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BEYOND POLICE MISCONDUCT AND FALSE ARREST: EXPANDING THE SCOPE OF 42 U.S.C. § 1983 LITIGATION

*John R. Williams*¹

The most common forms of constitutional litigation under 42 U.S.C. § 1983 involve the traditional areas of police misconduct: unreasonable force, false arrest, and searches and seizures.² The purpose of this article, however, is to discuss cases which have provided a § 1983 remedy for other kinds of official misconduct.

I. MALICIOUS PROSECUTION

A. *Constitutional Grounds for Malicious Prosecution*

The United States Supreme Court confirmed in *Albright v. Oliver*³ that a malicious prosecution claim under § 1983 arises from the Fourth Amendment. This concept emerged in 1965, but it was not until *Albright* that it became more clear.⁴ Although many courts before *Albright* accepted the Fourth Amendment analysis, many still re-characterized malicious prosecution actions as substantive due process violations.⁵ Setting up

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² See *Graham v. Connor*, 490 U.S. 386, 392-94 (1989) (describing example of unreasonable or excessive force); *Ricciuti v. N.Y. City Transit Auth.*, 124 F.3d 123, 127-30 (2d Cir. 1997) (depicting example of false arrest, malicious prosecution, and others); *Nelson v. City of Cambridge*, 101 F. Supp. 2d 44, 48-49 (D. Mass. 2000) (citing *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1 (1st Cir. 1995) for false arrest elements).

³ 510 U.S. 266 (1994).

⁴ See *Dombrowski v. Pfister*, 380 U.S. 479, 488-89 (1965) (describing constitutional violations by prosecutors can support certain injunctions).

⁵ See *Kerr v. Lyford*, 171 F.3d 330, 339 (5th Cir. 1999) (describing longstanding rule

the Court's decision in *Albright*, the Seventh Circuit and Judge Posner opined that malicious prosecution was not a constitutional tort at all.⁶ Judge Posner also reasoned in another case that malicious prosecution was only "a link in a chain showing a deprivation of liberty or property without due process of law."⁷

In *Albright*, the Supreme Court affirmed the Seventh Circuit's disposition, but through a different analysis.⁸ Disagreeing with the First, Sixth, and Seventh Circuits, the Court held that malicious prosecution cases pursuant to § 1983 arise from the Fourth Amendment and not the more general notion of substantive due process.⁹ The Court made no final ruling, however, as to whether a constitutional tort exists separate and apart from the § 1983 context.¹⁰ The Court thereby left standing an overwhelming weight of authority confirming such existence.

in circuit that malicious prosecution is Fourth Amendment issue); *Cook v. Sheldon*, 41 F.3d 73, 79 (2d Cir. 1994) (aligning malicious prosecution with due process violation); *Senra v. Cunningham*, 9 F.3d 168, 173 (1st Cir. 1993) (imposing substantive due process "shocks the conscience" test); *Doe v. Louisiana*, 974 F.2d 36 (5th Cir. 1992) (describing malicious prosecution as due process violation); *Martin v. Thomas*, 973 F.2d 449, 455 (5th Cir. 1992) (describing Fourth Amendment violation); *Janetka v. Dabe*, 892 F.2d 187, 190 (2d Cir. 1989) (resisting arrest prosecution subject to Fourth Amendment malicious prosecution); *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989) (framing § 1983 claim as due process claim despite freedom of accused during trial); *Rose v. Bartle*, 871 F.2d 331, 343, 348 (3d Cir. 1989) (finding grounds for malicious prosecution despite multiple amendments cited by appellants); *Jones v. City of Chicago*, 856 F.2d 985, 993-94 (7th Cir. 1988) (explaining malicious prosecution for continued confinement could trigger due process violation); *Strength v. Hubert*, 854 F.2d 421, 425-26 (11th Cir. 1988) (analyzing probable cause required by Fourth Amendment is incorporated by Fourteenth Amendment); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988) (analyzing malicious prosecution for wrongful arrest); *Hand v. Gary*, 838 F.2d 1420, 1427 (5th Cir. 1988) (reascertaining probable cause post arrest invokes Fourth Amendment analysis); *McMaster v. Cabinet for Human Res.*, 824 F.2d 518, 522 (6th Cir. 1987) (imposing substantive due process "shocks the conscience" standard); *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985) (en banc) (explaining malicious prosecution routed in Fourth or Fourteenth Amendment depending on facts); *Losch v. Borough of Parkesburg*, 736 F.2d 903, 907-09 (3d Cir. 1984) (implying § 1983 malicious prosecution action could exist under analysis of Fourth or Fourteenth Amendment); *see also Dunn v. Tennessee*, 697 F.2d 121, 127 (6th Cir. 1982); *Occhino v. United States*, 686 F.2d 1302, 1311 (8th Cir. 1982); *Cline v. Brusett*, 661 F.2d 108, 112 (9th Cir. 1981); *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981); *Singleton v. City of New York*, 632 F.2d 185, 204 (2d Cir. 1980); *Norton v. Liddel*, 620 F.2d 1375, 1378 (10th Cir. 1980); *Colton v. Swain*, 527 F.2d 296, 303-04 (7th Cir. 1975); *Hampton v. Hanrahan*, 484 F.2d 602, 610 (7th Cir. 1973); *Shaw v. Garrison*, 467 F.2d 113, 121-22 (5th Cir. 1972); *Oakes v. Cooke*, 858 F. Supp. 330, 335 (N.D.N.Y. 1994) (McAvoy, C.J.); *Rodick v. City of Schenectady*, 856 F. Supp. 105, 107-08 (N.D.N.Y. 1994) (McAvoy, C.J.).

⁶ *See Albright v. Oliver*, 975 F.2d 343, 345-46 (7th Cir. 1992).

⁷ *Mahoney v. Kesery*, 976 F.2d 1054, 1060 (7th Cir. 1992).

⁸ *See Albright v. Oliver*, 510 U.S. 266, 271-74 (1994).

⁹ *Id.* at 273-75.

¹⁰ *Id.* at 275.

Just five months later, in a § 1983 claim for post-verdict confinement, the Court implied that a Fourth Amendment constitutional tort for malicious prosecution in fact existed.¹¹ The Court noted that “[t]he common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here”¹² Judge Posner and the Seventh Circuit seemed to acknowledge the import of this ruling and subsequently accepted the proposition that malicious prosecution by a state actor is actionable on Fourth Amendment grounds.¹³

In 2001, however, the ever contrarian Seventh Circuit reversed itself, holding that if the common-law requirements for a malicious prosecution action are present, the availability of a state law remedy would “scotch” any federal claim: “Claims of malicious prosecution should be analyzed . . . under the language of the Constitution itself and, if a state law withholds a remedy, under the approach . . . adopted by Justices Kennedy and Thomas in *Albright*.”¹⁴ Said another way, the Seventh Circuit still treats malicious prosecution as a procedural due process matter. The practical result is that in the Seventh Circuit, depending upon the panel of judges, a stand-alone claim for malicious prosecution may once again not exist.¹⁵

Other circuits also remain surprisingly confused in this area. For example, the Third Circuit stated in one case that federal malicious prosecution actions may be brought on procedural due process grounds or under

¹¹ See *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

¹² *Id.*

¹³ See *Smart v. Bd. of Tr. of Ill. Univ.*, 34 F.3d 432, 434 (7th Cir. 1994); see also *Whiting v. Traylor*, 85 F.3d 581, 584-85 (11th Cir. 1996). Judge Posner stated in *Smart* that:

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

Smart, 34 F.3d at 434 (citing *Albright*, 510 U.S. at 271-74); see *Ianesco v. City of Chicago*, 286 F.3d 994, 999-1000 (7th Cir. 2002) (demonstrating acceptance by Seventh Circuit).

¹⁴ *Newsome v. McCabe*, 256 F.3d 747, 751 (7th Cir. 2001) (Easterbrook, J.); cf. *Ianesco*, 286 F.3d at 999-1000.

¹⁵ The Sixth Circuit has joined an evolving bandwagon. In *Frantz v. Village of Bradford*, 245 F.3d 869 (6th Cir. 2001) the Sixth Circuit revisited “the role of state law in defining a section 1983 claim for malicious prosecution.” *Id.* at 875. The court concluded that under *Albright*, a malicious prosecution claim may not be separated from a false arrest claim. Thus, the Sixth Circuit would reject the Second Circuit’s view that indictment or arraignment cuts off damages from a false arrest. In fact, the Sixth Circuit now holds that there is a direct line from false arrest to trial-related damages, which is not interdicted by any judicial determination of probable cause. See *id.* at 877. Judge Gilman dissented and opined that *Albright* holds no such thing and in fact does no more than hold that malicious prosecution may not be analyzed as a substantive due process violation. See *id.* at 878.

other explicit constitutional provisions.¹⁶ The court further held that post-conviction incarceration – as a result of a malicious prosecution – can not constitute a Fourth Amendment violation because it is not a “seizure” in Fourth Amendment terms.¹⁷

B. Conceptual Differences Between Malicious Prosecution and False Arrest

The Second Circuit in *Singer v. Fulton County Sheriff*¹⁸ analyzed the nature of a constitutional malicious prosecution action. Currently in the Second Circuit, malicious prosecution actions stand apart from false arrest. The court also acknowledged the concept that a malicious prosecution claim indeed arises from Fourth Amendment violations.

Different elements comprise false arrest and malicious prosecution. For example, whereas lack of probable cause is a necessary element in both claims, only malicious prosecution requires a “favorable termination” for the accused in the underlying prosecution. This distinction is an important one: the *Singer* court found that the dismissal of the underlying criminal prosecution “in the interests of justice” was not enough to substantiate the favorable termination element of a malicious prosecution claim, even though such a disposition would suffice to support an action for false arrest.¹⁹

Another distinction between the two claims is the availability of damages. Any difference turns primarily on when the judicial process is initiated. For example, in the instance of a warrantless arrest, a successful false arrest action covers damages from the time of arrest up to the time of arraignment. A malicious prosecution action, however, would cover injuries occurring post arraignment, since that is the time when the arresting officer’s report forms the basis for prosecution. In the instance of an arrest pursuant to a warrant, however, a successful malicious prosecution action can also recover damages from the time of arrest until the time of arraignment. A claim for malicious prosecution, therefore, should ordinarily accompany any action for false arrest.²⁰

Malicious prosecution actions also have certain other advantages over false arrest actions. While both claims could suffice to ensure full

¹⁶ *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998).

¹⁷ *Id.* The Third Circuit also held in another case that malicious prosecution is not a substantive due process violation but at no point suggested a look at the Fourth Amendment. *See Merkle v. Upper Dublin Sch. Dist.*, 211 F.3d 782, 792 (3d Cir. 2000).

¹⁸ 63 F.3d 110 (2d Cir. 1995).

¹⁹ *See Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995).

²⁰ This is not to say that in all factual situations damages from a false arrest are categorically cut off at the point when prosecution is initiated (either by the filing of an information or in the return of an indictment). *See High v. Jacobs*, 961 F.2d 359, 366 (2d Cir. 1992).

compensation for injuries resulting from any false arrest (such as lengthy incarceration or criminal defense expenses), malicious prosecution claims purvey a forgiving statute of limitations. Liability for malicious prosecution does not accrue until there is a favorable termination of the underlying criminal prosecution.²¹ A prosecutor is therefore unable to delay the adjudication of the criminal case long enough to expire the statute of limitations. As a result, the attorney need not decide whether or not to file a malicious prosecution claim before the termination of the criminal prosecution.²² Similar to a contract approach in malpractice litigation, this benefit can keep attorneys from awakening in the wee hours of the night. Lest we sleep too well, however, there is a decision by a Connecticut trial judge – in a comparable vexatious litigation case – who recently held that the statute of limitations runs from the date of the wrongful act and not from the date of a “favorable termination.”²³

There are other advantages to malicious prosecution suits. For example, a malicious prosecution suit allows the victim of false grand jury testimony to avoid the common law immunity ordinarily afforded to trial or grand jury witnesses. The plaintiff can therefore sue for any damages resulting from the perjury.²⁴

C. Elements of Malicious Prosecution

The elements of a malicious prosecution case, under both the Fourth Amendment and state law, are that “(1) the defendant either commenced or

²¹ See *Nieves v. McSweeney*, 241 F.3d 46, 53 (1st Cir. 2001); *Beck v. City of Muskegon Police Dept.*, 195 F.3d 553, 557 (10th Cir. 1999); *Sneed v. Rybicki*, 146 F.3d 478, 481 (7th Cir. 1998); *Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998) (describing statute of limitations in the context of *Bivens* action); *Eugene v. Alief Indep. Sch. Dist.*, 65 F.3d 1299, 1306 (5th Cir. 1995); *Murphy v. Lynn*, 53 F.3d 547, 548 (2d Cir. 1995). *But cf.* *Brooks v. City of Winston-Salem*, 85 F.3d 178, 182 (4th Cir. 1996) (explaining malicious prosecution could accrue before favorable termination if action would not invalidate outstanding judgment).

²² Unless of course you want to include claims for unreasonable force or bail bond, or you live outside the Second and Fifth Circuits and are nervous about when a false arrest claim accrues.

²³ *Balletti v. Alter*, 23 Conn. L. Rptr. No. 2, 70 (1998) (Peck, J.), available at 1998 WL 712357, at *2 (Conn. Super. Ct. Sept. 25, 1998). This ruling seems anomalous and probably will not be followed elsewhere.

²⁴ See *Harris v. Roderick*, 126 F.3d 1189, 1198 (9th Cir. 1997) (concluding common-law immunity doesn't protect perjured witness testimony of complainant when sued for malicious prosecution); see also *Curtis v. Bembenek*, 48 F.3d 281, 285-86 (7th Cir. 1995); *Anthony v. Baker*, 955 F.2d 1395, 1400-01 (10th Cir. 1992); *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988). *But see* *Briscoe v. Lahue*, 460 U.S. 325 (1983) (analyzing grant of common law immunity for certain witnesses); *Cunningham v. Gates*, 229 F.3d 1271, 1291 (9th Cir. 2000); *Franklin v. Terr*, 201 F.3d 1098, 1099 (9th Cir. 2000); *Leavell v. Kieffer*, 189 F.3d 492, 494 (7th Cir. 1999); *Spurlock v. Satterfield*, 167 F.3d 995, 1001, 1004-06 (6th Cir. 1999); *Hammond v. Kunard*, 148 F.3d 692, 695-97 (7th Cir. 1998).

continued a criminal proceeding against [the plaintiff]; (2) the proceeding terminated in [the plaintiff's] favor; (3) there was no probable cause for the criminal proceeding; and (4) the criminal proceeding was instituted with actual malice."²⁵

1. Favorable Termination for the Accused

As noted above, an essential element of a § 1983 malicious prosecution suit – as in most state common-law malicious prosecution suits – is that the underlying criminal prosecution terminates in favor of the accused.²⁶ What constitutes a favorable termination may well be a function of state law. It is not necessary, however, that the civil plaintiff prevail on all aspects of the underlying criminal prosecution, so long as she prevails with respect to that charge upon which the civil suit is based. In *Janetka v. Dabe*,²⁷ the Second Circuit held that it was not necessary that the plaintiff be acquitted of all underlying charges so long as he is acquitted of the one charge that constituted the basis of his civil suit.²⁸ The charges must be genuinely unrelated to each other: for example, acquittal of charges for cocaine selling will not fulfill the favorable termination element when that charge is accompanied by a conviction for possession of the same substance (in the same trial).²⁹

Examples of the favorable termination requirement can be seen across the federal circuits. The Fifth Circuit, in a view which probably would be accepted everywhere, holds that when the government drops charges against an accused in exchange for something – such as an agreement to resign from a public office – the favorable termination element has not been fulfilled.³⁰ The Seventh Circuit, applying Illinois law, employs a more demanding standard than any other court: for example, a prosecu-

²⁵ *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991); see *Bonide Prod., Inc. v. Cahill*, 223 F.3d 141, 145 (2d Cir. 2000); *McSweeney*, 241 F.3d at 53. The court explained that the plaintiff also must show deprivation of a constitutional right. See *McSweeney*, 241 F.3d at 53-54. The First Circuit followed *Albright* and stated that malicious prosecution is grounded in the Fourth Amendment. See *id.*

²⁶ See *Brummett v. Cambele*, 946 F.2d 1178, 1183-84 (5th Cir. 1991).

²⁷ 892 F.2d 187 (2d Cir. 1989).

²⁸ See *Janetka*, 892 F.2d at 190 (differentiating disorderly conduct from resisting arrest); accord *Green v. Montgomery*, 219 F.3d 52, 59-60 (2d Cir. 2000); *Uboh*, 141 F.3d at 1005 (describing *Bivens* action); *Lowth*, 82 F.3d at 563; see also *DeLaurentis v. City of New Haven*, 597 A.2d 807, 821-22 (Conn. 1991).

²⁹ See *DiBlasio v. City of New York*, 102 F.3d 654, 659 (2d Cir. 1996).

³⁰ *Evans v. Ball*, 168 F.3d 856, 859-60 (5th Cir. 1999); *White v. Wortz*, 66 F. Supp. 2d 331, 334 (D. Conn. 1999). The court in *Wortz* held that when a charge is dismissed as part of a plea bargain involving a guilty plea to some unrelated charge, the dismissal nevertheless is not a favorable termination. Conversely, when "there is no *quid pro quo*," a voluntary dismissal by the prosecution is sufficient to support a malicious prosecution action. *Itzen v. Catalina*, 256 F.3d 324, 328 (5th Cir. 2001).

tor's entry of a *nolle prosequi* is not sufficiently favorable to support a malicious prosecution action.³¹ The Eleventh Circuit in *Uboh v. Reno*³² analyzed the issue in the context of a *Bivens* action. The court looked to state law and held the prosecutor's decision to dismiss several counts of an indictment, after the plaintiff had been convicted of unrelated counts, was a sufficiently favorable outcome to support a Fourth Amendment malicious prosecution action: "Actual innocence . . . is not required for a common law favorable termination."³³ The court implied that any doubt as to whether a termination is favorable for the purpose of a malicious prosecution claim should be resolved in favor of the plaintiff, and that the defendant should carry the burden to prove otherwise: "We find nothing in the record to suggest that the prosecutor's request to withdraw all drug charges . . . amounts to anything less than an indication of innocence."³⁴

2. Absence of Probable Cause

A successful claim for malicious prosecution also requires the absence of probable cause in the underlying criminal prosecution. The probable cause determination relevant to malicious prosecution differs from probable cause relevant to false arrest. First, in a malicious prosecution action the relevant probable cause determination is whether there was probable cause to believe the criminal proceeding could succeed.³⁵ This determination is distinct from the question of whether there was probable cause for the actual arrest. Second, in a malicious prosecution action, the lack of probable cause is an element of the tort that must be pled and proved by the plaintiff.

Accordingly, in a malicious prosecution action the existence of probable cause is determined at a different point in time vis-à-vis a false arrest claim. Probable cause for malicious prosecution is not determined at the time of the arrest, but when the defendant *initiates* the prosecution by filing a report with the prosecutor, submitting an affidavit, or giving grand jury testimony. This is particularly true when the prosecution follows a warrantless arrest. In such cases, the judicial proceeding is not deemed to have been commenced until the plaintiff's arraignment or an indictment by a grand jury. Accordingly, the existence of probable cause for the pur-

³¹ *Washington v. Summerville*, 127 F.3d 552, 557-58 (7th Cir. 1997). This line of thinking would not likely be well received in Connecticut, where even in the Eighteenth Century it was held that a *nolle prosequi* "is more conclusive than an acquittal of the Grand Jury." *State v. Stanley*, 2 Kirby 25 (Conn. 1787).

³² 141 F.3d 1000 (11th Cir. 1998).

³³ *Uboh*, 141 F.3d at 1005 (11th Cir. 1998) (citing RESTATEMENT OF TORTS §§ 659-60 (1938)). This situation is the federal equivalent of a *nolle prosequi*.

³⁴ *Id.*

³⁵ *See Posr v. Court Officer Shield # 207*, 180 F.3d 409, 417 (2d Cir. 1999).

poses of malicious prosecution is determined at the time the judicial proceeding commences (i.e., the time of the arraignment), not the time of the arrest. Thus, information discovered by a malicious prosecution defendant (ordinarily the arresting officer) after a warrantless arrest, but before the commencement of proceedings, is relevant to the determination of probable cause for purposes of a malicious prosecution action although not for purposes of a false arrest action.³⁶

3. Actual Malice

A malicious prosecution action also requires actual malice.³⁷ Ordinarily, malice in this context is proven by the lack of probable cause for either the arrest or the prosecution.³⁸ In assessing whether there was probable cause, the Second Circuit has held that it is proper to charge a jury, "that the indictment [is] 'evidence' of probable cause, which could be rebutted by, *inter alia*, proof that the officers had misrepresented or concealed material evidence."³⁹

4. Loss of Liberty

The Second Circuit determined that an additional element – the loss of liberty – is also necessary to establish a federal (but not a state) malicious prosecution claim. Through the evolution of numerous cases, the Second Circuit made this element quite reasonable to achieve: loss of liberty can be achieved by virtue of mere arraignment, because the plaintiff/accused is required to return to court and comply with conditions of his pretrial release.⁴⁰ As Justice Ginsburg observed in *Albright*:

A defendant incarcerated until trial no doubt suffers greater burdens. That difference, however, should not lead to the conclusion that a defendant released pretrial is not still 'seized' in the constitutionally relevant sense. Such a defendant is scarcely at liberty; he remains apprehended, arrested in his movements, indeed 'seized' for trial, so long as he is

³⁶ *Mejia v. City of New York*, 119 F. Supp. 2d 232, 254 (E.D.N.Y. 2000) (Trager, J.). Sometimes during that interval evidence is discovered which demonstrates the accused's innocence. Such evidence can not be ignored by the complaining party when instituting a prosecution.

³⁷ See *Rodick v. City of Schenectady*, 1 F.3d 1341, 1348 (2d Cir. 1993).

³⁸ See *Ricciuti v. N.Y. Transit Auth.*, 124 F.3d 123, 131 (2d Cir. 1997); *Lowth v. Town of Cheektowaga*, 82 F.3d 563, 566 (2d Cir. 1996); *Cox v. County of Suffolk*, 827 F. Supp. 935, 940 (E.D.N.Y. 1993) (Wexler, J.); *Tveraas v. Coffey*, 818 F. Supp. 75, 79 (D. Vt. 1993) (Parker, C.J.).

³⁹ *Robinson v. Cattaraugus County*, 147 F.3d 153, 163 (2d Cir. 1998) (Kearse, J.).

⁴⁰ See *Rohman v. N.Y. City Transit Auth.*, 215 F.3d 208, 215-16 (2d Cir. 2000).

bound to appear in court and answer the state's charges. He is equally bound to appear, and is hence 'seized' for trial, when the state employs the less strong-arm means of a summons in lieu of arrest to secure his presence in court.⁴¹

It logically follows that if loss of liberty can be established through a traffic ticket, there is also a loss of liberty germane to lengthy and costly criminal prosecutions.⁴² Accordingly, when a false arrest has been made, the coerced court appearances involved in defending a criminal prosecution will satisfy the required loss of liberty element. This will hold true even if the plaintiff/accused is free on bail bond throughout the criminal process.

The Second Circuit restated the elements of malicious prosecution later that same year, but left out the loss of liberty element: "To prevail on a claim of malicious prosecution, four elements must be shown: (1) the defendant initiated a prosecution against plaintiff, (2) without probable cause to believe the proceeding can succeed, (3) the proceeding was begun with malice, and (4) the matter terminated in plaintiff's favor."⁴³ A subsequent Second Circuit panel synthesized these decisions and held that the fifth element, post-arraignment restraint of liberty, is necessary to establish a federal (but not a state) malicious prosecution claim, and that this element is adequately satisfied when the plaintiff was required to return to court after arraignment to comply with the conditions of his pretrial release.⁴⁴

5. Other Considerations

Fraudulent police activity and certain First Amendment violations can also substantiate malicious prosecution claims. The Fifth Circuit in *Sanders v. English*⁴⁵ permitted a malicious prosecution suit against a police lieutenant who acquired exculpatory information after an arrest had been completed. The officer ignored the evidence and did nothing to bring it to the attention of the prosecuting authorities. The Fifth Circuit held that the officer had an obligation to do so and that his failure gave rise to a Fourth Amendment malicious prosecution action.⁴⁶ Similarly, the Seventh Circuit has held that a malicious prosecution action may be maintained even in the

⁴¹ *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsberg, J., concurring).

⁴² *See Cardullo v. Pedevillano*, 15 Conn. L. Rptr. No. 11, 351 (1995).

⁴³ *Ricciuti*, 124 F.3d at 130.

⁴⁴ *See Rohman*, 215 F.3d at 215-16.

⁴⁵ 950 F.2d 1152 (5th Cir. 1992).

⁴⁶ *See id.*; *cf.*, *Gallo v. City of Philadelphia*, 161 F.3d 217, 222-24 (3d Cir. 1998) (incorporating immunity discussion in *Bivens* context); *Reid v. New Hampshire*, 56 F.3d 332, 336-37 (1st Cir. 1995) (explaining failure to release exculpatory information triggers Fourth Amendment malicious prosecution).

face of a conviction if it is alleged and proven that the conviction itself was obtained by fraud.⁴⁷ The Second Circuit recognizes a separate cause of action for arrests improperly motivated by First Amendment considerations. In such instances, the arrestee can sue strictly under the First Amendment and not have to meet the favorable termination requirement.⁴⁸

D. Choice of Law for Malicious Prosecution Under § 1983

1. The Second Circuit, New York, and Connecticut

In 2002 the Second Circuit finally implied that a plaintiff must set forth the elements of malicious prosecution *under state law* in addition to demonstrating a violation of Fourth Amendment rights.⁴⁹ This conclusion, however, was also not always clear.

Examination of the favorable termination requirement readily demonstrates the choice of law evolution in the Second Circuit as it pertains to malicious prosecution actions. Establishing the favorable termination element of a malicious prosecution claim is critical. Ordinarily, this task is controlled by state law.⁵⁰ Indeed, state courts have a significant interest in what sort of termination is favorable under their laws. The Second Circuit initially moved away from this view in 1992 and in *Roesch v. Otarola*⁵¹ applied what had been a New York standard to Connecticut cases.⁵²

⁴⁷ See *King v. Goldsmith*, 897 F.2d 885, 886-87 (7th Cir. 1990) (distinguishing *Cameron v. Fogarty*, 806 F.2d 380 (2d Cir. 1986)). The court in *King* distinguished *Cameron*, reasoning that a conviction does not necessarily bar malicious prosecution claims that do not arise from erroneous probable cause arrests. See *id.*

⁴⁸ See *Johnson v. Bax*, 63 F.3d 154, 159 (2d Cir. 1995) (Newman, C.J.).

⁴⁹ See *Fulton v. Robinson*, 289 F.3d 188, 195 (2d Cir. 2002); see also *Janetka v. Dabe*, 892 F.2d 187, 189 (2d Cir. 1989) ("A claim of malicious prosecution brought pursuant to sections 1983 and 1988 is governed by state law in the absence of federal common law." (citing *Conway v. Village of Mt. Kisco*, 750 F.2d 205, 214 (2d Cir. 1984))). But see *Goree v. Gunning*, 738 F. Supp. 79, 82 (E.D.N.Y. 1990) (holding malicious prosecution not actionable when acquitted charges related to plaintiff's conviction charges).

⁵⁰ See *Janetka*, 892 F.2d at 189; see also *Reed v. City of Chicago*, 77 F.3d 1049, 1051-52 (7th Cir. 1996); *Easton v. Sundram*, 947 F.2d 1011, 1017 (2d Cir. 1991); *Conway v. Village of Mt. Kisco*, 750 F.2d 205, 214 (2d Cir. 1984).

⁵¹ 980 F.2d 850 (2d Cir. 1992).

⁵² See *Roesch v. Otarola*, 980 F.2d 850, 852-53 (2d Cir. 1992). In this case the Second Circuit held that dismissal of a Connecticut criminal prosecution under the "accelerated rehabilitation" program provided by a Connecticut statute was not sufficiently favorable to support a federal malicious prosecution action (even though such a dismissal resulted in erasure of the arrest *nunc pro tunc*). See *id.* The court relied on *Singleton v. City of New York*, 632 F.2d 185 (2d Cir. 1980), cert. denied, 450 U.S. 920 (1981), and *Hygh v. Jacobs*, 961 F.2d 359, 368 (2d Cir. 1992). The *Singleton* and *Hygh* decisions followed a line of New York authority. E.g., *Ryan v. N.Y. Tel. Co.*, 467 N.E.2d 487, 493 (N.Y. 1984). Additionally, the court in *Kramer v. Herrera*, 576 N.Y.S.2d 736, 737 (4th Dept. 1991) held that

By 1995, however, the Second Circuit recognized in *Russell v. Smith*⁵³ that, “a claim of malicious prosecution brought under § 1983 is governed by state law.”⁵⁴ Analyzing New York law, the court set forth a rigid standard for fulfilling the favorable termination element:

An acquittal is the most obvious example of a favorable termination. In many instances, however, criminal proceedings are terminated in a manner that does not establish either guilt or innocence. In the absence of a decision on the merits, the plaintiff must show that the final disposition is indicative of innocence.⁵⁵

The court then held that the New York court’s dismissal of an indictment with leave to re-prosecute – a dismissal without prejudice – was not a favorable termination under New York law.

Emboldening this standard, the Second Circuit later held in a New York case that, “[w]here the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused . . . *only when its final disposition is such as to indicate the innocence of the accused.*”⁵⁶ Continuing to cite only New York state cases, the court went on to note that in New York “dismissals for lack of subject matter jurisdiction . . . and dismissals . . . for failure to allege sufficient facts to support the charge” are considered insufficiently favorable to support malicious prosecution litigation.⁵⁷ The court continued: “[t]he matter of whether the prosecution’s effective abandonment of a prosecution . . . generally depends on the cause of the abandonment.”⁵⁸ Having said that, the court noted that such abandonment procured by the accused is ordinarily an insufficient favorable termination. Exactly *when* the abandonment is “brought about by the accused’s assertion of a constitutional or other privilege . . . such as the right to a speedy trial” is a matter yet undecided by the highest New York court.⁵⁹

New York procedures like “adjournment in contemplation of dismissal” or “dismissal in the interest of justice” under N.Y. CRIM. PROC. LAW § 170.40 (McKinney 1982) were not “favorable” enough for purposes of a malicious prosecution action. *See Herrera*, 576 N.Y.S.2d at 737; *Taylor v. Gregg*, 36 F.3d 453, 455-56 (5th Cir. 1994) (explaining the same effect under Texas law); *cf.*, *Harford v. County of Broome*, 102 F. Supp. 2d 85, 95 (N.D.N.Y. 2000) (describing no favorable termination subsequent to dismissal in return for “adjournment in contemplation of dismissal”).

⁵³ 68 F.3d 33 (2d Cir. 1995).

⁵⁴ *See id.* at 36.

⁵⁵ *Id.*

⁵⁶ *Murphy*, 118 F.3d at 948 (citing only New York state cases) (emphasis added).

⁵⁷ *Id.*; *cf.*, *Breen v. Garrison*, 169 F.3d 152, 152-53 (2d Cir. 1999).

⁵⁸ *Murphy*, 118 F.3d at 949.

⁵⁹ *Id.* This represents a view with which even a Connecticut court would agree. *See See v. Gosselin*, 48 A.2d 560, 561-62 (Conn. 1946).

Connecticut courts, however, have a broader view of what sort of dispositions are sufficiently favorable. In Connecticut, any time criminal charges are dropped without some trade-off from the defendant, or any time a civil action is resolved without payment from or order against the defendant, the disposition is considered favorable for malicious prosecution or vexacious litigation claims.⁶⁰ Said another way, if the prior action terminated without any adjudication against the plaintiff, "[the] favorable termination prong is satisfied under Connecticut law. Thus, the termination of the underlying criminal action need not indicate innocence – merely, it must not indicate guilt."⁶¹ Under that view, a dismissal pursuant to the accelerated rehabilitation statute would be sufficiently favorable to support a malicious prosecution action.⁶² Additionally, unlike New York, the Second Circuit now assumes that a dismissal for denial of a speedy trial is sufficiently favorable to the accused to support an action for malicious prosecution.⁶³

In the *Roesch* decision, the Second Circuit refused to follow the more liberal Connecticut standard for favorable termination.⁶⁴ Since *Roesch*, however, one Connecticut state-court judge went so far as to hold that under state law a suit for vexatious litigation can be based upon a prior civil action in which there was a negotiated settlement (*to wit* the payment of money) if the jury is satisfied that the payment was made solely to avoid further costs of litigation.⁶⁵

In May of 2002, the Second Circuit at last implied in *Fulton v. Robinson*⁶⁶ – without directly saying so – that it had finally come to understand

⁶⁰ See *DeLaurentis v. City of New Haven*, 597 A.2d 807 (Conn. 1991); *Gosselin*, 48 A.2d at 561-62; *Andreo v. Sakon*, 17 Conn. L. Rptr. No. 6, 223 (1996) (holding dismissal of civil suit for failure to prosecute sufficiently favorable to support vexatious litigation).

⁶¹ See *Russo v. City of Hartford*, 184 F. Supp. 2d 169, 185-86 (D. Conn. 2002) (Hall, J.).

⁶² *Grasso v. Newbury*, 16 Conn. L. T. 18 at 31 (1990). In *Grasso*, the Superior Court held that an action for state-law malicious prosecution could be based upon a dismissal under the accelerated rehabilitation statute. The court held that the decision in *Konan v. Fornal*, 612 F. Supp. 68, 69 (D. Conn. 1985) (relying upon *Singleton*), misinterpreted Connecticut law. But see *Roesch v. Ofarola*, 980 F.2d 850, 852-53 (2d Cir. 1992).

⁶³ See *Murphy*, 118 F.3d at 950-51; *Posr v. Court Officer Shield #207*, 180 F.3d 409, 417-18 (2d Cir. 1999); *Bordeau v. Village of Deposit*, 113 F. Supp. 2d 292, 299 (N.D.N.Y. 2000) (Hurd, J.).

⁶⁴ See *Roesch*, 980 F.2d at 853 n.3.

⁶⁵ See *Golub v. Holmes*, 12 Conn. L. Rptr. No. 4, 107 (1994). When it comes to procedure the Second Circuit has consistently agreed with the above jury-oriented approach for New York cases: "When the termination of a case is indecisive because it does not clearly address the merits of the charge, the underlying facts must be examined to determine 'whether the failure to proceed implies a lack of reasonable grounds for the prosecution.' . . . Where . . . the reasons for a dismissal of charges are in dispute, the matter should ordinarily be submitted to a jury." *Ricciuti v. N.Y. Transit Auth.*, 124 F.3d 123, 131 (2d Cir. 1997).

⁶⁶ 289 F.3d 188 (2d Cir. 2002).

the differing standards for favorable termination between the states in the circuit. Like the majority of malicious prosecution cases in the Second Circuit, *Fulton* arose in New York. As a result, the court applied New York's draconian favorable termination standard. In articulating this standard, however, the court employed language it had not used before: "In order to prevail on a § 1983 claim against a state actor for malicious prosecution, a plaintiff must show a violation of his rights under the Fourth Amendment . . . and establish the elements of a malicious prosecution claim *under state law*. . . . To establish a malicious prosecution claim under New York law, a plaintiff must show" ⁶⁷ This language clearly suggests the court understands that the law it is applying is *only* New York law and not the law of the entire circuit.

2. Other Circuits

The Third Circuit also looks to state law for guidance in federal malicious prosecution actions. In *Smith v. Holtz* ⁶⁸ the court held that a dismissal on purely double jeopardy grounds was a favorable termination that would support a § 1983 malicious prosecution action. In *Hilferty v. Shipman* ⁶⁹ The plaintiff had been prosecuted with her common-law husband. He cut a deal with the prosecutor under which he pled guilty, and the now-plaintiff received a *nolle prosequi*. She alone sued for malicious prosecution. Allowing the suit, the court held that:

[W]hen a co-defendant acting as an authorized agent of another party, say his wife, enters into a compromise that provides for the dismissal of charges against her, she cannot be barred from filing a malicious prosecution claim if she herself offered no consideration in exchange for the dismissal, unless it is clear that she was fully aware that such waiver would be the consequence of allowing her husband to enter into the compromise on her behalf. ⁷⁰

The Fifth Circuit also employs state common law. ⁷¹ That circuit imputes the draconian Texas requirement that a plaintiff show actual innocence. ⁷² A plaintiff in the Fifth Circuit must do this in addition to demonstrating all the other elements for a malicious prosecution.

⁶⁷ *Fulton*, 289 F.3d at 195 (emphasis added).

⁶⁸ 87 F.3d 108 (3d Cir. 1996).

⁶⁹ 91 F.3d 573 (3d Cir. 1996).

⁷⁰ *Hilferty v. Shipman*, 91 F.3d 573, 583 (3d Cir. 1996).

⁷¹ See *Evans v. Ball*, 168 F.3d 856, 862 n.9, 863 (5th Cir. 1999) (explaining that "malicious prosecution may be a constitutional violation . . . only if all of its common law elements are established.").

⁷² See *Hayter v. City of Mount Vernon*, 154 F.3d 269, 275 (5th Cir. 1998).

There is a general common-law concept whose varied application in malicious prosecution suits demonstrates a disparity in choice of law jurisprudence across the circuits. In Massachusetts, the Supreme Judicial Court (SJC) held in *Broussard v. Great Atlantic & Pacific Tea Co.*⁷³ that:

[C]onviction of the accused by a tribunal to which the complaint was made, although reversed on appeal, conclusively establishes the existence of probable cause, unless the conviction was obtained solely by false testimony of the defendant charged with malicious prosecution⁷⁴

This common law rule is enshrined in the Restatement (Second) of Torts.⁷⁵ The Second Circuit has seemingly embraced it.⁷⁶ Interestingly, the First Circuit strongly suggested in dicta that this state law rule should not apply in federal malicious prosecution actions.⁷⁷ The Third Circuit flatly rejects the concept as being entirely out of keeping with the intent of civil rights statutes.⁷⁸

E. The Underlying Prosecution: Criminal and Civil

In *Easton v. Sundram*,⁷⁹ the Second Circuit noted the distinction between *criminal* malicious prosecution suits and *civil* malicious prosecution suits; that is, *civil* malicious prosecution suits in some jurisdictions are called claims for vexatious litigation. The Second Circuit held that only malicious *criminal* prosecutions which terminate favorably can be the subject of § 1983 malicious prosecution litigation, while civil suits brought by state actors can not.

However, in *Pinsky v. Duncan*,⁸⁰ the Second Circuit dramatically changed directions without mentioning either *Easton* or *Singer*. In *Duncan* the court held that a civil suit, under some circumstances, can provide the necessary predicate for a § 1983 malicious prosecution action. In *Duncan*, civil litigants had obtained a prejudgment attachment of assets under the provisions of the Connecticut prejudgment remedy statute. The attached parties challenged the constitutionality of the attachments and prevailed in the United States Supreme Court, which held the state law unconstitu-

⁷³ 86 N.E.2d 439, 324 Mass. 323 (1949).

⁷⁴ *Broussard*, 86 N.E.2d at 440, 324 Mass. at 326.

⁷⁵ See RESTATEMENT (SECOND) TORTS § 667(1) (1977); see also *Lind v. Schmid*, 337 A.2d 365, 370 (N.J. 1975).

⁷⁶ See *City of Newport v. Fact Concerts*, 453 U.S. 247, 259 (1981); *Cameron v. Fogarty*, 806 F.2d 380, 387 (2d Cir. 1986).

⁷⁷ See *Meehan v. Town of Plymouth*, 167 F.3d 85, 90-91 (1st Cir. 1999).

⁷⁸ See *Montgomery v. De Simone*, 159 F.3d 120, 125 (3d Cir. 1998).

⁷⁹ 947 F.2d 1011, 1017 (2d Cir. 1991).

⁸⁰ 79 F.3d 306 (2d Cir. 1996).

tional.⁸¹ Having thereafter prevailed on remand, they instituted a § 1983 malicious prosecution suit asserting that their property had been seized without due process and under color of the state law. The Second Circuit held that such actions were available at common law at the time § 1983 was enacted and that the Fourth Amendment malicious prosecution action was the nearest available analogy. This decision, of course, not only silently reverses *Easton* but modifies *Singer's* custody requirement by expanding it to cover both seizures of persons and seizures of effects.

F. Conclusion

In summary, Fourth Amendment malicious prosecution claims are an essential part of any suit for false arrest. Asserting a malicious prosecution claim will enhance the availability of damages and open up for judicial examination the full range of official misconduct involved.

II. PROSECUTORIAL MISCONDUCT AND IMMUNITY

Prosecutors, like other public officials, can be sued under § 1983 when they violate constitutional rights. The issue, however, is immunity.⁸² Sometimes prosecutors are immune and sometimes they are not. Typically, prosecutors are immune from civil liability for litigation-related activities.⁸³ In contrast, there is no prosecutorial immunity for activities involving investigation, office administration, or press relations.⁸⁴

⁸¹ See *Connecticut v. Doe*, 501 U.S. 1, 11-15 (1991).

⁸² See *Burns v. Reed*, 500 U.S. 478, 493-96 (1991) (applying and modifying immunity standard under *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)); *Imbler*, 424 U.S. at 430 (describing initial immunity standard). These cases are important markers in this area. The base concept for immunity is that the prosecutor is immune from those activities "intimately associated with the judicial phase of the criminal process." *Imbler*, 424 U.S. at 430. Cases like *Burns* further erode this basic standard in certain factual situations.

⁸³ See *Manetta v. Macomb County Enforcement Team*, 141 F.3d 270, 274 (6th Cir. 1998) (describing prosecutorial immunity for filing criminal complaint, seeking arrest warrant, and presenting to judicial officer). The officer in *Manetta*, however, was denied absolute immunity for his role in the preliminary investigation and for his order that the plaintiffs be held on extortion charges. See *id.* A prosecutor obtained immunity for using peremptory jury challenges in a racially discriminatory manner. See *Esteves v. Brock*, 106 F.3d 674, 677-78 (5th Cir. 1997). A county attorney obtained immunity for *ex parte* communications with a judge and for attempting to influence the testimony of witnesses at a related hearing, but was denied immunity for events which transpired while meeting with a witness during the investigation. See *Storck v. Suffolk County Dept. of Social Serv.*, 62 F. Supp. 2d 927, 944-45 (E.D.N.Y. 1999) (Wexler, J.). A prosecutor was entitled to immunity for knowingly presenting false testimony at a hearing because that was part of his role as an advocate. He was denied immunity, however, for coercing that testimony in the first place, because that is his role as an investigator. See *Zahrey v. Coffey*, 221 F.3d 342, 346-47 (2d Cir. 2000) (appearing in dicta). A prosecutor is immune for refusal to release evidence while an appeal is pending, because this is an aspect of her role as an advocate. See *Parkin-*

Prosecutors are not immune for deliberately failing to train, supervise, and educate police officers who routinely testify in criminal cases, when such indifference proximately causes perjury that leads to wrongful imprisonment. Such conduct falls within the administrative or investigative function of the prosecutor's job.⁸⁵ For example, the Sixth Circuit has found that there is no prosecutorial immunity for failing to properly investigate or advise police on the existence of probable cause (especially if this causes police to prematurely discontinue investigation).⁸⁶

A. *United States Supreme Court: Triggering Prosecutorial Immunity*

In *Buckley v. Fitzsimmons*,⁸⁷ the United States Supreme Court analyzed prosecutorial immunity vis-à-vis § 1983 claims against a prosecutor (Fitzsimmons). Determined to convict Buckley for the murder of an eleven year-old child, Fitzsimmons shopped around until he found a witness (the legendary Louise Robbins, Ph.D.) who was willing to swear that a footprint found at the scene of the crime was Buckley's. Robbins notoriously testified all over North America that she could analyze crime-scene footprints and thereby identify both the actual shoe worn and the individual wearing the shoe at the time of the crime. Knowing that this evidence was bogus, Fitzsimmons nevertheless presented it to a grand jury. Many months later, he finally obtained an indictment. At a subsequent press conference he falsely accused Buckley of the crime.⁸⁸

Buckley alleged that the prosecutor had knowingly manufactured witness testimony and falsely accused him at the subsequent press conference. Fitzsimmons successfully persuaded a divided Seventh Circuit that

son v. Cozzolino, 238 F.3d 145, 152-53 (2d Cir. 2001).

⁸⁴ See *Schrob v. Catterton*, 948 F.2d 1402, 1408, 1420-21 (3d Cir. 1991) (describing press and investigative activities preclude immunity); see also *Milstein v. Cooley*, 257 F.3d 1004, 1011-13 (9th Cir. 2001) (prosecutors not immune for acquiring known false statements, filing report against witness, and investigative activities); *DiCesare v. Stuart*, 12 F.3d 973, 977-79 (10th Cir. 1993) (preserving evidence as advocate); *Liffiton v. Keuker*, 850 F.2d 73, 76 (2d Cir. 1988) (describing illegal wiretaps, unauthorized investigation, and improper subpoena precludes immunity). Immunity also was denied to an assistant district attorney for requiring a robbery victim to make a face-to-face identification while failing to provide protection. See *Ying Jing Gan v. City of New York*, 996 F.2d 522, 531-34 (2d Cir. 1993). In another Second Circuit case, a prosecutor who enjoyed full immunity for allegedly suborning perjury in one criminal trial was not entitled to immunity for conspiring with one or more non-prosecutors to present the same or similar perjury. See *Dory v. Ryan*, 25 F.3d 81, 83-84 (2d Cir. 1994). The United States Supreme Court denied immunity to a prosecutor who had prepared a materially false certificate of probable cause in support of a search warrant. See *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997).

⁸⁵ See *Carter v. City of Philadelphia*, 181 F.3d 339, 355-56 (3d Cir. 1999).

⁸⁶ See *Prince v. Hicks*, 198 F.3d 607, 611-14 (6th Cir. 1999).

⁸⁷ 509 U.S. 259 (1993).

⁸⁸ See *Buckley*, 509 U.S. at 263-64 (1993).

prosecutorial immunity protected both these actions under *Imbler v. Pachtman*.⁸⁹ On the issue of immunity, the United States Supreme Court granted certiorari.

The Court initially remanded *Buckley* back to the Seventh Circuit with instructions to analyze the immunity issue in light of *Burns v. Reed*,⁹⁰ an instructive case that was pending at the time of the initial Seventh Circuit decision. *Burns* made clear that prosecutors who advise police during investigations are not absolutely immune from those actions.⁹¹ Upon that initial remand, the Seventh Circuit stuck to its guns and differentiated the facts at bar from those in *Burns*.⁹²

The Supreme Court granted certiorari a second time and further refined the standard for prosecutorial immunity.⁹³ The Court outlined that most public officials are entitled only to *qualified* immunity and that only sometimes do their actions fit within the common-law tradition of *absolute* immunity.⁹⁴ The Court indicated that the standard for whether immunity exists at all is "determined by the nature of the function performed, not the identity of the actor who performed it . . . and it is available for conduct of prosecutors that is 'intimately associated with the judicial phase of the criminal process.'"⁹⁵ The Court then held that absolute prosecutorial immunity was not available for either advising police during investigations or making statements during press conferences.⁹⁶

The Court has since upheld the *Buckley* modified standard. In a recent case the Court adhered to the distinction between advocacy and investigative / administrative activities when it afforded absolute immunity for the preparation and filing of charging documents (an information and motion for an arrest warrant), but denied immunity for executing a certifica-

⁸⁹ 424 U.S. 409, 430 (1976); see *Buckley*, 509 U.S. at 264.

⁹⁰ 500 U.S. 478 (1991).

⁹¹ See *Burns v. Reed*, 500 U.S. 478, 479 (1991). The Court held that absolute immunity is recognized for prosecutors in their role as advocates vis-à-vis investigators. Accordingly, the Court held that advising police in the investigation phase of a criminal case is not so "intimately associated with the judicial phase of the criminal process" that it qualifies for absolute prosecutorial immunity. *Id.* (quoting *Imbler*, 424 U.S. at 430); see also *Buckley v. Fitzsimmons*, 952 F.2d 965, 966 (7th Cir. 1992), remanded from *Buckley v. Fitzsimmons*, 502 U.S. 801 (1991).

⁹² See *Buckley*, 952 F.2d at 966.

⁹³ See *Buckley*, 509 U.S. at 259-60, 266-79 (modifying *Imbler* immunity standard).

⁹⁴ *Id.*

⁹⁵ *Id.* (quoting *Imbler*, 424 U.S. at 430) (internal citations omitted).

⁹⁶ *Id.* The Seventh Circuit went another direction on the second remand and held that the mere preparation of perjured testimony is not a constitutional tort until that testimony is presented in court (the testimony at bar was not). See *Buckley*, 20 F.3d 789, 794-96 (7th Cir. 1994), cert. denied, 513 U.S. 1085 (1995). Likewise, the Seventh Circuit held that merely holding a press conference does not give rise to a § 1983 cause of action. See *id.* at 797-99.

tion for probable cause due to the fact that it could have been done by anybody.⁹⁷

1. Prosecutorial Activity Not Protected by Immunity: Examples in Select Federal Circuits

a. Third Circuit

The Third Circuit held in *Kulwicki v. Dawson*⁹⁸ that actions of a prosecutor in the course of interviewing witnesses – prior to the return of an indictment – were not protected by absolute prosecutorial immunity. During an interview the prosecutor encouraged a witness to accuse the prosecutor's political rival, Attorney Kulwicki, of involvement in a baby-selling operation. Politics is rough stuff in Crawford County, PA. Additionally in the Third Circuit, a prosecutor received absolute immunity for conducting civil forfeiture proceedings in court, but no immunity for his unlawful retention of property *after* the forfeiture trial. This included his delay in returning property judicially ordered to be restored to the owner.⁹⁹

b. Second Circuit

In the Second Circuit, a prosecutor's misconduct in initiating prosecution, conducting plea negotiations, manipulating bail, and influencing sentencing were all immunized. Keeping the plaintiff unlawfully in custody for an additional three weeks after dismissal of all charges, however, was administrative in nature and not immune.¹⁰⁰

There are many other instructive examples from the Second Circuit. For example, a prosecutor was found not immune when he advised police that there was probable cause to arrest the plaintiff during an investigation.¹⁰¹ That prosecutor was immune, however, from his decision to initiate the prosecution and withhold *Brady* material.¹⁰² Interestingly, whether or not he was immune for his actions in conducting videotaped interviews was held too close to call without further evidence.¹⁰³ A prosecutor's orchestration of a sting operation, and his subsequent statements to the press about the resulting arrest, were not covered by prosecutorial immunity – although they did receive the benefit of qualified immunity on the particu-

⁹⁷ See *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997).

⁹⁸ 969 F.2d 1454 (3d Cir. 1992).

⁹⁹ See *Reitz v. County of Bucks*, 125 F.3d 139, 147 (3d Cir. 1997).

¹⁰⁰ See *Pinaud v. County of Suffolk*, 52 F.3d 1139, 1151-52 (2d Cir. 1995).

¹⁰¹ See *Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir. 1995).

¹⁰² See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

¹⁰³ See *Hill*, 45 F.3d at 662-63.

lar facts of the case.¹⁰⁴ Additionally, there is no immunity available where the prosecutor is not acting within her jurisdiction.¹⁰⁵

c. Other Circuits

In the Ninth and Eleventh Circuits, prosecutors were not immune for facilitating a police search of the opposing defense attorney's law office.¹⁰⁶ Interestingly, the special master who supervised the search received quasi-judicial immunity for his role. Additionally, signing an affidavit for an arrest warrant, knowing that there was no probable cause, is outside the scope of prosecutorial immunity.¹⁰⁷ We have seen in Connecticut, however, that when a prosecutor instructs somebody else to prepare an affidavit, he can receive prosecutorial immunity because he would then be acting in his capacity as an advocate (provided he does not personally vouch for the contents).¹⁰⁸

In the Fourth Circuit a prosecutor was granted absolute immunity for suborning perjury before a grand jury and maliciously prosecuting the plaintiff's lawyer in order to prevent continued defense representation. These are traditional prosecutorial activities.¹⁰⁹ In the D.C. Circuit, however, a prosecutor was not entitled to immunity for intimidating and coercing witnesses and disclosing grand jury testimony to unauthorized persons.¹¹⁰

The Tenth Circuit proclaimed that even if a prosecutor is immune to a damages action, she may not necessarily ignore her constitutional obligations: "A prosecutor may not simply raise the shield of official immunity and continue to act in an unconstitutional manner without fear of judicial orders to the contrary. . . . A plaintiff may therefore seek injunctive relief to guard against continuing (or future) governmental misconduct."¹¹¹

¹⁰⁴ See *Smith v. Garretto*, 147 F.3d 91, 94-95 (2d Cir. 1998).

¹⁰⁵ See *Doe v. Phillips*, 81 F.3d 1204, 1209-11 (2d Cir. 1996). A prosecutor who demanded that the plaintiff swear to her innocence on a bible in a church – as a condition of dropping charges – was not entitled to immunity since no government official can require a religious action. *Id.* Without the appropriate jurisdiction, immunity can not attach. *Id.*

¹⁰⁶ See *Gabbert v. Conn.*, 131 F.3d 793, 801-04 (9th Cir. 1997).

¹⁰⁷ See *Morley v. Walker*, 175 F.3d 756, 760 (9th Cir. 1999); *Jones v. Cannon*, 174 F.3d 1271, 1281-82 (11th Cir. 1999).

¹⁰⁸ See *Sheehan v. Colangelo*, 27 F. Supp. 2d 344, 345 (D. Conn. 1998).

¹⁰⁹ See *Lyles v. Sparks*, 79 F.3d 372, 377 (4th Cir. 1996).

¹¹⁰ See *Moore v. Valder*, 65 F.3d 189, 194-95 (D.C. Cir. 1995).

¹¹¹ *Lemmons v. Law Firm of Morris & Morris*, 39 F.3d 264, 267 (10th Cir. 1994) ("If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings against them in order to assert their federal constitutional claims. . . . This is not the way the law has developed." (quoting *Supreme Court of Virginia v. Consumers Union of America, Inc.*, 466 U.S. 719, 737 (1980))).

B. Conclusion

The civil sanctions of § 1983 litigation are virtually the only viable means of reigning-in prosecutors who have forgotten the Supreme Court's admonition:

[A prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹¹²

There has never been a time in our history when there was a greater need to limit the extent of prosecutorial immunity. This would afford greater opportunities for civil redress to the victims of overly-zealous prosecutors. The increasing reluctance of the judiciary to impose meaningful sanctions only exacerbates the common notion among the Justice Department and many prosecutors that government lawyers are not bound by certain ethical considerations.¹¹³

III. ADDITIONAL CONSTITUTIONAL CAUSES OF ACTION

Most constitutionally dubious arrests and prosecutions are accompanied by a variety of other constitutional violations. The alert and creative attorney should examine every such case for additional constitutional causes of action.

A. Unreasonable Bail

Unreasonable bail cases are rarely seen, yet they should accompany false arrest and malicious prosecution suits. Once the arrestee has been taken into custody, the Eighth Amendment commands that she be released on bail bond that is no greater than the minimum amount necessary to as-

¹¹² See *Berger v. United States*, 295 U.S. 78, 88 (1935); see also Arnold I. Burns, Warren L. Dennis, and Amybeth Garcia-Bokor, *Curbing Prosecutorial Excess: A Job for the Courts and Congress*, THE CHAMPION, July, 1998, at 12.

¹¹³ See *United States ex rel. O'Keefe v. McDonnell Douglass Corp.*, 132 F.3d 1252, 1257-58 (8th Cir. 1998); *In the Matter of Howes*, 940 P.2d 159, 169-70 (N.M. 1997).

sure her appearance in court (absent special circumstances which might justify detention). Even if the arrestee is able to post the bond which has been set, a bond set higher than necessary is an Eighth Amendment violation, and any resultant detention is actionable under the Eighth Amendment.¹¹⁴

Since the plaintiff's personal life and history probably are relevant to the setting of bail bond, these cases are best brought on behalf of clients who can stand fairly close scrutiny in a courtroom. Other than that, the only tricky aspect to unreasonable bail bond cases is determining the identity of the party or parties actually responsible for setting bond. Careful pre-filing attention to that issue is, of course, a good idea.¹¹⁵ However, a police officer who submits a knowingly false (or possibly even exaggerated) report to the stationhouse, with the reasonable expectation that the report will be a bond setting factor, could be held personally liable under the Eighth Amendment. This is the logical consequence of a traditional tort law concept: an actor is liable for the reasonably foreseeable consequences of his actions.¹¹⁶

Related to the unreasonable bail cases are those cases involving excessive delays in presenting prisoners for arraignment or in setting bond. Such delays are also actionable.¹¹⁷ Unjustified delay in releasing an arrestee falls into the same category as these cases, although an analysis in the Ninth Circuit relied on a Fourth Amendment rather than an Eighth Amendment approach.¹¹⁸ Keep in mind, however, that there is no Eighth Amendment right to immediate field release on a misdemeanor citation without booking.¹¹⁹

B. Access to Court Cases

[E]fforts by state actors to impede an individual's access to courts or administrative agencies may provide the basis for a constitutional claim. . . . Judicial access must be 'adequate, effective, and meaningful,' and therefore, when police officers conceal or obscure important facts about a crime from

¹¹⁴ See *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987).

¹¹⁵ See generally *Kohl v. Casson*, 5 F.3d 1141 (8th Cir. 1993).

¹¹⁶ See *Zahrey v. Coffey*, 221 F.3d 342, 351-52 (2d Cir. 2000) (citing *Wagenmann*, 829 F.2d at 212-13).

¹¹⁷ See *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991); *Willis v. City of Chicago*, 999 F.2d 284, 287-89 (7th Cir. 1993); *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1479-81 (9th Cir. 1993); *Webster v. Gibson*, 913 F.2d 510, 513-15 (8th Cir. 1990); *Lewis v. O'Grady*, 853 F.2d 1366, 1369-71 (7th Cir. 1988).

¹¹⁸ See *Mackinney v. Nielsen*, 69 F.3d 1002, 1009 (9th Cir. 1995).

¹¹⁹ See *Higbee v. City of San Diego*, 911 F.2d 377, 380 (9th Cir. 1990) (Trott, J.).

its victims rendering hollow the right to seek redress, constitutional rights are undoubtedly abridged.¹²⁰

The right of access to the courts has long been protected by the First Amendment.¹²¹ "[T]he right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship."¹²²

Withholding material evidence – or even failure to conduct a proper investigation that causes material evidence to go undiscovered – can be the basis of a § 1983 action under several legal theories. When police cover up a failure to disclose exculpatory information or evidence of their own wrongdoing, the resultant interference with the victim's ability to defend his criminal case (or prosecute a state civil suit) may be actionable under the First Amendment right of access to the courts.¹²³

The Sixth Circuit has held that – at least in theory – a cause of action for denial of access to the courts can be maintained by one who had a potential civil suit, but lost it because the police covered up the evidence she required.¹²⁴ The court held, however, that as a prerequisite to her § 1983 action against the police, she must first attempt to pursue that litigation and fail because of the cover up. This First Amendment right is increasingly recognized by the other courts of appeal.¹²⁵ There is also a growing acceptance that the statute of limitations is tolled until the plaintiff has first pursued and lost her underlying suit; the loss of the underlying cause of action is in fact an element of the tort.¹²⁶

¹²⁰ See *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995) (quoting *Bounds v. Smith*, 430 U.S. 817, 822 (1997)), *cert. denied*, 517 U.S. 1156 (1996); see also *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261, 1263 (7th Cir. 1984); *Stone v. City of Chicago*, 738 F.2d 896, 898-900 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 971-74 (5th Cir. 1983).

¹²¹ See *N.A.A.C.P. v. Button*, 371 U.S. 415, 429-30 (1963); *Cal. Transp. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

¹²² See *Chambers v. Balt. & Ohio R.R.*, 207 U.S. 142, 148 (1907).

¹²³ See *Germany v. Vance*, 868 F.2d 9, 17 n.9 (1st Cir. 1989); *Goodwin v. Metts*, 885 F.2d 157, 166 (4th Cir. 1989); see generally *McMillian v. Johnson*, 88 F.3d 1554, 1566 (11th Cir. 1996); *Creek v. Village of Westhaven*, 80 F.3d 186, 192-94 (7th Cir. 1996); *Vasquez*, 60 F.3d at 328; *King v. Goldsmith*, 897 F.2d 885, 885-87 (7th Cir. 1990); *Crowder v. Sinyard*, 884 F.2d 804, 812 (5th Cir. 1989); *Ryland v. Shapiro*, 708 F.2d 967, 971-72 (5th Cir. 1983); *Marsh v. Kirschner*, 31 F. Supp. 2d 79, 80-81 (D. Conn. 1998).

¹²⁴ See *Swelk v. City of River Rouge*, 119 F.3d 1259, 1262-63 (6th Cir. 1997).

¹²⁵ See *Rogan v. Menino*, 175 F.3d 75, 79 (1st Cir. 1999); *Delew v. Wagner*, 143 F.3d 1219, 1222-23 (9th Cir. 1998).

¹²⁶ See *Morales v. City of Los Angeles*, 214 F.3d 1151, 1155 (9th Cir. 2000).

C. Other Fair Trial Denials

Most forms of misconduct which would be a basis for reversing a criminal conviction, if perpetrated by those without immunity, are actionable under § 1983. In all these areas, the constitutional boundaries have been clearly delineated for years.

Thus, the use of improper tactics to procure eye-witness identifications is actionable, as is the withholding of exculpatory evidence.¹²⁷ In *Veal v. Geraci*,¹²⁸ the Second Circuit affirmed the right to sue under § 1983 for a detective's unconstitutional behavior at a lineup and further held that the right to sue accrues at the time of the pretrial *Wade* hearing in the criminal case.¹²⁹ A police officer's failure to disclose exculpatory or impeachment evidence to a criminal defendant, in violation of her duty under *Brady v. Maryland*,¹³⁰ is actionable by that defendant after his conviction is overturned.¹³¹ Similarly, a district attorney who threatened to fire an assistant prosecutor (if the latter provided an affidavit to the Governor in support of a death-row inmate's clemency petition) violated the inmate's right to due process. The fact that the prosecutor later backed off and withdrew her objection did not moot the suit.¹³²

IV. CONCLUSION

All citizens can leverage § 1983 remedies for the misconduct of government officials. Indeed, the United States Supreme Court in *Monroe v. Pape*¹³³ afforded all citizens the ability to obtain redress directly from officials who violate constitutionally protected liberties.

The ability of the federal government to provide constitutionally grounded redress against state officials was perhaps long ago foreseen by Alexander Hamilton:

Power being almost always the rival of power, the general government will at times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government. . . . If [the peo-

¹²⁷ See *Geter v. Fortenberry*, 849 F.2d 1550, 1559-60 (5th Cir. 1988); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988).

¹²⁸ 23 F.3d 722 (2d Cir. 1994).

¹²⁹ *Id.*; see generally *United States v. Wade*, 388 U.S. 218 (1967).

¹³⁰ 373 U.S. 83 (1963).

¹³¹ See *Gallo v. City of Philadelphia*, 161 F.3d 217, 221-22 (3d Cir. 1998); see also *Morgan v. Gertz*, 166 F.3d 1307, 1309-10 (10th Cir. 1999) (explaining "no harm no foul" rule applies if plaintiff acquitted); *Jean v. Collins*, 155 F.3d 701, 710-11 (4th Cir. 1998) (granting qualified immunity on startling grounds).

¹³² See *Young v. Hayes*, 218 F.3d 850, 852 (8th Cir. 2000).

¹³³ 365 U.S. 167 (1961).

ple's] rights are invaded by either, they can make use of the other as the instrument of redress.¹³⁴

Within every state, two sovereigns – the state and federal government – reign “cheek to jowl.”¹³⁵ Throughout the history of the United States, this arrangement has led to disagreement, as the actions of one sovereign often encroach upon the prerogatives of the other.¹³⁶ Yet this conflict reflects the virtue of the system: indeed, the beneficiaries of these competing sovereignties are the citizens of the United States.¹³⁷

Since *Monroe*, § 1983 has been successfully utilized as a remedial measure to correct tens of thousands of civil rights violations of all descriptions: from high school classrooms to maximum security wings of state prisons.¹³⁸ § 1983 has been a major force in protecting individuals from countless abuses by the city, county, and state.¹³⁹ Tort claims under § 1983 for malicious prosecution, prosecutorial misconduct, and others continuously civilize the society in which we live and on which we depend.¹⁴⁰

¹³⁴ *Idaho v. Horiuchi*, 253 F.3d 359, 361 (9th Cir. 2001) (citing THE FEDERALIST NO. 28, at 181 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

¹³⁵ *Id.*

¹³⁶ *Id.* (citing *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819)).

¹³⁷ *Id.*

¹³⁸ *Id.* at 361.

¹³⁹ *Hernandez v. Denton*, 861 F.2d 1421, 1427-28 (9th Cir. 1988) (Aldisert, J., concurring).

¹⁴⁰ *Id.*