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Section 1983 Litigation

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Hon. George C. Pratt:

From here we move on to Professor Schwartz. He is going to review significant cases in the area of local government which the Supreme Court decided last Term. Professor Schwartz is known to many of you. He is a Professor of Law here at Touro and is a co-author of the leading treatise on section 1983 litigation.¹ He teaches constitutional law, evidence and federal courts among other things. He has been active in the civil rights area for most of his legal career. So, Professor Schwartz, will you take over from here, please.

Professor Martin A. Schwartz:*

INTRODUCTION

Good morning. When we started this program five years ago, it seemed that the Supreme Court was deciding an extraordinary number of section 1983² cases each Term. But by now this has become a routine practice in the Supreme Court. Each Term the

* Professor Schwartz is highly accomplished in the field of § 1983 litigation and, among other things, co-authors, with John E. Kirklin, a leading treatise entitled *Section 1983 Litigation: Claims, Defenses, and Fees* (2d. ed. 1991 & 1994 Cumulative Supp. No. 1). Professor Schwartz has also been the co-chair of the Practicing Law Institute Program on § 1983 litigation for over ten years. The author gratefully acknowledges the valuable assistance of Mitchell S. Drucker and Lisa S. Levinson of the Touro Law Review.

1. 1 MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES (2d ed. 1991 and Supp. 1994). [hereinafter SCHWARTZ & KIRKLIN)].

2. 42 U.S.C. § 1983. This section provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or 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, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

Supreme Court gives us a large number of important section 1983 decisions. Upon thinking about it, that is not so surprising, given both the fact that section 1983 litigation is quite multifaceted and because it produces such a large volume of litigation.

The cases from the United States Supreme Court's last Term fall into four categories. First I am going to list the categories, then I will come back and get to the cases within those categories. First, the constitutional rights that are enforceable under section 1983; second, the subject of municipal liability; third, three decisions dealing with immunities; and, fourth, a major decision dealing with the subject of statutory attorneys' fees. The decisions from an overall standpoint produced a mixed bag of results: some of them were favorable to section 1983 plaintiffs, some to defendants. My own evaluation is that, overall, it was a fairly good Term for section 1983 claimants.

ENFORCEABLE CONSTITUTIONAL RIGHTS UNDER SECTION 1983

Now, let me start with the constitutional rights. Obviously the Supreme Court decides a number of important constitutional decisions each Term. That was true last Term as well. Of the constitutional decisions decided by the Court last Term, there are two that stand out in my mind as raising recurring issues in section 1983 litigation. The first is the Court's decision in *Helling v. McKinney*.³ In that case, the plaintiff-prisoner alleged in his complaint that he had been assigned to a cell with a cellmate who smoked five packs of cigarettes a day.⁴ A hundred cigarettes a day is a lot of cigarettes. He used the magical language in his complaint, that the prison officials, acting with "deliberate indifference," had exposed him to secondary tobacco

3. 113 S. Ct. 2475 (1993).

4. *Id.* at 2478. The complaint also alleged that cigarettes were sold to inmates without informing them of the health hazards to non-smoking cell mates and that continually burning cigarettes released some type of chemical.
Id.

smoke, and that this jeopardized his health in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment.⁵ In *Helling*, the Court ruled that the prisoner had stated a proper section 1983 Eighth Amendment claim in his complaint.⁶ In that sense, the holding of the Court is a limited one. It could be viewed as limited because all the Court held was that this complaint alleged a violation of Eighth Amendment rights. In the course of coming to that conclusion, however, the Court did make what I think is a significant ruling. The Court said that the Eighth Amendment does not require that a plaintiff show that he or she is *presently* suffering from a medical problem.⁷ The Eighth Amendment encompasses conditions of confinement — here is the language of the Court — “that is sure or very likely to cause serious illness and needless suffering the next week or month or year.”⁸ I would think that, if you are a plaintiff, you would say — “I will take the very likely standard over the certainty language.” Although the Court was not too definite about the probability factor, it gave some examples. The Court said, for example, that under the Eighth Amendment, prisoners could successfully complain about being subjected to contaminated water or to a communicable disease even though not presently suffering any symptoms.⁹

Of course, as I said, it is a limited holding because the Court only ruled that the prisoner stated a proper Eighth Amendment claim. Establishing an Eighth Amendment violation is a different matter. Here, the Court said that to establish a violation of the Eighth Amendment, what the prisoner is going to have to do on

5. *Id.* The Eighth Amendment provides that: “Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*” U.S. CONST. amend. VIII (emphasis added).

6. 113 S. Ct. at 2481.

7. *Id.* at 2480-81.

8. *Id.* at 2480.

9. *Id.*; *see also* *Hutto v. Finney*, 437 U.S. 678 (1978). In *Hutto*, prison inmates were placed into crowded cells with prisoners who had infectious maladies including hepatitis and venereal disease. *Id.* at 682. The Court stated that the Eighth Amendment must remedy the prison environment despite the absence of an allegation of immediate harm. *Id.*

remand is to show violations of the objective and subjective prongs that the Court has identified for Eighth Amendment prison condition cases.¹⁰ In the prior decision of *Wilson v. Seiter*,¹¹ the Court reaffirmed that the objective prong requires the plaintiff to show serious injuries.¹² In *Helling*, the Court said that an inquiry of the scientific and statistical data that relates to the likelihood that the plaintiff will suffer serious harm is required.¹³ Now, I view that as a type of factual inquiry because the Court is talking about scientific and statistical data. In addition, the serious injury inquiry will have to involve the question of whether society views the risk of health damage to the prisoner as being violative of contemporary standards of decency.¹⁴ I take that as raising a legal question, whether this governmental action is violative of contemporary standards of decency. This has been treated by the Supreme Court as a legal matter.¹⁵

The subjective prong in Eighth Amendment prison condition cases requires an inquiry into the state of mind of the pertinent prison officials.¹⁶ To make out an Eighth Amendment violation it

10. *Helling*, 113 S. Ct. at 2481-82.

11. 111 S. Ct. 2321 (1991).

12. *Id.* at 2324. The *Wilson* Court stated that its "holding in [*Rhodes v. Chapman*, 452 U.S. 337 (1981)] turned on the objective component of an Eighth Amendment prison claim (was the deprivation sufficiently serious?)" *Id.* In *Rhodes*, the Court held that the lodging of two inmates in a single cell did not rise to the level of cruel and unusual punishment. 452 U.S. at 348-50.

13. 113 S. Ct. at 2482.

14. *Id.* The Court stated that the Plaintiff must show that the risk of being exposed to secondary smoke is not a risk that today's society chooses to tolerate. *Id.*

15. *See, e.g., Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992) (stating that "contemporary standards of decency" are infringed by prison officials who maliciously cause harm to inmates).

16. *Helling*, 113 S. Ct. at 2482; *see also Wilson v. Seiter*, 111 S. Ct. 2321 (1991). The Court in *Wilson* held that, while the Eighth Amendment applies to conditions of confinement that are not formally imposed as a sentence for a crime, such claims require proof of a subjective component. *Id.* at 2326-27. Furthermore, where the claim alleges inhumane conditions of confinement or failure to attend to a prisoner's medical needs, the standard to be employed is

would not be enough for the plaintiff to show that what happened to him was the result of negligence, inadvertence or good faith error.¹⁷ The plaintiff would have to show that there was some wrongfulness in terms of the intention of the prison officials.¹⁸

Here is a surprise, Justice Thomas dissented from the Court's holding that the complaint in *Helling* stated an Eighth Amendment violation.¹⁹ The second surprise is that he was joined by Justice Scalia in dissent.²⁰ The dissent essentially reiterated the position that Justice Thomas took in a prior case, *Hudson v. McMillian*,²¹ in which he, again joined by Justice Scalia, argued that the Eighth Amendment should be limited to the criminal sentence, and does not provide any protection against prison conditions.²² The dissenters in *Helling* argued that,

"deliberate indifference" as articulated in *Estelle v. Gamble*, 429 U.S. 97 (1976). 111 S. Ct. at 2326-27.

17. See *Whitley v. Albers*, 475 U.S. 312, 319 (1986). The Court in *Whitley* was faced with the issue of whether an inmate who was shot by a prison guard during an attempt to quell a prison disturbance had been subjected to cruel and unusual punishment. *Id.* at 314. In holding that such actions do not constitute cruel and unusual punishment, the Court stated that:

"After incarceration, only the "unnecessary and wanton infliction of pain" . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interests or safety It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.

Id. at 319 (citations omitted).

18. The Court stated that, on remand, the trial court should determine the subjective factor of deliberate indifference in light of the prison authorities' current attitudes and conduct. *Helling*, 113 S. Ct. at 2482. While this case was being decided, the director of the prison adopted a new smoking policy within the facility. *Id.* The Court stressed that the adoption of this policy "will bear heavily on the inquiry into deliberate indifference." *Id.*

19. *Id.* (Thomas, J., dissenting).

20. *Id.* (Thomas, J., dissenting).

21. 112 S. Ct. 995 (1992).

22. *Id.* at 1005-10 (Thomas, J., dissenting).

in any case, if the Eighth Amendment is read to provide protection in prison condition cases, the line should be drawn at prisoners who are suffering actual present injury rather than, as in this case, threatened injury.²³

The second constitutional decision that I believe raises recurring section 1983 issues is *Soldal v. Cook County*.²⁴ The issue in *Soldal* was whether a deputy sheriff's participation in the removal of a mobile home from a mobile home park constituted a "seizure" within the meaning of the Fourth Amendment.²⁵ The employees of the mobile home, with the sheriff present and assisting by making sure that nobody interfered with the employees, wrenched the sewer and water connections off of the mobile home.²⁶ The mobile home was then hooked onto a trailer and moved to a neighboring property.²⁷

The Seventh Circuit, in a decision written by Judge Posner, held that while literally there was governmental action which may be viewed as a seizure, such governmental action does not implicate the Fourth Amendment because this case deals with a pure deprivation of property.²⁸ In Judge Posner's view, in order to bring the Fourth Amendment into play, it must be shown that the governmental action interfered with privacy interests.²⁹ There

23. *Helling*, 113 S. Ct. at 2485 (Thomas, J. dissenting). While criticizing the Court's holding in *Estelle v. Gamble*, 429 U.S. 97 (1976), Justice Thomas stated that while "stare decisis may call for hesitation in overruling a dubious precedent . . . it does not demand that such a precedent be expanded to its outer limits." *Id.*

24. 113 S. Ct. 538 (1992).

25. *Id.* at 542. The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

26. *Soldal*, 113 S. Ct. at 541.

27. *Id.* at 542.

28. *Soldal v. County of Cook*, 942 F.2d 1073, 1077 (7th Cir. 1991), *rev'd*, 113 S. Ct. 538 (1992).

29. *Id.* In arguing against a Fourth Amendment violation, Judge Posner stated:

were no privacy interests that were implicated in this case, at least according to the circuit court.³⁰ Judge Posner went on to say that if we should find this type of governmental action to be within the Fourth Amendment, it would create the unwholesome result of trivializing the Fourth Amendment by bringing garden variety evictions and repossessions within the Fourth Amendment as well.³¹ So he concluded for the Seventh Circuit that when there is a pure deprivation of property, the plaintiff may not claim protection under the Fourth Amendment, only under the Due Process Clause.³²

The Supreme Court, in a unanimous decision written by Justice White, rejected what the Court referred to as the “creative” Seventh Circuit interpretation of the Fourth Amendment.³³ Now, I normally think of creativity as being a positive attribute, but I think in this instance it was not meant to be a compliment. What Justice White actually said was that the Supreme Court rejects this creative interpretation of the Fourth Amendment as being completely at odds with its Fourth Amendment jurisprudence.³⁴ In fact, Justice White said that the Soldal’s home “was not only seized, it literally was carried away,” which, in his mind, gave “new meaning to the term ‘mobile home.’”³⁵

Literally there was a “seizure” here, but to use a literal interpretation of a constitutional provision enacted two centuries ago to make every repossession and eviction with police assistance actionable under—of all things — the Fourth Amendment would both trivialize the amendment and gratuitously shift a large body of routine commercial litigation from the state courts to the federal courts. That trivializing, this shift, can be prevented by recognizing the difference between possessory and privacy interests.

Id.

30. *Id.*

31. *Id.* at 1075-76.

32. *Id.* at 1077. Judge Posner, however, noted that a claim for deprivation of property without due process of law was unlikely to succeed because of the existence and availability of adequate state law judicial remedies. *Id.* at 1076.

33. *Soldal*, 113 S. Ct. at 547-48.

34. *Id.* at 548.

35. *Id.* at 543. Justice White firmly stated that the Court “fail[ed] to see how being unceremoniously dispossessed of one’s home in the manner

Justice White stressed that the only question before the Court was whether the governmental action constituted a seizure.³⁶ He said, we are not here to decide whether there was a Fourth Amendment violation.³⁷ That would depend upon the reasonableness of the governmental conduct.³⁸ We have only the limited issue before us as to whether the Seventh Circuit was correct in concluding that no seizure had taken place.³⁹ Now, in rejecting the circuit court's "creative" Seventh Circuit interpretation of the Fourth Amendment, the United States Supreme Court said that in the Fourth Amendment there is protection against governmental seizures and there is protection against governmental searches.⁴⁰ When the government is claimed to have engaged in an unconstitutional search, it is true that the constitutional focus has been whether the government has interfered with reasonable expectations of privacy.⁴¹ This case, however, does not deal with a governmental search. It deals with a seizure, a seizure of property. Therefore, the inquiry is whether

alleged . . . can be viewed as anything but a seizure invoking the protection of the Fourth Amendment." *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*; see also *United States v. Jacobsen*, 466 U.S. 109 (1984). The *Jacobsen* Court explained:

The first clause of the Fourth Amendment . . . protects two types of expectations, one involving "searches," the other "seizures." A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs where there is some meaningful interference with an individual's possessory interests in that property.

Id. at 113.

41. *Id.*; see also *California v. Greenwood*, 486 U.S. 35 (1988) (holding that plastic garbage bags left on the street do not carry an expectation of privacy giving rise to Fourth Amendment protection); *Katz v. United States*, 389 U.S. 347 (1967) (stating that the Fourth Amendment creates a right to privacy against certain government intrusions but not a right to privacy in general).

the government has interfered in a meaningful way with an individual's possessory interest in the particular property.⁴²

The fact that in this case the Due Process Clause might provide the Soldals, the mobile home owners, with constitutional protection, did not detract from the fact that they could also seek protection under the Fourth Amendment.⁴³ It is certainly not unusual for governmental conduct to implicate, perhaps even violate, more than one provision of the Federal Constitution. Thus, the Soldals could allege violations of both the Due Process Clause and the Fourth Amendment. The Court found that this case was distinguishable from its decision in *Graham v. Connor*,⁴⁴ where the Court held that in an excessive force arrest situation, the plaintiff may claim protection only under the Fourth Amendment.⁴⁵ This is another way of saying that in the excessive force arrest situation, the Fourth Amendment serves to pre-empt any protection that might otherwise exist under the Due Process Clause.⁴⁶ The *Soldal* case, however, actually involved a reverse type of situation. The rationale of *Graham* was that the textually explicit Fourth Amendment protection should be viewed as, in effect, superseding or pre-empting the more generalized protections of substantive due process.⁴⁷ But in *Soldal* it does not logically make sense to say the opposite — that the more general protections of due process in some way pre-empt the more specific protections of the Fourth Amendment.⁴⁸

42. See generally *Jacobsen*, 466 U.S. at 113; see also *United States v. Karo*, 468 U.S. 705 (1984). In *Karo*, government officials, acting under a court order, removed one of defendant's cans of ether and replaced it with their own, equipped with a beeper. 468 U.S. at 708. The Court held that this did not interfere with anyone's possessory interest in a meaningful way. *Id.* at 712.

43. *Soldal*, 113 S. Ct. at 548.

44. 490 U.S. 386 (1989).

45. *Id.* at 388.

46. For a similar analysis in a malicious prosecution action see *infra* note 132.

47. *Graham*, 490 U.S. at 395.

48. In arguing for this analogy, Judge Posner asserted that:

[t]he narrow holding of *Graham* is that when the gist of the challenged conduct is an arrest, the court should use the standards of the Fourth

I believe the Court went out of its way to allay Judge Posner's fears that finding a seizure in this case would somehow trivialize the Fourth Amendment. He said that when dealing with so-called garden variety repossessions, attachments and evictions, the key is the reasonableness of the governmental conduct.⁴⁹ Typically in those situations there is a court order and the likelihood is very great that the court order would make the governmental action reasonable.⁵⁰

I think that when one looks at what the Seventh Circuit did in this case, and how the Supreme Court ruled, it would seem that the Supreme Court's decision was primarily designed to lay to rest that creative interpretation of the Fourth Amendment that had been given by the Seventh Circuit.

MUNICIPAL LIABILITY

Now, let me move to the second issue, municipal liability. We are all familiar with the rule of the Federal Rules of Civil Procedure that requires the complaint to contain only a short and plain statement of the plaintiff's claim.⁵¹ In *Conley v. Gibson*,⁵²

Amendment to adjudge its lawfulness even though the conduct could also be characterized as a deprivation of liberty. But the converse should also be true. If the gist of the challenged conduct is a repossession or eviction conventionally challenged under the due process clause as a deprivation, recharacterization as a Fourth Amendment seizure is barred. The suggestion that *Graham* stands for the proposition that all property disputes should so far as possible be stuffed into the Fourth Amendment strikes us as bizarre.

Soldal, 942 F.2d at 1080. In rejecting this argument, the Supreme Court stated that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged . . . [the Court] examine[s] each constitutional provision in turn." *Soldal*, 113 S. Ct. at 548.

49. *Soldal*, 942 F.2d at 1076-77.

50. *Id.*; see, e.g., *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Specht v. Jensen*, 832 F.2d 1516 (10th Cir. 1987), *cert. denied*, 488 U.S. 1008 (1989).

51. FED. R. CIV. P. 8(a). This rule provides that a pleading which sets forth a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.*

52. 355 U.S. 41 (1957).

the Supreme Court said that under Rule Eight, the plaintiff is not required to allege the facts giving rise to the claim in any particular detail.⁵³ It is sufficient that the complaint give the defendant fair notice of the nature of the plaintiff's claim.⁵⁴ This is normally referred to as the liberal notice pleading policy. Despite the language of Rule Eight, and despite the Supreme Court's decision in *Conley*, the circuit courts of appeals, each one of them, took it upon themselves to impose some type of heightened pleading requirement for section 1983 cases, which requires the plaintiff to allege detailed facts in the complaint in support of the section 1983 claim.⁵⁵ After the *Monell* decision,⁵⁶ where the Supreme Court held that municipalities may be liable under section 1983,⁵⁷ most of the circuit courts took what they thought was the next logical step. They said, "Well, you know the heightened pleading requirement should apply as well to section 1983 claims seeking to establish municipal liability."

Now, putting aside whether this was or was not a correct reading of the Federal Rules of Civil Procedure, this heightened pleading requirement created real pragmatic difficulties for section 1983 plaintiffs. In fact, one could say it created more than a real pragmatic difficulty. The plaintiff seeking to establish municipal liability was very much placed in a classic catch-22 type situation. Now, why do I say that? Well, in order to make the detailed factual allegations in the complaint that the lower federal courts were insisting upon, the plaintiff typically needed to get to the discovery stage in order to get the necessary information from the municipal defendants. This is the information that would provide the basis for the detailed factual allegations. But, here is the catch-22; they are not going to let you get to the discovery stage unless you have detailed factual allegations in your complaint. But one cannot make the detailed factual allegations without the discovery. Most of the lower

53. *Id.* at 47.

54. *Id.*

55. See SCHWARTZ & KIRKLIN, *supra* note 1, at § 1.6 (compiling circuit court decisions).

56. *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

57. *Id.* at 701.

courts said that is simply too bad -- no detailed factual allegations in the complaint, complaint dismissed.⁵⁸

In the case decided last Term called *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*,⁵⁹ in a unanimous decision written by Chief Justice Rehnquist, the Supreme Court rejected the heightened pleading requirement for section 1983 municipal liability cases.⁶⁰ The County in that case argued to the United States Supreme Court that a heightened pleading requirement was necessary to vindicate the municipality's immunity from suit under section 1983.⁶¹ I read that as a type of "me too" argument. Judge Pratt referred to qualified and absolute immunity being viewed by the United States Supreme Court as creating an immunity from suit.⁶² The Court now takes the same position with respect to the Eleventh Amendment immunity.⁶³ So the County here was making a "me too" argument. "Since you say everybody else is immune from suit, not just liability, we should be viewed as having immunity from suit also." The Supreme Court said no, municipalities do

58. See, e.g., *Barr v. Abrams*, 810 F.2d 358 (2d Cir. 1987) (reiterating that complaints involving civil rights statutes must contain specific allegations of fact); *Angola v. Civiletti*, 666 F.2d 1 (2d Cir. 1981) (explaining that detailed factual allegations are necessary to protect governmental functions in civil rights actions); *Fine v. New York*, 529 F.2d 70 (2d Cir. 1975) (finding complaint insufficient where it made allegations but offered no detailed support). But see *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 624 (9th Cir. 1988) (stating that bare allegation of officials' conduct in conformity to official policy, custom, or practice is sufficient to defeat a motion to dismiss).

59. 113 S. Ct. 1160 (1993).

60. *Id.* at 1161.

61. *Id.* at 1162. The County argued that if a more relaxed pleading was permitted, municipalities would be subject to expensive and time consuming discovery in all § 1983 cases, thus eviscerating their immunity from suit and disrupting municipal functions. *Id.*

62. Hon. George C. Pratt, *What's Happening With Respect to the Second Circuit*, 10 TOURO L. REV. 297, at 300 (1994); see *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

63. See *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 113 S. Ct. 684 (1993); see *infra* notes 75-85 and accompanying text.

not have an immunity from suit under section 1983.⁶⁴ They are only immune from respondeat superior liability.⁶⁵ One could add that they are also immune from punitive damages,⁶⁶ but they do not possess a fundamental immunity from liability under section 1983.⁶⁷ Municipalities may be held liable under section 1983 when their policies and practices give rise to a violation of federally protected rights.⁶⁸

In *Leatherman*, the Supreme Court found that the heightened pleading requirement that the lower courts had been applying in section 1983 municipal liability cases was totally inconsistent with the language of Rule Eight of the Federal Rules of Civil Procedure.⁶⁹ Rule Eight does not impose a general heightened pleading requirement. Rule Nine, on the other hand, does require that claims of fraud or mistake be pleaded with particularity,⁷⁰ but certainly nothing in Rules Eight or Nine imposes any extraordinary pleading requirement for section 1983 municipal liability cases. So, the Chief Justice invoked the well known and well recognized principle, *expressio unius est exclusio alterius*.⁷¹ Everybody, of course, knew what he was talking about, but despite the force of this Latin command, the Supreme Court did not go all the way in *Leatherman*. It made it clear that its holding was limited to claims of municipal liability under section 1983,⁷²

64. *Leatherman*, 113 S. Ct. at 1162.

65. *Id.*

66. *City of Newport v. Fact Concerts*, 453 U.S. 247 (1980).

67. *Leatherman*, 113 S. Ct. at 1162.

68. *Id.*

69. *Id.* at 1163. The Supreme Court flatly stated that "it is impossible to square the 'heightened pleading standard' applied . . . in this case with the liberal system of 'notice pleading' set up by the Federal Rules." *Id.*

70. FED. R. CIV. P. 9(b). This rule provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." *Id.*

71. *Leatherman*, 113 S. Ct. at 1163. This Latin maxim stands for the proposition that "the expression of one thing is the exclusion of another." BARRON'S LAW DICTIONARY 176 (3d ed. 1991).

72. The Court narrowly phrased the issue before it as: "whether a federal court may apply a 'heightened pleading standard'-- more stringent than the usual pleading requirements of Rule 8(a) . . . in *civil rights cases alleging*

and most significantly, the Court expressly left open whether some type of heightened pleading requirement might still be justified in cases in which the defendant is likely to raise the defense of absolute or qualified immunity.⁷³ Actually, the Court was just talking about qualified immunity, but it seems to me that it is probably an open question with respect to claims of absolute immunity, as well.

As I see it, the *Leatherman* decision is an important pragmatic development for plaintiffs' attorneys in section 1983 litigation. It is frequently the case that the plaintiff's attorney has some factual basis for suspecting that what happened to her client was not just aberrational, but was part of some broader custom or practice within the municipality. Judge Pratt mentioned cases that would serve to illustrate that point.⁷⁴ Alternatively, there may be some factual basis for believing that what happened to the client was the result of inadequate training or supervision, or some malfunctioning in the hiring process. All the *Leatherman* case does is allow the section 1983 claimant to allege these claims and have an opportunity to prove them, to have discovery, and if the evidence is there, to proceed to the trial stage.

IMMUNITIES

I move to the third area, the subject of immunities, and there we had three decisions from the Supreme Court last Term. In *Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy*,⁷⁵ the Supreme Court ruled that district court denials of Eleventh Amendment immunity are immediately appealable.⁷⁶ That is to

municipal liability under . . . § 1983." *Leatherman*, 113 S. Ct. at 1161 (emphasis added).

73. *Id.* at 1162. The Court stated that it had "no occasion to consider whether [its] qualified immunity jurisprudence would require a heightened pleading in cases involving individual governmental officials." *Id.*

74. *See supra* note 62, at 307.

75. 113 S. Ct. 684 (1993).

76. *Id.* at 689. The Court held that "state entities that claim to be 'arms of the State' may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity." *Id.* The collateral order doctrine says that a judgment that is not final will be

say, an interlocutory appeal may be taken from a district court's denial of the Eleventh Amendment immunity. Now, this was not a section 1983 case. Rather, *Metcalf & Eddy* was actually a diversity case, but I choose it for inclusion in this discussion because this is an issue, the appealability of district court denials of Eleventh Amendment immunity, that in the past has arisen principally in section 1983 cases,⁷⁷ and I think that this is where it will continue to get the biggest play. The Court in *Metcalf & Eddy* ruled that just like absolute and qualified immunity, the Eleventh Amendment not only provides state government with an immunity from liability, it also provides an immunity from suit, that is to say, from the burdens of having to defend the litigation.⁷⁸ The Court, in fact, explicitly referred to protecting the state from burdensome litigation,⁷⁹ but having said all that, the Court went on and made what I think was a somewhat unusual comment. It said, "its ultimate justification is the importance of insuring that the States' dignitary interests can be fully vindicated."⁸⁰ Now, I have to confess, I do not really understand that very much. I did not know that it was a great indignity for states to defend against section 1983 actions. I understand states have the Eleventh Amendment protection, but I do not know why it is an indignity if a section 1983 plaintiff seeks some type of relief against state government. This dignitary interest justification was ridiculed by Justice Stevens in his

immediately appealable if it "fall[s] in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 687 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)).

77. See SCHWARTZ & KIRKLIN, *supra* note 1, at § 8.12.

78. *Metcalf & Eddy*, 113 S. Ct. at 687-89.

79. *Id.* at 689. The Court said that the "application of the collateral order doctrine in this case is justified in part by a concern that States not be unduly burdened by litigation" *Id.*

80. *Id.*

dissenting opinion.⁸¹ He termed it an “embarrassingly insufficient” justification for the Court’s decision.⁸²

In this case, the Court, in recognizing the right of interlocutory appeal, rejected the plaintiff’s argument that the right of immediate appeal should only exist in those cases where there are no factual questions relating to the immunity issue.⁸³ The Court simply said, “we see little basis for drawing such a line.”⁸⁴ I read that to mean that what the Court presumably had in mind is that the Eleventh Amendment defense is typically a defense that is separate from the merits of the case and it is typically, though not always, a defense that does not raise sharp factual questions.

You may get the impression that I think that the case was wrongly decided. I think that there is a very big difference between a claim against a public official in his or her personal capacity and a case against a state agency or state government itself. When suing a public official in his or her personal capacity, the official’s energy and time, and maybe even focus, may be diverted from his or her official responsibilities. If the official has to defend against personal liability, I think that this phenomena -- the diversion of time and energy from official responsibilities for defense of the lawsuit would kick in -- could occur, and I think that provides at least an arguable basis for recognizing that the official who is sued in his or her personal capacity, and whose motion for qualified or absolute immunity is denied, should have a right to test out that denial on immediate appeal to the circuit courts of appeals. I am saying that it is at least an arguable point. I think, however, that a case against state government itself, whether against a state agency, state government, or state official in an official capacity, does not raise those types of concerns about diversion of the time and energy of public officials from their official responsibilities. Only Justice

81. *Id.* at 691 (Stevens, J., dissenting). Justice Stevens pointed out that while the majority recognized a “dignitary interest” for the state, a private party defendant must still litigate a case despite an allegation of lack of jurisdiction. *Id.*

82. *Id.* (Stevens, J., dissenting).

83. *Id.* at 689.

84. *Id.*

Stevens was sharp enough to understand the distinction between those two types of situations.⁸⁵

Now, let us move to the other immunity decisions. We have seen in recent years a number of section 1983 lawsuits being brought against court reporters.⁸⁶ When I think about how these cases come about, I think about some criminal defendants, they cannot think of anyone else to sue -- I cannot get relief against the judge, I cannot get relief against the witnesses or the prosecutors, well, there is somebody else who may be the wrongdoer, and that wrongdoer is the court reporter, at least in the mind of the defendant. These cases sometimes involve claims of conspiracy between the court reporter and the trial judge, sometimes conspiracies between the court reporter and the prosecutor, and sometimes conspiracies involving all three of them.⁸⁷ They are based upon such claims as the court reporter intentionally prepared the transcript in a misleading way, or delayed the preparation of the transcript, or perhaps lost the transcript, and this interfered with the criminal defendant's due process rights. Well, an issue that has arisen over the past several years is what type of immunity, if any, can be claimed by a court reporter who is sued under section 1983. The United States Supreme Court largely resolved that issue last Term in a case called *Antoine v. Byers & Anderson*.⁸⁸ In that case the Supreme Court said that court reporters are not entitled to absolute immunity.⁸⁹ They did not have absolute immunity at common

85. *Id.* at 691-92 (Stevens, J., dissenting). Justice Stevens asserted that "preserving the freedom and independence that government officials need to carry out their official duties is one thing; doing so out of concern for the 'dignitary' interest of a State . . . is quite another." *Id.* at 692.

86. *See, e.g., Dellenbach v. Letsinger*, 889 F.2d 755 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *Scruggs v. Moellering*, 870 F.2d 376 (7th Cir. 1989); *Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984); *Green v. Maraio*, 722 F.2d 1013 (2d Cir. 1983).

87. *See Dellenbach*, 889 F.2d 755 (action against judge and two court reporters); *Scruggs*, 870 F.2d 376 (action against judge, court reporter, and prosecutor); *Green*, 722 F.2d 755 (same); *see also Holt*, 741 F.2d 169 (action against court reporter alone).

88. 113 S. Ct. 2167 (1993).

89. *Id.* at 2172.

law.⁹⁰ In terms of quasi-judicial immunity, they were arguing that they are really part of the judicial process.⁹¹ Court reporters do not, however, engage in the type of discretionary decision-making or exercise of judgment that is typically associated with judicial immunity.⁹² Now, while the Court did not spell it out, presumably in rejecting absolute immunity for court reporters, the Court would hold that court reporters could claim qualified immunity. The Court did not talk about qualified immunity, but I think that is the natural implication.

There is one variation of the court reporter issue that the Court did not discuss. Would the situation be different if the court reporter acted pursuant to a specific order of a judge? In other words, would the action pursuant to the judicial order then provide some justification for granting the court reporter absolute immunity? The Court did not talk about that issue, but there is an interesting recent decision from the Eighth Circuit that deals with the immunity to which a warden who had detained a prisoner pursuant to a facially valid court order was entitled.⁹³ The Eighth Circuit said that because the warden was acting pursuant to a facially valid court order, he should be given absolute immunity from liability.⁹⁴ The circuit court spoke about absolute immunity being justified on the basis of the public policy of encouraging public officials to comply with, and thereby vindicate, judicial orders.⁹⁵ What is interesting to me is that in reaching that result,

90. *Id.* at 2170. In the alternative, the respondents argued that the common-law judges who made handwritten notes during trials should be treated as their historical counterparts. *Id.* The Court found this analogy to be unpersuasive because, whereas court reporters are charged by statute with producing a "verbatim" transcript of the proceedings, common-law judges had much discretion in deciding what they wrote. *Id.* at 2170-71.

91. *Id.* at 2171.

92. *Id.* at 2171-72.

93. *Patterson v. Von Riesen*, 999 F.2d 1235 (8th Cir. 1993).

94. *Id.* at 1239.

95. *Id.* at 1240. The court stated that "[i]f wardens do not have absolute immunity . . . they will become a lightning rod for harassing litigation aimed at judicial orders." *Id.* The court emphasized the necessity for officials to be able to rely on court orders that are facially valid, as well as the need for the courts to trust that their orders would be carried through. *Id.* at 1241.

and the name of the case is *Patterson v. Von Riesen*, the Eighth Circuit said that *Antoine and Byers* was distinguishable because, in that case, no court order had been issued affecting the court reporter.⁹⁶ Which again, you know, raises in one's mind whether perhaps the court reporter issue should be analyzed or evaluated differently if there is a judicial order.

The third immunity decision in my mind is by far the most important of the Supreme Court's three immunity decisions, and I think that it is probably the most important section 1983 decision decided by the Court last Term. That is the decision dealing with prosecutorial immunity, *Buckley v. Fitzsimmons*.⁹⁷ Now, in the *Buckley* case, the United States Supreme Court rendered two rulings. First, the Court unanimously ruled that a prosecutor's participation in a press conference announcing an indictment is not shielded by absolute immunity;⁹⁸ and secondly — it is this second issue that provoked a five to four split among the Justices — a prosecutor's alleged fabrication of evidence during the pre-indictment stage is also not protected by absolute prosecutorial immunity.⁹⁹ The complaint in *Buckley* alleged the following: The section 1983 plaintiff, Stephen Buckley, had been arrested and detained in jail for three years on charges that grew out of a highly publicized murder of an eleven-year-old child.¹⁰⁰ The section 1983 complaint alleged that, in order to secure the indictment, the prosecutors fabricated evidence against Buckley.¹⁰¹ The fabricated evidence related to a boot print that had been found on the door of the home of the child who had been murdered.¹⁰² The boot print, presumably, was the boot print of the killer who had allegedly kicked in the door in order

96. *Id.*

97. 113 S. Ct. 2606 (1993).

98. *Id.* at 2617. Justice Kennedy, with whom Chief Justice Rehnquist and Justices White and Souter joined, agreed with the majority that there is no absolute immunity for statements made during a press conference. *Id.* at 2620 (Kennedy, J., dissenting).

99. *Id.* at 2615.

100. *Id.* at 2609.

101. *Id.* at 2610.

102. *Id.*

to enter the home.¹⁰³ The prosecutors had three separate studies done by law enforcement officers attempting to link up the boot print on the door with a pair of boots that Stephen Buckley had voluntarily turned over to the law enforcement authorities.¹⁰⁴ After engaging in the three separate studies, they were unable to link up Stephen Buckley's boots with the boot prints.¹⁰⁵ Of course, that did not stop the prosecutorial authorities. They then enlisted the assistance of an anthropologist named Louise Robbins, who is described in the section 1983 complaint as being, now I am just quoting here, I am not defaming anybody, "well known for her willingness to fabricate unreliable expert testimony."¹⁰⁶ So now, armed with the testimony of Louise Robbins, the prosecutors were able to secure a Grand Jury indictment against Stephen Buckley.¹⁰⁷

Following the indictment, of course, the next logical step that follows in criminal procedure is that a press conference is held, at which time the indictment is announced. The section 1983 complaint alleged that, at the press conference, the prosecutor made some false statements concerning the evidence that allegedly linked Stephen Buckley to this particular crime.¹⁰⁸ In addition, "mug shots" of Buckley were distributed to the media at the press conference.¹⁰⁹ Buckley's bail was set at three million dollars.¹¹⁰ Not surprisingly, he was not able to raise it and so he remained incarcerated while he was tried.¹¹¹ At the trial, the main prosecution witness was Louise Robbins. Based upon the evidence presented at the trial, the jury failed to reach a verdict and a mistrial was declared.¹¹² The prosecutors, undaunted, said "we will just try him again, right?"¹¹³ So Buckley remained in

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.* at 2610-11.

108. *Id.* at 2617.

109. *Id.*

110. *Id.* at 2611.

111. *Id.*

112. *Id.*

113. *Id.*

jail. While in jail pending the second trial, a third party confessed to the crime.¹¹⁴ Buckley was still not released.¹¹⁵ He was only released and the charges dropped against him after Louise Robbins, the prosecution's star witness, passed away.¹¹⁶

Well, Stephen Buckley gave some thought to his last three years and, not surprisingly, he asserted a claim in federal court under section 1983.¹¹⁷ He asserted claims sounding in false arrest, false incarceration, and malicious prosecution.¹¹⁸ One of the major issues in the case, since the alleged wrongdoers included the prosecutorial authorities, was whether these prosecutorial authorities should have absolute immunity with respect to the announcement of the indictment at the press conference, and the alleged fabrication of evidence relating to the boot print.¹¹⁹

The Seventh Circuit in this case had ruled that the prosecutors were entitled to absolute prosecutorial immunity with respect to both issues.¹²⁰ The rationale that the Seventh Circuit judges gave for coming to that conclusion is that the press conference and the fabrication of evidence could only have caused injury to Stephen Buckley at the judicial phase of the criminal proceedings.¹²¹ They read the Supreme Court decisions dealing with prosecutorial immunity¹²² as granting absolute prosecutorial

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. For an express delineation of these three counts in Stephen Buckley's original complaint see *Buckley v. County of Dupage*, No. 88-C1939, 1989 WL 64321, at *1 (N.D. Ill. June 9, 1989).

119. *Buckley*, 113 S. Ct. at 2611.

120. *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1240 (7th Cir. 1990), *rev'd*, 113 S. Ct. 2606 (1993).

121. *Id.* (stating that "residual injuries [from prosecution] have never been deemed sufficient to call for damages against public prosecutors . . .").

122. *Burns v. Reed*, 500 U.S. 478 (1991); *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989); *Flanagan v. United States*, 465 U.S. 259 (1984); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982); *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Cobbledick v. United States*, 309 U.S. 323 (1940).

immunity when the injury is associated with the judicial phase of a criminal proceeding.¹²³

The United States Supreme Court, in evaluating the prosecutorial immunity issue, said, "we make two important assumptions about the case."¹²⁴ The first is not particularly startling. The Court said it was going to assume that the allegations in the complaint are true.¹²⁵ Okay. The case has not been tried yet so the court is going to assume that the facts asserted in the complaint are true. That is not particularly surprising. The second assumption that the Court was willing to make, though, is much more significant. The Court was also willing to assume that the complaint asserted a violation of constitutionally protected rights.¹²⁶ Now, it seems to me that this is both important and interesting, and even a controversial assumption, for at least two reasons. One, Judge Pratt referred earlier to the Supreme Court's decision in the case called *Siegert v. Gilley*,¹²⁷ but what the Supreme Court said in *Siegert* was that when you have a claim of qualified immunity, the federal court should first look and determine whether the complaint states a violation of constitutionally protected rights.¹²⁸ This is because there is no sense in evaluating whether it is a violation of clearly established constitutional rights if the complaint does not even state a violation of constitutional rights. Well, the Supreme Court in *Buckley* paid absolutely no attention to *Siegert*. It may be that what it had in mind was that absolute immunity somehow is different in terms of the methodology for evaluating absolute immunity, as compared to qualified immunity. But it seems to me rather odd that the Court made absolutely no reference to *Siegert*.

The second reason why I think it is an important assumption that the complaint stated a violation of constitutionally protected

123. *Buckley*, 919 F.2d at 1241. The Seventh Circuit stated that, in such a case, "the defendant must look to the court in which the case pends to protect his interests." *Id.*

124. *Buckley*, 113 S. Ct. at 2609.

125. *Id.*

126. *Id.*

127. 111 S. Ct. 1789 (1991).

128. *Id.* at 1793.

rights in *Buckley* is because it is very frequently the fact in section 1983 cases against prosecutors that the plaintiff is alleging some type of egregious wrongdoing.¹²⁹ It is not always obvious, however, that this type of wrongdoing gets translated into a violation of some provision of the federal Constitution.¹³⁰ I suppose the most significant of Buckley's section 1983 claims was his claim of malicious prosecution. The issue of whether malicious prosecution is by itself a constitutional wrong is pending before the United States Supreme Court now.¹³¹ The Supreme Court has granted plenary review in a case from the Seventh Circuit that raises the issue of whether malicious prosecution is solely a matter of state tort law, or governmental action that gives rise to a violation of constitutionally protected rights.¹³² In any case, the Court in *Buckley* did make the

129. See *Siano v. Justices of Mass.*, 698 F.2d 52 (1st Cir.) (alleging use of forged evidence), *cert. denied*, 464 U.S. 819 (1983); *Lee v. Willins*, 617 F.2d 320 (2d Cir.) (alleging coercion of perjured testimony from witnesses), *cert. denied*, 449 U.S. 861 (1980); *Heidelberg v. Hammer*, 577 F.2d 429 (7th Cir. 1978) (alleging destruction of a lineup report and police tapes of incoming calls).

130. See, e.g., *Prince v. Wallace*, 568 F.2d 1176 (5th Cir. 1978) (claims of deprivation of right to speedy trial and freedom from cruel and unusual punishment summarily dismissed); *Black v. Cloose*, 612 F. Supp. 470 (D. Minn. 1984) (enforcement of alleged unconstitutional traffic law is not a deprivation of right to travel), *aff'd*, 758 F.2d 317 (1985); *Halpern v. City of New Haven*, 489 F. Supp. 841 (D. Conn. 1980) (prosecutor's discretion on whether to investigate).

131. *Albright v. Oliver*, 975 F.2d 343 (7th Cir. 1992), *cert. granted*, 113 S. Ct. 1382 (1993). *Editor's note:* Subsequent to this symposium, the Supreme Court affirmed the Seventh Circuit's holding that malicious prosecution by itself is not a constitutional wrong. *Albright v. Oliver*, 114 S. Ct. 807 (1994).

132. In *Albright*, a plurality of the Court held that a § 1983 malicious prosecution action based solely on a Fourteenth Amendment substantive due process violation was not actionable. 114 S. Ct. at 814. *Albright* alleged that the Defendant, Detective Oliver, deprived him of substantive due process under the Fourteenth Amendment. *Id.* at 810-11. *Albright* argued that he was deprived of his "liberty interest"—to be free from criminal prosecution except upon probable cause." *Id.* The Court, quoting *Graham v. Connor*, 490 U.S. 386, 395 (1989), stated that a constitutional claim should not be brought under substantive due process when there exists an "explicit textual source of constitutional protection." *Id.* at 813. Since the Court found the Fourth

assumption that in this case, the complaint stated a violation of constitutional rights, and evaluated only the question of prosecutorial immunity.

The Supreme Court rejected out of hand what it referred to as the "unprecedented" location of injury theory that had been articulated by the Seventh Circuit.¹³³ I do not think unprecedented is anything but unflattering. That is like calling the other decision "creative."¹³⁴ That was creative, this one is unprecedented. But what the Supreme Court meant by its reference to "unprecedented" is that it found the Seventh Circuit analysis of the immunity issue to be fundamentally at odds with its immunity jurisprudence which takes a functional approach to the immunity issue.¹³⁵ That is to say, the Court focuses on the nature of the function carried out by the official, not the nature of the injury and not the point in time at which the injury sets in.¹³⁶

Having taken care of the Seventh Circuit's location of injury theory, the Court then evaluated the two issues -- the press conference issue and the fabrication of evidence issue. With respect to the press conference issue, the Court was unanimous. The Court had no trouble concluding that the announcement of an indictment at a press conference is simply not a part of the prosecutor's advocacy function.¹³⁷ The Court looked at prior Supreme Court prosecutorial immunity decisions,¹³⁸ and found the prosecutorial immunity justified when the prosecutor acts as an advocate in a judicial proceeding, not when the prosecutor acts

Amendment was created to protect against "pretrial deprivations of liberty[.]" it reasoned that this would be the appropriate basis for Albright's § 1983 malicious prosecution action. *Id.* at 813. However, since no Fourth Amendment claim was presented to the Supreme Court, the Court declined to rule on the possible outcome of such a claim. *Id.* at 814.

133. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2611, 2615 (1993).

134. *See Soldal v. County of Cook*, 113 S. Ct. 538, 547-48 (1992); *see generally supra* notes 24-43 and accompanying text.

135. *Buckley*, 113 S. Ct. at 2615.

136. *Id.*

137. *Id.* at 2618.

138. *Burns v. Reed*, 500 U.S. 478 (1991); *Imbler v. Pachtman*, 424 U.S. 409 (1976).

in an administrative or investigatory capacity,¹³⁹ and found that participating in a press conference is simply not advocacy.¹⁴⁰ Although, when I think about it, I am sure that there are a certain number of prosecutors who do view announcing the indictment as part of their advocacy function, and I think there are probably a good many defense attorneys who would agree with that type of characterization.

It was the other issue, the alleged manufacture of evidence, that provoked the five to four split on the ruling of the Supreme Court. Now, on this issue, the essential question for the Supreme Court was this: are we talking about conduct by the prosecutors which was part of their preparation for judicial proceedings, either for the Grand Jury or for trial? If we can characterize what the prosecutors did in this case as preparation for trial, then we are in a position to say that it is part of the advocacy function, and the advocacy function is shielded by absolute prosecutorial immunity.¹⁴¹ On the other hand, if we characterize what the prosecutors did in this case, not as part of the preparation for trial or as part of their advocacy function, but as an investigatory activity (i.e., if the prosecutor acted like a police officer or a detective), under the functional approach, the prosecutors can claim only the same qualified immunity that the detective can claim.¹⁴²

The majority and the dissent agreed upon how the issue should be framed, but the majority of five Justices said this is clearly investigative, there is no question about it.¹⁴³ After reading it, you wonder how there can be a dissent in this case. The majority said this was clearly an investigatory function being carried out, because the alleged fabrication of boot print evidence occurred well before there was probable cause to arrest Stephen Buckley.¹⁴⁴ It was well before the prosecutors even claimed that

139. *Buckley v. Fitzsimmons*, 113 S. Ct. at 2615-18.

140. *Id.* at 2618.

141. *Id.* at 2615.

142. *Id.* at 2616.

143. *Id.*

144. *Id.*

they had probable cause to arrest him.¹⁴⁵ And so the majority determined that the prosecutors were involved in an investigatory task, rather than an advocacy function.¹⁴⁶ Therefore, they cannot claim absolute prosecutorial immunity, only qualified immunity.¹⁴⁷

When you read the dissenting opinion, you think you are in a different world. The dissenters say this was clearly an example of preparation for trial.¹⁴⁸ The prosecutors were dealing with the presentation of evidence and they were thinking about presenting witnesses and evidence at the Grand Jury, and later at trial, as part of their preparation for trial. Thus, the dissenters said they were clearly entitled to absolute immunity.¹⁴⁹ Now, it is obvious, I think, to anyone who reads the majority and the dissent, that we now know what the rule is. We know the line that the Supreme Court is drawing between advocacy functions and investigatory functions. I think it is also obvious that this is a very difficult line to draw. I think it is a subtle line. Justice Scalia, in his concurring opinion, said that it is not really that difficult and that he had an easy answer for it. The answer is that an official who claims absolute immunity has the burden of establishing it and if the defendant prosecutors are not able to establish entitlement to absolute immunity, they are simply going to have to settle for qualified immunity.¹⁵⁰

I think that one lesson that comes out of the case is that it is very important to pay close attention to the time frame in which the alleged misconduct by the prosecutors occurs. If the conduct occurred prior to the time when there was either a finding of probable cause, or at least prior to the time when the prosecutors claimed to have probable cause, there is a strong likelihood that the function that the prosecutors were engaged in is going to be viewed as being an investigatory function.¹⁵¹ Whereas, the other

145. *Id.*

146. *Id.*

147. *Id.* at 2617.

148. *Id.* at 2621 (Kennedy, J., dissenting).

149. *Id.* at 2621-22 (Kennedy, J., dissenting).

150. *Id.* at 2610 (Scalia, J., concurring).

151. *Id.* at 2615-16 (Scalia, J., concurring).

side of the coin is that what the prosecutors do in the post-probable cause stage is very likely to be viewed as advocacy and protected by absolute prosecutorial immunity.¹⁵² Although, as the Court points out, it is not to be misread as drawing a very clear, so called "bright line," because it may be that even in the post-probable cause time frame, the prosecutors start acting like detectives again.¹⁵³ You know, they went out and investigated for more evidence, in which case, of course, we are back to an investigatory function.

The reports that I have seen, one in particular in the *Legal Times of Washington*, indicated, and it is not particularly surprising, that prosecutors are very upset about the Supreme Court's decision in the *Buckley* case.¹⁵⁴ They do make an important point. Prosecutors today are increasingly becoming involved in investigatory work and some of this is a result of their participation in task forces that are formulated to tackle drug networks and other types of complex criminal operations. They make the point that in the real world, this line between advocacy functions and investigatory functions is not as clear as the majority of the Supreme Court would like it to be.¹⁵⁵ Now, the dissenters in *Buckley* say, as a result of the majority's decision, this may prompt prosecutors to seek quicker probable cause determinations from the trial court.¹⁵⁶ You know, because once there is a probable cause determination, then the likelihood is greatly enhanced that the prosecutor will be shielded by absolute immunity. But the prosecutors say that the danger is really much greater, that the danger might be that prosecutors may now be deterred from engaging in investigatory activities.¹⁵⁷ We are going to have to wait and see how this plays out, both pragmatically and legally, because I do not think by a long shot that this is the last word by the Supreme Court on what

152. *Id.* (Scalia, J., concurring).

153. *Id.* at 2616, n.5.

154. See Naftali Bendavid, *Limiting Prosecutorial Power*, *LEGAL TIMES OF WASH.*, Aug. 9, 1993, at S25.

155. See *supra* note 154.

156. *Buckley*, 114 S. Ct. at 2623 (Kennedy, J., dissenting).

157. See *supra* note 154.

ultimately comes down to attempting to define what is the prosecutorial function, and what is the advocacy function, of the prosecutor.

ATTORNEYS' FEES

Now, let me just spend a few minutes on this last subject of attorneys' fees. The Civil Rights Attorneys' Fees Award Act of 1976, which is 42 U.S.C. § 1988,¹⁵⁸ is the Congressional statute that authorizes awards of attorneys' fees in section 1983 cases. There are three important points for present purposes about that statute. One, it makes the award of attorneys' fees discretionary for the trial judge. Two, the only one who is eligible for an award of attorneys' fees is a "prevailing party." And three, if fees are awarded, the statute says the court should award "reasonable" attorneys' fees.¹⁵⁹ So those are the three concepts that I think are important in understanding what the Supreme Court did last Term in a very important decision called *Farrar v. Hobby*.¹⁶⁰

In *Farrar*, the issue before the Supreme Court was whether a section 1983 plaintiff, who only recovers one dollar in nominal damages, is, nevertheless, a prevailing party who is entitled to an award of attorneys' fees under section 1988.¹⁶¹ Now, I think one way to look at what the Court did in this case is that there are really two different rulings in the case. All of the Justices agreed that a plaintiff who recovers only nominal damages is nevertheless a "prevailing party" who is potentially eligible for an award of fees under section 1988.¹⁶² The thinking was that, the Court's view of who is a prevailing plaintiff has been, in

158. 42 U.S.C. § 1988 (1993). Subsection (b) of this statute provides in pertinent part that "[i]n any action or proceeding to enforce . . . [§ 1983] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." *Id.*

159. *Id.*

160. 113 S. Ct. 566 (1992).

161. *Id.* at 570.

162. *Id.* at 573.

prior Supreme Court decisions,¹⁶³ a generous one, and the Court has said that any relief by a court which materially alters the legal relationship between the parties by modifying the defendant's behavior qualifies the plaintiff as a prevailing party.¹⁶⁴ Here, the thinking goes, an award of nominal damages does alter the legal relationship between the parties. It does force an alteration of the defendant's conduct. After all, the defendant has to turn over money to the plaintiff, even if it is a measly one dollar bill, or perhaps four quarters.

Now, that did not resolve the question of whether the plaintiff in this particular case was entitled to an award of attorneys' fees. I mean, we say that the plaintiff is a prevailing party by recovering nominal damages. That only qualifies a plaintiff as being potentially eligible for an award of attorney fees. Whether or not attorneys' fees should be awarded, well, that is in the discretion of the trial judge, and if fees are awarded, the amount is also in the trial judge's discretion. Having concluded that this plaintiff was a prevailing party by the recovery of nominal damages, the Justices in effect said to themselves — they did not come out and say this in so many words, but I think this is what is going on — “we really have a very extreme case here.” Now, why was it an extreme case? The plaintiff in this case sought only monetary damages¹⁶⁵ and the plaintiff was not, you know, the modest sort. The complaint sought compensatory damages of seventeen million dollars against six different defendants.¹⁶⁶ Seeking seventeen million dollars against six different defendants and winding up with a recovery of one dollar in nominal damages against one defendant made the Court think about whether this is

163. See *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93 (1989) (stating that to be considered a prevailing party plaintiff must be able to point to a resolution of the dispute materially altering the legal relationship); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (holding plaintiffs may be considered prevailing parties if they succeed on any significant issue which achieves some of the benefit sought).

164. *Id.*

165. 113 S. Ct. at 566. The plaintiff's original claim for injunctive relief was not pursued. *Id.* at 570.

166. *Id.* at 570.

a plaintiff who should be awarded attorneys' fees under section 1988. Think about what the district court did in this case. The district court awarded the plaintiff attorneys' fees of \$280,000, \$27,932 in expenses, and \$9,730 in pre-judgment interest.¹⁶⁷ Now, after doing some quick arithmetic, that is well over \$300,000. So, the Court said that in this case, while it found that the Fifth Circuit was wrong in concluding that the plaintiff was not a prevailing party, under these types of circumstances, the only reasonable fee is no fee.¹⁶⁸ The appropriate exercise of discretion, given this extreme type of situation, is that no fees should be awarded. There is language in Justice Thomas' opinion for the majority that could lead one to conclude that normally when only nominal damages are recovered, perhaps it is appropriate to either award no fees or a very low fee.¹⁶⁹

Well, there are only five justices who voted on this question of whether the plaintiff should be awarded fees.¹⁷⁰ The question presented to the Court was whether the plaintiff was a prevailing party.¹⁷¹ Of the five who voted that fees should not be awarded to this plaintiff, Justice O'Connor wrote a separate concurring opinion in which she took the position that the differential between what the plaintiff had sought in this case -- the seventeen million dollars and the one dollar nominal damages recovered -- should not be the only factor a court should consider.¹⁷² A court should also look to the public importance of the litigation.¹⁷³ It might be that the plaintiff only recovered a dollar, but there might be important legal issues being litigated.¹⁷⁴ Also, she said a court should focus upon whether the litigation, even though it only culminated in a one dollar nominal damage award,

167. *Id.*

168. *Id.* at 575.

169. *Id.* The Court stated that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief . . . the only reasonable fee is usually no fee at all." *Id.*

170. The five Justices were Chief Justice Rehnquist and Justices Thomas, O'Connor, Scalia and Kennedy.

171. 113 S. Ct. at 570.

172. *Id.* at 578 (O'Connor, J., concurring).

173. *Id.* (O'Connor, J., concurring).

174. *Id.* (O'Connor, J., concurring).

accomplished some public good, such as deterring lawless behavior in the future or vindicating some type of important right.¹⁷⁵

Some things about *Farrar* are unclear, at least in my mind. I do not think we know how much weight lower courts are going to be giving to Justice O'Connor's concurring opinion. In other words, are they going to place more emphasis upon the opinion for the Court, which, as I said, could be read to mean usually no fees or very low fees for a plaintiff who only gets nominal damages. Or, on the other hand, are they going to engage in more of the type of case-by-case evaluation that Justice O'Connor advocates, which would focus on factors other than the disparity between the nominal damages recovered and the amount requested.

To focus on the open questions, what would one do in the case of a plaintiff who comes into federal court and says implicitly, "I am the noble sort, I am the non-materialistic sort, I only want one dollar to vindicate my constitutionally protected rights" and the court indeed finds a violation of constitutional protected rights? The jury gives the plaintiff the one dollar and then we have a motion for attorneys' fees for seventy-five thousand dollars. I think how that situation is going to be handled is problematical. Thank you very much.

Hon. George C. Pratt:

Marty, thank you very much. Gary Shaw, you have been sitting patiently, and probably have a whole list of comments to make.

Professor Gary M. Shaw:

And in the interest of brevity, I will not mention them all. Although I sort of tend to be more skeptical about noble plaintiffs, I do not think it will be as big a problem as you may think.

175. *Id.* (O'Connor, J., concurring).

Professor Martin A. Schwartz:

There are some.

Professor Gary M. Shaw:

There are some, but I suspect more of them will be going for the money. Let me just make one comment and then ask one question. I want to go back to the *Soldal*¹⁷⁶ case for a moment. I suspect from my own perspective that, in some respects, the Seventh Circuit did not have to worry that this was going to create a tremendous amount of new litigation, only because of the *DeShaney*¹⁷⁷ case, and it seems to me the reason that the plaintiff could get around *DeShaney* here was that the plaintiff claimed there was a conspiracy between the private actors and the police.¹⁷⁸ And it seems to me that what the complaint could have said was that the police stood there and did nothing and there was no sort of conspiracy or concerted action. Then, *DeShaney* would have ruled, and so I think that the Seventh Circuit's concern was somewhat overstated. My question, I guess, would be that I have been listening to you for five years now, Marty, talking about trends in section 1983, and my recollection is that in earlier years your comments were not that there was a mixed bag so much as a series of cases that favored defendants rather than plaintiffs and now I am listening to you say, a mixed bag. Do you see this as a trend that is going to continue further in the plaintiffs' direction or do you see it peaking sort of here? And at the risk of asking you to prognosticate unfairly, do you think the elevation of Judge

176. 113 S. Ct. 538 (1992); *see generally supra* notes 24-50 and accompanying text.

177. *DeShaney v. Winnebago County Dep't of Social Servs.*, 481 U.S. 189 (1989) (holding that due process does not impose upon a state an affirmative duty to protect its citizen from parental abuse).

178. *Soldal*, 113 S. Ct. at 1075 (citing *Soldal*, 923 F.2d 1241 (7th Cir. 1991), *rev'd*, 113 S. Ct. 538 (1992)). It was alleged that the deputy sheriff and Terrace Properties joined efforts in an attempt to get rid of a tenant. *Id.*

Ginsburg to the Court¹⁷⁹ is going to make a difference in that area?

Professor Martin A. Schwartz:

Well, there are about five different questions there.

Professor Gary M. Shaw:

Typical professor.

Professor Martin A. Schwartz:

Typical professor. I do not think that what the Supreme Court did last Term¹⁸⁰ is going to work any monumental changes in section 1983 litigation or in constitutional litigation. Judge Pratt and I have talked about this often. What seems to be taking place is a type of fine tuning of section 1983 law. There are some details being worked out, such as how the courts should handle nominal damages and how to more precisely evaluate prosecutorial immunity. But the basic framework of section 1983 litigation dealing with issues such as municipal liability and the immunities that officials can claim is in place, and that basic framework makes it very difficult, in my mind, for the plaintiff to recover. It makes it difficult, pragmatically, from an economic feasibility standpoint, and it makes it difficult legally. I mean,

179. Ruth Bader Ginsburg was nominated to the Supreme Court on June 14, 1993 and was sworn in on Tuesday, August 10, 1993.

180. Among the important § 1983 cases decided in the October 1992 Term were: *Buckley v. Fitzsimmons*, 113 S. Ct. 2606 (1993) (discussing prosecutorial immunity); *Helling v. McKinney*, 113 S. Ct. 2475 (1993) (involving prisoners' rights and the Eighth Amendment); *Antoine v. Byers & Anderson*, 113 S. Ct. 2167 (1993) (denying court reporters absolute immunity); *Leatherman v. Tarrant County*, 113 S. Ct. 1160 (1993) (overruling the heightened pleading rule in municipal liability claims); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 113 S. Ct. 684 (1993) (permitting immediate appeals when Eleventh Amendment immunity is denied); *Farrar v. Hobby*, 113 S. Ct. 566 (1992) (involving attorney fees in instance in which only nominal damages were awarded); *Soldal v. Cook County*, 113 S. Ct. 538 (1992) (discussing Fourth Amendment seizures).

one should not ever underestimate how forceful this interlocutory appeal is with respect to denials of qualified immunity. That is the most recurring issue and it often means that the case never gets to the merits, and that whoever brings this case has to immediately be prepared to shoulder the financial expense of an appeal in the circuit court. That is usually before they have even gotten to the discovery stage. The other thing that I think one has to always keep in mind in evaluating where the Supreme Court is going in section 1983 litigation, is that none of what the Supreme Court does with respect to the details of section 1983 matters at all, unless there are meaningful constitutionally protected rights for plaintiffs to enforce. Because you always come back to this fundamental point: section 1983 itself does not create any federally protected rights, it is just a type of remedial vehicle for the enforcement of rights that are created by the Federal Constitution, and in some instances created by federal statutes. So I do not think that one should draw any broad conclusions from some of what one could say are pro-plaintiff decisions rendered by the Supreme Court last Term, and they are not all pro-plaintiff decisions. The nominal fee decision, for example, is not.¹⁸¹ The Eleventh Amendment decision is not.¹⁸² Section 1983 is a hard area to evaluate from an overall standpoint, precisely because the area is so vast and because it is so multifaceted.

I do not know if it is valuable to say much about Justice Ginsburg. I do not know if I am in a better position than anybody else to start talking about how she will affect the Court's future decisions.

Hon. George C. Pratt:

Before you put away your crystal ball, and perhaps you too Gary, do you think *Leatherman*¹⁸³ is going to be restricted to no

181. *Farrah v. Hobby*, 113 S. Ct. 566 (1992); *see generally supra* notes 160-175 and accompanying text.

182. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 113 S. Ct. 684 (1993); *see generally supra* notes 75-85 and accompanying text.

183. 113 S. Ct. 1160 (1993); *see generally supra* notes 59-74.

heightened pleading just with municipal liability claims, or could it be a harbinger of maybe a new era in federal pleading, kind of get back to basics, look at the federal rules and do not go any further?

Professor Martin A. Schwartz:

Judge Pratt and I just spent two days last week at a section 1983 conference for the Practicing Law Institute. We were involved with a large number of people who have great expertise in the section 1983 area and I would say -- tell me if you agree with this -- that the prevailing sentiment seemed to be that the logic of the *Leatherman* case would naturally apply to all section 1983 claims, that there is simply nothing in the Federal Rules of Civil Procedure that sanctions a heightened pleading requirement in any section 1983 case. I am somewhat more skeptical. I am more skeptical for two reasons. One, because if that was so, why did the Supreme Court not simply come out and say, you know, no heightened pleading requirement at all in section 1983 cases. True, we just have the municipal liability issue before us, but why do we not just take care of the whole thing? I am skeptical for this reason, and I am also skeptical because of how protective the Supreme Court has been of section 1983 defendants with respect to qualified immunity.¹⁸⁴ I think that this protective attitude in the qualified immunity area could lead the Supreme Court to say that to defeat qualified immunity, the complaint has to state factual allegations in some detail.¹⁸⁵

184. Section 1983 itself does not provide for any immunities. However, the Supreme Court has never interpreted this to mean that Congress, which enacted § 1983, intended to exclude common law immunities. SCHWARTZ & KIRKLIN, *supra* note 1, at § 9.1 (main volume only). Further, the Court has held that qualified immunity is an immunity from suit, not a mere defense to it. In fact, immunities are considered so important that a denial of qualified immunity is immediately appealable to the Court of Appeals. SCHWARTZ & KIRKLIN, *supra* note 1, § 9.2 (main volume only) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

185. Many circuit cases have required detailed factual allegations in such cases. 1 SCHWARTZ AND KIRKLIN, *supra* note 1, at § 9.25.

Hon. George C. Pratt:

Apparently, there have already been a number of decisions around the country, both at the circuit¹⁸⁶ and district court¹⁸⁷ levels, that seek to limit *Leatherman* and preserve the heightened pleading rule for other aspects of section 1983 cases. Judges like the heightened pleading rule as a docket-clearing type of device. If you can throw out a case on the face of a motion to dismiss, it just speeds things along. I just wonder if the Supreme Court has not resisted. It was a unanimous decision. I know they made the exception, they said they were not deciding it, but the issue was not before them either. It was proper judicial conduct to say, "we are only going to decide the question before us."

Professor Martin A. Schwartz:

But there are a large number of cases where the Supreme Court does go beyond the particular question before the Court and, you know, one could say that this was a question presented.

Hon. George C. Pratt:

Sometimes that is the only thing they decide.

Professor Martin A. Schwartz:

One could phrase the issue differently. One could say the issue in this case is whether a heightened pleading requirement is

186. Some courts have held that *Leatherman* does not extend to cases involving individual government officials. *Kimberlin v. Quinlan*, 6 F.3d 789 (D.C. Cir. 1993); *Moore v. Agency for Int'l Dev.*, 994 F.2d 874 (D.C. Cir. 1993).

187. *See, e.g., Mastroianni v. Deering*, 835 F. Supp. 1577 (S.D. Ga. 1993) (applying heightened pleading requirement in § 1983 conspiracy action); *McDonald v. City of Freeport*, 834 F. Supp. 921 (S.D. Tex. 1993) (employing the heightened pleading requirement in § 1983 action against government official); *Orange v. County of Suffolk*, 830 F. Supp. 701 (holding that § 1983 cases alleging conspiracy require heightened pleading) (E.D.N.Y. 1993).

appropriate in a section 1983 case, so I do not think it would be wrong to go all the way.

Hon. George C. Pratt:

Professor Shaw, anything further?

Professor Gary M. Shaw:

No. I guess I sort of share Marty's skepticism. If the Court had wanted to abolish the heightened pleading rule, I think it probably would have come out in favor of this. This is a unanimous decision. This is not one of those cases where they are trying to cobble together a majority and say, okay, the only way we can cobble together a majority is to have this precise specific rule. Rather, they had unanimity. If they had wished to go further, they probably would have done so, even losing one or two votes. On that basis, it would not have made a difference. So I guess I sort of share Marty's skepticism, although at the same time, given the Federal Rules of Civil Procedure, I think the courts are probably correct in abolishing the heightened pleading rule, and judges' dockets notwithstanding, I think it should be applicable to other issues as well.

Hon. George C. Pratt:

Any comment from the audience? Yes.

Audience Member:

I need to ask a question. Before I ask a question, am I right in remembering that Grand Jurors enjoy the protection of absolute immunity?¹⁸⁸ Then I have trouble understanding how the Grand Jury can execute its investigatory function without the assistance of a prosecutor. It seems to me impossible, so I have a very hard time understanding how a prosecutor carrying out an

188. Grand jurors do enjoy absolute immunity. *Decamp v. Douglas County*, 978 F.2d 1047 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 3036 (1993).

investigative function in conjunction with the Grand Jury investigation before a probable cause determination or after a probable cause determination, cannot be entitled to that same protection, especially in light of the other decisions, you know, with the warden that you pointed out.¹⁸⁹

Professor Martin A. Schwartz:

I think the answer is that the prosecutors' activities in presenting the case to the Grand Jury would clearly be considered to be advocacy in nature. It is the functions that are carried out prior to that point in time that might not be protected by absolute immunity.

Audience Member:

But the placing of evidence before the Grand Jury can only occur after the prosecutor has helped guide it. It is not a secret that with complex areas of crime you need minds that are willing to chase people and put it together. It is not a surprise that the Grand Jury has helped the investigation whether you think of that as advocacy or investigation. I, myself, think of it as investigation, but I still think that it should be cloaked with the same degree of protection as that of the Grand Jury which investigates it.

Professor Martin A. Schwartz:

You are talking from the standpoint of a former prosecutor and you know the judges think that they are entitled to absolute immunity and the court reporters would also like absolute immunity. Everybody that does what they do would like absolute immunity. But the question becomes, what is the rationale behind the immunity? And the rationale behind prosecutorial immunity is to try to protect those functions which are very closely associated with the judicial process. In other words, the way Professor

189. *Patterson v. Von Riesen*, 999 F.2d 1235 (8th Cir. 1993); *see supra* notes 93-95 and accompanying text.

Neuborne¹⁹⁰ describes it, it is putting a type of cone over the judicial proceeding and everybody who is under the cone gets shielded by absolute immunity, but at some point you are outside of the cone and you are not acting in a prosecutorial manner, but you are acting as a detective or police official.

Audience Member:

That is right, but my question is that if the Grand Jury itself is inside the cone . . . ?

Professor Martin A. Schwartz:

Well, the jurors are viewed as judges. In effect they are making a judgmental decision, so you want to protect their judging because you do not want their judging to be influenced, how they may ultimately vote on this question of whether or not to indict, by potential liability.

Audience Member:

Let me ask you this: In the *Buckley* case, was the investigation carried out in conjunction with the Grand Jury or was it independent of the Grand Jury investigation?

Professor Martin A. Schwartz:

At the time that the prosecutors were acting, there was no Grand Jury.¹⁹¹

190. Professor Neuborne is a Professor of Law at New York University School of Law. He has served as Staff Counsel to the New York Civil Liberties Union from 1967-72, Assistant Legal Director of the American Civil Liberties Union from 1972-76, and National Legal Director of the American Civil Liberties Union from 1974-78. Professor Neuborne has also lectured extensively on the topic of Civil Rights, including at several of the Practicing Law Institute Symposiums.

191. *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2608 (1993).

Audience Member:

Do you think that distinction is relevant?

Professor Martin A. Schwartz:

What seems to be critical is whether or not the prosecutors have sought a probable cause determination. I think that is the critical point in time, and this may prompt some prosecutors to seek probable cause determinations earlier on in the game.

Hon. George C. Pratt:

Professor Schweitzer,¹⁹² I see you have a microphone.

Audience Member:

I have a non-prosecutorial reaction to the *Buckley* case. It seems to me that fabrication of evidence, at least with certain crimes, would be one of the grossest scandals and miscarriages of justice if it led to the case being decided the wrong way. I am amused about the distinction between the investigatory and the prosecutorial functions here, and it strikes me that perhaps the reason that it is not such a controversial matter is that when it comes to alleged fabrication of expert evidence, many of us have a somewhat cynical view or skeptical view of the nature of expert testimony. In any event, I suppose my question is: What if the prosecutors had been accused of manufacturing physical evidence, is there any way to make that reprehensible and actionable in any stage of the proceeding and might the case come out differently?

Professor Martin A. Schwartz:

I think you have to evaluate it from the same perspective. It seems to me that the manufacturing of evidence is probably going

192. Professor Thomas Schweitzer is an Associate Professor at Touro College, Jacob D. Fuchsberg Law Center.

to be easier to characterize as investigatory, because it is harder to call it preparation for trial if what you are doing is trying to bring something into existence, in the first instance, that simply did not exist there before. So, I think the analysis is the same. What were they doing, were they acting as advocates or were they acting as detectives? I think it is going to be hard to conclude that they are acting as advocates when what they are doing is trying to create a piece of evidence that simply did not exist before.

Audience Member:

It strikes me then, if that is so, it shows the total inadequacy of the conceptional approach.

Professor Martin A. Schwartz:

Remember one thing, these are allegations in the complaint, they are not facts that have been resolved. Then, you know, it is very common for individuals, not only those who have been convicted, but also individuals who have just been put through the criminal process, to work out in their own minds that they have been subjected to this because of what those terrible prosecutors, witnesses, and trial judges did to them. And sometimes there is a factual basis for those allegations and sometimes there is more of a mental contrivance on the part of the individual.

