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## Wrongful Conviction Claims Under Section 1983

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## WRONGFUL CONVICTION CLAIMS UNDER SECTION 1983

*Martin A. Schwartz\** and *Honorable Robert W. Pratt\*\**

PROFESSOR SCHWARTZ: During the past decade, a number of studies and articles were published that highlight the rising incidence of wrongful convictions.<sup>1</sup> These studies identified some of the leading causes of the rise in wrongful convictions, including the mishandling of forensic evidence,<sup>2</sup> false confessions,<sup>3</sup> suggestive identification procedures used by the police,<sup>4</sup> and misconduct by

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\*\* Chief Judge, United States District Court for the Southern District of Iowa.

<sup>1</sup> See, e.g., Brandon L. Garrett & Peter J. Neufeld, *Invalid Forensic Science Testimony and Wrongful Convictions*, 95 VA. L. REV. 1, 1 (2009) (studying the incidence of wrongful convictions later vacated by DNA testing results); Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 36 (2005).

<sup>2</sup> See Garrett & Neufeld, *supra* note 1, at 16. This point was further recognized by Justice Scalia in *Melendez-Diaz v. Massachusetts*, identifying forensic science as a practice with "[s]erious deficiencies . . . in criminal trials." 129 S. Ct. 2527, 2537 (2009).

<sup>3</sup> See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Injustice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 58 (1987) (calculating that fourteen percent of all wrongful convictions examined in their study have been caused in large part from coerced or false confessions). Studies also show that false confessions take place much more often than people earlier supposed. See *id.* at 23 (discussing the alarming lack of awareness of wrongful convictions over the past century).

<sup>4</sup> See N. CAL. INNOCENCE PROJECT, RIGHTING AND PREVENTING WRONGFUL CONVICTIONS IN CALIFORNIA 11 (2006), available at <http://law.scu.edu/ncip/File/causes-of-wrongful-convictions.pdf>.

prosecutors and other law enforcement agents.<sup>5</sup> Whether a victim of a wrongful conviction may recover damages under 42 U.S.C. § 1983<sup>6</sup> depends upon the resolution of several issues, some potentially difficult. Undoubtedly, the plaintiff's right to recover damages under § 1983 for wrongful conviction is a high-stakes issue, as evidenced by several recent significant monetary settlements and awards.<sup>7</sup> Given that these § 1983 actions can involve potentially difficult questions, it is helpful to initially identify the various issues.

The first issue is the identification of the type of constitutional violation alleged by the wrongfully convicted individual. Supreme Court precedent recently applied by the circuit courts holds that a prosecutor's knowing use of perjured testimony or other false evidence violates procedural due process.<sup>8</sup> However, a court must determine the point at which the constitutional violation occurs. The question is whether a law enforcement officer's fabrication of evidence alone constitutes unconstitutional conduct, or whether the constitutional violation occurs only when the fabricated evidence is introduced by the prosecutor at trial.<sup>9</sup>

*Brady* violations<sup>10</sup> are being alleged in § 1983 actions with increased frequency. A *Brady* claim under § 1983 will not succeed against a prosecutor due to the absolute immunity afforded prosecu-

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<sup>5</sup> See Garrett, *supra* note 1, at 42-43. This misconduct has often included suppression of exculpatory evidence, fabrication of evidence, and coercion of confessions. See *id.* at 45. See also Newsome v. McCabe, 319 F.3d 301, 302-03 (7th Cir. 2003) (affirming a jury finding that the defendant's due process rights were violated by the concealment of evidence favorable to the defense).

<sup>6</sup> 42 U.S.C.A. § 1983 (West 2011).

<sup>7</sup> See Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 121 (2008). In 2007, District Court Judge Nancy Gertner awarded over \$100 million to plaintiffs framed by the FBI after spending over thirty years in jail for murder. See Richard Moran, *The Presence of Malice*, N.Y. TIMES, Aug. 2, 2007, at A17.

<sup>8</sup> See, e.g., Morris v. Ylst, 447 F.3d 735, 737-83 (9th Cir. 2006), *cert. denied*, 549 U.S. 1125 (2007) (citing Mooney v. Holohan, 294 U.S. 103, 112-13 (1935)); Limone v. Condon, 372 F.3d 39, 45 (1st Cir. 2004).

<sup>9</sup> See Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994).

<sup>10</sup> The Supreme Court, in *Brady v. Maryland*, holds that "the 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." 373 U.S. 83, 87 (1963). In *Brady*, the Court explicitly demanded that prosecutors disclose exculpatory evidence to the criminal defendant, effectively "launch[ing] the modern development of constitutional disclosure requirements." Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 686 (2006).

tors for carrying out their adversary functions.<sup>11</sup> However, law enforcement agents do not enjoy the same absolute immunity enjoyed by prosecutors, and instead are afforded only qualified immunity.<sup>12</sup> Therefore, in order for the § 1983 plaintiff's (criminal defendant's) claim to have a realistic chance to succeed, it would likely have to be asserted against the individual law enforcement officer. Of course, this requires a showing that the law enforcement officer was responsible for the *Brady* violation. A law enforcement officer has an affirmative due process obligation under *Brady* to submit exculpatory evidence to the prosecutor.<sup>13</sup>

In the context of a criminal prosecution, a *Brady* violation may come about as a result of negligence by the prosecutor.<sup>14</sup> In examining *Brady* violations, the Supreme Court has expressed its lack of concern for the prosecutor's good or bad faith, and focuses not on the character of the prosecutor, but only on the exculpatory character

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<sup>11</sup> See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Yarris v. Cnty. of Delaware*, 465 F.3d 129 (3d Cir. 2006).

<sup>12</sup> See, e.g., *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Anderson v. Creighton*, 483 U.S. 635 (1987); *Malley v. Briggs*, 475 U.S. 335 (1986); see also *Pierson v. Ray*, 386 U.S. 547, 555-57 (1967) (holding that police officers are entitled to a qualified immunity and that officers must assert that the arrest was made in good faith and that there was probable cause to make the arrest in order to avoid § 1983 liability).

<sup>13</sup> In *Kyles v. Whitley*, the Supreme Court extended *Brady* by imposing an affirmative duty on a prosecutor to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." 514 U.S. 419, 437 (1995). The Court did not "discuss the relative disclosure obligations of police" in *Brady* or *Kyles*. *Walker v. City of New York*, 974 F.2d 293, 299 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993). With room left for interpretation, some courts have extended this prosecutorial obligation as creating an affirmative duty upon law enforcement agents to submit all potentially exculpatory evidence to the prosecutor because an officer who deliberately withholds evidence will prevent a prosecutor from complying with *Brady*. See, e.g., *Jean v. Collins*, 221 F.3d 656, 663 (4th Cir. 2000) (en banc), cert. denied, 531 U.S. 1076 (2001) (holding by an equally divided vote that a police officer who, acting in bad faith, intentionally withholds evidence, and thereby prevents a prosecutor from adhering to *Brady*, has violated the defendant's due process rights); *Walker*, 974 F.2d at 299 (ruling that the "police satisfy their obligation under *Brady* when they turn exculpatory evidence over to the prosecutors").

<sup>14</sup> Compare *Kyles*, 514 U.S. at 420 (stating that the prosecutor has a duty to disclose evidence that may be favorable to the defense "regardless of any failure by the police to bring favorable defense to the prosecutor's attention"), and *Porter v. White*, 483 F.3d 1294, 1305 (11th Cir. 2007) (stating that, in a criminal context, a defendant can establish a *Brady* violation by showing that evidence favorable to his case was not disclosed to defense counsel, regardless of the prosecution's good or bad faith), with *Daniels v. Williams*, 474 U.S. 327, 328 (1986) (stating that, in a civil action, "the Due Process Clause is simply not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property").

of the evidence.<sup>15</sup> This leads to the question of whether a § 1983 procedural due process claim for a *Brady* violation against a law enforcement officer may be based upon the officer's negligence. The answer is unclear because the Supreme Court precedent holds that in a § 1983 action, a due process violation may not be based upon an official's negligent conduct.<sup>16</sup> Instead, the Court requires that the § 1983 plaintiff show intentional wrongdoing or deliberate indifference.<sup>17</sup> This establishes an unusual set of circumstances in which the Due Process Clause may effectively have two different meanings: one in the context of a criminal prosecution with respect to the prosecutor's *Brady* obligations, where negligence may give rise to a *Brady* violation, and the other in the context of an affirmative § 1983 due process claim against the law enforcement officer, where negligence may not suffice to establish a due process violation.

Another difficult question arising under *Brady* concerns the element of a *Brady* violation requiring a criminal defendant to show a reasonable probability that the result in the criminal case would have been different had the exculpatory material been given to the defense.<sup>18</sup> Because this is a hypothetical inquiry, how can one ever know for sure whether there is a reasonable probability of a different outcome? In a § 1983 action, would this be an issue decided by the judge as a matter of law, or an issue of fact that would be presented to the jury? These questions remain unanswered.

Causation is yet another issue that may arise because there is a proximate cause element in the plaintiff's claim for relief under § 1983.<sup>19</sup> This may raise difficult questions in the law enforcement context when multiple parties are involved in the alleged constitutional violation. It may be difficult to determine exactly where the

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<sup>15</sup> *Brady*, 373 U.S. at 87.

<sup>16</sup> See *Daniels v. Williams*, 474 U.S. 327, 328 (1986); see also *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (stating that because the Court refuses to impose liability every time a state officer causes harm, "liability for negligently inflicted harm [will be] categorically beneath the threshold of constitutional due process").

<sup>17</sup> See *Daniels*, 474 U.S. at 327; see also *Lewis*, 523 U.S. at 833.

<sup>18</sup> *United States v. Bagley*, 473 U.S. 667, 682 (1985) (holding that a *Brady* violation will be found "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different").

<sup>19</sup> See *Graham v. Baughman*, 772 F.2d 441, 446 (8th Cir. 1985) ("In order for a plaintiff in a § 1983 action to be entitled to compensatory damages for a violation of procedural due process, he must prove that the violation actually was the cause of his injury or deprivation.").

chain of causation breaks:<sup>20</sup> With the police officer? His supervisor? The prosecutor? After a grand jury indictment, or even the state court decision? This determination will ultimately rest upon which actions by the particular official were reasonably foreseeable.<sup>21</sup>

Section 1983 cases involving a plaintiff who claims that he or she was wrongfully convicted and seeks monetary relief often invoke the doctrine of *Heck v. Humphrey*.<sup>22</sup> Under the *Heck* doctrine, the plaintiff's claim is not cognizable if the claim attacks the constitutionality of the conviction or the sentence, unless the conviction or sentence has been overturned.<sup>23</sup> Interestingly, this doctrine presents an even more rigorous prerequisite than a requirement that the plaintiff exhausted available state remedies.<sup>24</sup>

In *Van de Kamp v. Goldstein*,<sup>25</sup> the Supreme Court really held that when the prosecutor's administrative functions are so closely related to the trial process, they too are protected by the prosecutor's absolute immunity.<sup>26</sup> Cases like *Van de Kamp* demonstrate some of the other immunity issues that arise in this area. For example, in *Van de Kamp*, it was conceivable that the plaintiff could have brought a claim against one or more of the witnesses in the case. However, officers who testify have an absolute witness immunity in exchange for their testimony,<sup>27</sup> and likely escape liability for this reason alone.

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<sup>20</sup> See *Zahrey v. Coffey*, 221 F.3d 342, 347 (2d Cir. 2000) (discussing the factors looked at by courts in making this type of determination and the resulting inconsistencies).

<sup>21</sup> See *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 609-11 (6th Cir. 2007) (relying upon the reasonable foreseeability that the harm was a result of the defendant's conduct, the court found that a public defender's failure to request an indigency hearing was the proximate cause of a prisoner's injury); see also 1A MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES ch. 6 (4th ed. 2003).

<sup>22</sup> 512 U.S. 477, 478-79 (1994) (involving an Indiana prisoner who brought a lawsuit against the state prosecutors claiming that the prosecutors manufactured evidence).

<sup>23</sup> *Id.* at 486-87.

<sup>24</sup> See *id.* at 480-81 (stating that the exhaustion of state remedies is not necessarily required under § 1983). Some courts have referred to this situation as being "*Heck*-barred." See, e.g., *McCann v. Neilsen*, 466 F.3d 619, 621 (7th Cir. 2007). One magistrate judge even stated that the plaintiff "seeks to prove the merits of his case in this § 1983 action, which is precisely what the *Heck* court meant to prevent." *Slater v. Henderson*, No. 5:05-CV-152 (CWH), 2006 WL 1652516, at \*1 (M.D. Ga. June 14, 2006).

<sup>25</sup> 129 S. Ct. 855 (2009).

<sup>26</sup> *Id.* at 864-65 (focusing not on the way in which the information was delivered, but instead on the way in which it is maintained).

<sup>27</sup> See *Brisco v. LaHue*, 460 U.S. 325, 335-36, 345-46 (1983) (reinforcing the common law absolute immunity from damages "for all persons—governmental or otherwise—who were integral parts of the judicial process").

But would this absolute immunity extend to an inappropriate agreement or conspiracy to give false testimony? The Second Circuit answers this question in the negative, stating that absolute immunity would not cover an agreement that was made outside of the judicial process.<sup>28</sup> Conversely, other circuits that have considered this issue have held that absolute witness immunity extends to the agreement or conspiracy.<sup>29</sup>

HONORABLE ROBERT W. PRATT: The line of § 1983 cases includes incredible examples such as a Massachusetts case involving the FBI reportedly withholding evidence that resulted in four wrongful convictions,<sup>30</sup> and the trial and aftermath of Senator Ted Stevens's prosecution in the District of Columbia which resulted in the suicide of a prosecutor and investigation after the "botched" trial.<sup>31</sup> This may be the tip of the very ugly iceberg that represents the way in which personal liberties are treated in this country.

*McGhee v. Pottawattamie County*<sup>32</sup> is a case that presents an excellent application of these principles. *McGhee*, a case tinged with racial overtones, involved two African American plaintiffs who were convicted of murder in 1978.<sup>33</sup> The plaintiffs had separate trials and their respective verdicts stood for twenty-three years.<sup>34</sup> The victim, John Schweer, spent his life as a Council Bluffs, Iowa police officer.<sup>35</sup> After retirement, he became a night security guard in a used car lot.<sup>36</sup> Prior to the murder, there was a conflict between the decedent

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<sup>28</sup> *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994) (explaining that witnesses have immunity for their testimony, but do not enjoy immunity for extra-judicial conduct like that of a conspiracy).

<sup>29</sup> See, e.g., *Jones v. Cannon*, 174 F.3d 1271, 1289 (11th Cir. 1999); *Miller v. Glanz*, 948 F.2d 1562, 1571 (10th Cir. 1991) (stating that without such an extension, "a defendant could simply transform the perjury complaint into an allegation of a conspiracy" and further holding that the extension "serves the same important purposes of immunity to witnesses themselves").

<sup>30</sup> See *Limone v. United States*, 579 F.3d 79, 83, 99-100 (1st Cir. 2009) (finding FBI officers' actions of withholding exculpatory evidence and encouraging a witness to be the proximate cause of the defendants' wrongful convictions resulting in the defendants being in prison for over thirty years, where two died before their release).

<sup>31</sup> See Charlie Savage, *Prosecutor Who Pursued Stevens Case Kills Himself*, N.Y. TIMES, Sept. 28, 2010, at A19.

<sup>32</sup> (*McGhee I*), 547 F.3d 922 (8th Cir. 2008).

<sup>33</sup> *Id.* at 925.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 926.

and Charles Gates, a man with a rather infamous history and relationship with the victim.<sup>37</sup> Mr. Gates was an alternate suspect, a fact that was never disclosed to the criminal defendants during the course of the pretrial or trial proceedings.<sup>38</sup> In fact, the defendants, as well as two police officers and two prosecutors, testified at a post-conviction hearing that no such suspect ever existed.<sup>39</sup> In 1999, after befriending an employee of the state penitentiary where they were incarcerated, the defendants gained possession of the police file for their case. The file contained documents pointing to an alternate suspect.<sup>40</sup> After presenting this evidence, the Iowa Supreme Court granted new trials for the defendants in 2003.<sup>41</sup>

Before his new trial, Terry Harrington was offered a second-degree murder plea, but refused to take it because he claimed innocence.<sup>42</sup> The second defendant, Curtis McGhee, pled guilty to second-degree murder.<sup>43</sup> However, his case never went to the Supreme Court because his conviction was voluntarily set aside.<sup>44</sup> In 2005, both defendants brought wrongful conviction claims.<sup>45</sup> Eventually, the parties reached a settlement totaling \$12 million, with Mr. Harrington receiving \$7,030,000 and Mr. McGhee receiving \$4,970,000.<sup>46</sup>

In the civil case, the prosecutors claimed absolute immunity arguing that immunity applied because they were acting as advocates in a criminal prosecution for conduct “intimately associated with the judicial process.”<sup>47</sup> However, as discussed in the oral argument, this immunity is generally only available after probable cause to arrest ex-

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<sup>37</sup> See *McGhee I*, 547 F.3d at 926 (referring to Mr. Gates as an alternate suspect in both this murder and the murder of a co-worker that occurred more than ten years earlier).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *McGhee v. Pottawattamie Cnty. (McGhee II)*, 475 F. Supp. 2d 862, 874 (S.D. Iowa 2007), *aff'd in part rev'd in part*, 547 F.3d 922.

<sup>41</sup> *Id.* at 874-75.

<sup>42</sup> *Id.* at 878.

<sup>43</sup> *Id.* at 876-77.

<sup>44</sup> *Id.*

<sup>45</sup> *McGhee II*, 475 F. Supp. 2d at 866-67.

<sup>46</sup> *\$12 Million Wrongful Conviction Settlement is Hailed*, DES MOINES REG., Jan. 5, 2010, at A1, available at 2010 WLNR 854334.

<sup>47</sup> Appellee Terry Harrington's Response Brief, *McGhee I*, 547 F.3d 922 (07-1453, 07-1524), 2007 WL 6370526.

ists.<sup>48</sup> The issue presented was the time at which the liability for the prosecutors attached.<sup>49</sup> Summary judgment was denied because a jury would have been able to find that probable cause was lacking.<sup>50</sup> Although a witness implicated the plaintiffs, law enforcement had ample reason to doubt the witness' credibility given the number of ever-changing versions of events he had given.<sup>51</sup>

Council Bluffs is a small town of about 60,000 people.<sup>52</sup> It is easy to imagine that in a small community such as this, there would be a great deal of pressure on the prosecutors to solve the murder of a long-time police officer. The events leading up to the case cast some doubt on the prosecutors' actions, creating a jury question about the liability of the prosecutors both before and after filing the charges, thereby bringing up the question of qualified immunity.<sup>53</sup>

The issue that eventually went before the Supreme Court was whether the prosecutors were entitled to either absolute immunity or qualified immunity.<sup>54</sup> In *Harlow v. Fitzgerald*,<sup>55</sup> the Supreme Court held that "government officials performing discretionary functions are generally shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>56</sup> In considering whether an official may rely on qualified immunity to escape civil liability, the Court measures the objective legal reasonableness of the unconstitutional act against the clearly established law at the time of the action.<sup>57</sup> Compare this standard with the Second Circuit

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<sup>48</sup> See Transcript of Oral Argument at 31-32, *Pottawattamie Cnty. v. McGhee (McGhee III)*, 129 S. Ct. 2002 (2009) (No. 08-1065), 2009 WL 3640088.

<sup>49</sup> See *McGhee II*, 475 F. Supp. 2d at 881.

<sup>50</sup> *Id.* at 884.

<sup>51</sup> *Id.*

<sup>52</sup> *State & County Quick Facts: Council Bluffs, Iowa*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/19/1916860.html> (last visited Feb. 10, 2011).

<sup>53</sup> *McGhee I*, 547 F.3d at 926-27, 929. In the Eighth Circuit, the qualified immunity issue with police officers was relatively simple to evaluate because of precedent stating that, with respect to police officers, there is no qualified immunity. *McGhee II*, 475 F. Supp. 2d at 912.

<sup>54</sup> See Brief in Opposition for Respondent Terry J. Harrington, *McGhee III*, 129 S. Ct. 2002 (No. 08-1065), 2009 WL 720926, at \*i (stating that the question presented was "[w]hether this Court's prosecutorial immunity precedent may be expanded to retrospectively extend absolute immunity to prosecutors' investigative functions").

<sup>55</sup> 457 U.S. 800 (1982).

<sup>56</sup> *Id.* at 818.

<sup>57</sup> *Id.* at 815.

where the court found it difficult to reconcile the defendant's proposition that a prosecutor who uses false evidence at trial, which he in fact manufactured, would be immune from liability, while a police officer that manufactures false evidence subsequently used by a prosecutor at trial would be liable.<sup>58</sup> The Second Circuit further concluded that the prosecutor's alleged fabrication and use of evidence effectively caused the plaintiff's deprivation of liberty by denying him due process.<sup>59</sup>

This finding is at issue with the Court's decision in *Heck*. *Heck* involved what Justice Scalia referred to as the intersection of two federal statutes that often collide: § 1983 and habeas corpus.<sup>60</sup> In *Heck*, the Court stated that a proceeding cannot be brought against a prosecutor for manufacturing evidence without the prior conviction first being vacated or overturned.<sup>61</sup> Applying this principle to Mr. McGhee, who pled guilty to second-degree murder, and whose conviction was never set aside as Mr. Harrington's was, it is clear that the circumstances are similar to those in *Heck*.

Another issue that arises is damages. Title 42, section 1988(a) of the United States Code states that civil rights law must be "exercised and enforced in conformity with" federal law.<sup>62</sup> However, if federal law does not exist or is deficient, then state law applies.<sup>63</sup> This issue arose in *Harrington v. Wilbur*,<sup>64</sup> where I held that *pro tanto* was contrary to the legislative intent of § 1983.<sup>65</sup> In *Harrington*, the defendants requested *pro tanto*, which would offset any verdict that the plaintiffs might receive.<sup>66</sup> Although the jury was not told that the plaintiffs were paid twelve million dollars, if the jury returned a verdict of twelve million dollars or less, then the effect of re-

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<sup>58</sup> *Zahrey v. Coffey*, 221 F.3d 342, 346, 352-53 (2d Cir. 2000) (stating that "[a]ctions taken as an advocate enjoy absolute immunity, while actions taken as an investigator enjoy only qualified immunity" and discussing the difficulties in comprehending the assumption of liability at different points in the chain of causation).

<sup>59</sup> *Id.* at 349 (holding that "the right at issue in this case is appropriately identified as the right not to be deprived of liberty as a result of the fabrication of evidence by a government officer acting in an investigating capacity").

<sup>60</sup> *Heck*, 512 U.S. at 480.

<sup>61</sup> *Id.* at 486-87.

<sup>62</sup> 42 U.S.C.A. § 1988(a) (West 2011).

<sup>63</sup> *Id.*

<sup>64</sup> No. 4:03-CV-90616(L), 2010 WL 4231218 (S.D. Iowa Oct. 22, 2010).

<sup>65</sup> *Id.* at \*5.

<sup>66</sup> *Id.* at \*3.

turning a verdict against the remaining defendants would be zero.<sup>67</sup> In *McDermott, Inc. v. AmClyde*,<sup>68</sup> an admiralty case, the Supreme Court considered a similar issue and held that *pro tanto* was “inequitable.”<sup>69</sup> This case provided the basis for the rationale in *Harrington*.<sup>70</sup> Therefore, I declined to use the *pro tanto* approach because it did not go to the legislative intent of § 1983.<sup>71</sup>

PROFESSOR SCHWARTZ: There are many issues here—some are quite tedious and nuanced, and some have no clear answers. When federal law cannot resolve an issue in a § 1983 case, § 1988(a) instructs federal district judges to apply state law, so long as it is consistent with the policies of § 1983.<sup>72</sup>

Although this does not sound especially complex on the surface, each part of this analysis can create difficulties. A court must first decide whether there is federal law on the particular issue.<sup>73</sup> Sometimes it is clear that there is no federal law. For example, there is no statute of limitations for § 1983 cases; therefore, the district court judge must apply the state law limitations period.<sup>74</sup> However, federal judges sometimes turn to state law even when federal law is available.<sup>75</sup>

An example involves circuit court law concerning tolling of the statute of limitations when is it subject to equitable tolling or equitable estoppel.<sup>76</sup> Many of the relevant decisions confuse the two concepts, even though a body of federal law addressing the meanings of equitable tolling and equitable estoppel exists.<sup>77</sup> Federal courts commonly adopt state law tolling concepts—including concepts of equitable tolling and equitable estoppel—when they adopt the state law limitations period.<sup>78</sup> However, this might not be the correct ap-

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<sup>67</sup> *Id.* at \*5.

<sup>68</sup> 511 U.S. 202 (1994).

<sup>69</sup> *Id.* at 214 (“In sum, the *pro tanto* approach, even when supplemented with good faith hearings, is likely to lead to inequitable apportionments of liability . . .”).

<sup>70</sup> *Harrington*, 2010 WL 4231218, at \*6.

<sup>71</sup> *Id.* at \*5.

<sup>72</sup> 42 U.S.C.A. § 1988(a); 1B MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 12.01[A] (4th ed. 2003).

<sup>73</sup> SCHWARTZ, *supra* note 72, § 12.01[B] n.10.

<sup>74</sup> *Id.* § 12.01[B].

<sup>75</sup> *Id.* § 12.05[C].

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> SCHWARTZ, *supra* note 72, § 12.05[C]

proach because state law should not be used when a federal principle of law exists, as explicitly stated in § 1988.<sup>79</sup> The virtue of applying existing federal law is having uniform federal principles with respect to a federal cause of action. Conversely, the issue will be addressed differently in each state if the district judge turns to state law on the question.<sup>80</sup>

HONORABLE ROBERT W. PRATT: In *McGhee*, the court relied on federal law found specifically in *Banks ex rel. Banks v. Yokemick*,<sup>81</sup> where the Southern District of New York stated that the “driving force” of the *pro tanto* rule was preventing a windfall to the plaintiff.<sup>82</sup> The court said that the policy of the *pro tanto* rule was to ensure victim compensation, while at the same time prevent unjust enrichment of the victim at the expense of court fees.<sup>83</sup> However, the *pro tanto* rule, “in the name of avoiding unjust enrichment for the plaintiff, . . . in essence would effectuate a windfall to the defendant.”<sup>84</sup> This result is inconsistent with federal policy.<sup>85</sup> Therefore, the *Banks* court ultimately found the *pro tanto* approach incompatible with the deterrent effect of § 1983,<sup>86</sup> which was intended to “favor fairness first for the interest of the injured party, rather than promot[e] an economic equilibrium that tips the benefit of the doubt and resulting equities towards the wrongdoer.”<sup>87</sup>

PROFESSOR SCHWARTZ: We have not focused explicitly on § 1983 malicious prosecution claims, which have their own convoluted body of law. Malicious prosecution claims should be decided based on Fourth Amendment violations.<sup>88</sup> However, the claims discussed here are normally based on procedural due process violations as opposed to substantive due process.<sup>89</sup> The difficulties re-

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> 177 F. Supp. 2d 239 (S.D.N.Y. 2001).

<sup>82</sup> *Id.* at 260 (“At its most basic level, the driving force embodied in [the New York statute] is that of ensuring the compensation of victims while preventing their unjust enrichment.”).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 261.

<sup>85</sup> *See id.* at 262.

<sup>86</sup> *Banks*, 177 F. Supp. 2d at 261.

<sup>87</sup> *Id.* at 260.

<sup>88</sup> *See Albright v. Oliver*, 510 U.S. 266, 276 (1994) (Ginsburg, J., concurring).

<sup>89</sup> *Id.* at 275-76 (Scalia, J., concurring).

garding this issue started with *Albright v. Oliver*,<sup>90</sup> where the plaintiff attempted to assert a due process malicious prosecution claim.<sup>91</sup> In *Albright*, the Supreme Court stated that a malicious prosecution claim must be asserted under the Fourth Amendment, rather than under substantive due process.<sup>92</sup> However, it is very difficult to determine exactly what the Court held because there were so many opinions.<sup>93</sup>

Every circuit has its own body of § 1983 malicious prosecution law, which is not an ideal situation.<sup>94</sup> The characterization of these claims should be made as some kind of constitutional violation such as the Fourth Amendment. This demonstrates that in § 1983 work, so much depends upon the law of the particular circuit with respect to a particular issue.

Section 1983 issues are often discussed and analyzed as discrete issues even though they are interconnected. Prosecutorial immunity, qualified immunity, municipal liability,<sup>95</sup> and pleading standards are all talked about separately rather than in connection with one another. However, as a result of viewing the issues separately, the Supreme Court has failed to consider the interplay of the various issues.

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<sup>90</sup> *Id.* at 266.

<sup>91</sup> *Id.* at 269 (plurality opinion).

<sup>92</sup> *Id.* at 276 (Ginsburg, J., concurring).

<sup>93</sup> There were six opinions in the case. *Albright*, 510 U.S. at 266.

<sup>94</sup> *See, e.g.*, *Fulton v. Robinson*, 289 F.3d 188 (2d Cir. 2002); *Kurtz v. City of Shrewsbury*, 245 F.3d 753 (8th Cir. 2001); *Gunderson v. Schlueter* 904 F.2d 407 (8th Cir. 1990).

<sup>95</sup> Subsequent to the Practising Law Institute Section 1983 Litigation, the Supreme Court, in a wrongful conviction case, held that to establish municipal liability based upon inadequate training of prosecutors of their *Brady* obligations, the § 1983 plaintiff must establish a pattern of constitutional violations. *See Connick v. Thompson*, No. 09-571, 2011 WL 1119022 (Mar. 29, 2011).