# 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 STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime. Under that Amendment, no accusation may issue except on a grand jury determination that there is probable cause to support the accusation.[1] The question presented by this case is whether the Due Process Clause of the Fourteenth Amendment imposes any comparable constraint on state governments.

In *Hurtado* v. *California*, 110 U. S. 516 (1884), we decided that the Due Process Clause does not compel the States to proceed by way of grand jury indictment when they initiate a prosecution. In reaching that conclusion, however, we noted that the substance of the federal guarantee was preserved by California's requirement

[1]"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . ." U. S. Const., Amdt. 5. See also *United States* v. *Calandra*, 414 U. S. 338, 343 (1974).

that a magistrate certify "to the probable guilt of the defendant." *Id.,* at 538. In accord with *Hurtado*, I would hold that Illinois may dispense with the grand jury procedure only if the substance of the probable-cause requirement remains adequately protected.[2]

Assuming, as we must, that the allegations of petitioner's complaint are true, it is perfectly clear that the probable-cause requirement was not satisfied in this case. Indeed, it is plain that respondent Oliver, who attested to the criminal information against petitioner, either knew or should have known that he did not have probable cause to initiate criminal proceedings.

Oliver's only evidence against petitioner came from a paid informant who established her *unreliability* on more than 50 occasions, when her false accusations led to aborted and dismissed prosecutions.[3] Nothing

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[2]In *Hurtado*, 110 U. S., at 532, the Court made this comment on the traditions inherited from English law, with particular reference to the Magna Charta:

"Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property.

". . . Such regulations, to adopt a sentence of Burke's, `may alter the mode and application but have no power over the substance of original justice.'"

[3]According to the complaint, Oliver, a detective in the Macomb, Illinois, Police Department, agreed to provide Veda Moore with protection and money in exchange for her assistance in acting as a

about her performance in this case suggested any improvement on her record. The substance she described as cocaine turned out to be baking soda. She twice misidentified her alleged vendor before, in response to a leading question, she agreed that petitioner might be he;[4] in fact, she had never had any contact with petitioner. As the Court of Appeals correctly concluded, the commencement of a serious criminal proceeding on such "scanty grounds" was nothing short of "shocking."[5]

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confidential informant. Allegedly, Moore, addicted to cocaine, lied to Oliver about her undercover purchases of controlled substances in order to receive the promised payments. During the course of her tenure as an informant, Moore falsely implicated over 50 individuals in criminal activity, resulting each time in a dismissed prosecution.

[4]Relying entirely on information provided by Moore, Oliver testified before a grand jury and secured an indictment against a first suspect, John Albright, Jr., for selling a "look alike" substance in violation of Illinois law. When he attempted to arrest John Albright, Jr., however, Oliver became convinced that he had the wrong man, and substituted the name of a second suspect, Albright's son, on the arrest warrant. Once again, it became clear that Oliver's suspect could not have committed the crime. Oliver then asked Moore whether her vendor might have been a different son of the man she had first identified. When Moore admitted of that possibility, Oliver attested to the criminal information charging petitioner, his third and final suspect, with a felony.

[5]"Detective Oliver made no effort to corroborate Veda Moore's unsubstantiated accusation. A heap of baking soda was no corroboration. Her initial misidentification of the seller cast grave doubt on the accuracy of her information. And this was part of a pattern: of fifty persons she reported to Oliver as

These shocking factual allegations give rise to two important questions of law: does the commencement of formal criminal proceedings deprive the accused person of "liberty" as that term is used in the Fourteenth Amendment; and, if so, are the demands of "due process" satisfied solely by compliance with certain procedural formalities which ordinarily ensure that a prosecution will not commence absent probable cause? I shall discuss these questions separately, and then comment on the several opinions supporting the Court's judgment.

Punishment by confinement in prison is a frequent conclusion of criminal proceedings. Had petitioner's prosecution resulted in his conviction and incarceration, then there is no question but that the Due Process Clause would have been implicated; a central purpose of the Fourteenth Amendment was to deny States the power to impose this sort of deprivation of liberty until after completion of a fair trial. Over the years, however, our cases have made it

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trafficking in drugs, none was successfully prosecuted for any crime. In the case of `Albright,' Oliver should have suspected that Moore had bought cocaine either from she knew not whom or from someone she was afraid to snitch on (remember that she had gone to work for Oliver in the first place because she was being threatened by a man to whom she owed money for previous purchases of cocaine), that she had consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random. The fact that she used her informant's reward to buy cocaine makes this hypothesis all the more plausible. An arrest is a serious business. To arrest a person on the scanty grounds that are alleged to be all that Oliver had to go on is shocking." 975 F. 2d 343, 345 (CA7 1992).

clear that the interests protected by the Due Process Clause extend well beyond freedom from an improper criminal conviction.

As a qualitative matter, we have decided that the liberty secured by the Fourteenth Amendment is significantly broader than mere freedom from physical constraint. Although its contours have never been defined precisely, that liberty surely includes the right to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place.[6] On a quantitative level, we have, to be sure, acknowledged that not every modest impairment of individual liberty amounts to a deprivation raising constitutional concerns. Cf. *Meachum* v. *Fano*, 427 U. S. 215 (1976). At the same time, however, we have recognized that a variety of state actions have such serious effects on protected liberty interests that they may not be undertaken arbitrarily,[7] or without observing procedural

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[6]As we stated in *Meyer* v. *Nebraska,* 262 U. S. 390 (1923):

"While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." *Id.,* at 399 (citations omitted).

[7]See, *e.g., Turner* v. *Safley*, 482 U. S. 78, 94–99 (1987)

safeguards.[8]

In my opinion, the formal commencement of a criminal proceeding is quintessentially this type of state action. The initiation of a criminal prosecution, regardless of whether it prompts an arrest, immediately produces "a wrenching disruption of everyday life." *Young* v. *United States ex rel. Vuitton et Fils,* 481 U. S. 787, 814 (1987). Every prosecution,

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(invalidating prison regulation of inmate marriages); *Moore* v. *East Cleveland*, 431 U. S. 494, 500 (1977) (striking down ordinance that prohibited certain relatives from residing together because it had only a "tenuous relation" to its goals); *Wieman* v. *Updegraff*, 344 U. S. 183, 191 (1952) (requiring loyalty oaths of public employees violates due process because "[i]ndiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power"); *Pierce* v. *Society of Sisters*, 268 U. S. 510, 534–535 (1925) (state law requiring parents to send children to public school violates due process because "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State").

[8]See, *e.g., Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property `be preceded by notice and opportunity for hearing appropriate to the nature of the case'") (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950)); *Goss* v. *Lopez*, 419 U. S. 565, 581 (1975) ("[D]ue process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story"); *Wisconsin* v. *Constantineau*, 400 U. S. 433, 436–437

like every arrest, "is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States* v. *Marion,* 404 U. S. 307, 320 (1971). In short, an official accusation of serious crime has a direct impact on a range of identified liberty interests. That impact, moreover, is of sufficient magnitude to qualify as a deprivation of liberty meriting constitutional protection.[9]

The next question, of course, is what measure of "due process" must be provided an accused in connection with this deprivation of liberty. In *In re Winship*, 397 U. S. 358, 361–364 (1970), we relied on both history and certain societal interests to find that, in the context of criminal conviction, due process entails proof of guilt beyond a reasonable doubt. The same considerations support a requirement that criminal prosecution be predicated, at a minimum, on a finding of probable cause.

It has been the historical practice in our

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(1971) ("Where 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").

[9]The Court of Appeals was persuaded that the Court's reasoning in *Paul* v. *Davis*, 424 U. S. 693 (1976), required a different conclusion. 975 F. 2d, at 345. Even if one accepts the dubious proposition that an individual's interest in his or her reputation *simpliciter* is not an interest in liberty, *Paul* v. *Davis* recognized that liberty is infringed by governmental conduct that injures reputation in conjunction with other interests. 424 U. S., at 701. The commencement of a criminal prosecution is certainly such conduct.

jurisprudence to withhold the filing of criminal charges until the state can marshal evidence establishing probable cause that an identifiable defendant has committed a crime. This long tradition is reflected in the common law tort of malicious prosecution,[10] as well as in our cases.[11] In addition, the probable cause requirement serves valuable societal interests, protecting the populace from the whim and caprice of governmental agents without unduly burdening the government's prosecutorial function.[12] Consistent with our reasoning in *Winship*,

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[10]See, *e.g.*, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts §119 pp. 876–882 (5th ed. 1984).

[11]*Wayte* v. *United States*, 470 U. S. 598, 607 (1985); *Bordenkircher* v. *Hayes*, 434 U. S. 357, 364 (1978) ("In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion"); *Gerstein* v. *Pugh*, 420 U. S. 103, 119 (1975) ("The standard of proof required of the prosecution is usually referred to as `probable cause,' but in some jurisdictions it may approach a prima facie case of guilt"); see also *United States* v. *Lovasco*, 431 U. S. 783, 791 (1977) (noting that "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause") (footnote omitted); *United States* v. *Calandra*, 414 U. S. 338, 343 (1974) (noting that one of the "grand jury's historic functions" was to determine whether probable cause existed); *Dinsman* v. *Wilkes*, 12 How. 390, 402 (1852) (noting that instigation of a criminal prosecution without probable cause creates an action for malicious prosecution).

[12]Because probable cause is already required for an arrest, and proof beyond a reasonable doubt for a

these factors lead to the conclusion that one element of the "due process" prescribed by the Fourteenth Amendment is a responsible decision that there is probable cause to prosecute.[13]

Illinois has established procedures intended to ensure that evidence of "the probable guilt of the defendant," see *Hurtado*, 110 U. S., at 538, has been assembled before a criminal prosecution is pursued.[14] Petitioner does not challenge the general adequacy of these procedures. Rather, he claims that the probable cause determination in his case was invalid as a substantive matter, because it was wholly unsupported by reliable evidence and tainted by Oliver's disregard or suppression of facts bearing on the reliability of his informant. This contention

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conviction, the burden on law enforcement is not appreciably enhanced by a requirement of probable cause for prosecution.

[13]I thus disagree with dicta to the contrary in a footnote in *Gerstein* v. *Pugh*, 420 U. S., at 125, n. 26 ("Because the probable cause determination is not a constitutional prerequisite to the charging decision, it is required only for those suspects who suffer restraints on liberty other than the condition that they appear for trial"). As I have explained, the commencement of criminal proceedings itself infringes on liberty interests, regardless of the restraints imposed.

[14]At the time of this suit, Illinois law allowed the filing of felony charges only by information or indictment. Ill. Rev. Stat., Ch. 38, §111–2(a) (1987). If the filing were by information, as was the case here, then the charges could be filed but not pursued until a preliminary hearing had been held or waived pursuant to Ch. 38, §109–3, and, if held, had concluded in a finding of probable cause to believe that the defendant had committed an offense. Ch. 38, §§111–2(a), §109–3.

requires us to consider whether a state's compliance with facially valid procedures for initiating a prosecution is by itself sufficient to meet the demands of due process, without regard to the substance of the resulting probable cause determination.

Fortunately, our prior cases have rejected such a formalistic approach to the Due Process Clause. In *Mooney* v. *Holohan*, 294 U. S. 103, 110 (1935), a criminal defendant claimed that the prosecutor's knowing use of perjured testimony, and deliberate suppression of evidence that would have impeached that testimony, constituted a denial of due process. The State urged us to reject this submission on the ground that the petitioner's trial had been free of procedural error. Our treatment of the State's argument should dispose of the analogous defense advanced today:

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. *Hebert* v. *Louisiana*, 272 U. S. 312, 316, 317 [1926]. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like

result by intimidation." *Id.,* at 112.

In the years since *Mooney*, we have consistently reaffirmed this understanding of the requirements of due process. Our cases make clear that procedural regularity notwithstanding, the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused.[15] It is, in other words, well established that adherence to procedural forms will not save a conviction that rests in substance on false evidence or deliberate deception.

Just as perjured testimony may invalidate an otherwise proper conviction, so also may the absence of proof render a criminal conviction unconstitutional. The traditional assumption that "proof of a criminal charge beyond a reasonable doubt is constitutionally

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[15]See, *e.g.*, *United States* v. *Agurs*, 427 U. S. 97, 103, and n. 8 (1976) (citing cases); *Giglio* v. *United States*, 405 U. S. 150, 153–154 (1972) (failure to disclose Government agreement with witness violates due process); *Brady* v. *Maryland*, 373 U. S. 83, 87 (1963) ("suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); *Napue* v. *Illinois*, 360 U. S. 264 (1959) (failure of state to correct testimony known to be false violates due process); *Pyle* v. *Kansas*, 317 U. S. 213, 215–216 (1942) (allegations of the knowing use of perjured testimony and the suppression of evidence favorable to the accused "sufficiently charge a deprivation of rights guaranteed by the Federal Constitution, and, if proven, would entitle petitioner to release from his present custody"). But cf. *United States* v. *Williams*, 504 U. S. ___ (1992) (prosecutor need not present exculpatory evidence in his possession to the grand jury).

required," *Winship*, 397 U. S., at 362, has been endorsed explicitly, and tied directly to the Due Process Clause. *Id.*, at 364.[16] When the quantum of proof supporting a conviction falls sufficiently far below this standard, then the Due Process Clause requires that the conviction be set aside, even in the absence of any procedural error. *Jackson* v. *Virginia*, 443 U. S. 307 (1979).

In short, we have already recognized that certain substantive defects can vitiate the protection ordinarily afforded by a trial, so that formal compliance with procedural rules is no longer enough to satisfy the demands of due process. The same is true of a facially valid determination of probable cause. Even if prescribed procedures are followed meticulously, a criminal prosecution based on perjured testimony, or evidence on which "no rational trier of fact" could base a finding of probable cause, cf. *id.,* at 324, simply does not comport with the requirements of the Due Process Clause.

I do not understand the plurality to take issue with the proposition that commencement of a criminal case deprives the accused of liberty, or that the state has a duty to make a probable cause determination before filing charges. Instead, both the CHIEF JUSTICE and JUSTICE SCALIA identify petitioner's reliance on a "substantive due process" theory as the critical flaw in his argument. Because there is no substantive due

[16]"Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U. S., at 364.

process right available to petitioner, they conclude, his due process claim can be rejected in its entirety and without further consideration.

In my opinion, this approach places undue weight on the label petitioner has attached to his claim.[17] The Fourteenth Amendment contains only one Due Process Clause. Though it is sometimes helpful, as a matter of doctrine, to distinguish between substantive and procedural due process, see *Daniels* v. *Williams*, 474 U. S. 327, 337–340 (1986) (STEVENS, J., concurring in judgments), the two concepts are not mutually exclusive, and their protections often overlap.

Indeed, the Fourth Amendment, upon which the plurality principally relies, provides both procedural and substantive protections, and these protections converge. When the Court first held that the right to be free from unreasonable official searches was "implicit in `the concept of ordered liberty,'" and therefore protected by the Due Process Clause of the Fourteenth Amendment, *Wolf* v. *Colorado*, 338 U. S. 25, 27–28 (1949), it refused to require the States to provide the procedures accorded in federal trials to protect that right.[18] *Id.*, at 28–33. Significantly, however, when we overruled the procedural component of that decision in *Mapp* v. *Ohio*, 367 U. S.

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[17]In any event, it should be noted that in presenting his question for review, petitioner invokes the Due Process Clause generally, without reference to "substantive" due process. See Pet. for Cert. i.

[18]Our refusal in *Wolf* to require States to adopt a federal rule of procedure—the exclusionary rule—paralleled our earlier refusal in *Hurtado* to require States to adopt a federal rule of procedure—the grand jury process for ascertaining probable cause. Nevertheless, both cases recognized that the Fourteenth Amendment protected the substantive rights as implicit in the concept of ordered liberty.

643 (1961), we made it clear that we were "extending the *substantive* protections of due process to all constitutionally unreasonable searches —state or federal . . . ." *Id.*, at 655 (emphasis added).

Moreover, in *Winship*, we found it unnecessary to clarify whether our holding rested on substantive or procedural due process grounds; it was enough to say that the "Due Process Clause" itself requires proof beyond a reasonable doubt. 397 U. S., at 364. Similarly, whether the analogous probable cause standard urged by petitioner is more appropriately characterized as substantive or procedural is not a matter of overriding significance. In either event, the same Due Process Clause operates to protect the individual against the abuse of governmental power, by guaranteeing that no criminal prosecution shall be initiated except on a finding of probable cause.

According to the plurality, the application of certain portions of the Bill of Rights to the States through the Fourteenth Amendment "has substituted, in these areas of criminal procedure, the specific guarantees of the various provisions of the Bill of Rights . . . for the more generalized language contained in the earlier cases construing the Fourteenth Amendment." *Ante*, at 6–7. The plurality then reasons, in purported reliance on *Graham* v. *Connor*, 490 U. S. 386 (1989), that because the Fourth Amendment is designed to address pretrial deprivations of liberty, petitioner's claim must be analyzed under that Amendment alone. *Ante*, at 7. In the end, however, the CHIEF JUSTICE concludes that he need not consider petitioner's claim under the Fourth Amendment after all, because that question was not presented in the petition for certiorari. *Ante*, at 8.

There are two glaring flaws in the plurality's analysis. First, the pretrial deprivation of liberty at issue in this case is addressed by a particular amendment, but not the Fourth; rather, it is

addressed by the Grand Jury Clause of the Fifth Amendment. That the Framers saw fit to provide a specific procedural guarantee against arbitrary accusations indicates the importance they attached to the liberty interest at stake. Though we have not required the States to use the grand jury procedure itself, it by no means follows that the underlying liberty interest is unworthy of Fourteenth Amendment protection. As we explained in *Hurtado*, "bulwarks" of protection such as the Magna Charta and the Due Process Clause "guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty, and property."[19]

Second, and of greater importance, the cramped view of the Fourteenth Amendment taken by the plurality has been rejected time and time again by this Court. In his famous dissenting opinion in *Adamson* v. *California*, 332 U. S. 46, 89–92 (1947), Justice Black took the position that the Due Process Clause of the Fourteenth Amendment makes the entire Bill of Rights applicable to the States. As a corollary, he advanced a theory not unlike that endorsed today by the CHIEF JUSTICE and JUSTICE SCALIA: that the express guarantees of the Bill of Rights mark the outer limit of Due Process Clause protection. *Ibid.* What is critical, for present purposes, is that the *Adamson* majority rejected this contention, and held instead that the "ordered liberty" protected by the Due Process Clause is not coextensive with the specific provisions of the first eight Amendments to the Constitution. Justice Frankfurter's concurrence made this point perfectly clear:

> "It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. . . . The Amendment neither

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[19] *Hurtado* v. *California,* 110 U. S. 516, 532 (1884). See n. 2, *supra*.

> comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency . . . ." *Id.,* at 66.

In the years since *Adamson*, the Court has shown no inclination to reconsider its repudiation of Justice Black's position.[20] Instead, the Court has identified numerous violations of due process that have no counterparts in the specific guarantees of the Bill of Rights. And contrary to the suggestion of the plurality, *ante*, at 5, 7, these decisions have not been limited to the realm outside criminal law. As I have already discussed, it is the Due Process Clause itself, and not some explicit provision of the Bill of Rights, that forbids the use of perjured testimony and the suppression of evidence favorable to the accused.[21] Similarly, we have held that the Due Process Clause requires an impartial judge,[22] and prohibits the use of unnecessarily suggestive identification procedures.[23] Characteristically, Justice Black was the sole dissenter when the Court concluded in *Sheppard* v. *Maxwell*, 384 U. S. 333 (1966), that the failure to control disruptive influences in the courtroom constitutes a

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[20]Indeed, no other Justice has joined Justice Black in maintaining that the scope of the Due Process Clause is limited to the specific guarantees of the Bill of Rights. Although Justice Douglas joined Justice Black in dissent in *Adamson*, he later retreated from this position. See, *e.g.*, *Griswold* v. *Connecticut*, 381 U. S. 479, 484 (1965); L. Tribe, American Constitutional Law, §11–2 p. 774 and n. 32 (2d ed. 1988).

[21]See n. 15, *supra*.

[22]*Tumey* v. *Ohio*, 273 U. S. 510 (1927).

[23]*Stovall* v. *Denno*, 388 U. S. 293, 302 (1967). Justice Black dissented. *Id.*, at 303–306.

denial of due process.

Perhaps most important, and virtually ignored by the plurality today, is our holding in *In re Winship* that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt." 397 U. S., at 364. Because the reasonable-doubt standard has no explicit textual source in the Bill of Rights, the *Winship* Court was faced with precisely the same argument now advanced by the CHIEF JUSTICE and JUSTICE SCALIA: noting the procedural guarantees for which the Bill of Rights specifically provides in criminal cases, Justice Black maintained that "[t]he Constitution thus goes into some detail to spell out what kind of trial a defendant charged with crime should have, and I believe the Court has no power to add to or subtract from the procedures set forth by the Founders." *Id.*, at 377 (dissenting opinion). Holding otherwise, the *Winship* majority resoundingly rejected this position, which Justice Harlan characterized as "fl[ying] in the face of a course of judicial history reflected in an unbroken line of opinions that have interpreted due process to impose restraints on the procedures government may adopt in its dealing with its citizens . . . ." *Id.*, at 373, n. 5 (concurring opinion).

Nevertheless, the CHIEF JUSTICE and JUSTICE SCALIA seem intent on resuscitating a theory that has never been viable, by reading our opinion in *Graham* v. *Connor* more broadly than our actual holding. In *Graham*, which involved a claim of excessive force in the context of an arrest or investigatory stop, we held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of `substantive due process,' must be the guide for analyzing these claims." 490 U. S., at 395. Under *Graham*, then, the existence of a specific protection in the Bill of Rights that is incorporated by

the Due Process Clause may preclude what would in any event be redundant reliance on a more general conception of liberty.[24] Nothing in *Graham*, however, forecloses a general due process claim when a more specific source of protection is absent or, as here, open to question. See *ante*, at 8 (reserving question whether Fourth Amendment protects against filing of charges without probable cause).

At bottom, the plurality opinion seems to rest on one fundamental misunderstanding: that the incorporation cases have somehow "substituted" the specific provisions of the Bill of Rights for the "more generalized language contained in the earlier cases construing the Fourteenth Amendment." *Ante*, at 7. In fact, the incorporation cases themselves rely on the very "generalized language" the CHIEF JUSTICE would have them displacing.[25] Those cases add to

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[24]Moreover, it likely made no difference to the outcome in *Graham* that the Court rested its decision on the Fourth Amendment rather than the Due Process Clause. The text of the Fourth Amendment's prohibition against "unreasonable" seizures is no more specific than the Due Process Clause's prohibition against deprivations of liberty without "due process." Under either provision, the appropriate standards for evaluating excessive force claims must be developed through the same common law process of case-by-case adjudication.

[25]See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 655 (1961) (applying the exclusionary rule to the States because "without that rule the freedom from state invasions of privacy would be so ephemeral . . . as not to merit this Court's high regard as a freedom `implicit in the concept of ordered liberty'"); *Benton* v. *Maryland*, 395 U. S. 784, 794 (1969) (holding that "the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States

the liberty protected by the Due Process Clause most of the specific guarantees of the first eight Amendments, but they do not purport to take anything away; that a liberty interest is not the subject of an incorporated provision of the Bill of Rights does not remove it from the ambit of the Due Process Clause. I cannot improve on Justice Harlan's statement of this settled proposition:

> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This `liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment." *Poe* v. *Ullman*, 367 U. S. 497, 543 (1961) (dissenting opinion).

I have no doubt that an official accusation of an infamous crime constitutes a deprivation of liberty worthy of constitutional protection. The Framers of

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through the Fourteenth Amendment"); *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968) ("Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee").

the Bill of Rights so concluded, and there is no reason to believe that the sponsors of the Fourteenth Amendment held a different view. The Due Process Clause of that Amendment should therefore be construed to require a responsible determination of probable cause before such a deprivation is effected.

A separate comment on JUSTICE GINSBURG's opinion is appropriate. I agree with her explanation of why the initial seizure of petitioner continued until his discharge and why the seizure was constitutionally unreasonable. Had it been conducted by a federal officer, it would have violated the Fourth Amendment. And, because unreasonable official seizures by state officers are deprivations of liberty or property without due process of law, the seizure of petitioner violated the Fourteenth Amendment. Accordingly, JUSTICE GINSBURG is correct in concluding that the complaint sufficiently alleges a cause of action under 42 U. S. C. §1983.

Having concluded that the complaint states a cause of action, however, her opinion does not adequately explain why a dismissal of that complaint should be affirmed. Her submission, as I understand it, rests on the propositions that (1) petitioner abandoned a meritorious claim based on the component of the Due Process Clause of the Fourteenth Amendment that is coterminous with the Fourth Amendment; and (2) the Due Process Clause provides no protection for deprivations of liberty associated with the initiation of a criminal prosecution unless an unreasonable seizure occurs. For reasons already stated, I firmly disagree with the second proposition.

In the Bill of Rights, the Framers provided constitutional protection against unfounded felony accusations in the Grand Jury Clause of the Fifth Amendment and separate protection against unwarranted arrests in the Fourth Amendment. Quite

obviously, they did not regard the latter protection as sufficient to avoid the harm associated with an irresponsible official accusation of serious criminal conduct. Therefore, although in most cases an arrest or summons to appear in court may promptly follow the initiation of criminal proceedings, the accusation itself causes a harm that is analytically, and often temporally, distinct from the arrest. In this very case, the petitioner suffered a significant injury *before* he voluntarily surrendered.[26] In other cases a significant

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[26]The petitioner was deprived of a constitutionally protected liberty interest at the moment that he was formally charged with a crime—an event that occurred *prior* to his seizure, and *several months prior* to the preliminary hearing. I agree with JUSTICE GINSBURG that the officer's incomplete testimony at the preliminary hearing perpetuated the violation of petitioner's right to be free from unreasonable seizure, *ante*, at 4, but it also perpetuated the violation of his right to be free from prosecution absent probable cause. As such, contrary to her suggestion, *ante*, at 2, n. 1, either constitutional violation—the prosecution absent probable cause or the unreasonable seizure—can independently support an action under 42 U. S. C. §1983.

Furthermore, although JUSTICE GINSBURG speculates that respondent may be fully protected from damages liability by an immunity defense, *ante*, at 4–5, n. 5, that issue is neither free of difficulty, cf. *Buckley* v. *Fitzsimmons*, 509 U. S. ___ (1993), nor properly before us. See Plurality Opinion, *ante*, at 2, n. 3. The question on which we granted certiorari is whether the initiation of criminal charges absent probable cause is a deprivation of liberty protected by the Due Process Clause. Neither the fact that the seizure caused by petitioner's arrest also deprived him of liberty, nor the possible availability of an affirmative defense, is a sufficient reason for failing to

interval may separate the formal accusation from the arrest, possibly because the accused is out of the jurisdiction or because of administrative delays in effecting the arrest.[27]

Because the constitutional protection against unfounded accusations is distinct from, and somewhat broader than, the protection against unreasonable seizures, there is no reason why an abandonment of a claim based on the seizure should constitute a waiver of the claim based on the accusation. Moreover, a case holding that allegations of police misconduct in connection with an arrest or seizure are adequately reviewed under the Fourth Amendment's reasonableness standard, *Graham* v. *Connor*, 490 U. S. 386 (1989), tells us nothing about how unwarranted accusations should be evaluated.

*Graham* merely held that the due process right to be free from police applications of excessive force when state officers effect a seizure is governed by the same reasonableness standard as that governing seizures effected by federal officers. *Id.*, at 394–395. In the unlawful seizure context exemplified by *Graham*, there is no need to differentiate between a so-called Fourth Amendment theory and a substantive due process theory because they are coextensive.[28] Whether viewed through a Fourth

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discuss or decide this question. The question whether one is protected by the Due Process Clause from unfounded prosecutions has implications beyond whether damages are ultimately obtainable. Indeed, in this very case petitioner's complaint sought injunctive relief in addition to damages.

[27]See, *e.g.*, *Doggett* v. *United States*, 505 U. S. ___ (1992) (time lag between indictment and arrest of 8½ years due in part to the defendant's absence from the country and in part to the Government's negligence).

[28]It is worthwhile to emphasize that the Fourth Amendment itself does not apply to state actors. It is

Amendment lens or a substantive due process lens, the substantive right protected is the same.

When, however, the scope of the Fourth Amendment protection does not fully encompass the liberty interest at stake—as in this case—it is both unwise and unfair to place a blinder on the lens that focuses on the specific right being asserted. Although history teaches us that the Fourth and Fifth Amendments have been viewed "as running `almost into each other,'" *Mapp* v. *Ohio*, 367 U. S., at 646, quoting *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), and citing *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (C. P. 1765), we have never previously thought that the area of overlapping protection should constrain the independent protection provided by either.

Although JUSTICE SOUTER leaves open the possibility that in some future case, a due process claim could be stated for a prosecution absent probable cause, he concludes that this is not such a case. He is persuaded that the federal remedy for Fourth Amendment violations provides an adequate justification for refusing to "`break new ground'" by recognizing the "novel due process right" asserted by petitioner. *Ante,* at 2. Like the CHIEF JUSTICE, *ante*, at 5, 8, and JUSTICE GINSBURG, *ante* at 6, he points to *Collins* v. *Harker Heights*, 503 U. S. ___ (1992), as a pertinent example of our reluctance "to expand the concept of substantive due process . . . in [an]

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only because the Court has held that the privacy rights protected against federal invasion by that Amendment are implicit in the concept of ordered liberty protected by the Due Process Clause of the Fourteenth Amendment that the Fourth Amendment has any relevance in this case. Strictly speaking, petitioner's claim is based entirely and exclusively on the Fourteenth Amendment's Due Process Clause.

unchartered area." *Id*., at ___ (slip op., at 9). Our relevant holding in that case was that a city's failure to provide an employee with a reasonably safe place to work did not violate the Federal Constitution. We unanimously characterized the petitioner's constitutional claim as "unprecedented." *Id*., at ___ (slip op., at 11). The contrast between *Collins* and this case could not be more stark.

The lineage of the constitutional right asserted in this case dates back to the Magna Charta. See n. 2, *supra.* In an early Massachusetts case, Chief Justice Shaw described it as follows:

> "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious, and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty." *Jones* v. *Robbins,* 74 Mass. 329, 344 (1857).

Moreover, most of the Courts of Appeals have treated claims of prosecutions without probable cause as within "the ambit of compensability under the general rule of 42 U. S. C. §1983 liability," see *ante*, at 5 (SOUTER, J., concurring in judgment). See, *e.g., Golino* v. *New Haven*, 950 F. 2d 864, 866–867 (CA2 1991) (and case cited therein), cert. denied, 509 U. S. ___ (1992); *Robinson* v. *Maruffi*, 895 F. 2d 649, 654–657 (CA10 1990) (citing cases); *Torres* v. *Superintendent of Police of Puerto Rico*, 893 F. 2d 404, 408 (CA1 1990) (citing cases, and finding cause of action if "egregious"); *Goodwin* v. *Metts*, 885 F. 2d 157, 162 (CA4 1989) (citing cases), cert. denied, 494 U. S. 1081 (1990); *Rose* v. *Bartle*, 871 F. 2d 331, 348–349 (CA3 1989) (citing cases); *Strength* v. *Hubert*, 854 F. 2d 421 (CA11 1988); *Wheeler* v. *Cosden Oil &*

*Chemical Co.*, 734 F. 2d 254 (CA5 1984).

Given the abundance of precedent in the Courts of Appeals, the vintage of the liberty interest at stake, and the fact that the Fifth Amendment categorically forbids the Federal Government from initiating a felony prosecution without presentment to a grand jury, it is quite wrong to characterize petitioner's claim as an invitation to enter unchartered territory. On the contrary, the claim is manifestly of constitutional dimension.

This conclusion should end our inquiry. Whether the Due Process Clause in any given case may provide a "duplication of protections," *ante*, at 2 (SOUTER, J., concurring in judgment) is irrelevant to whether a liberty interest is at stake.[29] Even assuming the dubious proposition that, in this case, due process protection against a baseless prosecution may not provide "a substantial increment to protection otherwise available," *ibid.*,[30] that is a

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[29]JUSTICE SOUTER relies in part upon "pragmatic concerns about subjecting government actors to two (potentially inconsistent) standards for the same conduct." *Ante*, at 2. I see no basis for that concern in this case. Moreover, Congress properly weighs "pragmatic concerns" when it decides whether to provide a remedy for a violation of federal law. Such concerns motivated the enactment of §1983—a statute that provides a remedy for constitutional violations. Thus, if such a violation is alleged—and I am satisfied that one is here—we have a duty to enforce the statute without examining pragmatic concerns.

[30]It seems to me quite wrong to attribute to a subsequent arrest the reputational and other harms caused by an unjustified accusation. In addition, although JUSTICE GINSBURG is prepared to hold that a Fourth Amendment claim does not accrue until the baseless charges are dismissed, at least some of the

consideration relevant only to damages, not to the existence of constitutional protection. Furthermore, that few of petitioner's injuries flowed *solely* from the filing of the charges against him does not make those injuries insubstantial. To the contrary, I can think of few powers that the State possesses which, if arbitrarily imposed, can harm liberty as substantially as the filing of criminal charges.

While the supposed adequacy of an alternative federal remedy persuades JUSTICES GINSBURG and SOUTER that petitioner's claim fails, the availability of an alternative state remedy convinces JUSTICE KENNEDY. I must therefore explain why I do not agree with his reliance on *Parratt* v. *Taylor*, 451 U. S. 527 (1981). In 1975 I helped plant the seed that ultimately flowered into the *Parratt* doctrine. See *Bonner* v. *Coughlin*, 517 F. 2d 1311, 1318–1319 (CA7 1975), modified en banc, 545 F. 2d 565 (1976), cert. denied, 435 U. S. 932 (1978) (cited in *Parratt* v. *Taylor*, 451 U. S., at 541–542). The plaintiff in *Bonner*, like the plaintiff in *Parratt*, claimed that the negligence of state agents had deprived him of a property interest "without due process of law." In both cases, the claim was rejected because a predeprivation remedy was infeasible and the State's

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Courts of Appeals have held that the arrest triggers the running of the statute of limitations. See, *e.g.*, *Rose* v. *Bartle*, 871 F. 2d 331, 351 (CA3 1989); *McCune* v. *Grand Rapids*, 842 F. 2d 903, 906 (CA6 1988); *Mack* v. *Varelas*, 835 F. 2d 995, 1000 (CA2 1987); *Venegas* v. *Wagner*, 704 F. 2d 1144, 1146 (CA9 1983). And, given the disposition of this case, a majority of this Court might agree. In any event, uncertainties about such matters counsel against constitutional adjudication based upon "pragmatic concerns."

postdeprivation remedy was considered adequate to prevent a constitutional violation. *Parratt* v. *Taylor*, 451 U. S., at 543–544; *Bonner* v. *Coughlin*, 517 F. 2d, at 1319–1320. Both of those cases involved the type of ordinary common law tort that can be committed by anyone. Such torts are not deprivations "without due process" simply because the tortfeasor is a public official.

The rationale of those cases is inapplicable to this case whether one views the claim at issue as substantive or procedural.[31] If one views the petitioner's claim as one of substantive due process, *Parratt* is categorically inapplicable. *Zinermon* v. *Burch*, 494 U. S. 113, 125 (1990). Conversely, if one views his claim as one of procedural due process, *Parratt* is also inapplicable, because its rationale does not apply to officially authorized deprivations of liberty or property.

Thus, contrary to JUSTICE KENNEDY's conclusion, *ante*, at 5, *Parratt*'s "precedential force" does not dispose of this case. Petitioner was subjected to criminal charges by an affirmative, deliberate act of a state official.[32] The filing of criminal charges is effectuated through established state procedures under which government agents, such as respondent Oliver, are authorized to act.[33] In addition, the State's authorized

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[31]See 1 S. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, §3.15 pp. 211–212 (3d ed. 1991).

[32]This case is thus distinguishable from *Hudson* v. *Palmer*, 468 U. S. 517 (1984), in which petitioner alleged that a prison guard intentionally destroyed his property. *Id.*, at 533 (holding that the Due Process Clause is not violated by random and unauthorized intentional deprivations of property "until and unless it provides or refuses to provide a suitable postdeprivation remedy").

[33]See n. 14, *supra.*

agent knows precisely when the deprivation of the liberty interest to be free from criminal prosecution will occur—the moment that the charges are filed.[34] Therefore, as with arrest or imprisonment, the State is capable of providing a reasoned predeprivation determination, at least *ex parte*, prior to the commencement of criminal proceedings.[35] See *Zinermon* v. *Burch*, 494 U. S., at 136–139. Failure to do so, or to do so in a meaningful way, see *supra*, at 8–11, is constitutionally unacceptable.[36] Thus, notwithstanding the possible availability of a state tort action for malicious prosecution, §1983 provides a federal remedy for the constitutional violation alleged by petitioner. *Monroe* v. *Pape*, 365 U. S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked") (overruled in part not relevant here, *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 664–689 (1978)).

The remedy for a violation of the Fourteenth Amendment's Due Process Clause provided by §1983 is not limited, as JUSTICE KENNEDY posits, *ante*, at 5, to

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[34]The *Parratt* doctrine is also inapplicable here because it does not apply to cases in which the constitutional deprivation is complete when the tort occurs. *Zinermon* v. *Burch*, 494 U. S., at 125 (citing *Daniels* v. *Williams*, 474 U. S. 327, 338 (1986) (STEVENS, J., concurring in judgments)); see *infra*, at 22–23.

[35]See, *e.g., Gerstein* v. *Pugh*, 420 U. S., at 114 (holding that the Fourth Amendment, as applied to the States through the Due Process Clause of the Fourteenth Amendment, "requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest").

[36]See, *e.g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–437 (1982).

cases in which the injury has been caused by "a state law, policy, or procedure." One of the primary purposes of §1983 was to provide a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Monroe* v. *Pape*, 365 U. S., at 175–176 (emphasis in original). Therefore, despite his suggestion to the contrary, *ante*, at 5, JUSTICE KENNEDY's interpretation of *Parratt* is in direct conflict with both the language and the purposes of §1983. See *Monroe* v. *Pape*, 365 U. S., at 172–187.

Section 1983 provides a federal cause of action against "[e]very person" who under color of state authority causes the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U. S. C. §1983. The *Parratt* doctrine is reconcilable with §1983 only when its application is limited to situations in which no constitutional violation occurs. In the context of certain deprivations of property, due process is afforded—and therefore the Constitution is not violated—if an adequate postdeprivation state remedy is available in practice to provide either the property's prompt return or an equivalent compensation. See *Bonner* v. *Coughlin*, 517 F. 2d, at 1320. In other contexts, however, including criminal cases and most cases involving a deprivation of liberty, the deprivation is complete, and the Due Process Clause has been violated, when the loss of liberty occurs.[37] In those

[37]Postdeprivation procedures may provide adequate due process for deprivations of liberty in limited circumstances. See, *e.g.*, *Zinermon* v. *Burch*, 494 U. S. 113, 132 (1990) ("[I]n situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake . . . or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process");

contexts, any postdeprivation state procedure is merely a remedy; because it does not provide the predeprivation process that is "due," it does not avoid the constitutional violation. In such cases, like this one, §1983 provides a federal remedy regardless of the adequacy of the state remedy. *Monroe* v. *Pape*, 365 U. S., at 183.

The Court's judgment of affirmance is supported by five different opinions. Significantly, none of them endorses the reasoning of the Court of Appeals, and none of them commands a majority. Of greatest importance, in the aggregate those opinions do not reject my principal submission: the Due Process Clause of the Fourteenth Amendment constrains the power of state governments to accuse a citizen of an infamous crime.

I respectfully dissent.

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*Daniels* v. *Williams*, 474 U. S., at 342 (STEVENS, J., concurring in judgments) (noting that *Parratt* could defeat a procedural due process claim that alleged a deprivation of liberty when "a predeprivation hearing was definitionally impossible"); *Ingraham* v. *Wright*, 430 U. S. 651, 701 (1977) (STEVENS, J., dissenting) (dissenting from the Court's holding that the State's postdeprivation remedies for corporal punishment in the schools satisfied the Due Process Clause, but noting that "a postdeprivation remedy is sometimes constitutionally sufficient").