

January 2005

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Recommended Citation

Charissa A. Eckhout, Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis, 82 Denv. U. L. Rev. 499 (2005).

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Section 1983 and the Tort of Malicious Prosecution: A Tenth Circuit Historical Analysis

SECTION 1983 AND THE TORT OF MALICIOUS PROSECUTION: A TENTH CIRCUIT HISTORICAL ANALYSIS

INTRODUCTION

The malicious prosecution doctrine of 42 U.S.C. § 1983¹ (hereinafter § 1983) has been the source of much confusion and the cause of a long term split in the circuit courts.² With regards to this particular constitutional tort doctrine, the courts have experienced two separate controversial splits.³ The first split occurred over whether a federal claim for malicious prosecution even existed under § 1983.⁴ The Supreme Court has, in recent history, resolved this issue by validating § 1983 malicious prosecution claims in cases such as *Heck v. Humphrey*⁵ and *Albright v. Oliver*.⁶

The modern split concerning § 1983 malicious prosecution claims lies not in whether the claim exists, but rather in how a successful claim of this nature must be pleaded.⁷ Specifically, the circuits are split over whether a § 1983 malicious prosecution claim requires a showing of only constitutional deprivation, or of both a constitutional deprivation, as well as the common law tort elements.⁸

In an attempt to clarify exactly where the Tenth Circuit stands in this chaotic doctrine, this Article focuses on the Tenth Circuit's historical implementation of § 1983 malicious prosecution claims, as well as the Court's current stance on this issue. Part I of this Article explains the historical context through which malicious prosecution crept into § 1983 litigation. This section looks at how the circuits split over the malicious prosecution issue, and how the Tenth Circuit has sided in that split. Part II provides an analysis of the modern circuit split over how to properly frame a constitutional malicious prosecution claim. This section looks at the split both generally, and more specifically in light of the Tenth Circuit's most recent decision of *Pierce v. Gilchrist*.⁹ Part III offers an analysis of why the circuits continue to disagree over the application of

1. 42 U.S.C. § 1983 (1996).

2. See generally Jacques L. Schillaci, Comment, *Unexamined Premises: Toward Doctrinal Purity in § 1983 Malicious Prosecution Doctrine*, 97 NW. U. L. REV. 439, 452-62 (2002).

3. *Id.*

4. *Id.* at 452.

5. 512 U.S. 477 (1994).

6. 510 U.S. 266 (1994).

7. Schillaci, *supra* note 2, at 459.

8. *Id.* at 459-62.

9. 359 F.3d 1279 (10th Cir. 2004).

§ 1983 malicious prosecution actions, and, specifically, why the Tenth Circuit's approach is most suitable.¹⁰

I. BACKGROUND

A. *The Development of § 1983 Malicious Prosecution Claims*

Section 1983 developed from the Civil Rights Act of 1871, an enactment aimed at protecting the rights of former slaves.¹¹ After the adoption of the Thirteenth Amendment, the southern states proceeded to enact codes requiring former slaves to work for their previous owners.¹² In an attempt to put an end to this underhanded method of maintaining slavery, the federal government enacted the Civil Rights Act of 1871 via the Fourteenth Amendment's authority.¹³ The first section of this Act is now codified as 42 U.S.C. § 1983.¹⁴

While the Act did effectively deter state enactments of "black codes,"¹⁵ the statute sat "virtually dormant" until the mid-twentieth century when courts began interpreting the statute's scope.¹⁶ In the landmark decision of *Monroe v. Pape*,¹⁷ the Supreme Court "broaden[ed] the scope of § 1983 liability to encompass wrongdoing by state officials even when [the wrongdoing] was not officially sanctioned by state law."¹⁸ The *Monroe* decision set into motion the broadening evolution of § 1983 claims. Specifically, the decision provided for greater interpretation of the statute's "under the color of state law" language.¹⁹

Malicious prosecution is a suit brought by a victim of a maliciously instituted prosecution.²⁰ The claimant in a malicious prosecution action brings suit only after the termination of the allegedly malicious proceedings.²¹ The doctrine of *constitutional* malicious prosecution developed as a result of a broadened understanding of § 1983's scope.²² In the beginning, claimants brought federal constitutional claims under § 1983 in conjunction with a state malicious prosecution tort action.²³ As a result of these joint claims some federal courts began to recognize a conjoined

10. *Pierce*, 359 F.3d at 1290.

11. Schillaci, *supra* note 2, at 446.

12. *Id.*

13. *Id.* at 447.

14. *Id.*

15. *Id.* at 446 (describing codes that, despite the emancipation of slaves, forced African Americans to maintain working for their former masters).

16. Esther M. Schonfeld, Article, *Malicious Prosecution as a Constitutional Tort: Continued Confusion and Uncertainty*, 15 *TOURO L. REV.* 1681, 1689 (1999).

17. 365 U.S. 167 (1961).

18. Schillaci, *supra* note 2, at 451 (citing *Monroe*, 365 U.S. at 187).

19. *Id.* at 450.

20. Jay M. Zitter, Annotation, *Excessiveness or Inadequacy of Compensatory Damages for Malicious Prosecution*, 50 *A.L.R.* 4th 843, § 2(a) (2004).

21. *Id.*

22. Schillaci, *supra* note 2, at 451-52.

23. *Id.*

federal malicious prosecution action under § 1983.²⁴ However, this new claim did not develop without criticism. In reality, the recognition by some circuits of a § 1983 malicious prosecution claim developed into the first of two circuit splits.²⁵

The circuits divided nearly down the middle with the Second, Third, Fourth, Fifth, and Seventh Circuits recognizing a malicious prosecution claim under § 1983, and the First, Sixth, Eighth and Ninth Circuits rejecting such a claim.²⁶ The courts that allowed the new § 1983 action reasoned that since a malicious prosecution claim required a showing of malice in prosecution, it was inherently also a constitutional violation.²⁷ Alternatively, those circuits opposing § 1983 malicious prosecution claims rejected the notion that criminal prosecutions lacking probable cause were per se constitutional violations.²⁸ Because there existed neither a constitutional nor a federal statute that expressly mentioned malicious prosecution, these circuits further argued that the common law tort elements alone were not sufficient to base a constitutional claim.²⁹

B. The Tenth Circuit's Approach to Early § 1983 Malicious Prosecution Claims

The Tenth Circuit joined the other circuits who embraced the new § 1983 malicious prosecution claim. The Tenth Circuit first showed its inclination to allow a federal malicious prosecution claim in the case of *Taylor v. Nichols*.³⁰ This case involved a § 1983 claim brought by a police officer in federal district court.³¹ The officer was accused of criminal assault and battery stemming from a routine traffic stop.³² The officer was investigated, arrested, detained, and, eventually, acquitted of the allegations.³³ After being acquitted, the officer brought suit against the person alleging criminal assault, as well as the prosecuting attorney in the case.³⁴ The federal district court granted defendants' motion to dismiss holding that the alleged injury was not actionable under the Civil Rights Act because the alleged defendant in the case was not acting under the color of state law.³⁵ The officer appealed the case to the Tenth Circuit Court of Appeals, where the court affirmed the lower court's judgment.³⁶

24. *Id.*

25. *Id.*

26. *Id.* at 452-53.

27. *Id.* at 452.

28. *Id.* at 453-54.

29. *Id.* at 454.

30. 558 F.2d 561 (10th Cir. 1977).

31. *Taylor*, 558 F.2d at 563-64.

32. *Id.* at 563.

33. *Id.* at 563-64.

34. *Id.* at 564.

35. *Id.*

36. *Id.* at 565.

The Tenth Circuit rejected the officer's claim on the same basis as the lower court decision—the person alleging criminal assault was not a state actor.³⁷ While the court ultimately dismissed the claim, the decision was important because the court acknowledged the viability of a § 1983 malicious prosecution claim.³⁸ The court reasoned that:

The tort case of malicious prosecution is not coterminous in its elements with a civil rights suit based upon misuse of the process. True, the same facts could give rise to violations under both federal and state law, but color of state law would have to be present in order to have a civil rights case.³⁹

While this case did not embrace entirely the idea of a § 1983 malicious prosecution claim, it certainly opened the Tenth Circuit's door to the possibility of hearing such a claim.

In 1984, the Tenth Circuit permanently accepted the idea of a federal malicious prosecution action.⁴⁰ In *Lusby v. T.G. & Y. Stores, Inc.*,⁴¹ the Tenth Circuit acknowledged and upheld a § 1983 malicious prosecution claim. In allowing the claim, the court particularized the level of deprivation necessary to comprise a constitutional violation.⁴² The court reasoned that "not every tort amounts to a deprivation of constitutional rights"; however, "when private parties or public officials use criminal complaints to coerce a release of civil liability from injured persons, this action, as a malicious prosecution, is egregious and qualifies as a deprivation of due process that violates the Fourteenth Amendment."⁴³ Having finally recognized a § 1983 malicious prosecution claim, the Tenth Circuit proceeded to further define the claim in its subsequent decisions.

In 1990 the Tenth Circuit decided the malicious prosecution case of *Robinson v. Muraffi*.⁴⁴ Robinson alleged that defendant police officers knowingly permitted the use of false testimony in his prosecution.⁴⁵ Robinson had allegedly killed one of the defendants' fellow police officers.⁴⁶ The defendant police officers argued that because the chain of causation between the police misconduct and the actual grand jury indictment was broken by subsequent independent acts of the prosecutor, the officers were not liable.⁴⁷ The court rejected this reasoning, stating that "[i]f police officers have been instrumental in the plaintiff's contin-

37. *Id.* at 564.

38. *Id.*

39. *Id.*

40. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1431 (10th Cir. 1984).

41. *Lusby*, 749 F.2d at 1423.

42. *Id.* at 1431.

43. *Id.*

44. 895 F.2d 649 (10th Cir. 1990).

45. *Robinson*, 895 F.2d at 651.

46. *Id.*

47. *Id.* at 655.

ued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors or grand jurors or magistrates to confine or prosecute him."⁴⁸ In extending malicious prosecution actions to police officers, the court clearly broadened the previous scope of malicious prosecution claims in the Tenth Circuit.⁴⁹

The *Lusby* and *Robinson* cases not only show the development of the § 1983 malicious prosecution claim in the Tenth Circuit, but also exhibit the broadening scope of the claim generally. In the beginning, malicious prosecution claims were directed only at the prosecuting attorney. As the subsequent case law indicates, however, § 1983 malicious prosecution claims later extended to government actors such as police officers, investigators, and others involved in the *pre*-trial process.⁵⁰

II. THE MODERN § 1983 MALICIOUS PROSECUTION CIRCUIT SPLIT

Today it is clear that the Tenth Circuit recognizes § 1983 malicious prosecution claims; however, prior to 1994, some circuits remained opposed to the implementation of the new action. The jurisdictions that recognized the § 1983 malicious prosecution claim soon faced a new uncertainty within the doctrine—how to properly implement the new claim. Due to the “embarrassing diversity of judicial opinion” in the area, the Supreme Court decided to reconcile the matter by granting certiorari in *Albright v. Oliver*.⁵¹

A. The Supreme Court's “Clarification”: *Albright v. Oliver*

Admitting that the majority of circuits recognized some form of a viable malicious prosecution claim under § 1983, the Court focused instead on the modern split among the circuits.⁵² The modern concern over malicious prosecution claims was not whether the § 1983 claim existed, but rather, whether malicious prosecution, standing alone, could violate the Constitution.⁵³ The Court identified the two differing views that divided the circuits. The first, more expansive, view contended that the elements of a malicious prosecution claim under § 1983 were equivalent to that of the common law tort.⁵⁴ Under this contention, a party claiming malicious prosecution must meet the following elements: (i) the bringing of the action by the defendant, (ii) its successful termination in favor of the plaintiff, (iii) want of probable cause to bring the action, (iv) malice,

48. *Id.* at 656 (quoting *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988)).

49. *Id.* (stating that police officers can no longer hide behind the officials they have defrauded).

50. *See, e.g., Taylor*, 558 F.2d at 561 (§ 1983 claim against attorney); *Lusby*, 749 F.2d at 1423 (§ 1983 claim against off-duty police officer acting as security guard); *Robinson*, 895 F.2d at 649 (§ 1983 claim against police officer).

51. 510 U.S. 266, 271 n.4 (1994) (quoting *Albright v. Oliver*, 975 F.2d 343, 345 (7th Cir. 1992)).

52. *Albright*, 510 U.S. at 271 n.4.

53. *Id.*

54. *Id.*

and (v) damages.⁵⁵ The opposing circuits maintained that common law tort elements were not sufficient to support a § 1983 claim. Rather, these circuits contended that an action required a showing of some injury or deprivation of a constitutional magnitude in addition to the traditional elements of common law malicious prosecution.⁵⁶

The *Albright* Court hoped to clarify the chaotic malicious prosecution doctrine; however, somewhere in the midst of its analysis, the Court swayed from its original goal. Instead, the Court addressed the issue of which constitutional claim produces a proper foundation for such claims, leaving the pleading issue completely unsettled.⁵⁷ In its redirected analysis the Court concluded: "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'"⁵⁸ Thus the Court asserted that § 1983 is not the underlying basis of an alleged civil rights claim, but rather the vehicle for raising such an action.⁵⁹ The court reasoned that "Section 1983 'fulfills the procedural or remedial role of authorizing the assertion of the claim for relief.' However, the statute itself does not grant or create any substantive rights. Therefore, plaintiffs . . . must rely on another source, such as the United States Constitution or a federal statute, for the substantive rights they seek to enforce."⁶⁰ Having established the necessity of a substantive foundation for relief, it was then essential to determine what constitutional or statutory basis was most appropriate.

While the issue of how to properly establish a § 1983 malicious prosecution claim remained unanswered by the Court, the *Albright* decision did clarify what constitutional deprivation was required by § 1983.⁶¹ Previously, many claimants based their § 1983 malicious prosecution claim upon a Fourteenth Amendment due process foundation.⁶² The Court in *Albright* rejected this basis, finding that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'"⁶³ This decision falls clearly in line with the Court's unwillingness to further expand the boundaries of substantive due process.⁶⁴ Although the court articulated that due process

55. *Pierce v. Gilchrist*, 359 F.3d 1279, 1286 (10th Cir. 2004).

56. *Albright*, 510 U.S. at 271 n.4.

57. *Id.* at 271.

58. *Id.* (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

59. *Id.*

60. Schonfeld, *supra* note 16, at 1698-99 (citing Martin A. Schwartz & John E. Kirklín, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 1A, 1B, 1C (3d ed. 1997); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)).

61. *Albright*, 510 U.S. at 271.

62. *See, e.g., Lusby*, 749 F.2d at 1423.

63. *Albright*, 510 U.S. at 273 (quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989)).

64. Schonfeld, *supra* note 16, at 1717.

was an inadequate basis for § 1983 malicious prosecution claims, it suggested instead that the Fourth Amendment would provide a more 'explicit' textual support upon which claimants could rely.⁶⁵ Chief Justice Rehnquist reasoned that the "Fourth Amendment relates to 'deprivations of liberty that go hand in hand with criminal prosecutions,'" and, thus, provides the proper foundation for § 1983 malicious prosecution claims.⁶⁶

B. *The Aftermath of Albright*

Two certainties have evolved from the *Albright* decision: first, the use of due process as a foundation for § 1983 malicious prosecution actions is no longer permitted, and second, virtually all federal circuit courts now recognize malicious prosecution as a § 1983 constitutional tort.⁶⁷ The aftermath of the *Albright* decision has also resulted in uncertainty with regards to the proper pleading requirements of this new constitutional tort.⁶⁸

The *Albright* decision left the circuits to decide which, if any, elements are necessary conditions of a constitutional malicious prosecution claim. The circuits are currently split over the proper resolution to this dilemma creating both a majority and minority rule.⁶⁹ The majority rule, upheld by the First, Third, Fourth, Sixth, Tenth, and Eleventh circuits, requires plaintiffs to show only a Fourth Amendment deprivation.⁷⁰ These circuit courts argue that because § 1983 claims develop from Fourth Amendment deprivations, and because the language of the amendment mentions nothing of unreasonable prosecutions, it is unnecessary to require the common law tort elements to be pleaded.⁷¹

The minority rule, to which the Second, Fifth, Seventh, and Ninth Circuits subscribe, requires that a plaintiff demonstrate both a Fourth Amendment violation in addition to the common law elements of malicious prosecution.⁷² These circuits view § 1983 malicious prosecution liability as tort actions that implicate constitutional rights.⁷³ As such, the minority circuits argue that the best method of analysis is to "borrow" the elements of the underlying malicious prosecution claim from state law and apply them to the federal § 1983 claim.⁷⁴

65. *Albright*, 510 U.S. at 275.

66. Schonfeld, *supra* note 16, at 1718 (quoting *Albright*, 510 U.S. at 274).

67. Schillaci, *supra* note 2, at 459.

68. *Id.*

69. *Id.*

70. *Id.* at 460-61.

71. *Id.* at 461.

72. *Id.* at 459.

73. *Cook v. Sheldon*, 41 F.3d 73, 79 (2d Cir. 1994).

74. *Cook*, 41 F.3d at 79.

C. *The Tenth Circuit's Shift in Analysis*

The Tenth Circuit has taken an interesting stance in the controversy over how properly to present a § 1983 malicious prosecution claim. In a series of post-*Albright* decisions, the circuit has recognized that the common law elements of malicious prosecution are a "starting point" for § 1983 claims.⁷⁵ This "starting point" analysis differs substantially from the other majority rule circuits in that the other circuits require absolutely no examination of common law elements.⁷⁶ The Tenth Circuit's "starting point" analysis, while unique, has also caused some confusion within the Tenth Circuit. As discussed later, this confusion was recently clarified by the Tenth Circuit's decision of *Pierce v. Gilchrist*.⁷⁷

To see the Tenth Circuit's post-*Albright* transition, it is most beneficial to examine the court's more recent decisions in chronological order. One of the first Tenth Circuit cases to follow the *Albright* decision was the unpublished opinion of *Sack v. Huggins*.⁷⁸ In *Sack*, the Tenth Circuit looked to the Fifth Circuit's minority rule precedent, and held that the common law element requiring that the criminal proceedings be terminated in plaintiff's favor *prior* to a malicious prosecution claim is a necessary common law element.⁷⁹ Alone, this case would suggest that the Tenth Circuit had sided with the minority rule requiring that common law elements be shown.

In 1995, however, the court appears to invoke the opposite rule in its decision of *Garcia v. Johnson*.⁸⁰ In this decision, the court looked away from the common law elements and invoked a more "majority rule" analysis. The *Garcia* court consciously made a distinction between the plaintiff's claim following state tort law versus constitutional tort law under § 1983.⁸¹ The court went on to state that the plaintiff "can only maintain this claim if the allegations in his complaint rise to the level of a constitutional violation."⁸² In making such an intentional distinction between state tort law and constitutional tort law, the court's rationale in this case seems to fall more in line with the majority rule, than that of the minority.

The Tenth Circuit further employed the "starting point" analysis in both the *Sanders v. Howlett*⁸³ and *Wolford v. Lasater*⁸⁴ decisions. While

75. See, e.g., *Sanders v. Howlett*, 1995 WL 143460 (10th Cir. March 30, 1995) (unpublished table decision); *Wolford v. Lasater*, 78 F.3d 484 (10th Cir. 1996); *Taylor v. Meacham*, 82 F.3d 1556 (10th Cir. 1996); *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004).

76. Schillaci, *supra* note 2, at 460-61.

77. 359 F.3d 1279 (10th Cir. 2004).

78. 1994 WL 413271 (10th Cir. Aug. 1, 1994) (unpublished table decision).

79. *Sack*, 1994 WL 413271, at *4 (citing *Brummett v. Camble*, 946 F.2d, 1178, 1183-84 (5th Cir. 1991)).

80. 1995 WL 492879 (10th Cir. Aug. 18, 1995) (unpublished table decision).

81. *Garcia*, 1995 WL 492879, at *5.

82. *Id.*

83. 1995 WL 143460 (10th Cir. Mar. 30, 1995) (unpublished table decision).

continuing with this analysis, the court added to its rationale by implementing an analysis of the probable cause element that is required in common law malicious prosecution claims.⁸⁵ In *Sanders*, the court remarked that in Kansas, the lack of probable cause to initiate criminal proceedings “is an essential element of the tort of malicious prosecution.”⁸⁶ In *Wolford*, the probable cause element is the ultimate basis by which the court dismissed the claimant’s malicious prosecution claim.⁸⁷ In its reasoning, the court cited New Mexico precedent that under “state tort law, lack of probable cause to initiate criminal proceedings is an essential element of the tort of malicious prosecution.”⁸⁸ The *Wolford* decision went a step further than that of the *Sanders* decision, however, in combining both a state malicious prosecution analysis of probable cause with a Fourth Amendment analysis of probable cause.⁸⁹ The court’s transition to include both a common law and Fourth Amendment analysis of the probable cause issue signifies a shift in the court’s reasoning from common law tort elements to constitutional analysis; this shift becomes even more apparent in its later decisions.

The court’s transition in analysis is more clearly evidenced in *Taylor v. Meacham*.⁹⁰ In *Taylor*, the Tenth Circuit acknowledged its confusion of the issue, and its previous inconsistent decisions.⁹¹ The *Taylor* court recognized the need for a solid announcement of malicious prosecution pleading requirements in the Tenth Circuit. Unfortunately, at some point the court lost its focus and failed to provide the much anticipated “clarification.” Instead of announcing a hard and fast rule as to whether the court requires a showing of common law elements, the court responded, once again, with a “starting point” analysis.⁹²

While the court did not provide an express rule, it did make another small step in clarifying the “muddied waters” of the post-*Albright* malicious prosecution claim. In the midst of the court’s “starting point” analysis it stated “our circuit takes the common law elements of malicious prosecution as the ‘starting point’ for the analysis of a § 1983 malicious prosecution claim, but always reaches the ultimate question, which it must, of whether the plaintiff has proven a *constitutional* violation.”⁹³ The constitutional violation at issue in this case was a deprivation of Fourth Amendment rights.⁹⁴ In fact, the court seemed to focus its analy-

84. 78 F.3d 484 (10th Cir. 1996).

85. *Lasater*, 78 F.3d at 489.

86. *Sanders*, 1995 WL 143460, at *2.

87. *Wolford*, 78 F.3d at 489.

88. *Id.*

89. *Id.*

90. 82 F.3d 1556 (10th Cir. 1996).

91. *Taylor*, 82 F.3d at 1561.

92. *Id.*

93. *Id.*

94. *Id.* at 1562.

sis primarily on the constitutional violation rather than on a common law tort analysis.⁹⁵ Accordingly, the court's shift in focus shows the court's inclination toward the majority rule § 1983 malicious prosecution analysis.

D. *Pierce v. Gilchrist*⁹⁶

1. Facts

In 2004, the Tenth Circuit was faced with its most shocking malicious prosecution case. The drastic nature of the claim, and the obvious need for an adequate remedy arguably pressured the court to come forward with a hard and fast rule by which to implement § 1983 malicious prosecution claims.

Plaintiff, Jeffrey Pierce, was convicted of first degree rape, oral sodomy, second degree burglary, and assault with a dangerous weapon, and sentenced to sixty-five years in prison.⁹⁷ After serving fifteen years of this sentence, Pierce was exonerated, and his conviction and sentence were vacated.⁹⁸ Pierce thereafter filed suit against the forensic analyst, the Oklahoma City District Attorney, and other governmental units for compensatory and punitive damages.⁹⁹

The events leading to Pierce's conviction and incarceration demonstrated an offensive abuse of prosecutorial power. On May 8, 1985, a woman named Sandra Burton was raped in her home.¹⁰⁰ Ms. Burton lived at the same apartment complex where Pierce was employed as a landscaper.¹⁰¹ Shortly after the rape, Pierce was taken to the police station to participate in a lineup.¹⁰² Pierce took part in the identification proceedings, but was *not* identified as the rapist.¹⁰³ Almost a year later, pursuant to a warrant, Pierce was arrested again as a suspect in the rape investigation.¹⁰⁴ Pierce's body was searched, and samples of his head and pubic hairs, as well as body fluids, were collected for investigation.¹⁰⁵ Five minutes after the samples were collected, Pierce was notified that a forensic analyst had matched his hairs to those found at the crime scene.¹⁰⁶

95. *Id.*

96. 359 F.3d 1279 (10th Cir. 2004).

97. *Pierce*, 359 F.3d at 1282.

98. *Id.* at 1283.

99. *Id.* at 1281.

100. *Id.* at 1282.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

The forensic analysis was conducted by the defendant, Joyce Gilchrist.¹⁰⁷ Gilchrist's report claimed to identify thirty-three scalp and pubic hairs from the crime scene that were "microscopically consistent" with those taken from Pierce's body.¹⁰⁸ As a result of these findings, Pierce was charged with first degree rape, oral sodomy, second degree burglary, and assault with a dangerous weapon, and later convicted.¹⁰⁹

Pierce would have served his sixty-five year sentence had the FBI not conducted an investigation of Gilchrist's forensic work.¹¹⁰ The FBI released a report in 2001 reflecting that five out of eight cases being investigated involved "contrived and erroneous statements by Ms. Gilchrist regarding identification of persons."¹¹¹ Furthermore, the report revealed that Gilchrist had "repeatedly made statements beyond the limits of forensic science."¹¹² It was also later uncovered that Gilchrist had been professionally reprimanded on various occasions, and had been expelled from the Association of Crime Scene Reconstruction for providing misrepresented evidence not factually supported by science.¹¹³

As a result of the FBI's findings, particularly that Pierce's hairs were microscopically *inconsistent* with the hairs found at the crime scene, the police ordered a DNA analysis of the *Pierce* case evidence. It was this DNA analysis that exonerated Pierce, and led to his vacated conviction and sentence.¹¹⁴ Thereafter, Pierce brought suit under § 1983 for malicious prosecution to which Gilchrist moved for summary judgment, claiming that she was provided qualified immunity and that Pierce had failed to state an actionable claim.¹¹⁵ The district court denied defendant's motion for summary judgment, finding that a jury could reasonably conclude that the defendant's actions were instrumental in Pierce's post-trial confinement.¹¹⁶ Gilchrist appealed to the Court of Appeals for the Tenth Circuit, which upheld the district court's finding.¹¹⁷

Defendant Gilchrist appealed on the basis that Pierce failed to plead all of the "required" common law malicious prosecution elements.¹¹⁸ Specifically, Gilchrist alleged that the plaintiff did not and could not prove the first and third elements of the common law malicious prosecu-

107. *Id.*

108. *Id.*

109. *Id.*

110. *See id.* at 1283 (discussing how an independent FBI investigation prompted the police department to send the *Pierce* case evidence for DNA analysis; the result exonerated Pierce, and his sentence was accordingly vacated).

111. *Id.*

112. *Id.*

113. *Id.* at 1284.

114. *Id.* at 1283.

115. *Id.* at 1284-85.

116. *Id.* at 1285.

117. *Id.* at 1285, 1301.

118. *Id.* at 1286.

tion claim—that the action against Pierce was brought by Gilchrist herself and that there was a want of probable cause.¹¹⁹ Gilchrist's argument hit directly to the question the Tenth Circuit had managed to avoid answering: At what point does the "starting point" analysis of common law malicious prosecution elements end, and a constitutional analysis begin?

2. Decision

The Tenth Circuit finally answered this longstanding question by holding that Gilchrist misunderstood the "starting point" analysis articulated in previous case law.¹²⁰ The court announced that the first step in its analysis was to identify a constitutional violation.¹²¹ The court, pursuant to *Albright*, recognized the Fourth Amendment as the most pertinent of Plaintiff's alleged claims.¹²² Next, the court maintained that the "[p]laintiff's actual cause of action is for a constitutional violation under § 1983; the common law tort of malicious prosecution is relevant *only as an analogy* that is helpful in structuring the legal analysis."¹²³ The court identified the usefulness in applying the common law principles as a way to structure a claim; however, it rejected entirely the notion that pleading common law elements was necessary.¹²⁴

While the court explicitly rejected the necessity of pleading common law elements, it continued to address Gilchrist's allegations, and asserted that, even had the court required a showing of all elements, Pierce's claim would still succeed.¹²⁵ The court first examined Gilchrist's allegation that her lack of involvement in procuring the arrest warrant exonerated her from the § 1983 claim.¹²⁶ Ultimately, Gilchrist contended that the plaintiff's claim failed to prove the first common law element, and, thus, failed to state a claim.¹²⁷ The court responded to this allegation by looking at the plain language of § 1983, and reasoning that the statute not only applies to someone "who 'subjects,' but also to any person who 'causes to be subjected . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.'"¹²⁸ As this language suggests, the court recognized that Congress intended not only for a person who formally initiates prosecution to fall within the bounds of § 1983, but rather for any

119. *Id.* at 1287.

120. *Id.*

121. *Id.* at 1285.

122. *Id.*

123. *Id.* at 1286 n.3 (emphasis added).

124. *Id.* at 1290.

125. *See id.* at 1290–97 (stating "[W]e fail to see the logic in a position that would confine constitutional claims to the precise rubric of tort law," but nevertheless addressing each of Gilchrist's common-law assertions).

126. *Id.* at 1291.

127. *Id.* at 1287.

128. *Id.* at 1292 (citing 42 U.S.C. § 1983 (1994) (emphasis added)).

state actor who causes a deprivation of constitutional rights to fall within the statute.¹²⁹ Gilchrist clearly fell within this definition.¹³⁰

Second, the court looked at Gilchrist's argument that "under Oklahoma law, existence of probable cause *at the time of arrest*, is a complete defense to malicious prosecution," thus implying that the third common law tort element of malicious prosecution was lacking.¹³¹ The court responded to this argument by asserting that "[e]ven when probable cause is present at the time of the arrest, evidence could later surface which would eliminate that probable cause."¹³² While the victim's photographic identification may have been sufficient to initially arrest Pierce, the court held that probable cause was completely lacking when the hair and blood enzyme analysis exonerated the plaintiff from being the rapist.¹³³

The court's decision in *Pierce* provided an opportunity for Pierce to obtain redress for the fifteen years that were taken from him. In addition, the court's decision was also a touchstone for the Tenth Circuit. Nearly a decade after the Supreme Court decided *Albright*, the Tenth Circuit finally articulated a clear strategy for implementing § 1983 malicious prosecution claims.

III. ANALYSIS

While the Tenth Circuit has managed to clearly articulate its position on interpreting § 1983 malicious prosecution claims, the other circuits remain split over which analysis is superior.¹³⁴ In an effort to make an informed conclusion as to which is the better method, it is necessary to look at both the practical and theoretical implications of each mode of analysis. After examining the implications of each method, it is clear that the majority rule, to which the Tenth Circuit subscribes, is the most efficient and effective method of interpretation.

A. Practical Implications

1. Inarticulate Pleading Requirements Result in Claim Dismissal and Barred Recovery

The pleading stage of a claim can be one of the most important and influential stages of litigation. Having a strong initial complaint is an extremely important method of initial presentation, but more importantly it is the required showing by which the claimant must prove that she is

129. *Id.*

130. *Id.* at 1293.

131. *Id.* at 1295.

132. *Id.* (quoting the district court opinion).

133. *Id.* at 1293-94.

134. Schillaci, *supra* note 2, at 459.

entitled to relief and demand a judgment for that relief.¹³⁵ It remains common legal knowledge that “fail[ing] to state a claim upon which relief can be granted” under the Federal Rules of Civil Procedure, Rule 12(b)(6) necessitates a dismissal.¹³⁶ This concern of 12(b)(6) dismissal becomes an imminent realization when the uncertainty of § 1983 malicious prosecution pleading requirements is at issue. Such a dismissal is disappointing to lawyers and potentially devastating to a claimant’s attempt at recovery.

As a claimant, it is extremely important to have a clear understanding of a claim’s pleading requirements so as not to disregard a necessary element. Where a cause of action, such as § 1983 malicious prosecution, has such divergent opinions as to what elements compose the claim, it is very difficult to confidently plead the action. As such, it is absolutely necessary to clarify any confusion the circuits have created in this area. The inarticulate “starting point” language that the Tenth Circuit relied upon prior to *Pierce v. Gilchrist*¹³⁷ did nothing more than confuse § 1983 malicious prosecution and encourage improper pleading. By clearly articulating in *Pierce* that a claimant need not present common law tort elements, the Tenth Circuit has done its part to avoid such devastating pleading mistakes.¹³⁸

2. Heightened Pleading Requirements in Civil Rights Litigation Further Exemplify the Need for Less Burdensome Pleading Standards

The court’s decision in *Pierce* is even more important when considered in the context of heightened pleading requirements for civil rights cases.¹³⁹ Despite what some would argue is a definitive Supreme Court decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,¹⁴⁰ many federal courts have imposed heightened pleading requirements on claimants as a result of the massive inflow of civil rights litigation.¹⁴¹ In 1993, the *Leatherman* Court unanimously rejected the notion of heightened pleading requirements in civil rights actions, yet left open the question of heightened pleading standards in

135. Evan Sanford Schwartz, *A Plea for Help: Pleading Problems in Section 1983 Municipal Liability Claims*, 6 TOURO L. REV. 377, 379 (1990) (citing FED. R. CIV. P. 8(a)(2–3)).

136. FED. R. CIV. P. 12(b)(6) (stating, “Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.”).

137. 359 F.3d 1279 (10th Cir. 2004).

138. *Pierce*, 359 F.3d at 1290.

139. See generally Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Claims*, 41 BRANDEIS L.J. 267 (2002) (recognizing the courts’ modern trend of imposing heightened pleading requirements).

140. 507 U.S. 163 (1993).

141. Korb & Bales, *supra* note 139, at 271.

cases involving individual government officials who may assert a qualified immunity defense.¹⁴² This uncertainty has since expanded and created its own specific circuit split with regard to the proper level of specificity in pleading requirements.¹⁴³

Furthering the debate over the requisite pleading specificity, the Federal Rules of Civil Procedure require what is commonly known as “notice pleading,” or more simply, a “short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁴⁴ The leading rationale for maintaining liberal pleading standards is to allow for adequate discovery.¹⁴⁵ Rule 8 of the Federal Rules of Civil Procedure was “adopted in response to stringent state code and common law pleading standards” because “[s]uch stringent standards permitted courts to dismiss colorable claims simply for an inartful draft of the complaint.”¹⁴⁶ These concerns only further weigh in favor of less burdensome pleading requirements for § 1983 malicious prosecution claims. Unfortunately, however, federal notice pleading standards are not uniformly applied to civil rights cases.¹⁴⁷ Stringent pleading requirements result in the dismissal of potentially viable actions before the actual merit of the case is ever reached.¹⁴⁸ By requiring heightened pleading standards, a claimant is obligated to “craft their complaints with factual specificity far in excess of the minimal specificity prescribed by . . . general notice pleading.”¹⁴⁹ Without a full understanding of what the court requires, a claimant is likely to improperly plead the claim and potentially bar himself from recovery.

3. Clear Pleading Requirements are a Necessity in Formulating Litigation Strategy

Should a claimant move beyond the initial pleading phase of litigation, the need for a clear articulation of the elementary requirements of a § 1983 malicious prosecution claim is vital. In properly formulating a litigation strategy it is essential that both claimants and defendants be aware of a claim’s elements. Requiring a § 1983 claimant to prove common law tort elements requires a much broader and more challenging burden.¹⁵⁰ By requiring the presence of common law tort elements, the court potentially allows many constitutional violations to go unpun-

142. *Id.* at 275–77.

143. *See generally id.* (evidencing the inter-circuit disagreement over heightened pleading requirements for civil rights cases).

144. *Id.* at 270–71 (citing FED. R. CIV. P. 8(a)(2)).

145. Schwartz, *supra* note 135, at 378.

146. *Id.* at 379–80.

147. *See generally* Korb & Bales, *supra* note 139 (articulating the current split among circuits over civil rights heightened pleading requirements).

148. Schwartz, *supra* note 135, at 380.

149. Korb & Bales, *supra* note 139, at 272.

150. Schillaci, *supra* note 2, at 469.

ished and, as a result, for many victims to be without redress.¹⁵¹ To allow for such injustice is in direct conflict with the intention of § 1983.¹⁵² Similarly, a defendant must know exactly what elements he is up against, and how best to strategize his defense. Thus it is equally important for both plaintiff and defendant to be aware of the necessary § 1983 malicious prosecution requirements in pleading, preparing, and arguing their case.

B. Theoretical Implications

In addition to the practical implications of successfully pleading a § 1983 malicious prosecution claim, there are theoretical implications that necessitate a clear ruling on the claim's elements. While many states provide plaintiffs redress via state malicious prosecution claims, § 1983 malicious prosecution claims provide a federal alternative to filing state court actions.¹⁵³ Furthermore, state malicious prosecution actions and federal § 1983 actions can be brought concurrently.¹⁵⁴ Because both state and federal actions are available to claimants, it seems counter-intuitive to assume that both forums would provide equivalent remedies. As such, requiring claimants to prove common law tort elements in § 1983 malicious prosecution cases seems to counteract the purpose of an alternative forum.

1. Statutory Purpose and Scope Demonstrate the Purely Constitutional Nature of § 1983 Malicious Prosecution Actions

The purpose of § 1983 is to "interpose the federal courts between the States and the people, as guardians of the people's federal rights."¹⁵⁵ Historically, however, the aim of common law tort malicious prosecution claims has been to protect reputation, bodily integrity and protection of property.¹⁵⁶ As the primary goals of each action are independent from the other, it only follows that the claims, themselves, should be considered separately. The minority circuits have wrongly chosen to intermix the common law tort elements into what is a purely constitutional § 1983 cause of action. In an analogous § 1983 false imprisonment action, the Supreme Court even noted that "a public official is liable under § 1983 only 'if he causes the plaintiff to be subjected to deprivation of his constitutional rights.'"¹⁵⁷ The Court went on to criticize the Fifth Circuit's employment of "traditional tort-law concepts" in determining a constitu-

151. *Id.*

152. *Id.*

153. SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 1.56 (4th ed. 2003).

154. *Id.*

155. *Schillaci, supra* note 2, at 466 (quoting *Mitchum v. Foster*, 407 U.S. 225, 242 (1972)).

156. *Id.*

157. *Id.* at 463 (quoting *Baker v. McCollan*, 443 U.S. 137, 142 (1979)).

tional claim.¹⁵⁸ While the Supreme Court has not spoken directly to the issue of § 1983 malicious prosecution, the Court's statement here provides for a reasonable analogy to such a claim.

Furthermore, it is clear by the variance in scope between state claims and § 1983 claims that the two actions are to be treated differently. Because state malicious prosecution claims are intended to protect the reputation and bodily integrity of persons, actions are brought against *any* actors that may incite wrongful prosecution.¹⁵⁹ Significantly, federal malicious prosecution actions are brought against *state* actors "under the color of state law."¹⁶⁰ Similarly, state malicious prosecution tort claims are available to claimants who have been the victim of misuse or abuse of *civil* process.¹⁶¹ Conversely, § 1983 malicious prosecution actions are not available subsequent to civil disputes.¹⁶² These divergences in scope clearly depict a vast difference in statutory purpose based upon the notion of constitutionality. Specifically, this purpose must be kept in mind when determining the complexity of pleading standards for the two different claims.

2. Section 1983 Provides Favorable Damage Awards that Federal Claimants Risk Foreclosure Against as a Result of Common Law Tort Elements

Damage awards available for common law malicious prosecution actions have been historically equivalent to that of the § 1983 alternative.¹⁶³ Both compensatory and punitive damages are available in state and § 1983 malicious prosecution actions respectively.¹⁶⁴ In Oklahoma, for example, a jury may award punitive damages where the defendant acted "willfully, wantonly, or in reckless disregard of the rights of another, resulting in injury."¹⁶⁵ Similarly, the federal § 1983 claim requires that a defendant's conduct be "motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."¹⁶⁶ Because both federal and common law claims require similar evidentiary standards for recovering compensatory and punitive damages, the concern of foreclosing federal claimants by way of stricter common law pleading requirements appears slight. However, in

158. Schillaci, *supra* note 2, at 463.

159. *Id.* at 467.

160. *Id.*

161. *Id.*

162. *Id.* at 468.

163. *Lusby v. T.G. & Y. Stores, Inc.*, 749 F.2d 1423, 1436 (10th Cir. 1984).

164. *See Zitter*, *supra* note 20, at § 2(a) and *Schonfeld*, *supra* note 16, at 1698.

165. *Lusby*, 749 F.2d at 1436 (quoting *White v. Conoco, Inc.*, 710 F.2d 1442, 1448 (10th Cir. 1983)).

166. *Id.* (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)).

1976, the equal balance between state and federal malicious prosecution remedies was tilted.¹⁶⁷

While the remedies available to the separate claims initially appear consistent, The Civil Rights Attorneys Fees Award Act of 1976¹⁶⁸ sweetened the federal remedy by authorizing § 1983 claimants to recover attorneys' fees.¹⁶⁹ This legislative development not only increased the damage awards available to § 1983 claimants, but also created another incentive for claimants to raise their claim federally.¹⁷⁰ Due to costly litigation expenses, recovery of attorneys' fees is a substantial benefit of the § 1983 claim. As such, the availability of attorneys' fees provides yet another reason for requiring only a constitutional pleading requirement for § 1983 malicious prosecution claims. By mandating this less burdensome and more appropriate standard, claimants will have a better opportunity to recover optimum damages.

3. Requiring Common Law Elements in § 1983 Actions Negates the Purpose of Providing an Alternative Forum and Potentially Bars Claimant Recovery

Because § 1983 is aimed at protecting individuals from wrongful state action, the proper showing for such a claim should only be a constitutional violation. Claimants are already afforded the opportunity to raise claims of malicious prosecution in state courts by proving the required malicious prosecution elements. Should the federal courts require a consistent showing of malicious prosecution elements, the federal forum would fail to reach the claimants that the state courts have otherwise overlooked. Many of these disregarded actions are extremely important claims that are intimately linked with individual freedom. For instance, it would be inconsistent with the Constitution to deny a man redress after he has spent fifteen years of his life wrongly imprisoned merely because he could not procure the common law tort elements of malicious prosecution.¹⁷¹ The Tenth Circuit recognized the inconsistency in this reasoning by stating "[i]t would be odd to interpret a statute, § 1983, which was enacted during Reconstruction to provide a federal remedy for violations of civil rights countenanced under state law, as simply incorporating the positive law of the states as a standard for evaluating federal constitutional claims."¹⁷² The court further explained that they previously relied on the common law elements in § 1983 actions "not because of its au-

167. Schonfeld, *supra* note 16, at 1697.

168. 42 U.S.C. § 1988(b) (2000).

169. Schonfeld, *supra* note 16, at 1686.

170. *Id.* at 1697 (attributing the dramatic increase of § 1983 actions, in part, to the Civil Rights Attorney's Fees Award Act of 1976).

171. *See generally Pierce*, 359 F.3d at 1288 (stating that § 1983 was enacted to create a federal remedy for civil rights violations, and that its standards were not intended to be an incorporation of state law).

172. *Id.* at 1288.

thority as positive law, but because . . . ‘over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights’.”¹⁷³ Thus it is clear that the common law tort elements are applicable only by analogy to constitutional tort doctrines.¹⁷⁴

Finally, it has been argued that by relying solely on a showing of constitutional violation, federal courts will be overburdened by § 1983 claims.¹⁷⁵ While this may initially appear to be the case, careful analysis reflects that there are other doctrines in place to curtail the influx of § 1983 claims. One of these safeguards is the doctrine of qualified immunity, which requires that a state official violate clearly established federal law to be sued.¹⁷⁶ Another safeguard provides that § 1983 defendants have the availability of interlocutory appeal from a district court’s determination before the case proceeds.¹⁷⁷ As a result of these procedural securities, it is unnecessary to require a showing of common law tort elements in an attempt to limit § 1983 malicious prosecution claims.

CONCLUSION

The modern status of § 1983 malicious prosecution remains in conflict; however, the future appears to be bright. Though the Tenth Circuit’s history of interpreting § 1983 malicious prosecution claims is long and complex, the court has finally abandoned its inadequate “starting point” analysis. In doing so, the Tenth Circuit has joined the majority of circuits in recognizing the importance of separating state and federal claims. A close analysis clearly reveals that a constitutional deprivation, and only a constitutional deprivation, is necessary to properly plead a § 1983 malicious prosecution claim. Requiring the additional common law tort elements would be inconsistent with federal pleading requirements, the statutory purpose of the claim, and all notions of civil rights justice.

To conclude, it is useful to consider a statement by Justice Harlan: “a deprivation of a constitutional right is significantly different and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right.”¹⁷⁸ While this issue of § 1983 malicious prosecution interpretation remains controversial, it is my hope that

173. *Id.*

174. *Id.*

175. See Schillaci, *supra* note 2, at 471.

176. *Id.*

177. *Id.*

178. Schonfeld, *supra* note 16, at 1765 (citing *Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring)).

the minority circuits will closely review the majority's rationale and realize the civil rights threat that accompanies their employed methodology.

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* J.D. Candidate, 2006, University of Denver Sturm College of Law. The author would like to thank Steve Rypma, Sara Lewis, and Megan "Ande" Yahr for their many insights into this subject matter and their assistance in the development of the article.