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Section 1983 Litigation

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SECTION 1983 LITIGATION

Hon. George C. Pratt:

The first speaker will be Professor Martin Schwartz. Professor Schwartz is the author of the leading, most authoritative treatise[1] in this area. If you are practicing in this area and you do not have a copy of his treatise on section 1983[2] litigation, you are working with one hand tied behind your back. He has done, and continues to do, endless research in this area. He has spoken at this program each time it has been given. He speaks in other places. He is a consultant to practicing attorneys. And you will find that he really knows what he is talking about.

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* Professor Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, co-authors, with John E. Kirklin, a leading treatise entitled *Section 1983 Litigation: Claims, Defenses, and Fees* (2d ed. 1991 & Supp. I 1995). Additionally, Professor Schwartz is the author of a monthly column in the *New York Law Journal*, "Public Interest Law." Professor Schwartz has also been the co-chair of the Practicing Law Institute Program on § 1983 litigation for over ten years. The author expresses grateful appreciation for the valuable assistance of Lisa S. Levinson in the preparation of this article.

1. MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983: CLAIMS, DEFENSES AND FEES (2d ed. 1991 & Supp. I 1994).

2. 42 U.S.C. § 1983 (1988). This section provides:

> 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

Professor Martin A. Schwartz:*

INTRODUCTION

Well, as Judge Pratt mentioned, there were a number of decisions rendered by the Supreme Court last Term dealing with section 1983 litigation.[3]

In my opinion, the two most important of those decisions dealt with the litigation of malicious prosecution claims brought under section 1983,[4] and with prisoners' rights claims that are litigated under the Eighth Amendment deliberate indifference standard.[5] Somewhat significantly, I think, both of those decisions were in favor of section 1983 defendants. I will concentrate my remarks on those two cases.

There are two other cases that I will talk about in a more abbreviated form. One dealt with attempts by prisoners to attack the constitutionality of their convictions or sentences under section 1983.[6] The other dealt with qualified immunity.[7]

I. MALICIOUS PROSECUTION - *ALBRIGHT V. OLIVER*

Now, to start with the malicious prosecution issue. In *Albright v. Oliver*,[8] the Supreme Court was asked to decide whether a claim of malicious prosecution may be asserted under section 1983 on a substantive due process theory.[9] This is an issue that has created great difficulty in the circuit courts; the circuit courts around the

3. Some of the decisions involving § 1983 decided during the 1994 Term include: Heck v. Humphrey, 114 S. Ct. 2364 (1994); Livadas v. Bradshaw, 114 S. Ct. 2068 (1994); Farmer v. Brennan, 114 S. Ct. 1970 (1994); Elder v. Holloway, 114 S. Ct. 1019 (1994); Albright v. Oliver, 114 S. Ct. 807 (1994).

4. Albright v. Oliver, 114 S. Ct. 807 (1994).

5. Farmer v. Brennan, 114 S. Ct. 1970 (1994).

6. Heck v. Humphrey, 114 S. Ct. 2364 (1994).

7. Elder v. Holloway, 114 S. Ct. 1019 (1994).

8. 114 S. Ct. 807 (1994).

9. *Id.* at 810. The defendant claimed that the "action of the respondents infringed his substantive due process right to be free of prosecution without probable cause." *Id.* at 812.

country have been struggling with this question for some time. There have been several different positions in the circuits. For example, the Second Circuit,[10] along with the Third Circuit,[11] ruled that the same elements of the common law tort of malicious prosecution[12] also give rise to a constitutional claim under section 1983.[13]

In comparison, the First[14] and Sixth[15] Circuits ruled that malicious prosecution may be litigated under section 1983 only when the contested conduct is sufficiently egregious, whatever that may be. The Ninth Circuit ruled that the plaintiff asserting a malicious prosecution claim has to prove that the defendant acted with an intent to violate the plaintiff's constitutionally protected rights.[16] So, you have all of these different positions on the question.

In the *Albright* case, Kevin Albright had been arrested and charged in an Illinois state criminal proceeding with the sale of a substance which appeared to be an illegal drug.[17] He was charged

10. *See, e.g.*, Raysor v. Port Auth. of N.Y. & N.J., 768 F.2d 34 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986); Singleton v. City of N.Y., 632 F.2d 185 (2d Cir. 1980), *cert. denied*, 450 U.S. 920 (1981).

11. *See, e.g.*, Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988).

12. At common law, the elements of a malicious prosecution action are: "(1) A criminal proceeding instituted or continued by the defendant against the plaintiff. (2) Termination of the proceeding in favor of the accused. (3) Absence of probable cause for the proceeding. (4) 'Malice,' or a primary purpose other than that of bringing an offender to justice." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §119, at 871 (5th ed. 1984).

13. The Fifth Circuit, for the most part, has also held that the elements of the common law tort of malicious prosecution give rise to a constitutional claim under section 1983. *See, e.g.*, Sanders v. English, 950 F.2d 1152 (5th Cir. 1992); Wheeler v. Cosden Oil Chem. Co., 734 F.2d 254 (5th Cir. 1984). *But see* Beker Phosphate Corp. v. Muirhead, 581 F.2d 1187 (5th Cir. 1987) (holding that the claim must be sufficiently egregious).

14. *See, e.g.*, Morales v. Ramirez, 906 F.2d 784 (1st Cir. 1990); Torres v. Superintendent of Police, 893 F.2d 404 (1st Cir. 1990).

15. *See, e.g.*, Coogan v. Wixom, 820 F.2d 170 (6th Cir. 1987); Vasquez v. Hamtramck, 757 F.2d 771 (6th Cir. 1985); Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983).

16. Usher v. Los Angeles, 828 F.2d 556 (9th Cir. 1987); Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (en banc).

17. *Albright*, 114 S. Ct. at 810.

on the basis of testimony that was given at a preliminary hearing by Detective Oliver.[18] The detective had testified that Kevin Albright had sold the substance to a woman named Veda Moore, who was an undercover informant.[19]

As it turned out, Ms. Moore was pretty unreliable. That is putting it mildly. The evidence showed that she actually made false accusations in more than fifty other cases.[20] Albright, after being arrested and charged, posted a bond and he was released.[21] However, he was told that he could not leave the State of Illinois.[22] I guess this is some type of punishment in and of itself. It turned out that the substance that Albright sold was baking soda.[23] The state court judge eventually dismissed the criminal proceeding on the ground that the facts alleged in the indictment did not add up to a criminal offense under the Illinois Penal Code.[24]

So now, what is Mr. Albright to do? He did what any self-respecting red-blooded American would do. He brought a suit in federal court under section 1983.[25] It was in the nature of malicious prosecution. He brought it against Detective Oliver, who had given the testimony at the preliminary hearing, and alleged a violation of substantive due process.[26] He claimed that he had a liberty interest to be free from criminal prosecution except upon probable cause.[27] He did not assert - this becomes important - a procedural due process claim and he did not assert a Fourth Amendment claim. It was solely a substantive due process claim.

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18. *Id.*

19. *Id.* at 810 n.1.

20. *Id.* at 823 (Stevens, J., concurring). Justice Stevens noted that:

> [N]othing about [Ms. Moore's] performance in this case suggested any improvement on her record. The substance she described as cocaine turned out to be baking soda. She twice misidentified her alleged vendor before, in response to a leading question, she agreed that petitioner might be he; in fact, she had never had any contact with petitioner.

Id. at 823 (Stevens, J., concurring).

21. *Id.* at 810.

22. *Id.*

23. *Id.* at 810 n.1.

24. *Id.* at 810.

25. *Id.* at 810-11.

26. *Id.*

27. *Id.*

Also note that he did not sue the prosecutor. There was good reason for that. The prosecutor would have been absolutely immune for the decision to prosecute and for any of the prosecutorial activities at the preliminary hearing,[28] so he just sued the detective.

The Supreme Court, in a seven-to-two vote, rejected Albright's substantive due process claims, but the Court did so in six different opinions, none of which commanded a majority.

The plurality opinion was written by the Chief Justice, and was joined in by Justices O'Connor, Scalia, and Ginsburg. This is a case where you have to count the votes of the Justices, so that is four. Keep the number four in mind and we will see where we go with that.

This plurality of four reiterated the present Court's normal reluctance to expand the scope of substantive due process.[29] Moreover, the plurality said that it is the criminal procedural protections contained in the Bill of Rights that have been incorporated against state government into the Due Process Clause of the Fourteenth Amendment that were intended to provide

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28. *See* Burns v. Reed, 500 U.S. 478 (1991). In *Burns*, the Court held that a prosecutor has absolute immunity for participating in the judicial phase of criminal proceedings, such as probable cause hearings. *Id.* at 479. However, absolute immunity is limited. The Court refused to extend such immunity to prosecutors who give legal advice to the police. *Id.* at 480. The Court reasoned that giving legal advice to the police was not "'intimately associated with the judicial phase of the criminal process[.]'" *Id.* (quoting Imbler v. Pachtman, 424 U.S. 409, 431 (1976)).

29. The plurality opinion stated that:

> "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decision making in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. Petitioner's claim to be free from prosecution except on the basis of probable cause is markedly different from those recognized in this group of cases.

Albright, 114 S. Ct. at 812 (citations omitted) (quoting Collins v. City of Harker Heights, Tex., 112 S. Ct. 1061, 1068 (1992)).

protections against arbitrary and abusive exercises of prosecutorial power, rather than the more general notion of due process.[30]

It is on this basis, the plurality said, that where an individual has been arrested, as Albright had been, he may claim protection only under the Fourth Amendment.[31] The Fourth Amendment then becomes, in the case of arrests, the sole source of constitutional protection against challenges to pretrial deprivations of liberty.[32]

The plurality in the *Albright* case did something that was very similar as to what the Court had done in its prior decision of *Graham v. Connor*.[33] There, in the excessive force arrest situation, the Court had also ruled that the Fourth Amendment, in effect, preempts any ability to rely upon substantive due process.[34]

Now, the notion that one constitutional provision somehow provides the sole source of individual protection and, in effect, preempts reliance upon other provisions of the Constitution, is a somewhat new and, I think, unusual development. The Supreme Court has normally recognized that the same official conduct may give rise to allegations of constitutional violations under a number of different provisions of the Federal Constitution.[35] I think this new, more restrictive approach which developed in *Graham* and

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30. *Id.* at 813.

> It was through . . . the Bill of Rights that their framers sought to restrict the exercise of arbitrary authority by the Government in particular situations. Where a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, [the Fourteenth] "Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."

Id. (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

31. *Id.*

32. *Id.*

33. 490 U.S. 386 (1989).

34. *Id.* at 395. The Court reasoned that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" claims involving seizures. *Id.*

35. *See* Soldal v. County of Cook, 113 S. Ct. 538, 548 (1992) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands.").

continued in *Albright* reflects the Court's displeasure with the whole notion of substantive due process.

Having said that Mr. Albright might have a Fourth Amendment claim, the Court then said, unfortunately for poor Mr. Albright, that since he did not present a Fourth Amendment claim to the Supreme Court, it would not decide the merits of such a claim.[36]

In fact, of the nine Justices on the Supreme Court, and remember there were six different opinions, only Justice Ginsburg in a separate concurring opinion chose to discuss the Fourth Amendment issue.[37] She articulated what you might think of as a continuing seizure theory. Her theory is that once an individual has been arrested, the seizure does not end at the point of arrest, but continues throughout the criminal proceeding.[38]

The reason she gave for that was, realistically, once a person has been charged and arrested, that person remains under the control of the state throughout the duration of the criminal prosecution.[39] On the basis of that theory, she would say that since there is a continuing seizure, the police have an obligation to act reasonably throughout the criminal prosecution.[40] It would mean, as she said, that if an officer testified and gave false or misleading testimony during the course of a criminal prosecution, he may be acting in violation of the Fourth Amendment.[41]

It is an interesting theory, but no other Justice was willing to sign onto it. Only Justice Ginsburg in the *Albright* case recognized this continuing seizure theory.

Justice Souter wrote a separate concurrence.[42] He agreed with the plurality that Mr. Albright did not have a substantive due process claim.[43] His only possible constitutional protection was

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36. *Albright*, 114 S. Ct. at 813.

37. *Id.* at 814-17 (Ginsburg, J., concurring).

38. *Id.* at 815-16 (Ginsburg, J., concurring).

39. *Id.* (Ginsburg, J., concurring).

40. *Id.* at 816 ("This conception of a seizure and its course recognizes that the vitality of the Fourth Amendment depends upon its constant observance by police officers.") (Ginsburg, J., concurring).

41. *Id.* (Ginsburg, J., concurring).

42. *Id.* at 819-22 (Souter, J., concurring).

43. *Id.* at 819 (Souter, J., concurring).

under the Fourth Amendment.[44] The reasons given by Justice Souter for that conclusion were a little different than the plurality's analysis.

Justice Souter said that any damages that Albright may have suffered would have stemmed from the arrest.[45] This was another way of saying that he did not see any independent damages flowing to Albright from the charge, the decision to prosecute, as opposed to the arrest. However, he left open the possibility that there might be other cases, which he termed extraordinary cases, in which the bringing of baseless criminal charges results in damages that are independent of the damages brought about as the result of the arrest. On that basis he attempted to disassociate himself from the plurality.[46]

However, his opinion expresses the same displeasure with substantive due process that the plurality does.[47] He ultimately, in the *Albright* case, came to the same conclusion as the plurality, namely, that the Fourth Amendment was the sole possible basis for Albright's claim.[48] My view is that he is so closely aligned with

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44. *Id.* at 821-22 (Souter, J., concurring).

45. *Id.* at 822 (Souter, J., concurring).

46. *Id.* (Souter, J., concurring).

47. *Id.* at 820 (Souter, J., concurring).

> We are, nonetheless, required by '[t]he doctrine of judicial self-restraint . . . to exercise the utmost care whenever we are asked to break new ground in [the] field' of substantive due process . . . . The importance of recognizing [such] limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on the trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments with the ill-defined contours of some novel due process right.
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> This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions in which the Court has resisted against relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed. This case calls for just such restraint, in presenting no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already.

Id. at 820 (Souter, J., concurring) (citations omitted) (quoting Collins v. Harker Heights, Tex., 112 S. Ct. 1061, 1068 (1992)).

48. *Id.* at 822 (Souter, J., concurring).

the plurality - I take him and I add him to the plurality of four, and that in substance adds up to a majority of five. So, now we are up to five.

Justice Kennedy authored a concurring opinion that was joined in by Justice Thomas.[49] As I see it, Justice Kennedy made a good point and a bad point. He said, we agree that where an individual challenges the constitutionality of an arrest, it is the Fourth Amendment that provides the sole source of constitutional protection;[50] you cannot rely upon due process. Justice Kennedy stressed, however, that Kevin Albright did not challenge his arrest, he challenged the decision to charge him and to prosecute him, and that in this situation the individual should be entitled to assert a due process claim.[51]

Now, to me, Justice Kennedy makes a valid point, and it raises a troublesome question about the approach taken by the plurality. The plurality seems to be saying that because Kevin Albright was arrested, he can challenge only the arrest and he can do so only under the Fourth Amendment.

It would seem to me that Kevin Albright is entitled to say, look, I have been arrested, but I choose not to challenge the arrest. My challenge is to the filing of these baseless charges and the decision to go ahead with the prosecution.

Having made what I think is a good and perceptive point, Justice Kennedy should have stopped while he was ahead. Instead, unfortunately, he went further and said that while Kevin Albright was entitled to assert a due process claim against the filing of baseless charges, his due process claim was defeated by the doctrine of *Parratt v. Taylor*.[52] Why? Because, he said, Illinois provided an adequate state law remedy, namely, a state malicious prosecution claim, a claim that could be asserted under Illinois state law.[53]

Well, I think this is totally wrong. *Parratt v. Taylor* was a doctrine that was intended to apply to procedural due process

49. *Id.* at 817-19 (Kennedy, J., concurring).
50. *Id.* at 817 (Kennedy, J., concurring).
51. *Id.* at 817-18 (Kennedy, J., concurring).
52. 451 U.S. 527 (1981).
53. *Albright*, 114 S. Ct. at 819 (Kennedy, J., concurring).

claims, and even more narrowly, to a particular type of procedural due process claim; a procedural due process claim growing out of random and unauthorized official conduct.[54] I think that if one was to accept Justice Kennedy's position that the *Parratt v. Taylor* doctrine can apply to a claimed denial of substantive constitutional rights, it would place in jeopardy the landmark ruling in *Monroe v. Pape*[55] that the section 1983 federal remedy was intended by Congress to be independent of any available state remedies.

Only Justices Stevens and Blackmun, in their dissenting opinions, were willing to recognize that the filing of baseless criminal charges could work a deprivation of liberty and give rise to a violation of substantive due process.[56]

What is the overall picture here? I see the plurality and Justice Souter rejecting the substantive due process claim because of the existence of an alternative federal remedy, namely, the Fourth Amendment claim. Justice Kennedy, concurring, rejected the malicious prosecution claim because of the existence of an alternative state law remedy.

Despite the fact that you have all these different positions among the Justices, it is possible that there is an underlying theme, largely unarticulated, that unifies the seven Justices who rejected Mr. Albright's claim. The unarticulated thinking might be that because the type of official wrongdoing that Albright is complaining about is adequately covered under state law malicious prosecution claims, there is not a sufficient reason to constitutionalize the claim under the doctrine of substantive due process.[57]

Let me make one other point. Technically we do not have a majority opinion in this case, but already lower federal courts are reading *Albright* as standing for the proposition that a substantive

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54. Zinermon v. Burch, 494 U.S. 113 (1990). In Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), the Court noted that "*Parratt* . . . was dealing with a . . . 'random and unauthorized act by a state employee. . . . '" *Id.* at 435-36 (quoting Parratt v. Taylor, 451 U.S. 527, 541 (1981)).

55. 365 U.S. 167 (1961).

56. *Albright*, 114 S. Ct. at 822-35 (Stevens, J., dissenting).

57. *See* Davidson v. Cannon, 474 U.S. 344 (1986); Daniels v. Williams, 474 U.S. 327 (1986); Baker v. McCollan, 443 U.S. 137 (1979); Estelle v. Gamble, 429 U.S. 97 (1976); Paul v. Davis, 424 U.S. 693 (1976).

due process malicious prosecution claim may not be asserted under section 1983.[58]

II. ATTACKS ON CONVICTIONS AND SENTENCES - *HECK V. HUMPHREY*

Malicious prosecution also played an important role in the Supreme Court's decision in *Heck v. Humphrey*.[59] In *Heck*, the United States Supreme Court unanimously ruled that to recover damages under section 1983 for an unconstitutional conviction or sentence the plaintiff must show that the conviction or sentence has been overturned on appeal, either in state court or in a state habeas corpus proceeding or perhaps, by the governor.[60]

To put this issue in perspective, state prisoners who attack the constitutionality of their convictions or sentences may seek relief in a federal habeas corpus proceeding but, of course, only after exhausting state remedies.[61] These claims literally come within section 1983 because they are claims that state action is unconstitutional. So there is a potential overlap between section 1983 and federal habeas corpus. Prisoners would almost always rather bring a section 1983 action because the exhaustion requirement for habeas corpus is not in section 1983. In addition, there is the potential for recovery of attorney's fees under section 1988[62] in section 1983 actions. This is not true in federal habeas proceedings.

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58. *See* Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40 (1st Cir. 1994); Osborne v. Howard, 844 F. Supp. 511 (E.D. Ark. 1994); Cruz v. Stasinopoulos, 843 F. Supp. 435 (N.D. Ill. 1994).

59. 114 S. Ct. 2364 (1994).

60. *Id.* at 2372.

61. *Id.* at 2369.

62. 42 U.S.C.A. § 1988 (b) (West Supp. 1994). Section 1988 provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

In 1973, in *Preiser v. Rodriguez*,[63] the Supreme Court attempted to unravel this potential overlap of section 1983 and federal habeas corpus. The Court ruled that where a prisoner attacks either the fact or the duration of confinement and seeks either immediate or quicker relief from confinement, federal habeas corpus is the exclusive prisoner remedy.[64] Claims in which the prisoner seeks immediate or quicker release come within the heart of federal habeas corpus[65] and, in effect, the more specific federal habeas remedy prevails over the more general section 1983 remedy.[66]

This ruling prevents prisoners from trying to avoid the federal habeas exhaustion requirement by simply putting a section 1983 label on the pleading. However, in *Preiser*, the Supreme Court did not hold that prisoners may never sue under section 1983. They can sue under section 1983, for example, to contest the conditions of their confinement.[67] That would not be a claim for speedier or immediate release. The Supreme Court in *Preiser* said, in ambiguous dictum, that prisoners can seek damages under section 1983 because that would not be a claim seeking release either.[68]

So, predictively, these well-schooled prisoners, having read *Preiser v. Rodriguez*, devised a strategy. What we will do, they

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Id.

63. 411 U.S. 475 (1973).

64. *Id.* at 488-89.

65. *Id.* at 487-89.

66. *Id.* at 489.

67. *Id.* at 500. The Court held, in Wilwording v. Swenson, 404 U.S. 249 (1971), that 42 U.S.C. § 1983 "confers jurisdiction on the United States District Courts to entertain a state prisoner's application for injunctive relief against allegedly unconstitutional conditions of confinement." *Preiser*, 411 U.S. at 500. (Brennan, J., dissenting).

68. The Court stated that:

> If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release -- the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy. Accordingly, as petitioners themselves concede, a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

Id. at 494.

said, is to claim under section 1983 that the conviction or sentence is unconstitutional. We will not ask for release, but simply ask for money damages. Of course, if we get a holding that the conviction or sentence is unconstitutional, we will then take that ruling to state court and ask for release.

The lower federal courts, for twenty years, struggled with the question of whether prisoners could assert claims that their convictions or sentences were constitutional, under section 1983, when they were seeking monetary relief.[69] The lower federal courts dealt with that issue as an exhaustion question. In other words, whether the prisoner could file a section 1983 damages claim even though state remedies had not been exhausted was the question in the lower courts.

However, in *Heck v. Humphrey*, Justice Scalia, being the creative Justice that he is, said that despite the many years of lower court decisions, it is really not a question of exhaustion, but whether the section 1983 claim is cognizable at all.[70] That is the way he put it. He reasoned this out through a series of steps. Section 1983 creates a type of tort liability.[71] If you look to the closest common law tort anàlogy to section 1983 suits attacking the constitutionality of a conviction or sentence, it would be, he said, malicious prosecution.[72] One of the elements of common law malicious prosecution is that the criminal proceeding must have terminated in favor of the accused.[73] Justice Scalia said there was good reason

69. *See generally* Martin A. Schwartz, *The Preiser Puzzle: Continued Frustrating Conflict Between the Civil Rights and Habeas Corpus Remedies for State Prisoners*, 37 DEPAUL L. REV. 85 (1988).

70. *Heck*, 114 S. Ct. at 2370.

71. *Id.* at 2370. "'[T]he common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules... provide the appropriate starting point for the inquiry under § 1983 as well.'" *Id.* (quoting Carey v. Piphus, 435 U.S. 247, 257-58 (1978)).

72. *Id.* at 2371. The Court compared a false arrest claim, where a plaintiff can recover damages for the time of detention to the time of arraignment only, to a malicious prosecution claim, where "plaintiff may recover, in addition to general damages, 'compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of the society.'" *Id.* (quoting KEETON ET AL., *supra* note 12, § 119, at 887-88).

73. *Heck*, 114 S. Ct. at 2371.

for that requirement; it prevents collateral attacks in civil actions on the validity of convictions and sentences.[74]

So, Justice Scalia, in effect, imported that common law principle into section 1983 actions. The result was that a claim by a prisoner under section 1983 that the conviction or sentence is unconstitutional cannot be asserted until there is a showing that the conviction or sentence has been overturned, either by executive clemency or in some state or federal court proceeding.[75]

Justice Scalia stressed that this principle only applies to those claims that necessarily implicate the constitutionality of the conviction or sentence.[76] If, for example, a convicted defendant asserts a Fourth Amendment violation that may be susceptible to harmless error analysis, well, that would not be a claim that necessarily implicates the constitutionality of the conviction.[77]

Keep in mind two other points. One is the fact that just because a claim is cognizable under section 1983 does not mean the federal court will reach the merits. There may be a number of non-merits, reasons for not resolving the claim, such as, res judicata, various immunities, or some of the abstention doctrines.[78] All the Court held in *Heck v. Humphrey* is that until the conviction or sentence has been overturned, a claim cannot even be asserted under section 1983.[79]

The second point is that implicit in the Court's decision is a ruling with respect to accrual of a claim for purposes of the statute of limitations. If it is true that the section 1983 claim cannot be asserted until the conviction or sentence has been overturned, that means that the statute of limitations does not start to run until that point in time.[80]

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74. *Id.*

75. *Id.* at 2372.

76. *Id.* ("[This] principle . . . applies to § 1983 damages actions that necessarily require the plaintiff to prove the unlawfulness of his conviction or confinement . . . .").

77. *Id.* at 2373 n.7.

78. *See generally* Schwartz, *supra* note 69.

79. *Heck*, 114 S. Ct. at 2372.

80. *Id.* at 2373-74.

If you put *Albright* and *Heck* together, it is interesting that in *Albright* the Supreme Court essentially closed the door on section 1983 malicious prosecution claims, while in *Heck v. Humphrey*, the Supreme Court invoked the common law doctrine of malicious prosecution to close the door on a fairly sizable chunk of prisoner section 1983 claims.

III. QUALIFIED IMMUNITY - *ELDER V. HOLLOWAY*

Let us move on. If one was limited to four words, the four most important words in section 1983 litigation, they would be "qualified immunity" and "deliberate indifference." The Supreme Court last Term did decide a case dealing with qualified immunity, although I think it is on a fairly minor point. Of course, the issue on qualified immunity is whether the official violated clearly established federal law.

In *Elder v. Holloway*,[81] the Supreme Court reaffirmed that qualified immunity is ordinarily - of course, it has never told us what it means by ordinarily - a question of law for the district court.[82] When there is a right to appeal, qualified immunity is also a question of law for the circuit court.[83]

Here is the issue. I think it is a small point. In evaluating whether the federal law was clearly established at the time of the incident in question, the Supreme Court in *Elder* said that the circuit court can consider all relevant federal precedents, not just those that were considered by or cited to the district court judge.[84] I think of it, in a way, as a question of who is going to do the legal research. The Ninth Circuit came up with a ruling that was really one of a kind. It said if the precedent was not cited to the district court and the district judge did not come up with it on his or her own, the circuit court cannot consider the precedent. This seems a little foolish

81. 114 S. Ct. 1019 (1994).
82. *Id.* at 1023.
83. *Id.*
84. *Id.* at 1021.

because a court determining the qualified immunity defense should be able to consider all relevant precedents.[85]

That is what the Court held in *Elder v. Holloway*. So, that was not an earth-shattering decision. It did not even make the first page of the *New York Times*.

IV. *FARMER V. BRENNAN* AND DELIBERATE INDIFFERENCE

The other decision, *Farmer v. Brennan*,[86] was a major decision on the meaning of the phrase deliberate indifference. The plaintiff in the case, Dee Farmer, was a transsexual - I am going to refer to Farmer as she; that is how she wants to be referred. There was a commotion during the oral argument, how are we going to refer to Dee Farmer? The government insisted that Farmer be referred to as he. It made a big point of this.[87] If Farmer wants to be she, I think we can give her that.

She alleged in her section 1983 complaint that she had been beaten and raped by another inmate.[88] In *Farmer*, the Supreme Court ruled that prison officials have an Eighth Amendment obligation to protect inmates from beatings, assaults, and attacks

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85. *Id.* at 1022. The purpose of qualified immunity is to protect public officials "'from undue interference with their duties and from potentially disabling threats of liability.'" *Id.* at 1022 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982)). The Supreme Court found that the Ninth Circuit's decision did not assist this goal because "its operation is unpredictable in advance of the district court's adjudication. Nor does the rule further the interests on the other side of the balance: deterring public officials' unlawful actions and compensating victims of such conduct." *Id.* at 1022-23. The Supreme Court found that "[i]nstead, it simply releases defendants because of shortages in counsels' or the court's legal research or briefing." *Id.* at 1023.

86. 114 S. Ct. 1970 (1994).

87. *See* 62 U.S.L.W. 3483 (U.S. Jan. 25, 1994).

88. *Farmer*, 114 S. Ct. at 1975. The complaint alleged that she was placed in this particular penitentiary or "in its general population despite knowledge that the penitentiary had a violent environment and a history of inmate assaults, and despite knowledge that [she], as a transsexual who 'projects feminine characteristics,' would be particularly vulnerable to sexual attack . . . ." *Id.*

by other inmates, and may be held liable if found to be deliberately indifferent with respect to this constitutional obligation.[89]

However, in writing the opinion, Justice Souter said that even though the Court has employed a deliberate indifference standard in prison condition cases since the 1976 decision in *Estelle v. Gamble*[90] - guess what - we realize that we never "paused," that was Justice Souter's phrase, to define the meaning of deliberate indifference.[91] I have two words for the Court: for shame!

The lower courts also have been using the deliberate indifference standard for all these years and the Court cannot be bothered to tell us what this phrase means. It cannot because its meaning is obvious. If you think about it, it is questionable whether, literally, a person can be deliberate and indifferent at the same time. The Seventh Circuit described deliberate indifference as a "seeming oxymoron."[92]

Now the Court in *Farmer* said that we have a case that requires us to define the term and now we are going to define it. The Supreme Court said it agreed with the position of the defendant prison officials that deliberate indifference under the Eighth Amendment requires a showing that the prison officials had actual knowledge of the risk of harm to the prisoner.[93] You can break it down into three elements, as the Court's decision does.[94]

First, the prison official must be actually aware of the facts which gave rise to the inference that there was substantial risk to Farmer.[95] Second, the prison official had to have actually drawn the inference. It is not just that the official knew about the facts

89. *Id.* at 1976-77.

90. 429 U.S. 97 (1976).

91. *Farmer*, 114 S. Ct. at 1977-78.

92. *See* McGill v. Duckworth, 944 F.2d 344, 351 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 1265 (1992).

93. In *Farmer*, the Court stated that "deliberate indifference" lies somewhere between negligence and "purpose or knowledge," and that "deliberate indifference" can be equated with recklessness. "It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk." *Farmer*, 114 S. Ct. at 1978.

94. *Id.* at 1979.

95. *Id.*

creating the risk to Farmer, but also had to draw an inference from those facts.[96] And third, despite having the information and drawing the inference, the official disregarded the risk of danger.[97]

The Court in *Farmer* stated that the meaning of deliberate indifference for Eighth Amendment purposes was not governed by the decision that it had rendered in the case of *City of Canton v. Harris*.[98] In *City of Canton*, the Court had adopted the deliberate indifference standard for municipal liability claims based upon inadequate training.[99] In that context, the Supreme Court stated that a municipality could be held liable for deliberately indifferent training where the need for training was obvious.[100] The need may be so obvious that, objectively, new or different training should have been provided.[101] That standard in *City of Canton* was described in *Farmer* as being an objective obviousness test.[102] However, the Supreme Court in *Farmer*, said that in *City of Canton* the Court was interpreting section 1983 itself.[103] In *Farmer*, the question was, how do we interpret the Eighth Amendment?

So, what you wind up with, if you put *Farmer* together with *City of Canton*, is two different definitions of deliberate indifference. Nobody knew what it meant prior to *Farmer*. Now it has two different meanings. One meaning exists for municipal liability inadequate training claims where there is a type of objective standard.[104] The standard is whether the policy maker knew or

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96. *Id.*

97. *Id.*

98. 489 U.S. 378, 381 (1989) (action brought against city alleging violation of detainee's due process rights to obtain "necessary medical attention while in police custody"). In *Farmer*, the Court found that *City of Canton* dealt with an interpretation of § 1983 and therefore did not govern this Eighth Amendment issue. *Farmer*, 114 S. Ct. at 1980-81.

99. *City of Canton*, 489 U.S. at 388-89.

100. *Id.* at 390.

101. *Id.*

102. *Farmer*, 114 S. Ct. at 1981. "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." *Id.*

103. *Id.* at 1980-81.

104. *City of Canton*, 489 U.S. 378.

should have known.[105] In the *Farmer* case, you are dealing with a question of subjective knowledge on the part of the prison officials.[106] And, I might add, that this may not be the end of the story.

There is another, shall I say, realm of deliberate indifference claims, those asserted by pretrial detainees. These claims are asserted not under the Eighth Amendment; they are asserted under the Due Process Clause.[107] Many are claims arising out of detainee suicides in which inadequate medical treatment is alleged.[108] They are litigated under a deliberate indifference standard also.

The question remains as to what deliberate indifference means with respect to these due process claims? Now, if I had to guess, it will probably mean the same thing that it means under the Eighth Amendment. But we really do not have a definitive position. I suppose it is possible that a different standard will be adopted for these detainee claims, but I doubt it.

The last point I want to make, and Justice Souter stressed it in his opinion in *Farmer*, is that whether a prison official had actual knowledge of the risk of harm to the prisoner is a question of fact, and it is a question of fact which should be decided by a jury from all of the relevant evidence.[109]

Interestingly, he said that the relevant evidence might include the obviousness of the risk of harm to the prisoner,[110] including for example, where prison rape or prison assault is pervasive in a particular prison.[111] The jury may be able to infer from the persuasiveness of the assaultive conduct that the prison official actually knew about the risk of harm to Farmer. Not that the jury

105. *Farmer*, 114 S. Ct. at 1981.

106. *Id.* at 1981. Therefore, "a prison official who was unaware of a substantial risk of harm to an inmate [cannot] be held liable under the Eighth Amendment if the risk was obvious and a reasonable prison official would have noticed it." *Id.*

107. Bell v. Wolfish, 441 U.S. 520 (1979).

108. *See, e.g.*, Colburn v. Upper Darby Township, 946 F.2d 1017 (3d Cir. 1991); Popham v. City of Talladega, 908 F.2d 1561, 1563 (11th Cir. 1990); Camps v. City of Warner Robins, 822 F. Supp. 724 (M.D. Ga. 1993).

109. *Farmer*, 114 S. Ct. at 1981.

110. *Id.*

111. *Id.* at 1981-82.

must find such a fact, but the jury may find that the prison official had that knowledge.[112]

On the other hand, prison officials may be able to defend these cases by showing either that they did not know about the facts that created the substantial risk of harm for Farmer or, they knew about those facts, and while maybe they should have drawn the inference of a substantial risk of harm, they just did not.[113]

The first is an ostrich defense. The second is the ignorance defense. The third possibility is that the prison official knew about the facts creating the risk of harm, drew the inference, and took reasonable steps to prevent harm from occurring. The good guy defense![114]

Thank you very much.

Hon. Leon D. Lazer:

We will have a brief question period now which may deal with the section 1983 cases. Are there any questions?

Hon. George C. Pratt:

I just want to comment on two things Marty mentioned in discussing *Albright v. Oliver*. This problem of the Fourth or the Fourteenth Amendment really hinges on the *Parratt v. Taylor* problem.

Now, Marty and I have never agreed on what *Parratt v. Taylor* means or should mean. *Parratt* involved a $23.50 hobby kit that came into the prison to be delivered to one of the prisoners.[115] And when he came to get it, somehow it had disappeared.[116] To decide whether there was a due process violation you have to first look to see whether there was a deprivation of life, liberty, or property, and

112. *Id.*

113. *Id.* at 1982.

114. *Id.* at 1982-83. "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 1983.

115. Parratt v. Taylor, 451 U.S. 527, 529 (1981).

116. *Id.* at 530.

then determine whether that deprivation came without due process of law.

If you have the deprivation and the circumstances are such that a pre-deprivation hearing is impractical, then a post-deprivation hearing is all the state can provide. Obviously, you cannot have a hearing before you "lose" something. It just does not make any sense.

When the Supreme Court rendered the opinion, it said that a post-deprivation hearing is the most anybody can do to help this plaintiff.[117] Therefore, if the state provides a post-deprivation hearing, such as an action to collect damages for the loss of the hobby kit, the deprivation that occurred is not without due process.[118] It is a deprivation, true, but it is *with* due process, in the sense that adequate corrective mechanisms are made available.[119]

The implications of this for using the Due Process Clause are enormous. You had some Supreme Court Justices saying, well, this applies to property, but it does not apply to liberty. Eventually the Supreme Court disagreed with that and said the clause applies to deprivations of liberty and property.[120]

What happened after that is that the Supreme Court had to shift all of its false-arrest police type cases from a Fourteenth Amendment due process to a Fourth Amendment search and seizure analysis; otherwise, they would have thrown them out of the civil rights litigation entirely because almost all of them occur out in the field and represent random unauthorized conduct of individual police officers rather than established state procedures.

The Court said you cannot have hearings out there on the roadside to decide whether the police officer can club the driver over the head with his billyclub; it just does not happen. But suddenly the Court has moved out of the Fourteenth Amendment into the Fourth Amendment and said, "Well, this is a question of whether there was an unreasonable seizure under the Fourth Amendment." As a result, these cases were no longer affected by the *Parratt v. Taylor* Fifth Amendment problem.

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117. *Id.* at 538-41.
118. *Id.*
119. *Id.*
120. Zinermon v. Burch, 494 U.S. 113 (1990).

Now, translate this over into the malicious prosecution situation, which has always presented problems of its own. If you think about what somebody complains of when they raise a claim of malicious prosecution, it really is not that they have been deprived of something *without* due process, because the fact of the matter is that to recover under malicious prosecution, they have to show they were wrongfully charged and acquitted.

What they are really complaining about is they got *too much* process. That is why these malicious prosecution cases have given rise to all kinds of problems, and apparently, if Marty's interpretation is correct, the majority of the justices are now saying, "Well, you are not going to recover on any of this."

Another distinction was drawn by the Court in *Zinermon v. Burch.*[121] The *Parratt* doctrine applies to procedural due process, but not to substantive due process claims.[122] I frequently challenge Marty to tell me what substantive due process really is, and once you get beyond the specific guarantees of the Bill of Rights, it is hard to say what it means. All this comes into focus, however, in connection with a malicious prosecution claim. So I do not accept, as readily as he does, the concept that it is simply wrong to say that *Parratt v. Taylor* could not apply to a substantive due process claim. That is one comment.

The other one is more in the nature of a question concerning the deliberate indifference problem. Marty, the Court, if I understood you, has said that deliberate indifference under the Eighth Amendment is essentially both a subjective and an objective test as to knowledge, but that you can find subjective knowledge as an inference to be drawn from the obviousness of the situation. What you are really looking at, then, is the objective side of it. The jury can then look at that and say, well, obviously not only must the jailers have known about this, but also, they did, in fact, know about it.

I always understood the *City of Canton* test for municipal liability to be an objective test that held that even constructive knowledge is enough to establish liability. Now, almost everything

121. *Id.*

122. *Parratt*, 451 U.S. at 546-54 (Powell, J., concurring).

else the Supreme Court has done in section 1983 cases has been to get rid of juries. They have tried to create rules of law that can be handled on summary judgment and on motions to dismiss, simply because they want to avoid jury trials in these cases as much as possible.[123] So we have a Court that has been saying, "We have too many jury trials in these cases; we have got to find ways of dealings with these problems in a non-jury way." My question, then, is: Did they really, in *Farmer*, say we are going to give this issue to the jury to determine whether or not it is sufficiently obvious?

123. *See* Hunter v. Bryant, 502 U.S. 224 (1991); Town of Newton v. Rumery, 480 U.S. 386 (1987); Harlow v. Fitzgerald, 457 U.S. 800 (1982).