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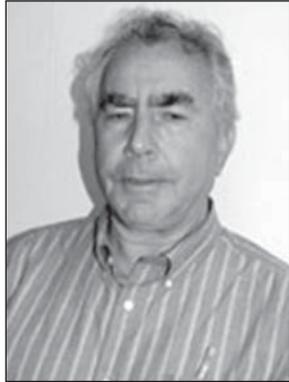
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Supreme Court Holds Grand Jury Witnesses Absolutely Immune from § 1983 Liability

By Martin A. Schwartz

Police officer perjury is a terrible blight on the criminal justice system. The issue was recently explored by Michelle Alexander in her op-ed article in the *New York Times*, "Why Police Lie Under Oath." The article quoted former San Francisco Police Commissioner Peter Keane's disturbing conclusion that "[p]olice officer perjury to justify illegal dope searches is commonplace[,] a routine way of doing business in courtrooms everywhere in America."¹ The problem is neither limited to police perjury to justify drug searches nor limited geographically. Ms. Alexander found that New York City police officers "engage in patterns of deceit in cases involving charges as minor as trespass."²



Police officer perjury compromises the integrity of the criminal justice system, and can have serious adverse consequences for criminal suspects and defendants, worst of all being wrongfully convicted and serving time for a crime the defendant did not commit. As Ms. Alexander so aptly put it, "[a]s a juror, whom are you likely to believe: the alleged criminal in an orange jumpsuit or two well-groomed police officers in uniforms who just swore to God they're telling the truth, the whole truth and nothing but."³

And yet, some three decades ago the United States Supreme Court in *Briscoe v. LaHue*⁴ held that police officers are absolutely immune from claims for money damages under 42 U.S.C. § 1983 for allegedly giving perjurious testimony at a criminal trial. Although § 1983 authorizes the assertion of federal constitutional claims against state and local officials, absolute immunity effectively deprives the § 1983 complainant of a meaningful remedy. Last term, the Supreme Court in *Rehberg v. Paulk*⁵ extended the absolute witness immunity recognized in *Briscoe v. LaHue* to grand jury witnesses. In a unanimous opinion written by Justice Samuel A. Alito, Jr., the Court in *Rehberg* held that grand jury witnesses are absolutely immune from § 1983 liability for their testimony, and even for conspiring to give false testimony.

Charles Rehberg, a CPA, sent anonymous faxes to the management of a hospital in Georgia, criticizing the hospital's management and operations. The district attorney's office then launched an investigation against

Rehberg, which, according to Rehberg, was undertaken as a favor to hospital officials. Rehberg was indicted in state court for, *inter alia*, assaulting a physician, burglary, and making harassing telephone calls. After all of the criminal charges were dismissed, Rehberg brought suit in federal district court under 42 U.S.C. § 1983 seeking money damages against James Paulk, the chief investigator in the local district attorney's office, in his personal capacity. The complaint alleged that Paulk conspired to present and presented false testimony to the grand jury against Rehberg, causing him to be indicted in violation of his constitutionally protected rights.

"Police officer perjury compromises the integrity of the criminal justice system, and can have serious adverse consequences for criminal suspects and defendants, worst of all being wrongfully convicted and serving time for a crime the defendant did not commit."

Section 1983 claims are generally assertable against state and local officials and municipalities,⁶ although not against states or state entities.⁷ A § 1983 plaintiff may seek money damages against a state or local official in her personal capacity based upon her allegedly unconstitutional conduct.⁸ A personal-capacity claim (also referred to as an individual-capacity claim) seeks a judgment for money damages payable out of the official's private funds. By contrast, an official-capacity claim against an official is tantamount to a claim against the governmental entity.⁹ For example, an official capacity claim against the Mayor of the City of New York is tantamount to a claim against the City. *Rehberg v. Paulk* concerns only personal-capacity claims.

Although § 1983 makes no mention of immunity from liability, United States Supreme Court precedent firmly establishes that state and local officials sued for money damages in their personal capacities may assert an immunity defense.¹⁰ Some officials sued under § 1983 are entitled to assert an absolute immunity, while others are entitled to assert qualified immunity. Generally speaking, officials who carry out judicial, prosecutorial and legislative functions are shielded by absolute immunity, while officials who carry out law enforcement and other executive functions are protected by

qualified immunity. As we will see, whether an official is entitled to assert an absolute immunity or qualified immunity depends on the nature of the function she carried out.

Absolute immunity shields an official from monetary liability even if she acted in a blatantly unconstitutional manner, and even if she acted maliciously or otherwise in bad faith.¹¹ Qualified immunity provides somewhat lesser protection, shielding an official from personal liability so long as she did not violate clearly established federal law.¹² Nevertheless, qualified immunity is a quite formidable defense, just not as formidable as absolute immunity. The Supreme Court in *Rehberg v. Paulk* had to decide whether Paulk's grand jury testimony, and his alleged participation in a conspiracy to give false testimony, were protected by absolute immunity. The Court held that Paulk was protected by absolute witness immunity for those actions.

The Court in *Rehberg* reiterated its approach for determining whether an official sued for damages under § 1983 is entitled to an absolute or qualified immunity. Because it is assumed that Congress was familiar with the common-law immunities in place when the original version of § 1983 was enacted in 1871, the Court first looks for "guidance" to those common law immunities.¹³ In other words, the Court does not simply make a "freewheeling" determination of whether recognition of an immunity defense is sound policy.¹⁴ On the other hand, the Court has not applied the common law immunities "mechanically," and has considered both developments in the law since 1871 as well as policy concerns underlying § 1983.¹⁵ The Court in *Rehberg* gave the following example. In 1871, it was common for criminal cases to be prosecuted by private parties who did not enjoy absolute immunity.¹⁶ Since 1871, the great majority of criminal offenses have, of course, been prosecuted by public prosecutors,¹⁷ and common-law courts afforded them absolute immunity from malicious prosecution and defamation claims. Even though the common-law in 1871 did not afford prosecutors absolute immunity, the Supreme Court has afforded them absolute immunity from § 1983 liability for carrying out their advocacy functions. In the seminal case of *Imbler v. Pachtman*,¹⁸ the Court held that prosecutors are absolutely immune for initiating and prosecuting a criminal case. Since *Imbler* was decided in 1976, an extensive body of Supreme Court and circuit court decisional law, guided by common-law concepts as well as policy considerations, has attempted to flesh out the scope of absolute prosecutorial immunity.¹⁹

The Court applies a "functional approach" under which the immunity to which a § 1983 defendant is entitled depends not upon the official's title, but upon the nature of the particular function at issue in the case at hand.²⁰ An official may thus be entitled to absolute

immunity for carrying out one function though qualified immunity for another. Prosecutors, for example, enjoy absolute immunity for carrying out their advocacy functions, though qualified immunity for their actions that are essentially investigatory or administrative in nature. The line between the two types of functions is sometimes difficult to discern.²¹

Although at common-law trial witnesses enjoyed immunity only from slander and libel claims,²² in *Briscoe v. LaHue*,²³ the Supreme Court recognized a much broader absolute immunity for trial witnesses sued under § 1983 that encompasses *any constitutional claim* based on the witness's testimony. The Court in *Briscoe* held that a police officer who gave allegedly perjurious testimony at a criminal trial was protected from § 1983 liability by absolute witness immunity. It reasoned that police officers should not testify with the lurking fear of monetary liability, and expressed concern that some officers might shade their testimony in favor of a potential § 1983 claimant because of that fear.²⁴ And, the Court did not want police officers diverting their energies from their police responsibilities to the defense of § 1983 claims based upon their testimony in a criminal trial.²⁵ These are legitimate reasons supporting absolute immunity for the trial testimony of police officers. The problem is that on the other side of the lawsuit there may be a § 1983 plaintiff who suffered a serious deprivation of constitutional rights because of perjurious police testimony, but is denied relief because of absolute immunity.

Nevertheless, the Court in *Rehberg v. Paulk* extended the absolute witness immunity recognized in *Briscoe v. LaHue* for trial testimony to law enforcement officer witnesses who testify before the grand jury. The Court found that the same justifications for granting absolute immunity for trial witnesses apply to grand jury witnesses. "In both contexts, a witness's fear of retaliatory litigation may deprive the tribunal of critical evidence. And, in neither context is the deterrent of potential civil liability needed to prevent perjurious testimony," because in each instance perjury is subject to criminal prosecution.²⁶ The Court overlooked the reality that perjury prosecutions are fairly uncommon.

The Court in *Rehberg* held that absolute immunity protects not only the in-court testimony of grand jury witnesses, but also witness preparation and even alleged conspiracies to give perjured testimony. The Court was concerned that were the rule "otherwise 'a criminal defendant turned civil plaintiff could simply reframe a claim to attack the preparation instead of the absolutely immune actions themselves.'"²⁷ In the "vast majority" of claims against grand jury witnesses, the witness and prosecutor engaged in preparatory activity, such as preliminary discussions in which the witness related the "substance of her intended testimony."²⁸ Failure to immunize an alleged conspiracy to

give false testimony and trial preparation would thus make it easy for § 1983 claimants to evade absolute witness immunity. The extension of absolute immunity to witness preparation and conspiracies effectively put the Court's "stamp of approval" on the majority view in the circuits that absolute witness immunity encompasses witness preparation and conspiracies, and effectively overturned the Second Circuit's minority view that absolute witness immunity was limited to the testimony itself and did not encompass either conspiracies to give false testimony or witness preparation.²⁹

The Court perhaps attempted to soften the immunity blow a bit with ambiguous footnote one, stating that the extension of absolute immunity to conspiracies to give false testimony and witness preparation "[o]f course does not mean that absolute immunity extends to *all* activity engaged in by a witness outside the grand jury room."³⁰ The Court offered as examples decisions in which it has "accorded only qualified immunity to law enforcement officials who falsify affidavits"³¹ and who "fabricate evidence concerning an unsolved crime."³²

Brief ambiguous "of course" footnotes can "of course" muddy the waters and cause great mischief. Section 1983 plaintiffs' attorneys will undoubtedly rely on footnote one in their attempts to escape the clutches of absolute immunity, while defendants' counsel will attempt to distinguish footnote one away. In the author's view the footnote suggests that the officer's out-of-court conduct will not be protected by absolute witness immunity if it was too far removed from her in-court testimony. Of course, how far is too far, and whether or not the officer's conduct constitutes witness preparation, will have to be determined on a case-by-case basis.

In a final attempt to avoid the clutches of absolute immunity, *Rehberg* argued that Paulk was not protected by absolute immunity because he was a "complaining witness." *Rehberg* relied upon Supreme Court precedent to support the conclusion that law enforcement officials who submitted affidavits in support of applications for arrest warrants were not entitled to absolute immunity because they were "complaining witnesses."³³ Prior to its decision in *Rehberg v. Paulk*, the Court had not provided a workable definition of "complaining witness." *Rehberg* resolved that a grand jury witness is not a "complaining witness" because at common law in 1871 a "complaining witness" referred to an individual who procured an arrest and initiated a criminal prosecution;³⁴ a witness who only testified before a grand jury was not a complaining witness. In fact, "it is almost always a prosecutor who is responsible for the decision to present a case to a grand jury...."³⁵ The term "complaining witness" is misleading, a "misnomer," because a complaining witness need not testify at all.³⁶ The Court thus ruled that even

though a law enforcement officer who testifies before the grand jury or at trial may be an important witness, he is not a complaining witness.³⁷

Most states that do not use the grand jury system provide a preliminary hearing procedure.³⁸ The Court in *Rehberg* cited, with apparent approval, circuit court decisions holding that witnesses at a preliminary hearing are entitled to the same absolute immunity granted grand jury witnesses.³⁹ Although this part of the Court's decision is dicta, it follows logically from the rationale of the Court's extension of absolute immunity to grand jury testimony.

The Court's decision in *Rehberg v. Paulk* does not resolve the immunity to which other witnesses are entitled, for example, witnesses in civil litigation, before administrative agencies, and in arbitration proceedings. One reason these issues do not arise with great frequency in § 1983 litigation is because a suable § 1983 defendant must be a person who acted under color of state law. Law enforcement officers who testify pursuant to their official responsibilities clearly act under color of state law. Private witnesses clearly do not, unless they conspired with a public official.

The decision in *Rehberg v. Paulk* is strictly limited to the issue of immunity from § 1983 liability enjoyed by grand jury witnesses. The decision does not deal with the type of conduct engaged in by law enforcement officials that may be actionable as a constitutional wrong under § 1983. Nor did the Court deal in *Rehberg* with the right of a § 1983 plaintiff to obtain disclosure of grand jury testimony. Although the Court referred to the importance of grand jury secrecy,⁴⁰ and in passing stated that absolute witness immunity "may not be circumvented...by using evidence of the witness' testimony to support any other § 1983 claim concerning the initiation or maintenance of a prosecution,"⁴¹ the Court did not decide when disclosure of grand jury testimony may be ordered in a § 1983 action.⁴²

To summarize the Supreme Court's important rulings in *Rehberg v. Paulk*:

1. Grand jury witnesses are protected by absolute witness immunity;
2. Absolute witness immunity shields not only the testimony itself, but also an alleged conspiracy to give false testimony and trial preparation;
3. Via strong dictum, witnesses who testify at preliminary hearings are shielded by absolute witness immunity; and
4. Although "complaining witnesses" do not enjoy absolute immunity, merely testifying before the grand jury does not render a witness a "complaining witness."

Endnotes

1. Michelle Alexander, *Why Police Lie Under Oath*, N.Y. TIMES, Feb. 3, 2013, at 4, available at <http://www.nytimes.com/2013/02/03/opinion/sunday/why-police-officers-lie-under-oath.html>. Peter Keane is presently a law professor at Golden State University Law School.
2. Alexander, *supra* note 1. See, e.g., *People v. Perino*, 19 N.Y.3d 85, 90, 945 N.Y.S.2d 602, 605 (2012) (affirming conviction for perjury of New York City police officer).
3. Alexander, *supra* note 1.
4. 460 U.S. 325, 326 (1983).
5. 132 S. Ct. 1497, 1500 (2012).
6. Municipalities are not subject to liability on the basis of respondeat superior, but only when the violation of the plaintiff's federally protected rights is attributable to the enforcement of a municipal policy of practice. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978).
7. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (state officials liable in personal capacity); *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 691 (1978) (municipal entities may be sued under § 1983).
8. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 68 (1989).
9. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).
10. See, e.g., *Rehberg v. Paulk*, 132 S. Ct. 1497, 1502 (2012).
11. See, e.g., *Shmueli v. City of N.Y.*, 424 F.3d 231, 237-38 (2d Cir. 2005) (prosecutorial immunity).
12. See, e.g., *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012).
13. *Rehberg*, 132 S. Ct. at 1502.
14. *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 342 (1986)).
15. *Id.* at 1503-04.
16. *Id.*
17. *Id.* at 1504.
18. 424 U.S. 409 (1976).
19. See 1 Martin A. Schwartz, Section 1983 Litigation § 9.05 (4th ed. 2012).
20. *Forrester v. White*, 484 U.S. 219, 224 (1988). See also *Burns v. Reed*, 500 U.S. 478, 486 (1991).
21. See Martin A. Schwartz, *Developments in Prosecutorial Immunity*, N.Y.L.J. March 5, 2013, p. 3 col. 1.
22. *Rehberg*, 132 S. Ct. at 1505.
23. 460 U.S. 325 (1983).
24. *Id.* at 333.
25. *Id.* at 343.
26. *Rehberg*, 132 S. Ct. at 1505. Perjury before a grand jury, like perjury at trial, is a serious criminal offense. *Id.*
27. *Id.* at 1506 (quoting *Buckley v. Fitzsimmons*, 509 U.S. 259, 283 (1993) (Kennedy, J., concurring in part and dissenting in part)).
28. *Id.* at 1506-07.
29. *San Filippo v. United States*, 737 F. 2d 246, 255 (2d Cir. 1984), cert. denied, 470 U.S. 1035 (1985). *Accord, Dory v. Ryan*, 25 F. 2d 80, 81 (2d Cir. 1994).
30. *Rehberg*, 132 S. Ct. at 1507 n.1 (emphasis added).
31. *Id.* (citing *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997) and *Malley v. Briggs*, 475 U.S. 335, 340-45 (1986)) (dictum).
32. *Id.* (citing *Buckley v. Fitzsimmons*, 509 U. S. 259, 272-76 (1993)).
33. *Id.* (citing *Malley*, 475 U.S. at 340-41 and *Kalina*, 522 U.S. at 131).
34. *Id.* at 1507 (citing *Kalina*, 522 U.S. at 131).
35. *Id.* at 1508.
36. *Id.* at 1507.
37. The Court in *Rehberg* said that it would be anomalous to permit a police officer who testifies before the grand jury to be sued for maliciously procuring an unjust conviction when it is the prosecutor, who is shielded by absolute immunity, who is responsible for the decision to prosecute.
38. The Fifth Amendment right to grand jury indictment in "capital and other infamous cases" has not been incorporated into the Fourteenth Amendment and thus does not apply to the states. *Hurtado v. California*, 110 U.S. 516, 524 (1884).
39. 132 S. Ct. at 1510 (citing *Brice v. Nkaru*, 220 F.3d 233, 239, n. 6 (4th Cir. 2000); *Curtis v. Bembenek*, 48 F.3d 281, 284-85 (7th Cir. 1995)).
40. *Rehberg*, 132 S. Ct. at 1509 (referring to fact that allowing civil actions against grand jury witnesses risks "subversion of grand jury secrecy").
41. *Rehberg*, 132 S. Ct. at 1506 (emphasis supplied).
42. For an analysis of the impact of *Rehberg* on disclosure of grand jury testimony, see *Marshall v. Randall*, 719 F.3d 113, 115-18 (2d Cir. 2013) (*Rehberg* does not preclude use of grand jury testimony to impeach credibility of defendant officer). See also *Frederick v. City of N.Y.*, No. 11 Civ. 469 (JPO), 2012 WL 4947806 at *3 (S.D.N.Y. Oct. 11, 2012) (interpreting *Rehberg* as prohibiting use of grand jury testimony only against testifying witness, and not against third parties); *Maldonado v. City of N.Y.*, No. 11 Civ. 3514(PKC)(HPB), 2012 WL 2359836 at *4 (S.D.N.Y. June 21, 2012). On the issue of the privilege for grand jury testimony and when the privilege may be overcome, see Schwartz, Section 1983 Litigation: Federal Evidence § 8.04 (5th ed. 2012).

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