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Section 1983 Litigation

Honorable George C. Pratt

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that the Section 1983 federal remedy is simply independent of the available state remedies. I think it is becoming more and more important to pay attention to the relationship between the Section 1983 remedies and the state remedies. Thank you very much.

Hon. George C. Pratt:

Let me start where you ended up. I do not feel that the prisoner case[171] is an exhaustion situation. I agree with you that we have got to pay more attention to the interrelationship between state and federal proceedings, but is not this prisoner thing more like a condition precedent to having a claim? If you have not got the disciplinary sanction vacated, nothing wrong has been done to you that the federal court or Section 1983 is interested in correcting.

Professor Schwartz:

Well, in some technical way you are right. In *Heck v. Humphrey*,[172] the Supreme Court said that these Section 1983

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[171] *See* Edwards v. Balisok, 117 S. Ct. 1584 (1997). A state prisoner alleged a violation of due process under 42 U.S.C.A. § 1983 resulting from a deprivation of good time credits. *Id.* at 1585. The Supreme Court held that a claim challenging the procedures used in a disciplinary hearing is not always cognizable under § 1983, and in this case was not cognizable. *Id.* at 1589.

[172] 512 U.S. 477 (1994). Petitioner filed suit seeking damages only under 42 U.S.C.A.§ 1983, claiming that respondents "under the color of state law, engaged in unlawful acts that led to his arrest and conviction." *Id* at 479. The federal district court dismissed without prejudice. *Id.* The court of appeals affirmed, reiterating the holding of the lower court that

> [i]f the plaintiff in a federal civil rights action is challenging the legality of his conviction, so that the victory would require his relief even if he had not sought that relief, the suit must be classified as a habeas corpus action and dismissed if the plaintiff has failed to exhaust his state remedies.

Id. at 477.

The Supreme Court affirmed, finding that "this Court has long expressed similar concerns for finality and consistency [of final judgments] and has generally declined to expand opportunities for collateral attack." *Id.* at 484-85. Further, the Court stated "[e]ven a prisoner who has fully exhausted state

claims are simply not cognizable.[173] That is true in *Edwards v. Balisok*[174] as well.[175] But, if you say that they are not cognizable unless a certain condition is first shown to exist, what is that condition? With regard to getting the conviction or the disciplinary sanction overturned, if you start from the premise that it is not likely to be overturned by executive order, when then is it likely to be overturned? By state appeal or by state habeas corpus proceeding.

I think that, realistically, this is a type of exhaustion requirement. In fact, it is probably worse than an exhaustion requirement. At least with an exhaustion requirement an individual goes through whatever administrative or other state remedies that are available, and exhaustion requirements have been satisfied. Now the individual can file the Section 1983 claim. Under *Heck v. Humphrey*[176] and *Edwards v. Balisok*[177], I think that there are a large number of claims where the individual, either one who has been convicted or one who faces a disciplinary sanction, may have suffered a federal constitutional violation that might never be cognizable because of an inability to get the conviction or disciplinary sanction overturned. What I am saying is that, in substance, it is a type of exhaustion rule. Maybe your point is that, in some ways, it is even more onerous than exhaustion requirements.

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remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *Id.* at 489.

[173] *Heck*, 512 U.S. 477, 490 (1994).

[174] 117 S. Ct. 1584 (1997).

[175] *Id.* at 1589.

[176] 512 U.S. 477 (1994).

[177] 117 S. Ct. 1584 (1997). Respondent lost 30 days of good time credit for violating prison rules. *Id.* at 1585. Respondent brought suit, alleging a violation of his Fourteenth Amendment due process rights under 42 U.S.C. § 1983. *Id.* The Court held that the respondent's claim was not cognizable under § 1983, and reversed the lower court's ruling. *Id.* at 1585-86.

Judge Pratt:

I agree with the latter. You made a couple of interesting points in terms of what the Supreme Court requires other people to do and what it does itself. In the *Richardson*[178] case, the private prison guards asked whether they have qualified immunity or not.[179] The Court said that it would assume that there was state action[180] and proceeded to decide the qualified immunity issue.[181] In *Siegert v. Gilley*,[182] the Supreme Court took the D.C. Circuit to task for doing exactly the same thing.[183] It said that you cannot

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[178] 117 S. Ct. 2100 (1997). Respondent brought a federal tort action against Petitioners, two prison guards, under 42 U.S.C. § 1983. *Id.* at 2102. Petitioners moved to dismiss, claiming qualified immunity. *Id.* The district court denied the motion, noting that Tennessee had privatized the correctional facility in question, and the law did not afford these guards qualified immunity. *Id.* The court of appeals affirmed, as did the Supreme Court. *Id.* at 2103.

[179] *Id.* at 2102.

[180] *Id.*

[181] *Id.* at 2109 (finding "no special immunity-related need to encourage vigorous performance.").

[182] 500 U.S. 226 (1990). Petitioner was a clinical psychologist employed at a federal government facility. *Id.* at 227. Respondent became petitioner's supervisor in January of 1985. *Id.* at 227-28. In August of 1985, Petitioner was notified that he was about to be terminated based upon his "inability to report for duty in a dependable and reliable manner, his failure to comply with supervisory directives, and cumulative charges of absence without approved leave." *Id.* at 228. Petitioner agreed to resign rather than be terminated. *Id.* In response to a potential employer's request, respondent answered that "he could not recommend [Siegert] for privileges as a psychologist." *Id.* In December of 1987, Petitioner was terminated from federal service employment. *Id.* at 229. Petitioner filed suit, alleging that the adverse reference infringed on his "'liberty interests' in violation of the protections afforded by the Due Process Clause of the Fifth Amendment." *Id.* The Supreme Court rejected his claim. *Id.*

[183] *Id.* at 232. The Court stated:

> [T]he Court of Appeals agrees with respondent that in the absence of an allegation of malice, petitioner had stated no constitutional claim. But it then went on to 'assume, without deciding that [Gilley's] bad faith motivation would suffice to make [his] actions in writing the letter a violation of Siegert's constitutional rights, and

get to the qualified immunity issue until a constitutional violation has been found[184], which means that you cannot assume there is a constitutional violation. I guess what the circuit courts cannot do, the Supreme Court can, and nobody is going to tell it no.

Professor Schwartz:

The reason why the immunity issue came up that way in *Richardson* is because that is what the Sixth Circuit did.[185] The Sixth Circuit said that it was not going to decide the state action issue, it was just going to decide the immunity issue.[186] That is the way that the issue was presented to the United States Supreme Court.[187]

Judge Pratt:

I agree with you that if there is no state action, then there is no constitutional claim. If there is no constitutional claim, then there is no immunity issue. If the Court had done what they said had to be done in *Siegert,*[188] it would have remanded the case for a

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that the process given by the credentialing review was not adequate to meet due process requirements.' (282 U.S. App. D.C., at 398, 895 F.2d at 803). We think the Court of Appeals should not have assumed, without deciding, this preliminary issue in this case, nor proceeded to examine the sufficiency of the allegations of malice.

Id

[184] *Id.*

[185] Richardson v. McKnight, 83 F.3d 417 (6th Cir. 1995).

[186] *Id.* at 425.

[187] Richardson v. McKnight, 117 S. Ct. 2100 (1997). The Supreme Court granted certiorari to review the Court of Appeals holding that, "primarily for reasons of 'public policy,' . . . the privately employed prison guards were not entitled to the immunity provided their governmental counterparts." *Id.* at 4580. (quoting Richardson v. McKnight, 88 F.3d at 425).

[188] 500 U.S. 226 (1990).

decision as to whether there was a constitutional violation and only would then have faced the qualified immunity issue.[189]

In the *McMillian*[190] case from Alabama, the sheriff was either a state policymaker or a municipal one.[191] In the process of deciding that case, the Court said it they would show deference to the Eleventh Circuit's interpretation of state law[192] because it gets state law problems more often than does the Supreme Court.[193] Yet the Court has specifically said to circuit courts that they may not show deference to the wisdom of the district court judge. If in the Second Circuit you have a district court judge from Vermont, the Supreme Court says that you cannot show any deference to his or her interpretation of Vermont state law; the circuit court has to interpret the law for itself. But that rule doesn't apply to the Supreme Court. It shows deference to the circuits, which also have similar familiarity with the local law.[194]

Not everything the Supreme Court does is wrong. You commented, Marty, that, in the same case,[195] it was kind of bizarre for the Supreme Court to even take the case when the deciding issue was one of Alabama state law. It seemed to me that one of the points the Court was trying to make was that there is nothing unusual about having a sheriff in one state being a state

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[189] *Id.* at 226. (stating that an allegation of a violation of a "clearly established constitutional right" must be made to "satisfy the necessary threshold inquiry in the determination of a qualified immunity claim.")..

[190] McMillian v. Monroe, 117 S. Ct. 1734 (1997). Petitioner was convicted of murder. *Id.* at 1734. His conviction was overturned and he was released. *Id.* Petitioner brought a § 1983 claim against the county and the county sheriff, alleging that the sheriff had intimidated witnesses and suppressed exculpatory evidence in violation of his constitutional rights. *Id.* The district court dismissed the claims, and Petitioner appealed. *Id.* at 1734-35 The court of appeals affirmed and the Supreme Court granted certiorari. *Id.* The Supreme Court affirmed, holding that the sheriff was not a policymaker for the county, but rather for the state. *Id.*

[191] *Id.* at 1736.

[192] *Id.* at 1737.

[193] *Id.* at 1735.

[194] *See McMillian*, 177 S. Ct. at 1735. (stating that "[t]he court defers considerably to the Court of Appeals' expertise in interpreting Alabama state law.").

[195] McMillian v. Monroe, 117 S. Ct. 1734 (1997).

official and a sheriff in another state being a local official. That broader principle is important, as you pointed out, for district attorneys and probably for a number of other officials that have similar labels around the country. But the guiding principle is that you have to look to the law of the particular state. Incidentally, they had to decide, or they thought they had to decide, what the Alabama law was on this particular point.[196]

Professor Schwartz:

The decision may be important because this issue comes up pretty frequently. Municipal judges, for example, are they state policymakers or local policymakers? How about district attorneys? Second Circuit cases made the point that they are state policymakers when they prosecute cases, but when they carry out administrative tasks, like training, for example, they are municipal policymakers.[197] One thing to pay attention to in the *McMillian*[198] case is that, when this issue comes up, there was a

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[196] *Id.* at 1735.

[197] *See e.g.*, Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992); Baez v. Hennessy, 853 F.2d 73 (2d Cir. 1988) (prosecutors are state policy makers when deciding whether to prosecute), *cert. denied*, 488 U.S. 1514 (1988). In *Walker*, the plaintiff was convicted of murder based on perjured testimony and served nineteen years in prison. *Id.* at 294. The City of New York claimed that "the district attorney is a state official, and therefore that his deliberate indifference cannot trigger municipal liability. *Id.* The court held that for purposes of training, the district attorney is a municipal policy maker. *Id. See also* Eisenberg v. District Attorney of County of Kings, 847 F. Supp. 1029 (E.D.N.Y. 1994). In *Eisenberg*, Plaintiff was charged with sexual misconduct in the third degree. *Id* at 1031. During the investigation by the District Attorney, the alleged victim's "eyewitness" made a "statement that completely exonerated [plaintiff]." *Id.* The District Attorney continued the prosecution nonetheless. *Id.* Plaintiff brought suit against the District Attorney under § 1983, claiming a violation of his right to due process and privacy under the Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id* at 1032. The District Attorney argued that the Eleventh Amendment provides immunity from suit. *Id.* at 1035. The Court agreed and further found that the District Attorney is not entitled to immunity from suits involving administrative acts. *Id.* at 1037.

[198] *McMillian*, 117 S. Ct. 1734 (1997).

difference between the majority and the dissent as to those aspects of state law that are most pertinent on this issue.[199] According to other states do about interlocutory appeals I do not know, and I the majority, it is important to focus on what the state constitution says about the issue, what the highest court says about the issue, and what the circuit court said about the issue. The majority rejected the more pragmatic approach taken by the dissent.[200]

Judge Pratt:

One final comment on the *Johnson*[201] case - the interlocutory appeal. There is nothing in Section 1983, according to the Supreme Court, that says that the states must have an interlocutory appeal available for a denial of qualified immunity. That is significant because it is the first time, as Marty pointed out, that the Supreme Court has said that there can be a difference between how these cases should be handled in state and federal court. It is not a very significant difference. Certainly for New York, the interlocutory appeal is there. You can appeal almost anything to the Appellate Division in New York. Forty states now have adopted the Federal Rules and its final judgment rule,[202] and almost all of them follow the Supreme Court's

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[199] *Id.* The dissent by Justice Ginsburg, joined by Justices Stevens, Souter and Breyer concludes that a sheriff is a municipal policymaker by looking at the electoral process, payment of salary, equipment, implementation of policy and geographic confines. The majority, on the other hand, defers to the circuit court's reliance upon the Alabama Constitution. *Id.*

[200] *Id.* at 1740.

[201] Johnson v. Frankel, 117 S. Ct. 1800 (1997).

[202] *See* 28 U.S.C. § 1291. This section provides in pertinent part:

> The Court of Appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in §§ 1292 (c) and (d) and 1295 of this title.")

Id.

interpretation of it. So in almost all of those states they would have the same qualified immunity appeal available. What the do not particularly care. But in New York it has no significance at all because it was available anyway.

Professor William E. Hellerstein:

Marty, on the issue of state action in the privatization case, it may well be that the Sixth Circuit decided the qualified immunity issue and did not address it.[203] But my reading of the case is that the Court assumed arguendo, without deciding, that it is not conceivable that privatization of prisons would result in a decision that it is not state action. I gave that on my Constitutional Law exam this year. I considered it, as I told my students that came in to review their exam, a "gimme." How could you miss it? Of course it is state action. They missed discussing the issue. Those who saw the issue said of course it is state action, no matter how you put it. Could it be otherwise?

Professor Schwartz:

I would have thought not, prior to *Richardson*. I would have thought that there has to be a finding of state action. But let me add a wrinkle to this. When you talk about state action theories in the Supreme Court and how they play out with private prisons, what is the most likely state action theory? One, I think, would say the public function theory.[204] Of all of the theories, that is the most likely for state action in this context.

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[203] *See* Richardson v. McKnight, 117 S. Ct. 2100 (1997).

[204] *See* Maura L. Demouy, *Employment Law: Exploring the Boundaries of Section 1983 and Title VII*, 54 M.D.L.R. 942 (1995).

> In order to become a "state actor," the public function doctrine requires that private actors must both serve a public function and perform a traditionally exclusive responsibility of the state. Because courts have found it difficult to determine when the public function doctrine applies, the public function doctrine has created liability only in a small category of cases.

Id.

Professor Hellerstein:

Except for *Burton v. Wilmington Parking Authority*,[205] the beneficial, intertwining, synchronicity, symbiotic relationship seems to me to be when the city is able to "dish off", as they say in basketball terms, its responsibility for a prison. Usually this is because it makes fiscal sense to do so, and it strikes me as coming fairly close to the *Burton* line of cases.[206]

Professor Schwartz:

One problem now with the public function doctrine is that the Supreme Court modern public function decisions state that to come within the doctrine, the function has to be not only a traditional governmental function, but also must be historically an excessively governmental function.[207] That exclusivity is the aspect that is typically very hard to satisfy. I know too well, because I lost a case in Supreme Court on this issue.[208] So when you are talking "conceivable," you are probably talking to the

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[205] 365 U.S. 715 (1961). Appellant was refused service at a restaurant located in a publicly- owned and operated building solely because he was a Negro. *Id.* at 715. Appellant brought suit against the restaurant and the state agency from which the restaurant was leased, claiming a violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Supreme Court of Delaware held that the appellant was not entitled to relief. *Id.* Appellant appealed to the United States Supreme Court, claiming that the "state statute had been construed unconstitutionally. *Id.* The Supreme Court reversed and remanded, holding that "when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself." *Id.* at 726.

[206] *Id. See, e.g.* Aaron v. Cooper, 261 F.2d 97 (C.A. 8th Cir. 1957); City of Greensboro v. Simkins, 246 F.2d 425 (C.A. 4 th Cir. 1957); Derrington v. Plummer, 240 F.2d 922 (C.A. 5th Cir. 1957).

[207] *See, e.g.*, Flagg Bros. v. Brooks, 436 U.S. 149 (1978) (stating that "while many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the state.").

[208] *See* Flagg Bros. v. Brooks, 436 U.S. 149 (1978).

wrong person. What is interesting in *Richardson*[209] is that the Court, in discussing the immunity issue, said that private prisons have been part of the history of this country.[210] The Court said that in the eighteenth and nineteenth centuries there were a good number of private prisons in this country which, in terms of public function doctrine, could lead the Court to say history shows otherwise.[211] This is not one of those exclusively governmental functions.

In terms of the *Burton* symbiotic relationship test,[212] I think that test is basically a dead letter as far as the United States Supreme Court is concerned. The Court has, in case after case, found reasons to distinguish *Burton*[213] whenever it has been asserted to support state action. The point that one has to wonder about is that, even if you had a plaintiff named "Burton" and a restaurant called the "Eagle Restaurant," would the Supreme Court find state action under those facts? I don't know.

I do think that there are some idiosyncratic situations, and this may be one of them, where the Supreme Court would not utilize a state action doctrine like "public function" or "symbiotic relationship." Rather, it probably would rely on *West v. Atkins*,[214] which is a case holding that private physicians who

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[209] Richardson v. McKnight, 117 S. Ct. 2100 (1997).

[210] *Id* at 2104.

[211] *Id.*

[212] Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (1961).

[213] *Id.*

[214] 487 U.S. 42 (1987). Respondent was a private physician under contract to provide orthopedic services at a North Carolina prison. *Id.* at 42. Petitioner, injured in the prison, was "barred by state law from employing or electing to see a physician of his own choosing." *Id.* Petitioner brought suit under 42 U.S.C. § 1983 claiming a violation of his "Eighth Amendment right to be free from cruel and unusual punishment." *Id.* The district court granted summary judgment in favor of the respondent, holding that, "as a 'contract physician,' respondent was not acting 'under color of state law,' a jurisdictional prerequisite for a § 1983 action. *Id.* The court of appeals affirmed. *Id.* The United States Supreme Court reversed and remanded, holding "a physician who is under contract with the State to provide medical services to inmates at a state-prison hospital on a part-time basis acts 'under color of state law,' within the meaning of § 1983, when he treats an inmate." *Id.*

provide services to prisoners are engaged in state action. It is not a sound decision in terms of state action doctrine and analysis. It's a decision that is all over the place, but it is a unanimous decision and makes sense in terms of the result. I think that it probably would be utilized by the Court to support the conclusion that private prison guards are engaged in state action.