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### Section 1983 Cases in the October 2004 Term

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## SECTION 1983 CASES IN THE OCTOBER 2004 TERM

*Martin A. Schwartz\**

Section 1983 authorizes the enforcement of a very broad array of federal constitutional rights against state and local officials and against local government.<sup>1</sup> These federal rights run the range from prisoners' rights to property rights cases, and everything in between.<sup>2</sup>

Last Term, the Supreme Court decided three § 1983 cases involving the rights of prisoners<sup>3</sup> and three cases involving the

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\* Professor Martin A. Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, authored leading treatises entitled SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (4th ed. 1997), SECTION 1983 LITIGATION; FEDERAL EVIDENCE (3d ed. 1999) and SECTION 1983 LITIGATION: JURY INSTRUCTIONS (1999). In addition, Professor Schwartz is the author of a bi-monthly column in the *New York Law Journal*, entitled "Public Interest Law." This article is based on a transcript of remarks from the Seventeenth Annual Supreme Court Review Program presented at Touro Law Center, Huntington, New York.

<sup>1</sup> Action for Deprivation of Rights, 42 U.S.C. § 1983 (1996) stating in pertinent part:

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

<sup>2</sup> See, e.g., Michael Irvine, *Excepts From a Jailhouse Lawyer's Manual, Fifth Edition: Chapter 17: Using 42 U.S.C. § 1983 and 28 U.S.C. § 1331 to Obtain Relief from Violations of Federal Law*, 31 COLUM. HUM. RTS. L. REV. 305 (2000) (discussing prisoners rights and how to use § 1983 effectively); Harvey Brown, 42 U.S.C. 1983: *The Vehicle for Promoting Public Employees' Constitutional Rights*, 47 BAYLOR L. REV. 619 (1995) (discussing § 1983 with regard to public employers); *Recent Case: 42 U.S.C. 1983 – Eighth Circuit Denies Qualified Immunity to University Administrator Who Violated Professors' First Amendment Speech Rights*, 111 HARV. L. REV. 2129 (1998) (discussing *Burnham v. Ianni*, 119 F.3d 668 (8th Cir. 1997)); Michael Moss, *Note: Civil Rights – Municipal Liability for Police Action Under 42 U.S.C. § 1983: City of Oklahoma v. Tuttle*, 29 HOW. L.J. 655 (1986) (discussing municipal liability of police under § 1983).

<sup>3</sup> See *Johnson v. California*, 543 U.S. 499 (2005); *Wilkinson v. Austin*, 125 S. Ct. 2384

property rights of landowners.<sup>4</sup> In addition, the Court decided three cases that dealt with Fourth Amendment Rights under § 1983,<sup>5</sup> and one that involved the enforcement of federal statutes under § 1983.<sup>6</sup>

## I. PRISONERS' RIGHTS

### A. *Johnson v. California*<sup>7</sup>

The first prisoner § 1983 case was *Johnson v. California*. *Johnson* involved a California policy that provided for the racial segregation of prisoners for up to sixty days after prisoners entered a prison.<sup>8</sup> The prisoners were segregated into four groups: African Americans, Caucasians, Asians, and Latinos.<sup>9</sup> California's goal was to attempt to minimize, if not eliminate, some of the racial violence in the California prisons.<sup>10</sup> The issue before the United States Supreme Court was the proper standard of judicial review when a prisoner claims intentional racial discrimination under the Equal Protection Clause.<sup>11</sup> There were two different lines of Supreme Court authority

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(2005); *Wilkinson v. Dotson*, 125 S. Ct. 1242 (2005).

<sup>4</sup> See *San Remo Hotel v. San Francisco*, 125 S. Ct. 2491 (2005); *Castle Rock v. Gonzales*, 125 S. Ct. 2796 (2005); *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

<sup>5</sup> See *Illinois v. Caballes*, 543 U.S. 405 (2005); *Muehler v. Mena*, 125 S. Ct. 1465 (2005); *Davenport v. Alford*, 543 U.S. 146 (2004).

<sup>6</sup> See *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005).

<sup>7</sup> 125 S. Ct. 2410 (2005).

<sup>8</sup> *Id.* at 502.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 502-03 ("The [California Department of Corrections] asserted rationale for this practice is that it is necessary to prevent violence caused by racial gangs. . . . An associate warden testified that if race were not considered in making initial housing assignments, she is certain there would be racial conflict in the cells and in the yard. Other prison officials also expressed their belief that violence and conflict would result if prisoners were not segregated. The CDC claims that it must therefore segregate all inmates while it determines whether they pose a danger to others.") (citations omitted).

<sup>11</sup> *Id.* at 502 ("We consider whether strict scrutiny is the proper standard of review for an

that had to be reconciled in this case.<sup>12</sup>

One standard is called the *Turner v. Safley*<sup>13</sup> standard of review, which asks whether the governmental action is reasonably related to a legitimate penological interest.<sup>14</sup> The Court has applied this standard to a broad range of prisoner constitutional claims.<sup>15</sup> If the Court answers this in the affirmative, the government prevails.<sup>16</sup> On the other hand, the Supreme Court has consistently held that intentional racial discrimination under the Equal Protection Clause is governed by the compelling state interest test, which is the most demanding standard of judicial review.<sup>17</sup>

Justice O'Connor, writing for the majority, stated that all claims of intentional racial discrimination, including claims asserted by prisoners, are governed by the compelling state interest standard.<sup>18</sup> The Court acknowledged that prison security is a compelling governmental interest and remanded the case back to the lower courts to decide whether the California policy was necessary to further this compelling governmental interest in prison security.<sup>19</sup>

There were strong hints in the Court's opinion that California

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equal protection challenge to that policy.”).

<sup>12</sup> *Johnson*, 543 U.S. at 509. The Court explained that the CDC requested that an exception to the rule that strict scrutiny must apply with regard to all racial classifications. *Id.* The CDC argued that the Court should apply a deferential standard of review. *Id.*

<sup>13</sup> 482 U.S. 78 (1987).

<sup>14</sup> *Id.* at 89.

<sup>15</sup> See, e.g., *Lewis v. Casey*, 518 U.S. 343, 349-50 (1996) (judicial access); *Thornburg v. Abbott*, 490 U.S. 401, 414-16 (1989) (freedom of speech); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350, 353 (1987) (freedom of religion).

<sup>16</sup> *Id.*

<sup>17</sup> See *Johnson*, 543 U.S. at 505.

<sup>18</sup> *Id.* at 506 (explaining that a heightened standard of review is used in the prison context as well).

<sup>19</sup> *Id.* at 514-15. The opinion stated that “Strict scrutiny does not preclude the ability of

would not be able to meet this burden. The Court stated that California appeared to be the only state that racially segregates its prisoners. And, the Court suggested that racial segregation of prisoners could exacerbate racial tensions in the prisons rather than minimize them.<sup>20</sup>

Not surprisingly, Justices Scalia and Thomas dissented. They argued that the *Turner v. Safley* deferential standard of judicial review should govern the case.<sup>21</sup>

PROFESSOR CHERMERINSKY<sup>22</sup>: Justice O'Connor stated that rational basis review is triggered when the claim involves rights that were taken away from prisoners in order to facilitate incarceration.<sup>23</sup> She then cites to *Pell v. Procunier*,<sup>24</sup> an earlier case that stated that prisoners retain rights except those that have to be taken away in order to effectuate incarceration.<sup>25</sup> That seems to imply is that strict scrutiny would be used for those rights that do not have to be taken away in order to facilitate incarceration.<sup>26</sup>

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prison officials to address the compelling interest in prison safety." *Id.* at 514.

<sup>20</sup> *Id.* at 507-08. The Court explained, "Virtually all other States and the Federal Government manage their prison systems without reliance on racial segregation." *Id.* at 508. It also enumerated that racial classifications might actually "incite racial hostility." *Id.* at 507 (quoting *Shaw v. Reno*, 509 U.S. 630, 643 (1993)).

<sup>21</sup> *Id.* at 529 (arguing that the *Turner* standard should govern the prisoners' claims).

<sup>22</sup> Professor Erwin Chemerinsky is the Alston & Bird Professor of Law and Political Science at Duke University. Professor Chemersinsky is a renowned federal constitutional law scholar and has published extensively in the area of constitutional law.

<sup>23</sup> *Johnson*, 543 U.S. at 510.

<sup>24</sup> 417 U.S. 817 (1974).

<sup>25</sup> *Id.* at 822 ("We start with the familiar proposition that 'lawful incarceration brings about the necessary withdrawal of many privileges and rights, a retraction justified by the considerations underlying our penal system.'") (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

<sup>26</sup> See *Johnson*, 543 U.S. at 510 (reasoning that the *Turner* logic cannot be applied to issues relating to race because the right not to be racially discriminated against does not need to be compromised in order to effectuate proper prison administration).

**B. Wilkinson v. Austin<sup>27</sup>**

PROFESSOR SCHWARTZ: In *Wilkinson v. Austin*, a prisoner was placed in a maximum-security facility, which implemented the policy that prisoners have almost no human contact with other prisoners.<sup>28</sup> The Supreme Court held that the placement of a prisoner in a maximum-security facility was a deprivation of liberty for the purpose of procedural due process.<sup>29</sup> When a prisoner claims a deprivation of liberty, the test is whether the prisoner has suffered a hardship that is atypical and significant in relationship to the “ordinary incidence of prison life.”<sup>30</sup>

How does one make this evaluation? The Supreme Court acknowledged that the lower courts have had a difficult time trying to figure out what the benchmark should be to determine whether the prisoner has suffered atypical and significant hardship.<sup>31</sup> The Supreme Court determined that it did not have to resolve this issue.<sup>32</sup> Regardless of what benchmark is used, the Court found that placement in a maximum-security facility is atypical and a significant hardship and therefore is a deprivation of liberty.<sup>33</sup>

After deciding that there was a deprivation of liberty, the question became: what procedures are the prisoners entitled to as a

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<sup>27</sup> 125 S. Ct. 2384 (2005).

<sup>28</sup> *Id.* at 2388 (explaining that the system is used to segregate the most dangerous prisoners from the rest of the prison population).

<sup>29</sup> *Id.* at 2393.

<sup>30</sup> *Id.* at 2394 (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

<sup>31</sup> *Id.* Compare e.g., *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997), and *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996), with *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999). See also *Wagner v. Hanks*, 128 F.3d 1173, 1177 (7th Cir. 1997).

<sup>32</sup> *Austin*, 125 S. Ct. at 2394.

<sup>33</sup> *Id.* at 2394, 2395.

matter of procedural due process.<sup>34</sup> The Court determined that the existing Ohio state law procedures provided sufficient process, even though the procedures were not adversarial in nature and the prisoners did not have a right to call witnesses.<sup>35</sup> The Supreme Court said that the prison's strong interest in prison security justified relaxing the adversarial nature of the procedures.<sup>36</sup> Therefore, the prisoners did not prevail.

### C. **Wilkinson v. Dotson**<sup>37</sup>

The third prison case, *Wilkinson v. Dotson*, involved the distinction between prisoner use of § 1983 and prisoner use of federal habeas corpus.<sup>38</sup> This issue has given the federal courts difficulties for over thirty years. Some of the issues involving the distinction between prisoner use of § 1983 and federal habeas corpus are fairly complex.<sup>39</sup>

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<sup>34</sup> *Id.* at 2395.

<sup>35</sup> *Id.* at 2395, 2397 (applying the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), to determine if the state procedures provided a sufficient level of process).

<sup>36</sup> *Id.* at 2397 (“Were Ohio to allow an inmate to call witnesses or provide other attributes of an adversary hearing before ordering transfer to OSP, both the States immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated. . . . The danger to witnesses, and the difficulty in obtaining their cooperation, make the probable value of an adversary-type hearing doubtful in comparison to its obvious costs.”).

<sup>37</sup> 544 U.S. 74, 125 S. Ct. 1242 (2005).

<sup>38</sup> *Dotson*, 125 S. Ct. at 1244-45.

<sup>39</sup> *Id.* at 1247-48 (“Throughout the legal journey from *Preiser* to *Balisok* the Court has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies when they seek to invalidate the duration of their confinement—either *directly* through an injunction compelling speedier release or *indirectly* through a judicial determination that necessarily implies the unlawfulness of the States custody. . . . These cases, taken together, indicate that a state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—if success in that action would necessarily demonstrate the invalidity of confinement or its duration.”).

Prisoners prefer § 1983 because they can seek attorney's fees if they prevail;<sup>40</sup> fees are not available in federal habeas corpus.<sup>41</sup> They prefer § 1938 because they do not have to exhaust state judicial remedies, which is a requirement under federal habeas corpus.<sup>42</sup> Also, a jury trial is available for § 1983 monetary claims, though not in a federal habeas proceedings.

In *Wilkinson*, two prisoners challenged the adequacy of the state's procedures that were used to determine whether a prisoner should be released on parole.<sup>43</sup> The Supreme Court ruled that the prisoners could assert that claim under § 1983 because they were not seeking the type of relief that is associated with the habeas corpus proceeding.<sup>44</sup> The prisoners were not seeking to invalidate their convictions, to challenge their sentences, or to obtain immediate or speedier release from confinement.<sup>45</sup> They simply sought greater procedural protections, which would only result in a new hearing.<sup>46</sup> Therefore, the prisoners were permitted to bring their claims under § 1983.

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<sup>40</sup> *Id.* at 1253 (Kennedy, J., dissenting).

<sup>41</sup> *Id.* (explaining that relief in the form of damages is unavailable under writs of habeas corpus and suits brought under § 1983 are trying to bypass this). See *Heck v. Humphrey*, 512 U.S. 477, 491 (1994); *Edwards v. Balisok*, 520 U.S. 641, 643-44 (1997).

<sup>42</sup> *Dotson*, 125 S. Ct. at 1246 (majority opinion) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 490-91 (1973)).

<sup>43</sup> *Id.* at 1245.

<sup>44</sup> *Id.* at 1248.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*



## II. PROPERTY RIGHTS

### A. **San Remo Hotel v. City and County of San Francisco**<sup>47</sup>

The three property cases from the 2004 Term involving landowners are said to have changed the landscape of property rights under the Constitution.<sup>48</sup> One of these three cases is *San Remo Hotel v. City and County of San Francisco*.<sup>49</sup> *San Remo Hotel* dealt with the ripeness requirements, for § 1983 takings claims set forth in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson County*.<sup>50</sup>

In 1985, the Supreme Court in *Williamson County* made it more difficult for property owners to assert a takings claim under § 1983 by imposing two ripeness requirements that the plaintiff must satisfy.<sup>51</sup> First, the plaintiff must show that he sought just compensation from the state court.<sup>52</sup> Second, the plaintiff must show that he sought a final decision as to the permissible use of the property from the local land use authorities.<sup>53</sup> These two ripeness requirements are jurisdictional.<sup>54</sup> The problem with these requirements is that they place the plaintiff in a “catch-22” because if the plaintiff seeks just compensation in state court, and now seeks to

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<sup>47</sup> 125 U.S. 2491 (2005).

<sup>48</sup> Marcia Coyle, *Supreme Court Review: A Changing Landscape*, NAT'L L.J., Aug. 3, 2005, at 7.

<sup>49</sup> 125 U.S. 2491 (2005). The other two land use cases were *Lingle v. Chevron USA, Inc.*, 125 S. Ct. 2074 (2005) and *Kelo v. City of New Haven*, 125 S. Ct. 2665 (2005).

<sup>50</sup> 473 U.S. 172 (1985).

<sup>51</sup> *Williamson County*, 473 U.S. at 186, 194.

<sup>52</sup> *Id.* at 186.

<sup>53</sup> *Id.* at 194.

assert a takings claim in federal court, the normal rules of preclusion will apply in the federal court action.<sup>55</sup> This was the case in *San Remo Hotel*.

The Full Faith and Credit Statute,<sup>56</sup> 28 U.S.C. § 1738, requires the federal courts to give the state court judgment the same preclusive effect in federal court that the judgment would receive under state law in the state court.<sup>57</sup> From the landowner's perspective, the landowner had a choice: he could face dismissal for lack of ripeness if he does not proceed to state court or, if he does proceed to state court, he could face dismissal for preclusion.<sup>58</sup>

Some of the landowners sought to avoid this "catch-22" by making a reservation on the state court record of the right to litigate a federal claim in federal court.<sup>59</sup> In *San Remo Hotel*, the United States Supreme Court stated that the reservation of the federal claims was ineffectual.<sup>60</sup> The Court held that this type of reservation on the state court record is effectual only when a federal court invokes the *Pullman* abstention doctrine.<sup>61</sup> In other words, the reservation is not effective when a § 1983 takings claimant brings suit in federal court and asserted a claim for just compensation in state court, not because the federal court involved *Pullman* abstention, but in order to comply with the *Williamson* ripeness rules.

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<sup>54</sup> *Id.* at 194-95.

<sup>55</sup> *Id.* at 195.

<sup>56</sup> 28 U.S.C. § 1738 (2006).

<sup>57</sup> *San Remo Hotel*, 125 S. Ct. at 2499-2500.

<sup>58</sup> *Id.* at 2495.

<sup>59</sup> *Id.* at 2497.

<sup>60</sup> *Id.* at 2497-98.

<sup>61</sup> *Id.* at 2497.

How about the catch-22? The Supreme Court said that the procedural plight of the landowner was irrelevant.<sup>62</sup> The Court said that these takings claims should be litigated in the state courts where they historically have been brought.<sup>63</sup> According to the Court, the state courts have the greater expertise on these issues and, furthermore, there is no *right* to litigate these claims in the federal courts.<sup>64</sup> I believe that *San Remo Hotel* will lead to a shifting of takings claims back to state court.

### B. Town of Castle Rock v. Gonzales<sup>65</sup>

*Town of Castle Rock v. Gonzales* is a different type of property case. This is a case that consists of truly tragic facts. It is a follow-up to *DeShaney v. Winnebago County Department of Social Services*,<sup>66</sup> where Justice Blackmun referred to “Poor Joshua,” who had been severely beaten by his father to the point that he spent his life in a facility for the profoundly retarded.<sup>67</sup>

In *Town of Castle Rock v. Gonzales*, Jessica Gonzales was residing with her three young children, ages seven, nine, and ten.<sup>68</sup> She was estranged from her husband and was afraid of him and obtained a restraining order from the Colorado state courts limiting

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<sup>62</sup> *San Remo Hotel*, 125 S. Ct. at 2505.

<sup>63</sup> Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847, 852-53 (1989).

<sup>64</sup> *San Remo Hotel*, 125 S. Ct. at 2504.

<sup>65</sup> 125 S. Ct. 2796 (2005).

<sup>66</sup> 489 U.S. 189 (1989).

<sup>67</sup> *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting) (“Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father . . . now is assigned to live out the remainder of his life profoundly retarded.”).

<sup>68</sup> *Gonzales*, 125 S. Ct. at 2801.

the father's contact with the children.<sup>69</sup> One night, fearful that her husband had taken the three children, when the children were gone, Ms. Gonzales called the police several times and asked the police to enforce the restraining order.<sup>70</sup> The restraining order was written in mandatory terms requiring the police to enforce it. A Colorado statute, couched in mandatory terms, also required enforcement of a domestic abuse restraining order.<sup>71</sup>

The police did not intercede on her behalf.<sup>72</sup> The three children were killed by their father; the father then went to the police station and, in a shoot-out, was killed.<sup>73</sup> The Tenth Circuit held that Jessica Gonzales had a property interest in the restraining order because of the mandatory language that was set forth, both in the order and in the Colorado statute.<sup>74</sup> The property interest was for the purpose of procedural due process.<sup>75</sup>

However, the United States Supreme Court reversed the Tenth Circuit's decision, reasoning that the mandatory language in the state statute and in the restraining order had to be read together with the traditional discretion that law enforcement officers have in taking action.<sup>76</sup> Given this traditional discretion, the Court found that Jessica Gonzales did not have a reasonable expectation that the order

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<sup>69</sup> *Id.* at 2800-01.

<sup>70</sup> *Id.* at 2801-02.

<sup>71</sup> *Id.* at 2805, 2806.

<sup>72</sup> *Id.* at 2802.

<sup>73</sup> *Gonzales*, 125 S. Ct. at 2802.

<sup>74</sup> *Id.* (citing *Gonzales v. City of Castle Rock*, 366 F.3d 1093, 1101, 1117 (10th Cir. 2004)).

<sup>75</sup> *Id.* at 2802-03 (citing *Gonzales v. City of Castle Rock*, 307 F.3d 1258 (10th Cir. 2002)).

<sup>76</sup> *Id.* at 2805-06.

would be enforced. Therefore, she did not have a protected property interest.<sup>77</sup>

This was not a typical procedural due process claim. The claim was probably couched as one of procedural due process in an attempt to take the case outside the realm of *DeShaney*. The *DeShaney* decision established the strong general principle of substantive due process that the government does not have a due process obligation to protect an individual from being harmed by another private individual.<sup>78</sup>

What Jessica Gonzolas presumably actually wanted was enforcement of the domestic abuse restraining order. She did want process but wanted the police to take action to protect her.<sup>79</sup> The idea that her procedural due process rights were violated is a claim that does not seem to fit the factual context. The dissent made some sense of the procedural due process argument by reasoning that procedural due process would at least require the government to make a reasoned decision.<sup>80</sup>

### III. FOURTH AMENDMENT RIGHTS

A very high percentage of § 1983 cases involve claims asserting violations of the Fourth Amendment.<sup>81</sup> Many of the cases

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<sup>77</sup> *Id.* at 2810.

<sup>78</sup> *DeShaney*, 489 U.S. 195-96.

<sup>79</sup> *Gonzales*, 125 S. Ct. at 2813 (Stevens, J., dissenting).

<sup>80</sup> *Id.* at 2822-25.

<sup>81</sup> *See, e.g., Davenport v. Alford*, 543 U.S. 146, 152 (2004) (holding that, in an § 1983 action against two police officers for making an arrest without probable cause, the criminal offense for which there is probable cause to arrest does not have to be “closely related” to the offense stated by the arresting officer at the time of arrest); *Bd. of Educ. v. Earls*, 536 U.S. 822, 826-27 (2002). Students brought a § 1983 action against the Board of Education

are claims of excessive force by law enforcement officers, claims of arrest without probable cause, or challenges to governmental searches.<sup>82</sup> Last Term, the Supreme Court decided four cases involving the Fourth Amendment.<sup>83</sup>

One of these Fourth Amendment cases looks like it comes from Comedy Central; one case looks like it comes from Law and Order, and the third case looks like it comes from Animal Planet.

#### A. **Davenpeck v. Alford**<sup>84</sup>

In *Davenpeck v. Alford*, James Alford was impersonating a police officer.<sup>85</sup> Alford pulled behind a disabled vehicle with the “wig-wag” lights flashing on Alford’s automobile.<sup>86</sup> An actual police officer became suspicious of Alford, and pulled up alongside Alford’s vehicle. He noticed that in Alford’s car, there were handcuffs, a police radio, and a police scanner.<sup>87</sup> A second police officer arrived at the scene and noticed that Alford was recording the conversations between the actual officers and Alford with a tape

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Independent School District, claiming that the Student Activities Drug Test Policy, which requires students participating in after school activities to be tested for drugs, violates the Fourth Amendment. *Id.*

<sup>82</sup> See *Muehler v. Mena*, 125 S. Ct. 1465 (2005) (explaining that a § 1983 action challenging an officer’s use of handcuffs to detain an individual during a search of her home is not a violation of the Fourth Amendment); *Davenpeck*, 543 U.S. at 152; *Illinois v. Caballes*, 543 U.S. 405, 410 (2005) (“A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.”).

<sup>83</sup> See *Illinois v. Caballes*, 543 U.S. 405 (2005); *Muehler v. Mena*, 125 S. Ct. 1465 (2005); *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Davenpeck v. Alford*, 543 U.S. 146 (2004).

<sup>84</sup> 543 U.S. 146 (2004).

<sup>85</sup> *Id.* at 148.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

recorder.<sup>88</sup> One of the officers informed Alford that the recording was in violation of the state's Privacy Act.<sup>89</sup> Alford responded that his actions were within his rights, and in his glove compartment he kept a decision from the state court of appeals, holding that it does not violate the Privacy Act.<sup>90</sup> After telling the police officer that he worked in law enforcement, Alford was arrested for violating the state's Privacy Act.<sup>91</sup> Alford brought a § 1983 action in federal district court against the police officers asserting that he was arrested without probable cause in violation of the Fourth Amendment.<sup>92</sup>

On appeal, the Ninth Circuit found that there was no probable cause to arrest him for a violation of the Privacy Act,<sup>93</sup> and that the crimes of impersonating a police officer and violating the Privacy Act are not sufficiently related to each other.<sup>94</sup> Several circuit courts have also taken that position that an arrest is unconstitutional when there was no probable cause for the crime for which the suspect was

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<sup>88</sup> *Id.* at 149.

<sup>89</sup> *Davenport*, 543 U.S. at 149. WASH. REV. CODE § 9.73.030(1)(b) (1994) states in pertinent part:

Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any . . . [p]rivate conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the conversation.

*Id.*

<sup>90</sup> *Davenport*, 543 U.S. at 149-50.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 151. The jury returned a verdict in favor of the police officer, finding that there was probable cause to make the arrest. *Id.*

<sup>93</sup> *Id.* at 152 (explaining that, under the Privacy Act, "[t]ape recording officers conducting a traffic stop is not a crime in Washington," the crime of impersonating an officer is not "closely related" to the offense invoked by *Davenport* as he took [Alford] into custody" and that the defense of qualified immunity is not applicable).

<sup>94</sup> *Id.*

arrested, unless the crime is closely related to a crime for which there is probable cause.<sup>95</sup>

The United States Supreme Court reversed the Ninth Circuit, rejecting the closely related doctrine.<sup>96</sup> The Supreme Court held that the Fourth Amendment is satisfied as long as the arresting officer had probable cause for *any* crime. The crime for which there is probable cause does not have to be the crime articulated by the officer.<sup>97</sup> In fact, the Supreme Court stated that it has never found that the arresting officer has to articulate the crime for which the suspect is charged, although it is probably good practice to do so.<sup>98</sup>

The Court stated that the closely related doctrine might dissuade officers from articulating the crime charged.<sup>99</sup> Furthermore,

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<sup>95</sup> See *United States v. Jones*, 432 F. 3d 34, 41 (1st Cir. 2005) (“As the Supreme Court has recently reiterated, however, the probable cause inquiry is not necessarily based upon the offense actually invoked by the arresting officer but upon whether the facts known at the time of the arrest objectively provided probable cause to arrest . . . . If, on the facts known to the arresting officers, there was probable cause to believe he was committing another crime, the arrest was valid.”); *United States v. Bain*, 135 F. App’x 695, 696 (5th Cir. 2005) (“An arrest does not violate the Fourth Amendment if the officer making the arrest has probable cause to arrest the defendant for any crime, regardless of whether the defendant can be lawfully arrested for the crime for which the officer states or believes he is making the arrest.”); *Benas v. Baca*, 159 F. App’x 762, 765 (9th Cir. 2005) (An arrest is lawful so long as there is probable cause to arrest the suspect for *any* offense on the basis of facts as known to the arresting officers.”).

<sup>96</sup> *Davenpeck*, 543 U.S. at 153-54.

<sup>97</sup> *Id.* at 153 (“[A]n arresting officers state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. . . . [H]is subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause.”).

<sup>98</sup> *Id.* at 155 (“[T]he ‘closely related offense’ rule is condemned by its perverse consequences. While it is assuredly good police practice to inform a person of the reason for his arrest at the time he is taken into custody, we have never held that to be constitutionally required.”).

<sup>99</sup> *Id.* (“[T]he predictable consequence of a rule limiting the probable-cause inquiry to offenses closely related to (and supported by the same facts as) those identified by the arresting officer is not, as respondent contends, that officers will cease making sham arrests on the hope that such arrests will later be validated, but rather that officers will cease providing reasons for arrest. And even if this option were to be foreclosed by adoption of a statutory or constitutional requirement, officers would simply give every reason for which



the Court may have been concerned that if it adopted the closely related offense doctrine, the courts may have problems trying to figure out whether the crime for which there was probable cause was closely related to the crime articulated by the officer.

### B. **Muehler v. Mena**<sup>100</sup>

In *Muehler v. Mena*, a Los Angeles police officer got a search warrant to search residential premises in efforts to locate a gang member and uncover evidence of gang activity.<sup>101</sup> The police officers went to search the premises at seven in the morning and sent the SWAT team.<sup>102</sup>

PROFESSOR CHERMERINSKY: The search in *Muehler* occurred at two different houses, the purpose of which was to look for a particular gang member.<sup>103</sup> The police executed both warrants.<sup>104</sup> When the police arrived at one of the homes, the only person home was an eighteen-year-old Latina named Iris Mena.<sup>105</sup> She was asleep in a nightshirt and was not suspected of anything.<sup>106</sup> The police took her out of the room in handcuffs and began to question her.<sup>107</sup> As the police were simultaneously searching the second home, they found the person they were originally looking

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probable cause could conceivably exist.”).

<sup>100</sup> 125 S. Ct. 1465 (2005).

<sup>101</sup> *Id.* at 1468.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Muehler*, 125 S. Ct. at 1468.

<sup>105</sup> *Id.* at 1468.

<sup>106</sup> 125 S. Ct. at 1469.

<sup>107</sup> *Id.* at 1469 (“During [her] detention in the garage, an officer asked for each detainee’s name, date of birth, place of birth, and immigration status.”).

for.<sup>108</sup> He was questioned and let go while Iris Mena was still held in handcuffs. The police brought an immigration officer, who questioned her about her immigration status.<sup>109</sup> Mena had the papers to show she was lawfully in the country and ultimately, was not arrested.<sup>110</sup>

Mena brought a civil suit § 1983 for money damages.<sup>111</sup> She prevailed in federal district court in Los Angeles; the jury found there was a violation of the Fourth Amendment and a small amount of damages were awarded.<sup>112</sup> The Ninth Circuit affirmed on two grounds.<sup>113</sup> First, the Ninth Circuit determined that holding Mena for two or three hours outside in handcuffs during the entire search violated the Fourth Amendment.<sup>114</sup> The court stated that there was no reason to believe that she was a danger to the officers. They could tell from her clothing that she was not concealing any weapon, was not suspected of any crime and, therefore her Fourth Amendment rights were violated.<sup>115</sup> Second, the Ninth Circuit found that questioning Mena on her immigration status violated the Fourth Amendment.<sup>116</sup> In March of 2005 Chief Justice Rehnquist

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<sup>108</sup> *Id.* at 1475 (“At the same time, officers served another search warrant at the home of Romero’s mother [who] . . . was found at his mother’s house; after being cited for possession of a small amount of marijuana, he was released.”).

<sup>109</sup> *Id.* at 1469 (“The INS officer later asked the detainees for their immigration documentation. Mena’s status as a permanent resident was confirmed by her papers.”).

<sup>110</sup> 125 S. Ct. at 1468 (“Before the officers left the area, Mena was released.”).

<sup>111</sup> *Id.* at 1468.

<sup>112</sup> *Id.* at 1469 (awarding her \$10,000 in actual damages and \$20,000 in punitive damages against each petitioner, giving her a total of \$60,000).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Muehler*, 125 S. Ct. at 1469 (explaining that the officers should have released her once they realized that she posed no immediate threat).

<sup>116</sup> *Id.*

announced the decision in *Muehler v. Mena* and Mena lost nine-to-nothing.<sup>117</sup>

The Court gave two grounds for its decision. First, the Court held that it was permissible to hold Mena in handcuffs during the length of the search.<sup>118</sup> Pursuant to the search incident to arrest doctrine, it is permissible to detain the occupants of a residence during the search to ensure that they do not interfere with the search, that they answer questions, and that they do not flee.<sup>119</sup> Also within this doctrine is the right of the police to detain someone in handcuffs.<sup>120</sup> Therefore, the Court concluded that the officers should, in order to protect themselves during the search, be able to detain anyone in the house in handcuffs without the need to show the dangerousness of that individual.<sup>121</sup>

The second basis for the Court's decision in *Muehler* was that a person who has been lawfully stopped by the police could be questioned about anything.<sup>122</sup> The questioning does not have to be limited to the purpose of the search.<sup>123</sup> The Court refrained from addressing the issue of Mena being held for thirty to forty-five

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<sup>117</sup> *Muehler*, 125 S. Ct. at 1467. Chief Justice Rehnquist delivered the opinion in which O'Connor, Scalia, Kenney, and Thomas joined. Justice Kennedy filed a concurring opinion and Stevens did as well, in which Justices Souter, Ginsburg, and Breyer joined.

<sup>118</sup> *Id.* at 1465, 1468.

<sup>119</sup> *Id.* at 705.

<sup>120</sup> *Muehler*, 125 S. Ct. at 1470.

<sup>121</sup> *Id.* ("The officers' use of force in the form of handcuffs to effectuate Mena's detention in the garage, as well as the detention of the three other occupants, was reasonable because the governmental interests outweigh the marginal intrusion.").

<sup>122</sup> *Id.* at 1471 (" '[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual; ask to examine the individual's identification; and request consent to search his or her luggage.' " (quoting *Florida v. Bostick*, 501 U.S. 429, 434-35, (1991)).

<sup>123</sup> *Id.*

minutes beyond the time of the search. The Court explained that since the Ninth Circuit did not rule on that issue, it remanded the case back to the Ninth Circuit.<sup>124</sup>

PROFESSOR SCHWARTZ: The point I would make here is that in its Fourth Amendment analysis, the Supreme Court separated the transactions.<sup>125</sup> The Court analyzed separately the detention of Mena, the handcuffing of Mena, and the questioning of Mena.<sup>126</sup> It should also be pointed out that there could be an excessive force claim in a given case based upon excessively tight handcuffing that causes injury; however, that claim was not presented in this case.

PROFESSOR CHEMERINSKY: It was already established that it is permissible to detain individuals when there is a search of a residence. Yet, this case differs in that a person has a claim if the handcuffs were used in an abusive way and caused damage.<sup>127</sup> The Court added that if a person is lawfully stopped or detained, they could be questioned about anything.<sup>128</sup> The Court, however, qualified this by stating that the questions should not lengthen the duration of the detention.<sup>129</sup>

PROFESSOR SCHWARTZ: However, the individual does not have to answer the questions.<sup>130</sup> That is a different issue.

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<sup>124</sup> *Id.* at 1472.

<sup>125</sup> *Muehler*, 125 S. Ct. at 1472.

<sup>126</sup> *Id.* at 1470, 1471, 1472.

<sup>127</sup> *Id.* at 1470.

<sup>128</sup> *Id.* at 1471.

<sup>129</sup> *Id.* (“As the Court of Appeals did not hold that the detention was prolonged by the questioning, there was no additional seizure within the meaning of the Fourth Amendment. Hence, the officers did not need reasonable suspicion to ask Mena for her name, date and place of birth, or immigration status.”).

<sup>130</sup> *Muehler*, 125 S. Ct. at 1471.

PROF. CHERMERINSKY: The argument made to the Court was that given the totality of the circumstances, Iris Men could not have realistically believed that she could refuse to answer the questions of a police officer. She was in handcuffs and the police are asking about her immigration status. Did she believe that if she said, "I'm not going to answer that," they would let her go? No *Miranda* warnings were given because this was considered a detention, not an arrest.<sup>131</sup> The Court stated in broad language that once there is a lawful detention, the questioning could be about anything.<sup>132</sup>

### C. *Illinois v. Caballes*<sup>133</sup>

PROFESSOR SCHWARTZ: In *Illinois v. Caballes*, Roy Caballes was stopped for speeding by a police officer in Illinois.<sup>134</sup> A second police officer walked a police dog around the car.<sup>135</sup> When the dog came to the trunk he alerted the officers.<sup>136</sup> The officers searched the trunk and found marijuana.<sup>137</sup> The Supreme Court held that the dog sniff did not constitute a search within the meaning of the Fourth Amendment.<sup>138</sup> The *Caballes* Court expanded its decision in *United States v. Place*,<sup>139</sup> which held that a dog sniff of luggage

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<sup>131</sup> *Id.* at 1470 ("The imposition of correctly applied handcuffs on Mena, who was already being lawfully detained during a search of the house.").

<sup>132</sup> *Id.* at 1471.

<sup>133</sup> 543 U.S. 405 (2005).

<sup>134</sup> *Caballes*, 543 U.S. at 406.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 409.

<sup>139</sup> 462 U.S. 696 (1983).

does not constitute a search under the Fourth Amendment.<sup>140</sup> The Court's rationale for the decision in *Place* was that the dog can only detect contraband and no one has a reasonable expectation of privacy in contraband.<sup>141</sup> I believe that the unarticulated principle is that the police dog is nothing more than a sensory enhancer, just like eyeglasses or contact lenses; the police dog is viewed as an extension of the law enforcement officer's nose. If the officer had a better nose to smell with, it would not need the police dog. This is troublesome because the Court, since its first police dog case, avoided the difficult issues. One of which was whether the police dog can be considered a suitable "person" under § 1983. Section 1983 authorizes the claims only against "persons."<sup>142</sup> One could ask how a police dog could possibly be considered a § 1983 person, but a municipality is considered a § 1983 person.<sup>143</sup>

#### IV. ENFORCEMENT OF FEDERAL STATUTES UNDER § 1983

The last § 1983 case, *City of Rancho Palos Verdes v. Abrams*,<sup>144</sup> involved the enforcement of federal statutes under § 1983. Federal statutes are sometimes, but not always, enforceable under § 1983.<sup>145</sup> There has been a fairly clear trend in recent years of the Supreme Court tightening up enforcement of federal statutes under § 1983, making it more difficult for plaintiffs to enforce these

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<sup>140</sup> *Id.* at 697-98.

<sup>141</sup> *Id.*

<sup>142</sup> *Tabor v. City of Chicago*, 10 F. Supp. 2d 988, 993 (N.D. Ill. 1998).

<sup>143</sup> *Id.*

<sup>144</sup> 544 U.S. 113 (2005).

<sup>145</sup> *National Warranty Ins. Co. v. Greenfield*, 24 F. Supp. 2d 1096, 1109-10 (D. Or. 1998).

statutes.<sup>146</sup>

That trend continued last Term when the Court unanimously held that provisions for the Federal Telecommunications Act, which deals with the placement of wireless communications facilities, are not enforceable under § 1983.<sup>147</sup> This is a federalism issue because the question is whether a federal statute, which is silent on the question of enforceability under § 1983, is enforceable in federal court against state and local government.<sup>148</sup> In past cases, the Justices have often been divided on this type of federalism issue. However, *Abrams* was a unanimous decision.<sup>149</sup>

The Court's rationale in *Abrams* is interesting. In past cases, the Court held that if the federal statutory scheme sets forth a comprehensive remedy, that is an indicator that Congress intended that the comprehensive specific remedy would be the exclusive remedy, and preclude enforcement of the federal statute under § 1983.<sup>150</sup>

The issue in *Abrams* was different because it did not involve the comprehensiveness of the remedy in the Federal Telecommunications Act. The Telecommunications Act had a

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<sup>146</sup> Denise C. Morgan & Rebecca E. Zietlow, *The New Party Debate: Congress and Rights of Belonging*, 73 U. CIN. L. REV. 1347, 1356 (2005).

<sup>147</sup> *Abrams*, 125 S. Ct. at 1455, 1462.

<sup>148</sup> *Id.* at 1457-60.

<sup>149</sup> *Id.* at 1455. Bradford C. Mank, *Suing Under § 1983: The Future After Gonzaga University v. Doe*, 39 HOUS. L. REV. 1417, 1460-61 (2003).

<sup>150</sup> See *Northern Coal & Dock Co. v. Strand*, 278 U.S. 142, 146 (1928) (holding that a widow could not recover under a State Workmen's Compensation Act for the death of her husband when he was working as a stevedore because § 20 of the Federal Employers' Liability Act provided the exclusive remedy); *New York Central v. Winfield*, 244 U.S. 147, 151 (1917) (holding that the Federal Employer's Liability Act was "comprehensive and exclusive," thereby denying interstate carrier employees the opportunity to recover under a state statute).

remedy, which was akin to a judicial review remedy; but the remedy was very narrow, it was very circumscribed, and most importantly, it did not authorize attorney's fees.<sup>151</sup> The Court held that the very carefully tailored circumscribed nature of the specific remedy in the Federal Telecommunications Act evidenced a congressional intent to preclude enforcement under § 1983.<sup>152</sup>

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<sup>151</sup> *Abrams*, 125 S. Ct. at 1459-60.

<sup>152</sup> *Id.* at 1462 (“Enforcement of § 332(c)(7) through § 1983 would distort the scheme of expedited judicial review and limited remedies created by § 332(c)(7)(B)(v). We therefore hold that the TCA—by providing a judicial remedy different from § 1983 in § 332(c)(7) itself—precluded resort to § 1983.”).



