited in note 20). See also Part I.D.1. Some cases appearing to recognize reputational harms even postdated *Davis*. See, for example, *Vitek*, 445 US at 491–92 (including protection from the stigmatizing effects of involuntary commitment as one of the historic liberties protected by the Due Process Clause).

right, or the Court's prior precedents, it is conceivable that the Court could have recognized an independent liberty interest in reputation after all. Nonetheless, the stigma-plus claim appears to be a permanent, if peculiar, feature of procedural due process.

The stigma-plus claim, and its grounding in a shifting Supreme Court doctrine, provokes a range of puzzles. It raises the question how much deference *Davis's* focus on underlying liberty interests should receive. It raises the question why the Court paved any path for reputational injuries, and why the plus safeguard was erected as gatekeeper. And, most materially for prospective litigants, it raises the question what kinds of injuries can meet its demanding test—and which perpetrators can be held responsible.

II. SOURCES OF STIGMA AND SOURCES OF HARM

Since *Davis*, courts have grappled with the stigma-plus test, trying to formulate clear rules for what qualifies as a protected interest under the doctrine and what relationship between the two elements is required. For example, courts have examined whether either evidence of a “connection between” the two elements¹¹³ or evidence of an “enhance[ment]” of the reputational harm by the liberty interest infringement¹¹⁴ qualifies under the terms of the test. Similarly, they have investigated the required temporal proximity between¹¹⁵ and temporal order of¹¹⁶ the two parts of the claim. And two circuits have grappled directly with the question whether the elements must proceed from the same source. The First Circuit has concluded that the same actor must supply both elements for a stigma-plus claim to be adequately pleaded. By contrast, the Second Circuit allows any state actor to

¹¹³ *Marrero v City of Hialeah*, 625 F2d 499, 502, 513, 519 (5th Cir 1980) (determining plaintiffs did not need to show that the alleged reputational injury *caused* the alleged infringement of a liberty interest but that a showing of “connection” with and “reasonabl[e] relat[ion]” between the two elements was sufficient).

¹¹⁴ *McGhee v Draper*, 639 F2d 639, 643 (10th Cir 1981) (“McGhee II”) (allowing plaintiff untenured teacher to show that nonrenewal “caused or enhanced” alleged reputational damage); *McGhee v Draper*, 564 F2d 902, 906–07 (10th Cir 1977) (“McGhee I”).

¹¹⁵ See *Brandt v Board of Cooperative Educational Services*, 820 F2d 41, 45 (2d Cir 1987) (finding defamatory statements made at time of termination to qualify under the stigma-plus test). See also *Siegert v Gilley*, 500 US 226, 233–34 (1991) (declining to find a stigma-plus claim when “alleged defamation was not uttered incident to the termination of [] employment,” but offered “several weeks later”).

¹¹⁶ See *Martz v Incorporated Village of Valley Stream*, 22 F3d 26, 32 (2d Cir 1994) (finding defamatory comments that *followed* alleged deprivation of liberty or property interest as failing to qualify under the stigma-plus test).

supply the plus element. This Part describes and compares these competing approaches.

A. The First Circuit: Stigma and Plus Must Proceed from the Same Source

The First Circuit has taken the position that the stigma and plus elements of a claim must proceed from the same governmental source. It developed its approach in two opinions, *Hawkins v Rhode Island Lottery Commission*¹¹⁷ and *URI Student Senate v Town of Narragansett*.¹¹⁸ In these opinions, the First Circuit articulates concerns about state action and causation, and seeks to avoid either problem by using a formalist approach that sharply curtails prospective litigation to instances in which a single actor issued the defamatory statements and inflicted the resulting injury to a liberty interest.

In *Hawkins*, the plaintiff was terminated from his employment with the Rhode Island State Lottery Commission following the state governor's bitter public criticism of his conduct in office.¹¹⁹ He sued the governor and the Lottery Commission using a § 1983 stigma-plus theory, arguing that the governor's public remarks criticizing his job performance amounted to defamation and improperly caused the Lottery Commission to remove him from his post.¹²⁰ The First Circuit concluded that Hawkins had "failed to state a viable due process claim" because "the party responsible for the alleged defamation was not the party responsible for the termination."¹²¹ The Lottery Commission was fiscally and operationally autonomous and separate from the governor's office.¹²² As such, "[a]lthough the governor's rhetoric may have created a political climate antithetic[al] to Hawkins [and] that affected the Commission's deliberations, the governor neither spoke for the Commission nor controlled its actions."¹²³ Plaintiff's termination was not a ratification of the governor's defamatory statements, but an independent action taken by an autonomous agency.¹²⁴

¹¹⁷ 238 F3d 112 (1st Cir 2001).

¹¹⁸ 631 F3d 1 (1st Cir 2011).

¹¹⁹ *Hawkins*, 238 F3d at 113.

¹²⁰ *Id* at 115.

¹²¹ *Id* at 116.

¹²² *Id*.

¹²³ *Hawkins*, 238 F3d at 116.

¹²⁴ *See id* at 116.

A decade later, the First Circuit underscored this approach. In *URI Student Senate*, the defendant city had passed an ordinance authorizing police officers to affix a sticker to any residence deemed to have hosted an “unruly gathering.”¹²⁵ The plaintiffs, representing both local college students and local landlords, brought a § 1983 stigma-plus facial challenge to this practice, arguing, respectively, that the practice exposed the students to disciplinary proceedings and that it impeded the landlords’ ability to find tenants.¹²⁶ The First Circuit rejected this claim on the grounds that when “the stigma and the incremental harm—the ‘plus’ factor—derive from distinct sources, a party cannot make out a viable procedural due process claim.”¹²⁷

The court’s concerns included the absence of a state-guaranteed right in either the landlords’ or the students’ claims and the groups’ failure to demonstrate sufficient state action. There was no “right to rent and live in Narragansett free of public branding.”¹²⁸ Nor were landlords entitled to have rental units fully occupied.¹²⁹ Moreover, “the vacancies that the [landlord] appellants lament[ed] [did] not result from state action but, rather, from the actions of third parties.”¹³⁰ It was “prospective tenants, acting without government compulsion, who [had] decide[d] whether or not to rent particular dwellings.”¹³¹ The court dismissed the student plaintiffs’ claimed rights on similar grounds, suggesting they derived purely from private contracts.¹³² Nonetheless, the court insisted that the case was not decided by the tenuous rights claims or the absence of state action. “[E]ven if both sources [were] government entities,” a party could not make out a viable procedural due process claim when the stigma and the incremental harm derived from distinct sources.¹³³

The First Circuit has justified this approach in several ways. In *Hawkins*, it cited political considerations. “[I]n the context of a public clash between political opponents,” the court was hesitant

¹²⁵ *URI Student Senate*, 631 F3d at 5.

¹²⁶ *Id.* at 9–10.

¹²⁷ *Id.* at 10, citing *Hawkins*, 238 F3d at 112, 116.

¹²⁸ *URI Student Senate*, 631 F3d at 10.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *URI Student Senate*, 631 F3d at 11.

¹³³ *Id.* at 10, citing *Hawkins*, 238 F3d at 112, 116. The court may have wished to avoid giving the impression that its legal conclusion applied only to the facts before it.

to “exceed the established limits of constitutional claims of reputation injury.”¹³⁴ Moreover, the Lottery Commission was fiscally and operationally autonomous and subject to a tripartite appointing authority.¹³⁵ As a result, “the governor neither spoke for the Commission nor controlled its actions.”¹³⁶ In other cases the court has focused on the nature of a plus injury to justify its approach. A “change in rights or status” must be “directly attributable to the challenged governmental action” to support a stigma-plus claim.¹³⁷ This showing could not be made when distinct sources supplied the stigma and the plus.¹³⁸ A second actor could not supply defamation “incident to” another actor’s subsequent act.¹³⁹ These arguments have not formally persuaded a peer circuit, but they have influenced other courts in rejecting more attenuated stigma-plus claims.¹⁴⁰

B. The Second Circuit: “Perfect Parity” Is Not Required

In contrast, the Second Circuit disclaims a parity requirement. According to the Second Circuit, all that is necessary to bring a stigma-plus claim is meeting the requirements that “(1) the stigma and plus would, to a reasonable observer, appear connected . . . and (2) the actor imposing the plus adopted (explicitly or implicitly) those [stigmatizing] statements in doing so.”¹⁴¹ Because it accepts multiple-actor stigma-plus claims, however, the Second Circuit’s approach raises more complicated questions, including to which actor liability attaches and whether a private actor could supply either element of the claim. This Part describes the origins of the Second Circuit’s test and addresses its approach to the resulting complexities.

¹³⁴ *Hawkins*, 238 F3d at 116.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *URI Student Senate*, 631 F3d at 10, citing *Pendleton v City of Haverhill*, 156 F3d 57, 63 (1st Cir 1998).

¹³⁸ *URI Student Senate*, 631 F3d at 10.

¹³⁹ *Pendleton*, 156 F3d at 64, citing *Siegert*, 500 US at 234.

¹⁴⁰ See, for example, *Wesley v Campbell*, 2010 WL 3120204, *7 (ED Ky) (rejecting a stigma-plus claim by an unindicted arrestee for sexual abuse of a child pursuant to an investigative report and a subsequent termination from school employment on the grounds that the report and the termination came from two different governmental actors); *Tibbetts v Kulongoski*, 567 F3d 529, 538–39 (9th Cir 2009) (rejecting a stigma-plus claim with elements supplied by different governmental actors when the alleged stigma preceded the alleged plus by sixteen months, although on more lenient qualified immunity grounds).

¹⁴¹ *Velez v Levy*, 401 F3d 75, 89 (2d Cir 2005).

In *Velez v Levy*,¹⁴² the plaintiff alleged that several fellow members of one of New York City's community school district boards¹⁴³ fabricated and disseminated charges that she had harassed and terrorized a school official and that the chancellor of the city school district had removed her from her post "in retaliation for her stated political views."¹⁴⁴ She challenged her removal on stigma-plus grounds, arguing it deprived her of a liberty interest and resulted from her fellow board members' allegedly defamatory statements.¹⁴⁵

The plaintiff claimed that her fellow board members had disseminated to the chancellor and to local news outlets allegations that she had sprinkled "'foul smelling' [. . . 'voodoo' powder]" outside a school superintendent's office.¹⁴⁶ The chancellor investigated and, concluding that the plaintiff's alleged behavior was inappropriate and possibly criminal, removed the plaintiff from her post.¹⁴⁷ The plaintiff sought and won reinstatement to this position from the city's board of education, which rejected the chancellor's investigation as incomplete, illogical, and unduly politicized.¹⁴⁸

Although the Second Circuit described cases in which the same governmental actor was responsible for each element of the stigma-plus claim as "typical," it concluded that "perfect parity in the origin of both the 'stigma' and the 'plus' [was] not required to state the infringement of a 'stigma-plus' liberty interest."¹⁴⁹ The Second Circuit argued that the stigma-plus claim required consideration of whether the plaintiff had alleged a "sufficiently proximate" connection between the two elements to state a claim.¹⁵⁰ This connection could be shown through demonstrating both (1) that "the stigma and plus would, to a reasonable observer, appear connected," such as "due to their order of occurrence . . . or

¹⁴² 401 F3d 75 (2d Cir 2005).

¹⁴³ At the time the events at issue took place, New York was divided into thirty-two community school district boards composed of local elected officials. A citywide board composed of members appointed by the borough presidents and the mayor oversaw and administered the boards, including through appointment of the chancellor of the city school district. See *id* at 79–81 & n 1.

¹⁴⁴ See *id* at 80.

¹⁴⁵ *Id* at 79–80.

¹⁴⁶ *Velez*, 401 F3d at 79, 81–82.

¹⁴⁷ *Id* at 82–83.

¹⁴⁸ *Id* at 83.

¹⁴⁹ *Id* at 89.

¹⁵⁰ *Velez*, 401 F3d at 89.

their origin,” and (2) that “the actor imposing the plus adopted (explicitly or implicitly) those statements in doing so.”¹⁵¹

To allocate liability to the appropriate actor, the Second Circuit examined which of the various defendants were in a position to provide the plaintiff with the predeprivation hearing required to afford her adequate procedural due process.¹⁵² Although it does not follow that liability for stigma plus will always attach to the actor responsible for the plus, it will often have that effect. In this case, the court found that the chancellor was the only actor in a position to order preremoval review or supply postremoval remedies.¹⁵³

While it provided some guidance for assigning liability, the *Velez* court did not grapple directly with the other complexity that multiple-actor stigma-plus claims generate: whether private actors may supply either element of the claim. Because state actors supplied both elements of the stigma-plus claim alleged in *Velez*, it did not present the Second Circuit with an opportunity to address this question directly. But the court likely intended its opinion to validate only stigma-plus claims brought against state actors. References throughout the opinion illustrate a focus on governmental action.¹⁵⁴ The circuit’s basic formulation of a stigma-plus claim describes the plus element as constituting a “tangible and material state-imposed burden.”¹⁵⁵ The circuit’s discussion of the stigma element in past single-actor stigma-plus claims similarly focuses on state actors.¹⁵⁶

The *Velez* court justified its approach by mining other circuits it viewed as reaching sympathetic conclusions.¹⁵⁷ It discusses each

¹⁵¹ Id at 89.

¹⁵² See id at 93.

¹⁵³ Id.

¹⁵⁴ See, for example, *Velez*, 401 F3d at 89 (“When government actors defame a person and . . . deprive them of some tangible legal right or status, . . . a liberty interest may be implicated, even though the ‘stigma’ and ‘plus’ were not imposed at precisely the same time.”); id at 89 n 12 (noting that the absence of state action may be a reason why “one or more defendants whose actions collectively *implicate* a liberty interest may not be *liable* for the deprivation of that liberty interest”).

¹⁵⁵ See id at 87; *Sadallah v City of Utica*, 383 F3d 34, 38 (2d Cir 2004); *Doe v Department of Public Safety*, 271 F3d 38, 47 (2d Cir 2001).

¹⁵⁶ See *Sadallah*, 383 F3d at 38 (referring to “government-imposed stigma”).

¹⁵⁷ The court also disputed the distance between its position and the First Circuit’s. It went so far as to suggest that the sufficient-connection test could reconcile its approach with the First Circuit’s. *Velez*, 401 F3d at 90, citing *Hawkins*, 238 F3d at 116. Specifically, the Lottery Commission in *Hawkins*, “in its termination of the plaintiff, ‘uttered no defamatory statements,’ and instead *specifically denied* that its actions were an endorsement of [the alleged] stigmatizing claims.” *Velez*, 401 F3d at 90, quoting *Hawkins*, 238 F3d at 116.

case in brief, but a full discussion of one example is illuminating. In *McGhee v Draper*,¹⁵⁸ the Tenth Circuit explained that a stigma-plus claim involving multiple actors could entitle a plaintiff to a name-clearing hearing.¹⁵⁹ Although the Second Circuit did not discuss this complexity, the stigma alleged in the *McGhee* cases was attributable to private actors.¹⁶⁰ *McGhee* concerned an untenured school teacher who alleged that the school board discontinued her contract in response to unfounded parent and student complaints at school board meetings.¹⁶¹ The plaintiff claimed that the parents and students supplied the requisite stigma by making their complaints and that the school board itself supplied the accompanying plus by terminating the plaintiff. According to the Tenth Circuit, the school board's actions to terminate the plaintiff could qualify as depriving the plaintiff of a liberty interest whether the board "explicitly state[d] the stigmatizing factors" or "implicitly ratif[ied] some other stigmatizing allegations."¹⁶² The burden on the plaintiff was not onerous. She could state a claim by alleging that a termination or other alleged plus factor "caused or enhanced" the "alleged reputational damage."¹⁶³ Alternatively, she could allege that "the reputational harm was entangled with some more tangible interests."¹⁶⁴ Or she could allege that the harm occurred in "an atmosphere where the plaintiff's reputation [was] at issue."¹⁶⁵

The Second Circuit noted further support in other circuits. In *Bishop v Tice*,¹⁶⁶ the plaintiff safety engineer alleged stigma and

As such, it could be viewed as decided on the basis of the absence of an actual connection between stigma and plus rather than on the basis of the relevant actors' identities. *Velez*, 401 F3d at 90, quoting *Hawkins*, 238 F3d at 116. *URI Student Senate* firmly rejected those overtures, however, see 631 F3d at 10, citing *Hawkins*, 238 F3d at 112, 116, and other opinions have explicitly emphasized the disagreement, see *Mead v Independence Association*, 684 F3d 226, 234–35 (1st Cir 2012). But the Second Circuit could make a similar argument about *URI Student Senate*, pointing to the role of private actors in supplying the second element of the claim.

¹⁵⁸ 639 F2d 639 (10th Cir 1981) ("McGhee II").

¹⁵⁹ *Id.* at 643.

¹⁶⁰ The full implications of private-actor cases like the *McGhee* cases are discussed in Part III.A.2.

¹⁶¹ *McGhee I*, 564 F2d at 906–07. The teacher was accused of being an immoral "sex-pot," of permitting a student to check out a book containing four-letter expletives, and of changing student grades on report cards. *Id.*

¹⁶² *McGhee II*, 639 F3d at 643.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 643 n 2 (quotation marks omitted).

¹⁶⁵ *Id.*

¹⁶⁶ 622 F2d 349 (8th Cir 1980).

plus elements attributable to two different actors.¹⁶⁷ The Eighth Circuit permitted the claim to proceed.¹⁶⁸ The Second Circuit treated this conclusion as supporting its contention that stigma and plus could be supplied separately.¹⁶⁹ Similarly, *Marrero v City of Hialeah*¹⁷⁰ concerned an instance in which stigma and plus were supplied by the same state actor, but the Fifth Circuit stated expansively that “it [was] sufficient that the defamation occur[ed] in connection with, and [was] reasonably related to, the alteration of the right or interest.”¹⁷¹ And in *Owen v City of Independence*,¹⁷² the plaintiff city police chief alleged that the city council released a stigmatizing report concerning his operation of the police department, after which the city manager discharged him.¹⁷³ While the Supreme Court disposed of the case on other grounds,¹⁷⁴ it approved the lower court’s conclusion that the petitioner was deprived of due process. Referring back to its holding in *Davis*, the Court reasoned that “even if [the council’s accusations] did not in point of fact cause petitioner’s discharge, the defamatory and stigmatizing charges certainly occurred in the course of the termination of employment.”¹⁷⁵

Taken together, these examples illustrate a consistently contextual approach. Each court appears to permit claims involving multiple actors or separate incidents so long as the plaintiff could claim sufficient causal connection between the two elements. Rather than erect formal barriers between the stages of the stigma-plus claim or which actors may supply them, they allow subsequent actions to “ratify”¹⁷⁶ prior stigmatizing conduct. While not dispositive of the question the Second Circuit considered, the cases appear sympathetic to its conclusion.

¹⁶⁷ Id at 353–54. The plaintiff alleged that he was stigmatized by Occupational Safety and Health Administration auditors’ demand, made in front of third parties, that the plaintiff resign or face unspecified criminal charges. Id at 351–52. And the plaintiff accused his supervisor of supplying a plus by denying him either an explanation or any further administrative remedy. Id at 352. The case was complicated somewhat by allegations of collusion between the supervisor and the auditors. See id at 352, 354.

¹⁶⁸ Id at 353–54.

¹⁶⁹ *Velez*, 401 F3d at 88.

¹⁷⁰ 625 F2d 499 (5th Cir 1980).

¹⁷¹ Id at 519–20. See also *Velez*, 401 F3d at 88–89 (interpreting the Fifth Circuit’s holding).

¹⁷² 445 US 622 (1980).

¹⁷³ Id at 628–29.

¹⁷⁴ The parties had not briefed the court on the liberty-interest question, and the Supreme Court decided the case on qualified immunity grounds. Id at 633 n 13, 657.

¹⁷⁵ Id at 633 n 13 (quotation marks omitted), citing *Davis*, 424 US at 710.

¹⁷⁶ *McGhee II*, 639 F2d at 643.

* * *

In sum, the First and Second Circuits vary along multiple dimensions. They disagree about whether an identity of actors is necessary, and they appear to disagree about whether the plus hurdle requires sharp rules or context-driven standards for evaluating whether stigma and plus are adequately linked. But both approaches share reference back to the purpose the stigma-plus test was designed to achieve: careful scrutiny of the causal link between its elements.

III. THE SECOND CIRCUIT'S APPROACH BEST ACCOMPLISHES THE PURPOSE OF THE STIGMA-PLUS CLAIM

The varying approaches taken by the First and Second Circuits exemplify the challenges of interpreting the stigma-plus claim.¹⁷⁷ Both circuits attempt to answer *Davis's* demand for close scrutiny of stigma-plus claims. But without a strong theory explaining the purpose of a stigma-plus claim, they trade assertions as to what tests and outcomes it requires. This Part fills this gap through a two-part argument. In Part III.A, it considers what purpose the stigma-plus claim serves. It frames this question by examining alternative design choices made in other hurdles to civil litigation. It ultimately concludes that the stigma-plus hurdle represents a causation test. In Part III.B, it examines the circuits' competing approaches to determine which is best suited to scrutinizing the causal link between stigma and harm.

A. Deriving the Purpose of the Stigma-Plus Claim

Existing literature on *Davis* and the stigma-plus claim presents a straightforward hypothesis about its source: to disapprove of ballooning litigation dockets in the federal courts by placing a damper on claims, with a particular focus on discouraging seemingly tenuous claims like those predicated on reputational harm.¹⁷⁸ There is some evidence to support this hostility hypothesis. The decision is time-stamped at a contentious moment in the development of procedural due process and federal constitutional

¹⁷⁷ See William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1530–32 (1987) (discussing courts' expanding role in interpreting § 1983).

¹⁷⁸ See, for example, Whitman, 79 Mich L Rev at 7–8 (cited in note 69); Mitnick, 43 UC Davis L Rev at 90–93 (cited in note 18); Rubin, 72 Cal L Rev at 1111 (cited in note 20) (describing the Court's concern as “essentially a ‘floodgates of litigation’ problem”).

torts¹⁷⁹ and goes out of its way to break new ground.¹⁸⁰ Also, stigma plus was one of a spate of contemporaneous retrenching moves the Court deployed to scale back the scope of constitutional-tort liability.¹⁸¹ The Court may have hoped to reduce strain on the federal docket or to eliminate redundancies between federal claims and state causes of action.¹⁸² Perhaps there is something about reputation-based claims that makes this redundancy especially troubling.¹⁸³

However, the hypothesis that the stigma-plus claim was motivated by hostility to federal litigation proves too little. Even if the claim needs no internal logic, stopping the analysis there provides no insight into its chosen form and provides little guidance regarding novel applications of the claim.

Such an explanation also proves incorrect. While the stigma-plus claim emerged from a skeptical Court, a focus on what it prohibited fails to account for what it enabled. It is a claim founded on the conclusion that reputation is not a protected liberty interest, but it also lends reputational harm the power to amplify the infringement of some other protected interest into a new or strengthened claim. The claim's design thus disapproves reputation as a liberty interest while in the next breath affording it a powerful role. If the first half of this doublespeak motivates the hostility hypothesis, the second half illustrates that courts were more preoccupied by the potential harm represented by reputational injury than they have let on.

This Section presents a more compelling story capable of knitting together this apparent contradiction. The stigma-plus claim represents a beefed-up check on the claimed causal link between stigma and harm. The Section reaches this conclusion by first examining alternate design choices and then considering alternate applications of the stigma-plus claim.

¹⁷⁹ See Part I.

¹⁸⁰ Whether reputation-based interests may support a procedural due process claim as a normative or constitutional matter, *Davis* has been criticized as an unconvincing treatment of past precedents and a doctrinal eddy. See notes 107–12. See also Mark Tushnet, *The Constitutional Right to One's Good Name: An Examination of the Scholarship of Mr. Justice Rehnquist*, 64 *Ky L J* 753, 753, 758–63 (1976) (criticizing the Court's efforts to distinguish its precedents).

¹⁸¹ See note 78.

¹⁸² For a version of this argument, see Whitman, 79 *Mich L Rev* at 7–10 (cited in note 69).

¹⁸³ For one argument that reputation is an unusual interest, see Cass R. Sunstein, *Hard Defamation Cases*, 25 *Wm & Mary L Rev* 891, 891 (1984) (discussing the inherent tension between free expression and the interest in reputation).

1. Analogs elsewhere in civil rights law.

Elsewhere in civil rights law and civil litigation, courts have made three different design choices in carving out hurdles to claims: (a) general claims bars, (b) heightened evidentiary requirements, and (c) heightened pleadings requirements. The stigma-plus claim belongs to the third category, but examples from all three illuminate what it was designed—and not designed—to achieve.

a) General claims bars. General rules barring wide swaths of cases take several forms. For one, courts may limit claims based on class membership. The Supreme Court has, for example, declined to recognize the poor as a protected class under the Equal Protection Clause.¹⁸⁴ As a result, taxpayers were barred from challenging inequitable school financing on the basis of their wealth status.¹⁸⁵ Courts have also erected various immunity formulas.¹⁸⁶ For example, public officials performing judicial,¹⁸⁷ legislative,¹⁸⁸ and prosecutorial¹⁸⁹ functions enjoy absolute immunity from suit for monetary damages.¹⁹⁰

Such bars are counterpoints to stigma plus in two respects. First, stigma plus targets a particular type of injury. By contrast, the claims bars described above either foreclose causes of action entirely on the basis of the plaintiffs or the defendant's identity or present global hurdles for plaintiffs in federal court. Second, stigma plus paves a path forward for reputational harm rather than excluding it as a basis for recovery. The Court could have crafted a general rule raising the bar for all procedural due process claims, or it could have barred reputation-based claims

¹⁸⁴ See *San Antonio Independent School District v Rodriguez*, 411 US 1, 29 (1973).

¹⁸⁵ *Id.* Many turned to state legislatures, which designed their own wealth-equalization formulas, with mixed results. See Jeffrey S. Sutton, *San Antonio Independent School District v. Rodriguez and Its Aftermath*, 94 Va L Rev 1963, 1971–73 (2008). Similarly, the Supreme Court's refusal to officially designate LGBTQ status a suspect class has not foreclosed securing rights for LGBTQ persons. See, for example, *Obergefell v Hodges*, 135 S Ct 2584, 2604–05 (2015) (finding that bans on same-sex marriage violate the fundamental right to marry); Cass R. Sunstein, *The Supreme Court 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv L Rev 4, 78 (1996) (describing the Court's approach to anti-gay legislation as “rationality review ‘with bite’”).

¹⁸⁶ See *Whitman*, 79 Mich L Rev at 6–7 & nn 11–19 (cited in note 69).

¹⁸⁷ See *Pierson v Ray*, 386 US 547, 554 (1967).

¹⁸⁸ See *Tenney v Brandhove*, 341 US 367, 379 (1951); *Bogan v Scott-Harris*, 523 US 44, 48–57 (1998).

¹⁸⁹ See *Imbler v Pachtman*, 424 US 409, 422–29 (1976).

¹⁹⁰ Officers performing other functions are entitled to good-faith or qualified immunity. See *Buckley v Fitzsimmons*, 509 US 259, 273 (1993); *Harlow v Fitzgerald*, 457 US 800, 818 (1982).

altogether. Yet it did neither. This design choice suggests that the Court viewed reputational injury as worthy of scrutiny—in the right circumstances.

b) Heightened evidentiary requirements. Evidentiary requirements structure the ways in which plaintiffs may prove their claims. They typically require a precise dialogue between plaintiffs and defendants. For example, *McDonnell-Douglas Corp v Green*¹⁹¹ provides for a burden-shifting framework that specifies a precise multistep analysis for evaluating an employment discrimination claim under Title VII: (1) the plaintiff must make out a prima facie case of discrimination, (2) the defendant must show a legitimate nondiscriminatory reason for action, and (3) the plaintiff must demonstrate that that legitimate reason was in fact pretext.¹⁹²

Like stigma plus, heightened evidentiary requirements raise the proof standards faced by prospective litigants and hinge on interpretation of terms within common-law frameworks. But they also differ from stigma plus, facing plaintiffs at a later phase of litigation. Stigma plus may impede a plaintiff from stating a plausible claim for which relief may be granted at the motion-to-dismiss stage.¹⁹³ As in *Davis*¹⁹⁴ and *Velez*,¹⁹⁵ plaintiffs may be excluded from federal court on the basis of their pleadings.¹⁹⁶ By contrast, evidentiary requirements like the steps of the *McDonnell-Douglas* framework typically exclude plaintiffs at summary judgment.¹⁹⁷ Consequently, plaintiffs facing evidentiary hurdles have surer access to the discovery process—an undeniable advantage. Access to discovery may in itself be a goal of civil rights litigation for its capacity to shed light on potentially discriminatory or unlawful practices.¹⁹⁸ Moreover, discovery may lessen the information imbalance between civil rights plaintiffs and defendants, the latter of whom likely have access to details

¹⁹¹ 411 US 792 (1973).

¹⁹² See *id.* at 802–05.

¹⁹³ See FRCP 12(b)(6).

¹⁹⁴ *Davis*, 424 US at 696.

¹⁹⁵ *Velez*, 401 US at 80.

¹⁹⁶ As with most pleadings hurdles, however, stigma-plus plaintiffs may also lose stigma-plus claims at the summary judgment stage. See, for example, *URI Student Senate*, 631 F3d at 7.

¹⁹⁷ See FRCP 56.

¹⁹⁸ Howard M. Wasserman, Iqbal, *Procedural Mismatches, and Civil Rights Litigation*, 14 Lewis & Clark L Rev 157, 171 (2010) (describing discovery as an “end in itself” in some civil rights litigation and civil rights plaintiffs as private attorneys general in some of their litigation endeavors).

about the termination decision or other pertinent actions.¹⁹⁹ This is not to suggest that discovery is an unassailable boon to the litigation process,²⁰⁰ but to illustrate that the stigma-plus hurdle is unusual in framing and in stringency.

The “pretext-plus” requirement that several circuits,²⁰¹ including the First,²⁰² have adopted in employment discrimination cases is an example of a heightened evidentiary requirement. Under this requirement, plaintiffs responding to defendants’ claimed nondiscriminatory reasons for taking adverse employment actions must demonstrate both that the claimed reason was false and that evidence external to the prima facie case of discriminatory treatment showed the defendant’s discriminatory intent.²⁰³ This requirement structures the plaintiff’s burden of persuasion, guiding how plaintiffs may prove—rather than plead—their claims.²⁰⁴

“Animus plus” plays a similar role. In mixed-motive employment discrimination cases,²⁰⁵ it requires that employees prove causation by offering evidence that both “reflects directly the alleged discriminatory animus” and “bears squarely on the contested employment decision.”²⁰⁶ This approach and its variants, adopted at various times by, among others, the First,²⁰⁷ Fifth,²⁰⁸ and DC²⁰⁹ Circuits, represents an “attempt[] to weed out stray remarks from probative evidence of discrimination by focusing on

¹⁹⁹ Id at 168, 171; Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 Notre Dame L Rev 849, 873–74 (2010). See also Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 Stan L Rev 905, 927 (2010) (naming this conundrum a “paradox of pleading”).

²⁰⁰ As Judge Frank Easterbrook (along with others) have argued, discovery has considerable social costs. See Frank H. Easterbrook, *Discovery as Abuse*, 69 BU L Rev 635, 637–38 (1989). For example, the costs of responding to a discovery request may outweigh the social value of the information. Id. Alternatively, litigants may file burdensome requests to bring their adversary to the settlement table—not because the requested information is useful. Id.

²⁰¹ See Catherine J. Lanctot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 Hastings L J 57, 83 & nn 94–96 (1991).

²⁰² See, for example, *White v Vathally*, 732 F2d 1037, 1042–43 (1st Cir 1984).

²⁰³ Id. See also Lanctot, 43 Hastings L J at 81–91 (cited in note 201).

²⁰⁴ *White*, 732 F2d at 1043.

²⁰⁵ See Ezra S. Greenberg, Note, *Stray Remarks and Mixed-Motive Cases after Desert Palace v. Costa: A Proximity Test for Determining Minimal Causation*, 29 Cardozo L Rev 1795, 1796 (2008) (defining mixed-motive employment discrimination cases as those “based in part on a nondiscriminatory reason and in part on a discriminatory reason”).

²⁰⁶ Id at 1818–19.

²⁰⁷ *Febres v Challenger Caribbean Corp*, 214 F3d 57, 60 (1st Cir 2000).

²⁰⁸ *Brown v CSC Logic, Inc*, 82 F3d 651, 655–56 (5th Cir 1996).

²⁰⁹ *Thomas v National Football League Players Association*, 131 F3d 198, 204 (DC Cir 1997).

whether there is a causal link between the employer's discriminatory animus and the employment decision."²¹⁰ Courts have generally deployed the animus-plus standard as an evidentiary hurdle at the summary judgment²¹¹ or trial²¹² stages.

These hurdles share the broad goals of the stigma-plus claim in sorting likely from unlikely causal connections. Yet they differ in their generalized demand only for additional evidence, some in more precise forms than others. By contrast, the stigma-plus test will accept only one form of additional evidence as proof of the underlying claim: specific allegations that the plaintiff was deprived of another property or liberty interest.

c) Heightened pleading requirements. Pleadings hurdles differ from evidentiary hurdles in that they scrutinize only the facial sufficiency of the complaint.²¹³ The most familiar pleadings requirement is the motion-to-dismiss standard applicable in federal court.²¹⁴ But there are also unique pleadings hurdles that apply to specific claims.

The general motion-to-dismiss standard, prescribed by the Federal Rules of Civil Procedure, requires that civil plaintiffs in federal court plead sufficient factual detail for courts to conclude their claims are facially plausible.²¹⁵ While the pleadings standard is typically applied to motions to dismiss,²¹⁶ defendants may invoke the same standard in support of judgment on the pleadings provided that it does not delay trial.²¹⁷ Commentators have predicted that²¹⁸ (but contested whether)²¹⁹ these hurdles will have an outsized effect on civil rights claims.

²¹⁰ Greenberg, Note, 29 *Cardozo L Rev* at 1819 (cited in note 205).

²¹¹ See *Brown*, 83 F3d at 656–57 (evaluating the sufficiency of evidence introduced in support of motions for summary judgment).

²¹² See *Febres*, 214 F3d at 60–61 (evaluating the sufficiency of evidence introduced at trial).

²¹³ See *Ashcroft v Iqbal*, 556 US 662, 678 (2009).

²¹⁴ See *id.* at 678–80; *Bell Atlantic Corp v Twombly*, 550 US 544, 556–57, 570 (2007).

²¹⁵ See *Iqbal*, 556 US at 678–80; *Twombly*, 550 US at 556–57.

²¹⁶ See FRCP 12(b)(6).

²¹⁷ See FRCP 12(c). See also *Frappier v Countrywide Loans, Inc.*, 750 F3d 91, 96 (1st Cir 2014) (applying the Rule 12(b)(6) motion-to-dismiss standard to a Rule 12(c) motion for judgment on the pleadings).

²¹⁸ Wasserman, 14 *Lewis & Clark L Rev* at 167–74 (cited in note 198) (detailing the “substance-procedure mismatch” between civil rights litigation and the plausibility pleading standard articulated in *Iqbal*).

²¹⁹ Compare Joe S. Cecil, et al., *Motions to Dismiss for Failure to State a Claim after Iqbal: Report to the Judicial Conference Advisory Committee on Civil Rules* *9, 14 (Federal Judicial Center, Mar 2011), archived at <http://perma.cc/PS98-NW6D> (noting consistently low rates of dismissal for failure to state a claim before and after *Iqbal*), with Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and*

Courts have also constructed pleadings hurdles unique to specific claims, like stigma plus, using the common law.²²⁰ The civil-disabilities test for petitions for a writ of coram nobis is an example. Petitions for coram nobis provide an avenue for persons no longer in federal custody to seek collateral relief for unconstitutional or unlawful convictions.²²¹ The federal habeas corpus statute²²² provides for relief only for defendants in federal custody. Accordingly, the Supreme Court has affirmed the availability of “the extraordinary writ of *coram nobis*” as a common-law remedy to cure “errors of the most fundamental character” when no other remedy is available and there were sound reasons the former detainee failed to seek earlier relief.²²³ It is an attractive avenue of relief for former convicts facing the collateral consequences of conviction.²²⁴ Some federal courts have required that claimants show that “the judgment of conviction produce[d] lingering civil disabilities” in order to seek review of their convictions.²²⁵ Claimants must also plead that those disabilities were “unique to criminal convictions,”²²⁶ while mere reputational harms or the pure “satisfaction of having [one’s] position vindicated” fall short.²²⁷ This test serves as a substitute for the custody requirement in an ordinary habeas corpus claim.²²⁸ The civil-disabilities test marks a particularly interesting comparison with stigma plus because both

Housing Discrimination Litigation, 100 Ky L J 235, 260–62 (2012) (noting an increase in motions to dismiss challenging pleadings sufficiency and an increase in dismissal rates in housing and employment discrimination cases). See also William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U Chi L Rev 693, 748–50 (2016) (suggesting that other constraints on litigant behavior may prove more significant than the reworked pleading standard).

²²⁰ Some scholars have questioned the importance of variation between pleadings hurdles on the grounds that the main determinant of success is strength of the case rather than the standard of pleading. See Hubbard, 83 U Chi L Rev at 701–06 (cited in note 219). Even if this is so, the variation still has real-world effects: the stigma-plus test and the examples given here require not only that a case be strong, but also that its strength be pleaded in a specific way.

²²¹ See *Telink v United States*, 24 F3d 42, 45 (9th Cir 1994).

²²² 28 USC § 2255.

²²³ *United States v Morgan*, 346 US 502, 512–13 (1954) (quotation marks omitted).

²²⁴ These collateral consequences include ineligibility for naturalization or military service, restrictions on political service, and heightened sentences under recidivism statutes. See Note, *The Need for Coram Nobis in the Federal Courts*, 59 Yale L J 786, 786–87 (1950).

²²⁵ *United States v Keane*, 852 F2d 199, 203 (7th Cir 1988).

²²⁶ *Id.* Examples of the types of disabilities considered include loss of the right to vote, loss of occupational licenses, or a loss of the right to bear arms, but exclude financial penalties or civil disabilities.

²²⁷ *Id.* at 204.

²²⁸ See *United States v Bush*, 888 F2d 1145, 1146, 1148 (7th Cir 1989).

reject reputational harms as predicate injury, potentially underscoring courts' ambivalence about or uncertainty toward the extent to which reputational injury is separately cognizable as harm.

* * *

Courts' dislike of seemingly tenuous harms, including reputational injury, has led them to erect varied hurdles to recovery. Which hurdle applies to a given context illuminates the designing court's view of the underlying claim. When courts design hurdles that do not preclude claims altogether, they convey ambivalence, settling on a middle ground between recognizing the particular claim and scrutinizing whether it has a strong basis. For example, the evidentiary hurdles described above require specific evidence illustrating a link between the claimed harm and the impermissible reason for its occurrence.²²⁹ If plaintiffs can establish the purported causal link between the impermissible motive and the adverse action, courts deploying these tests wish to allow them to proceed.

By contrast, other hurdles are designed to prompt plaintiffs to plead different types of claims altogether. For example, general claims bars keep disfavored claims out of court. More subtly, barriers like the *coram nobis* civil-disabilities test steer plaintiffs from pleading impermissible claims (based on reputation) to permissible ones (based on specific harms).

Stigma plus unites elements of each type of hurdle: it declines to foreclose pleading reputational claims but requires a comparatively higher evidentiary bar to succeed on such claims. At the same time, stigma plus is less open ended than evidentiary hurdles, which require only that plaintiffs provide more evidence of their underlying claims and do not restrict the types of evidence plaintiffs may use. Stigma plus demands pleading that an altogether separate liberty interest was infringed. But unlike the civil-disabilities test, stigma plus paves a path forward for reputation-based injuries. It serves not to exclude reputation-based injuries from federal court, but to ensure that only those reputation-based injuries that cause infringements of further liberty or property interests may proceed.

²²⁹ See text accompanying notes 202–11.

These details suggest that the stigma-plus claim is best read as a causation test requiring close and specific scrutiny of the purported link between the two elements it retains. It resembles pleadings hurdles in that it makes very specific demands of prospective plaintiffs. But it also shares features of evidentiary hurdles in that it preserves an avenue to sort out which claims demonstrate the required link between the elements.

2. Analogs elsewhere in stigma-plus law.

The wide universe of successful stigma-plus claims further illuminates the purpose of the hurdle and sheds light on the extent to which privately supplied elements may complete the claim. As a preliminary matter, other circuits have taken sympathetic approaches to stigma-plus claims perpetrated by multiple actors.²³⁰ Further, other circuits have proven willing to consider stigma-plus claims predicated on a looser concept than the First Circuit's strict parity. This Section considers two possible examples of more complex stigma-plus claims: claims in which a private actor supplies the underlying stigma and claims in which a private actor supplies the subsequent plus. These possible claims offer the attraction of deterring harmful behavior. But they also encounter the apparent pitfall of the state-action requirement underlying all procedural due process claims.²³¹

Under § 1983, plaintiffs must prove that they were deprived of a federal right by a person acting under color of state law.²³² For purposes of this analysis, any governmental entity generally qualifies as a state actor.²³³ But a nongovernmental entity may

²³⁰ See, for example, *McGhee II*, 639 F2d at 643 (finding a potential liberty deprivation when a number of parents and students made stigmatizing statements against the plaintiff teacher at school board meetings and the defendant school board proceeded to terminate the plaintiff); *Bishop*, 622 F2d at 352–54 (finding a valid claim for deprivation of plaintiff's liberty interest when two defendants made stigmatizing statements at the direction of a third, and the third defendant denied the plaintiff access to administrative remedies); *Marrero*, 625 F2d at 519–20 (holding that, when stigma and plus were imposed by the same actors, “the defamatory communication need not cause the loss of the protected right, or more tangible interest, in order to satisfy the stigma-plus requirement” because “it is sufficient that the defamation occur in connection with, and be reasonably related to, the alteration of the right or interest”). See also Part II.B.

²³¹ See notes 65–71 and accompanying text.

²³² See *id.* This analysis is generally parallel under § 1983 and the Fourteenth Amendment. See *Lugar v Edmondson Oil Co*, 457 US 922, 935 n 18 (1982).

²³³ See John Dorsett Niles, Lauren E. Tribble, and Jennifer N. Wimsatt, *Making Sense of State Action*, 51 SC L Rev 885, 901–04, 908–09 (2011). State officials may still be considered public actors if they act in a private capacity or if they engage in an abuse of

also qualify as a state actor if it was acting in a public capacity²³⁴ or if the state was sufficiently supportive to make the private conduct fairly attributable to the state.²³⁵

In a single-actor stigma-plus suit, the inquiry into whether the defendant acted under color of state law will be relatively straightforward. The question will be only whether the responsible actor qualifies as governmental in form, function, or fair attribution. When different actors generate each element, however, the analysis becomes more complicated. The same analysis must be performed twice, assessing where each actor's identity falls on the spectrum from private to public. If one actor is a state actor and the other is not, the relationship between the two actors must be dissected to uncover whether the private conduct of one is attributable to the other. Federal courts reviewing these claims have not openly wrestled with this complexity. But their approaches may be classified roughly in terms of stigma-plus claims in which a private actor supplied the stigma and those in which a private actor supplied the plus.

The *McGhee* cases illustrate an example of private actors supplying the stigma that motivates a public plus. Although the Second Circuit treated the case as supporting its position,²³⁶ the *McGhee* cases concerned a more tenuous stigma-plus claim. The stigmatizing comments that motivated the defendant school board to terminate the plaintiff school teacher were made by private actors speaking at school board meetings, not public officials.²³⁷ The Tenth Circuit did not evaluate any possible state-action concerns. These concerns may have been allayed by the presence of a state defendant or the fact that the nonrenewal served to "ratify" stigmatizing allegations about the plaintiff.²³⁸ The Tenth Circuit also could have reasoned that the stigma was fairly attributable to the school board because it provided the forum for the hearings. Or it may simply have concluded that the importance of the interest in reputation permitted a finding of

their authority. See *Lebron v National Railroad Passenger Corp*, 513 US 374, 378 (1995) (treating Amtrak as a public entity).

²³⁴ See Niles, Tribble, and Wimsatt, 51 SC L Rev at 904–08 (cited in note 233). See also *Flagg Brothers, Inc v Brooks*, 436 US 149, 161–63 (1978); *Terry v Adams*, 345 US 461, 466 (1953).

²³⁵ See Niles, Tribble, and Wimsatt, 51 SC L Rev at 910–26 (cited in note 233). See also *Blum v Yaretsky*, 457 US 991, 1012 (1982); *Jackson v Metropolitan Edison Co*, 419 US 345, 350 (1974).

²³⁶ *Velez*, 401 F3d at 89.

²³⁷ *McGhee v Draper*, 564 F2d 902, 906–07 (10th Cir 1977) ("McGhee I").

²³⁸ *McGhee II*, 639 F2d at 643.

stigma plus irrespective of the actors' identities, provided sufficient causal connection could be shown.

There are not many obvious examples of state-action challenges with the opposite formulation of state stigma and private plus. To the contrary, the Second Circuit's formulation of the stigma-plus claim appears to reject a private plus altogether by requiring that the plaintiff prove an "additional state-imposed burden" as the plus element of the claim.²³⁹ Similarly, the First Circuit rejected the plaintiffs' claims in *URI Student Senate* in part because the plus the plaintiffs pleaded was supplied by private actors.²⁴⁰

The closest analogy may be stigma-plus claims arising from sex-offender registration requirements. A number of courts have permitted plaintiffs to proceed on this theory. For example, in *Gwinn v Awmiller*,²⁴¹ the plaintiff argued that he had been erroneously classified as a sex offender and subsequently subjected to various procedural due process harms, including receiving no notice that registration as a sex offender was a condition of his supervised release.²⁴² The court found that no further deprivation of state or federal rights was necessary in order for the plaintiff's liberty interest to be implicated.²⁴³ Numerous circuits have reached the same conclusion.²⁴⁴ The plaintiff in *Gwinn* appears to have taken care to plead a plus element attributable to government. Nonetheless, the underlying harm the plaintiff identified appears more expansive. An absence of notice or other procedural protections is an element of all stigma-plus claims. It is rather either the fact of registration itself or the resulting harms that likely generated the complaint. According to the plaintiff in *Gwinn*, these costs included limitations on employment and admission to substance abuse programs.²⁴⁵ In *Valmonte v Bane*,²⁴⁶

²³⁹ See *Velez*, 401 F3d at 87; *Sadallah v City of Utica*, 383 F3d 34, 38 (2d Cir 2004); *Doe v Department of Public Safety*, 271 F3d 38, 47 (2d Cir 2001). As discussed in note 156, the circuit uses similar terms to describe the stigma element.

²⁴⁰ *URI Student Senate*, 631 F3d at 10. See also text accompanying notes 128–32.

²⁴¹ 354 F3d 1211 (10th Cir 2004).

²⁴² *Id.* at 1216, 1222–23.

²⁴³ See *id.* at 1216, 1223–24.

²⁴⁴ See, for example, *Doe*, 271 F3d at 47–59, *rev'd on other grounds*, 538 US 1 (2003). But see *Russell v Gregoire*, 124 F3d 1079, 1083, 1089 (9th Cir 1997) (rejecting the claim that Washington state's sex-offender-registration statute implicated a liberty interest sufficient to bring a § 1983 stigma-plus claim on the basis that the statute was regulatory rather than punitive).

²⁴⁵ See *Gwinn*, 354 F3d at 1221–22.

²⁴⁶ 18 F3d 992 (2d Cir 1994).

the Second Circuit confronted this concern directly. It found that a registry “[did] not simply defame” the plaintiff.²⁴⁷ Rather, “it place[d] a tangible burden on her employment prospects” in the private childcare field, in part because childcare employers were required by statute to consult the registry.²⁴⁸

Like the *McGhee* cases, these cases do not illustrate the operation of a purely private plus element. In *Valmonte*, the state’s requirement that employers consult the registry did the work of dispensing the harm; any private action was purely speculative.²⁴⁹ Even in a subsequent case predicated on a private actor’s proactive consultation of a sex-offender registry, the plaintiff could likely argue that such use of the registry was “fairly attributable” to the state via its registration requirement.²⁵⁰ Given that the purpose of many sex-offender registries is to compel public availability of this information, private and public actors seem to work together to dispense most plausible harms.

Taken together, the circuits’ experimentation with private actors yields several insights. First, multiple pathways could explain the result each court reached. No court affirms the independent sufficiency of a privately supplied element. But the cases also suggest that the use of a distinction between private and public actors to sort qualifying deprivations of liberty interests (such as loss or impairment of state employment²⁵¹ or foreclosure of a right to be considered for government contracts²⁵²) from disqualifying deprivations of liberty interests (such as notices impinging on landlords’ options for renting their properties)²⁵³ is unhelpful. None of the courts dwells at length on the state-action requirement or insist on a formal quantum of state involvement. As a practical matter, courts are unlikely to find that state action was

²⁴⁷ Id at 1001. See also *Dupuy v Samuels*, 397 F3d 493, 511 (7th Cir 2005) (noting agreement with the Second Circuit on this point).

²⁴⁸ *Valmonte*, 18 F3d at 1001. Similarly, in *Doe*, the Second Circuit had emphasized the onerous duties the state registration law imposed. See *Doe*, 271 F3d at 57.

²⁴⁹ See *Valmonte*, 18 F3d at 1001.

²⁵⁰ See *Blum*, 457 US at 1012.

²⁵¹ See *Cannon v City of West Palm Beach*, 250 F3d 1299, 1303 (11th Cir 2001); *Donato v Plainview-Old Bethpage Centennial School District*, 96 F3d 623, 630–31 (2d Cir 1996); *Martz v Incorporated Village of Valley Stream*, 22 F3d 26, 31 (2d Cir 1994); *Mosrie v Barry*, 718 F2d 1151, 1161–62 (DC Cir 1983). See also *Davis*, 424 US at 701 (“[T]his line of cases does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due Process Clause.”) (emphasis added).

²⁵² See *Old Dominion Dairy Products, Inc v Secretary of Defense*, 631 F2d 953, 955–56, 964 (DC Cir 1980).

²⁵³ See *URI Student Senate*, 631 F3d at 10.

supplied by a purely private actor whose conduct is not intuitively attributable to a state actor. But the courts' inquiry appears to rest less on the identity of the individual actor standing alone and more on the interaction of the two elements of the stigma-plus claim. As above, this approach points toward a focus on the causal relationship between the underlying stigma and accompanying plus.

B. Vindicating the Purpose of the Stigma-Plus Claim

Part III.A.1 concludes that the stigma-plus test is better read as a test for causation than as a means to express disfavor or hostility toward reputation-based claims. But it also supports the conclusion that skepticism toward the claim is doing some work in the background, pushing the hurdle to an unusual height. Part III.A.2 lends further support to the causation reading by illustrating how courts have applied the test to causally complex situations. Determining that the stigma-plus test is a causation test does not, however, immediately clarify which circuit has the better approach.

Both circuits' approaches to the multiple-actor problem can be defended as responding to concerns regarding causation. The First Circuit frames the same-actor requirement as aiding determinations whether or not a defamatory statement was "incident to" deprivation of a liberty interest.²⁵⁴ The Second Circuit is even more pronounced, directly invoking proximate cause.²⁵⁵ But the circuits employ different tools toward this end. While the Second Circuit invokes a flexible standard designed to parse the details, investigating whether a second actor's behavior was caused by the first in a fact-specific inquiry, the First Circuit appears convinced that a rule sharply delineating acceptable claims is the best way to vindicate the skeptical posture of the plus hurdle.

This Section weighs these competing approaches as a means of evaluating causation. It concludes that the Second Circuit's approach better achieves this end. By requiring courts to evaluate deterrence contextually, the Second Circuit ensures that each component of the stigma-plus claim has independent force. Such an approach better captures the liberty interest this cause of action is designed to protect and better deters state action designed to infringe on that interest.

²⁵⁴ See *Pendleton v City of Haverhill*, 156 F3d 57, 63–64 (1st Cir 1998).

²⁵⁵ See *Velez*, 401 F3d at 89.

1. Paradigms for evaluating causation.

Under black-letter law, the “standard definition” of proximate cause is “that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury, and without which the result would not have occurred. It is the efficient cause—the one that necessarily sets in operation the factors that accomplish the injury.”²⁵⁶ But those are “just words,”²⁵⁷ and require difficult line-drawing enterprises to acquire meaning. The First and Second Circuits’ approaches can be thought of as two different methods for achieving this end.

The First Circuit’s sharp rule puts to rest uncertainty about unusual causal pathways, minimizing court costs and errors by excluding separate-actor claims as a class. An act to deprive someone of a recognized liberty interest is more likely to be proximately caused by that same actor’s defamatory statement. By contrast, if separate actors are responsible for each element, not only is it less likely that the defamation caused the deprivation of a liberty interest, but the methods of proof are much more difficult.

The Second Circuit’s contextual inquiry has a different virtue. While it promises higher decision costs, it facilitates greater deterrence of bad actors. Under this paradigm, courts tailor the incentives that tortfeasors face by allocating liability to deter objectionable behavior on a case-by-case basis. Rather than prioritizing minimalist rules, they calibrate deterrence to context.²⁵⁸

2. Design features of stigma plus.

Just as design choices reveal that stigma plus is a causation test, they suggest that stigma plus is both a hurdle and an avenue for prospective claims. As discussed in Part III.A.1, courts have settled on a compromise position that is unusual in several respects. First, despite initial skepticism toward claims grounded

²⁵⁶ *State v Lawson*, 688 P2d 479, 482 & n 3 (Utah 1984).

²⁵⁷ Richard A. Posner, *Cardozo: A Study in Reputation* 105 (Chicago 1990). See also *Berrafato v Exner*, 216 NW 165, 168 (Wis 1927) (referring to “the vexed term proximate cause”).

²⁵⁸ See Saul Levmore, *Judging Deception*, 74 U Chi L Rev 1779, 1789 (2007); Saul Levmore, *The Wagon Mound Cases: Foreseeability, Causation, and Mrs. Palsgraf*, in Robert L. Rabin and Stephen D. Sugarman, eds, *Torts Stories* 129, 146–50 (Foundation 2003). See also *Palsgraf v Long Island Railroad Co*, 162 NE 99, 103 (NY App 1928) (Andrews dissenting) (referring to proximate cause as accomplishing “public policy” or a “rough sense of justice”).

in a reputational injury,²⁵⁹ plaintiffs have been given a path forward. Second, while that path requires that plaintiffs surmount a hurdle (the plus requirement) not faced by most plaintiffs,²⁶⁰ a plus is not a trump—there is no requirement that either element be independently sufficient to support a claim.²⁶¹ For example, courts routinely permit plaintiffs without protected property interests in their government employment to plead a stigma-plus claim despite the fact that such plaintiffs would have no independent cause of action for the loss of employment.²⁶² Moreover, the structure of the plus component constructs a high hurdle for plaintiffs, but not one that is insurmountable.²⁶³

There are several reasons to think the interest in reputation is stronger than the courts have let on. Most notably, a claim that brings together the elements of stigma and plus is greater than the sum of its parts. Considering the effects of the claim at the margins, the interest in reputation is strong enough to permit plaintiffs to ratchet up a plus element that is not otherwise a cognizable interest into the basis for a colorable § 1983 action.²⁶⁴ Government employment in which plaintiffs have no independent property interest is the typical example. Courts defend allowing these plaintiffs to plead stigma-plus claims on the grounds that *Roth* and *Davis* treat stigma and loss of employment accomplished together as pleading a liberty interest.²⁶⁵

Additionally, a stigma-plus claim may still be brought even when the plus element constitutes a violation of an independently cognizable state or federal right (and when the plaintiff could otherwise bring a defamation claim).²⁶⁶ Claims with these features often appear to be the strongest examples of stigma-plus claims. For example, a hypothetical plaintiff post office clerk whose supervisor publicly revealed the plaintiff's membership in an unpopular religious group, made slurs and false claims about the plaintiff on this basis, spurring public outcry, and subsequently participated in terminating the plaintiff's employment, could

²⁵⁹ See *Davis*, 424 US at 712.

²⁶⁰ See Part III.A.1.

²⁶¹ See note 106 and accompanying text.

²⁶² See, for example, *Owen v City of Independence*, 445 US 622, 633 n 13 (1980); *Doe v United States Department of Justice*, 753 F2d 1092, 1104–12 (DC Cir 1985); *Dennis v S & S Consolidated Rural High School District*, 577 F2d 338, 342–43 (5th Cir 1978).

²⁶³ See Part III.A.1.

²⁶⁴ See notes 104–06 and accompanying text.

²⁶⁵ See *Doe*, 753 F2d at 1106–07; *Hill*, 455 F3d at 237–38.

²⁶⁶ See *Davis*, 424 US at 712.

likely make a slam-dunk stigma-plus claim even though such a plaintiff would typically have independent avenues to vindicate his rights, such as a state cause of action for defamation and a state or federal cause of action for employment discrimination. The fact that a stigma-plus claim is still viable despite these alternative avenues suggests that there is something about the link between the defamation and the infringed liberty interest that independently warrants action; a defamation suit would not sufficiently vindicate the injury.

Yet this result is somewhat surprising. If the plaintiff has such a strong plus claim—and possibly a strong defamation claim as well—why does he need recourse to stigma plus? Perhaps the availability of stigma-plus claims when other causes of action are available, standing alone, could be explained by accidental or deliberate redundancy. There is no requirement that rights claims be mutually exclusive, and there are considerable strategic advantages to being able to pursue multiple claims at once²⁶⁷ or to being able to jurisdiction or forum shop.²⁶⁸ However, treating stigma plus as mere redundancy fails to grapple with the history of the procedural due process right. While the underlying-rights approach to procedural due process designates state statutes, contracts, and other independent interests as touchstones, the stigma-plus claim intentionally grafts an additional layer onto state concepts of reputation or liberty deprivation. This may be a high hurdle for litigants to meet, but it draws on a long history of allowing reputation-based claims under the right circumstances.²⁶⁹

As Part III.A.1 reveals, courts made the apparent choice to design and maintain the stigma-plus test out of a wide set of alternatives. They are perfectly capable of foreclosing avenues for claims entirely²⁷⁰ or of designing pleadings hurdles like the coram nobis civil-disabilities test that serve only to constrict an existing type of claim.²⁷¹ With that test, courts seem to have concluded that a conviction cannot cause cognizable coram nobis injury without civil disabilities unique to conviction.²⁷² By contrast, stigma plus

²⁶⁷ For example, plaintiffs could better protect themselves at the pleadings or fact stages by having multiple claims to stand on if one is dismissed.

²⁶⁸ For example, plaintiffs could rely on stigma plus as a single federal claim to secure federal pendant jurisdiction for related state claims.

²⁶⁹ See Part I.D.1.

²⁷⁰ See notes 185–86 and accompanying text.

²⁷¹ See text accompanying notes 221–27.

²⁷² *Keane*, 852 F2d at 203.

implies that reputational injury *can* cause a cognizable liberty infringement if accompanied by the requisite additional harm—harm which need not itself support a separately cognizable claim.

The choice to design an evidentiary hurdle that paves a way forward suggests instead that there is something in the stigma-plus injury that requires separate deterrence. An accompanying reputational harm compounds the harm represented by the violated right. This design choice also undermines the hypothesis that stigma plus was designed to cabin excessive litigation or express hostility toward novel claims. If redundancy in available causes of action is an aspect of courts' resistance to the stigma-plus claim, they have nonetheless doubled down on permitting it in this case.

3. Deterrent qualities of the Second Circuit's approach.

The salience of the deterrent effects of a given rule depends on whether *ex ante* behavior is likely to vary between cases.²⁷³ This inquiry involves investigating the overall and marginal impacts of a rule to determine if gains can be achieved through the formulation of an alternative.²⁷⁴ Even if such impacts appear minor, incentives work on the margins; focusing on the individual or average outcomes in every case may obscure the broader influence of court decisions.²⁷⁵ It also depends on whether the parties to whom the rule applies face transaction costs. While parties can bargain around the rule in a world of low transaction costs,²⁷⁶ in a world of high transaction costs, setting the initial rule has profound distributive consequences.²⁷⁷

The stigma-plus claim presents a context in which these deterrent effects matter. First, when it comes to deterring violations of civil rights, it may be especially important to ensure that the burden falls more heavily on rights violators than rights holders. Rights holders enjoy the protection of a stable set of normative commitments embodied in civil rights laws. By contrast, rights violators behave in idiosyncratic and presumptively low-value

²⁷³ Frank H. Easterbrook, *The Supreme Court 1983 Term—Foreword: The Court and the Economic System*, 98 Harv L Rev 4, 10–18 (1983) (discussing the *ex ante* effects of marginal deterrents).

²⁷⁴ *Id.* at 10.

²⁷⁵ *Id.* at 11–12, 33–34.

²⁷⁶ See generally R. H. Coase, *The Problem of Social Cost*, 3 J L & Econ 1 (1960). See also A. Mitchell Polinsky, *An Introduction to Law and Economics* 13–14 (Aspen 3d ed 2003).

²⁷⁷ Polinsky, *An Introduction to Law and Economics* at 14–15 (cited in note 276).

ways. Second, the multiple-actor context presents a context in which transaction costs may be high, presenting bargaining barriers not only between the tortfeasor and the victim but also between the entities responsible for successive components of the tort. This context is ripe for misunderstandings between the relevant parties. Moreover, victims are in a poor position to predict social torts of this nature and are likely to object on normative grounds to the notion of bargaining over their reputations or other liberty interests. Attention to deterring antisocial behavior at each step of the inquiry can prevent these situations from arising.

Third, the marginal effects of the rule are relevant. *Ex post*, the rule will prove an insuperable barrier to recovery only when the stigma-plus claim is the sole viable claim for a given victim to bring. When victims have multiple causes of action to choose from, the unavailability of stigma plus is less likely to result in incentives to violate rights. Victims can still deter defamation or termination by bringing separate suits. But when defamation or termination claims are unavailable, stigma plus may be the only avenue for victims to vindicate their rights. Similarly, when the convergence of reputational injury and subsequent harm represents an interest that is greater than the sum of its parts, the availability of the stigma-plus claim will have greater importance. For example, some plaintiffs might experience termination of employment because of erroneous sex-offender classification as a particular affront to their dignity. As a result, putative concerns about excessive litigation may make less headway against stigma-plus claims than against other § 1983 or civil rights suits. This suggests the First Circuit's efforts to privilege limiting stigma-plus claims over ensuring they are carefully considered aims at a paper tiger.

Moreover, *ex ante*, the structure of the stigma-plus claim provides a separate deterrent effect at each phase of a putative rights violation. The Second Circuit's approach is better calibrated to supply this required deterrence for several reasons. As noted above, stigma-plus claims are either redundant or designed to capture a harm that is greater than the sum of its parts. In this respect, in single-actor cases, the claim could have two separate deterrent effects. It may add marginal deterrence to causing

stigma and harm in conjunction, in cases in which the two elements are inflicted simultaneously,²⁷⁸ and it may deter causing harm once stigma has been caused.²⁷⁹ In multiple-actor cases, questions of deterrence grow more complicated. Each actor may face different incentives at different times.

The First Circuit's test enables possible defendants to evade two different types of claims. First, multiple actors may secretly act in concert to inflict stigma plus. By merely exporting the harm (or the stigma) to a different actor, government figures can evade (additional) liability. For example, suppose that a city council member would like to achieve political cover (or political consensus) for terminating a disfavored at-will employee. The council member could persuade a city employee occupying a different office to make the defamatory comments that she feels would justify termination. Then the council could move to release the employee, facing no liability whatsoever.

More worryingly—and more plausibly—the second actor can free ride on the first actor's defamatory comments. If the infringed liberty interest constituted a separately protected interest like a Fourth Amendment right or an employment contract, the second actor might already face liability for her actions.²⁸⁰ But she would be foreclosed from facing the additional liability that stigma-plus claims are designed to allocate for inflicting additional harm. As a result, the volume of stigma-plus harms could spiral. For example, the plaintiff city employee in *Velez* was injured above and beyond the loss of employment. Losing employment because of her coworkers' stigmatizing remarks compounded the injury.²⁸¹ Allowing her recovery only under an employment statute might fail to capture part of the injury she claims.

These problems are most likely to manifest in cases in which the aggrieved party has no legal protections or proving or litigating the putative liberty interest is likely to prove very difficult. This may or may not be a problem. On the one hand, injuries to

²⁷⁸ See, for example, *Brandt v Board of Cooperative Education Services*, 820 F2d 41, 45 (2d Cir 1987) (finding defamatory statements made at time of termination to qualify under the stigma-plus test).

²⁷⁹ See *Siegert v Gilley*, 500 US 226, 233–34 (1991) (declining to find a stigma-plus claim where “alleged defamation was not uttered incident to the termination of [] employment,” but offered “several weeks later”).

²⁸⁰ She also might not. The incentives depend to some extent on the different elements of similarly available claims and on which of those elements are more readily provable.

²⁸¹ See *Velez*, 401 F3d at 79.

areas in which persons lack legal protections, such as at-will employment or bases of class protection not recognized in a particular jurisdiction, are to some extent injuries the legal system is less invested in protecting. At-will employees may have received some gain in return for accepting their employment; those who are not members of protected classes may not warrant the courts' special solicitude.

Yet the single-actor requirement seems to be a heavy-handed response to this concern. If the goal is to deter litigants from bringing claims resting on less than compelling liberty interests, heightening the standard for what qualifies as a plus would more closely serve this purpose. Moreover, in permitting unprotected interests to serve as possible bases for stigma-plus claims, the courts have also recognized that the primary harm associated with stigma-plus claims is *conjunctive*. Even if a given state has not chosen to extend full equal protection to LGBT persons, for instance, it may be worth recognizing the liberty interest that is infringed by losing employment on the basis of sexual orientation.

The Second Circuit's rule has two primary drawbacks of its own. First, it may enable plaintiffs to evade causation and proximity requirements. By permitting stigma-plus elements to develop from distant figures' acts, the Second Circuit may make it easier for plaintiffs to bring claims that are further afield from the interests the stigma-plus claim was designed to protect. Second, it permits first movers making defamatory comments to free ride on the deprivations of liberty interests subsequently initiated by others. Because the approach generally allocates liability to the second actor rather than the first,²⁸² although the defamatory comments supply the stigma and are often analyzed for whether they "caused" the harm, the first actor may escape substantive liability.

Ultimately, neither of these effects is as concerning as those effects stemming from the First Circuit's approach. The first concern can be avoided by scrutinizing causation and proximity. The Second Circuit's contextual approach illustrates how this might work.²⁸³ If courts worry about attenuated claims, they can address that concern head on by examining the attenuation, rather than by implementing exclusionary rules. The second concern likely afflicts the First Circuit's approach as well. Moreover, it reflects a

²⁸² See *id.* at 93.

²⁸³ See *id.* at 89. See also Part II.B.

logical design for the claim. The stigma-plus concept emphasizes the importance of the follow-on harm, without which the claim is pure defamation. Defamation may be separately litigated and presumptively elicits a lesser, or at least different, harm than stigma-plus claims.

There is one additional arena in which the circuits' approaches may have varying effects: neither circuit's approach has a neutral effect on litigation. It seems most likely that the Second Circuit invites more litigation and more complex litigation by endorsing a broader set of claims and by compelling litigation of more complex causation questions. But in the context of infringements on liberty interests, reducing litigation isn't necessarily a good thing.²⁸⁴ Instead, litigation costs must be weighed against the deterrence benefits that come from a rule that discourages a broader set of potentially infringing behaviors.

4. Unavoidable underdeterrence.

While the Second Circuit's approach appears to better approximate the deterrent goals of the stigma-plus claim, it fails to completely deter possible harms for two primary reasons. First, government employees are only weakly responsive to deterrence. Second, the circuit generally requires state action to find a viable stigma-plus claim.²⁸⁵

As to the first, to counter the suggestion in Part III.B.3 that greater litigation might enhance the deterrent effects of the Second Circuit's approach, the fact that the liable actor in a stigma-plus claim is a state actor may mean increased litigation does not translate to increased deterrence. In addition to the protections of sovereign immunity, state actors may not feel the pocketbook liabilities that claims against them represent, especially by the time the relevant claim is filed and litigated or settled. In particular, strategic behavior and underdeterrence are likely to be more prevalent when the actor who supplies the second prong

²⁸⁴ Certainly there is a possibility of nuisance suits, provoking defendants shy of litigation expenses into settlements unwarranted by the underlying facts. Yet for some of the reasons explored in Part III.A.1, because the stigma-plus claim is primarily a hurdle at the pleading rather than the facts stage, this concern is likely less profound than in other civil contexts. Nuisance suits may be disposed of with less financial investment from the annoyed party. See Blackmun, 60 *NYU L Rev* at 20–21 (cited in note 63) (pointing out that any “burden” constitutional rights litigation places on the federal courts “presumably is worth bearing when an action is meritorious”).

²⁸⁵ The First Circuit's approach poses the same issue.

of the claim is a figure of higher authority in the state government and likely to be treated with a more deferential immunity standard.²⁸⁶

As to the second, the Second Circuit's approach will in many cases fail to address or deter cases in which the plus element was supplied by a private actor rather than a state actor. As explained in Part III.A.2, the Second Circuit has shown some sympathy for stigma-plus claims that involve a private actor. It favorably cited *McGhee II* for the proposition that state actors could ratify private actors' stigmatizing statements.²⁸⁷ Moreover, the Second Circuit has approved stigma-plus claims rooted in sex-offender registration despite the fact that the concrete harms of erroneous registration flow in part from private actors.²⁸⁸

A rule that reached private actors' contributions to stigma-plus claims might be desirable for several reasons. Taken to its logical conclusion, concern for heightened deterrence might suggest this extension is appropriate. Courts' approaches to mixed private-public arrangements like sex-offender registries illustrate that private actors can become entangled with state actors' actions, supporting viable stigma-plus claims. Moreover, private actors are subject to the same—or greater—deterrence and free-riding concerns as their state counterparts. But this argument founders on different shoals: the requirement that a violation of procedural due process be supplied by a state actor to be cognizable under the Fifth or Fourteenth Amendments.²⁸⁹

Courts could evade the state-action bar by allocating liability to the state actor. In a sex-offender-registry claim, for example, courts appear to make one of two moves. In some cases, they formally allocate liability to the perpetrator of the stigma rather than the perpetrator of the plus. At other points, they view the harms that follow from erroneous sex-offender registration to be the incidents rather than the consequences of the registration itself. Yet courts have proven hesitant to allocate liability to the first actor in a stigma-plus claim outside of the somewhat unusual sex-offender-registry context. There are plausible justifications for this choice. If the first actor bears liability, there will be no

²⁸⁶ See *Brown v Montoya*, 662 F3d 1152, 1165–68 (10th Cir 2011) (comparing immunities outcomes for a police officer and a state secretary of corrections).

²⁸⁷ See notes 158–65 and accompanying text.

²⁸⁸ See note 244. See also text accompanying notes 248–50.

²⁸⁹ See Part III.A.2.

meaningful way to deter the second actor from supplying a follow-on harm in cases in which that harm is not a separate avenue for recovery. If the full stigma-plus violation could be deterred simply by focusing on the first node, that would be sufficient. But given the impediments to holding state actors accountable discussed above, such an approach would likely heighten problems of underdeterrence. Moreover, because the first prong of a stigma-plus claim will typically require showing the elements of a defamation claim, prospective plaintiffs already have access to an avenue to hold first actors liable for their claims. In the marginal case, they lack such an avenue only for *second* actors. A final option would be to hold both the stigma and the plus actors liable in a form of joint and several liability. This approach has the attraction of ensuring that neither party goes undeterred. Yet it poses the trade-off of increased litigation complexity. Perhaps as a result, it does not appear to be deployed by courts.

The Second Circuit has a final rejoinder to these quibbles: it allocates liability based on which party is positioned to supply the missing procedures underlying the plaintiff's claimed due process injury.²⁹⁰ The first actor in a multiple-actor stigma-plus claim, or a purely private actor in either the first or the second position, will rarely reach this point. This elegant approach may have the added virtue of administrability. Despite underdeterrence concerns, then, it is the Second Circuit that provides the contextual approach best calibrated to allocate liability to the offending actor and to distinguish in which cases private action is cognizable as part of a stigma-plus claim.

CONCLUSION

Even after being linked to its historical context, compared to other heightened pleading and scrutiny standards, and dissected according to varying courts' approaches, the stigma-plus claim appears to be unique. This unusual design initially appears to rely on two distinct elements, stigma and plus, linked only by the requirement of causation. So framed, the First Circuit's conclusion that the same actor must supply each element may initially appear plausible as a means of enforcing scrutiny of the causal link.

But this approach to the stigma-plus claim fails to appreciate the claim's overarching purpose. If its purpose were only to

²⁹⁰ See *Velez*, 401 F3d at 93.

vindicate two distinct claims, existing state defamation laws and protections for underlying liberty interests would likely be sufficient. The claim is better appreciated as an attempt to capture the unique damage that the conjunction of stigma and harm supply. Those harms attach to single or multiple actors alike. It is the Second Circuit's approach to the claim that thus best realizes its objectives—but for reasons that court left unexamined and underdeveloped. This Comment has filled that gap by deriving the purpose of the stigma-plus claim, examining the claim in action, and cataloguing the ways in which the Second Circuit's approach is best able to vindicate the Court's peculiar frame.

Drawing on this analysis, many—but not all—of the prospective plaintiffs introduced at the beginning of this Comment have viable claims. Under the dictates of *Davis*, the pure-reputation plaintiff has no available federal remedy. The single-actor stigma-plus plaintiff has a straightforward claim in any federal circuit. The multiple-actor stigma-plus plaintiff has a viable claim in the Second Circuit—and a good argument for bringing her claim anywhere else. Finally, the private-actor stigma-plus plaintiff may or may not be able to recover. As the facts were presented in *URI Student Senate*, recovery is unlikely. At a higher level of generality, however, plaintiffs in her situation should not give up. Depending on the context-driven account described in Part II.B, plaintiffs may be able to recover against state actors who ratify private actors' conduct or to whom private actors' conduct may be fairly attributed.