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Esther M. Schonfeld

MALICIOUS PROSECUTION AS A CONSTITUTIONAL TORT: CONTINUED CONFUSION AND UNCERTAINTY

*Esther M. Schonfeld**

INTRODUCTION

Large numbers of plaintiffs who sue under 42 U.S.C. § 1983[1] allege that they were subject to malicious prosecution. Because Section 1983 provides a claim for relief only for violations of federally protected rights, and not for state law wrongs, courts must determine whether the malicious prosecution claim states a violation of federal constitutional rights. Despite the great frequency with which the issue arises, there is a tremendous amount of uncertainty, inconsistency and confusion in the decisional law.

The essential issue is whether the malicious prosecution claim states a violation of either Fourth Amendment, substantive or

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* J.D. Candidate 1999, Touro Law School; B.B.A. 1981, City University of New York, Bernard M. Baruch College. The author would like to thank Professor Martin Schwartz for inspiring me to write this article and for his invaluable advice and assistance throughout the development of this article. The author would also like to express her gratitude to Charles Baron, Esq. and Michele Le Moal-Gray for their helpful comments. This article is dedicated to Jeremy and Alexandra, whose love, patience and support have made this work possible.

[1] 42 U.S.C. § 1983 (1994). Section 1983 provides 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 at equity, or other proper proceeding for redress.

Id. See generally 1A, 1B & 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (3d ed. 1997). *See also* SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION THE LAW OF SECTION 1983 (4th ed. 1998).

procedural due process rights.[2] In *Albright v. Oliver*,[3] the United States Supreme Court endeavored to resolve the conflict in the lower courts regarding whether malicious prosecution constitutes a constitutional tort actionable under 42 U.S.C. § 1983.[4] Chief Justice Rehnquist characterized this issue as one "on which there is an embarrassing diversity of judicial opinion."[5] Nevertheless, in *Albright*, the Court had no more success in arriving at a resolution than did the lower courts.[6] The Court's decision was

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[2] In recent years the Supreme Court has been less willing to increase the scope of non-textual due process rights. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115 (1992). In *Collins*, the Supreme Court noted that "the Court has been reluctant to expand the concept of substantive due process because [the] guideposts for responsible decision making in this unchartered area are scarce and open ended. The doctrine of judicial self restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Id.* at 125. *See also* Graham v. Connor, 490 U.S. 386 (1989) (holding that "all claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than a 'Substantive Due Process' approach"); Bowers v. Hardwick, 478 U.S. 186 (1986) (holding that "there should be . . . great resistance to expand[ing] the substantive reach of . . . [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental."). *See also* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215 (1987) (speculating that the Court's decision in Bowers v. Hardwick represented the beginning of the "second death of substantive due process."). In his article, Professor Conkle states that substantive due process met its first death in the 1930's when "the Court eliminated substantive due process as a serious ground of constitutional challenge" but "resurrected [it] again in Griswold v. Connecticut." *Id.* at 218. The issue of whether an individual has a substantive due process right to be free from prosecution without probable cause had created much confusion among the lower courts. *See, e.g.*, Brummet v. Camble, 946 F.2d 1178, 1180 (5th Cir. 1991); Morales v. Ramirez, 906 F.2d 784 (1st Cir. 1990); Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988); Coogan v. Wixon, 820 F.2d 170 (6th Cir. 1987); Usher v. Los Angeles, 828 F.2d 556 (9th Cir. 1987); Singleton v. City of New York., 632 F2d 185 (2d Cir. 1980).

[3] 510 U.S. 266 (1994).

[4] *Id.* at 269-72.

[5] 975 F.2d at 345 (citing Brummet v. Camble, 946 F.2d 1178, 1180, n.2 (5th Cir. 1991)).

[6] Martin A. Schwartz, *The § 1983 Malicious Prosecution Case*, N.Y. L.J., March 15, 1994, at 3. According to Professor Schwartz, "[t]his highly

an opinion encompassing six different views.[7] Chief Justice Rehnquist wrote the plurality opinion, and was joined by Justices O'Connor, Scalia and Ginsburg.[8] Ultimately, the plurality agreed that a substantive due process violation cannot occur when a criminal prosecution is initiated without probable cause.[9] According to the Court, the Fourth Amendment,[10] not substantive due process, is the source for evaluating constitutional claims similar to those in *Albright*.[11]

The inability of the *Albright* court to reach a consensus has perpetuated the confusion in the lower courts.[12] As one recent court noted, "there has been a remarkable divergence of opinion among the circuit courts."[13] The lower courts, post-*Albright*, continue to grapple with the issue of whether a claim of malicious prosecution can be asserted under Section 1983.[14] Therefore, the availability of Section 1983 for relief on a malicious prosecution claim remains unclear.[15] Some lower courts continue to adhere to pre-*Albright* analysis. Other lower court decisions, however,

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fragmented decision does a great disservice to the public. It will undoubtedly spur much litigation, because technically the various opinions fail to definitely resolve the Fourth Amendment and due process issues." *Id.*

[7] *Albright*, 510 U.S. at 267. *See* Schwartz, *supra* note 6.

[8] *Albright*, 510 U.S. at 267. Justices Scalia, Ginsburg, and Kennedy, joined by Justice Thomas and Justice Souter, filed concurring opinions. *Id.* Justices Stevens and Blackman filed dissenting opinions. *Id.*

[9] *Id.* at 273-274. The plurality concluded that "it is evident that substantive due process may not furnish the constitutional peg on which to hang such a 'tort.'" *Id.* at 271 n.4.

[10] U.S. CONST. amend. IV. The Fourth Amendment provides:

> 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 the things to be seized.

Id.

[11] *Albright*, 510 U.S. at 274.

[12] *See infra* part V.

[13] UBOH v. Reno, 141 F.3d 1000 (1998).

[14] *See infra* part IV.

[15] *See generally* 1A, 1B & 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983: CLAIMS AND DEFENSES (3d ed. 1997).

demonstrate that *Albright* may be influencing the courts to view more narrowly Section 1983 claims for malicious prosecution.

This article will examine the constitutional ramifications of the Supreme Court's decision in *Albright v. Oliver*. The purpose of this article is to provide a comprehensive analysis as to whether malicious prosecution is actionable under Section 1983. Parts I and II of this article will address the availability of Section 1983 to remedy constitutional violations and the specific development of malicious prosecution as a constitutional tort.[16] Part III discusses the lower federal court treatment of malicious prosecution under 42 U.S.C. § 1983, prior to the Supreme Court's decision in *Albright*.[17] Part IV examines and analyzes the different opinions of the Supreme Court in *Albright*.[18] Part V explores the treatment by the lower federal courts of malicious prosecution cases brought pursuant to Section 1983 subsequent to *Albright*.[19] Finally, Part VI presents an analysis of the Supreme Court's decision and argues that malicious prosecution claims may be actionable under Section 1983 if the plaintiff alleges a constitutional violation protected by the Fourth Amendment.[20]

I. SECTION 1983 AS A TOOL FOR REMEDYING CONSTITUTIONAL VIOLATIONS

A. Section 1983: Its Historical Roots

"No federal statute is more important in contemporary American law than 42 U.S.C. § 1983."[21]

Section 1983 grew out of the period of the Civil War and Reconstruction when *antebellum* assumptions about the nature of

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[16] *See infra* notes 21-145 and accompanying text.

[17] *See infra* notes 146-200 and accompanying text

[18] *See infra* notes 201-309 and accompanying text

[19] *See infra* notes 310-500 and accompanying text

[20] *See infra* notes 501-544 and accompanying text

[21] *See* Schwartz, *supra* note 15, at § 1.1. For an overview of legal commentary on Section 1983 *see also* SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION THE LAW OF SECTION 1983 (4th ed. 1998).

federal system were superceded by an emphasis on national power.[22] Prior to the Civil War, the Constitution of the United States protected fundamental rights only against infringement by the federal government.[23] The first ten amendments failed to provide ample protection from acts of individuals or state governments. The post-War Reconstruction period "marked a fundamental shift in the federal government's role in protecting African-Americans' newly-won rights of freedom and citizenship."[24] Before the Civil War, the federal government was unable to interfere with the judgments of localities and states as to what legal rights African-Americans enjoyed.[25] As a result, throughout the United States, African-Americans were treated as a subordinate class of beings, and state and local laws withheld from them the most fundamental freedoms.[26]

In the aftermath of the war, however, dramatic changes were to take place and Congress was ready for a constitutional revolution.[27] The end of slavery was near, yet a new controversy had emerged over the "federalist or nationalist tendencies of the abolitionists as they moved to consolidate their victory."[28] The result of this controversy was the adoption of Reconstruction Amendments,[29] the first of which was the Thirteenth Amendment of the Constitution, adopted in 1866.[30]

The Thirteenth Amendment was viewed as an abolishment of slavery and a constitutional basis for the protection of certain

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[22] 42 U.S.C. § 1983 is derived from § 1 of the Civil Rights Act of 1871.

[23] *See* Douglas L. Colbert, *Bifurcation of Civil Rights Defendants: Undermining Monell In Police Brutality Cases* 44 HASTINGS L.J. 499 (1993) (discussing in detail the historical imperative behind Section 1983).

[24] *Id.* at 510.

[25] *Id.*

[26] *Id.*

[27] *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH L. REV. 1323 (1952).

[28] *Id.*

[29] U.S. CONST. amend. XIII, XIV, XV.

[30] U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment provides: [n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist with the United States, or any place subject to their jurisdiction." *Id.*

guaranteed minimum rights.[31] Nonetheless, the need for "legislative appendages to the Thirteenth Amendment became almost immediately apparent."[32] The violent resistance in the South to the passage of the Thirteenth Amendment "provided Congress with the legal impetus and moral determination to introduce further legislation for the purpose of giving 'practical effect, life, vigor, and enforcement' to the Amendment's 'declara[tion] that all persons in the United States should be free.'"[33] When the Thirty-ninth Congress convened in 1865, it passed, over President Andrew Johnson's veto, the Civil Rights Act of 1866.[34]

The Civil Rights Act of 1866, which marked the beginning of the new federalism, was aimed at granting citizenship to all individuals born in the United States.[35] Upon the enactment of the Civil Rights Act of 1866, all citizens, without regard to color, were entitled to equal protection of the laws.[36] After the passage of this law, civil rights activists wished to make permanent the centralization of civil rights authority in federal government.[37] The Fourteenth Amendment resulted from the implementation of

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[31] *See* Gressman, *supra* note 27 at 1324.

[32] *See id.*

[33] *See* Colbert, *supra* note 23, at 499 (quoting CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866) (remarks of Senator Trumbull)).

[34] *Id. See* The Civil Rights Act of 1866, 14 Stat. 37 (1866). Section one provides in pertinent part:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right, in every State and Territory in the United States to make and enforce contract rights, to sell, hold, and convey real and personal property, and to full and equal benefits of all laws and proceedings for the security of persons and property, as enjoyed by white citizens. . . .

Id. The Civil Rights Act of 1866 was enacted pursuant to the Thirteenth Amendment. Portions of this legislation are now codified at 42 U.S.C. §§ 1891-1982 (1994).

[35] *See* Gressman, *supra* note 27, at 1329.

[36] *See id.*

[37] *See id.*

this activist viewpoint.[38] Within a year after the ratification of the Fourteenth Amendment, Congress thought it necessary to eliminate barriers to blacks' full enjoyment of their freedom, *inter alia*, their right to vote. Two years later, the Fifteenth Amendment was ratified so as to protect the emancipated slaves' right to vote.[39]

However, the impact from the Civil War had generated a "condition of affairs . . . rendering life and property insecure and the carrying of mails and the collection of the revenue dangerous."[40] The Reconstruction Amendments alone could not put a stop to the widespread abuses in the South against the newly freed slaves and their white supporters. There was a "campaign of violence and deception in the South, fomented by the Ku Klux Klan . . . denying decent citizens their civil and political rights."[41] This problem was augmented by state officials who

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[38] U.S. CONST. amend. XIV § 1. The Fourteenth Amendment states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

[39] U.S. CONST. amend. XV § 1. The Fifteenth Amendment states: "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.*

[40] CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871). *See also* Arnon D. Siegel, Note, *Section 1983 Remedies For The Violation of Supremacy Clause Rights*, 97 YALE L.J. 1827, 1831 (1988).

[41] Schwartz, *supra* note 15, § 1.3 at 9 (citing Wilson v. Garcia, 471 U.S. 261, 276 (1985)). *See also* CONG. GLOBE, 42nd Cong., 1st Sess. 78 (1871). Representative Beatty remarked:

> [C]ertain States have denied to persons with their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, woman were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged

themselves participated in the violence and failed to punish the perpetrators.[42] Among other things, victims of the violence were faced with significant barriers in bringing their complaints to federal court.

By 1871, the problem became so acute that President Grant sent a message to Congress "recommend[ing] such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States."[43] It soon became clear to Congress that specific legislation was necessary in order to combat the anti-black atrocities that were being committed in the South by the Ku Klux Klan.[44] The Forty-second Congress passed the Civil Rights Act of 1871,[45] now codified in 42 U.S.C. §1983, in response to what

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> and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to those persons.

Id.

[42] *See* David Y. Bannard, *A Foreseeability-Based Standard For The Determination of Municipal Liability Under Section 1983*, 28 B.C. L. REV. 937 (1987). Representative Perry remarked:

> Sheriffs, having eyes to see, see not; judges, having ears to hear, hear not; witnesses conceal the truth or falsify it; grand and petit juries act as if they might be accomplices. In the presence of these gangs all the apparatus and machinery of civil government, all the processes of justice, skulk away as if government and justice were crimes and feared detection. Among the most dangerous things an injured party can do is to appeal to justice. Of the uncounted scores and hundreds of atrocious mutilations and murders it is credibly stated that not one has been punished.

Id. at 979, n.34 (quoting CONG. GLOBE, 42nd Cong., 1st Sess. at 428 (1871)).

[43] CONG. GLOBE, 42nd Cong., 1st Sess. 244 (1871).

[44] CONG. GLOBE, 42nd Cong., 1st Sess. 441-51, 605-07 (1871) (reporting the outrages by the Ku Klux Klan). *See* Bannard, *supra* note 42, at 941. "The President's message was not, however, the only indication of the severity and extent of this problem. The Senate also had received a 600 page report that detailed both Klan activities and the inability or unwillingness of some state governments to protect their citizens equally from the Klan depravities." *Id.*

[45] 17 Stat. 13 (1871). The Civil Rights Act of 1871 provides:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured

Congress perceived as the inability and unwillingness of the states to enforce their laws equally.[46] "The Civil War had been fought over more than just racial equality—it had been a war over the soul of the Constitution. Section 1983 was meant to further the winners' constitutional vision."[47]

B. The Development of Section 1983 Into An Integral Part of American Law

The Supreme Court's initial narrow statutory interpretations[48] caused Section 1983 essentially to be unused for almost ninety years.[49] From 1871-1961, Section 1983 "lay virtually dormant."[50] In those years, the Supreme Court interpreted

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> by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication.' and the other remedial laws of the United States which are in their nature applicable in such other cases.

Id. The Civil Rights Act of 1871, also referred to as the "Ku Klux Klan Act," was enacted for the purpose of enforcing the provisions of the Fourteenth Amendment. Monroe v. Pape, 365 U.S. 167, 171 (1961).

[46] *See* Schwartz, *supra* note 15, §1.3 at 9. *See also* Monroe v. Pape, 365 U.S. 167, 175-76 (1961).

[47] Arnon D. Seigel, *Section 1983 Remedies For the Violation of Supremacy Clause Rights*, 97 YALE L.J. 1827, 1832 (1988) (citations omitted).

[48] *See, e.g.*, Stift v. Lynch, 267 F.2d 237, 240 (7th Cir. 1959) (holding that acts in violation of state law fall outside Section 1983); Hemsley v. Myers, 45 F. 283, 290 (C.C.D. Ken. 1891) (holding "no new mode of proceeding is enacted, and no new right created by [section 1983]. As now it stands . . . it may be properly denominated a 'declaratory' statute."). *See also* Lane v. Wilson, 307 U.S. 268, 274 (1939).

[49] *See* Gressman, *supra* note 27, at 1342-43.

[50] *See* P. LOW & J. JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 891-95 (2d ed. 1989) (discussing that civil rights statutes

"'under the color of law' to limit the statute's impact on federalism."[51] In the Slaughter-House cases,[52] the Court interpreted the Fourteenth Amendment's privileges and immunities clause to include only those rights it deemed inherent in federal citizenship.[53] As a result, State-created privileges and immunities were not fundamental federal rights protected by the clause.[54] Several years later, in the Civil Rights cases,[55] the Court underscored the requirement of state action as a prerequisite for invoking the protection of the amendment. As the Slaughter-House and Civil Rights cases demonstrate, the Court's narrow view of Section 1983 prevented its use as a remedy for violation of constitutional rights. As a result, relatively few cases were brought under Section 1983 in the ninety years after its enactment.[56]

The modern impetus for the development of Section 1983 did not occur until 1961, when the Supreme Court unveiled the groundwork for a broad application of the remedies provided in Section 1983 for constitutional violations.[57] In *Monroe v. Pape*,

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"lay dormant" until "rediscovered and reinvigorated" in the modern era). *See also* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1487 (1969) (noting that only 19 decisions were rendered under § 1983 in its first sixty-five years of existence).

[51] Michael J. Gerhardt, *The Monell Legacy: Balancing Federalism Concerns and Municipal Accountability Under Section 1983*, 62 S. CAL. L. REV. 539, 549 (1989).

[52] 83 U.S. (16 Wall.) 36 (1873).

[53] *Id.* at 77-78.

[54] *Id.* at 74-75.

[55] 109 U.S. 3 (1883).

[56] *See* Note, *supra* note 50, at 1487.

[57] Monroe v. Pape, 365 U.S. 167 (1961). *Monroe* involved a Fourth Amendment claim of illegal search and seizure. *Id.* at 169. In *Monroe*, thirteen police officers entered James Monroe's home early one morning without a search warrant and ransacked the house, while the occupants were forced to stand naked. *Id.* at 169-70. James Monroe was subsequently taken to the police station, held in custody for ten hours, and interrogated about a two-day old murder. *Id.* Monroe was never charged. *Id.* Thereafter, the Monroes brought a § 1983 claim against the police officer and the City of Chicago. *Id.* The Supreme Court held that there was a cause of action for damages against the police officers. *Id.* at 192. The Court, however,

the Supreme Court began a revival of Section 1983, by recognizing the broad scope of its protection.[58] Prior to *Monroe*, one of the primary reasons that Section 1983 was ignored was an early decision which had held that conduct by state and local officials that was unauthorized by state law, was neither an act "under color of law" nor state action.[59] Therefore, the Court's "under color of law" ruling required a litigant to establish that the state had authorized an official's unlawful conduct under state law, state custom, or state usage.[60] The Court in *Monroe* removed this restriction and rejected the narrow definition of the term "under color of law" that had rendered Section 1983 ineffective for the previous ninety years.[61] *Monroe* construed the term "under color of law" as encompassing unauthorized acts committed by state officers, holding that when a state officer's acts violate state law they were to be considered "under color of law" for purposes of Section 1983 as long as the officer invoked state authority.[62] In addition, the *Monroe* court established that the existence of a state remedy did not preclude the federal

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dismissed the suit against the City because if found that Congress did not intend to make a municipality a "person" under § 1983. *Id.* at 187. *But see* Monell v. Department of Social Services, 436 U.S. 658 (1978). Seventeen years after the Supreme Court's decision in *Monroe* limiting the liability of a municipality, the Court in *Monell* came to the opposite conclusion and held that a municipality could be classified as a "person" under § 1983. *Id.* at 690. The Court surveyed the legislative record detailed in Monroe stating "[o]ur analysis of the legislative history . . . compels the conclusion[s] that Congress did intend municipalities . . . to be included among those persons to whom § 1983 applies." *Id.* at 690.

[58] *Monroe*, 365 U.S. at 198.

[59] *See, e.g.*, Barney v. City of New York, 193 U.S. 430 (1904) (holding that City of New York's construction of a railroad tunnel did not qualify as state action because it was illegal and unauthorized).

[60] *See id.*

[61] *Monroe*, 365 U.S. at 187. Justice Frankfurter argued instead for a limited construction of "under color of law" that would include only acts that were actually authorized by state law or custom or for which the state refused to provide a remedy. *Id.* at 242-43, 246 (Frankfurter, J., dissenting).

[62] *Id.* The Court held that § 1983 covered acts by all those "who carry a badge of authority of a state and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Id.* at 172.

Section 1983 claim.[63] As a result of this decision, Section 1983 would become the principal means by which plaintiffs could hold government officials accountable for the deprivation of constitutional rights.[64] Justice Douglas, writing for the majority, stated that Section 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."[65]

Since the *Monroe* decision, the Supreme Court and the lower federal courts have explored many different issues arising from Section 1983 litigation. "As the climate in the federal courts became more favorable, the evolutionary process gained momentum."[66] The number of Section 1983 claims brought in federal court increased so dramatically[67] that by the 1970's the Supreme Court began to restrict the scope of the constitutional tort.[68] For example, in *Paul v. Davis*,[69] the Supreme Court attempted to curtail the use of the Due Process Cause as a tool for bringing common law tort actions under Section 1983. In *Paul,*

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[63] *Id.* at 183. "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

[64] *See* Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU. L. REV. 737 (exploring the prevailing descriptions of the impact of the *Monroe* decision and concluding that its operative feature was that it took the "Bill of Rights, then in the process of 'incorporation' into the due process clause of the fourteenth amendment, and showed how to ground civil rights litigation into it.").

[65] *Monroe*, 365 U.S. at 187.

[66] Susanah M. Mead, *Evolution of the 'Species of Tort Liability' Created by 42 U.S.C. § 1983: Can Constitutional Tort Be Saved From Extinction?*, 55 FORDHAM L. REV. 1, 22 (1986) (describing the concern over the increase in the number of section 1983 cases filed as leading to a "period of devolution of the constitutional tort species.").

[67] *Id.* In 1960, 280 cases were filed under Section 1983, in 1970, 3,586 cases were filed under Section 1983 and, in 1971, 4,609 Section 1983 cases were filed. *Id.* at n.42 (citations omitted).

[68] *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976); Ingraham v. Wright, 430 U.S. 651 (1977).

[69] Paul v. Davis, 424 U.S. 693 (1976). *Cf.* Wisconsin v. Constantinue, 400 U.S. 433 (1971).

the Court held that injury to reputation caused by state officials is not a deprivation of liberty or property protected by the Fourteenth Amendment absent a demonstrable statutory entitlement or loss of a state-conferred status.[70] The plaintiff, Davis, was pictured in a police department flyer labeled "active shoplifters" that was sent to local business establishments in Louisville, Kentucky.[71] Davis had been arrested for shoplifting, however, soon after the flyer's circulation the charges against him were dropped.[72] Davis chose not to pursue the available state tort remedies, but instead brought suit in federal court under Section 1983.[73] Davis claimed that he was branded a criminal without the benefit of a trial, depriving him of his reputation, and thereby depriving him of "liberty " or "property without due process of law."[74] The Court disagreed holding that the "interest in reputation asserted in this case is neither 'liberty nor 'property' guaranteed against state deprivation without due process of law."[75] Justice Rehnquist, writing for the majority, observed that Davis' complaint "would appear to state a classical claim for defamation actionable in the courts of virtually every state."[76] The Court was unwilling to convert traditional state tort law into a claim of a deprivation of federal rights.[77]

The court attempted to further restrict the reach of the Fourteenth Amendment in *Ingraham v. Wright*.[78] *Ingraham*, a Section 1983 case, involved a Fourteenth Amendment Due Process claim challenging the use of corporal punishment in public schools.[79] The plaintiffs, junior high school students who were severely paddled by public school officials for alleged disciplinary violations, argued that they were denied liberty

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[70] *Id.* at 710-12.
[71] *Id.* at 701-02.
[72] *Id.* at 695-96.
[73] *Id.*
[74] *Id.* at 698.
[75] *Id.* at 712.
[76] *Id.* at 697.
[77] *Id.* at 698-99.
[78] 430 U.S. 651 (1977).
[79] *Id.* at 653.

interests without due process.[80] The Supreme Court held that where a student who had been subjected to corporal punishment could bring a state tort action for damages, no additional federal remedy was required.[81] The Court in *Ingraham* conceded that students had a constitutionally protected liberty interest in freedom from unwarranted invasions of their bodily security,[82] but found that the availability of state remedies satisfied the due process requirement.[83]

This principle was taken a step further in *Parratt v. Taylor*.[84] In *Parratt*, the Court found that the loss of a hobby kit was a deprivation of a protected property interest, but that state remedies available to plaintiff provided the required due process.[85] *Parratt* involved an inmate at a Nebraska prison who brought a Section 1983 claim alleging that prison officials had negligently lost mail-order hobby material valued at $23.50.[86] The Court needed to determine "what process is due a person when an employee of a state negligently takes his property."[87] The *Parratt* court held that the prison inmate was not entitled to a pre-deprivation hearing to determine the propriety of his loss of the hobby kit, because the available state tort remedies were

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[80] *Id.* In 1970, Dade County schools were permitted to use corporal punishment to maintain discipline pursuant to a local school board regulation and Florida legislation. *Id.* at 655. However, the regulations contained explicit limitations and directions. *Id.* at 656. The legislation required consultation with the principal and authorized corporal punishment only when other means of discipline were unsuccessful. *Id.* at 657. The evidence demonstrated that the methods used in this case were exceptionally harsh. *Id.* Ingraham was so severely paddled that he suffered a hematoma. *Id.*

[81] *Id.* at 677.

[82] *Id.* at 674 (stating "[i]t is fundamental that the state cannot hold and physically punish an individual except in accordance with due process of law.").

[83] *Id.* at 682-83.

[84] 451 U.S. 527 (1981).

[85] *Id.* at 541.

[86] *Id.* at 529.

[87] *Id.* at 537. *But see* Daniels v. Williams, 474 U.S. 327, 328 (1985) (holding that the Due Process clause of the Fourteenth Amendment is "simply not implicated by a negligent act of [a state official] causing unintended loss of, or injury to, life, liberty or property.").

sufficient.[88] The Court concluded that the post-deprivation remedy was all the process that was due.[89]

These three decisions demonstrate how the Court has attempted to limit Section 1983 access to the federal courts by narrowing Fourteenth Amendment protections and promoting the availability of adequate state tort remedies as a satisfactory alternative. For thirty years since the decision in *Monroe*, the Supreme Court and the lower federal courts continued to struggle with the political and doctrinal consequences of the resurrection of Section 1983. Nevertheless, in the years that followed the *Monroe* decision, there has been an unprecedented growth in the number of cases filed under section 1983.[90] Professor Martin Schwartz largely attributes the increase in the utilization of Section 1983 to four major legal developments.[91] First, the *Monroe* decision which established that Section 1983 is "independent" and "supplementary to" any available state law remedies.[92] Second, the Supreme Court's decision in *Monell v. Department of Social Services*,[93] which overruled *Monroe*'s finding that Congress did not intend to include municipalities in Section 1983.[94] The *Monell* Court held that Congress did, in fact, intend local

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[88] *Parratt*, 451 U.S. at 541. The Court held that the deprivation of the prisoner's property by state prison officials did not violate the due process clause because Nebraska tort claims procedures provided a "full and meaningful opportunity" for the prisoner to seek compensation for the negligence by the state prison officials. *Id.*

[89] *Id.* at 539. The Court reasoned that the government entity had no notice that the deprivation would occur and thus could not conduct a hearing prior to the deprivation. *Id.* at 541. The first available opportunity for the government to provide a hearing was after the deprivation occurred. *Id.*

[90] *See* Schwartz, *supra* note 15, §1.1 at 3. "While only 270 federal civil rights actions were filed in 1961, today between 40,000 and 50,000 § 1983 actions are commenced in federal court each year." *Id.*

[91] *Id.* at 4.

[92] *Id.* (citing Monroe v. Pape, 365 U.S. 167, 183 (1961)).

[93] 436 U.S. 658 (1978). In *Monell*, the Court considered whether plaintiffs could obtain damages from both the City of New York and the Department of Social Services based on the municipality's "official policy" of compelling pregnant employees to take unpaid leaves of absence even though the employees were not medically required to do so. *Id.* at 661.

[94] *See* Schwartz, *supra* note 15, §1.1 at 5.

governments to be treated as "persons" within the statute's coverage.[95] However, municipalities could only be held liable when their "policies" or "customs" caused constitutional violations.[96] Two years later in *Owen v. City of Independence*,[97] the Court held that municipalities cannot assert qualified immunity based upon the "good faith" of their employees.[98]

The third development was the Supreme Court's decision in *Maine v. Thiboutot*,[99] which held that the remedy afforded under

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[95] *Monell*, 436 U.S. at 690. The Court found that "Congress in enacting . . . [Section 1983], intended to give a broad remedy for violations of federally protected civil rights." *Id.* at 685.

[96] *Id.* at 694. The Court stated "municipalities can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleging to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. The Court further stated that when the "execution of a government policy or custom . . . inflicts the injury . . . the government as an entity is responsible under § 1983." *Id.* at 694.

[97] 445 U.S. 662 (1980). The Court addressed the question unanswered by *Monell*; whether municipalities are entitled to use the defense of official immunity when litigating § 1983 cases. *Id.* at 624. In *Owen*, the City of Independence's Chief of Police brought a § 1983 action alleging that his dismissal, without notice and opportunity to be heard, violated his Fourteenth Amendment due process rights. *Id.* at 625, 629-30. The City Manager fired the Chief of Police after the City Council voted to release various reports of his alleged misfeasance to the news media. *Id.* at 627-29. The Court held that the municipality was liable and not entitled to immunity from liability because its agents acted in "good faith." *Id.* at 634, 638.

[98] *Id.* at 638. The Court analyzed the strong policy rationales for ensuring that municipalities do not escape accountability for their "customs" and "policies" that cause constitutional violations. *Id.*

[99] 448 U.S. 1, 4 (1980). In *Thiboutot*, recipients of Aid to Families with Dependent Children benefits invoked § 1983, alleging that state officials had denied them benefits to which they were entitled under the Social Security Act. *Id.* at 3. The defendants argued that § 1983 should only apply to civil rights laws and claims under the Equal Protection Clause because that was Congress' intent in passing the original statute. *Id.* at 6-7. The Court acknowledged that one of the principal purposes of adding the phrase "laws" to the statute's predecessor was to "ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute." *Id.* at 7. (citations omitted). The Court, however,

Section 1983 encompassed violations of federal statutory law as well as constitutional law.[100] *Thiboutot*'s recognition of the Section 1983 cause of action for federal statutory violations opened the federal courts to many litigants who otherwise would have no remedy. Last, the Civil Rights Attorney's Fees Award Act of 1976,[101] passed in 1976, authorizes plaintiffs who prevail in actions brought pursuant to Section 1983 to recover attorney fees.[102] These factors contributed to the development of Section 1983 as an integral part of the law and to the dramatic increase in the number of Section 1983 actions.

C. Section 1983: Establishing a Prima Facie Case

1. Legal Elements

Section 1983 enables private individuals to maintain a cause of action to vindicate their federally protected rights against officials who acted under color of state law.[103] In *Mitchum v. Foster*,[104] the Court stated that "the very purpose of Section 1983 was to

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concluded that that was not Congress' only purpose in amending the language of the statute. *Id.*

[100] *Thiboutot*, 448 U.S. at 4. The Court found a federal cause of action under § 1983, refused to restrict § 1983's applicability to civil rights statutes or to cases arising under the Equal Protection Clause of the Fourteenth Amendment; instead, the Court rested its broad holding on the "plain language" of the statute. *Id.* at 6-7.

[101] 42 U.S.C. § 1988 (1995). 42 U.S.C. § 1988 provides that in any proceeding to enforce Section 1983, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.* *See also* Brian Buckley, *Washington Courts Get Stingy: Improper Denial of Attorney's Fees Under 42 U.S.C. §§ 1983 and 1988*, 70 WASHINGTON L. REV. 491, 494 (1995). Section 1988 was enacted in direct response to the Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, which appeared to disallow attorney fee awards under statutes which did not contain express authorization for such awards. *See also* Alyeska Pipeline Service Co. v. Wilderness Society, 41 U.S. 240 (1975).

[102] *See* Schwartz, *supra* note 15, § 1.1 at 5.

[103] *See* 42 U.S.C. § 1983 (b) (1994).

[104] Mitchum v. Foster, 407 U.S. 225, 242 (1972).

interpose the federal courts between the States and the people, as guardians of the people's federal rights - to protect the people from unconstitutional action under color of state law."[105]

In order to state a claim under 42 U.S.C. § 1983, two major elements are required.[106] First, the conduct complained of must have been committed by a person acting under color of law. Second, the challenged conduct must have deprived the plaintiff of federal rights.[107] However, the following four requirements are necessary in establishing a prima facie case:[108] "(1) a violation of rights protected by the federal constitution or created by federal statue or regulation, (2) proximately caused (3) by the conduct of a "person" (4) who acted "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia."[109] A plaintiff in a Section 1983 action may recover compensatory and punitive damages, as well as injunctive or declaratory relief.[110] In addition, a prevailing party may recover reasonable attorney fees.[111]

2. Functional Role

Section 1983 "fulfills the procedural or remedial role of authorizing the assertion of the claim for relief."[112] However, the statute itself does not grant or create any substantive rights.[113] Therefore, plaintiffs suing under Section 1983 must rely on

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[105] *Mitchum*, 407 U.S. at 242.

[106] 42 U.S.C. § 1983. *See also* Gomez v. Toledo, 446 U.S. 635 (1980).

[107] *Id.* at 640.

[108] *See* Schwartz, *supra* note 15, § 1.4 at 12.

[109] *Id.* (citations omitted).

[110] *See e.g.*, Carey v. Piphus, 435 U.S. 247 (1978); Smith v. Wade, 461 U.S. 30 (1983); 28 U.S.C. §§ 2201-2202 (1994).

[111] *See supra* note 101 and accompanying information.

[112] Schwartz, *supra* note 15, §1.4 at 13.

[113] *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (holding that Section 1983 "by itself does not protect anyone against anything."); Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (providing that Section 1983 "is not itself a source of substantive rights, but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.").

another source, such as the United States Constitution or a federal statute, for the substantive rights they seek to enforce.

3. *Immunity Defenses*

Many Section 1983 claimants seek to recover monetary damages against state or local officials in their official capacity. The official, however, may be able to defeat personal liability by asserting a common law immunity as a defense.[114] Although Section 1983 on its face contains no language addressing immunities, the defenses are judicially created and stem from the common law as it existed in 1871 when Congress enacted the statute.[115] For example, prosecutors are absolutely immune from liability for damages under Section 1983 with respect to activities "intimately associated with the judicial phase of the criminal process."[116] In *Imbler v. Pachtman*, the Court articulated several justifications for providing immunity to prosecutors for prosecutorial acts, including a "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust."[117] Thus, to establish liability, the plaintiff would have to point to "some other culprit, such as a police detective who furnished false information or withheld exculpatory information from the prosecutorial authorities."[118]

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[114] *See generally* Schwartz, *supra* note 15, at §§ 9.1-12; Nahmod, *supra* note 21, at § 7:42; Richard A. Matasar, *Personal Immunities Under § 1983: The Limits Of The Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987) (examining the historical analysis in immunity cases).

[115] Pierson v. Ray, 386 U.S. 547, 554-55 (1967).

[116] Imbler v. Pachtman, 424 U.S. 409, 430 (1976). *See also* Buckley v. Fitzsimmons, 509 U.S. 259 (1993) (holding prosecutorial statements at press conferences not protected); Burns v. Reed, 500 U.S. 478 (1991) (holding that absolute immunity available to prosecutors engaged in prosecutorial functions did not extend to the provision of legal opinions by prosecutors).

[117] *Imbler*, 424 U.S. at 422-23.

[118] *See* Schwartz, *supra* note 6, at 3.

The Court in *Imbler* left open the question of whether absolute immunity extends to a prosecutor when he steps outside of his role as advocate and engages in an investigatory or administrative function.[119] In another prosecutorial decision, *Burns v. Reed*,[120] the Supreme Court held that a prosecutor's participation in a probable cause hearing was clearly protected by absolute immunity because his actions involved his role as advocate rather than as administrator or investigative officer.[121] The Court found, however, that a prosecutor enjoys only qualified immunity for giving advice to the police "in the investigative phase of a criminal case."[122]

In *Buckley v. Fitzsimmons*,[123] the Supreme Court continued to refine the contours of prosecutorial immunity.[124] In *Buckley*, the

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[119] *Imbler*, 424 U.S. at 430-31.

[120] 500 U.S. 478 (1985).

[121] *Id.* at 491-92.

[122] *Id.* at 493. The Court reasoned that "[a]dvising the police in the investigative phase of a criminal case" is not "so 'intimately associated with the judicial phase of the criminal process' that it qualifies for absolute immunity." *Id.* (quoting *Imbler*, 424 U.S. at 430). *Burns* demonstrates that the function that a prosecutor is engaged in is very difficult to figure out. Schwartz, *supra* note 15, § 9.8 at 250-53.

[123] 509 U.S. 259 (1993).

[124] *See generally* Schwartz, *supra* note 15, §9.8 at 253. *See also* Kalina v. Fletcher, 118 S. Ct. 502 (1997). In *Kalina*, the Supreme Court found a prosecutor absolutely immune for activities undertaken in connection with preparing and filing the information and the motion for the arrest warrant. *Id.* at 509-10. The Court also held, however, that a prosecutor was not entitled to absolute immunity when she swore under the penalties of perjury for the truth of the matter contained in a "Certificate for Determination of Probable Cause," in connection with the issuance of an arrest warrant. *Id.* at 509. The Court explained:

> [P]etitioner argues that the execution of the certificate was just one incident in a presentation that, viewed as a whole, was the work of an advocate and was integral to the initiation of the prosecution. That characterization is appropriate for her drafting of the certification, her determination that the evidence was sufficiently strong to justify a probable-cause finding, her decision to file charges, and her presentation of the information and the motion to the court. Each of those matters involved the exercise of professional judgment; indeed, even the selection of the particular

Supreme Court held that prosecutors were not absolutely immune for holding a press conference announcing an indictment.[125] The Court reasoned that comments to the media are not part of the prosecutor's advocacy function and "have no functional tie to the judicial process."[126] The Court also rejected the assertion of absolute immunity to prosecutors in the face of allegations that they had fabricated evidence during the pre-indictment stage.[127] The prosecutors in *Buckley* were not functioning as advocates, but in an investigative capacity, inasmuch as they lacked probable cause to arrest or to initiate judicial proceedings during that period.[128]

In light of these Supreme Court decisions, Section 1983 claims for malicious prosecution against prosecutors are likely to be defeated by absolute immunity because the plaintiff would be challenging the prosecutor's role as advocate.

II. THE DEVELOPMENT OF MALICIOUS PROSECUTION AS A CONSTITUTIONAL TORT

A. The Common Law Roots of Malicious Prosecution

> facts to include on the certification to provide the evidentiary support for the finding of probable cause required the exercise of the judgment of the advocate. But that judgment could not affect the truth or falsity of the factual statements themselves. Testifying about facts is the function of the witness, not the lawyer.

Id.

[125] *Buckley*, 509 U.S. at 277.

[126] *Id.* at 277-78.

[127] *Id.* at 273. "When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is 'neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.'" *Id.* (quoting Hampton v. Chicago, 484 F.2d 602, 608 (7th Cir. 1973)).

[128] *Id.* at 274. "Their mission at that time was entirely investigative in character. A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.*

"The interest in freedom from unjustifiable litigation is protected by actions for malicious prosecution."[129] An important feature of Eighteenth Century tort law was the malicious prosecution action, which had its roots in a concern for the integrity of the court.[130] At common law, the tort of malicious prosecution provided a cause of action against "private defendants for unjustified harm arising out of the misuse of government processes."[131] In his treatise, Joel Bishop defined the tort as "the putting in motion of any process of the law, and the carrying of it forward until it terminates in favor of the one prosecuted, maliciously and without reasonable or probable cause, to his injury in respect either of personal security or of property."[132]

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[129] W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS, § 119 at 870 (5th ed. 1984).

[130] The historical analysis of the tort of malicious prosecution is treated in full detail in Note, *Groundless Litigation & the Malicious Prosecution Debate: A Historical Analysis,* 88 YALE L.J. 1218 (1979).

[131] Wyatt v. Cole, 504 U.S. 158 (1992) (citing 2C. ADDISON, LAW OF TORTS (1876), THOMAS M. COOLEY, LAW OF TORTS (1879), JOEL P. BISHOP, COMMENTARIES ON NON-CONTRACT LAW (1889)).

[132] JOEL P. BISHOP, COMMENTARIES ON NON-CONTRACT LAW § 221, 89 (1889). Bishop wrote:

> One who, having no reasonable or probable cause to set in motion the law's processes against another, does it to promote some indirect or sinister end, - termed, in legal language, doing it maliciously, -- and thereby inflicts some legal injury on the other, such as arresting his person, seizing his goods, or doing any other disturbance to his person or property, or maligning him, or impairing his business standing, or subjecting him to the labor and expense of a defense beyond what he may have back in taxable costs, commits a civil wrong for which the party injured is entitled to redress in what is termed a suit for malicious prosecution. If the proceeding against him was successful, he is estopped to assert that it was malicious and without probable cause. Therefore, he cannot bring his action for redress until that proceeding is terminated.

Id. § 250, at 103. Bishop, quoting Lord Campbell, C.J., discusses the principle behind the malicious prosecution action; "to put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." *Id.* § 243, at 98 (quoting Churchill v. Siggers, 3 Ellis & B. 929, 937).

Historically, an action for malicious prosecution was reserved for traditional court prosecutions only.[133] During the tenth and eleventh centuries, courts were very concerned with malicious prosecution because the price of losing a civil lawsuit was so strong.[134] However, the tort evolved during the sixteenth and seventeenth centuries out of the ancient writ of conspiracy into an action on the case[135] maintainable against a single defendant.[136] As early as 1285, various statutes were enacted to assist individuals who had been maliciously accused or indicted of a crime.[137] In such cases, the writ of conspiracy was employed to seek redress.[138] By the sixteenth century, the writ of conspiracy

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[133] Melvin v. Pence, 130 F.2d 423 (1942).

[134] *See* Note, *supra* note 130, at 1221. *See also* PERCY HENRY WINFIELD, THE HISTORY OF CONSPIRACY AND ABUSE OF LEGAL PROCEDURE (Cambridge, 1921) (discussing abuse of legal procedure in Anglo-Saxon times). "The Laws of Edgar provide that he who shall accuse another wrongfully, so that he either in money or property be worse, shall, on disproof of the charge by the accused, be liable in his tongue, unless he make compensation with his 'wer.'" *Id.* at 4. (citations omitted).

[135] *See* MARTIN L. NEWELL, MALICIOUS PROSECUTION 4 (1892). An "action upon the case" was an action brought to recover damages for an injury for which the ancient forms of the common law failed to provide a remedy. *Id.*

[136] *See* W. Keeton, *supra* note 129, at 834; *see also* Briscoe v. LaHue, 460 U.S. 325, 351 n.7 (1983) (Marshall, J. dissenting). *See also* Winfield, *supra* note 134 at 118 (tracing the "decay of the writ of conspiracy and the supersession of it to the action upon the case in the nature of conspiracy, which ultimately developed into the modern action for malicious prosecution.").

[137] *See* Newell, *supra* note 135, at 6. An example of such a statute provided in pertinent part:

> Forasmuch as many, through Malice intended to grieve other, do procure false appeals to be made of Homicides and other Felonies by Appellors . . . and the Appellors shall nevertheless restore to the Parties appealed their Damages, according to the Discretion of Justices, having respect to the Imprisonment or Arrestment that the Party appealed hath sustained by reason of such Appeals, and to the Infamy that they have incurred by the Imprisonment or otherwise, and shall nevertheless make a grievous Fine upon the King.

Id. (citing 13 Ed I (St. West II) c. 12 A.D. 1285).

[138] *See* Winfield, *supra* note 134, at 118 (providing numerous examples of cases involving a writ of conspiracy). The writ of conspiracy was an inadequate remedy in the Courts. *Id.* There were many petitions for amendment of the criminal law probably based upon the fact that the

was replaced by an "action on the case" in the nature of a conspiracy.[139] In 1698, in *Saville v. Roberts*,[140] the English courts began to recognize an action for malicious prosecution.[141] In *Saville*, the court classified three alternative grounds upon which an action can be brought: damage to one's fame, damage to one in "peril of losing life, limb or liberty," and damage to one's property when he is forced to defend himself.[142]

By 1851, the United States Supreme Court recognized a malicious prosecution action where prosecution occurred without probable cause.[143] The tort of malicious prosecution provides a remedy to parties injured by the improper use of judicial proceedings.[144] The common-law elements of the tort of malicious prosecution are as follows: (1) the initiation of a criminal proceeding; (2) the proceeding must have terminated in plaintiff's favor; (3) the proceeding must have been initiated without probable cause; and (4) the defendant must have acted with malice.[145]

"corruption of officers and fear of great men" caused the law to be ineffectual. *Id.* *See also* MARTIN L. NEWELL, MALICIOUS PROSECUTION (1892) The writ of conspiracy was only permitted to be used under two circumstances. *Id.* at 5. First, for a conspiracy to "procure a man to be indicted for treason" and second, for a "conspiracy to prosecute a man for felony by which life was put in danger." *Id.* at 7. *See also* Briscoe v. Prosser, 460 U.S. 325, 351 n.7 (1983).

[139] *See* Winfield, *supra* note 134, at 118.

[140] Savile v. Roberts, 1 Ld.Raym. 374, 91 Eng. Rep. 1147 (K.B. 1698).

[141] *See* Winfield, *supra* note 134, at 123. In *Savile*, Lord Holt C.J., recognizing the need to stop malicious prosecutions, rejected the argument that allowing an action for malicious prosecution would discourage prosecutions. *Id.*

[142] *Id.* at 129 (referring to these three alternatives as "plinths upon which the English Law has been reared – reputation, personal security, and property.").

[143] Dinsman v. Wilkes, 53 U.S. (12 How.) 390 (1851).

[144] *See* Keeton, *supra* note 129, at 870.

[145] *See id.* at 871. *See also* RESTATEMENT SECOND OF TORTS § 653. This section provides:

> A private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a

III. THE CIRCUITS IN CONFLICT BEFORE *ALBRIGHT*

Albright v. Oliver marked the first time that the Court analyzed the specific issue of whether malicious prosecution is actionable under Section 1983.[146] In order to understand the implications of *Albright*, it is beneficial to analyze the wide divergence of pre-*Albright* decisional law. As the *Albright* Court noted, "most of the lower courts recognize some form of malicious prosecution action under Section 1983."[147] However, the problem lies in the fact that most of the courts have disagreed on the elements of the claim.

The Second and Third Circuits had adopted the most liberal approach by allowing Section 1983 claims for malicious prosecution when the elements of the common law tort were alleged.[148] For example in *Lee v. Mihalich*, the Third Circuit Court of Appeals directly equated the elements of a Section 1983 claim with the common law tort of malicious prosecution.[149] The

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urpose other than that of bringing an offender to justice, and (b) e proceedings have terminated in favor of the accused.

also MARTIN L. NEWELL, MALICIOUS PROSECUTION (1892). The nts for an action for malicious prosecution dates back from early on t 10. In his treatise, Newell stated that an action for malicious n requires the institution of an action without probable cause, with d acquittal of the accused. *Id.* *See also* JOEL P. BISHOP, 'ARIES ON NON-CONTRACT LAW § 221, 89 (1889). Bishop similarly hat an action for malicious prosecution would lie where plaintiff w malice and lack of probable cause, termination of the proceeding 's favor, and some type of legal damage. *Id.* §§ 224-227, at 90.

ght v. Oliver, 510 U.S. 266 (1994). *See also* Martin A. Schwartz, *3 Malicious Prosecution Case*, N.Y.L.J., March 15, 1994, at 3; Soto, *Ruling Restricts Remedy for Malicious Prosecution*, Chicago Bulletin, Feb. 1, 1996 at 6.

ht, 510 U.S. at 811 n.4.

.g., Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989), Lee v. Mihalich, 66, 70 (3d Cir. 1988). *See also Albright*, 510 U.S. at 271 n.4. different views and noting that the Third Circuit's view represented xpansive approach).

847 F.2d. at 69-70. In *Lee*, a nursing home and its owner were d by the Medicaid Fraud Unit of the Pennsylvania Attorney

court held that "the elements of liability for the constitutional tort of malicious prosecution under Section 1983 coincide with those of the common law tort."[150] Therefore, under *Lee*, a plaintiff could make out a valid Section 1983 claim merely by alleging the common-law elements of malicious prosecution.[151]

Likewise, the Second Circuit recognized a Section 1983 action for malicious prosecution for deprivation of the Due Process guarantees of the Fourteenth Amendment.[152] In *Singleton v. City of New York*, the Second Circuit held that the common law elements of the tort of malicious prosecution give rise to a Section 1983 claim for malicious prosecution.[153] In *White v.*

General's office and were prosecuted for Medicaid fraud. *Id.* at 67. Following the dismissal of the criminal action, Lee and the nursing home filed a § 1983 action alleging malicious prosecution. *Id.*

[150] *Id.* at 70.

[151] *But see* Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998).

[152] *See, e.g.*, White v. Frank, 855 F.2d 956 (2d Cir. 1988); Singleton v. City of New York, 632 F.2d 185 (2d Cir. 1980). In *Singleton*, the court stated that plaintiff was required to show a criminal prosecution instituted by the defendant, termination in plaintiff's favor, the absence of probable cause, and malice. *Id.* at 172.

[153] *Singleton*, 632 F.2d at 195. Jerome Singleton commenced a federal Section 1983 action alleging assault, false arrest and malicious prosecution. *Id.* at 187. Singleton had applied for and received an "adjournment in contemplation of dismissal." The Second Circuit held that such adjournment could not form the basis for a Section 1983 malicious prosecution claim because it was not a disposition of the criminal proceeding in favor of the accused. *Id.* at 189. *See also* Roesch v. Otarola, 980 F.2d 850 (2d Cir. 1992). In *Roesch*, the Second Circuit held that a plaintiff could not maintain a § 1983 claim for malicious prosecution when the plaintiff's criminal case was terminated under an accelerated pretrial rehabilitation program. *Id.* at 853. Comparing Connecticut's program to New York's "adjournment in contemplation of dismissal," the court reasoned that "a dismissal pursuant to the Connecticut accelerated pretrial rehabilitation program is not a termination in favor of the accused for purposes of a civil rights suit." *Id.* The court noted:

> [i]f we permit a criminal defendant to maintain a section 1983 action after taking advantage of accelerated rehabilitation, the program, intended to give first-time offenders a second chance, would become less desirable for the State to retain and less desirable for the courts to use because the savings in resources from dismissing the criminal

Frank,[154] plaintiff bought a Section 1983 action against police officers whose perjured testimony led to his improper incarceration.[155] Applying the common law elements of the tort of malicious prosecution, the Second Circuit allowed the Section 1983 claim noting that "[t]here can be no question that malicious prosecution can form the basis for imposition of liability under section 1983."[156]

In *Hygh v. Jacobs*,[157] the Second Circuit, reiterating the common law tort elements, stated that a Section 1983 claim for malicious prosecution may not be maintained unless the plaintiff proves a termination of a criminal proceeding in his favor.[158] Plaintiff brought a Section 1983 claim for constitutional violations, including malicious prosecution, stemming from his arrest for disorderly conduct and resisting arrest.[159] The prosecution was dismissed against the plaintiff "in the interest of justice."[160] The court held that a dismissal "in the interest of justice" is "neither an acquittal of the charges nor any

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proceeding would be consumed in resolving the constitutional claims.

Id. *See also* Raysor v. Port Authority, 768 F.2d 34 (2d Cir. 1985).

[154] 855 F.2d 956 (2d Cir. 1988).

[155] *Id.* at 957. In *White*, the police officers argued that they were entitled to absolute immunity based on their grand jury testimony. *Id.* at 958. However, the court rejected their argument and concluded:

> Where, however, the constitutional tort is the action of a police officer in initiating a baseless prosecution, his role as a 'complaining witness' renders him liable to the victim under § 1983, just as it did at common law, and the fact that this testimony at a judicial proceeding may have been the means by which he initiated the prosecution does not permit him to transpose the immunity available for defamation as a defense to malicious prosecution.

Id. at 961. Moreover, the *White* court recognized that although a grand jury indictment is prima facie evidence of the probable cause requirement, this may be rebutted by evidence that the defendant "misrepresented, withheld or falsified evidence." *Id.* (citations omitted).

[156] *Id.* at 961 n.5.

[157] 961 F.2d 359 (2d Cir. 1992).

[158] *Id.* at 363.

[159] *Id.* at 361.

[160] *Id.*

determination of the merits . . . . Rather, it leaves the question of guilt or innocence unanswered."[161] Therefore, the court concluded that "it cannot provide the favorable termination required as the basis for a claim of malicious prosecution."[162]

The Fifth Circuit, at one time, held that malicious prosecution was not encompassed within Section 1983.[163] However, its more recent cases have held that malicious prosecution is available under Section 1983.[164] In *Sanders v. English*,[165] the court recognized a Section 1983 malicious prosecution action. Plaintiff Sanders, was arrested for armed robbery by McCoy, a police lieutenant from the City of Mansfeld police department.[166] Thereafter, information was brought to McCoy's attention that Sanders was not the assailant.[167] Nevertheless, McCoy filed an information charging Sanders with the crime and did not divulge the information to the police chief or prosecuting attorney.[168] Eventually, the case was dismissed and Sanders brought a Section 1983 case alleging that McCoy violated his constitutional rights by arresting and prosecuting him.[169] The court stated that the constitutional right to be free from malicious prosecution is "'sufficient to support a damage judgment against state law enforcement officials under 42 U.S.C. § 1983,' including police officers who have had input into the prosecutor's decision to initiate criminal proceedings against an individual."[170] The court further stated that "[d]eliberately concealing or deliberately failing to disclose exculpatory evidence, like 'maliciously tendering false information,' can, as under the circumstances here present, form the basis for an inference that a defendant police

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[161] *Id.* at 368 (citations omitted).

[162] *Id.*

[163] *See, e.g.*, Cook v. Houston Post, 616 F.2d 791 (5th Cir. 1980); Curry v. Ragan, 257 F.2d 449 (5th Cir. 1986).

[164] *See, e.g.*, Sanders v. English, 950 F.2d 1152 (5th Cir. 1992); Brummet v. Camble, 946 F.2d 1178 (5th Cir. 1991).

[165] 950 F.2d 1152 (5th Cir. 1992).

[166] *Id.* at 1154.

[167] *Id.*

[168] *Id.*

[169] *Id.*

[170] *Id.* at 1163 (quoting Hand v. Gray, 838 F.2d 1420 (5th Cir. 1988)).

officer acted with malice in initiating and maintaining a prosecution."[171]

The Eleventh Circuit adopted the Fifth Circuit's analysis and found a "federal right to be free from malicious prosecution."[172] In *Strengh v. Hubert*,[173] plaintiff brought a section 1983 claim against the investigator for the office of the Alabama Attorney General alleging that the defendants conspired, "under the color of law," to cause their wrongful prosecution in violation of their Fourth and Fourteenth Amendment rights.[174] The court held that the right to be free from malicious prosecution is a federal right which is protected by Section 1983.[175] The court reasoned that "'a safeguard so fundamental to criminal due process -- one against capricious prosecutions -- is . . . incorporated by the fourteenth amendment.'"[176]

Other circuits required a plaintiff to show more than the elements of the common law tort. For example, the Ninth Circuit took the position that a claim for malicious prosecution is not available under Section 1983 if there is a remedy available within the state judicial system, unless the claim is accompanied by an intent to deprive an individual of a constitutional right.[177] In

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[171] *Id.* (quoting Goodwin v. Metts, 885 F.2d 157, 162-63 (4th Cir. 1989)).

[172] Strengh v. Hubert, 854 F.2d 421, 425 (11th Cir. 1988) (quoting Shaw v. Garrison, 467 F.2d 113, 120 *cert. denied* 409 U.S. 1024 (5th Cir. 1972)) (recognizing that "freedom from malicious prosecution is a federal right protected by Section 1983."). *See* NAACP v. Hunt, 891 F.2d 1555, 1563 (11th Cir. 1990) ("[Plaintiff] must show that the parties 'reached an understanding' to deny the plaintiff his or her rights. . . [and] prove an actionable wrong to support the conspiracy.").

[173] 854 F.2d 421 (11th Cir. 1988).

[174] *Id.* at 423.

[175] *Id.*

[176] *Id.* at 425 (citing Wheeler v. Cosden Oil & Chemical Co., 734 F.2d 254, 260 (5th Cir.) amended 744 F.2d 1134 (5th Cir. 1984)).

[177] Usher v. City of Los Angeles, 828 F.2d 556 (9th Cir. 1987). *See also* Bretz v. Kelman, 773 F.2d 1026, 1031 (9th Cir. 1987) (en banc) (concluding that "malicious prosecution generally does not constitute a deprivation of liberty without due process of law and is not a federal constitutional tort if process is available within the state judicial systems to remedy such wrongs."); Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981) (holding that allegations in a complaint that state officials had denied plaintiff a fair trial by bribing

Usher v. City of Los Angeles, the Ninth Circuit held that a claim for malicious prosecution may be made under Section 1983 when the "'malicious prosecution is conducted with the intent to deprive a person of equal protection of the laws or is otherwise intended to subject a person to a denial of constitutional rights.'"[178] In his complaint, Usher alleged that defendants illegally arrested him, submitted false police reports, initiated his prosecution in bad faith and acted with racial animus towards him.[179] Because the defendants intended to deprive him of his equal protection rights, the court concluded that Usher had properly stated a cause of action under Section 1983 for malicious prosecution.[180]

Similarly, the Eighth Circuit held that malicious prosecution can form the basis for a Section 1983 action if the defendant's conduct infringes upon some constitutional right.[181] The court's decision in *Gunderson v. Schlueter* is especially instructive because that court tested plaintiff's allegations under due process.[182] In *Gunderson*, a conservation officer brought criminal charges against plaintiff, a resort operator, for various fish and

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witnesses, stirring up adverse medical attention and knowingly presenting false evidence and perjured testimony were sufficient to state a cause of action under § 1983).

[178] *Usher*, 828 F.2d at 562 (quoting Bretz v. Kelman, 773 F.2d 1026, 1310 (9th Cir. 1987)). In *Usher*, plaintiff brought a Section 1983 action against Los Angeles police officers after he was tried and acquitted of disturbing the peace, malicious mischief, and resisting police officers. *Id.* at 558. Usher alleged that he was taken to the police department where he was forced to remain in handcuffs for two hours, was refused access to a toilet and was physically abused by the officers who referred to him as a "nigger." *Id.* Ultimately, Usher was discharged from his employment after his employer investigated the events surrounding the arrest. *Id.*

[179] *Id.*

[180] *Id.*

[181] *See, e.g.*, Sanders v. Sears, Roebuck & Co., 984 F.2d 972 (8th Cir. 1993) (dismissing a malicious prosecution action because the court found no constitutional violation); Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990) (holding that malicious prosecution alone is not punishable under § 1983).

[182] Gunderson v. Schlueter, 904 F.2d 407 (8th Cir. 1990).

game violations.[183] The plaintiff was acquitted of the charges and brought a Section 1983 suit alleging malicious prosecution and a substantive due process violation.[184] The court ruled that plaintiff received the procedural due process to which he was entitled, and that the officer's conduct, which was much more egregious than that alleged, was not sufficiently outrageous to support a substantive due process claim.[185] Hence, there was no constitutional injury.[186]

The Sixth Circuit also took a restrictive view of Section 1983 with regards to claims of malicious prosecution, requiring a violation of rights specifically protected by the Constitution.[187] Relying on its prior decision in *Dunn v. Tennessee,*[188] the Sixth Circuit held in *Coogan v. City of Wixon*[189] that a Section 1983 claim for malicious prosecution is only available when "the 'misuse of a legal proceeding is so egregious as to subject the aggrieved individual to a deprivation of constitutional

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[183] *Id.* at 410. In 1984, Schlueter, a conservation officer, began to single out the customers at Gunderson's resort for stricter enforcement of the fish and game laws. *Id.* at 408. When Schlueter discovered that Gunderson complained to Schlueter's supervisor, Schlueter told Gunderson "people who file complaints on me live to regret it." *Id.* Thereafter, Schlueter began an undercover investigation of Gunderson, which was characterized as rising to the level of "harassment." *Id.*

[184] *Id.*

[185] *Id.* at 410-11. While the court acknowledged that outrageous conduct by law enforcement authorities that "shocks the conscience" might violate due process even without a procedural violation, nevertheless, the court concluded that the officer's conduct, while "objectionable and perhaps born of a personal animosity toward the plaintiff," did not rise to the level needed to prove a due process violation. *Id.* at 411.

[186] *Id.*

[187] *See, e.g.,* Braley v. City of Pontiac, 906 F.2d 220 (6th Cir. 1990). *See also* Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987) (refusing to recognize plaintiff's § 1983 claim because the alleged injury did not result in a constitutional violation); Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982) (applying this standard, the court found that plaintiff's claim of malicious prosecution stated a valid cause of action under the Fourth Amendment).

[188] 697 F.2d 121 (6th Cir. 1982).

[189] 820 F.2d 170 (6th Cir. 1987).

dimension.'"[190] In *Coogan*, plaintiff, a real estate developer, was prosecuted for allegations that he had burned insured property.[191] After his prosecution was dismissed, plaintiff brought a Section 1983 malicious prosecution action against the City of Wixom.[192] The court refused to recognize the plaintiff's claim, reasoning that the plaintiff neither established the absence of probable cause, nor proved any constitutional injury.[193]

Like the Sixth and Ninth Circuits, the First Circuit has required that a plaintiff must show egregious conduct in order to bring a Section 1983 claim of malicious prosecution.[194] In *Torres v. Superintendent of Police*, the First Circuit set forth the specific requirements for a Section 1983 claim based on malicious prosecution.[195] In recognizing a categorical difference between tort claims for malicious prosecution and constitutional claims arising from the same tort, the court stated that malicious prosecution does not per se abridge rights secured by the Constitution.[196] Therefore, in order to state a claim for malicious prosecution under Section 1983, the complaint must allege that the malicious conduct was "so egregious that it violated substantive or procedural due process rights under the Fourteenth

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[190] *Coogan*, 820 F.2d at 175 (quoting Dunn v. Tennessee, 697 F.2d 121, 125 (6th Cir. 1982)).

[191] *Id.* at 174.

[192] *Id.*

[193] *Id.* Furthermore, the court held that the City of Wixom could not be held responsible for the action of its officers. *Id.*

[194] *See, e.g.*, Smith v. Department of Corrections, 936 F.2d 1390 (1st Cir. 1991); Morales v. Ramirez, 906 F.2d 784 (1st Cir. 1990); *See also*, Torres v. Superintendent of Police, 893 F.2d 404 (1st Cir. 1990) (explicitly recognizing existence of specific constitutional tort for malicious prosecution).

[195] *Torres*, 893 F.2d at 409. In *Torres*, plaintiffs were former police officers in the Puerto Rico Police Department who had been dismissed from their jobs for alleged violations of certain weapon laws. *Id.* at 406. After the criminal charges against them were dismissed, plaintiffs commenced a § 1983 suit claiming that the defendants brought baseless charges against them without probable cause but "for reasons of personal animosity." *Id.* at 408.

[196] *Id. See* Baker v. McCollan, 442 U.S. 137 (1979) ("The Constitution does not guarantee that only the guilty will be arrested. If it did, § 1983 would provide a cause of action for every defendant acquitted - -, indeed, for every suspect released.").

Amendment."[197] According to the First Circuit, a substantive due process violation occurs when the malicious prosecution is "conscience shocking"[198] and a procedural due process violation occurs when the plaintiff was deprived "of liberty by a distortion and corruption of the processes of law."[199] Furthermore, to establish a malicious prosecution claim under Section 1983 on the grounds of a procedural due process violation, a plaintiff must show that "no adequate state post-deprivation remedy was available to rectify the harm."[200]

Although many of the lower courts had found malicious prosecution actionable under Section 1983, the lower courts widely disagreed on the elements of the constitutional claim. Thus, it is no wonder that without clear guidance, a wide divergence of approaches to malicious prosecution under Section 1983 developed in the lower courts. It was against this backdrop, then, that the United States Supreme Court decided *Albright v. Oliver*.

IV. ALBRIGHT V. OLIVER

A. Background

In *Albright*, Veda Moore, a cocaine addict, approached Roger Oliver, a detective in the City of Macomb, Illinois police department, for protection from an individual to whom she owed money for cocaine.[201] In exchange for police protection, Moore agreed to act as an informant against narcotic dealers.[202] Pursuant to this arrangement, Moore was required to identify dealers and then purchase drugs from them with money supplied to her by

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[197] *Torres*, 893 F.2d at 410.

[198] *Id.* The court emphasized that "misuse of the legal process alone will not be enough to sustain a claim." *Id.*

[199] *Id.*

[200] *Id.* In *Torres*, the First Circuit did not find that the charges brought against the former police officers, which were later dismissed, rose to the level of a constitutional violation. *Id.* at 409-11.

[201] Albright v. Oliver, 510 U.S. 266, 293 n.3 (1994) (Stevens J., dissenting).

[202] *Id.*

Oliver.[203] Additionally, she was to be paid a small sum of money for each dealer that she identified.[204] As it turned out, Moore, acting as an informant, had implicated more than fifty dealers, none of whom were successfully prosecuted.[205]

During her tenure as an undercover informant, Moore reported to Oliver that she had purchased cocaine from John Albright, Jr.[206] Laboratory tests revealed that the substance sold to Moore, was not cocaine, but was, in fact, baking powder.[207] Thereafter, Oliver secured a grand jury indictment against John Albright, Jr., for selling a "look alike" substance.[208] When Oliver went to execute the warrant he learned that John Albright, Jr. was a sixty-year old retired pharmacist; Oliver realized that he had the wrong man.[209] At that time, Oliver also advised that John Albright, Jr. had two sons, John David Albright and Kevin Albright.[210] After Oliver had determined that John David Albright could not have

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[203] *Id.*

[204] Brief for Respondent at 6, *Albright* (No. 92-833). Specifically, Oliver gave Moore between $50.00 and $75.00 for every transaction she completed. *Id.*

[205] *Albright*, 510 U.S. at 293 n.3 (Stevens. J., dissenting).

[206] *Id.* at 268 n.1.

[207] *Id.*

[208] *Id.* at 293 n.4. (Stevens, J., dissenting). *See* ILL. COMP. STAT. 570/404 (c) (West 1993). The statute provides in pertinent part: "[I]t is unlawful for a person to possess a look-alike substance." *Id.* Section 102(y) of Act 570 provides in pertinent part as follows:

> Look-alike substances means a substance, other than a controlled substance which (1) by overall dosage unit, appearance, including shape, color, size, markings or lack thereof, taste, consistency, or any other identifying physical characteristic of the substance, would lead a reasonable person to believe that the substance is a controlled substance, or (2) is expressly or impliedly represented to be a controlled substance or is distributed under circumstances which would lead a reasonable person to believe that the substance is a controlled substance.

Id.

[209] *Albright*, 510 U.S. at 268 n.1. "Albright was an elderly, respectable, inoffensive gentleman unlikely to have committed the offense of which Veda Moore had accused him." Albright v. Oliver, 975 F.2d 343, 344 (7th Cir. 1992).

[210] *Id.*

committed the crime, he contacted Moore to determine whether she purchased the narcotics from Kevin Albright.[211] When Moore admitted that Kevin Albright could have been the drug dealer, Oliver executed a criminal information charging Kevin Albright with the sale of a "look-alike" substance and proceeded to change the arrest warrant to reflect the name of Kevin Albright.[212] Upon learning that an arrest warrant had been issued against him, Kevin Albright turned himself into the Macomb police department, but denied any involvement in the alleged crime.[213] Kevin Albright was released after he posted a bond.[214] However, as a condition of his bond, he was not permitted to leave the state of Illinois without permission of the court.[215] At a preliminary hearing, Oliver testified that Kevin Albright sold a "look-alike" substance to Veda Moore.[216] Before the trial, the circuit court dismissed the criminal action against Kevin Albright, on the basis that "the charge did not state an offense under Illinois Law."[217]

Almost two years later, petitioner Kevin Albright instituted a Section 1983 action against both police officer Roger Oliver and the City of Macomb, alleging that they had violated his rights under the Due Process Clause of the Fourteenth Amendment,[218] specifically, "his 'liberty interest' to be free from criminal prosecution except upon probable cause."[219] The district court dismissed Albright's complaint for failure to state a claim under

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[211] *Id.* Suspecting that John David Albright was the drug dealer, Oliver altered the arrest warrant to reflect the name of John David Albright. Brief for Respondent at 8, *Albright* (No. 92-833). In response to the warrant, John David Albright traveled from Chicago, Illinois to Macomb where he met with Oliver and advised him that he had been working in Chicago for the previous year and was not in Macomb on the date in question. *Id.*

[212] *Id.*

[213] *Albright*, 510 U.S. at 268.

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] *Id.*

[218] *Id.*

[219] *Id.* at 269. In his complaint, Albright also alleged a common law malicious prosecution claim. *Id.* at 271 n.2.

Section 1983.[220] The Court of Appeals for the Seventh Circuit, in an opinion by Judge Posner, affirmed the decision of the district court.[221] The court acknowledged that "malicious prosecution can be a component of a constitutional tort," however, prosecution without probable cause may be actionable under Section 1983 only when accompanied by "incarceration or other palpable consequences."[222] The United States Supreme Court granted certiorari on the issue of whether the Due Process Clause of the Fourteenth Amendment protects an individual's rights to be free from prosecution without probable cause.[223]

B. The Different Opinions of the Court

Chief Justice Rehnquist, writing for the plurality, began the Court's analysis by identifying the specific constitutional provision allegedly infringed by the State.[224] In his complaint, Albright alleged a deprivation of his "substantive due process rights to be free of prosecution without probable cause."[225] The plurality pointed out that Albright did not allege a procedural due process claim or a violation of his right to be from seizure under

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[220] *Id.* at 269.

[221] Albright v. Oliver, 975 F.2d 343, 348 (7th Cir. 1992).

[222] *Id.* at 346-347. Analogizing malicious prosecution to defamation, Judge Posner reasoned that "[i]f the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes." *Id.* at 346. However, "[d]efamation accompanying a discharge from employment can make it impossible for a person to obtain equivalent employment elsewhere, thus depriving him of liberty of occupation, one of the liberties protected by the due process clause." *Id.* *See* Paul v. Davis, 424 U.S. 693 (1976).

[223] *Albright*, 510 U.S. at 268.

[224] *Id.* at 271. Immediately pointing out that "§ 1983 'is not a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Id.* (quoting Baker v. McCollan, 443 U.S. 137 (1979)).

[225] *Id.*

the Fourth Amendment, notwithstanding the plurality's concession that Albright's surrender to the police "constituted a seizure for purposes of the Fourth Amendment."[226] Chief Justice Rehnquist, quoting from *Collins v. City of Harker Heights*,[227] acknowledged the Court's persistent reluctance to expand substantive due process, noting that the "guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[228] The right to be free of prosecution, he explained, did not fall within the realm of cases to which substantive due process has been typically employed: "marriage, family, procreation, and the right to bodily integrity."[229]

Invoking the Court's decision in *Hurtado v. California*,[230] Albright argued that the Due Process Clause of the Fourteenth Amendment was intended, in part, to protect an individual from arbitrary exercises of governmental power.[231] While acknowledging that the Due Process Clause of the Fourteenth Amendment protects substantive rights intended to secure individuals from the arbitrary exercise of government power, the Chief Justice pointed out that in criminal prosecutions, the Constitution does not limit its analysis to whether the government's conduct was arbitrary.[232] Supreme Court precedent over the past one hundred years since the *Hurtado* decision has incorporated many of the specific protections in the Bill of Rights into the Fourteenth Amendment.[233] As a result, the plurality concluded that it is the provision of the Bill of Rights, not the general notion of due process, that was intended by the framers to

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[226] *Id.*

[227] 503 U.S. 115 (1992).

[228] *Albright*, 510 U.S. at 271-72. *See also* County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998).

[229] *Id.* at 272.

[230] 110 U.S. 516, 527 (1884) (holding that an individual has the right to be free from the "arbitrary exercise of the powers of government" as a part of his or her substantive liberty interest).

[231] *Albright*, 510 U.S. at 272.

[232] *Id.*

[233] *Id.* at 272-273 (pointing to a series of cases that incorporated the Bill of Rights into the Fourteenth Amendment).

provide protections against arbitrary abuses of power.[234] Applying the principle enunciated in *Graham v. Connor*,[235] the plurality posited that where a specific Amendment to the Constitution addresses the type of government action at issue, that Amendment must be used to analyze the Section 1983 claim, not substantive due process.[236]

Applying this principle to Albright's claim, the plurality determined that the Fourth Amendment serves as the sole source of constitutional protection against arbitrary pretrial deprivations of liberty.[237] The Chief Justice explained that the Fourth Amendment relates to "deprivations of liberty that go hand in hand with criminal prosecutions."[238] Having concluded that Albright's claim should have been brought under the Fourth Amendment, the Court refused to recognize Albright's due process claim "to be free from criminal prosecution except upon probable cause."[239] Finally, the plurality expressed no opinion as to whether Albright's claim could have succeeded under the

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[234] *Id.* at 273. "It was through these provisions of the Bill of Rights that the Framers sought to restrict the exercise of arbitrary authority by the Government in particular situations." *Id.*

[235] 490 U.S. 386, 395 (1989). In *Graham*, an excessive force arrest situation, the Court refused to recognize the claim under substantive due process holding that a claim for excessive force on the part of police officers during an arrest, or other seizure of a person, must be analyzed under the Fourth Amendment standard. *Id.* The Court reasoned that "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing" claims involving seizures. *Id.*

[236] *Albright*, 510 U.S. at 273. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Id.* (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

[237] *Id.* at 274. The Court maintained that "[t]he Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.*

[238] *Id.*

[239] *Id.* at 268.

Fourth Amendment because the issue was not presented to the Court in the petition for certiorari.[240]

In his brief concurrence, Justice Scalia elaborated on the issue of substantive due process.[241] First, he noted that there are many cases in which "abuses of the trial process" can lead to a "deprivation of life, liberty or property without due process."[242] Nevertheless, Albright's pre-trial arrest provided the only deprivation of liberty claim.[243] Justice Scalia reiterated his objection to the concept of substantive due process, maintaining that the Due Process protections of the Fourteenth Amendment only guarantee that certain procedures are followed as a prerequisite to a deprivation of liberty.[244] Justice Scalia asserted that substantive due process cannot be used to bestow greater constitutional guarantees than those afforded by the Bill of Rights.[245]

Justice Ginsburg agreed with the plurality that Albright's claim is properly analyzed under the Fourth Amendment, but unlike the plurality, addressed Albright's Fourth Amendment claim.[246] She articulated two theories as to why Albright failed to assert a Fourth Amendment claim: the inapplicability of the Fourth Amendment and second, the running of the statute of limitations applicable to this claim.[247] Justice Ginsburg concluded that Albright's possible Fourth Amendment claim was "neither substantially deficient nor inevitably time barred."[248]

In reaching this conclusion, Justice Ginsburg rejected Albright's limited view of the Fourth Amendment.[249] She opined

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[240] *Id.* at 275.

[241] *Id.* (Scalia, J., concurring).

[242] *Id.* (Scalia, J., concurring).

[243] *Id.* (Scalia, J., concurring) (stating that "it is unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies; but petitioner has in any case not invoked 'procedural' due process.").

[244] *Id.* (Scalia, J., concurring).

[245] *Id.* at 276 (Scalia, J., concurring).

[246] *Id.* (Ginsburg, J., concurring).

[247] *Id.* at 276 (Ginsburg, J., concurring).

[248] *Id.* at 280 (Ginsburg, J., concurring).

[249] *Id.* at 279 (Ginsburg, J., concurring).

that Albright anticipated that the Court would define "seizure" as the period from his surrender until his release on bond, and thus Oliver's allegedly misleading testimony could not be analyzed under the Fourth Amendment.[250] Responding to this assumption, Justice Ginsburg asserted that, at common law, a "seizure" continued even after an individual's release from custody.[251] She believed that this view comported with "common sense and common understanding," because a person is not free simply due to the fact that he or she is not under the "physical grip" of the State.[252] Rather, he must appear in court at the State's request, and may be restricted from traveling outside of the State without first seeking the State's permission.[253] In addition, pending criminal prosecution, the defendant's "employment prospects may be diminished severely, he may suffer reputational harm, and he will experience the financial and emotional strain of preparing a defense."[254] Under Justice Ginsburg's "continued seizure" theory, the Fourth Amendment's prohibition against unreasonable search and seizure remains throughout the criminal prosecution.[255] Thus, if an officer gave false or misleading testimony during the course of a criminal prosecution, he may be acting in violation of the Fourth Amendment.[256]

It follows, Justice Ginsburg stated, that the statute of limitations had not begun to run at the time that Albright turned himself in to the police,[257] but was triggered only when the State dropped the charges against Albright.[258] Therefore, the Justice concluded that Albright's possible Fourth Amendment claim was "neither substantially deficient nor inevitably time-barred."[259] Justice

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[250] *Id.* at 277 (Ginsburg, J., concurring).
[251] *Id.* at 277-78 (Ginsburg, J., concurring).
[252] *Id.* at 278 (Ginsburg, J., concurring).
[253] *Id.* (Ginsburg, J., concurring).
[254] *Id.* (Ginsburg, J., concurring).
[255] *Id.* at 279 (Ginsburg, J., concurring).
[256] *Id.* (Ginsburg, J., concurring).
[257] *Id.* at 280 (Ginsburg, J., concurring).
[258] *Id.* (Ginsburg, J., concurring) (citing McCune v. Grand Rapids, 842 F.2d 903, 908 (6th Cir. 1988)).
[259] *Id.* (Ginsburg, J., concurring).

Ginsburg, however, found that Albright had abandoned the claim in the district court.[260]

Justice Kennedy, joined by Justice Thomas, agreed with the plurality's holding that a claimed arrest without probable cause invoked the Fourth Amendment and not substantive due process.[261] However, Justice Kennedy believed that Albright's claim was not one of unreasonable seizure, but "the malicious initiation of a baseless criminal prosecution against him."[262] Therefore, the Justice analyzed the criminal prosecution under the due process clause.[263] Pointing out the lack of a provision in the Bill of Rights concerning the initiation of a criminal prosecution, Justice Kennedy conceded that a "criminal rule" that does not contravene a specific guarantee in the Bill of Rights may still violate the Due Process Clause if it infringes upon a fundamental principle of justice.[264] In Justice Kennedy's opinion, Albright failed to meet this standard.[265] Next, Justice Kennedy turned to the possibility that there may be a due process violation in malicious prosecution, noting that the Due Process Clause may safeguard interests similar to those protected by the common law of torts.[266] However, relying on *Parratt v. Taylor*,[267] Justice

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[260] *Id.* (Ginsburg, J., concurring). "The principle of party presentation cautions decisionmakers against asserting it for him." *Id.* at 281 (Ginsburg, J., concurring).

[261] *Id.* at 281 (Kennedy, J., concurring).

[262] *Id.* (Kennedy, J., concurring).

[263] *Id.* (Kennedy, J., concurring).

[264] *Id.* at 282 (Kennedy, J., concurring). Specifically, Justice Kennedy stated that government conduct may still violate the Due Process Clause if it "'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* (quoting Patterson v. New York, 432 U.S. 197, 202 (1977)). *See also* Medina v. California, 505 U.S. 437 (1992).

[265] *Albright*, 510 U.S. at 283 (Kennedy, J., concurring).

[266] *Id.* at 283-84 (Kennedy, J., concurring). "The common law of torts long recognized that a malicious prosecution, like a defamatory statement, can cause unjustified torment and anguish – both by tarnishing one's name and by costing the accused money in legal fees and the like." *Id.* (Kennedy, J., concurring). Justice Kennedy reasoned that "some of the interests granted historical protection by the common law of torts (such as the interests in

Kennedy asserted that when a post-deprivation remedy exists, a Section 1983 due process cause of action will be denied.[268] Based upon the availability in Illinois of a malicious prosecution remedy, Justice Kennedy interpreted the Court's decision in *Parratt* as foreclosing the availability of Section 1983 relief to Albright.[269]

Justice Souter, concurring, like the plurality expressed reluctance to expand the protection of substantive due process if doing so would duplicate protections already addressed by other constitutional provisions.[270] He found that Albright had "not shown a substantial deprivation of liberty from the mere initiation of prosecution."[271] Justice Souter reasoned that none of the

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freedom from defamation and malicious prosecution) are protected by the Due Process Clause." *Id.* (Kennedy, J., concurring).

[267] 451 U.S. 527 (1981).

[268] *Albright*, 510 U.S. at 284 (Kennedy, J., concurring). Citing *Parratt*, Justice Kennedy stated that "a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate post-deprivation remedy." (citations omitted). *Id.* (Kennedy, J., concurring). Justice Kennedy explained that "some questions of property, contract, and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer." *Id.* (Kennedy, J., concurring). Justice Kennedy conceded that courts are reluctant to apply the *Parratt* doctrine because they recognize "the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action." *Id.* (Kennedy, J., concurring).

[269] *Id.* at 285-86 (Kennedy, J., concurring).

[270] *Id.* at 288 (Souter, J., concurring.) Justice Souter stated:

> We are, nonetheless, required by '[t]he doctrine of judicial self-restraint . . . to exercise the utmost care whenever we are asked to break new ground in [the] field' of substantive due process . . . . The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments with the ill-defined contours of some novel due process right.

Id. (Souter, J., concurring).

[271] *Id.* at 289 (Souter, J., concurring).

injuries complained of by Albright could be attributable solely to the criminal prosecution.[272] Injuries similar to those alleged by Albright typically occur after an arrest, and are better addressed under the Fourth Amendment.[273] However, Justice Souter left open the possibility that "[t]here may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure."[274]

In a lengthy dissent, Justice Stevens, joined by Justice Blackmun, opined that substantive due process should reach claims of malicious prosecution.[275] As a preliminary matter, Justice Stevens pointed out that the Fifth Amendment,[276] which

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> This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions . . . in which the Court has resisted relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed. This case calls for such restraint, in presenting no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already.

Id. (Souter, J., concurring).

[272] *Id.* (Souter, J., concurring). Albright's complaint provided:

> [A]n extensive list of damages: limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond; financial expense of his legal defense; reputational harm among members of the community; inability to transact business or obtain employment in his local area, necessitating relocation to St. Louis; inability to secure credit; and personal pain and suffering.

Id. (Souter, J., concurring).

[273] *Id.* at 290 (Souter, J., concurring).

[274] *Id.* at 291 (Souter, J., concurring).

[275] *Id.* at 291-316 (Stevens, J., dissenting).

[276] U.S. CONST. amend. V. The Fifth Amendment provides:

> 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.

Id.

provides the standard for issuing criminal accusations by the federal government, requires a determination by a grand jury that there exists probable cause to support the accusation.[277] Next, he examined whether state governments have similar constraints under the Due Process Clause of the Fourteenth Amendment.[278] According to Justice Stevens, *Hurtado v. California*[279] indirectly established that states are required to adequately ensure that probable cause exists before the initiation of a criminal proceeding.[280] Applying this analysis to Albright's claim, the dissent concluded that the probable cause requirement of the Due Process Clause had not been satisfied.[281]

Justice Stevens emphasized the "interests protected by the Due Process Clause extend well beyond freedom from improper criminal conviction."[282] Although the Justice recognized that not every impairment of a liberty interest amounts to a constitutional

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[277] *Albright*, 510 U.S. at 291 (Stevens, J., dissenting).

[278] *Id.* (Stevens, J., dissenting).

[279] 110 U.S. 516 (1884). In *Hurtado*, the Court held that the Fourteenth Amendment did not require the states to comply with the grand jury indictment mandated for the federal government by the Fifth Amendment, but only because the state had competent assurances for a valid probable cause determination. *Id.* at 538. The Court reasoned:

> Tried by these principles, we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produces for the prosecution, is not due process of law.

Id.

[280] *Albright*, 510 U.S. at 292 (Stevens, J., dissenting).

[281] *Id.* at 292-93 (Stevens, J., dissenting). Justice Stevens pointed out that the evidence against Albright consisted of false accusations from a cocaine addict who had falsely accused cocaine dealers in over fifty other cases. *Id.* (Stevens, J., dissenting). Moreover, the alleged substance turned out to be a "look-alike" substance, and not to be cocaine. *Id.* at 293 (Stevens, J., dissenting). Nevertheless, relying on this information, Oliver testified before a grand jury and sought an indictment against Albright. *Id.* (Stevens, J., dissenting). Thus, the dissent found it "shocking" that a criminal proceeding was commenced on such "scanty grounds." *Id.* (Stevens, J., dissenting) (quoting Albright. v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992)).

[282] *Id.* at 294 (Stevens, J., dissenting).

deprivation, an accusation of a serious criminal offense is the type of state action that has a direct impact on a constitutionally protected liberty interest.[283] Having established Albright's entitlement to due process, the dissent discussed how much due process is required to deprive an accused of such a liberty interest.[284] Justice Stevens opined that a probable cause requirement is a prerequisite to a criminal prosecution, finding it would be analogous to other requirements that the Court has considered as essential to due process.[285] Justice Stevens looked to *In re Winship*,[286] which established the requirement that a criminal conviction be established by proof beyond a reasonable doubt, to support a probable cause requirement.[287] In *Albright*, the state of Illinois followed certain procedures to guarantee that probable cause had been established.[288] However, Albright did not claim that the actual procedures followed by the state were inadequate.[289] Rather, Albright's claim was that, in his case, the probable cause determination was invalid as a substantive matter

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[283] *Id.* at 294-96 (Stevens, J., dissenting).

[284] *Id.* at 296 (Stevens, J., dissenting).

[285] *Id.* (Stevens, J., dissenting).

> It has been the historical practice in our jurisprudence to withhold the filing of criminal charges until the state can marshal evidence establishing probable cause that an identifiable defendant has committed a crime. This long tradition is reflected in the common law tort of malicious prosecution, as well as in our cases. In addition, the probable cause requirement serves valuable societal interests, protecting the populace from the whim and caprice of governmental agent without unduly burdening the government's prosecutorial function.

Id. (Stevens, J., dissenting) (footnotes omitted).

[286] 397 U.S. 358 (1970) (relying on history and societal interests to support its finding).

[287] *Albright*, 510 U.S. at 296 (Stevens, J., dissenting). "Consistent with our reasoning in *Winship*, these factors lead to the conclusion that one element of the 'due process' prescribed by the Fourteenth Amendment is a responsible decision that there is probable cause to prosecute." *Id.* (Stevens, J., dissenting).

[288] *Id.* at 297-98 (Stevens, J., dissenting).

[289] *Id.* at 298 (Stevens, J., dissenting).

because it was tainted and unsupported by reliable evidence.[290] Justice Stevens concluded that compliance with valid procedures by a state for the initiation of a criminal prosecution would not, by itself, preserve a conviction based upon false evidence.[291]

In Justice Stevens' view, the plurality's analysis suffered "two glaring flaws."[292] First, the Fifth Amendment, rather than the Fourth Amendment, protects the type of pretrial deprivation of liberty challenged in this case.[293] Second, he faulted the plurality for claiming that the Due Process Clause is limited by the specific guarantees contained within the Bill of Rights.[294] As Justice Stevens noted, the view taken by the plurality was previously adopted by Justice Black in his dissenting opinion in *Adamson v. California*,[295] which advanced his theory that the Due Process Clause incorporated the entire Bill of Rights and "that the express guarantees of the Bill of Rights mark the outer limit of Due Process protection."[296] That position had never been accepted by a majority of the Supreme Court.[297] Rather, the Court has recognized certain violations of the Due Process Clause not specifically delineated within the Bill of Rights.[298]

Justice Stevens agreed with Justice Ginsburg's view that the seizure of Albright was unreasonable within the meaning of the Fourth Amendment.[299] However, he questioned Justice

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[290] *Id.* (Stevens, J., dissenting). Albright argued that the determination as to probable cause was invalid because "it was wholly unsupported by reliable evidence and tainted by Oliver's disregard or suppression of facts bearing on the reliability of his informant." *Id.* (Stevens, J., dissenting).

[291] *Id.* at 299 (Stevens, J., dissenting). "Even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which 'no rational trier of fact' could base a finding of probable cause . . . simply does not comport with the requirements of the Due Process Clause." *Id.* at 300 (Stevens, J., dissenting) (citations omitted).

[292] *Id.* at 302 (Stevens, J., dissenting).

[293] *Id.* (Stevens, J., dissenting).

[294] *Id.* at 303 (Stevens, J., dissenting).

[295] 332 U.S. 46 (1947)

[296] *Albright*, 510 U.S. at 303 (Stevens, J., dissenting).

[297] *Id.* (Stevens, J., dissenting).

[298] *Id.* at 304 (Stevens, J., dissenting).

[299] *Id.* at 307 (Stevens, J., dissenting).

Ginsburg's conclusion that the complaint should be dismissed.[300] Justice Stevens asserted that waiver of Albright's Fourth Amendment "seizure" claim should not preclude the availability of a Fifth Amendment claim for injuries arising from the initiation of a baseless criminal proceeding against him.[301]

Justice Stevens found Justice Kennedy's reliance on *Parratt v. Taylor* unpersuasive.[302] Justice Stevens viewed *Parratt* as "limited to situations in which no constitutional violation occurs."[303] Justice Stevens distinguished *Parratt*, noting that *Parratt* involved the negligent act of state officials, specifically, "a type of ordinary tort that can be committed by anyone."[304]

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[300] *Id.* (Stevens, J., dissenting).

[301] *Id.* at 309 (Stevens, J., dissenting). The dissent stated "[b]ecause the constitutional protection against unfounded accusations is distinct from, and somewhat broader than, the protection against unreasonable seizures, there is no reason why an abandonment of a claim based upon seizure should constitute a waiver." *Id.* (Stevens, J., dissenting). The dissent reasoned that "the scope of the Fourth Amendment protection does not fully encompass the liberty interest at stake – as in this case – it is both unwise and unfair to place a bidder on the lens that focuses on the specific right being asserted." *Id.* (Stevens, J., dissenting). Justice Stevens criticized Justice Souter's concurrence for implying that Albright's claim would require the Court to "break new ground" and "enter unchartered territory." *Id.* at 310-11 (Stevens, J., dissenting). Noting the "stark" contrast between the claims in *Albright* and *Collins*, Justice Stevens criticized Justice Souter's reliance on *Collins*, stating petitioners claim in *Collins* was "unprecedented." *Id.* at 310 (Stevens, J., dissenting). *See also* Collins v. Harker Heights, 503 U.S. 115 (1992). According to Justice Stevens, Albright's claim to be free from prosecution without probable cause has existed since the days of the Magna Carta. *Albright*, 510 U.S. at 310-11 (Stevens, J., dissenting).

> The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

Id. at 311 (Stevens, J., dissenting) (quoting Jones v. Robbins, 74 Mass. 329, 344 (1857)).

[302] *Id.* at 313 (Stevens, J., dissenting).

[303] *Id.* at 313-15 (Stevens, J., dissenting).

[304] *Id.* at 313 (Stevens, J., dissenting).

Justice Stevens found *Parratt* inapplicable to deprivations of property or liberty that are officially authorized.[305] The dissent argued that Albright was specifically denied his constitutional rights when the state intentionally subjected him to criminal prosecution, depriving him of his liberty interest under the Constitution.[306] Therefore, Justice Stevens concluded "[t]he remedy for a violation of the Fourteenth Amendment Due Process Clause provided by Section 1983 is not limited, as Justice Kennedy posits . . . to cases in which the injury has been caused by 'a state law, policy, or procedure.'"[307] Rather, "Section 1983 provides a cause of action against '[e]very person' who under color of state authority causes the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'"[308]

In sum, *Albright* produced six different opinions covering a wide variety of different issues. The common theme that runs through the plurality and concurring opinions is that substantive due process is not available in a claim such as Albright's, when

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[305] *Id.* (Stevens, J., dissenting). The dissent opined:

> The rationale of [*Parratt*] is inapplicable to this case whether one views the claim at issue as substantive or procedural. If one views the petitioner's claim as one of substantive due process, *Parratt* is categorically inapplicable . . . Conversely, if one views his claim as one of procedural due process, is also inapplicable, because its rationale does not apply to officially authorized deprivations of liberty or property.

Id. (Stevens, J., dissenting) (citations omitted).

[306] *Id.* at 314 (Stevens, J., dissenting). "Petitioner was subjected to criminal charges by an affirmative, deliberate act of a state official. The filing of criminal charges is effectuated through established state procedures under which government agent, such as respondent Oliver, are authorized to act." *Id.* at 314 (Stevens, J., dissenting).

[307] *Id.* at 315 (Stevens, J., dissenting).

[308] *Id.* (Stevens, J., dissenting). In his dissent, Justice Kennedy concluded by noting the diversity of opinions by the Court and the fact that none of them reject his contention that "the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime." *Id.* at 316 (Stevens, J., dissenting).

the claim is adequately covered under another constitutional amendment.[309]

V. TREATMENT BY LOWER FEDERAL COURTS OF MALICIOUS PROSECUTION CASES IN THE AFTERMATH OF *ALBRIGHT*

A. The Lower Courts

The circuits were in conflict pre-*Albright* and remain so post-*Albright*. The general quandary is exemplified by the conflicting decisions even within some circuits since the Supreme Court's decision in *Albright*. [310] One court noted that "in many ways *Albright* muddied the waters rather than clarified them."[311]

In the wake of *Albright*, the First Circuit held that a malicious prosecution claim based upon substantive due process is no longer available under Section 1983.[312] Prior First Circuit decisions limited reliance on substantive due process in malicious prosecution claims.[313] Under *Torres*, a Section 1983 malicious prosecution claim based upon a substantive due process deprivation must have alleged "conscience shocking" conduct by the defendant.[314] However, since *Albright*, this standard is no

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[309] *Id.* at 275.

[310] *See generally* 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (3d ed. 1997). *Compare* Singer v. Fulton County Sheriff, 63 F.3d 110, 116 (2d Cir. 1995) (holding that while common law tort actions may parallel constitutional claims, "it is only the violation of the constitutional right that is actionable and compensable under Section 1983") *with* Cook v. Sheldon, 41 F.3d 73, 79 (2d Cir. 1994) (holding that "though Section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law.").

[311] Taylor v. Meacham, 82 F.3d 1556, 1561 n.5 (10th Cir. 1996).

[312] *See, e.g.*, Roche v. John Hancock Mutual Life insurance Company, 81 F.3d 249 (1st Cir. 1996); Perez-Ruiz v. Crespo-Guillen, 25 F.3d 40 (1st Cir. 1994).

[313] Torres v. Superintendent of Police of Puerto Rico, 893 F.2d 404 (1st Cir. 1990).

[314] *Id.* at 410.

longer applicable.[315] In *Perez-Ruiz v. Crespo-Guillen*,[316] the First Circuit ruled that "*Albright* would appear virtually to foreclose reliance on substantive due process as the basis for a viable malicious prosecution claim under Section 1983 - superseding even *Torres*' very limited tolerance of reliance on substantive due process in this area."[317] Additionally, the Court held that a Section 1983 procedural due process claim is not available unless there are no adequate state remedies.[318] Similarly, in *Roche v. John Hancock Mutual Life Ins. Co.*,[319] the First Circuit addressed

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[315] *See, e.g., Perez-Ruiz*, 25 F.3d at 42. *But see* Hall v. Gonfrade, 36 F.3d 1089 (Table) 1994 WL 527165 (1st Cir. Sept. 29, 1994). In *Hall*, an unpublished opinion, the Court applied pre-*Albright* analysis. *Id.* at *2. The court stated that in order to state a claim for malicious prosecution based upon substantive due process, an individual must allege "conscience shocking" conduct. *Id.* However, the court noted that *Albright* appears "to foreclose reliance on substantive due process as a basis for a viable malicious prosecution claim under section 1983." *Id.* at *3 n.4. (citations omitted).

[316] 25 F.3d 40 (1st Cir. 1994). In *Perez-Ruiz*, two individuals, Perez and Lopez, were arrested on separate incidents and charged with the crime of selling cocaine. *Id.* at 41. After Perez was acquitted and the charges against Lopez were dropped, they brought § 1983 claims against various officials and officers of the Commonwealth of Puerto Rico asserting various claims, including malicious prosecution. *Id.* Perez and Lopez complained of a large conspiracy against them. *Id.* Relying on *Torres*, the district court rejected the malicious prosecution claim, reasoning that plaintiff's had failed to assert conduct that could be characterized as "conscience shocking." *Id.* (citations omitted). The First Circuit affirmed, supporting its conclusion with the *Albright* decision. *Id.*

[317] *Id.* at 42.

[318] *Id.* at 42-43. In *Perez-Ruiz*, the court rejected appellants procedural due process claim reasoning that the law in the Commonwealth of Puerto Rico provided appellants with an adequate state remedy. *Id.* at 43.

[319] 81 F.3d 249 (1st Cir. 1996). In *Roche*, a former employee brought a malicious prosecution claim under § 1983 against his former employer after his employer submitted information to authorities regarding allegations of suspected wrongdoing by the employee. *Id.* at 252-53. In 1991, John Hancock Mutual Life Ins. Co. fired about 450 workers including Daniel J. Roche. *Id.* at 251. A day later a senior vice-president began receiving threatening phone calls. *Id.* The police investigation led nowhere and Roche was rehired in February, 1992. *Id.* Thereafter, in March, 1992, the anonymous phone calls resumed *Id.* Several people along with a voice analysis firm identified the caller's voice as that of Roche's. *Id.* Relying on

the availability of Section 1983 to remedy a claim for malicious prosecution.[320] The First Circuit held that "there is no substantive due process right under the Fourteenth Amendment to be free from malicious prosecution."[321] The Court noted that *Albright* left unresolved whether such a claim would be available under the Fourth Amendment.[322]

After *Albright*, it was unclear in the Third Circuit whether a malicious prosecution claim, even under the Fourth Amendment, was viable.[323] Prior to *Albright* the Third Circuit had what was termed as the "most expansive approach" to such claims.[324] The impact of *Albright* upon Third Circuit jurisprudence was unclear and the district courts had no clear direction from the Third Circuit.[325] However, in *Gallo v. City of Philadelphia*,[326] the

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this information, the police procured a warrant for Roche's arrest. *Id.* at 252. Roche was later charged with threatening to murder the vice-president, threatening to harm his family, and making harassing calls. *Id.* After the jury acquitted, Roche brought a civil rights suit. *Id.* at 253.

[320] *Id.* at 256.

[321] *Id.*

[322] *Id.* at 256 n.5. Nevertheless, the court did not address any Fourth Amendment claim, characterizing it as "virgin territory." *Id.* The Court noted that "[e]ven assuming the vitality of such an approach, the existence of probable cause vitiates any arguable Fourth Amendment claim." *Id.*

[323] *See* Barna v. City of Perth Amboy, 42 F.3d 809 (1994).

[324] Albright v. Oliver, 510 U.S. 266, 270 n.4 (1994).

[325] *See, e.g.*, Smith v. Holtz, 856 F. Supp. 227, 236 (M.D. Pa. 1994) (noting in dicta that the issue was still unresolved; whether a malicious prosecution claim could exist under the Fourth Amendment); Miller v. City of Philadelphia, 954 F. Supp. 1056, 1065 (E.D. Pa. 1997) (discussing how *Albright* failed to provide the courts with clear guidance and citing district court decisions reaching results on both sides of the issue. *See also* Barna v. City of Perth Amboy, 42 F.3d 809 (1994). In *Barna*, the plaintiffs appealed the granting of summary judgment on their Section 1983 false arrest claims brought against police officers. *Id.* at 812. Plaintiffs also argued that their complaint contained a claim for malicious prosecution. *Id.* at 812, n.2. The Third Circuit concluded that the malicious prosecution claim was not submitted to the district court and therefore, not properly before the Court of Appeals. *Id.* at 812. The court avoided addressing *Albright*, noting "we have no occasion to consider what effect the Supreme Court's decision in *Albright* . . . has on our circuit jurisprudence." *Id.* *See also* Hilfirty v. Shipman, 91 F.3d 573 (3d Cir. 1996). In *Hilfirty*, the Third Circuit ignored

Third Circuit, addressing a malicious prosecution claim brought under Section 1983, discussed the impact of *Albright*. Relying on *Albright* and *Singer v. Fulton*,[327] the Third Circuit held that a plaintiff asserting a claim for malicious prosecution must show "some deprivation of liberty consistent with the concept of 'seizure.'"[328] Adopting Justice Ginsburg's "continued seizure" theory, the court held that intentional restrictions imposed on Gallos' liberty, including travel restrictions and mandatory court appearances over an eight and a half-month period, qualified as a seizure.[329]

Albright and reinstated the analysis of malicious prosecution that had existed prior to *Albright*. *Id.* at 579. The opinion failed to discuss *Albright* or the applicable constitutional provisions from which the malicious prosecution claim derives. *Id.* The court stated that in order to state a prima facie claim for malicious prosecution under Section 1983, a plaintiff "must establish the element of the common law tort as it developed over time." *Id.* at 575. The Third Circuit disagreed with the district court's conclusion that the grant of *nolle prosequi* was not a favorable termination of the criminal proceedings reasoning as follows:

> Where a party authorizes her co-defendant to enter into a compromise agreement providing for the dismissal of her criminal charges and she offers no consideration in exchange for such dismissal, she will not have been found to have relinquished her right to file a malicious prosecution claim unless it is plain from the record of a hearing in open court or a written release-dismissal agreement that such relinquishment was knowing, intentional and voluntary.

Id. at 583-84. The court concluded that the grant of *nolle prosequi* did not deprive Miller of the right to pursue her malicious prosecution claim. *Id.* at 584-85.

[326] 161 F.3d 217 (3d Cir. 1998). Following acquittal on charges of arson, Gallo brought a § 1983 action against the officials who were responsible for investigating his case, alleging malicious prosecution. *Id.* at 218.

[327] 63 F.3d 110 (2d Cir. 1995). For a detail discussion of *Singer*, *see infra* notes 416-437 and accompanying text.

[328] *Gallo*, 161 F.3d at 222.

[329] *Id.* at 225. *See also* Torres v. McLaughlin, 163 F.3d 169 (3d Cir. 1998) (holding that a § 1983 claim for malicious prosecution may be based on constitutional provisions other than the Fourth Amendment.) The *Torres* court, however, found that a post-conviction incarceration was not a seizure with in the Fourth Amendment. *Id.* at 174.

The Fourth Circuit held that under *Albright*, the Fourteenth Amendment's substantive due process protection does not afford an individual a remedy for malicious prosecution without probable cause.[330] Several cases which have addressed the issue have recognized that under some circumstances the Fourth Amendment guarantees that an individual has the right to be free from malicious prosecution.[331] In *Wilkes v. Young*, the Fourth Circuit held that a claim alleging that an individual was prosecuted in the absence of probable cause "can only be judged upon the Fourth Amendment."[332] However, in that case, the Fourth Circuit found no violation of the Fourth Amendment.[333] In *Wilkes*, the plaintiff brought a Section 1983 claim arising from her arrest for failure to appear in Magistrate's Court.[334]

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[330] Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996) (stating that the Fourteenth Amendment fails to provide substantive due process protection in the area of malicious prosecution); Wilkes v. Young, 28 F.3d 1362, 1364 n.2 (4th Cir. 1994) (following *Albright's* holding that an individual contending malicious prosecution without probable cause has no claim under the Fourteenth Amendment).

[331] Riley v. Dorton, 115 F.3d 1159 (1997); Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996); Wilkes v. Young, 28 F.3d 1362 (4th Cir. 1994).

[332] *Wilkes*, 28 F.3d at 1364 n.2.

[333] *Id.* at 1363.

[334] *Id.* In *Wilkes*, Gloria Wilkes' car was ticketed when her daughter illegally parked Wilkes' car in a fire lane in front of the Florence County Public Services Building. *Id.* As a result of the summons, Wilkes was required to appear in magistrate court. *Id.* When Wilkes failed to appear in court, the magistrate instructed LeGrand Young, an employee of the Florence County Building and Grounds Department, to prepare an affidavit. *Id.* at 1363-63. The affidavit stated that Wilkes had failed to report to court as required by the ticket that she received for illegally parking in a fire lane. *Id.* Thereafter, Wilkes was arrested under a warrant charging her with a state criminal offense of "willful failure to appear in Magistrate Court following arrest and release." *Id.* at 1368 (Phillips, J., dissenting). The basis of the warrant was the affidavit which contained several misleading statements, including the fact that Wilkes had been properly served with the summons to appear in Magistrate Court. *Id.* (Phillips, J. dissenting). Wilkes, a grandmother, was fingerprinted, photographed and detained for several hours, during which she "suffered humiliation from the taunts of fellow inmates and significant physical harm resulting from the exacerbation of preexisting diabetic and coronary

Specifically, plaintiff argued that her Fourth Amendment rights were violated when an allegedly false affidavit was submitted in support of the warrant for her arrest.[335] The Court held that plaintiff had failed to prove a Fourth Amendment violation, reasoning that a misleading statement contained in an affidavit does not establish a violation of an individual's Fourth Amendment rights "unless the statement is 'necessary to the finding of probable cause.'"[336] The court concluded that the evidence, including the uncontroverted facts set forth in the affidavit, established probable cause.[337]

In *Brooks v. City of Winston-Salem*,[338] the Fourth Circuit ruled that allegations that a police officer's seizure "pursuant to legal process was not supported by probable cause and that the criminal proceedings terminated in his favor are sufficient to state a Section 1983 for malicious prosecution claim alleging a seizure that was violative of the Fourth Amendment."[339]

In order to prevail on a Section 1983 claim of malicious prosecution, the Fifth Circuit held that a plaintiff must establish a violation of Fourth Amendment rights.[340] Additionally, malicious

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conditions." *Id.* (Phillips, J., dissenting). Ultimately, the charges against her were dismissed. *Id.* at 1364.

[335] *Id.* at 1364.

[336] *Id.* at 1365 (quoting Franks v. Delaware, 438 U.S. 154, 156 (1978)).

[337] *Id.* In his dissent, Justice Phillips opined:

> [t]his case provides a prime example of a law-abiding citizen's being left at the mercy of low-level official caprice, callous inattention, and deliberate indifference by a judicial willingness to relax the fundamental requirements, apparently out of some overriding sense that there simply is not that much at stake here – either for this plaintiff or for the Fourth Amendment.

Id. at 1376 (Phillips, J. dissenting).

[338] 85 F.3d 178 (4th Cir. 1996).

[339] *Id.* at 183-84. Larry Jerome Brooks was arrested and prosecuted on state criminal charges, including rape and kidnapping. *Id.* at 180. Brooks proclaimed his innocence and offered to submit to DNA and polygraph testing. *Id.* Ultimately, the charges against Brooks were dropped. *Id.* Three years later Brooks filed a § 1983 claim alleging violations of his Fourth, Fifth, and Fourteenth Amendment rights. *Id.*

[340] Johnson v. Louisiana Dep't of Agriculture, 18 F.3d 318, 320 (5th Cir. 1994).

prosecution claims under Section 1983 are considered under the Fourth Amendment's "reasonableness" standard.[341] In *Johnson v. Louisiana Dep't of Agriculture*,[342] the Fifth Circuit avoided confronting *Albright* where a plaintiff failed to satisfy an element of the common law tort of malicious prosecution.[343] In *Johnson*, the court addressed a claim for malicious prosecution in violation of the First Amendment.[344] The court determined that it was "far from clear" whether the Constitution recognizes any such claim.[345] Therefore, the court held that in order to prevail on this type of claim an individual must, "at the very least," allege a deprivation of a constitutional right and establish that all of the elements of the common law tort have been satisfied.[346] As the plaintiff had failed to prove that the underlying criminal proceeding had terminated in his favor, the court did not address the issue.[347] The court noted that *Albright* "casts a shadow on all prior cases" in the circuit which deal with malicious prosecution claims.[348]

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[341] Blackwell v. Barton, 34 F.3d 298, 303 (5th Cir. 1994).

[342] 18 F.3d 318 (5th Cir. 1994)

[343] *Id.* at 320-21.

[344] *Id.* at 320. *Johnson* involved a civil rights action brought by Donald Johnson, a crop duster, against Louisiana state officials who allegedly sanctioned him several times and eventually revoked his license and certification to apply pesticides. *Id.* at 319-20. Johnson argued that the Department of Agriculture continuously sanctioned him because he refused to give a large enough contribution to the Agricultural Commissioner's reelection campaign. *Id.* at 320. Moreover, Johnson claimed that the department fabricated illegal evidence against him in order to facilitate adjudicating him guilty of violating Louisiana pesticide laws. *Id.* at 319. As a result of the increasingly severe penalties against him, Johnson's cropdusting career ended. *Id.* at 319-20.

[345] *Id.*

[346] *Id.*

[347] *Id.* at 321. After the charges were brought against him, The Louisiana Advisory Committee on Pesticide held hearings on several occasions and recommended that penalties be assessed against Johnson. *Id.* at 319. Thereafter, Johnson "appealed five of his administrative penalties and four ended in a decrease in punishment." *Id.* at 321. Accordingly, the Fifth Circuit refused to recognize Johnson's claim because "none of the appeals ended with a finding of not guilty." *Id.*

[348] *Id.* at 321 n.2.

In *Brothers v. Klevenhagen,*[349] the Fifth Circuit held that "a pretrial detainee receives the protection of the Due Process Clause of the Fourteenth Amendment."[350] In a footnote, the court distinguished the facts in *Albright*[351] and further commented that "that portion of *Albright* that suggests that the Fourth Amendment applies to pretrial deprivations of liberty did not receive the support of a majority of the Justices."[352]

In *Eugene v. Alief,*[353] the Fifth Circuit attempted to clarify *Albright* when it held that a malicious prosecution claim based upon an alleged violation of the Fourth Amendment was a viable cause of action.[354] The court interpreted *Albright* as rejecting reliance on the Fourteenth Amendment for pre-trial deprivations, such as malicious prosecution.[355] Further, in *Morin v. Caire,*[356] the Fifth Circuit addressed a claim arising under the Fourteenth Amendment and stated that "the Supreme Court has recently determined that there is no substantive due process right to be free from criminal prosecution except upon probable cause."[357]

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[349] 28 F.3d 452 (5th Cir. 1994). In *Brothers*, family members of a felony suspect who was shot and killed while attempting to escape from custody, filed suit against the county and its sheriff alleging excessive force and a violation of § 1983. *Id.* at 454.

[350] *Id.* at 455-56 (citing Valencia v. Wiggens, 981 F.2d 1440 (5th Cir. 1993)).

[351] *Id.* at 456 n.3. "Albright was an individual complaining of an arrest warrant and prosecution without probable cause. That scenario is far different from a pretrial detainee escaping from custody." *Id.*

[352] *Id.*

[353] 65 F.3d 1299 (5th Cir. 1995). *Eugene* involved a parent who alleged that the school district that her son attended violated her civil rights after a security guard at the school arrested her. *Id.* at 1302.

[354] *Id.* at 1303-04.

[355] *Id.* at 1303.

[356] 77 F.3d 116 (5th Cir. 1996). In *Morin*, plaintiffs remained in prison for 21 months in connection with the homicide of one of their partners. *Id.* at 119. Ultimately, the charges were dropped and plaintiffs brought a federal civil rights action against the arresting officer. *Id.* In their complaint, plaintiffs allege violations of their rights under the Fourth, Fifth, Eighth and Fourteenth Amendment together with state law tort claims of malicious prosecution, false imprisonment and abuse of process. *Id.*

[357] *Id.* at 120 (citing Albright v. Oliver, 510 U.S. 266 (1994)).

Since *Albright*, the Sixth Circuit has recognized a Section 1983 claim for malicious prosecution alleging violations of the Fourth Amendment.[358] The Sixth Circuit addressed the question in *Moore v. Hayes*.[359] In *Moore*, the plaintiff's Section 1983 claim alleged malicious prosecution in violation of the Fourth, Fifth and Fourteenth Amendment.[360] The court considered potential testimony which would have established probable cause and affirmed the district court's dismissal of plaintiff's Section 1983 claim for malicious prosecution.[361] The court reasoned that *Albright* held that such a claim must be analyzed under the Fourth Amendment and must allege "either the absence of probable cause or specific instances of prosecutorial misconduct which, if proven, would negate probable cause."[362]

Following *Albright*, the Seventh Circuit in *Smart v. Board of Trustees of University of Illinois*,[363] recognized a federal claim for malicious prosecution under the Fourth Amendment.[364] The Seventh Circuit, interpreting the *Albright* decision, stated that if

> malicious prosecution or abuse of process is committed by state actors and results in the arrest or other seizure

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[358] *See* Smith v. Williams, 78 F.3d 585 (table), 1996 WL 99329 (6th Cir. 1996). In *Smith*, the Sixth Circuit rejected plaintiff's Fourteenth Amendment claim for malicious prosecution, but recognized plaintiff's Fourth Amendment claim. *Id.* at *4-5. The court acknowledged that prior to *Albright* the Sixth Circuit had recognized substantive due process claims for malicious prosecution. *Id.* at *4. However, the court recognized that *Albright* held that such a claim must be analyzed under the Fourth Amendment, rather than the Fourteenth Amendment. *Id.* *See also* Donavan v. Thames, 105 F.3d 291 (6th Cir. 1997) (discussing *Albright* and noting that under Kentucky law, "a claim for warrantless arrest without probable cause cannot be brought as a malicious prosecution claim.").

[359] 83 F.3d 422 (table), 1996 WL 200282 (6th Cir. 1996).

[360] *Id.* at *2.

[361] *Id.* at *4.

[362] *Id.*

[363] 34 F.3d 432 (7th Cir. 1994). *Smart* involved a § 1983 claim brought by an unsuccessful applicant for an academic position with a state university, alleging that the university funded a lawsuit brought against him for defamation, thereby infringing upon his freedom of speech. *Id.* at 433.

[364] *Id.* at 434.

> of the defendant, there is an infringement of liberty, but we now know that the defendant's only constitutional remedy is under the Fourth Amendment (as made applicable to the states by the Fourteenth), and not under the due process clause directly.[365]

In *Esmail v. Macrane*,[366] the Seventh Circuit explained that to state a claim for malicious prosecution under Section 1983 plaintiff must prove that "the action taken by the state, whether in form of prosecution or otherwise, was a spiteful effort to 'get' him for reasons wholly unrelated to any legitimate state objective."[367] In *Reed v. City of Chicago*,[368] the Seventh Circuit avoided a "struggle with *Albright*" and dismissed plaintiff's malicious prosecution claim.[369] Finding no claim for malicious

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[365] *Id.* (citing Albright v. Oliver, 510 U.S. 266 (1994)).

[366] 53 F.3d 176 (7th Cir. 1995). In *Esmail*, the plaintiff, the owner of a liquor store in Illinois, claimed a violation of his equal protection rights after he had been harassed by the mayor. *Id.* at 177. The plaintiff alleged that the defendant repeatedly attempted to deny him his liquor licenses and caused the police to harass him. *Id.* While the plaintiff did not pursue a First Amendment retaliation claim, he did challenge the mayor's actions as a denial of his Fourteenth Amendment right to equal protection. *Id.* at 178.

[367] *Id.* at 180. In an opinion authored by Judge Richard Posner, the Seventh Circuit acknowledged the plaintiff's § 1983 claim as arising under the Fourteenth Amendment. *Id.* The court determined that plaintiff's case was not the common type of equal protection case. *Id.* at 178. Nevertheless, the court concluded that unequal treatment does not necessarily violate equal protection except "where the decision to prosecute is made either in retaliation for the exercise of a constitutional right." *Id.* at 179.

[368] 77 F.3d 1049 (7th Cir. 1996). *Reed* involved a § 1983 claim brought by an arrestee who had been indicted on first degree murder charges and held for approximately 23 months until his acquittal. *Id.* at 1050. Plaintiff sued the City of Chicago and certain police detectives, alleging that he was arrested and detained without probable cause. *Id.* at 1051.

[369] *Id.* at 1053 (holding that the lower court dismissed plaintiff's malicious prosecution claim because he "failed to maneuver around the *Albright* minefield."). It should be noted that the court recognized a federal malicious prosecution claim. *Id.* at 1051. The court stated "[t]o state a claim for malicious prosecution under section 1983, a plaintiff must demonstrate that (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and

prosecution, the court reasoned that plaintiff had failed to allege that the detectives committed any type of improper acts, such as withholding exculpatory evidence of perjured testimony, after arresting him without probable cause.[370] In a similar case, *Washington v. Summerville*,[371] the Seventh Circuit held that an individual asserting a claim for malicious prosecution under Section 1983 must "first clear the preliminary hurdle" of stating a cognizable violation of federal law.[372]

Recently, in *Sneed v. Rybicki*,[373] the Seventh Circuit affirmed the dismissal of plaintiff's malicious prosecution claim brought under Section 1983.[374] Plaintiff was arrested and convicted for first degree murder.[375] Ultimately, the conviction was reversed and the charges against him were dismissed.[376] Plaintiff sued under Section 1983 for false arrest and malicious prosecution.[377] In concluding that plaintiff had failed to state a cause of action for malicious prosecution, the court discussed the distinction between false arrest claims and malicious prosecution claims.[378] Both

(3) he was deprived of liberty." *Id.* (citing Smart v. Board of Trustees of University of Illinois, 34 F.3d 432 (7th Cir. 1994)).

[370] *Id.* at 1053. "It is conceivable that a wrongful arrest could be the first step towards a malicious prosecution. However, the chain of causation is broken by an indictment, absent an allegation of pressure or influence exerted by the police officers, or knowing misstatements made by the officers to the prosecutor." *Id.* at 1053. *See also* Sneed v. Rybicki, 146 F.3d 478 (7th Cir. 1998); Spiegel v. Rabinovitz, 121 F.3d 251 (7th Cir. 1997).

[371] 127 F.3d 552 (7th Cir. 1997). In *Washington*, an arrestee filed a § 1983 claim after the State Attorney's *nolle porsequi*'s motion was entered in an underlying murder prosecution. *Id.* at 554.

[372] *Id.* at 599. The court found that the accused did not have a cognizable federal malicious prosecution claim. *Id.*

[373] 146 F.3d 478 (7th Cir. 1998).

[374] *Id.* at 482.

[375] *Id.* at 480.

[376] *Id.* The Illinois Appellate Court reversed plaintiff's conviction and remanded because there was no probable cause for the arrest. *Id.*

[377] *Id.* The district court dismissed the § 1983 false arrest claim as barred by the two year statute of limitations. *Id.* The district court dismissed the § 1983 malicious prosecution claim for failure to state a cause of action. *Id.* On appeal, plaintiff only contested the dismissal of the malicious prosecution claim. *Id.*

[378] *Id.* at 481.

claims have the same two-year statute of limitations, which begins to run when all of the elements of the claim can be pleaded.[379] However, a false arrest claim begins to run the day of the arrest, while a malicious prosecution claim does not begin to run until the criminal proceedings are terminated in favor of the plaintiff.[380] The court explained that "a plaintiff whose false arrest claim is time-barred may well still have a viable claim for malicious prosecution, but he must plead malicious prosecution instead of using that label to navigate around the statute of limitations."[381] The court concluded that plaintiff had failed to allege any improper acts or wrongdoing after his arrest.[382] His blanket statement that he was maliciously prosecuted was insufficient to state a claim for malicious prosecution under Section 1983.

The Ninth Circuit continues to adhere to its pre-*Albright* analysis. In *Haupt v. Dillard*,[383] the Ninth Circuit affirmed the district court's dismissal of the plaintiff's federal malicious prosecution claim.[384] The court reiterated the standard set forth by the district court and concluded that to state a claim for malicious prosecution under Section 1983, plaintiff must prove both a deprivation of a constitutionally protected right together with all of the elements of the state tort law.[385] However, the court did not address the malicious prosecution claim because

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[379] *Id.*

[380] *Id.*

[381] *Id.* Therefore, an individual who "alleges only that he was arrested and detained without probable cause has only pled false arrest." *Id.* A plaintiff must allege "some action that supports the conclusion that a malicious prosecution occurred." *Id.*

[382] *Id.* The court reasoned that plaintiff had not "alleged that 'detectives gave perjured testimony,' or 'falsified any information or evidence'. . . [n]or did he allege that police withheld exculpatory evidence." *Id.*

[383] 17 F.3d 285 (9th Cir. 1994). In *Haupt*, plaintiff, a criminal defendant who was acquitted on charges of kidnapping and murder, brought an action in federal court under § 1983 claim. *Id.* at 287. Plaintiff's claim included malicious prosecution, unreasonable search and seizure, and right to a fair and impartial trial. *Id.*

[384] *Id.* at 290.

[385] *Id.*

plaintiff had failed to satisfy the requisite elements of the state tort, specifically, lack of probable cause.[386] Citing the *Albright* decision, the court noted that the constitutional foundation for a malicious prosecution claim brought under Section 1983 "is a matter of dispute."[387] In *Freeman v. City of Santa Anna*,[388] the Ninth Circuit rejected plaintiff's malicious prosecution claim without discussing *Albright*.[389] The court relied on pre-*Albright* decisions when it stated that a claim for malicious prosecution may exist when the plaintiff proves "that the defendants prosecuted her with malice and without probable cause, and that they did so for the purpose of denying her equal protection or another specific constitutional right."[390]

The Tenth Circuit recognizes Section 1983 claims based upon malicious prosecution.[391] Prior to *Albright*, the Tenth Circuit had not been consistent on this issue. While some decisions required only the common law element of malicious prosecution, others required "egregious misuse of legal procedure."[392] However,

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[386] *Id.*

[387] *Id.* at 290 n.4.

[388] 68 F.3d 1180 (9th Cir. 1995). *Freeman* involved a suit brought by a bar/restaurant owner against the City of Santa Anna, California and several police officers, for alleged constitutional violations. *Id.* at 1184. Plaintiff alleged that her bar/restaurant was subjected to discriminatory and unfair enforcement efforts by the police officers. *Id.*

[389] *Id.* at 1189.

[390] *Id.* (citing Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) (en banc); Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981)). The court found that plaintiff had not satisfied this burden because she was unable to prove lack of probable cause. *Id.* *See also* Cline v. Brusett, 661 F.2d 108 (9th Cir. 1981). In *Cline*, the Ninth Circuit held:

> The general rule is that malicious prosecution does not constitute a deprivation of life, liberty or property without due process of law and, therefore, is not cognizable under 42 U.S.C. § 1983. However, an exception to this rule exists for malicious prosecution conducted with the intent of denying a person equal protection or which otherwise subject a person to a denial of constitutional rights.

Id. at 112 (citations omitted).

[391] *See, e.g.*, Taylor v. Meacham, 82 F.3d 1556 (10th Cir. 1996); Wolford v. Lasater, 78 F.3d 484 (10th Cir. 1996).

[392] *Compare* Anthony v. Baker, 767 F.2d 657 (10th Cir. 1985) *with* Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1990).

since *Albright*, the Tenth Circuit has recognized that a claim for malicious prosecution under Section 1983 does not "implicate" substantive due process.[393] As the Tenth Circuit stated in *Taylor v. Meacham*,[394] the common law elements of malicious prosecution are the "starting point" for the court's analysis of a malicious prosecution claim under Section 1983, but ultimately, the plaintiff must prove a constitutional violation.[395] In *Taylor*, the court affirmed the dismissal of plaintiff's malicious prosecution claim under Section 1983, finding no constitutional

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[393] Taylor v. Meacham, 82 F.3d 1556, 1561 n.3 (10th Cir. 1996) (recognizing that a § 1983 claim may be brought against County government for malicious prosecution if the prosecution involves a constitutional violation). Nevertheless, the court noted that "*Albright* muddied the waters rather than clarified them." *Id.* at 1561 n.5.

[394] 82 F.3d 1556 (10th Cir. 1996). In *Taylor*, plaintiff was arrested and charged with first degree murder. *Id.* at 1558. After DNA results from evidence found at the scene of the crime did not match plaintiff's DNA, the charges were dropped against him. *Id.* at 1559. Thereafter, plaintiff brought a § 1983 claim for wrongful arrest and malicious prosecution, alleging that his wrongful arrest and detention "constituted an unreasonable seizure and deprivation of his liberty, in violation of the Fourth, Fifth and Fourteenth Amendments." *Id.* at 1558. Plaintiff argued lack of probable cause and that the decision to charge him with the twenty year old murder was done with "reckless disregard of the actual facts and included willful misstatements of facts and lies to individuals who were interviewed." *Id.* at 1559.

[395] *Id.* at 1561. The court concluded:

> [O]ur circuit takes the common law elements of malicious prosecution as the 'starting point' for the analysis of a § 1983 malicious prosecution claim but always reaches the ultimate question, which it must, of whether the plaintiff has proven a constitutional violation . . . that right is the Fourth Amendment's right to be free from unreasonable seizures.

Id. *See also* Gaschler v. Scott County, Kansas, 141 F.3d 1184 (Table), 1998 WL 161045 (10th Cir. Kan.) (affirming the dismissal of plaintiff's claim for malicious prosecution brought under § 1983 because plaintiff was unable to prove that the defendants acted with malice and without probable cause); Klein v. Coblentz, 132 F.3d 42 (Table), 1997 WL 767538 (10th Cir. Colo.) (stating that in order to maintain a malicious prosecution claim brought pursuant to § 1983, plaintiff must allege "facts tending to prove the common law elements of malicious prosecution and that his Fourth Amendment right to be free from unreasonable seizure has been violated.").

violation.[396] In *Wolford v. Lasater*,[397] the Tenth Circuit held that a claim of malicious prosecution brought under the Fourteenth Amendment was not viable.[398] Although, the Tenth Circuit recognized plaintiff's malicious prosecution claim brought under the Fourth Amendment,[399] the court, nevertheless, dismissed the Fourth Amendment claim.[400]

In *Tinney v. Shores*,[401] the Eleventh Circuit cast doubt on the availability of a malicious prosecution claim brought under Section 1983 for violations of substantive and procedural due process.[402] However, in *Whiting v. Taylor*,[403] the Eleventh Circuit recognized a Section 1983 claim for a malicious prosecution claim in violation of the Fourth Amendment.[404] In *Whiting*, plaintiff, a boat owner, brought a Section 1983 claim against Marine patrol officers after the officers seized his boat for failing to display registration decals, obtained a warrant for his arrest on the charge of "obstructing officers without violence" and thereafter arrested him again.[405] Plaintiff alleged that he was

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[396] *Id.* at 1563. The court reasoned that any inaccuracies contained on the arrest warrant along with any information that may have been omitted, would not have changed the determination that probable cause existed. *Id.* at 1562.

[397] 78 F.3d 484 (10th Cir.1996). In *Wolford*, a former secretary for the Sheriff of San Juan County was arrested and charged with embezzling county funds and forging the former sheriff's signature. *Id.* at 486-87. Following her acquittal on both of the charges, she filed a § 1983 action against several county officials alleging that she had been arrested unconstitutionally and charged without probable cause in retaliation for supporting the former sheriff and filing notice of tort claim. *Id.* at 487.

[398] *Id.* at 489-90.

[399] *Id.* at 489.

[400] *Id.* The court reasoned that the affidavit submitted in support of the arrest warrant contained adequate facts to "demonstrate a substantial probability that plaintiff committed" the crimes of forgery, intent to defraud and embezzlement and that any false testimony provided to the grand jury was not material to the probable cause determination. *Id.*

[401] 77 F.3d 378 (11th Cir. 1996).

[402] *Id.* at 381.

[403] 85 F.3d 581 (11th Cir. 1996).

[404] *Id.* at 586.

[405] *Id.* at 583. Some of the charges against plaintiff were *nol prossed* by the state attorney and the others were dismissed by the state court judge. *Id.* In his order, the state court judge found that plaintiff had been harassed by the

"maliciously prosecuted in violation of his Fourth Amendment rights."[406] The court held that "no independent Fourth Amendment right exists to be free from malicious prosecution."[407] The court also noted that "referring to a federal 'right' to be free from malicious prosecution is actually a description of the right to be free from an unlawful seizure which is part of a prosecution."[408] The court concluded that plaintiff had in fact stated three possible unlawful seizures which properly formed the basis for a claim brought under Section 1983.[409]

B. Malicious Prosecution Developments in the Second Circuit

"Second Circuit decisional law provides an instructive example of the need for reevaluation in light of *Albright*."[410]

Prior to *Albright*, the Second Circuit recognized malicious prosecution claims brought pursuant to Section 1983 for deprivation of the Fourteenth Amendment due process

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defendants and prosecuting attorney through "gross incompetence or by intention." *Id.*

[406] *Id.* at 584. Plaintiff believed that the marine officials made false statements on a citation and arrest affidavits, falsified public records, backdated documents and kept or destroyed or caused to be destroyed plaintiff's personal property. *Id.* at 583.

[407] *Id.* at 584. In a footnote, the court referred to *Albright*'s holding that "no 'substantive' due process exists to be free from a malicious prosecution." *Id.* at 584 n.3. However, the court also noted that *Albright* "left open the question of whether such a claim could be based on the Fourth Amendment or the due process clause's procedural component." *Id.*

[408] *Id.* at 584 n.4. Therefore, the court determined that plaintiff could avoid a dismissal of his claim if he based it "on some actual unlawful, forcible, restraint of his person." *Id.* at 584.

[409] *Id.* The three possible unlawful seizures alleged by the plaintiff included "his surrender following the issuance of the arrest warrant, his arrest as he left the courtroom, and his being required to appear to answer the charges after being released on bond." *Id.*

[410] 1A MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.20 at 322 (3d ed. 1997).

guarantees.[411] The Second Circuit held that the common-law elements of the state tort of malicious prosecution give rise to a constitutional claim brought under Section 1983.[412] Following the Supreme Court's decision in *Albright*, the Second Circuit continued to adhere to the view that the elements of the constitutional tort analogous to malicious prosecution would be borrowed from the state law cause of action.[413]

In *Cook v. Sheldon*,[414] decided several months after the Supreme Court's decision in *Albright*, the Second Circuit was faced with its first major malicious prosecution case. In *Cook*, the plaintiff alleged that state troopers had arranged a fraudulent arraignment and thereafter allowed him to remain in prison to exact retribution.[415] After the charges against him were dropped, plaintiff brought a Section 1983 action in federal court alleging "false arrest, malicious prosecution, and malicious abuse of process."[416] Affirming the dismissal of defendant's motion for summary judgement, the court held that the malicious prosecution claim alleged a violation of plaintiff's established federal rights.[417]

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[411] *See, e.g.*, Singleton v. New York, 632 F.2d 185 (2d Cir. 1980); White v. Frank, 855 F.2d 956 (2d Cir. 1988).

[412] *See, e.g.*, Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992); Raysor v. Port Authority of New York and New Jersey, 768 F.2d (Cir. 1985). Under New York law, the elements of a claim for malicious prosecution include: (1) the commencement or continuation of a criminal proceeding, (2) the termination of that proceeding in favor of the plaintiff, (3) the absence of probable cause for the criminal proceeding, and (4) actual malice. Cook v. Sheldon, 41 F.3d 73, 79 (2d Cir. 1994).

[413] *See* Cook v. Sheldon, 41 F.3d 73 (2d Cir. 1994) ("Section 1983 liability may . . . be anchored in a claim for malicious prosecution, as this tort 'typically implicates constitutional rights secured by the fourteenth amendment, such as deprivation of liberty.'") (citations omitted).

[414] 41 F.3d 73 (2d Cir. 1994).

[415] *Id.* at 75. Plaintiff was charged with illegal possession of a car without a Vehicle Identification Number, a felony under New York law. *Id.* at 76.

[416] *Id.* at 77. Plaintiff argued that "the Troopers arrested him without probable cause" because they were "outraged" that he should advise his friend, who was also being interrogated, to remain silent and request the assistance of an attorney. *Id.*

[417] Id. at 79. Defendants argued that they were entitled to qualified immunity because they had probable cause to effectuate plaintiff's arrest. *Id.* at 75.

Totally disregarding *Albright*, the Second Circuit relied on state tort law to find the elements of malicious prosecution.[418] Furthermore, the court recognized malicious abuse of criminal process as actionable under Section 1983, relying on state law to define the specific elements of such a claim.[419] The court reasoned that:

> The torts of malicious prosecution and abuse of process are closely allied. While malicious prosecution concerns the improper issuance of process, '[t]he gist of abuse of process is the improper use of process after it is regularly issued.' . . . Since this circuit already recognizes malicious prosecution claims under section 1983 . . . it should extend that recognition to the tort's close cousin, abuse of criminal process.[420]

Shortly thereafter in *Pinaud v. County of Suffolk*,[421] the Second Circuit once again presumed that the pre-*Albright* decisions were controlling.[422] In *Pinaud*, plaintiff served a 28-month prison sentence for a state conviction for which the charges against him were eventually dismissed.[423] Thereafter, plaintiff brought a civil rights action against the district attorneys alleging, among other

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[418] *Id.* at 79. "Though Section 1983 provides the federal claim, we borrow the elements of the underlying malicious prosecution tort from state law." *Id.* (citing Raysor v. Port Authority of New York and New Jersey, 768 F.2d 34, 39 (2d Cir. 1985)). The court found that plaintiff had demonstrated all of the elements of the tort: "(1) The Troopers had commenced a criminal proceeding against him . . . (2) the proceedings ended in the plaintiff's favor, (3) the defendant did not have probable cause to believe plaintiff was guilty . . . and (4) the defendant acted with actual malice." *Id.*

[419] *Id.* at 80. The question of whether the Second Circuit would recognize the tort of malicious abuse of criminal process was one of first impression. *Id.* at 79.

[420] *Id.* at 80 (citations omitted).

[421] 52 F.3d 1139 (2d Cir. 1995).

[422] *Id.* at 1154.

[423] *Id.* at 1143. Plaintiff was led to believe that "when he pleaded guilty to this state charge that a contemporaneous federal sentence would be reduced by 828 days that he ultimately served on the vacated state conviction, [plaintiff] was in fact denied any federal credit for that time." *Id.*

things, malicious prosecution.[424] Admitting its reluctance to confront *Albright*, the Second Circuit found that plaintiff failed to state a claim for malicious prosecution because plaintiff had not satisfied the pre-*Albright* requirements for malicious prosecution.[425] In its attempt to avoid confrontation with *Albright* the court stated:

> Tempted as we are to try to clarify the law in this area in the wake of the many questions left unanswered by the Supreme Court's fragmented ruling in *Albright*, we nonetheless conclude that this is not the case in which to struggle with the meaning of *Albright*. The District Court found that Pinaud had not stated a claim under our pre-*Albright* malicious prosecution decisions. And the parties have not discussed *Albright* at all and therefore seem to assume that our pre-*Albright* decisions are controlling in this case. Under these circumstances, given that no claim has been made that any of the pre-*Albright* requirements for a malicious prosecution claim that are involved here have been eliminated by *Albright*, we think it appropriate to await another case - one in which the parties have addressed the impact of *Albright* and in which the issue is necessarily determinative - to explore that case's effect on Section 1983 malicious prosecution claims.[426]

The Second Circuit took its first stab at developing the principles set forth in *Albright* in *Singer v. Fulton County Sheriff*.[427] In *Singer*, the Second Circuit, in interpreting *Albright*, recognized that "the Fourteenth Amendment right to substantive

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[424] *Id.* Plaintiff claimed that "his travails were the result of an 'out-of-court' ploy among a group of district attorneys for the County of Suffolk." *Id.*

[425] *Id.* at 1154. The court held that plaintiff had failed to state a claim for malicious prosecution because "the dismissal of the charges against him 'was not indicative of his innocence and therefore was not a favorable termination' under New York law." *Id.* (citations omitted).

[426] *Id.* (footnote omitted).

[427] 63 F.3d 110 (2d Cir. 1995).

due process will not support a federal claim for malicious prosecution; however, *Albright* does not bar [plaintiff] from asserting a federal claim for malicious prosecution under the Fourth Amendment."[428] In *Singer*, the plaintiff Daniel Singer, was employed by the New York State Department of Environmental Conservation as a ranger.[429] In October, 1991, on his way to join a local search and rescue party,[430] Singer stopped at a local convenience shop to get supplies.[431] Singer gave the clerk a list of products that he was taking and advised him that he would return after the search to pay for items taken.[432] The clerk claimed that he never consented to the arrangement.[433] Shortly thereafter, Singer was arrested and charged with petit larceny.[434] The charges against Singer were later dismissed.[435] Singer then filed an action in federal district court alleging malicious prosecution, conspiracy to violate civil rights, and false arrest

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[428] *Id.* at 114.

[429] *Id.* at 112. Additionally, Singer was involved in local politics and was characterized as having the "ability to influence public opinion." *Id.* He published a local newsletter called The Northville Free Press, which provided Singer with a forum to criticize the local village government. *Id.* The newsletter was free of charge and available at local shops, including Stewart's Ice Cream Shop. *Id.*

[430] The search party was formed to search for a missing hunter. *Id.*

[431] *Id.* at 113. Singer drove to Stewart's Ice Cream Shop to get the food supplies. *Id.*

[432] *Id.* The total worth of the merchandise taken by Singer was $11.55, which consisted of bread, ham, cheese and pepperoni. *Id.* at 113 n.2.

[433] *Id.* at 113. After Singer left the shop, the store clerk telephoned the store manager to inform her that Singer left the shop without paying for merchandise. *Id.* Two hours later, the Deputy Sheriff arrived at the shop, where he interviewed the store clerk and store manager and had the store clerk sign an information alleging that Singer stole merchandise from the shop. *Id.* Based upon this information, the Deputy Sheriff went to Singer's home to arrest him. *Id.*

[434] *Id.*

[435] *Id.* The court noted that "a transcript of the November 19 status hearing reflects that the judge dismissed the charges in 'the interests of justice,' because the prosecution was unable to locate its primary witness . . . and therefore could not assure the court the case could be tried on the scheduled date." *Id.*

pursuant to Section 1983 and a malicious prosecution claim under state law.[436]

The court began its analysis by setting forth the principle that once an individual presents a Section 1983 claim for malicious prosecution, the court must employ a two step inquiry.[437] First, the court must determine "whether the defendant's conduct was tortious."[438] Second, the court must determine "whether the plaintiff's injuries were caused by the deprivation of liberty guaranteed by the Fourth Amendment."[439] Discussing the second inquiry first, the court stated that "[t]he Fourth Amendment right implicated in a malicious prosecution action is the right to be free of unreasonable seizure of the person – i.e., the right to be free of unreasonable or unwarranted restraints on personal liberty."[440] Therefore, an individual asserting a malicious prosecution claim under Section 1983, must "show some deprivation of liberty consistent with the concept of 'seizure.'"[441] Moreover, the seizure "must have been effected 'pursuant to legal process.'"[442] This "legal process" is often in the form of an arrest warrant or a subsequent arraignment.[443]

The court concluded that Singer's arrest was not "pursuant to legal process" and could not serve as the "predicate deprivation of liberty" because his arrest was made without a warrant and it occurred before an arraignment.[444] The court assumed *arguendo* that Singer's release after his arraignment could have constituted a "seizure."[445] The court noted that nothing in the record indicated any "deprivation of liberty," such as the requirement to

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[436] *Id.* at 113-14.

[437] *Id.* at 116.

[438] *Id.*

[439] *Id.*

[440] *Id.*

[441] *Id.*

[442] *Id.* at 116-17 (citing Heck v. Humphrey, 512 U.S. 477, 483 (1994)).

[443] *Id.* at 117. "Therefore, to successfully pursue a § 1983 claim of malicious prosecution in violation of his Fourth Amendment rights, Singer must show some post-arraignment deprivation of liberty that rises to the level of a constitutional violation." *Id.*

[444] *Id.*

[445] *Id.*

post bail or an inability to travel freely.[446] The court rejected Singer's claim because he failed to establish one of the state tort elements of malicious prosecution.[447] Specifically, the court found that the dismissal of the charges against Singer by the State Court "in the interests of justice" was not favorable to support Singer's malicious prosecution claim.[448]

In *Lennon v. Miller*,[449] a case addressing false arrest, malicious prosecution and excessive force, the Second Circuit held that police officers were entitled to qualified immunity on all of the three claims.[450] Mr. Lennon, whose prior threats to his wife, Mrs. Lennon ["plaintiff"], had been reported by her to the police, sought to obtain possession of a car from her.[451] Plaintiff called the police who determined that Mr. Lennon had a right to take possession of the car.[452] Police officers asked plaintiff to get out of the car in which she was sitting.[453] Plaintiff refused and in order to place her under arrest for "obstructing governmental administration," the defendants forcibly removed her from the vehicle.[454] After the charges against her were dropped,[455] plaintiff

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[446] *Id.*

[447] *Id.* at 118. The court stated that "[a]t common law, 'an accused, in order to maintain a cause of action for malicious prosecution, must establish that the state prosecution terminated in his favor.'" *Id.* (citing Singleton v. City of New York, 632 F.2d 285, 193 (2d Cir. 1980)).

[448] *Id.* "'[A]s a matter of law, [a dismissal in the interests of justice] cannot provide the favorable termination required as the basis for a claim of malicious prosecution.'" *Id.* (citing Hygh v. Jacobs, 961 F.2d 359, 368 (2d Cir. 1992).

[449] 66 F.3d 416 (2d Cir. 2995).

[450] *Id.* at 426.

[451] *Id.* at 419. Mr. and Mrs. Lennon were having marital problems and were living separately at the time of this dispute. *Id.* at 418-19.

[452] *Id.* at 419.

[453] *Id.*

[454] *Id.*

[455] *Id.* at 420. The Criminal Court dismissed the charges stating:

> If the officer believed that the defendant's possession of the vehicle was wrongful he should have arrested the defendant for Unauthorized Use of a Vehicle or Larceny of the Vehicle . . . . Since the officer did not arrest the defendant for any crime in connection with her possession of the vehicle, the officer had no

brought this action against the police officers under Section 1983.[456] The District Court denied defendants' motion for summary judgment on qualified immunity grounds.[457] The Court of Appeals reversed, finding the officers entitled to qualified immunity on the claims.[458]

Just one month later, in *Russell v. Smith*,[459] the Second Circuit addressed another malicious prosecution case. Once again, the court adhered to its belief that malicious prosecution claims asserted under Section 1983 are governed by state law.[460] *Russell* involved a plaintiff who had been charged with a second-degree murder.[461] Following the dismissal of the indictment "with leave

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authority to remove the defendant from the vehicle and the charge of Obstructing Governmental Administration cannot stand.

Id. at 419.

[456] Plaintiff argued that she was arrested and charged with a crime without probable cause, in violation of her rights under the Fourth Amendment. *Id.* It should be noted that although plaintiff referred to her claim as a violation of her Fourteenth Amendment rights, her complaint also identified the Fourth Amendment as a source of her claims. *Id.* at 423 n.2. Therefore, relying on *Albright*, the court construed plaintiff's allegation, that she was arrested without probable cause, as Fourth Amendment claims. *Id.*

[457] *Id.* at 420.

[458] *Id* at 426. When addressing the test for qualified immunity, the court made two observations. *Id.* at 422-23. First, "the availability of qualified immunity does not turn on whether the defendants violated the plaintiff's rights; qualified immunity is a defense." *Id.* at 423. Second, the "objective standard" does not demand the presence of clearly established constitutional rights, but an objectively reasonable belief by the defendants that their actions did not violate that right. *Id.* Applying these principles to the case, the court found that it was objectively reasonable for the officers to conclude that they had probable cause to believe that plaintiff obstructed governmental administration. *Id.* at 425. The court applied the identical standard for qualified immunity under malicious prosecution claims as it did under the false arrest claim. *Id.* at 425. "That is, was it objectively reasonable for the officers to believe that probable cause existed or could officers of reasonable competence disagree on whether the probable cause test was met." *Id.* (quoting Golino v. City of New Haven, 950 F.2d 864, 870 (2d Cir. 1991)).

[459] 68 F.3d 33 (2d Cir. 1995).

[460] *Id.* at 36.

[461] *Id.* at 34.

to re-present,"[462] plaintiff commenced a malicious prosecution claim under Section 1983 against the police officers and the City of New York.[463] Without referring to *Albright*, the court looked at the common law elements of malicious prosecution when considering plaintiff's claim.[464] The court concluded that plaintiff had failed to establish one of the elements of the common law tort, specifically, that the prior proceeding was terminated in plaintiff's favor.[465] Dismissal of the indictment with leave to re-present was not considered a favorable termination.[466]

The Second Circuit expanded the principles set forth in *Albright* in *Murphy v. Lynn*.[467] In *Murphy*, the court expanded the concept of a deprivation of liberty that is required for purposes of a Fourth Amendment malicious prosecution claim.[468] Relying on Justice Ginsburg's concurrence in *Albright*, the court held that restrictions imposed on an accused's ability to travel outside the state, together with required court appearances, constituted a seizure within the scope of the Fourth Amendment.[469] Plaintiff, Ernesto Murphy, was arrested and charged with disorderly conduct, resisting arrest, and felony assault arising from a traffic stop.[470] After his arraignment, Murphy was released on his own recognizance with a condition that he remain in the state while the charges against him were pending and return to court when

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[462] *Id.* Prior to his trial, the witness who had implicated plaintiff in the homicides recanted his testimony. *Id.* Accordingly, the state court dismissed the indictment "with leave to re-present." *Id.*

[463] *Id.*

[464] *Id.* at 36.

[465] *Id.* at 37. The court reasoned that because the state court dismissed the indictment against plaintiff "with leave to re-present," the state still had the ability to reinstate the murder charges against plaintiff. *Id.*

[466] *Id.* at 36. The court recognized that when a criminal proceeding is not terminated in such a manner that establishes either innocence or guilt, the "plaintiff must show that the final disposition is indicative of innocence." *Id.* Nevertheless, plaintiff was unable to prove that the "dismissal was indicative of innocence, or that the prosecution was subsequently abandoned." *Id.* at 37.

[467] 118 F.3d 938 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 1051 (1998).

[468] *Id.* at 944.

[469] *Id.* at 946.

[470] *Id.* at 941-42.

required to do so.[471] Subsequently, the indictment was dismissed due to a violation of Murphy's right to a speedy trial.[472] Plaintiff commenced a Section 1983 action for false arrest, use of excessive force, and malicious prosecution in violation of his First, Fourth, Fifth and Fourteenth Amendment rights.[473] Murphy appealed the dismissal of the malicious prosecution claim and the Second Circuit reversed and remanded.[474] Following a trial, a verdict was returned in plaintiff's favor.[475] The defendants appealed, arguing that the conditions imposed on plaintiff did not "implicate rights under the Fourth Amendment."[476] Furthermore, the defendants maintained that the dismissal based upon a violation of speedy trial, did not constitute a "termination of the criminal proceeding in favor of the accused."[477]

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[471] *Id.* at 942.

[472] *Id.* at 943.

[473] *Id.* Plaintiff commenced the action against two police officers, the police department, the police chief and the Town of Clarkstown. *Id*

[474] *Id.* The district court dismissed plaintiff's claims as barred by the statute of limitations. *Id.* Thereafter, the Second Department reversed the dismissal of the malicious prosecution claim noting that the statue of limitations "had not accrued until the criminal charges against Murphy were dismissed in December, 1990 and hence were asserted within the three-year period." *Id. See also* Murphy v. Lynn, 53 F.3d 547 (2d Cir. 1995), *cert. denied,* 118 S. Ct. 1051 (1998).

[475] *Murphy*, 118 F.3d at 943. The claims against the Town, the police department, and the police chief were dismissed. *Id.* However, the claims against the police officers were presented to the jury. *Id.* The jury instructions were as follows:

> In order to succeed on a malicious prosecution claim under § 1983, Murphy was required to prove (1) '[t]he commencement or the continuance of a criminal proceeding by a defendant against the plaintiff,' (2) 'the termination of that proceeding in favor of the plaintiff,' (3) 'the absence of probable cause for the proceeding,' (4) 'actual malice on the part of the person acting,' and (5) 'a post-arraignment deprivation of liberty guaranteed by the constitution.'

Id.

[476] *Id.* at 944.

[477] *Id.*

The Second Circuit rejected the defendants' argument and affirmed.[478] Noting that liberty deprivations regulated by the Fourth Amendment are not limited to "physical detention," the court held that a restriction on out-of-state travel imposed as a condition for release and an obligation to appear in court, constitute Fourth Amendment "seizure."[479] The court reasoned:

> while a state has the undoubted authority in connection with a criminal proceeding, to restrict a properly accused citizen's constitutional right to travel outside of the state as a condition of his pretrial release, and may order him to make periodic appearances, such conditions are appropriately viewed as seizures within the meaning of the Fourth Amendment.[480]

The condition imposed upon Murphy was "an obvious curtailment of his otherwise unquestionable constitutional right to travel outside the state."[481]

In *Robinson v. Cattaraugus County*,[482] the Second Circuit again addressed a malicious prosecution claim. Following an undercover investigation, plaintiffs Robinson and Shine were charged with possession and sale of cocaine.[483] Robinson pleaded guilty and served a two-year prison term as a result of his guilty plea.[484] Following a bench trial, Shine was found guilty.[485] The Appellate Division reversed Shine's conviction finding "sheer lawlessness", "egregious misconduct" and "conduct repugnant to

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[478] *Id.*

[479] *Id.* at 946.

[480] *Id.*

[481] *Id.* Additionally, the court noted that during the year in which the charges were pending Murphy was required to appear in court eight times. *Id.* Therefore, the court rejected the defendant's argument concluding that "the restrictions imposed upon Murphy constituted a seizure within the meaning of the Fourth Amendment." *Id.*

[482] 147 F.3d 153 (2d Cir. 1998).

[483] *Id.* at 157.

[484] *Id.*

[485] *Id.* at 158.

a sense of justice" on the part of the two arresting officers.[486] The court reasoned that the police officer's "violent and intimidating conduct" of "demanding entry to a person's home in the middle of the night, displaying a gun and demanding drugs," deprived plaintiff of due process.[487]

Following the reversal, Robinson and Shine filed a Section 1983 action and alleged Fourth Amendment violations; additionally, Shine alleged malicious prosecution.[488] At trial, the jury determined that Robinson and Shine's constitutional rights were violated and that the defendants were not entitled to qualified immunity.[489] However, the court awarded low damages to Shine and no damages to Robinson. Moreover, the jury rejected Shine's malicious prosecution claim.[490] A motion for a new trial was denied.[491]

On appeal, plaintiffs argued, among other things, that the jury findings were "against the weight of the evidence,"[492] and that the

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[486] *Id.* As part of an undercover operation, two police officers frequented a pub located in Cattaraugus County in an effort to find narcotics dealers. *Id.* at 156. Every week for several months, the officers would ask Robinson, one of three black residents, for drugs. *Id.* On every occasion he responded that he had no drugs and knew of no source. *Id.* Believing that he was being harassed because he was black, Robinson decided to sell the officers a bag filed with sugar for $200.00. *Id.* at 157. Several weeks later, the officers went to the pub and got Robinson's address from one of the pub patrons. *Id.* The officers represented themselves as car thieves and told the patron that Robinson had "ripped them off and they were going to teach that nigger a lesson." *Id.* That night, the officers entered Robinson's home, held Robinson and Shine at gunpoint, searched the occupants and took two bags of cocaine and $75.00 from Shine's pocket. *Id.*

[487] *Id.* "Defendant did not seek out the officers to sell drugs to them and the meager evidence that defendant may have been involved in the prior sale to the officers of powdered sugar rather than cocaine hardly supports a finding of 'ongoing criminal activity.'" *Id.* (citing People v. Shine, 187 A.D.2d 950, 951, 590 N.Y.S.2d 965, 965-66 (4th Dep't. 1992)).

[488] *Id.* at 159. Shine died before the trial. *Id.*

[489] *Id.*

[490] *Id.*

[491] *Id.* at 158.

[492] *Id.* at 159. Plaintiffs argue that they were entitled to a new trial on the issue of damages because the evidence proved that they were detained and terrorized in the house and they should have been compensated for pain and

supplemental instructions to the jury were improper.[493] On the malicious prosecution claim, Shine contended that the jury was improperly instructed that the grand jury indictment of Shine "constituted probable cause," and that the text of the decision of the Appellate Division should have been introduced into evidence.[494] Without citing or addressing *Albright*, the Second Circuit affirmed, finding "no basis for reversal."[495] The court stated that:

> [i]n order to prevail on a claim for malicious prosecution, a plaintiff must show that the civil defendant initiated or caused the institution of proceedings against the plaintiff without probable cause, that the proceedings were commenced against him with malice on the part of the civil defendant, and that those proceedings terminated in the plaintiff's favor.[496]

The court found with regard to the first element, that the jury was instructed that the grand jury indictment was "evidence of probable cause," rebuttable by proof that the police officers

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suffering. As they did not receive sufficient damages, they argued that the jury acted improperly "against the weight of the evidence." *Id.* The court rejected this argument reasoning that the denial of a new trial by the District Court "on the ground that the jury verdict was against the weight of the evidence is not reviewable on appeal." *Id.* at 160.

[493] *Id.* at 159. Plaintiffs' contended that the original jury instructions failed to indicate that punitive damages were proper even without compensatory damages. *Id.* at 161. The court found that the instructions contained plain error by failing to instruct the jury that if a constitutional violation was found the jury "must award at least nominal damages." *Id.* at 162. However, the plain error was cured because the court entered judgment awarding the plaintiffs each $1.00 as nominal damages. *Id.* Additionally, plaintiffs argued that the supplemental instructions dissuaded jurors from awarding punitive damages. *Id.* at 161. The court rejected this argument finding that there was no indication that the court "conveyed a suggestion that the jury should not award punitive damages." *Id.* at 161-62.

[494] *Id.* at 159.

[495] *Id.* at 160.

[496] *Id.* at 163 (citing Russel v. Smith, 68 F.3d 33 (2d Cir. 1995); Broughton v. State, 37 N.Y.2d 451, 335 N.E.2d 310, 373 N.Y.S.2d 87 (1975)).

misrepresented, concealed or falsified evidence.[497] There was no evidence that the jury was told that the indictment created a "conclusive presumption of probable cause."[498] With regard to the introduction of the Appellate Division opinion into evidence, the court noted that even if it would have been appropriate to give the jury the opinion, the opinion did not address whether probable cause existed to indict.[499] The court noted that the Appellate Division relied upon due process in reversing the conviction, not the absence of probable cause.[500]

VI. THE PRACTICAL RELEVANCE OF *ALBRIGHT*

Without clear guidance from the Supreme Court, approaches by the lower courts to malicious prosecution under Section 1983 have been inconsistent. What we see as a result of *Albright* is that some lower courts are attempting to interpret *Albright*, while others are totally avoiding confronting it[501] and even ignoring it.[502] However, given the diversity of opinions in *Albright*, it is no wonder that the lower courts have been struggling with *Albright*. It is not easy to analyze the decisions in *Albright*. In fact, the "splintered decision" indicates that the Justices themselves were in disagreement on how substantive due process claims should be addressed. It appears that the "embarrassing diversity of judicial opinion" that Chief Justice Rehnquist had attempted to combat continues, notwithstanding the Court's ineffectual attempt to end the conflict.

It is clear that the Court in *Albright* attempted to limit the scope of substantive due process.[503] But, in so doing, has the Court employed any convenient means to accomplish this goal? Apparently, the Court has employed an indirect means to

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[497] *Id.*

[498] *Id.* at 163.

[499] *Id.* at 163-64 (citing United States v. McCormack, 829 F.2d 322 (2d Cir. 1987)).

[500] *Id.*

[501] *See, e.g.*, Pinaud v. County of Suffolk, 52 F.3d 1139 (2d Cir. 1995).

[502] *See, e.g.*, Cook v. Sheldon, 41 F.3d 73 (2d Cir. 1994).

[503] Albright v. Oliver, 510 U.S. 266, 273 (1994).

accomplish its objective by both ignoring precedent and misinterpreting precedent.[504] As a consequence, the lower courts continue to struggle with this issue and conflicting decisions within the many circuits continue to arise.

Prior to *Albright*, some lower courts recognized a Section 1983 claim for malicious prosecution claim under the doctrine of substantive due process.[505] Then along came *Albright,* which held that substantive due process is not the proper method for evaluating claims of prosecution without probable cause.[506] Instead, the analysis shifted to the Fourth Amendment with its own undefined parameters.[507] Had the plurality addressed the claim under the Fourth Amendment, perhaps the lower courts would have some guidance.[508] However, since Albright did not argue a Fourth Amendment violation in his Section 1983 claim,

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[504] *See Albright*, 510 U.S. at 305 (Stevens, J., dissenting). In his dissent, Justice Stevens argued that Chief Justice Rehnquist and Justice Scalia read the Court's opinion in *Graham v. Connor* "more broadly than our actual holding." *Id.* (Stevens, J., dissenting). According to Justice Stevens, Justice Souter's reliance on *Collins v. Harker Heights* was improper. *Id.* at 310 (Stevens, J., dissenting). Justice Stevens also criticized Justice Kennedy's reliance on *Parratt v. Taylor* as unfounded, noting that "the *Parratt* doctrine is also inapplicable here because it does not apply to cases in which the constitutional deprivation is complete when the tort occurs." *Id.* at 314 n. 34 (Stevens, J., dissenting). *See also Albright*, 510 U.S. at 286-87 (Souter, J., concurring). In his opinion:

> The Court has previously rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one.

Id. at 286 (Souter, J., concurring) (citing United States v. James Daniel Good Real Property, 50 U.S. 43 (1993)). According to Justice Souter, precedent requires the Court to "examine each constitutional provision in turn." *Id.* at 287 (Souter, J., concurring).

[505] *See supra* text accompanying notes 148-200.

[506] *Albright*, 510 U.S. at 273-74.

[507] *Id.* at 274.

[508] *Id.* at 275.

the *Albright* court did not address such a claim under the Fourth Amendment.[509] Thus the Court left the cause of action unclear.

The plurality did appear to agree on one concept, that substantive due process is not available to an individual where a specific constitutional amendment provides a remedy for a violation.[510] This central theme rests on the Court's prior decisions in *Graham v. Connor*[511] and *Collins v. City of Harker Heights*.[512] The Court relied upon *Collins* for its holding that "'the Court has been reluctant to expand the concept of substantive due process because the guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended.'"[513] The Court also looked to *Graham*, for its proposition that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"[514]

The *Albright* Court relied on *Graham* to ensure that substantive due process is reserved for protecting rights "relating to marriage, family procreation, and the right to bodily integrity,"[515] and on *Collins* to avoid substantive due process as much as possible.[516] Accordingly, the Court was able to dispose of *Albright*'s substantive due process claim because his alleged violation was not within those categories and because the guideposts in the "uncharted area" of substantive due process are "scarce and open-ended."[517]

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[509] *Id.* "We express no view as to whether petitioner's claim would succeed under the Fourth Amendment, since he has not presented that question in his petition for certiorari." *Id.*

[510] *Id.* at 273.

[511] 490 U.S. 386 (1989).

[512] 503 U.S. 115 (1992).

[513] *Albright*, 510 U.S. at 271-72 (citing *Collins*, 503 U.S. at 125).

[514] *Id.* at 273 (citing *Graham*, 490 U.S. at 395).

[515] *Id.* at 272.

[516] *Id.*

[517] *Id.* at 271-74.

Can we really fault the court for its reluctance to expand substantive due process? Hasn't the Court been highly criticized with every attempt it has made to expand the doctrine?[518] On the other hand, hasn't the court on many occasions ventured into "uncharted areas"?[519]

So where does that leave the Supreme Court's decision in *Albright* today? The Justices in *Albright* lead us in different directions. Under Justice Kennedy's expanded interpretation of *Parratt v. Taylor*, some lower courts believe that whenever an adequate state remedy exists, the federal Section 1983 claim must be denied. However, Justice Kennedy's interpretation of *Parratt* is misplaced because *Parratt* and *Albright* involve totally different types of due process claims. According to Professor Martin Schwartz, Justice Kennedy misread *Parratt* because the *Parratt* Doctrine "encompasses a narrow range of procedural due process claims – specifically, those arising out of random and unauthorized official conduct."[520] Extending *Parratt* to alleged violations of substantive constitutional rights would place in jeopardy the Supreme Court's ruling in *Monroe v. Pape*,[521] that a federal remedy for a Section 1983 claim exists notwithstanding any available state remedies.[522]

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[518] *See* Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI-KENT L. REV. 617, 637 (1997) (stating that the doctrine of substantive due process has "gotten the Court into more trouble than any other for over a century, from *Scott v. Sandford*, to *Lochner v. New York*, through the Court's retreat from *Lochner* in the 1930's, and on to *Roe v. Wade* and the controversy that continues to rage over that case."). *See also* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857); Lochner v. New York, 198 U.S. 45 (1905); Roe v. Wade, 410 U.S. 113 (1973).

[519] *See* Wells, *supra* note 518, at 643. *See also* Graham v. Connor, 490 U.S. 386 (1989).

[520] 1A, MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.20 at 319-21 (3ed. 1997). *See also* Zinermon v. Burch, 494 U.S. 113 (1990).

[521] 65 U.S. 167 (1961).

[522] *See id. See also* Treece v. City of Naperville, No. 94 C 5548, 1998 WL 142391, at *5 (N.D.Ill. March 25, 1998) (rejecting defendant's argument that adequate state remedies exist for a malicious prosecution claim).

Justice Stevens would have extended relief to *Albright* under a substantive due process violation analysis. Justice Stevens believed that the filing of baseless criminal charges is violative of substantive due process because it is a deprivation of liberty. Justice Souter left open the possibility that substantive due process may be available under different circumstances. However, according to Justice Souter, there is no need to expand substantive due process if doing so would duplicate specific constitutional protections already provided. Finally, some courts find persuasive Justice Ginsburg's "continuing seizure" theory.[523]

Was the flaw in *Albright* its holding or the method by which the holding was reasoned? Some writers believe that *Albright* was decided correctly, but opine that the disturbing nature of *Albright* lies in the Court's strained reading of *Graham*.[524] One writer, James Lank, argues that the plurality's interpretation of *Graham* "may emerge as a powerful tool in disposing of future substantive due process claims."[525] According to Lank:

> [t]he court has fashioned a powerful tool that can be used to avoid considering substantive due process claims, but has done so at the expense of judicial credibility, in relying upon a strained reading of *Graham*. If substantive due process is to be limited, the best means short of disavowing it entirely may be to adopt Justice Scalia's explicit and categorical restriction of the

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[523] *See, e.g.*, Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997) (relying on Justice Ginsburg's concurring opinion in *Albright* to hold that restrictions on the ability of a defendant to travel together with the requirement that he attend court appointments constituted a seizure within the meaning of the Fourth Amendment); Beberaggi v. New York City Transit Authority, No. 93 Civ. 1737, 1994 WL 75144, at *5 (S.D.N.Y. March 9, 1994) (relying on Justice Ginsburg's opinion in *Albright)*; Cyprus v. Diskin, 936 F. Supp 259, 263 n.3 (E.D.Pa 1996) (noting Justice Ginsburg's "persuasive observations" in *Albright*); *but see* Wilkins v. May, 872 F.2d 190, 194 (7th Cir. 1989) (rejecting Justice Ginsburg's "continuing seizure" theory).

[524] James Lank, *The Graham Doctrine as a Weapon against Substantive Due Process: Albright v. Oliver*, 114 S. Ct. 807(1994), 17 HARV. J.L. & PUB. POL'Y, 918, 925 (1994).

[525] *Id.* at 929.

> doctrine, under which no new due process rights, which would impose further restriction on the States' criminal processes, may be asserted. Although this approach does not mesh with all of the Court's due process jurisprudence, it has the virtue of being straightforward and final. [526]

Others believe that *Albright* was decided incorrectly.[527] They believe that constitutional torts are "built around substantive due process."[528] According to Michael Wells, "*Albright* . . . seems to be a product of the Court's preference for the 'specifics' of the Bill of Rights."[529] Wells believes that "[i]f the Court meant that one may sue only for an illegal arrest, then the effect of its ruling is to deny constitutional protection to the interest in being free of badly motivated prosecutions in the absence of incarceration."[530] In his opinion:

> the central aim of constitutional tort should be to protect the broad range of common law interests encompassed within the Fourteenth Amendment 'liberty,' in circumstances where the official's conduct is fairly characterized as an abuse of power. The appropriate doctrinal category is substantive due process, however uncomfortable the Court may be with that doctrine. The Court ought either cast its lot with the critics of substantive due process, or else face them down. If the Justices believe that they may not make the law, then constitutional tort doctrine must be jettisoned in any event, along with a wide range of other constitutional doctrines. But, if they think, as their holding seems to indicate, that creative judicial rule making is sometimes appropriate and that tort law is an area meeting the

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[526] *Id.*
[527] *See* Wells, *supra* note 518, at 637.
[528] *Id.* at 639.
[529] *Id.*
[530] *Id.* at 648-49.

> criteria for judicial invention, then the proper course is to say so, and to offer real justifications rather than the false ones found in many of the opinions. The legitimacy of judicial law making turns not on whether the Court can avoid references to substantive due process as much as possible, but on whether it can offer persuasive reasons grounded in constitutional values for its creative work.[531]

Albright offers little direction and no clear guidance in resolving the question of whether malicious prosecution is actionable under Section 1983. Had Albright interposed a clear Fourth Amendment claim among his Section 1983 claims for malicious prosecution, the state of jurisprudence might not be so confused. The Justices' pronouncements on this issue, specifically with regard to the interplay of the Fourth Amendment and Section 1983 in a malicious prosecution claim, has left the lower courts with no clear legal principles to apply to new fact patterns.

This author believes that in order to prevail on a Section 1983 claim for malicious prosecution, a practitioner should couch the claim solely as a Fourth Amendment violation without labeling the claim as one for "malicious prosecution." This strategy may afford a plaintiff the greatest likelihood of success since the label "malicious prosecution" does not add anything to the claim. Since under Section 1983 a plaintiff must ultimately prove a constitutional violation, it should not matter what label the plaintiff uses.

The practitioner will also be faced with the issue of whether substantive due process has any role in this context after *Albright*. In recent years, the Supreme Court has clearly disfavored the doctrine of substantive due process.[532] The Court has expressed its reluctance to expand substantive due process because the

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[531] *Id.* at 660.

[532] *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258 91997); Albright v. Oliver, 510 U.S. 266 (1993); Collins v. Harker Heights, 503 U.S. 115 (1992).

guidelines for "responsible decisionmaking in this unchartered area are scarce and open-ended."[533]

A plaintiff who asserts a Fourth Amendment violation together with a substantive due process claim, is not likely to succeed on the substantive due process claim because *Albright* rejects the extension of substantive due process to malicious prosecution.[534] If, however, the Fourth Amendment is not implicated, then substantive due process may be available to the plaintiff.

For example, in *County of Sacramento v. Lewis,*[535] a high speed pursuit case, the United States Supreme Court stated that substantive due process is unavailable where a claim is "covered by" the Fourth Amendment.[536] However, the *Lewis* Court found that because there was no Fourth Amendment seizure,[537] substantive due process could be asserted by the Section 1983 plaintiff. Applying the "shock the conscience" standard,[538] the Court concluded that no constitutional liability for high-speed chases arises unless the officer has acted with the intent to harm the suspect or to worsen a suspect's legal plight.[539]

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[533] *Collins*, 503 U.S. at 125. *See also* Graham v. Connor, 490 U.S. 386 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

[534] *See* Albright v. Oliver, 510 U.S. 266, 273 (1994).

[535] 118 S. Ct. 1708 (1998). In *Lewis*, parents sued under Section 1983 to recover for deprivation of their son's substantive due process right to life after he was killed as a result of a high-speed police chase. *Id.* at 1712.

[536] *Id.* at 1715.

[537] *Id.* at 1715-16. "A police pursuit in attempting to seize a person does not amount to a 'seizure' within the meaning of the Fourth Amendment." *Id.* at 1715 (citing California v. Hodari D., 499 U.S. 621 (1991)). *See also* Brower v. County of Inyo, 489 U.S. 593 (1989).

[538] *Id.* at 1718. "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id. See also* Rochin v. California, 342 U.S. 165 (1952) (holding that the forceful pumping of a criminal suspect's stomach violated substantive due process because the government's conduct "shocked the conscience"); United States v. Salerno, 481 U.S. 739 (1987). "So-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty.'" *Id.* at 746 (quoting *Rochin*, 342 U.S. at 172).

[539] *Id.* at 1720-21.

The significance of *Lewis* "extends far beyond pursuit cases."[540] The decision demonstrates that different types of substantive due process claims require different modes of analysis.[541] The criteria for identifying "fatally arbitrary" action depends on whether legislative or executive action is at issue.[542] Substantive due process challenges to different types of executive action, for example, call for different "shock the conscience" evaluations.[543] Therefore, plaintiffs asserting substantive due process claims must now consider whether the challenge is to executive or legislative action.

Given the Supreme Court's expressed reluctance to expand substantive due process, the critical question is whether the plaintiff can prove a violation of Fourth Amendment rights. This in turn requires the Supreme Court to resolve what types of post indictment restraints against liberty constitute Fourth Amendment seizure.

If a pure Fourth Amendment claim is the best alternative in a malicious prosecution claim shouldn't the state law claim be sufficient? Even when state remedies are available, Section 1983 is usually the better alternative. As Justice Harlan stated: "a deprivation of a constitutional right is significantly different and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right."[544] In addition, unlike a plaintiff in a state court claim, the availability of attorneys fees under Section 1988 makes the Section 1983 claim more desirable.

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[540] Martin Schwartz, *The Decision On Police Pursuit*, N.Y.L.J. Oct. 20, 1998, at 3.

[541] *Id.*

[542] *Id. See also Lewis*, 118 S. Ct. at 1716.

[543] *See Lewis*, 118 S. Ct. at 1717-18. "Deliberate indifference is an appropriate measure of whether official conduct is conscience shocking when, but only when, actual deliberation by an official is practical." *Schwartz, supra* note 540, at 3. On the other hand, where an official does not have an opportunity to deliberate and make a quick decision, it is not appropriate to apply the deliberate indifference standard. *Id.*

[544] Monroe v. Pape, 365 U.S. 167, 196 (1961) (Harlan J., concurring).

CONCLUSION

The long debate over whether malicious prosecution gives rise to a constitutional claim will continue until the Supreme Court addresses the issue again and resolves the many unsettled questions. Among the issues to be resolved, whether malicious prosecution is actionable under the Fourth Amendment, whether the availability of a state tort remedy should foreclose the use of Section 1983 in federal court, and whether substantive due process is available at all.