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Section 1983 Litigation

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SECTION 1983 LITIGATION

Hon. Leon Lazer:

To begin our program, I would like to introduce the Honorable George Pratt of the Second Circuit Court of Appeals. Judge Pratt graduated from Yale Law School and clerked for Judge Froessel of the New York State Court of Appeals. Thereafter, he was a municipal lawyer, serving as the Village Attorney for Westbury, Roslyn Harbor and Brookville, as well as serving as Special Counsel for the Nassau County Board of Supervisors for Hempstead, North Hempstead and Babylon. In 1976, Judge Pratt was appointed to the United States District Court for the Eastern District of New York. He served there until his appointment to the Second Circuit in 1982. Judge Pratt teaches Section 1983 litigation at this school as well as Hofstra and St. John's Law Schools.

Hon. George C. Pratt:

Section 1983 states in pertinent part that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . causes . . . the deprivation of any rights, . . . shall be liable to the party injured in an action at law . . . ."[1] As evidenced by its original title, namely, "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes,"[2] § 1983 was enacted via Congress' Fourteenth Amendment powers.[3]

There had been virtually no litigation under § 1983 until *Monroe v. Pape*[4] was decided in 1961. Essentially, the petitioners brought an action in federal district court under § 1983, alleging

1. 42 U.S.C. § 1983 (1988).

2. An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (1988)).

3. U.S. CONST. amend. XIV, § 5. This section provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." *Id.*

4. 365 U.S. 167 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

abuse by thirteen members of the Chicago Police Department.[5] Justice Douglas, writing for the majority, outlined the basic parameters for § 1983 claims. Most importantly, § 1983 provides "a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[6] However, § 1983 does not, in and of itself, create any rights since its purpose is solely a procedural one, a vehicle used for the enforcement of already established rights.[7]

In addition, the Supreme Court, in finding that the City of Chicago was not liable,[8] held that municipalities were not considered "persons" under § 1983.[9] Inasmuch as a municipality is an entity rather than a person, § 1983 could not be properly used against defendant municipalities.[10] Lastly, § 1983 does not require any state of mind requirement.[11] The Supreme Court construed § 1983 in such a way because the word "willfully" was notably absent from the wording of the statute and because § 1983 provides a civil remedy, not a criminal one.[12] Thus, Justice Douglas' opinion heralded the commencement of litigation under § 1983.

A turning point in § 1983 litigation emerged upon the 1976 enactment of § 1988.[13] As § 1988 presented courts with discretionary power in "allow[ing] the prevailing party, . . . a reasonable attorney's fee as part of the costs,"[14] § 1983 became an in-

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5. *Id.* at 169.

6. *Id.* at 172.

7. *Id.* at 180. Section 1983 was passed "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens . . . might be denied by the state agencies." *Id.*

8. *Id.* at 192.

9. *Id.* at 187. *See generally* Kemp McCaffrey, *Recent Developments in 42 U.S.C. Section 1983 Claims Against Municipalities and Their Police Departments*, 15 FORUM 747, 747-48 (1980).

10. *Monroe*, 365 U.S. at 187.

11. *Id.*

12. *Id.*

13. 42 U.S.C. § 1988 (1988).

14. *Id.*

creasingly litigated statute.[15] Thereafter, as a growing body of case law developed over the years, the Supreme Court expressly overruled itself several times during its attempts at creating the governing law in this area.[16] For example, in *Monell v. Department of Social Services*,[17] the Supreme Court held, in direct contravention to *Monroe v. Pape*,[18] that municipalities are "persons" under § 1983.[19] Since this time, it has become increasingly difficult to predict the Supreme Court's direction in this area. However, using § 1983 case law will help guide the legal world through this very unpredictable process.

QUALIFIED IMMUNITY

Presently, many administrative and executive officials are protected from personal liability in § 1983 actions under qualified immunity.[20] Qualified immunity shields officials from civil liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."[21] Although Congress never explicitly sanctioned the use of the immunity defenses[22] for § 1983 actions, the Supreme Court has refused to abolish these traditional immunities that of-

15. *See* George C. Pratt, *Foreword to the First Edition* of 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES at vii (2d ed. 1991).

16. *Id.* (citing Monell v. Department of Social Servs., 436 U.S. 658 (1978)); Daniels v. Williams, 474 U.S. 327 (1986) (overruling Parratt v. Taylor, 451 U.S. 527 (1981)); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (overruling Wood v. Strickland, 420 U.S. 308 (1975)). *See also infra* notes 17-19, 25-32 and accompanying text.

17. 436 U.S. at 658.

18. 365 U.S. at 167.

19. *Monell*, 436 U.S. at 690.

20. 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES, 444 (2d ed. 1991) .

21. Anderson v. Creighton, 483 U.S. 635, 638 (1987).

22. *See* City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981). Another type of immunity defense is absolute immunity, which protects "[o]fficials such as judges, prosecutors, and legislators . . . against personal liability under § 1983 . . . ." SCHWARTZ, *supra* note 20.

ficials were afforded under the common law.[23] Accordingly, the Court has developed elaborate rules to govern qualified immunity.[24]

In *Wood v. Strickland*,[25] the Supreme Court held that the qualified immunity defense in school discipline cases encompasses two components, an objective and a subjective test of good faith.[26] A school official would not avoid liability if "he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . ."[27] However, the Supreme Court overruled *Wood* in *Harlow v. Fitzgerald*,[28] and abolished the subjective element of qualified immunity, thereby creating a solely objective standard.[29] In so holding, the Court rationalized its decision upon policy considerations. Subjectivity, as an element of qualified immunity, is outweighed by traditional court values, namely, the preservation of court time, money, and effective government.[30] This model was created in order to further judicial economy[31] since the subjective good faith of an official is usually regarded as a question of fact, preventing summary judgment.[32]

Thereafter, in *Mitchell v. Forsyth*,[33] the Supreme Court held that a denial of qualified immunity is immediately appealable, notwithstanding the lack of a final judgment.[34] As qualified immunity grants an official "immunity from suit rather than a mere

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23. *City of Newport*, 453 U.S. at 258.
24. *See infra* notes 25-39 and accompanying text.
25. 420 U.S. 308 (1975), *overruled by* Harlow v. Fitzgerald, 457 U.S. 800 (1982).
26. *Id.* at 321.
27. *Id.* at 322.
28. 457 U.S. 800 (1982).
29. *Id.* at 817-18.
30. *See id.* at 816-17.
31. *Id.* at 818.
32. *Id.* at 816.
33. 472 U.S. 511 (1985).
34. *Id.* at 526-27.

defense to liability,"[35] an official's qualified immunity would disappear upon a court's decision to proceed to trial.[36] In reaching this holding, the Supreme Court relied on the policy model enunciated in *Harlow*, namely, that officials must be protected from "the general costs of . . . trial-distraction . . . from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service."[37] Therefore, *Mitchell* provides officials with relief from erroneous judicial decision making.

Unfortunately, qualified immunity has implicated many problems. Primarily, the increasing number of immunity appeals severely strains an appellate judge's workload. For example, I see at least two or three immunity appeals on a weekly basis. Every § 1983 case that gets to a final judgment will undergo at least two appeals, sometimes even a third one on the attorney's fees. Clearly, this process holds considerable significance for defendants because it affords them an opportunity to win without facing the merits of plaintiffs' claims.

Secondarily, since courts preferably decide qualified immunity questions on summary judgment motions, it is difficult to determine the factual issues often involved in analyzing the objective reasonableness test.[38] Even if a question of fact is present, courts will try to dismiss cases by calling questions of fact, questions of law.[39] In my view, the *Harlow* test has proven unworkable inasmuch as objective reasonableness cannot be determined until factual disputes have been successfully resolved. However, due to judicial congestion, courts continue to bear an enormous pressure to resolve these questions on summary judgment.

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35. *Id.* at 526 (emphasis omitted).

36. *Id.*

37. *Id.* (quoting *Harlow*, 457 U.S. at 816).

38. *See* SCHWARTZ, *supra* note 20, at 568 ("[T]he Court in *Harlow* expressed a strong desire to turn qualified immunity essentially into an issue of law to be determined, wherever possible, pretrial on summary judgment . . . .").

39. *See id.* *See also Harlow*, 457 U.S. at 816 (abolishing subjective element of qualified immunity in order to determine applicability of this defense on summary judgment).

DELIBERATE INDIFFERENCE

In *Monroe v. Pape*,[40] the Supreme Court held that § 1983 does not embrace any state of mind requirement,[41] making § 1983 potentially applicable to both intentional and negligent conduct.[42] Thereafter, the Supreme Court began to apply the deliberate indifference standard[43] in order to determine the level of culpability sufficient to form liability. Since 1976, when the Supreme Court decided *Estelle v. Gamble*,[44] the deliberate indifference standard has been adopted in a variety of contexts,[45] and the level of culpability has varied according to the constitutional right allegedly violated by the defendant.[46]

In *Estelle*, the Supreme Court adopted the deliberate indifference standard in a prison medical context.[47] Specifically, the Court held "that deliberate indifference to serious medical needs

40. 365 U.S. 167 (1961), *overruled by* Monell v. Department of Social Servs., 436 U.S. 658 (1978).

41. *Id.* at 187. *See also supra* notes 11-12 and accompanying text.

42. SCHWARTZ, *supra* note 20, at 310. *But see* Daniels v. Williams, 474 U.S. 327 (1986). The Court held "that the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property." *Id* at 328 (emphasis omitted).

43. *See* City of Canton v. Harris, 489 U.S. 378, 389 (1989) (defining deliberate indifference as a "conscious" choice). Although the Supreme Court first adopted the deliberate indifference standard in 1976, the lower courts had already begun analyzing many § 1983 claims under the deliberate indifference standard. Estelle v. Gamble, 429 U.S. 97, 106 n.14 (1976).

44. 429 U.S. 97 (1976).

45. *See, e.g.*, Wilson v. Seiter, 111 S. Ct. 2321, 2326-27 (1991) (deliberate indifference is the appropriate standard for all Eighth Amendment cases); *City of Canton*, 489 U.S. at 388-89 (in alleging Fourteenth Amendment violation, namely, inadequate police training, plaintiff must show that the City was deliberately indifferent to its citizens' rights).

46. *See* SCHWARTZ, *supra* note 20, at 311.

47. In *Estelle*, plaintiff injured his back while engaging in prison work. 429 U.S. at 99. He alleged that the medical treatment he received constituted cruel and unusual punishment in violation of the Eighth Amendment. *Id.* at 101.

of prisoners" violates the Eighth Amendment's[48] proscription against cruel and unusual punishment.[49] However, in reaching that holding, the Court placed clear limitations regarding which actions would constitute deliberate indifference. For instance, malpractice, in and of itself, could never satisfy the deliberate indifference standard.[50] Rather, "[i]n order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[51] It was from this starting point that the Supreme Court began its vast expansion of the deliberate indifference standard.

In the last Term of this year, the Supreme Court sanctioned the general applicability of the deliberate indifference standard to all Eighth Amendment cases. In *Wilson v. Seiter*,[52] the Supreme Court held that in addition to inadequate medical care, prison conditions such as food, clothing, and the temperature of each prisoner's cell, are all equally subject to a deliberate indifference analysis.[53] As evidenced by the expansion of this doctrine, there is every indication that deliberate indifference may ultimately become the touchstone for § 1983 culpability.

In *City of Canton v. Harris*,[54] the Supreme Court, dealing again with a § 1983 claim in a medical context, extended the deliberate indifference standard to a failure to train claim under the Due Process Clause of the Fourteenth Amendment.[55] Plaintiff alleged that after being arrested, police officers failed to attend to her medical needs, causing her to become injured.[56] Essentially,

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48. U.S. CONST. amend. VIII. The Eighth Amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." *Id.*

49. *Estelle*, 429 U.S. at 104.

50. *Id.* at 106.

51. *Id.*

52. 111 S. Ct. 2321 (1991).

53. *Id.* at 2326-27.

54. 489 U.S. 378 (1989).

55. *Id.* at 388. The Due Process Clause of the Fourteenth Amendment provides in pertinent part that: "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1, cl. 3.

56. *City of Canton*, 489 U.S. at 381.

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plaintiff alleged that the defendant City failed to adequately train its officers with the skills needed to determine when detainees were in need of medical care.[57] The Supreme Court held that plaintiff's failure to train theory was a viable one provided that plaintiff could show that the City was deliberately indifferent to the rights of its citizens.[58]

Collins v. City of Harker Heights,[59] another failure to train case, focused on the government as an employer, rather than as a governing authority. In *Collins*, plaintiff alleged that her husband, a sanitation and sewer worker, was killed as a result of the City's policy of not providing its workers with safety training.[60] Inasmuch as this activity was proprietary and not governmental, the Fifth Circuit held that the City was not liable under § 1983.[61] Essentially, the court based its holding on the abuse-of-power standard, "which pertains to the decedent's relationship with the City - one of employer and employee, rather than one in which the City, as government, acted against the decedent, as governed."[62] This governmental activity, namely, employing the decedent via its proprietary powers, was not a proper subject for § 1983 litigation.[63]

Finally, in *Hafer v. Melo*,[64] the Supreme Court held that § 1983 properly encompasses personal liability for state officials

57. *Id.* at 380-81.

58. *Id.* at 388-89.

59. 916 F.2d 284 (5th Cir. 1990), *cert. granted*, 111 S. Ct. 1579 (1991), *aff'd*, 112 S. Ct. 1061 (1992).

60. *Id.* at 285.

61. *Id.* at 291.

62. *Id.* at 287. On appeal, the Supreme Court held that neither the abuse of power standard nor the decedent's relationship with the City were controlling factors in § 1983 claims. 112 S. Ct. 1061, 1066 (1992).

Instead, the proper analysis for § 1983 claims against municipalities is: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation." *Id.*

The Supreme Court held that plaintiff did not show that the City violated the Due Process Clause since she only claimed "that the city deprived [her husband] of life and liberty by failing to provide a reasonably safe work environment." *Id.* at 1069.

63. 916 F.2d at 287.

64. 112 S. Ct. 358 (1991).

sued in their individual capacities.[65] State officials, sued in their official capacities, are not "persons" under § 1983 since they are mere representatives of the government.[66] However, state officials sued in their personal capacities are "persons" under § 1983 since they are sued as individuals, not as governmental representatives.[67] The Supreme Court found no statutory support for defendant's argument "that § 1983 liability turns not on the capacity in which state officials are sued, but on the capacity in which they acted when injuring the plaintiff."[68] Therefore, even though it appeared that this Court was anti-civil rights, *Hafer* indicates that the converse holds true.

I would now like to introduce Professor Schwartz, of this law school, who will discuss the Supreme Court's last Term. Professor Schwartz is highly accomplished in the field of § 1983 litigation, and among other things he co-authored a book on the subject.[69] Professor Schwartz has been the co-chair, along with myself, of the Practicing Law Institute on Section 1983 Litigation for more than eight years. In addition, Professor Schwartz authors a monthly column which appears in the New York Law Journal entitled *Public Interest Law*.

Professor Martin Schwartz:

Good morning. I guess I have been able to make a career out of § 1983 because the Supreme Court has enabled me to do so. The Supreme Court has been very active, one might say unusually active, in refining the law in § 1983 litigation. There were several important decisions rendered by the Court last Term in this field,[70] and already the Court has a hefty array of § 1983 cases on its present plenary docket.[71]

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65. *Id.* at 365.
66. *Id.* at 362.
67. *Id.*
68. *Id.* at 363.
69. *See supra* note 20.
70. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991); Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991); Burns v. Reed, 111 S. Ct. 1934 (1991); Siegert v. Gilley, 111 S. Ct. 1789 (1991); West Va. Univ. Hosps.,

With the Term barely begun, and without waiting for oral argument or full briefing, the Supreme Court summarily reversed a decision of the Ninth Circuit Court of Appeals in a case involving judicial immunity.[72] The Supreme Court decision was *Mireles v. Waco*.[73] In *Mireles*, the Supreme Court held that judicial immunity, absolute judicial immunity, protected the actions of a California trial court judge sitting in Los Angeles.[74] The judge allegedly ordered the court deputies to physically seize a public defender who was in another courtroom in the courthouse and bring or, I might say, drag that public defender into the judge's courtroom.[75] Apparently the judge was angered by the public defender's failure to appear for a calendar call.[76] In his § 1983 complaint, the public defender alleged that the deputies not only

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Inc. v. Casey, 111 S. Ct. 1138 (1991); Dennis v. Higgins, 111 S. Ct. 865 (1991).

71. *See* International Soc'y For Krishna Consciousness, Inc. v. Lee, 112 S. Ct. 2701 (1992) (holding that in action brought pursuant to 42 U.S.C. § 1983, statute prohibiting, *inter alia*, repetitive solicitation of money within an airport does not violate First Amendment rights of members of not-for-profit religious corporation who solicited funds in public places to support their cause); Wyatt v. Cole, 112 S. Ct. 1827 (1992) (holding qualified immunity afforded to government officials is not available to private defendants charged with § 1983 liability for invoking state replevin, garnishment or attachment statutes); Suter v. Artist M., 112 S. Ct. 1360 (1992) (holding 42 U.S.C. § 1983 does not confer private right enforceable under § 1983 upon beneficiaries of Adoption Assistance and Child Welfare Act of 1980 which provides that "reasonable efforts will be made" to prevent removal of children from their parent's homes and facilitates reunification of families where removal has occurred); Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992) (holding 42 U.S.C. § 1983 does not provide remedy for municipal employee who was fatally injured in course of employment as a result of municipality's failure to train or warn employee of hazards in work place); Hudson v. McMillian, 112 S. Ct. 995 (1992) (holding use of excessive physical force by prison official against an inmate may constitute cruel and unusual punishment and give rise to 42 U.S.C. § 1983 cause of action where inmate does not suffer serious injury).

72. Mireles v. Waco, 112 S. Ct. 286 (1991), *rev'g* 934 F.2d 214 (9th Cir. 1991).

73. *Id.*

74. *Id.* at 288.

75. *Id.* at 287.

76. *Id.*

forcibly seized him, but they cursed him, and without any necessity they slammed him through the door and a swinging gate into the judge's courtroom.[77] The Supreme Court's opinion does not indicate whether this is standard operating procedure in Los Angeles for lawyers who miss their calendar calls.

The United States Supreme Court held that judicial immunity protected the judge from liability for ordering the court officers to bring the attorney, who was in the courthouse, into his courtroom.[78] The Court limited its decision to individuals who were in the courthouse.[79] The Court stated that the act of bringing a person who was in the courthouse into the judge's courtroom was a function that is normally performed by a judge.[80] In addition, the Supreme Court found that, in this case, the judge had not acted in the clear absence of all jurisdiction.[81] The fact that the judge may have acted maliciously, in bad faith, and in violation of the law would not suffice to rob the judge of absolute immunity.[82]

Judge Pratt mentioned the decision in *Hafer v. Melo*.[83] This case was decided by a full opinion written by Justice O'Connor, even though the case had been argued less than three weeks before the decision date.[84] In *Hafer*, the issue was whether a state official who was carrying out her official responsibilities could be sued for damages in her personal capacity.[85] If you wanted to plug that issue into the language of § 1983,[86] the question would

77. *Id.*

78. *Id.* at 288-89.

79. *Id.* at 288.

80. *Id.*

81. *Id.* at 289.

82. *Id.* at 288.

83. 112 S. Ct. 358 (1991). *See supra* notes 64-68 and accompanying text.

84. *Id.* (argued October 15, 1991, and decided November 5, 1991).

85. *Id.* at 361.

86. 42 U.S.C. § 1983 (1988). § 1983 provides:

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

become: is a state official who is sued personally for damages a "person" within the meaning of § 1983, even though the claim arises out of the enforcement of the official's public responsibilities?[87] The United States Supreme Court held that a state official who is sued personally under these circumstances is a "person" who may be sued under § 1983.[88] I had always believed that to be the state of the law, but the United States Supreme Court had never squarely resolved that point until its decision in *Hafer*.

The Court also resolved another point, which I think is an obvious one, and that is when a state official is sued personally for monetary damages the Eleventh Amendment[89] does not provide the state official with any immunity protection.[90] The Eleventh Amendment is designed, of course, to protect the state treasury and not the personal finances of an official.[91] The civil rights community, and especially the civil rights plaintiff's bar, were quite anxious for the decision of the United States Supreme Court in *Hafer*. After all, these two major points do seem to be so apparent in terms of their resolution. I think that the United States Supreme Court agreed to hear this case to alleviate any uncertainty that may have existed with respect to these two issues.[92] Therefore, I think the worries on the part of civil rights attorneys, at least on this issue, can now be laid to rest.

Let us go back to last Term. I see the decisions of the Supreme Court last Term concerning § 1983 litigation as representing a mixed bag of both pro-plaintiff[93] and pro-defendant[94] rulings, with each side receiving approximately an equal number of favorable decisions. I agree with Judge Pratt that the Supreme

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Id.

87. *Hafer*, 112 S. Ct. at 360.

88. *Id.*

89. U.S. CONST. amend. XI.

90. *Hafer*, S. Ct. at 365.

91. *See* Edelman v. Jordan, 415 U.S. 651 (1974).

92. *See supra* notes 64-68 and accompanying text.

93. *See* Siegert v. Gilley, 111 S. Ct. 1789 (1991); Dennis v. Higgins, 111 S. Ct. 865 (1991).

94. *See* Wilson v. Seiter, 111 S. Ct. 2321 (1991); Burns v. Reed, 111 S. Ct. 1934 (1991); West Va. Univ. Hosps., Inc. v. Casey, 111 S. Ct. 1138 (1991).

Court has not been as hostile toward § 1983[95] as it has been toward, for example, federal habeas corpus, which in my view, has now been decimated by the Supreme Court almost to the point of being a non-functional remedy.[96] Despite all of the complexities, and there are many that surround § 1983, in my view it remains a highly significant remedy for enforcing the Constitution against state and local government.

I also think that it is significant that many of the decisions in favor of plaintiffs last term were cases that arguably could have been decided in the other direction. Take for example the Court's ruling in *Dennis v. Higgins*[97] which stated that Commerce Clause[98] claims may be asserted under § 1983.[99] One does not normally think of a civil rights statute and the Commerce Clause in the same breath. However, there are a fair number of claims asserted throughout the country in which business entities claim to be victimized by state policies that unduly burden or discriminate against interstate commerce. These are litigated, or are at least attempted to be litigated, under § 1983.[100]

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95. *See supra* note 64-68 and accompanying text.

96. *See* Keeney v. Tamayo-Reyes, 112 S. Ct. 1715 (1992) (holding cause-and-prejudice standard, rather than deliberate bypass standard, used for excusing habeas corpus petitioner's failure to develop material fact in state court proceeding); Ylst v. Nunnemaker, 111 S. Ct. 2590 (1991) (unexplained denial of petition for habeas corpus by state court does not lift state procedural bar imposed on direct appeal so that state prisoner would be permitted to have federal habeas corpus claim heard on merits); Coleman v. Thompson, 111 S. Ct. 2546 (1991) (Following an unsuccessful habeas corpus petition in state court, the petitioner, who was convicted of murder, filed a notice of appeal in state court and a federal habeas corpus petition in federal district court containing, *inter alia*, several federal constitutional claims raised previously in the state court petition. The Court held that the petitioner's claims first presented in the state habeas proceeding were not subject to federal habeas review.).

97. 111 S. Ct. 865 (1991).

98. U.S. CONST. art. I, § 8, cl. 3.

99. *Dennis*, 111 S. Ct. at 868-70.

100. *See, e.g.*, Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984), *cert. denied*, 469 U.S. 834 (1984) (corporation unsuccessful in claim for attorney fees brought pursuant to 42 U.S.C. §§ 1983, 1988, following successful challenge of Iowa statute restricting use of sixty-five foot twin trailers found to restrict interstate commerce in violation of Commerce Clause); Martin Marietta Corp. v. Bendix Corp., 690 F.2d 558 (6th Cir.

Most of the lower courts that addressed this issue have held that § 1983 was intended by the Congress as a vehicle for enforcing the Fourteenth Amendment,[101] and it was not intended to be the mode of enforcement for constitutional provisions, such as the Commerce Clause.[102] In *Dennis*, the Supreme Court rejected that line of reasoning and held that § 1983 is not limited to Fourteenth Amendment claims.[103] Certainly, the language of § 1983 encompasses any constitutional violation,[104] and the Court found that the Commerce Clause had long been recognized in Supreme Court decisional law as providing a source of protection against state policies that discriminate against or unduly burden interstate commerce.[105] This aspect of the Commerce Clause is referred to as the Dormant Commerce Clause.[106] Therefore, I think the more precise holding of the *Dennis* decision, even though it is couched as a holding in Commerce Clause terms,[107] is that the Dormant Commerce Clause is enforceable under § 1983.[108]

1982) (pursuant to 42 U.S.C. § 1983 petitioners challenged anti-fraud provisions of Michigan Take-Over Offers Act and Michigan Uniform Securities Act regulating interstate takeovers, alleging they imposed an excessive burden on interstate commerce).

101. U.S. CONST. amend. XIV.

102. *See* Kraft v. Jacka, 872 F.2d 862, 869 (9th Cir. 1989) ("'§ 1983 was not intended to encompass those constitutional provisions which allocate power between the state and federal government . . . .'") (quoting White Mountain Apache Tribe v. Williams, 810 F.2d 844, 848 (9th Cir. 1984)); *Consolidated Freightways Corp.*, 730 F.2d at 1144 (Commerce Clause does not establish individual rights but rather allocates power between federal and state governments).

103. *Dennis*, 111 S. Ct. at 868-70.

104. *See supra* note 86.

105. *Dennis*, 111 S. Ct. at 870 (quoting South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87 (1984)).

106. *See* Wilson v. Blackbird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829) (Dormant Commerce Clause prohibits state from acting in a way which burdens or discriminates against interstate commerce).

107. *Dennis*, 111 S. Ct. at 867 (petitioner challenged, *inter alia*, certain "retaliatory" taxes and fees imposed by state of Nebraska on motor carriers registered in other states but operating in Nebraska).

108. *Id.* The Dormant Commerce Clause raises the question of whether a state is empowered to take a particular action affecting interstate commerce

One who has the fortune, or the misfortune, of studying the Supreme Court's Dormant Commerce Clause cases learns rather quickly that the principles, doctrines and certainly the applications of those principles and doctrines by the United States Supreme Court have not exactly been a model of consistency.[109] Because of this, I require my students to read the Mock Restatement of Constitutional Law,[110] at least a portion of it that is in the casebook.[111] In an attempt to summarize this difficult area of law, the Mock Restatement of Constitutional Law provides as follows: 1) The Congress may regulate interstate commerce; 2) States may also regulate interstate commerce; 3) But not too much; 4) Finally, how much is too much is beyond the scope of this Restatement.[112]

The *Dennis* case though, I think, has importance that extends well beyond the Dormant Commerce Clause. I think *Dennis* is important because it shows that § 1983 is not limited to Fourteenth Amendment claims.[113] There is language in the *Dennis* opinion itself which would support the conclusion that claims un-

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where Congress has remained silent. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 8.1, at 274-75 (4th ed. 1991).

109. *See* NOWAK, *supra* note 108, § 8.1, at 274-75. *Compare* Bendix Autolite Corp. v. Midwesco Enterprises, Inc., 486 U.S. 888, 897-98 (1988) (Scalia, J., concurring) ("I would . . . abandon the 'balancing' approach to these negative Commerce Clause cases . . . and leave essentially legislative judgments to the Congress . . . . [A] state statute is invalid under the Commerce Clause if, and only if, it accords discriminatory treatment to interstate commerce not required to achieve a lawful state purpose.") *with* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

110. *See* THOMAS REED POWELL, VAGARIES AND VARIETIES IN CONSTITUTIONAL INTERPRETATION 178 (1956) ("states may regulate commerce some, but not too much").

111. GERALD GUNTHER, CONSTITUTIONAL LAW 254 n.1 (12th ed. 1991) (citing POWELL, *supra* note 110, at 178).

112. *Id.*

113. Dennis v. Higgins, 111 S. Ct. 865, 868-70 (1991) (§ 1983 should be broadly construed).

der the Contract Clause,[114] forbidding governmental impairment of contracts, are enforceable under § 1983.[115] So too, it would seem that after *Dennis* the Bill of Attainder Clause[116] could be enforced under § 1983. In addition, a very recent Fourth Circuit opinion[117] cites Justice Kennedy's dissenting opinion in the *Dennis* case for the proposition that the Privileges and Immunities Clause of Article IV[118] is enforceable under § 1983 as well.[119]

Judge Pratt also referred to *Wilson v. Seiter*,[120] the decision which held that Eighth Amendment[121] attacks upon prison conditions are now governed by the deliberate indifference standard.[122] Deliberate indifference means that plaintiffs who attack prison conditions under the Eighth Amendment not only have to show that they were deprived of something serious with respect to the deficiency in prison conditions, serious measured from an objective standpoint,[123] they also have to show that the pertinent prison officials, whoever they may be, had some wrongful state of mind.[124] One thing that is interesting about this holding is that the Supreme Court reached this result despite the fact that the American Civil Liberties Union and the Justice Department united together,[125] and argued that, from the standpoint of the prisoner, having to endure seriously substandard

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114. U.S. CONST. art. I, § 10, cl. 1.

115. *See infra* pp. 35-37.

116. U.S. CONST. art. 1, § 9. Article 1, § 9 provides in pertinent part: "No Bill of Attainder . . . shall be passed." *Id.*

117. O'Reilly v. Board of Appeals for Montgomery County, 942 F.2d 281 (4th Cir. 1991).

118. U.S. CONST. art. IV, § 2. Article IV, § 2 provides in pertinent part: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." *Id.*

119. *O'Reilly*, 942 F.2d at 283.

120. 111 S. Ct. 2321 (1991). *See supra* notes 52-53 and accompanying text.

121. U.S. CONST. amend. VIII.

122. *Wilson*, 111 S. Ct. at 2327.

123. *Id.* at 2324.

124. *Id.* (requiring "inquiry into prison official's state of mind when it is claimed that the official has inflicted cruel and unusual punishment").

125. *Id.* at 2325 (petitioner, Pearly L. Wilson, was represented by the National Prison Project of the American Civil Liberties Union Foundation and the United States filed a brief as amicus curiae).

conditions as a result of the government's failure to meet basic human needs is cruel and unusual punishment regardless of the intent of the pertinent prison officials.[126] However, we see that even the Civil Liberties Union and the Justice Department, coming to the Supreme Court locked arm in arm, was not enough to convince the Supreme Court to dispense with the state of mind requirement.[127]

I think that the deliberate indifference standard, in this context, is a difficult standard for plaintiffs to satisfy.[128] However, it could have been worse in terms of evaluating the work of the Supreme Court last term. After all, the Sixth Circuit, in *Wilson v. Seiter*,[129] had adopted an even more stringent standard. The Sixth Circuit ruled that the plaintiffs had to show persistent, malicious cruelty, not just deliberate indifference.[130] The persistent, malicious cruelty standard is one that was taken from a 1986 Supreme Court decision, *Whitley v. Albers*,[131] which dealt with the standard to be applied to claims arising out of the use of force in a prison riot setting.[132] All of the Justices in *Whitley* agreed that the Sixth Circuit's persistent, malicious cruelty standard was an inappropriate standard to measure the constitutionality of the prison condition claims generally.[133]

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126. *Id.*

127. *Id.* at 2324.

128. *See id.* at 2330 (White, J., concurring). In rejecting the majority's deliberate indifference standard, Justice White stated that:

> [T]he majority's intent requirement . . . likely . . . [would] prove impossible to apply in many cases. Inhumane prison conditions often are the result of cumulative actions and inactions by numerous officials inside and outside a prison, sometimes over a long period of time. In those circumstances, it is far from clear whose intent should be examined, and the majority offers no real guidance on this issue. In truth, intent simply is not very meaningful when considering a challenge to an institution, such as a prison system.

Id. (White, J., concurring).

129. 893 F.2d 861 (6th Cir. 1990), *vacated*, 111 S. Ct. 2321 (1991).

130. *Id.* at 867.

131. 475 U.S. 312 (1986).

132. *Id.* at 314.

133. *Id.* at 320, 328-29 (Marshall, J., dissenting).

Let me move to the state action decision of last Term that has surprised many, *Edmonson v. Leesville Concrete Co.*[134] In *Edmonson*, the Court held that a private civil litigant's exercise of a peremptory juror challenge, which was alleged to have been made on racial grounds, constituted "state action" within the meaning of the Fifth[135] and Fourteenth Amendments.[136] Because *Edmonson* is a case that arose out of a federal civil trial, it was actually the Fifth Amendment that was directly implicated.[137] However, there is no question that the Court's finding of governmental action would pertain fully to a claim of state action arising out of a state court civil proceeding.[138] The Supreme Court, in finding state action, resuscitated two state action doctrines which, in my mind, appeared to be on the verge of extinction: the Symbiotic Relationship Doctrine[139] and the Public Function Doctrine.[140]

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134. 111 S. Ct. 2077 (1991).

135. U.S. CONST. amend. V.

136. *Edmonson*, 111 S. Ct. at 2080.

137. *Id.*

138. The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No *State* shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 3 (emphasis added). Although there is nothing in the Constitution explicitly requiring the federal government to provide Equal Protection of the laws, the U.S. Supreme Court has treated federal government action that would violate the Fourteenth Amendment's Equal Protection Clause, if it were state action, as a violation of the Fifth Amendment Due Process Clause. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

139. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961). Under the Symbiotic Relationship Doctrine a private actor can become subjected to constitutional scrutiny when there is a "mutually beneficial" relationship between the state and the private party. *Id. See also Edmonson*, 111 S. Ct. at 2083 (1991) (in determining whether there is state action "it is relevant to examine the . . . extent to which the actor relies on the governmental assistance and benefits").

140. *See Edmonson*, 111 S. Ct. at 2083. Under the Public Function Doctrine, state action will be found to exist where "the actor is performing a traditional governmental function." *Id. See also* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (state action will be found where "the function performed has been 'traditionally the exclusive prerogative of the State'") (emphasis omitted) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974)).

Although this appears to be a "born again" state action decision, it is filled with several troubling ambiguities. I would like to go through three of those ambiguities with you. First, the Court stated that a relevant factor in analyzing whether state action is present was the extent to which the private entity had relied upon governmental assistance.[141] If you go back to 1982, in *Rendell-Baker v. Kohn*,[142] the Court held that a school for maladjusted children was not engaged in state action even though the school had relied almost entirely upon governmental funding.[143] Indeed, in one year 99% of the school's budget consisted of governmental funds.[144]

Second, with respect to the Public Function Doctrine, there is a line of Supreme Court restrictive state action precedents going back to the early 1970's in which the Court consistently held that for state action to be found under the Public Function Doctrine it was not enough that the function be historically and traditionally a governmental function; the function also had to be an exclusive governmental function.[145] Curiously, in *Edmonson*, Justice Kennedy, writing for the majority, made no reference to the exclusivity aspect of the Public Function Doctrine. He very conspicuously avoided any reference to that word. Instead, Justice Kennedy referred to jury selection as being an important function of government,[146] a traditional function of government[147] and a unique function of government.[148] It is unclear, at this point, whether there is any intent on the part of the Supreme Court either to modify or perhaps abandon altogether the exclusivity aspect of the Public Function Doctrine that had been so prominent in earlier state action precedents.

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141. *Edmonson*, 111 S. Ct. at 2083.

142. 457 U.S. 830 (1982).

143. *Id.* at 832, 843.

144. *Id.* at 832.

145. *Id.* at 842. *See also* Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); Flagg Bros. v. Brooks, 436 U.S. 149, 157 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974).

146. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2087 (1991).

147. *Id.* at 2085.

148. *Id.* at 2086.

Third, in finding state action in *Edmonson*, the Supreme Court relied upon both the Symbiotic Relationship Doctrine and the Public Function Doctrine.[149] However, the Court failed to make clear whether either of these doctrines by itself would have been sufficient to support a finding of state action, or whether there was something about the combination of the two that was critical to the Court's state action conclusion.

My own view of the decision is that *Edmonson* should not be read as signaling a general state action revival in the United States Supreme Court. Rather, I believe that *Edmonson* is a product of the Supreme Court's perception of the unique harm that occurs to a judicial system as a result of racial discrimination in the jury selection process. I therefore think of *Edmonson* as being a so-called one-night stand, the restricted railroad ticket that is good for this train and this trip only, but not for any other. Now we might find out more about that this Term. Just this week the Supreme Court agreed to review a case which raises the question of whether there is state action when a criminal defense attorney exercises a peremptory challenge on racial grounds.[150] I think the answer to that question is going to have to be yes after *Edmonson*, but we have been surprised before.[151]

Indeed, I was somewhat surprised by the Court's unanimous ruling in *Burns v. Reed*.[152] In *Burns*, the Court held that prosecutors were not absolutely immune for the advice that they gave to the police during the investigative stage of a criminal proceed-

149. *Edmonson,* 111 S. Ct. at 2083-87 (to determine whether conduct constitutes state action it is relevant to examine whether government has placed its "power, property and prestige" behind alleged discrimination and whether actor is performing "traditional governmental function").

150. Georgia v. McCollum, 112 S. Ct. 370 (1991) (writ of certiorari granted Nov. 4,1991).

151. In Georgia v. McCollum, 112 S. Ct. 2348, 2354-57 (1992), consistent with Professor Schwartz's line of reasoning, the Supreme Court found that a criminal defense attorney's exercise of a peremptory challenge constituted state action and thus held that the Equal Protection Clause of the United States Constitution prohibited a criminal defense attorney from exercising a race based peremptory challenge.

152. 111 S. Ct. 1934 (1991).

ing.[153] In *Burns*, the prosecutor advised the police that they could interview a suspect under hypnosis, and that they had probable cause to arrest the suspect.[154] Actually, the prosecutor did not exactly go out on a limb. What the prosecutor told the police officers was that they "probably had probable cause."[155] However, acting upon that advice the officers made the arrest.[156] The Justice Department came before the Supreme Court,[157] supported by 36 states and the District of Columbia,[158] and argued that providing guidance to the police was an integral part of the prosecutor's job and that exposing prosecutors to monetary liability for giving such advice may deter prosecutors from providing advice to police in the future.[159] However, the Supreme Court rejected that argument.[160] The Court held true to the functional approach in resolving immunity questions and found that the giving of advice to the police was not sufficiently close to the judicial process to justify absolute immunity.[161]

The Court also decided a case last Term dealing with qualified immunity in *Siegert v. Gilley*.[162] This is actually not a § 1983 case. It is a *Bivens*[163] action, a claim for damages against federal

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153. *Id.* at 1944-45.

154. *Id.* at 1937.

155. *Id.*

156. *Id.*

157. Brief for the United States as Amicus Curiae Supporting Respondent, Burns v. Reed, 111 S. Ct. 1934 (1991) (No. 89-1715).

158. Brief of Amici, the states of Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, Wisconsin, Wyoming and the District of Columbia in support of Respondent's Brief on the Merits, Burns v. Reed, 111 S. Ct. 1934 (1991) (No. 89-1715).

159. *Burns*, 111 S. Ct. at 1943-44.

160. *Id.*

161. *Id.* at 1943.

162. 111 S. Ct. 1789 (1991).

163. Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971) (permitting damage actions directly under Con-

officials in their individual capacity.[164] The Supreme Court made it quite clear that the same immunity principles that apply in *Bivens* cases apply equally in § 1983 cases.[165] Qualified immunity is defined by the Supreme Court in wholly objective terms.[166] The question is, did the official violate clearly established federal law? Therefore, we no longer care what was in the mind of the public official when that official acted.[167] We do not care if the official had the worst motive imaginable, or the most publicly motivated mentality.[168]

There are complications with respect to this objective standard in a number of situations where factual issues are present. An example of such a situation can be found in *Siegert*. In *Siegert*, the plaintiff asserted a constitutional claim that he said depended upon the mental state of the public official.[169] It had been thought that the Supreme Court granted plenary review in the *Siegert* case in order to resolve the issue of qualified immunity of a public official when intent is an element of the constitutional claim.[170] However, the Court did not resolve the immunity issue. The Court said that it did not have to reach this immunity issue because it found that the plaintiff's complaint did not allege a violation of any constitutional rights.[171] The Supreme Court said that whether the plaintiff had alleged a constitutional claim was an antecedent question to the qualified immunity issue.[172]

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stitution against federal officials in their individual capacity for violations of Fourth Amendment of the United States Constitution).

164. *Id.*

165. *Siegert*, 111 S. Ct. at 1794.

166. *Id.* at 1793. *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 639 (1987) ("whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action") (quoting Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982)).

167. *Siegert*, 111 S. Ct. at 1793 .

168. *Id.*

169. *Id.* at 1793.

170. *See id.* at 1796 (Marshall, J., dissenting) (the two questions on which the Court granted certiorari specifically addressed issue of qualified immunity of a public official in *Bivens* claim for damages).

171. *Id.* at 1794.

172. *Id.* at 1793.

Most lower federal courts have approached the issue in the opposite fashion and found that the constitutional question need not be decided because, even if the plaintiff had stated a constitutional claim, the defendant would be protected by qualified immunity.[173] Therefore, if *Siegert* is important for qualified immunity purposes, perhaps it is important with respect to the methodology which lower federal courts are now required to employ when qualified immunity is raised as a defense to a constitutional claim.

The constitutional issue in *Siegert* is a recurring question: under what circumstances is a public employee who is discharged for stigmatizing reasons entitled to a name-clearing hearing as a matter of procedural due process?[174] The plaintiff, in *Siegert*, was a clinical psychologist in a federal government hospital.[175] His supervisor threatened to terminate his employment.[176] Therefore, he resigned.[177] Following his resignation he applied for a new position in a United States Army Hospital.[178] However, he needed the recommendation of his former supervisor who had threatened to fire him.[179] When the supervisor wrote up his "recommendation" he described Siegert, the former employee, as being "inept and unethical, perhaps the least trustworthy individual I have ever supervised in my thirteen years [on the job] . . . ."[180] Not surprisingly, Siegert did not get the new position.[181]

The United States Supreme Court held that Siegert was not entitled to a due process name clearing hearing because the stig-

173. *See* SCHWARTZ, *supra* note 20 at 578.

174. *Siegert*, 111 S. Ct. at 1791-92 .

175. *Id.* at 1791.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* When applying for a position in an Army Hospital a prospective employee must be "credentialed" which requires the candidate to fill out a "Credential Information Request Form" containing information on the prospective employee's previous job performance. Siegert v. Gilley, 895 F.2d 797, 799 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991).

180. *Siegert*, 111 S. Ct. at 1791.

181. *Id.*

matizing reasons did not occur in conjunction with termination of his employment.[182] Rather, the Court determined that it occurred later on when the employee applied for a new position.[183] The "later on" is described by the Supreme Court as "several weeks later."[184] I think this is going to be known as the "several weeks later doctrine" because now you have the question of what if it happened two days after he was fired? What if it was six weeks after? What do we mean by "several weeks later"?

In *Siegert*, Justice Kennedy wrote what I believe to be an important concurring opinion in which he addressed the issues that arose when the constitutional claim itself implicated a public official's state of mind and the public official raised the qualified immunity defense.[185] Justice Kennedy, in adopting the position of many federal circuit courts,[186] stated that a heightened pleading standard should be imposed on plaintiffs requiring plaintiffs to plead specific facts pertaining to the public official's wrongful state of mind.[187]

This is in tune with Judge Pratt's explanation of the judiciary's attempt to dispose of as many of these claims as early as possible.[188] Of course, the problem with the heightened pleading requirement is that at the pleading stage the plaintiff's counsel has not had discovery yet. Therefore, the plaintiff's counsel does not have the factual ammunition to make those specific factual allegations. It puts the plaintiff in a type of Catch-22 situation. If the

182. *Id.* at 1794.

183. *Id.*

184. *Id.*

185. *Id.* at 1795 (Kennedy, J., concurring).

186. *See, e.g.*, Siegert v. Gilley, 895 F.2d 797, 802 (D.C. Cir. 1990), *aff'd on other grounds*, 111 S. Ct. 1789 (1991) (subjective "intent [of a public official] must be pleaded with specific, discernible facts or offers of proof"); Branch v. Tunnell, 937 F.2d 1382, 1386 (9th Cir. 1991) ("heightened pleading standard [applies] in cases in which subjective intent is an element of a constitutional tort action"); Whitacre v. Davey, 890 F.2d 1168, 1171 (D.C. Cir. 1989) (heightened pleading standard in *Bivens* claim requires "specific and concrete" allegations pertaining to public official's wrongful state of mind).

187. *Siegert*, 111 S. Ct. at 1795 (Kennedy, J., concurring).

188. *See supra* notes 25-39 and accompanying text.

plaintiff does not make allegations the complaint will be dismissed. The plaintiff, however, can not make the allegations without discovery, but will not be permitted to have discovery unless the court allows the plaintiff past the pleading stage. In addition, the court is not going to allow the plaintiff past the pleading stage without the specific allegations. Therefore, it is a real problem for plaintiff's attorneys.

There was another decision last Term that I think presents a real problem for plaintiff's attorneys. In fact, it is a very serious setback for plaintiff's attorneys. In *West Virginia University Hospitals v. Casey*,[189] the Supreme Court held that the fees that a plaintiff's counsel expends, or more accurately a plaintiff expends, for services rendered by experts during both the pre-trial stage and the trial stage are not recoverable under the civil rights fee shifting statute contained in 42 U.S.C. § 1988.[190] The court found that the plaintiff could only recover the $30 per diem fee that is contained in 28 U.S.C. § 1821.[191] There are few experts who are willing to work for $30 per day. Therefore, you can see the problem.

The problem is compounded because, as with other major litigation in the federal courts, experts are becoming an increasingly important part of § 1983 cases.[192] In employment discrimination cases, too, the expert is important. The Lawyers' Committee For

189. 111 S. Ct. 1138 (1991).

190. *Id.* at 1148. 42 U.S.C. § 1988 provides in pertinent part: "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, . . . 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." 42 U.S.C. § 1988 (1988).

191. *West Va. Univ. Hosps.*, 112 S. Ct. at 1148. 28 U.S.C. § 1821(b) has been amended to increase the allowable per diem fee to $40. 28 U.S.C. § 1821(b), *amended by* Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 314(a), 104 Stat. 5115 (1990).

192. In *West Virginia University Hospitals.*, Justice Stevens stated that "expert witnesses were 'essential' and 'necessary' to the successful prosecution of plaintiff's case." 111 S. Ct. at 1151 (Stevens, J., dissenting). In addition, Justice Stevens opined that "[t]he expert witnesses here played a pivotal role in their non-testimonial, rather than simply their testimonial, capacity." *Id.* at 1151 n.6 (Stevens, J., dissenting).

Civil Rights Under Law[193] estimated that approximately 15-20% of the civil rights fees they recovered represented the amount expended for expert services.[194] I think that unless overturned by the Congress, this decision is going to have a serious negative impact for plaintiffs having to litigate § 1983 claims.[195]

Hon. Leon Lazer:

We are now going to take questions. We have a professional questioner who has taken part in our prior conferences and that is Professor Eileen Kaufman of this law school. Professor Kaufman has a distinguished background in civil rights and constitutional law and is a reporter for the Pattern Jury Instructions Committee of the New York Association of Supreme Court Justices. After Professor Kaufman asks any questions which she may have, we will open the panel to questions from the audience.

Professor Eileen Kaufman:

Before I ask a question, I would like to make a comment on the last case that Professor Schwartz talked about, *West Virginia University Hospitals v. Casey*,[196] the expert fees case. The case does far more than limit the recovery of expert fees to $30 a day for in court testimony.[197] The Court also held that the fee shifting statute did not cover the expenses associated with out-of-court

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193. The Lawyers' Committee For Civil Rights Under Law "[o]perates through local committees of private lawyers in eight major cities to provide legal assistance to poor and minority groups living in urban centers. [The] national office undertakes reform efforts in such fields as employment, voting rights, and housing discrimination." ENCYCLOPEDIA OF ASSOCIATIONS § 3, at 597 (27th ed. 1992).

194. Marcia Coyle, *Civil Rights Lawyers Lose on Expert Fees*, NAT'L L.J., April 11, 1991, at 8.

195. The Supreme Court decision in *West Va. Univ. Hosps.* v. Casey, 111 S. Ct. 1138 (1991) was overturned by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amends the Civil Rights Act of 1964, 42 U.S.C. § 2000e). The Bill was approved by the House of Representatives on November 7, 1991, and was signed into law by President Bush on November 21, 1991.

196. 111 S. Ct. 1138 (1991).

197. *Id.* at 1148.

assistance that experts offer.[198] Therefore, it has a very dramatic effect, I believe, on the ability of attorneys to take civil rights cases when it is apparent that the assistance of experts will be necessary.

Professor Schwartz, I would like to ask you about *Siegert v. Gilley*[199] because that case seems particularly troubling to me. It also seems that it is to some extent a question of the way the Court characterized the problem. The Court appeared to view this case no differently from *Paul v. Davis*,[200] where the Court held that a plaintiff could not recover under § 1983 for simply reputational injury.[201] However, wasn't there much more at stake here than a reputational injury? It seems to me that the plaintiff in *Siegert* alleged another much more tangible form of injury, namely, the loss of eligibility for governmental employment because, apparently, he was not credentialed.[202] That seemed to me to be an additional tangible injury that stands alongside the reputational injury that he was alleging.

Professor Martin Schwartz:

Prior to the 1976 decision in *Paul*, the Supreme Court decisional law dealing with governmental defamation of individuals established a principle that when the government defamed an individual's name or reputation it deprived that individual of a liberty interest.[203] Once an individual is deprived of a liberty interest, procedural due process applies and that individual is entitled to a name clearing hearing.[204] Certainly the government has enormous power in terms of how it could potentially brand an

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198. *Id.* (42 U.S.C. § 1988 conveys no authority to shift expert fees to losing party).

199. 111 S. Ct. 1789 (1991).

200. 424 U.S. 693 (1976).

201. *Id.* at 708-09.

202. *Siegert*, 111 S. Ct. at 1791. *See supra* note 180.

203. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

204. *Id.* The Court determined that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." *Id.*

individual or stigmatize an individual, and this seemed to be an important line of Supreme Court decisions.

Paul represents a decision that makes no logical sense at all. First of all, many believe, including myself, that *Paul* represents a somewhat less than candid reading of some of the prior Supreme Court decisional law.[205] Putting aside that troublesome aspect of it, however, there is what I consider the mathematical difficulty with the decision. What the Supreme Court stated in *Paul* was that while governmental injury to reputation does not itself constitute a deprivation of liberty, if it is coupled with the deprivation of some other tangible interest, somehow the two together added up to a deprivation of liberty.[206] One of the problems is that the Supreme Court has not clearly defined what is meant by "some tangible interest."[207] The one example that the Court gave was when it occurred in conjunction with the termination of public employment.[208] The Court stated that if an injury to reputation is coupled with the termination of public employment there was a deprivation of liberty.[209]

The reason I say it does not make sense mathematically is because if there is a public employee who has a property interest and he or she is terminated from their employment, that employee gets a hearing because there exists a deprivation of property.[210] However, the situation that the Supreme Court discussed in *Paul* involved a non-tenured employee who did not have a property interest.[211] What the Supreme Court stated in *Paul* was

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205. *See Paul,* 424 U.S. at 714-36 (Brennan, J., dissenting) (criticizing majority's decision as being "inconsistent with prior case law"). *See also* David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 322-38 (1976); Randolph J. Haines, Note, *Reputation, Stigma and Section 1983: The Lessons of Paul v. Davis,* 30 STAN. L. REV. 191 (1977).

206. *Paul,* 424 U.S. at 701-10.

207. *Id.* at 701.

208. *Id.* at 710. *See also* Board of Regents v. Roth, 408 U.S. 564 (1972) (defamation of non-tenured state employee by state official which did not occur in course of termination of employment failed to establish violation of 42 U.S.C. § 1983 or Fourteenth Amendment of the United States Constitution).

209. *Paul,* 424 U.S. at 710.

210. *Id.* at 707-10.

211. *Id.* at 709-10.

if a non-tenured employee without a property interest was terminated for stigmatizing reasons, that individual had suffered a deprivation of liberty entitling the individual to a due process name clearing hearing.[212] Now mathematically, that does not add up. What the Supreme Court stated was one does not have a liberty interest, so mathematically that is zero. Similarly, one does not have a property interest so mathematically that is zero. Somehow, however, the Supreme Court found that when the two interests are added together they resulted in a protected liberty interest. That is a very troublesome type of math. That is one troublesome aspect of it.

The question then becomes, isn't there a tangible interest in a case like *Siegert v. Gilley*?[213] Doesn't the tangible interest consist of being denied future employment?[214] Here is a presently available employment position being denied.[215] In that sense, maybe it should not matter whether the individual is denied a particular job or potentially being denied a wide range of government employment. The Supreme Court's opinion in *Siegert* is not clear on whether its analysis pertains when a range of jobs are at stake, or just the one job that Siegert was seeking.[216]

Professor Eileen Kaufman:

Professor Schwartz, you indicated that you think that *Edmonson* will be extended to the criminal defendant's use of peremptory challenges. Can that happen without the Court either implicitly or explicitly overruling *Polk County v. Dodson*,[217] a case where they held a public defender's representation did not constitute state action?[218]

212. *Id.* at 708-09.
213. 111 S. Ct. 1789 (1991).
214. *Id.* at 1791-92.
215. *Id.*
216. *Id.* at 1794.
217. 454 U.S. 312 (1981).
218. *Id.* at 324-25.

Professor Martin Schwartz:

In *Polk County v. Dodson*,[219] which is one of the decisions that was distinguished in *Edmonson*,[220] the Supreme Court held that a public defender's representation of an indigent criminal defendant did not constitute state action because the defender was not acting for the state but acting as an adversary of the state.[221] The Court found that the public defender was not carrying out a governmental function but rather, an essentially private function.[222]

I believe that the Court will follow its prior decision in *Polk County* concerning the general array of functions carried out by a public defender, but will not apply it to race based peremptory challenges.[223] What the Court held in *Edmonson* was that jury selection is special, it is different and it is especially different when it is on racial grounds.[224] Specifically, the Court held that in the civil context jury selection was a governmental function, because it occurred in the courthouse with all types of assistance from the government.[225] It appears that all of the factors that were present in *Edmonson* leading to the finding of state action are also present with respect to a public defender in a criminal case. We would certainly come up with an odd alignment of rules if the Court fails to apply *Edmonson* to the criminal defense attorney. Therefore, because the Supreme Court has prohibited prosecutors[226] and attorneys in civil cases[227] from exercising

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219. 454 U.S. 312 (1981).

220. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2086 (1991).

221. *Polk County*, 454 U.S. at 320.

222. *Id.* at 319-20.

223. *Id.*

224. *Edmonson*, 111 S. Ct. at 2080 (race based peremptory challenges violate Equal Protection Clause of the United States Constitution).

225. *Id.* at 2084-85 (when enforcing a discriminatory peremptory challenge, court has made itself a party to the biased act and placed "'its power, property and prestige behind the [alleged] discrimination.'") (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

226. *See* Batson v. Kentucky, 476 U.S. 79 (1986). *See also* Powers v. Ohio, 111 S. Ct. 1364 (1991); Carter v. Jury Comm'n of Greene County, 396 U.S. 320 (1970).

227. *Edmonson*, 111 S. Ct. at 2080 (1991).

race based peremptory challenges, I believe that the Court will also prohibit public defenders from exercising such challenges.[228]

Audience Participant:

Judge Pratt, in what direction do you think § 1983 cases, which focus on prisoners' rights, will take with the Rehnquist Court? We have a situation where the courts are being inundated with such claims. Certainly, the fact that many prisoner rights cases are frivolous must be balanced against economics, inasmuch as these claims involve costly investigations and defense strategies.

Hon. George C. Pratt:

A great number of § 1983 claims are *pro se*.[229] Almost all of these are filed by prisoners.[230] There are many problems involved with pro se cases, such as language difficulties. Usually, pro se papers are handwritten, which, aside from the problems involved in determining the claims, creates additional difficulties for judges in deciphering the handwriting of *pro se* litigants. Although our legal system requires judges to interpret these claims, using any inference in the prisoner's favor,[231] in many cases, this process fails. Unfortunately, many courts lack state help since states are the adversaries in many of these actions. As a consequence, judges are not always able to fulfill their duties.

In many instances, § 1983 claims are dismissed as soon as they are filed. Originally, this dismissal process was sanctioned under 28 U.S.C. § 1915(d),[232] which allows courts to dismiss pro se

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228. *See supra* note 152.

229. SCHWARTZ, *supra* note 20, at 25.

230. *Id.*

231. Hughes v. Rowe, 449 U.S. 5, 10 (1980) (per curiam) (Pro se complaints "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief."); Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (pro se complaints, "however inartfully pleaded," are not analyzed as strictly as those drafted by attorneys).

232. 28 U.S.C. § 1915(d) (1988). § 1915(d) provides that: "The court may request an attorney to represent any such person unable to employ counsel and

actions.[233] However, many *pro se* litigants no longer make these requests as they have realized that their actions may be dismissed upon making such requests. Thus, the court system continues to be left with tremendous numbers of *pro se* cases. It is unfortunate because judges are cognizant of the problems occurring in prisons,[234] but the great volume of pro se cases demands summary treatment of as many of these cases as is consistent with *Haines v. Kerner.*[235] It is only in rare instances that courts appoint attorneys to counsel pro se litigants whose claims appear meritorious.[236]

Courts apply the deliberate indifference standard in *pro se* cases except when the claims focus on access to the courts, the prison libraries, or the lack of amenities supplied to prisoners, such as typewriters.[237] Deliberate indifference is applied from a

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may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." *Id.*

233. *Id. See also* Neitzke v. Williams, 490 U.S. 319, 325 (1989) (It is proper to dismiss a pro se complaint on the grounds that it is frivolous "where it lacks an arguable basis either in law or in fact."); Anderson v. Coughlin, 700 F.2d 37, 45 (2d Cir. 1983) (inmates' civil rights suit was properly dismissed as frivolous since "ultimate success on the merits of their claims is slight").

234. *See* Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972) (stating that conditions in Greystone section of Santa Rita Rehabilitation Center, one of Alameda County's jail facilities, "violated basic standards of human decency" inasmuch as cells were tiny and the plumbing, ventilation, and sanitation "were obviously and grossly substandard").

235. 404 U.S. 519 (1972).

236. *See* Holt v. Ford, 862 F.2d 850, 853 (11th Cir. 1989) (typically, factors used by district courts in deciding whether or not to appoint counsel include merits of plaintiff's claim and complexity of factual and legal issues involved); McKeever v. Israel, 689 F.2d 1315, 1321-22 (7th Cir. 1982) (court granted plaintiff's request for counsel since case involved complex issues and plaintiff was unable to adequately investigate his claims and present his case at trial). *Cf.* Terrell v. Brewer, 935 F.2d 1015, 1017 (9th Cir. 1991) (appointment of counsel required a showing of "exceptional circumstances" which was not met since plaintiff "demonstrated sufficient writing ability and legal knowledge to articulate his claim").

237. *See* Bounds v. Smith, 430 U.S. 817 (1977). In *Bounds,* the Court stated that "[t]he inquiry is . . . whether law libraries or other forms of legal assistance are needed to give prisoners a reasonably adequate opportunity to

defendant's point of view.[238] Therefore, if the record shows that the defendant blatantly disregarded a prisoner's rights, then the defendant is deliberately indifferent.[239] Inasmuch as there is a lack of funding for present day prisons, denying typewriters to prisoners or reducing each prisoner's time in the library, both caused by a lack of adequate government funding, will probably not, in and of itself, demonstrate deliberate indifference.[240]

Audience Participant:

Professor Schwartz, I think I understood you to say that there is some reason to believe that the Contract Clause provides a basis for a § 1983 claim. Could you elaborate on that?

Professor Martin Schwartz:

Well, I say it for two reasons. First of all, it was not out of the realm of possibility that the Supreme Court in *Dennis* would have considered the time when 42 U.S.C. § 1983 was adopted, follow-

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present claimed violations of fundamental constitutional rights to the courts." *Id.* at 825. Some circuit courts have provided claimants with additional protections. Essentially, a claimant who cannot satisfy the *Bounds* test can state a claim for relief upon a showing of some actual injury, namely, an instance in which the claimant was denied access to court. *See* Peterkin v. Jeffes, 855 F.2d 1021, 1041 (3d Cir. 1988) (stating that the actual injury standard can be helpful in right of access cases); Sands v. Lewis, 886 F.2d 1166, 1171 (9th Cir. 1989) (explicitly adopting Third Circuit's actual injury standard).

238. Greason v. Kemp, 891 F.2d 829, 834 (11th Cir. 1990) (in determining deliberate indifference, courts "must focus on what was apparent to that [defendant] when he acted").

239. *See, e.g.,* Estelle v. Gamble, 429 U.S. 97, 104-05 (1976) (holding that deliberate indifference can be shown "by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed") (footnotes omitted); Howard v. Adkison, 887 F.2d 134, 136 (8th Cir. 1989) (affirming jury finding that defendants' failure to respond to inmate's request for cleaning supplies, so that he may clean the dirt and human waste contaminating his cell, constituted deliberate indifference).

240. *Cf. Bounds*, 430 U.S. at 825. ("[E]conomic factors may . . . be considered, for example, in choosing the methods used to provide meaningful access.").

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ing the adoption of the Fourteenth Amendment,[241] and find that the prime function of § 1983 was to enforce the Fourteenth Amendment.[242] In rejecting that line of reasoning and allowing Dormant Commerce Clause claims to be enforced under § 1983, the Court made clear that § 1983 encompasses at least some non-Fourteenth Amendment constitutional claims.[243] Second, add to that, the dialogue which occurred between the majority and the dissent in the *Dennis* case, concerning an old Supreme Court decision in *Carter v. Greenhow*[244] dealing with the Contract Clause.[245] The dissent argued that the Court, in *Carter*, held that the Contract Clause was not enforceable under § 1983.[246] The majority responded in a footnote that the Court had later explained that *Carter* did not directly resolve the Contract Clause question.[247]

Therefore, I would conclude that the majority of the present Court, following up on *Dennis v. Higgins,* [248] would probably find that Contract Clause claims are enforceable against state and local government. After *Dennis*, which held that the Commerce Clause was enforceable under § 1983,[249] coupled with the fact that the Commerce Clause, at least in some respects, is a power allocating provision between national and state government,[250] it would appear that the Contract Clause presents a stronger case for plaintiffs. In addition, the Contract Clause is a clause which

241. Dennis v. Higgins, 111 S. Ct. 865, 868 (1991) (legislative history of 42 U.S.C. § 1983 indicates that it is a remedial statute which should be liberally interpreted).

242. *Id.* at 869 (citing Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979)).

243. *Id.* at 869-70 ("§ 1983 'provide[s] a remedy, to be broadly construed, against all forms of official violation of federally protected rights'") (quoting Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 700-01 (1978)).

244. 114 U.S. 317 (1885).

245. *See id.* (violation of Contract Clause, United States Constitution Article I, Section 10, does not give rise to § 1983 cause of action).

246. *Dennis*, 111 S. Ct. at 876 (Kennedy, J., dissenting).

247. *Id.* at 872 n.9.

248. 111 S. Ct. 865 (1991).

249. *Id.* at 867.

250. *Id.* at 870.

gives, in no uncertain terms, a right to an individual to be free of governmental impairment of contracts.[251] Therefore, in light of the foregoing, I believe that the Court would hold that the Contract Clause is enforceable under § 1983.

Judge Pratt recently decided a case that enforced the Contract Clause regarding lag payroll imposed by the legislature on the state court employees.[252] Oddly enough, no one mentioned § 1983. However, it had to be the vehicle for endorsing the Contract Clause claim against the state and local governments.

Hon. George C. Pratt:

That issue was not even raised in the case, because it was assumed that it could be done.

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251. U.S. CONST. art. 1, § 10 cl. 1. The Contract Clause provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." *Id.*

252. Association of Surrogates and Supreme Court Reporters of New York v. New York, 940 F.2d 766 (2d Cir. 1991).