SUPREME COURT OF THE UNITED STATES

No. 92–833

KEVIN ALBRIGHT, PETITIONER *v.* ROGER OLIVER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[January 24, 1994]

JUSTICE SOUTER, concurring in the judgment.

While I agree with the Court's judgment that petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause, I reach that result by a route different from that of the plurality. The Court has previously rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one. See *United States* v. *James Daniel Good Real Property*, 510 U. S. ___, ___ (1993) (slip op., at 5) ("We have rejected the view that the applicability of one constitutional amendment pre-empts the guarantees of another"); *Soldal* v. *Cook County*, 506 U. S. ___, ___ (1992) (slip op., at 14) ("Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's `dominant' character. Rather, we examine each constitutional provision in turn"). It has likewise rejected the view that incorporation of the substantive guarantees of the first eight amendments of the Constitution defines the limits of due process protection, see *Adamson* v. *California*, 332 U. S. 46,

89–92 (1947) (Black, J., dissenting). The second Justice Harlan put it this way:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ." *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (dissenting opinion).

We are, nonetheless, required by "[t]he doctrine of judicial self-restraint . . . to exercise the utmost care whenever we are asked to break new ground in [the] field" of substantive due process. *Collins* v. *Harker Heights*, 503 U. S. ___, ___ (1992) (slip op., at 9). Just as the concept of due process does not protect against insubstantial impositions on liberty, neither should the "rational continuum" be reduced to the mere duplication of protections adequately addressed by other constitutional provisions. Justice Harlan could not infer that the due process guarantee was meant to protect against insubstantial burdens, and we are not free to infer that it was meant to be applied without thereby adding a substantial increment to protection otherwise available. The importance of recognizing the latter limitation is underscored by pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct and needlessly imposing on trial courts the unenviable burden of reconciling well-established jurisprudence under the Fourth and Eighth Amendments with the ill-defined contours of some novel due process right.[1]

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[1]JUSTICE STEVENS suggests that these concerns are not for this Court, since Congress resolved them in deciding to provide a remedy for constitutional violations under §1983. *Post*, at 22–23. The question before the Court, however, is not about the existence of a statutory remedy for an admitted constitutional violation, but whether a particular violation of substantive due process, as distinct from the Fourth Amendment, should be recognized on the

This rule of reserving due process for otherwise homeless substantial claims no doubt informs those decisions, see *Graham* v. *Connor*, 490 U. S. 386 (1989), *Gerstein* v. *Pugh*, 420 U. S. 103 (1975), and *Whitley* v. *Albers*, 475 U. S. 312, 327 (1986), in which the Court has resisted against relying on the Due Process Clause when doing so would have duplicated protection that a more specific constitutional provision already bestowed.[2] This case calls for just

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facts pleaded. This question is indisputably within the province of the Court, and should be addressed with regard for the concerns about unnecessary duplication in constitutional adjudication reflected in *Graham*, *Gerstein*, and *Whitley*. Nothing in Congress's enactment of §1983 suggests otherwise.

[2]Recognizing these concerns makes sense of what at first blush may seem a tension between our decisions in *Graham* v. *Connor,* 490 U. S. 386 (1989), and *Gerstein* v. *Pugh,* 420 U. S. 103 (1975), on the one hand, and *United States* v. *James Daniel Good Real Property,* 510 U. S. ___ (1993), and *Soldal* v. *Cook County,* 506 U. S. ___ (1992), on the other. The Court held in *Graham* that all claims of excessive force by law enforcement officials in the course of a "seizure" should be analyzed under the Fourth Amendment's "reasonableness" standard. "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of `substantive due process,' must be the guide to analyzing these claims." *Graham* v. *Connor*, *supra*, at 395. The *Gerstein* Court held that the Fourth Amendment, not the Due Process Clause, determines what post-arrest proceedings are required for suspects detained on criminal charges. *Gerstein* v. *Pugh, supra.* As we recently explained in *United States* v. *James Daniel Good Real Property, supra,* at ___ (slip op., at 6), the Court reasoned in *Gerstein* that the Fourth Amendment "balance between individual and public interests always has been thought to define the `process that is due' for seizures of person or property in criminal

such restraint, in presenting no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress already.

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cases." See *Gerstein*, *supra*, at 125, n. 27. Thus, in both *Gerstein* and *Graham*, separate analysis under the Due Process Clause was dispensed with as redundant. The Court has reached the same result in the context of claims of unnecessary and wanton infliction of pain in penal institutions. See *Whitley* v. *Albers*, 475 U. S. 312, 327 (1986) ("It would indeed be surprising if . . . `conduct that shocks the conscience' or `afford[s] brutality the cloak of law,' and so violates the Fourteenth Amendment, *Rochin* v. *California*, 342 U. S. 165, 172, 173 (1952), were not also punishment `inconsistent with contemporary standards of decency' and `repugnant to the conscience of mankind,' *Estelle* v. *Gamble*, 429 U. S., at 103, 106, in violation of the Eighth").

In framing his claim of infringement of a liberty interest in freedom from the initiation of a baseless prosecution, petitioner has chosen to disclaim any reliance on the Fourth Amendment seizure that followed when he surrendered himself into police custody. Petitioner has failed, however, to allege any substantial injury that is attributable to the former event, but not the latter. His complaint presents an extensive list of damages: limitations on his liberty, freedom of association, and freedom of movement by virtue of the terms of his bond; financial expense of his legal defense; reputational harm among members of the community; inability to transact business or obtain employment in his local area, necessitating relocation to St. Louis; inability to secure credit; and personal pain and suffering. See App. to Pet. for Cert. 49a–50a. None of these injuries, however, is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody. Thus, petitioner has not shown a substantial deprivation of liberty from the mere initiation of prosecution.

The significance of this failure follows from the recognition that none of petitioner's alleged injuries has been treated by the Courts of Appeals as beyond the ambit of compensability under the general rule of 42 U. S. C. §1983 liability for a seizure unlawful under Fourth Amendment standards, see *Tennessee* v. *Garner*, 471 U. S. 1 (1985) (affirming §1983 liability based on Fourth Amendment violation); *Brower* v. *County of Inyo*, 489 U. S. 593, 599 (1989) (unreasonable seizure in violation of the Fourth Amendment gives rise to §1983 liability). On the contrary, the Courts of Appeals have held that injuries like those petitioner alleges are cognizable in §1983 claims founded upon arrests that are bad under the Fourth Amendment. See, *e.g.*, *Hale* v. *Fish*, 899 F. 2d 390, 403–404 (CA5 1990) (affirming award of damages for mental anguish, harm to reputation,

and legal fees for defense); *B. C. R. Transport Co., Inc.* v. *Fontaine*, 727 F. 2d 7, 12 (CA1 1984) (affirming award of damages for destruction of business due to publicity surrounding illegal search); *Sims* v. *Mulcahy*, 902 F. 2d 524, 532–533 (CA7 1990) (approving damages for pain, suffering, and mental anguish in the context of a challenge to jury instructions); *Sevigny* v. *Dicksey*, 846 F. 2d 953, 959 (CA4 1988) (affirming damages for extreme emotional distress); *Dennis* v. *Warren*, 779 F. 2d 245, 248–249 (CA5 1985) (affirming award of damages for pain, suffering, humiliation, and embarrassment); *Konczak* v. *Tyrrell*, 603 F. 2d 13, 17 (CA7 1979) (affirming damages for lost wages, mental distress, humiliation, loss of reputation, and general pain and suffering).

Indeed, it is not surprising that rules of recovery for such harms have naturally coalesced under the Fourth Amendment, since the injuries usually occur only after an arrest or other Fourth Amendment seizure, an event that normally follows promptly (3 days in this case) upon the formality of filing an indictment, information, or complaint. There is no restraint on movement until a seizure occurs or bond terms are imposed. Damage to reputation and all of its attendant harms also tend to show up after arrest. The defendant's mental anguish (whether premised on reputational harm, burden of defending, incarceration, or some other consequence of prosecution) customarily will not arise before an arrest, or at least before the notification that an arrest warrant has been issued informs him of the charges.

There may indeed be exceptional cases where some quantum of harm occurs in the interim period after groundless criminal charges are filed but before any Fourth Amendment seizure. Whether any such unusual case may reveal a substantial deprivation of liberty, and so justify a court in resting compensation on a want of government power or a limitation of it

independent of the Fourth Amendment, are issues to be faced only when they arise. They do not arise in this case and I accordingly concur in the judgment of the Court.[3]

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[3]JUSTICE STEVENS argues that the fact that "few of petitioner's injuries flowed *solely* from the filing of the charges against him does not make those injuries insubstantial," *post*, at 23, n. 29 (emphasis in original), and maintains that the arbitrary filing of criminal charges may work substantial harm on liberty. *Ibid.* While I do not quarrel with either proposition, neither of them addresses the threshold question whether the complaint alleges any substantial deprivation beyond the scope of what settled law recognizes at the present time.