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## Challenging Unjust Convictions Under Section 1983

Cover Page Footnote

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## CHALLENGING UNJUST CONVICTIONS UNDER SECTION 1983

*Leon Friedman\**

Perhaps the easiest way to begin my discussion on challenging unjust convictions is to merely assert that an individual cannot use § 1983<sup>1</sup> to challenge unjust convictions and move on to the next panel. Yet, such challenges do indeed exist, in part, because of the presence of numerous exceptions.

### I. CHALLENGING UNJUST CONVICTIONS UNDER SECTION 1983: HECK V. HUMPHREY AND ITS PROGENY

*Heck v. Humphrey*,<sup>2</sup> which was decided in 1994, set the precedent for using § 1983 to challenge unjust convictions.<sup>3</sup>

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<sup>1</sup> 42 U.S.C § 1983 (2000) states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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> 512 U.S. 477 (1994).

<sup>3</sup> *Id.* at 486-87 (holding that to recover for an unjust conviction, a plaintiff must prove that his or her conviction or sentence was reversed in a direct appeal, invalidated by an authorized state tribunal, expunged by executive order, or "called into question by a federal court's issuance of a writ of habeas corpus").

Approximately 1,930 decisions have cited to *Heck* in the past twelve years, which includes 140 circuit court decisions. I did not even count the district court decisions because such a task would be quite difficult, given the unwieldy number of decisions.

One may wonder why so many decisions cite to *Heck*. The reason, or part of it, is that a large portion of these cases are brought by prisoners. And prisoners, as we all know, often initiate complaints or litigation because they are unhappy about their imprisonment. The problem in a case like *Heck*, or other cases such as *Preiser v. Rodriguez*<sup>4</sup> and *Edwards v. Balisok*,<sup>5</sup> is that these decisions held that a prisoner cannot challenge a prison's disciplinary actions if the result of the challenge may lead to a change in the term of imprisonment.<sup>6</sup> Thus, because such actions are barred by *Heck*, the number of decisions citing to *Heck* tends to be quite high.

#### A. *Preiser v. Rodriguez*

The first important case in the *Heck* line of decisions is the *Preiser* decision, which held that a prisoner convicted of a crime simply cannot challenge the conviction in a § 1983 action.<sup>7</sup> The prisoner's only basis for a challenge was habeas corpus.<sup>8</sup>

The *Preiser* Court explained that a prisoner cannot challenge his conviction or sentence in a § 1983 suit because any challenge

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<sup>4</sup> 411 U.S. 475 (1973).

<sup>5</sup> 520 U.S. 641 (1997).

<sup>6</sup> See *Heck*, 512 U.S. at 486-87; *Preiser*, 411 U.S. at 499; *Edwards*, 520 U.S. at 648.

<sup>7</sup> *Preiser*, 411 U.S. at 500.

<sup>8</sup> *Id.* The Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a

would assume that there was something wrong with the conviction or sentence—which must remain unchallenged because a subsequent challenge is barred by *res judicata*.<sup>9</sup> A prisoner cannot challenge the conviction or sentence because, based on *res judicata*, a court already decided he was guilty and that decision is on the books.<sup>10</sup> Hence, because there is a final judgment and sentence, a prisoner cannot bring a subsequent suit that challenges the judgment in the first action. Therefore, the unjust conviction analysis begins with *Preiser*, which seems to be a plausible decision.

### B. Heck v. Humphrey

In *Heck*, however, unlike *Preiser*, the plaintiffs merely sought damages and were not trying to upset their convictions. In other words, the decision's result would not release the plaintiffs from jail. Instead, the result of the case would give the plaintiffs money based upon the claim that the conviction was improper.

The Court held that a plaintiff could ordinarily file a § 1983 action for damages without having to exhaust all state remedies.<sup>11</sup>

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write of habeas corpus.” *Id.*

<sup>9</sup> *Id.* at 497-98. The Court explained that while *res judicata* principles are not entirely applicable to a habeas corpus proceeding, they are applicable to § 1983 actions. *Id.* at 497. Furthermore, that if *res judicata* did not apply to § 1983 actions:

[T]here would be an inevitable incentive for a state prisoner to proceed at once in federal court by way of civil rights action, lest he lose his right to do so. This would have the unfortunate dual effect of denying the state prison administration and the state courts the opportunity to correct the errors committed in the State's own prisoners, and of isolating those bodies from an understanding of and hospitality to the federal claim of state prisoners in situations such as those before us.

*Id.*

<sup>10</sup> *Id.* at 498-99; see *infra* note 88 and accompanying text (defining *res judicata*); see also *infra* Part II.C.

<sup>11</sup> *Heck*, 512 U.S. at 480-81. The Court explained that exhaustion is generally a

Yet, a § 1983 action that challenges the legality of an underlying conviction cannot be asserted “unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.”<sup>12</sup> Therefore, a prisoner cannot file a § 1983 claim for damages that challenges the validity of the conviction or imprisonment because any assertion that the arrest was improper, as is required in common law tort actions for false arrest or conviction, necessarily encompasses a challenge to the conviction itself.<sup>13</sup> Again, while it has nothing to do with exhaustion, it is merely that the prisoner has a predicate to his or her § 1983 action that is barred by *res judicata*, namely the judgment of conviction.<sup>14</sup>

### C. **Edwards v. Balisok**

The Court forwarded *Heck*’s holding into the prison discipline area in *Balisok*.<sup>15</sup> First, it is important to understand that if a prisoner is allowed to attack the prison procedure in a disciplinary hearing, according to the policy of the prison, a prisoner may gain or lose good time credits. A loss of good time credits changes a prisoner’s status and prohibits the prisoner from receiving an early release from jail. The Court held that the same principles announced in *Heck* and

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prerequisite for a federal habeas corpus action, and is not a prerequisite in a § 1983 suit. *Id.* at 480-81.

<sup>12</sup> *Id.* at 489.

<sup>13</sup> *Id.* at 486-87. The court discussed the common law torts of malicious prosecution and false arrest, finding that the principle that “civil tort actions are not the appropriate vehicles to challenge the validity of outstanding criminal judgments” should apply to § 1983 suits, which require the plaintiff to prove the unlawfulness of his conviction or confinement. *Id.* at 486.

<sup>14</sup> *Id.* at 487.

<sup>15</sup> *Balisok*, 520 U.S. at 648.

*Preiser* apply to the prison discipline area.<sup>16</sup> The action that a prisoner brings to attack a prison procedure assumes the invalidity of some judicial-type proceeding, which has not been undermined prior to the prisoner bringing the instant suit.<sup>17</sup> Thus, the holding in *Edwards* is similar to exhaustion cases under the Prison Litigation Reform Act (“PLRA”).<sup>18</sup> There is some predicate barring a prisoner from bringing a case, some element in the claim that a prisoner cannot challenge.

#### D. **Wilkinson v. Dotson**

Conversely, the Supreme Court held in *Wilkinson v. Dotson*<sup>19</sup> that if a prisoner simply attacks the prison’s procedures and the relief requested will not change the prisoner’s status or it will not lead to less time served, then that challenge is permissible.<sup>20</sup> The Supreme Court held that a *Heck* problem did not exist because the prisoners had not challenged their sentence and would serve the same amount of time, even with a favorable result.<sup>21</sup> Thus, if a prisoner simply

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<sup>16</sup> *Id.* at 643-44, 648.

<sup>17</sup> *Id.* at 646. In *Balisok*, the prisoner claimed that “he was completely denied the opportunity to put a defense on through specifically identified witnesses who possessed exculpatory evidence.” *Id.*

<sup>18</sup> Prison Litigation Reform Act, 42 U.S.C. § 1997e (2000). See e.g., *Powe v. Ennis*, 177 F.3d 393, 394 (5th Cir. 1999) (“[A] prisoner’s administrative remedies are deemed exhausted when a valid grievance has been filed and the state’s time for responding thereto has expired.”); *Wright v. Hollingsworth*, 260 F.3d 357, 358 (5th Cir. 2001) (holding that the PLRA required defendant to exhaust all available remedies prior to initiating a federal action).

<sup>19</sup> 544 U.S. 74 (2005).

<sup>20</sup> *Id.* at 82. The Court explained that the prisoners in *Wilkinson* were not seeking to secure an earlier release from prison or a change in their status. *Id.* Instead, “[s]uccess for Dotson . . . means at most new eligibility review, which at most will speed consideration of a new parole application. Success for Johnson means at most a new parole hearing at which . . . authorities may . . . decline to shorten his prison term.” *Id.*

<sup>21</sup> *Id.*

ends up serving the same time and his challenge does not alter the period that he is going to serve, then the prisoner can bring an action challenging parole procedures as long as it will not change his status.

### E. Hill v. McDonough

Last year the Supreme Court added to the previously discussed rulings in the case of *Hill v. McDonough*.<sup>22</sup> In the *Hill* case, a death penalty decision, a prisoner challenged the specific method used to lethally inject prisoners. The Court explained that the prisoner was not challenging the death penalty because the complaint only sought to force the respondents to find some other method to execute Hill.<sup>23</sup> Therefore, the action was viewed as a challenge to the three-drug protocol to bring about the lethal injection and not the lethal injection itself.<sup>24</sup>

*Hill* built on a case from the previous year, *Nelson v. Campbell*,<sup>25</sup> where the challenge was to the method of accessing the vein of the individual. Yet, *Nelson* and *Hill* simply challenged the method used to administer the death penalty, therefore, the Court held that the challenges in both cases did not create a *Heck* problem.<sup>26</sup>

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<sup>22</sup> 126 S. Ct. 2096 (2006).

<sup>23</sup> *Id.* at 2102.

<sup>24</sup> *Id.* The three drug protocol involved is administered as follows: first, sodium pentothal is used to anesthetize; second, pancuronium bromide is used to paralyze the muscles; and, third, potassium is used to stop the heart of the inmate. See Linda Greenhouse, *Supreme Court Hears Case Involving Lethal Injection*, N.Y. TIMES, Apr. 27, 2006, at A1.

<sup>25</sup> 541 U.S. 637 (2004); see also *Hill*, 126 S. Ct. at 2101 (citing *Nelson*, 541 U.S. at 644).

<sup>26</sup> *Hill*, 126 S. Ct. at 2103-04. The *Hill* Court explained that “the injunction Hill seeks would not necessarily foreclose the State from implementing the lethal injection sentence under present law, and thus it could not be said that the suit seeks to establish, ‘the unlawfulness [that] would render a conviction or sentence invalid.’ ” *Id.* (quoting *Heck*, 512 U.S. at 486). In *Nelson*, the Court also held that the challenge to Alabama’s injection procedure did not pose a *Heck* problem, given that the relief sought did not challenge the



**F. Peralta v. Vasquez**

*Peralta v. Vasquez*,<sup>27</sup> a recent case decided by the Second Circuit, took the analysis one step further. *Peralta* involved a prisoner's challenge to a prison disciplinary proceeding, but part of the challenge would have changed the prisoner's status because it would have taken away good time credits. Yet, the challenge brought by the prisoner only generally challenged prison procedures. The prisoner argued that it was a bad procedure that led to the termination of his good time credits. The question became, if there are two sanctions in a case, one that affected the duration of the custody and the other that affected the conditions of the confinement, can a prisoner maintain the challenges? The Second Circuit, in a decision by Judge Calabresi, held, “ ‘[I]n mixed sanction cases,’ a prisoner can, without demonstrating that the challenged disciplinary proceedings . . . have been invalidated, proceed separately with a § 1983 action aimed at the sanctions or procedures that affected the conditions of his confinement.”<sup>28</sup>

Suppose a prisoner asserts the following: “I am not altering, I am not asking for a change in my good time credits; I just want the procedures that were followed to be changed.” According to the Second Circuit, a prisoner can challenge the procedures used and can only bring “an action if he agrees to abandon forever any . . . claims he has with respect to the sanctions that affected the length of his

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sentence itself. *Nelson*, 541 U.S. at 645-46.

<sup>27</sup> 467 F.3d 98 (2d Cir. 2006).

<sup>28</sup> *Id.* at 100.

imprisonment.”<sup>29</sup> Essentially, it is not enough for a prisoner to say, “Okay, I am not going to challenge the length of my imprisonment, I will do that in the future after I made some internal administrative change.” The Second Circuit held that a prisoner must “abandon . . . any claims he may have with respect to the duration of his confinement that arise out of the proceeding he is attacking in his current § 1983 suit.”<sup>30</sup>

Thus, the Second Circuit found a prisoner must give up his claim because the court does not want to have to hear a prisoner’s claims piecemeal, through multiple lawsuits. The court, therefore, decided to make a distinction between a challenge that affects the length of your internment and a suit that simply challenges a procedure that led to the imprisonment without in any way affecting that result.<sup>31</sup> While this case is somewhat strange, the court’s rationale seems to be that it does not want a bifurcated case.

In conclusion, *Heck* and its progeny are very important because they close the door on § 1983 cases. Even if you think something about your conviction is unfair, you cannot use § 1983 to challenge the unjust conviction, but must use habeas corpus instead. Habeas corpus, however, is particularly difficult because the Antiterrorism and Effective Death Penalty Act<sup>32</sup> (“AEDPA”) has numerous requirements, such as exhaustion and a very short statute of limitations, which essentially prohibits a prisoner from initiating a

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

<sup>30</sup> *Id.* at 104.

<sup>31</sup> *Id.*

<sup>32</sup> Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, 22, 28, 40 and 42 U.S.C.).

lawsuit immediately after conviction.<sup>33</sup> Additionally, there is deference to state fact-finding and state legal conclusions.<sup>34</sup> Further, under the AEDPA, the plaintiff must show that there was an unreasonable application of the law.<sup>35</sup> The AEDPA's numerous provisions make it very difficult for a prisoner to challenge his or her conviction.

Naturally, a prisoner wants to go straight into court after being convicted, so that he or she can remedy the circumstances. Yet, the AEDPA prohibits such action. Instead, a prisoner must go through the state post conviction, exhaust everything, and face all the difficulties of AEDPA, which is one of the reasons why prisoners come into federal court with a § 1983 suit. In turn, the federal courts dismiss such actions, and this is why *Heck* has been cited 1,930 times.

## II. USING SECTION 1983 TO CHALLENGE UNJUST ARRESTS, EXCESSIVE FORCE, SEARCHES, AND CONDITIONS OF CONFINEMENT

There are some cases where a person can bring a § 1983 action, such as when a prisoner challenges the conditions of confinement.<sup>36</sup> Prisoners can bring a challenge to certain conditions, such as receiving improper medical treatment or inadequate meals—

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<sup>33</sup> 28 U.S.C. § 2244 (2000) (imposing a one-year limitation).

<sup>34</sup> *Id.* § 2254 (imposing a burden on the applicant to rebut “the presumption of correctness by clear and convincing evidence”).

<sup>35</sup> *Id.*

<sup>36</sup> “Section 1983 liability for alleged violations of detainee’s rights can be premised on two theories: (1) that the conditions of confinement violated the detainee’s rights or (2) that episodic acts or omissions of officials violated those rights.” *Hebert v. Maxwell*, m 05-30929, 2007 U.S. App. LEXIS 1160, at \*\*10-11 (5th Cir. filed Jan. 19, 2007).

whatever aspect of confinement the prisoners dislike. Yet, the PLRA creates an enormous number of hoops a prisoner must jump through and over to bring suit.<sup>37</sup> Under the PLRA, a prisoner must, among other things, exhaust all administrative remedies.<sup>38</sup> Again, there are a whole series of procedures a prisoner must follow, making it difficult to bring suit, but *Heck* does not preclude the prisoner's PLRA lawsuit.

Numerous cases deal with the conditions of arrest.<sup>39</sup> When a person is arrested, can the prisoner bring a false arrest claim while he or she is incarcerated and awaiting trial? Courts have held that the answer is no, such action is clearly barred because if a person is falsely arrested due to a lack of probable cause, the issue cannot be addressed until a jury renders a guilty verdict.<sup>40</sup> Arguably, one has

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<sup>37</sup> 42 U.S.C. § 1997e et. seq.

<sup>38</sup> *Id.* § 1997e(a).

<sup>39</sup> *See, e.g.,* *Boyd v. City of New York*, 336 F.3d 72 (2d Cir. 2003) (finding a former prisoner's § 1983 actions for false arrest and false imprisonment should be denied but remanding the prisoner's malicious prosecution claim); *Wallace v. City of Chicago*, 440 F.3d 421 (7th Cir. 2006) (denying the plaintiff's § 1983 action for false arrest due to statute of limitations); *Chachere v. Houston Police Dep't*, H-05-3187, 2006 U.S. Dist. LEXIS 84631, at \*\*9-11 (S.D. Tex. Nov. 21, 2006) (stating that if the Court were to grant the plaintiff damages for the alleged false arrest while the case is pending, such a ruling would necessarily implicate the validity of a future conviction stemming from the alleged false arrest).

<sup>40</sup> *See, e.g.,* *Covington v. City of New York*, 171 F.3d 117, 122-24 (2d Cir. 1999) (holding that false arrest claims accrue at the time of arrest, but if the § 1983 lawsuit's success would imply the conviction's invalidity, it does not accrue if the potential for a verdict in the underlying criminal prosecution exists); *Hamilton v. Lyons*, 74 F.3d 99 (5th Cir. 1996) (finding that *Heck* prevents the accrual of § 1983 claims that would imply the invalidity of convictions on pending criminal charges). The *Covington* court explained that:

So long as the criminal case remained pending, however, a parallel § 1983 case based upon a false arrest and wrongful search claim would create the distinct possibility of an inconsistent result if the prosecutor's evidence was dependent upon a valid arrest. That is the reason why the § 1983 cause of action could not accrue during the pendency of the criminal case.

*Covington*, 171 F.3d at 124.

nothing to do with the other. Logically, that is true, but courts do not look at it that way.

How about excessive force? Suppose a prisoner asserts, “Yes, I committed the crime and I was convicted but when the police arrested me, they really abused me.” Is there any bar to bringing an excessive force case in a § 1983 action if the conviction has been affirmed and not been set aside? And the answer is: sometimes, generally it depends on why an individual was arrested.<sup>41</sup> If a prisoner was arrested for resisting arrest, then arguing that the police used excessive force is somehow a challenge to the conviction for resisting arrest and, therefore, the prisoner cannot sue.<sup>42</sup> The suit is barred until the conviction is reversed, which may then result in a statute of limitations problem.<sup>43</sup>

If an individual is arrested for jaywalking, resists arrest, and the police shoot the person in the head, arguably an excessive force claim exists. The courts, however, consider that if a person resists arrest, the resistance thus provides the officer with a privilege to use reasonable force to overcome the arrestee’s resistance.<sup>44</sup> While it seems like an individual shot in the head for a jaywalking violation

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<sup>41</sup> See, e.g., *Washington v. Summerville*, 127 F.3d 552, 556 (7th Cir. 1997) (“[A] wrongful arrest claim, like many Fourth Amendment claims, does not inevitably undermine a conviction because a plaintiff can wage a successful wrongful arrest claim and still have a perfectly valid conviction.” (citing *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996))).

<sup>42</sup> *Heck*, 512 U.S. at 487 n.6.

<sup>43</sup> See *Covington*, 171 F.3d at 119-20.

<sup>44</sup> See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (explaining that an officer in a § 1983 action for excessive force is protected by qualified immunity when she “reasonably misapprehends the law governing the circumstances she confronted”); *Payne v. Pauley*, 337 F.3d 767, 778 (7th Cir. 2003) (holding that a police officer’s conduct is constitutional if, based on the totality of the circumstances, he does not use more force than is necessary to effectuate the arrest).

may have an excessive force claim, excessive force cases typically discuss all of the facts surrounding the resistance of the arrest,<sup>45</sup> and subsequently assert that the police are allowed to use whatever force is reasonably sufficient to overcome the arrestee.<sup>46</sup>

### A. Requirements for Challenging Unjust Arrests, Searches or Excessive Force

PROF. SCHWARTZ: It is often difficult to determine when a challenge to an arrest, a search, or excessive force attacks the validity of the conviction. When is a challenge to excessive force a claim that necessarily implicates the validity of the conviction? In cases where the plaintiff is challenging an arrest or force, the question always comes down to whether the challenge necessarily implicates the validity of the conviction.<sup>47</sup> We know what question to ask. The problem is answering the question. For example, when there is an excessive force claim or there is a challenge to an arrest or a search, it is often not clear whether it is correct to say that if the plaintiff succeeds, the success will necessarily lead to the overturning of the conviction.

PROF. FRIEDMAN: A few recent decisions discuss the existence of a challenge for resisting arrest, such as *VanGilder v.*

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<sup>45</sup> See, e.g., *Brosseau*, 543 U.S. at 195-97 (detailing how the accused ran through the neighbors' yards, jumped into a vehicle, and ignored the officer's commands); *Payne*, 337 F.3d at 775-76 (detailing how the defendant cursed at the police, incited onlookers, entered a squad car against an officer's instructions, and moved a vehicle that was part of the crime scene against an officer's instructions).

<sup>46</sup> See, e.g., *Payne*, 337 F.3d at 778 ("A police officer's use of force is unconstitutional if, 'judging from the totality of the circumstances at the time of arrest, the officer used greater force than was reasonably necessary to make the arrest.' " (citation omitted)); *Brosseau*, 543 U.S. at 200-01.

<sup>47</sup> *Heck*, 512 U.S. at 487.

*Baker*<sup>48</sup> and *Ballard v. Burton*.<sup>49</sup> To answer Professor Schwartz's question, courts will typically determine what the individual must show in order to succeed in the specific § 1983. For instance, in a malicious prosecution case an individual must show the action terminated in favor of the accused.<sup>50</sup> In a false arrest case, the arrestee must show there was no probable cause for the arrest.<sup>51</sup> In an excessive force claim, the officer would have to show that he acted reasonably in affecting the arrest.<sup>52</sup>

So what you have to do is look at the elements of the claim and decide, is there any element of the claim that you cannot prove so long as the conviction is still on the books? I think that is the way the courts review such claims. The courts always break it down into those elements and see what happens.

### **B. Statute of Limitations Problems**

The big issue in a § 1983 challenge by prisoners is when does the statute of limitations begin to run? Many cases discuss this issue in the context of the respective § 1983 challenge at issue, such as challenges to a false arrest, excessive force, and malicious prosecution.<sup>53</sup>

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<sup>48</sup> 435 F.3d 689, 692 (7th Cir. 2006) (stating that an inmate could challenge the lawfulness of a search even if it revealed evidence that was used to convict "because success on the merits would not necessarily imply that the plaintiff's conviction was unlawful" (quotations omitted)).

<sup>49</sup> 444 F.3d 391, 397 (5th Cir. 2006) (finding that a § 1983 claim can depend on whether a favorable judgment for the plaintiff implies his conviction is invalid).

<sup>50</sup> *Heck*, 512 U.S. at 484.

<sup>51</sup> *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1998).

<sup>52</sup> *Vasquez v. City of Jersey City*, No. 03-CV-5369(JLL), 2006 WL 1098171, at \*\*1, 3 (D.N.J. March 31, 2006).

<sup>53</sup> Notably, on February 21, 2007, after the date of the Practising Law Institute's program,

### 1. *False Arrest: Wallace v. City of Chicago*

A statute of limitations issue arose in *Wallace v. City of Chicago*,<sup>54</sup> when a prisoner brought a § 1983 action for damages arising from a false arrest. *Wallace* presented the following problem. Andre Wallace was arrested, put in jail, and convicted of murder. After the conviction, Wallace asserted that his original arrest was unconstitutional and subsequently, the conviction was overturned. Thus, any *Heck* problems that might have existed before the conviction was overturned disappeared. Next, Wallace filed a § 1983 action for damages arising from his false arrest. The dilemma was, however, that it had been six years since the arrest and five years since the conviction. The district court granted summary judgment against Wallace, holding that his false arrest claim was barred by the statute of limitations, which was affirmed by the Seventh Circuit Court of Appeals.<sup>55</sup> Wallace requested a rehearing en banc, which the full circuit court denied, though Judge Posner wrote a brilliant dissent.<sup>56</sup>

The *Wallace* case illustrates the current problem many individuals endure. When does the claim accrue with respect to

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the United States Supreme Court held that the statute of limitations for a § 1983 Fourth Amendment challenge to a warrantless arrest accrues when legal process is issued—when a plaintiff has “ ‘ a complete and present cause of action.’ ” *Wallace v. Kato*, 127 S. Ct. 1091, 1095 (Feb. 21, 2007) (quoting *Bay Area Landry and Dry Cleaning Pension Trust Fund v. Ferber Corp.* at Cal., 522 U.S. 192, 201 (1997)). For instance, in *Wallace*, the Court held that Wallace’s false arrest claim accrued when he first appeared before the examining magistrate and was bound over for trial on his underlying felony charge. *Id.* at 1096. Further, the Court explained that the accrual date for a § 1983 claim is a matter of federal law. *Id.* at 1095.

<sup>54</sup> *Wallace*, 440 F.3d 421.

<sup>55</sup> *Id.* at 423.

<sup>56</sup> *Id.* at 430 (Posner, J., dissenting).



excessive force or false arrest? Malicious prosecution is easier to establish because an element of malicious prosecution provides that a convicted defendant's claim only starts to run when the conviction has been overturned.<sup>57</sup> But what about false arrest?

It is perfectly plausible to say, as Judge Posner did in his dissent in the *Wallace* case, that a plaintiff could avoid dismissal by utilizing the doctrine of equitable tolling which allows "a plaintiff to delay suing beyond the statutory limitations period if he is unable despite all due diligence to sue within the period; but as soon as he is able to sue he must."<sup>58</sup> Yet, under *Heck*, you could not bring the false arrest case. Hence, the dilemma is as follows.

Court: "Hey, wait a minute. You should have brought your claim a year after your arrest."

Plaintiff: "I could not bring suit a year after my arrest because under *Heck*, I was precluded from doing so."

Court: "Well, it is too bad. Your statute of limitations has run."

The Supreme Court has now affirmed the Seventh Circuit decision, holding that false arrest claims accrue at the time of arrest.<sup>59</sup>

## 2. Excessive Force: *Swiecicki v. Delgado*

Aside from *Wallace*, there is another statute of limitations case from the Sixth Circuit, *Swiecicki v. Delgado*,<sup>60</sup> which was an

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<sup>57</sup> *Heck*, 512 U.S. at 484-87 (analogizing a § 1983 action to the common law tort of malicious prosecution which requires that a criminal conviction be terminated in favor of the accused, through direct appeal or at the initial trial, prior to bringing a claim for damages).

<sup>58</sup> *Wallace*, 440 F.3d at 431 (Posner, J., dissenting).

<sup>59</sup> *Wallace v. Kato*, 127 S. Ct. 1091, 1100 (2007).

<sup>60</sup> 463 F.3d 489 (6th Cir. 2006).

excessive force case. In *Swiecicki*, the issue was when does that statute of limitations start to run? If *Heck* precludes either a false arrest or excessive force case, how can a court say, “Well, you cannot bring that case while your conviction is around,” and once the conviction is vacated the court now tells you, “Oh, sorry, you should have brought the case we told you that you could not bring earlier.” What are you supposed to do under those circumstances?

The panel in *Swiecicki* held that a claim of excessive force accrues after the conviction was reversed because he was resisting arrest.<sup>61</sup> The court explained that statute of limitations for an excessive force claim under § 1983 begins to run after the underlying conviction is reversed or expunged because “a cause of action under § 1983 would necessarily imply the invalidity of the plaintiff’s underlying criminal conviction.”<sup>62</sup> Judge Posner, however, disagreed with that approach.<sup>63</sup> He took each of the cases the majority cited and switched them from one side to the other, finding that the score was not five to seven for the panel’s approach, but was twelve to nothing, against the panel’s approach.<sup>64</sup>

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<sup>61</sup> *Id.* at 495 (“The statute of limitations . . . did not begin to run until *Swiecicki*’s state-court conviction was overturned.”).

<sup>62</sup> *Id.* at 493 (citing *Shamaeizadeh v. Cunigan*, 182 F.3d 391, 396 (6th Cir. 1999) (emphasizing the facts’ temporal component)).

<sup>63</sup> See *Wallace*, 440 F.3d at 430-34 (Posner, J., dissenting).

<sup>64</sup> *Id.* at 432. Judge Posner explained that the panel cited five cases in adopting its rule that false arrest claims accrue at the time of the arrest. *Id.* (citing *Nieves v. McSweeney*, 241 F.3d 46 (1st Cir. 2001); *Beck v. City of Muskogee Police Dep’t*, 195 F.3d 553 (10th Cir. 1999); *Montgomery v. De Simone*, 159 F.3d 120, 126 (3d Cir. 1998); *Simmons v. O’Brien*, 77 F.3d 1093, 1097 (8th Cir. 1996); *Datz v. Kilgore*, 51 F.3d 252 (11th Cir. 1995)). Further, there were seven cases in conflict with the panels’ ruling. *Id.* at 433 (citing *Guager v. Hendle*, 349 F.3d 354 (7th Cir. 2003); *Harvey v. Waldron*, 210 F.3d 1008, 1015 (9th Cir. 2000); *Shamaeizadeh*, 182 F.3d at 399; *Covington*, 171 F.3d at 124; *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998); *Brooks v. City of Winston-Salem*, 85 F.3d 178, 183 (4th Cir. 1996); *Mackey v. Dickson*, 47 F.3d 744, 746 (5th Cir. 1995)). *Id.* at

Given these decisions, it seems like what a prisoner could do is file a claim and then, the first time the prisoner shows up before the judge at a Rule 16<sup>65</sup> conference he would say, “Your Honor, put this on the suspense calendar for the next ten years while I challenge my conviction.”

### 3. *Excessive Force: McCann v. Neilsen*

PROF. BLUM: Recently, the Seventh Circuit decided a case in this area, *McCann v. Neilsen*.<sup>66</sup> The plaintiff in *McCann* was a prisoner who brought a § 1983 claim for damages for a false arrest and excessive force claim. The court said the plaintiff was not denying his assault of a deputy as obstructive conduct.<sup>67</sup> Instead, the plaintiff alleged that “regardless of what he may have done, the deputy’s use of deadly force as a response was not reasonable.”<sup>68</sup> The *McCann* court held the question was not whether the plaintiff here “*could have* drafted a complaint that steers clear of *Heck* (he could have), but whether he did.”<sup>69</sup> The survival of many of these § 1983 challenges will depend upon good craftsmanship of the

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434. In his dissent, Posner stated:

The panel is right that there are two groups of cases. But they are consistent. One holds that a Fourth or Fifth Amendment claim accrues at the time of arrest, assuming the conviction does not depend on the evidence alleged to have been illegally seized. The other holds that the claim does not accrue then if the conviction does depend on that evidence. I count 12 cases to 0 against the panel’s approach.

*Id.*

<sup>65</sup> FED. R. CIV. P. 16.

<sup>66</sup> *McCann v. Neilsen*, 466 F.3d 619, 623 (7th Cir. 2006) (holding that the claimant’s claim of excessive force during his arrest was not barred by *Heck*).

<sup>67</sup> *Id.* at 622.

<sup>68</sup> *Id.* at 622-23.

<sup>69</sup> *Id.* at 622.

complaint and how the claim is phrased.<sup>70</sup>

Again, consider the jaywalker hypothetical discussed by Professor Friedman. Suppose the jaywalker resisted arrest and argued that the officer used deadly force. The jaywalker could further argue that he should be able to bring an excessive force claim even if the arrest was legitimate. Hence, the argument becomes, even if the jaywalker was resisting arrest, he can still bring a claim asserting that the police officer should not have shot him without upsetting the validity of the jaywalker's conviction. Under *McCann*, the court should let him proceed.

#### 4. *Malicious Prosecution*

PROF. FRIEDMAN: Suppose an individual is convicted of a crime and the conviction is reversed. After the conviction is reversed, the individual begins suing everyone in sight because of his unfair conviction. Who is "everyone in sight?" You would want to sue the officers who arrested you, as well as the prosecutor who brought the Grand Jury indictment and prosecuted the case that led to your conviction. Thus, one should sue the prosecutor for malicious prosecution as well.

First, you must prove malicious prosecution, which is a four-part test under the common law.<sup>71</sup> If you establish a constitutional

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<sup>70</sup> *Id.* (explaining that the critical issue is whether factual allegations in the complaint "necessarily imply the invalidity of his convictions" (quotations and citation omitted)).

<sup>71</sup> *See* *Martinez v. City of Schenectady*, 761 N.E.2d 560, 564 (N.Y. 2001). Under common law, malicious prosecution requires that the plaintiff establish: 1) "that a criminal proceeding was commenced"; 2) that the criminal proceeding "terminated in favor of the accused"; 3) that the proceeding lacked probable cause; and 4) "that the proceeding was brought out of actual malice." *Id.* (citing *Broughton v. State of New York*, 335 N.E.2d 310,

malicious prosecution,<sup>72</sup> you will prevail. If not, *Heck* applies and you cannot prevail. If an individual can establish the elements of constitutional malicious prosecution he will want to sue every person who put him in jail, including the police officers and prosecutor, since he was wrongly incarcerated. There may, however, be a problem in suing the prosecutor because absolute immunity may apply.<sup>73</sup> Therefore, if absolute immunity applies, you can only sue the police officers.

The requirements for common law malicious prosecution are: 1) there was initiation of a criminal prosecution; 2) it terminated in the plaintiff's favor; 3) there was no probable cause; and 4) there was actual malice in the defendant's action.<sup>74</sup> If the officer can prove that he or she had probable cause, then the officer cannot be held liable for malicious prosecution.<sup>75</sup> Also, liability cannot be imposed on an officer in a malicious prosecution action if the prosecutor made an independent judgment to continue with the charges.<sup>76</sup>

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314 (N.Y. 1975)).

<sup>72</sup> See *Rohman v. New York City Transit Auth.*, 215 F.3d 208, 215 (2d Cir. 2000) (stating that in addition to the four New York common law elements of malicious prosecution, a plaintiff alleging constitutional malicious prosecution under § 1983 must assert a "sufficient post-arraignment liberty restraint to implicate the plaintiff's Fourth Amendment rights"). Therefore, a plaintiff asserting a malicious prosecution claim under § 1983 must show a "denial of liberty consistent" with the notion of a "seizure." *Id.*

<sup>73</sup> A prosecutor is absolutely immune from a malicious prosecution action for the decision to prosecute a case. *Hartman v. Moore*, 126 S. Ct. 1695, 1704 (2006) (citing *Imbler v. Pachtman*, 424 U.S. 409, 431 (1976)). However, a prosecutor may still be liable for any "conduct taken in an investigatory role" or the offering of "legal advice to police regarding interrogations." *Id.* at 1705 n.8 (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 274-76 (1993); *Burns v. Reed*, 500 U.S. 478, 492-95 (1991)).

<sup>74</sup> See *supra* note 71.

<sup>75</sup> See *Gisondi v. Town of Harrison*, 528 N.E.2d 157, 159 (N.Y. 1988) (stating that a plaintiff may not prevail against the officers on a malicious prosecution action if the police had probable cause to suspect the plaintiff committed the alleged crime in the first place).

<sup>76</sup> See *Townes v. City of New York*, 176 F.3d 138, 147 (2d Cir. 1999). "It is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent

In New York, in terms of common law malicious prosecution, there is a law that provides if the Grand Jury indicts, the indictment creates a presumption of probable cause.<sup>77</sup> This is a presumption that can be overcome.<sup>78</sup> For instance, the Second Circuit in *McClellan v. Smith*,<sup>79</sup> held that “a Grand Jury indictment gives rise to a presumption that probable cause” existed and, therefore, invalidates a malicious prosecution claim.<sup>80</sup> Another way of overcoming the presumption is by bringing a *Brady* violation,<sup>81</sup> where one could argue that the prosecutor destroyed exculpatory evidence or the prosecutor failed to present exculpatory evidence.<sup>82</sup>

In addition to the four elements of common law malicious prosecution, suppose the prosecution was terminated by an adjournment in contemplation of dismissal (“ACD”).<sup>83</sup> Is that a

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conviction and incarceration is broken by the intervening exercise of independent judgment.” *Id.* Intervening judgment may include a prosecutor’s decision, or even the decisions of a grand jury, judge or jury. *See Barts v. Joyner*, 865 F.2d 1187, 1195 (11th Cir. 1989); *Smiddy v. Varney*, 665 F.2d 261, 266-68 (9th Cir. 1981). This principle is true “in the absence of evidence that the police officer misled or pressured the official who could be expected to exercise independent judgment.” *Townes*, 176 F.3d at 147.

<sup>77</sup> In New York, once a suspect has been indicted by a Grand Jury, the indictment creates a presumption of probable cause. *Colon v. City of New York*, 455 N.E.2d 1248, 1250 (N.Y. 1983).

<sup>78</sup> *Id.* at 1250-51. The court explained that the presumption of probable cause may be overcome by “establishing that the police witnesses have not made a complete and full statement of facts either to the Grand Jury or to the District Attorney, that they have misrepresented or falsified evidence, or that they have withheld evidence or otherwise acted in bad faith.” *Id.*

<sup>79</sup> *McClellan v. Smith*, 439 F.3d 137, 139 (2d Cir. 2006) (involving a plaintiff who brought a § 1983 suit for “false arrest, malicious prosecution, unlawful search and seizure, and unlawful imprisonment”).

<sup>80</sup> *Id.* at 145.

<sup>81</sup> A *Brady* violation is a due process violation that occurs when the prosecution suppresses “evidence favorable to an accused . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87 (1963). *See also infra* Part III (discussing *Brady* violations).

<sup>82</sup> *See infra* Part III.

<sup>83</sup> *See* N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2006).

termination in his favor? Unfortunately, the answer is no. Is it a termination for administrative reasons or something? It is not; there either has to be an acquittal, a reversal of the conviction or the indictment has to be dismissed. But in simply dismissing it, an adjournment in contemplation of dismissal is not termination in the favor of the defendant. Lack of probable cause and some kind of actual malice is a necessary prerequisite.<sup>84</sup>

For constitutional malicious prosecution, a plaintiff must show something more—a loss of liberty.<sup>85</sup> If nothing bad happened as a result of the prosecution, the individual is arrested, released on his own recognizance, and the prosecution begins. Where is the constitutional violation? A loss of liberty is a necessary prerequisite. There must be a Fourth Amendment<sup>86</sup> or Fifth Amendment<sup>87</sup> violation. Thus, to bring a § 1983 malicious prosecution claim a plaintiff must have suffered a deprivation of liberty.<sup>88</sup>

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<sup>84</sup> See *Martinez*, 761 N.E.2d at 564.

<sup>85</sup> See *supra* note 72.

<sup>86</sup> U.S. CONST. amend. IV states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

<sup>87</sup> U.S. CONST. amend. V states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

<sup>88</sup> See *supra* note 72.

### C. Res Judicata Problems

Suppose you challenge an excessive search and a magistrate judge or a court finds that there was probable cause. Although the parties are not the same, res judicata<sup>89</sup> problems may arise because in the conviction you were a defendant being prosecuted by the state, whereas in your suit against the officer, you are a plaintiff and the officer is the defendant. While there are some claim preclusion and collateral estoppel<sup>90</sup> problems that occur, ultimately, res judicata problems are at the core of the suit. You always have to question what it was the court decided that is still on the books and has not been undone.

PROF. SCHWARTZ: Here, we are dealing with state criminal proceedings, so there are potential preclusion problems, abstention problems, and potentially some *Rooker-Feldman*<sup>91</sup>

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<sup>89</sup> Res judicata is “an issue that has been definitively settled by judicial decision” or “an affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been—but was not—raised in the first suit.” BLACK’S LAW DICTIONARY 608 (2d pocket ed. 2001).

<sup>90</sup> Collateral estoppel is defined as “an affirmative defense barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one.” BLACK’S LAW DICTIONARY 108 (2d pocket ed. 2001).

<sup>91</sup> *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Rooker*, The plaintiffs sought to have the judgment of an Indiana circuit court “declared null and void.” *Rooker*, 263 U.S. at 414. The court stated that:

If the constitutional questions stated in the bill actually arose in the cause, it was the province and duty of the state courts to decide them; and their decision, whether right or wrong, was an exercise of jurisdiction. If the decision was wrong, that did not make the judgment void, but merely left it open to reversal or modification in an appropriate and timely appellate proceeding. Unless and until so reversed or modified, it would be an effective and conclusive adjudication.

*Id.* at 415. In *Feldman*, the Supreme Court had to determine “what authority the United States District Court for the District of Columbia and the United States Court of Appeals for



problems.<sup>92</sup> The *Heck* problem, however, seems to be the biggest problem of all. It could be an insurmountable problem because, as you said, it is not an exhaustion rule. It is a rule that really becomes an element of the plaintiff's claim. If the claim comes within *Heck*, the plaintiff's claim is not cognizable until the conviction is overturned, someplace and somehow. It could be overturned in a habeas proceeding, but it could also be overturned on appeal in state court or the person could receive clemency.<sup>93</sup>

### III. BRADY CLAIMS UNDER SECTION 1983

PROF. FRIEDMAN: Let me now discuss *Brady v. Maryland*<sup>94</sup> and then absolute immunity. Under the *Brady* rule, a criminal defendant's due process rights are violated if the prosecution suppresses exculpatory evidence requested by the accused.<sup>95</sup> Thus, a discussion of § 1983 decisions with *Brady* implications is particularly important.

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the District of Columbia Circuit have to review decisions of the District of Columbia Court of Appeals in bar admission matters." *Id.* at 463. The Supreme Court held that a district court cannot review a final decision of the highest court in that jurisdiction. *Id.* at 486.

<sup>92</sup> See *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 291 (2005). "*Rooker and Feldman* exhibit the limited circumstances in which this Court's appellate jurisdiction over state-court judgments, 28 U.S.C. § 1257, precludes a United States district court from exercising subject-matter jurisdiction in an action it would otherwise be empowered to adjudicate under a congressional grant of authority . . ." *Id.*

<sup>93</sup> *Heck*, 512 U.S. at 486-87. "[I]n order to recover damages for an unconstitutional conviction or imprisonment . . . a § 1983 plaintiff must prove [that their conviction was] reversed on direct appeal . . ."

<sup>94</sup> *Brady*, 373 U.S. at 83.

<sup>95</sup> *Id.* at 87. The Court held that regardless of whether the prosecution is acting in good or bad faith, the purposeful suppression of exculpatory evidence which is material to guilt or punishment of the defendant, such as a co-conspirator's confession of murder, is a violation of the Due Process Clause of the Fourteenth Amendment. *Id.*

### A. Yarris v. County of Delaware

Suppose you file a § 1983 action because the Grand Jury indicted you, you were convicted, and your conviction was overturned because the prosecutor or the police destroyed exculpatory evidence. There is a recent case discussing this issue called *Yarris v. County of Delaware*.<sup>96</sup> *Yarris* involved the deliberate destruction of exculpatory evidence. Deliberately destroying exculpatory evidence is not covered by absolute prosecutorial immunity. Prosecutors are immune for bringing the indictment, presenting evidence in court, and a few other actions.<sup>97</sup> Destroying evidence, however, before it gets to court is not covered by any of the elements of prosecutorial immunity.<sup>98</sup> The *Yarris* case is a very good opinion because the court found that, even though the prosecution did not destroy the evidence, it knowingly withheld the evidence.<sup>99</sup> The Third Circuit explained that withholding information, just like destroying information, is a *Brady* violation, and such conduct is not covered by absolute immunity.<sup>100</sup>

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<sup>96</sup> 465 F.3d 129, 131-32 (3d Cir. 2006). After serving twenty-two years on death row, Nicholas Yarris's conviction was overturned after he was given access to exculpatory evidence which he claimed the Delaware County prosecutors and detectives purposefully obscured and destroyed evidence in an attempt to frame him for the rape and murder of the victim, Linda Mae Craig. *Id.*

<sup>97</sup> *Id.* at 140-41 (stating that the courts apply a two-step inquiry, finding: 1) "whether the facts alleged show that the defendant's conduct violated a constitutional or statutory right"; and 2) whether that violated constitutional or statutory right was " 'clearly established' at the time the violation occurred").

<sup>98</sup> *See Id.* at 136-37 (stating that prosecutors are not afforded immunity from a lawsuit arising from the prosecutor's alleged destruction of exculpatory evidence since this action is not related to the prosecutor's prosecutorial function).

<sup>99</sup> *See id.*

<sup>100</sup> *Id.* at 138 (stating that since the prosecutors did not show that their denial of Yarris's DNA tests requests occurred during an ongoing adversarial proceeding, or " 'for the initiation of a prosecution or for judicial proceedings,' " the prosecutors will not be entitled

### B. Section 1983 Brady Cases Based On Negligence

I have litigated § 1983 *Brady* claims, and am working on one now.<sup>101</sup> While a *Brady* claim could be based upon negligence, a due process violation cannot be based upon negligence.<sup>102</sup> How do we reconcile that? The case I am currently involved with is of public record and is out of Brooklyn, so I am happy to discuss it. In my case, the defendant asked for the criminal record of any witnesses against him, as part of discovery. The prosecution responded to the discovery demands without providing any information. The only witness against the defendant was the complaining witness, who said, “He attacked me and robbed me.” Eventually, we found the complaining witness’s criminal record. Judge Nina Gershon appointed me in the federal habeas corpus action, which we were granted, and now we are suing in the Court of Claims for the prosecution’s failure to present the criminal record.

We are suing the City of New York because when I asked the prosecutor, “How come you did not produce the criminal record,” he said, “In over twenty-four years as a prosecutor, I and my office, we never produce the criminal record of a witness unless we know or have some reason to believe he has a criminal record.” I said, “But it was asked for.” He said, “Well, we interpret the CPL section as

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to absolute immunity (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993))).

<sup>101</sup> *Turner v. New York*, 825 N.Y.S.2d 904, 907 (Ct. Cl. 2006). A decision was rendered in the *Turner* case approximately six weeks after this speech was delivered. See *infra* note 118 and accompanying text.

<sup>102</sup> *Daniels v. Williams*, 474 U.S. 327, 328 (1986) *overruling* *Parratt v. Taylor* 451 U.S. 527 (1981). The *Daniels* Court held that “the Due Process Clause [of the Fourteenth Amendment] is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property.” *Id.*

requiring us to give it only if we have prior knowledge that he has a criminal record.” Hence, in the instant case we are arguing that this is a policy of the City of New York and there is no absolute immunity, because it is the policy of the District Attorney’s office. Unlike negligence, a policy of not looking seems to take it one step further, and cities do not have absolute immunity in that area. If the conduct is not considered the City’s policy, absolute immunity may be a problem for a simple negligence claim.<sup>103</sup>

One could ask, could it be that in a criminal prosecution or habeas proceeding a *Brady* violation could be based upon negligence, but in a § 1983 case the *Brady* violation would have to show more than negligence? That, somehow, seems illogical. But, if the Supreme Court holds in the § 1983 context that a due process claim cannot be based upon negligent conduct, how does one square all this? Well, there are a lot of *Brady* cases where the Court says that the prosecutor, even though he did not know exculpatory evidence existed, should have known that there was something pointing in the direction of exculpatory evidence.<sup>104</sup> The minute you get to that point, it becomes more than negligence, which is what most of these *Brady* § 1983 actions discuss. The easy cases are when the evidence is there but the prosecutor destroys or knows about it and does not do anything. Such actions, without a doubt, are both a basis for a *Brady*

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<sup>103</sup> See *Buckley*, 509 U.S. at 273 (“A prosecutor’s administrative duties and those investigatory functions that do not relate to an advocate’s preparation for the initiation of a prosecution or for judicial proceedings are not entitled to absolute immunity.”).

<sup>104</sup> See *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999) (holding that prosecutors have a duty to learn of the existence of any evidence known to other officials that is favorable to the defense); see also *Kyles v. Whitley* 514 U.S. 419, 438-39 (1995) (holding that a prosecutor has the duty to establish procedures and regulations for inter-department communications so

violation and basis for a later § 1983 action, and there is no absolute immunity under those circumstances.<sup>105</sup>

Aside from a § 1983 action, there are other problems that may arise, such as statute of limitations and absolute immunity problems. Eventually, you could bring an action in the Court of Claims under a New York statute, the Court of Claims Act, Section 8B, the state unjust imprisonment law.<sup>106</sup> Under this statute, “[a]ny person convicted and subsequently imprisoned for one or more felonies or misdemeanors against the state which he did not commit may . . . present a claim for damages against the state.”<sup>107</sup> In the case I have now, I brought a Court of Claims action against the State of New York and a § 1983 action against the City of New York based on the same events. There is no reason why you cannot do that.

With the Court of Claims action, a plaintiff must show that, “he has been convicted of one or more felonies or misdemeanors against the state and subsequently sentenced to a term of imprisonment, and has served all or any part of the sentence.”<sup>108</sup> Therefore, the claimant must provide documentary evidence, in order to prove his claim.<sup>109</sup> Second, the claimant must show the “judgment of conviction was reversed or vacated, and the accusatory instrument dismissed or, if a new trial was ordered, either he was found not

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as to insure that all relevant information and evidence in a case is properly disclosed).

<sup>105</sup> See *Jovanovic v. City of New York*, 04 Civ. 8437, 2006 WL 2411541, at \*16 (S.D.N.Y. Aug. 17, 2006) (advising no absolute immunity for prosecutorial activities that fall outside of scope of duties).

<sup>106</sup> N.Y. CT. CL. ACT § 8-b (McKinney 2006) (governing claims for unjust convictions and imprisonment).

<sup>107</sup> *Id.* § 8-b(2).

<sup>108</sup> *Id.* § 8-b(3)(a).

<sup>109</sup> *Id.*

guilty at the new trial or he was not retried and the accusatory instrument [was] dismissed . . . .”<sup>110</sup> Hence, the claimant must show that the judgment was reversed *and* the indictment was dismissed. If the claimant was convicted, served time, and the judgment of conviction was reversed, it would not be enough to establish a claim because the claimant would still be available and can be re-indicted.

Finally, you must prove that the indictment was dismissed on particular grounds, including “paragraph (a), (b), (c), (e) or (g) of subdivision one of section 440.10 of the criminal procedure law.”<sup>111</sup> Specifically, these dismissal grounds include fraud, lack of jurisdiction, false evidence, or the defendant could not understand or participate in the proceedings because of a mental defect.<sup>112</sup> Notably, the Act does not permit a person to bring a claim when the indictment is dismissed on section 440.10’s constitutional grounds, found in (d) and (f) of 440.10.<sup>113</sup> Hence, the State of New York’s statutes provide that if your conviction was reversed on newly discovered evidence, fraud or some local problem, the court will provide relief. However, if the conviction was reversed due to a *Brady* violation, the court will not provide relief.<sup>114</sup> Unfortunately, the courts, particularly the Court of Claims, are very strict about these requirements because if one reads section 440.10 of the Criminal Procedure Law and all of its subdivisions, one would see that the *omitted* subdivisions are the

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<sup>110</sup> *Id.* § 8-b(3)(b)(ii)

<sup>111</sup> N.Y. CT. CL. ACT § 8-b(3)(b)(ii)(A).

<sup>112</sup> N.Y. CRIM. PROC. LAW § 440.10 (McKinney 2006).

<sup>113</sup> *See* N.Y. CT. CL. ACT § 8-b(3)(b)(ii)(A).

<sup>114</sup> *See Turner*, 825 N.Y.S.2d at 907.

constitutional claims.<sup>115</sup>

Why should there be a difference? If your conviction was reversed and indictment dismissed, why should it matter if it was a federal constitutional claim or state constitutional claim? The State of New York, in its infinite wisdom, has said it is not interested in giving relief to defendants whose claims were dismissed on federal constitutional claims.<sup>116</sup> Therefore, in my case, I had to argue that the *Brady* claim is fraud within the meaning of one of the subsections of New York's Criminal Procedure Law.<sup>117</sup> A case from the Appellate Division, Second Department, supported this claim.<sup>118</sup> Currently, I am waiting for the Court of Claims to render its decision.<sup>119</sup>

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<sup>115</sup> Compare N.Y. CT. CL. ACT § 8-b (requiring the accusatory instrument to be dismissed based on a paragraph of subdivision one of section 440.10 of the criminal procedure law) with N.Y. CRIM. PROC. § 440.10 (stating grounds to vacate judgments).

<sup>116</sup> See *Turner*, 825 N.Y.S.2d at 907.

<sup>117</sup> N.Y. CRIM. PROC. LAW § 440.10(1)(c) which provides that a defendant may move to vacate a judgment on the ground that: "[m]aterial evidence adduced at trial resulting in the judgment was false and was, prior to the entry of the judgment known by the prosecutor . . . to be false."

<sup>118</sup> *People v. Thomas*, 641 N.Y.S.2d 48, 50 (App. Div. 1996).

<sup>119</sup> The Court of Claims issued a decision on December 5, 2006. See *Turner*, 825 N.Y.S.2d at 907. The court held that *Turner* could not receive relief under N.Y. CT. CL. ACT § 8-b because the *Brady* violation for the prosecution's failure to turn over impeachment evidence did not fall under any of the paragraphs in N.Y. CRIM. PROC. § 440.10. *Id.* Yet, the court denied both parties' motions for summary judgment finding that:

Paragraph c of § 440.10.1 is more promising from claimant's vantage, although limited on its terms to evidence that was known to be false. With that said, claimant cites persuasive precedent that paragraph c covers the situation when the falsity of the evidence should have been known by the prosecutor, and therefore the paragraph c predicate is satisfied here.

*Id.*

