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Fourth Amendment Symposium: The Supreme Court and Local Government Law: The 1988-89 Term

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SECTION 1983

Judge Leon Lazer:

Let me move on to subject number one for today, section 1983.¹ We are going to have a distinguished personage in our county, state, and nation moderate that program for us. Many in the judicial world believe that Judge George Pratt is one of the leading judicial figures in the country. He is, I think you should appreciate, a former municipal lawyer. That to me, of course, means the salt of the earth. He is a graduate of Yale Law School and a former law clerk to Judge Froessel in the New York State Court of Appeals. He has served as Village Attorney of Westbury, Roslyn Harbor, and Brookville, as well as Special Counsel to the Board of Supervisors of Nassau County and the towns of Hempstead, North Hempstead, and Babylon.

Judge Pratt became a district court judge in 1976 and, in 1982, the President exercised a great deal of wisdom in appointing him to the Second Circuit. He also teaches at Hofstra, St. John's, and here at Touro. So, it is a great pleasure and a privilege to have with us Judge George Pratt.

Judge George Pratt:

Thank you, Leon. Good morning. The salt of the earth—I always wondered about that expression. As I recall, Julius Caesar spread salt over Carthage so that nothing would grow there for a hundred years. I do not know if that intimates what I did to municipal law.

If you will look at the program of what is to be offered today, first is the introduction; the second part deals with section 1983 cases. Then the program goes on with the fourth amendment, job discrimination, affirmative action, and first amendment coverage. But they are all section 1983 cases. The whole show here is encompassed within section 1983.²

1. 42 U.S.C. § 1983 (1982).

2. 42 U.S.C. § 1983 provides:

I tell my students in the civil rights litigation seminar that I teach here at Touro each year that the section 1983 remedy means that you *can* fight city hall! You might say today's seminar, focusing upon the 1989 Term of the Supreme Court, shows city hall can fight back, too.

As you know, there are constant struggles going on in the federal courts regarding the various problems arising under the federal constitution. Under section 1983, they range from the basic elements (including state action, what makes up a constitutional claim, and a number of procedural problems with these lawsuits) all the way up to attorney fee awards and punitive damages. There was a significant punitive damage decision this Term,³ although we probably will not get to it. In the employment discrimination area, problems concern the use of statistics, the mixed motive problems and impact cases, and affirmative action decrees, as well as the shifting burdens of proof, which the Supreme Court has created and tampered with in the past few years.

One cannot help but wonder where the Supreme Court is going. Do we have a Reagan-appointed Court that is hell-bent on turning back the clock on civil rights, or is that too simplistic a view of what is happening? As we work through the cases today, I ask you to think, not only of what the Supreme Court did in these cases, but think also of what they could have done but did not do. It may help us to gain some insight on the current focus of this mass of litigation.

Our first insight will come from Professor Martin Schwartz. Marty is a professor here at Touro. He graduated from Brook-

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Id.

3. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

lyn Law School and has practiced in this field some twenty years. He is co-author of the best book in the area, *Section 1983 Litigation: Claims, Defenses and Fees*.⁴ It is the only book on this subject that pierces through the surface of the cases and seeks to arrive at a constructive theory of what is happening. I am sure many of you have noticed that he authors a monthly column in the New York Law Journal entitled "Public Interest Law." That is just a euphemism for section 1983 cases, mostly those from the Supreme Court.

It is well worth reading his collected writings. I do not think that there is anyone better qualified to speak on the subject than Professor Schwartz. He is going to focus on those cases that make up the largest single group of section 1983 litigation: police brutality cases, the so-called excessive force problem.

Martin Schwartz:

Good morning. Thank you, Judge Pratt. Several of the section 1983⁵ cases that were decided by the Supreme Court deal with rather fundamental aspects of section 1983 police brutality litigation. They run a rather broad range, including the constitutional standards that govern the litigation of these claims, the question of municipal liability based upon inadequate training, and the right to recover attorney's fees. I believe it is rather significant that, in a Term in which the Supreme Court was widely criticized for cutting back on civil rights, the Supreme Court preserved and perhaps even facilitated the section 1983 remedy for brutality claims.

To be sure, the Court's decisions work important changes in terms of the day-to-day ground rules as to how these cases will now be litigated. But, in working these changes, the Court has preserved the section 1983 remedy, at least for cases of egregious, or hardcore, brutality.

Now, to understand the significance of the changes, let me briefly give some background. Prior to last Term, the over-

4. M. SCHWARTZ & J. KIRKLIN, *SECTION 1983 LITIGATION: CLAIMS, DEFENSES, AND FEES* (1986 & Supp. 1989).

5. For text of 42 U.S.C. § 1983 (1982), see *supra* note 2.

whelming number of section 1983 brutality claims were litigated under a "shocks-the-conscience" substantive due process test, which first was formulated in 1973 by Judge Friendly in his well-known opinion, *Johnson v. Glick*.⁶ Under the Friendly formulation, to determine whether the use of force was conscience-shocking, it was necessary for the trier of fact to balance such factors as the need for the force that was employed, the extent of the injury that was inflicted, and whether the use of force was in good faith for legitimate law enforcement purposes or was utilized in a sadistic and malicious fashion.⁷ This last inquiry required the trier of fact to make a subjective evaluation. Because of its subjective nature,⁸ this shocks-the-conscience test has been somewhat troublesome to judges, litigators, and professors of the law. One leading litigator in this area, John Williams,⁹ argues that the real question under this test is whether the use of force is sufficiently egregious or outrageous.¹⁰ That may be considered an alternative description of shocks-the-conscience. Of course, when we think of it that way—we obviously all have different consciences—we get shocked differently and we get shocked differently at different times. The highly subjective nature of this test often makes it quite difficult to determine whether we are dealing with only a common law tort as opposed to a constitutional tort. It is not always easy to tell whether the use of force by a law enforcement officer crosses this very amorphous shocks-the-conscience border that takes the case into the constitutional realm. Last Term's decision in *Graham v. Connor*¹¹ all but bans the

6. 481 F.2d 1028 (2d Cir.), cert. denied, 414 U.S. 1033 (1973).

7. *Id.* at 1033.

8. See generally M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 3.3.

9. John Williams is an attorney with the law firm of Williams & Wise in New Haven, Connecticut, whose practice focuses principally on section 1983 litigation.

10. When "shocks-the-conscience" was a viable standard, John Williams explained that, regardless of what test one chooses to apply, "a jury with an unshocked conscience is unlikely to return a plaintiff's verdict. This is the practical reality which must be emphasized by practitioners both in selecting cases and in preparing them for trial." Williams, *A Practitioner's Guide to Representing Plaintiffs in Section 1983 Litigation*, reprinted in G. PRATT & M. SCHWARTZ, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEYS' FEES 1987: CURRENT DEVELOPMENTS 39, 44 (336 Practising Law Institute). See also *infra* note 14.

11. 109 S. Ct. 1865 (1989).

shocks-the-conscience test from the world of section 1983 litigation, and, I suppose, we are not going to hear from shocks-the-conscience too often in future section 1983 litigation.

In *Graham*, the Court held, somewhat broadly, that all claims of excessive force by governmental officials occurring in the course of an arrest, an investigatory stop, or, as the Court said, "other seizure" are now to be evaluated under a fourth amendment objective reasonableness test rather than under the substantive due process shocks-the-conscience theory.¹² And, what has taken place is that the fourth amendment, in the contexts of the arrest, the investigatory search, and other seizures, turns out to preempt the substantive due process claim. In these contexts, substantive due process simply is no longer available.¹³ The Court was very careful in stressing the objective nature of the test, stating that now, under the fourth amendment, the constitutional question should be evaluated from the perspective of a reasonable police officer on the scene. In evaluating reasonableness, the trier of fact should consider such factors as the severity of the crime that the suspect was allegedly involved in, whether the suspect was armed, whether the suspect presented an immediate threat to the safety of the officer or to others, and whether the suspect was attempting to resist arrest.¹⁴ The Court also indicated that, in making this reasonableness evaluation, the evaluation should allow for the fact that police officers often have to make difficult, split-second determinations on the spot.¹⁵ The Court explicitly indicated that the police officer's judgment in these situations should not be easily second-guessed.¹⁶ At the same time, the Court also stressed that the officer's good or bad intentions now

12. *Id.* at 1871.

13. *See id.*

14. *Id.* at 1871-72. *But see* Williams, *A Practitioner's Guide to Representing Plaintiffs in Section 1983 Litigation*, reprinted in G. PRATT & M. SCHWARTZ, SECTION 1983 CIVIL RIGHTS LITIGATION AND ATTORNEYS' FEES 1989: CURRENT DEVELOPMENTS 89, 123 (380 Practising Law Institute) ("Although the 'shocks the conscience' test is now consigned to the ashbin of history, it remains the everyday reality of litigation that a judge or jury with an unshocked conscience is unlikely to return much of a verdict in favor of any plaintiff.").

15. *Graham*, 109 S. Ct. at 1872.

16. *Id.*

are irrelevant in these contexts.¹⁷ They simply are not at issue. We do not care what is in the officer's mind. So, an officer's bad intentions will not turn an objectively reasonable use of force into a fourth amendment violation.¹⁸ Conversely, an officer's good intentions would not make an objectively unreasonable use of force constitutional.¹⁹

Now, just to map out the whole picture, the Court referred to its prior decisions and stated that not all claims of excessive force are to be litigated under a fourth amendment objective reasonableness standard.²⁰ The fourth amendment will apply to the use of force during arrests, investigatory stops, and other seizures.²¹ But, in dealing with a claim by a pretrial detainee, the Court said that the test is a due process punishment standard; that the use of force amounts to impermissible punishment—punishment not being permissible against a detainee.²² At the other extreme, in dealing with the use of force against a convicted prisoner, the appropriate constitutional standard is the eighth amendment—cruel and unusual punishment—a clause which does bring into play the officer's state of mind.²³ The Court left open whether the fourth amendment applies after the suspect is arrested: between the moment of arrest and the time that the suspect is taken into detention.²⁴

There are two schools of thought on this question in the lower courts. Some judges have taken the position that the seizure continues throughout the detention.²⁵ If that is true, it means that the way the suspect is handled must be objectively reasonable throughout the detention period. There are other circuit court judges who have said that the seizure does not continue, but ends at the point that the individual is taken into custody; at that point, the fourth amendment no longer applies,

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 1870.

21. *Id.* at 1871.

22. *Id.* at 1871 n.10. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 3.4 (Supp. 1989).

23. *Graham*, 109 S. Ct. at 1872-73.

24. *Id.* at 1871 n.10.

25. M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 3.3 (Supp. 1989).

but perhaps the due process clause will continue to have application in this situation.²⁶

Why the change of approach in *Graham*? Why has the Court chosen this fourth amendment objective reasonableness standard? Well, to some extent, the decision in *Graham* was foreshadowed by a decision in 1985, *Tennessee v. Garner*,²⁷ which had applied the fourth amendment to a claim that deadly force was used by the police against a fleeing felon.²⁸ *Graham* can be seen as a natural outgrowth of *Garner*. Of course, that simply raises the question of why the fourth amendment test was utilized in *Garner*. I see two reasons for the Court's shift to the fourth amendment approach. First, intellectually, the fourth amendment is more appealing to the Court than a substantive due process standard. After all, the fourth amendment provides textual support for a constitutional limitation against unreasonable use of force by government;²⁹ it is right there in the language of the Constitution itself. Contrast that to the very notion of substantive due process, which is a somewhat amorphous notion. It is certainly a judge-created doctrine, and, to some extent, the whole notion of substantive due process is a somewhat embattled notion.

The second reason, and this is somewhat speculative on my part, is that the Court's movement to the objective standard represents a hope on the part of the Court that more of these cases can be resolved at the summary judgment stage, therefore avoiding the necessity for a number of these cases to be tried. I have seen that theme in other section 1983 cases decided by the Court in recent years. For example, the Court attempted to make good-faith, qualified immunity an objective

26. *Id.*

27. 471 U.S. 1 (1985).

28. *Id.* at 7-8.

29. U.S. CONST. amend. IV provides:

The right of people to be secure in their persons, 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.

Id.

test.³⁰ But, I think the problem is that it has not worked for the immunity issue, and it is not likely to work for the *Graham* standard. The reason is that, invariably, at the heart of all of these brutality cases, there is a major controversy between the parties over what took place. The police officer has one version, and the individual alleging the section 1983 claim has a completely different version. Since a factual controversy exists, many cases are forced to trial, regardless of whether you have a subjective test or an objective test, and, I think, the facts at issue are going to continue to require trials.

The Court also utilized the fourth amendment in a second section 1983 case involving the use of force, *Brower v. County of Inyo*,³¹ which is affectionately referred to as the "blind roadblock" case. The police in that case had strategically placed a roadblock around the bend of the road—strategically placed so that the motorist, a fleeing suspect, would not be able to see it as he came around the turn.³² And, as he came around the turn, for good measure, the police officers, who had their patrol car at the roadblock, focused the lights of the patrol car at the oncoming driver.³³ The oncoming driver crashed into the roadblock and was killed instantly.³⁴

The holding of the Court was that the utilization of the roadblock under those circumstances constituted a seizure within the meaning of the fourth amendment, which is to be evaluated under an objective reasonableness standard.³⁵ Justice Scalia wrote a rather brief opinion for a unanimous Court that certainly showed his professorial background because the opinion, especially given its brevity, contained an unusually large number of hypothetical examples.³⁶ This is what I call Justice Scalia roaming into hypothetical heaven. But the essential distinction is this—there are two major types of cases. One is the

30. See *Harlow v. Fitzgerald*, 457 U.S. 800, 815-16 (1982). See generally M. SCHWARTZ & J. KIRKLIN, *supra* note 4, §§ 7.11-7.14 (Supp. 1989).

31. 109 S. Ct. 1378 (1989).

32. *Id.* at 1380.

33. *Id.*

34. *Id.*

35. *Id.* at 1383.

36. *Id.* at 1381-82.

case where the law enforcement official intentionally selects an instrumentality to gain physical control over the individual, and the instrumentality accomplishes that result, which is what happened in *Brower*.³⁷ In that situation, the fourth amendment comes into play. The fact that an individual such as Brower had the opportunity to stop his car at any moment, the Court says, is of no consequence.³⁸ On the other hand, if the control over the individual occurs, not by utilization of the instrumentality selected by the government but accidentally—a prime example is where a police officer is pursuing a fleeing motorist, and, in the course of the pursuit, the fleeing motorist's car goes out of control, the fleeing motorist crashes and, indeed, is stopped—then, in that situation, the individual was not stopped by the instrumentality selected by the government in its attempt to obtain physical control over the individual.³⁹ Therefore, the fourth amendment does not apply since the individual was stopped by his own conduct: his own loss of control of his automobile.⁴⁰

Now, let me move to the question of municipal liability. Since 1978, when it decided *Monell v. Department of Social Services*,⁴¹ the Supreme Court has provided little guidance on the question of what types of municipal policies may give rise to section 1983 municipal liability. One of the recurring questions has been whether deficient training and supervision could give rise to municipal liability. The lower court decisions were in such a state of confusion that some called them a conceptual disaster area. The courts differed, for example, over whether negligence, gross negligence, or deliberate indifference would be sufficient to impose municipal liability.⁴² These are, obviously, hard standards to define. One court said, in effect, we really cannot define them.⁴³ Another court said that the "dif-

37. *Id.* at 1383.

38. *Id.* at 1380.

39. *Id.* at 1380-81.

40. M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 3.4 (Supp. 1989).

41. 436 U.S. 658 (1978).

42. See *City of Canton v. Harris*, 109 S. Ct. 1197, 1204 nn.7-8 (1989).

43. *Archie v. City of Racine*, 847 F.2d 1211, 1219 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1338 (1989).

ference between a fool, a damn fool, and a God-damned fool" is the best way to try to distinguish between these standards.⁴⁴

Now, eleven years after *Monell*, the Court decided *City of Canton v. Harris*,⁴⁵ rendering a unanimous decision on this issue.⁴⁶ It is written in a rather matter-of-fact style. I call it the "no-sweat" decision—you know, everybody was in a state of confusion for eleven years and now the Supreme Court says the whole thing was rather obvious all along. Well, what *City of Canton* does is to select a rather tough standard for plaintiffs to meet, rejecting a lesser gross negligence standard.⁴⁷ For a plaintiff to recover against the municipality based upon a claim of inadequate training, the plaintiff has to show that the municipality was deliberately indifferent in the selection of its training policy.⁴⁸ Again, the Court said that municipalities should not be easily second-guessed as to the wisdom of their training policies.⁴⁹ Also, the Court held that the inadequate training must be very closely linked to the deprivation of the plaintiff's federally protected rights.⁵⁰

Although I think that *City of Canton* does, in fact, establish a difficult standard for plaintiff recovery, I also think that the fact that the United States Supreme Court has preserved the remedy against municipalities is of social importance because the hope, after all, is this: if municipalities are required to answer for inadequate training, they will shape up their training programs, which will lead to fewer constitutional violations by the police.

One municipal liability question that comes up frequently is the question of when a single decision by a high official is equivalent to municipal policy. It is very difficult for courts to

44. *Stanulonis v. Marzec*, 649 F. Supp. 1536, 1543 (D. Conn. 1986) (citations omitted).

45. 109 S. Ct. 1197 (1989).

46. *Id.* at 1200. Justices O'Connor, Scalia, and Kennedy concurred, saying that "a § 1983 plaintiff pressing a 'failure to train' claim must prove that the lack of training was the 'cause' of the constitutional injury." *Id.* at 1207 (O'Connor, J., concurring in part and dissenting in part).

47. 109 S. Ct. at 1206.

48. *Id.* at 1205.

49. *Id.*

50. *Id.*

distinguish between the exercise of discretion on the one hand and final policy-making decisions on the other. I want to call your attention to the case of *Jett v. Dallas Independent School District*.⁵¹ There are several important holdings in that case, but among the holdings are analyses of the function of the trial judge and jury on this question of whether a high-level official is a policy-maker and of the dividing up of the functions.⁵² The Court said that the trial judge should determine, as a matter of state law, whether the official was given final policy-making authority.⁵³ If the judge finds, as a matter of state law, that the official was given final policy-making authority, it is then for the jury to determine whether that decision made by the official was the cause of the violation of plaintiff's federal rights.⁵⁴

In addition to the decisions I have mentioned, there are two non-section 1983 cases that the Court rendered under the federal rules of evidence. One dealt with the admissibility of investigatory reports. I think it is going to be important to section 1983 brutality litigation that, in the *Beech Aircraft Corporation v. Rainey*⁵⁵ decision, the Court held that investigatory reports containing factual findings may be admissible even if they contain conclusions or opinions.⁵⁶ The Court also held, in *Green v. Bock Laundry Machine Co.*,⁵⁷ that all felony convictions could now be utilized to impeach the credibility of a witness in a civil case.⁵⁸ Again, that case is not a section 1983 case, but I think it has obvious direct applications to section 1983 litigation. Due to the factual nature of these claims, both the plaintiff and the officer involved almost always will be called upon to testify as to their versions of the encounter. It is likely that at least some complaining parties will have prior felony convictions, and, therefore, under *Green*, plaintiff's testimony will be available for impeachment. By contrast, however,

51. 109 S. Ct. 2702 (1989).

52. *Id.* at 2723.

53. *Id.*

54. *Id.*

55. 109 S. Ct. 439 (1988).

56. *Id.* at 453.

57. 109 S. Ct. 1981 (1989).

58. *See id.* at 1985.

the officer involved is unlikely to have such prior convictions, leaving his testimony free from attack, while placing the plaintiff's otherwise valid claim in jeopardy.

There were four important attorney fee decisions last term. I think three of the holdings have potential importance in brutality litigation.⁵⁹ I will run through them very quickly. The Court, in *Texas State Teachers Association v. Garland Independent School District*,⁶⁰ gave a generous definition to the term "prevailing party," saying that the prevailing plaintiff has to succeed only on any significant claim,⁶¹ thus rejecting the more stringent "central issue" test that had been applied by the Fifth and Eleventh Circuits.⁶² In *Blanchard v. Bergeron*,⁶³ the Court dealt with the interplay between contingent fee agreements and the statutory fee award under section 1988, holding that the fee that counsel is entitled to under a contingent fee agreement is not the maximum fee that may be recovered under the statute.⁶⁴ This is another way of saying that the defendant's fee liability does not depend on the amount of fees that are recoverable under the contingency fee agreement. The defendant's liability may be greater under the statute, or, for that matter, it may be less. Finally, in *Missouri v. Jenkins*,⁶⁵ the Court held that the fee award may include compensation for services rendered by paralegals, law clerks, and law graduates.⁶⁶ The computations normally would be at market rates, not at cost, and the Court approved rates at \$35 to \$50 per hour.⁶⁷

59. The fourth decision came in *Independent Fed'n of Flight Attendants v. Zipes*, 109 S. Ct. 2723 (1989) (allowing district courts to charge Title VII attorney fees against intervenors when the intervenors' claims were without merit).

60. 109 S. Ct. 1486 (1989).

61. *Id.* at 1492.

62. *Id.* at 1491. Under the central issue test, the prevailing party is the "plaintiff [that] prevailed on the central issue by acquiring the primary relief sought." *Id.* (citation omitted).

63. 109 S. Ct. 939 (1989).

64. *Id.* at 944.

65. 109 S. Ct. 2463 (1989).

66. *See id.* at 2470.

67. *Id.* at 2470, 2472.

Of course, I mentioned the fees last, but certainly not least for those who litigate section 1983 brutality cases. In one Supreme Court case, the fee award far exceeded the compensatory damages that were recovered.⁶⁸ The compensatory damages were around \$33,000 and the fee award was \$245,000.⁶⁹ I think that, from a societal standpoint, the Court does look at the preservation of the fee remedy as one in the arsenal of plaintiff's section 1983 remedies. I think that the preservation of that remedy provides an important incentive to both police officers and municipalities to confine their conduct to the Constitution.

Thank you very much.

Judge George Pratt:

Marty, thank you very much. Next, we will go on to Professor Leon Friedman of Hofstra Law School. Leon is a Harvard Law graduate and is active in the ACLU. He is an outspoken and clear-thinking authority in this field. He is so good, in fact, that the Federal Judicial Center hires him to teach federal judges about constitutional law, civil rights, and civil rights litigation.

Leon Friedman:

Pete Rose dominated the legal scene in 1989, so I think I'll point out some batting averages. Over the past few years, the Supreme Court has run between ten and twenty section 1983 cases each Term. Last Term there were over twenty section 1983 cases. If you break it up in terms of whether the government or the individual won, they are both batting about .500. It is a little complicated because the question arises of what to do with cases involving lawyers. Is that the individual winning or the lawyer? The lawyers went four-for-four last Term. They won all of their cases, including the counsel fee cases⁷⁰ and, most important, the case on the question of whether a federal

68. *City of Riverside v. Rivera*, 477 U.S. 561 (1986).

69. *Id.* at 565.

70. *See, e.g., Texas State Teachers Ass'n v. Garland Indep. School Dist.*, 109 S. Ct. 1486 (1989).

judge can order you to take a case under section 1915 of the Judiciary Code.⁷¹

A judge may request that you take a civil rights case where the lawyer or the individual cannot afford it. A judge out in Iowa requested Mr. Mallard to take such a case, and Mr. Mallard respectfully declined the request.⁷² Then the judge said: You do not understand, I am *requesting* you to take the case. Mallard was quite stubborn and apparently had said no once too often. Mallard requested a mandamus from the Eighth Circuit to review the judge's order appointing him, and that case went to the Supreme Court. It was decided five-to-four in Mallard's favor, a close case in which the Court said a request is a request.⁷³ Therefore, you do not have to worry about calls in the middle of the night about some case that a judge wants you to handle.

Putting that aside, there were two fourth amendment cases that were quite significant wins for the individual. If I could be a little more cynical than Marty Schwartz about why *Graham v. Connor*⁷⁴ came down, I think the Court is translating a lot of these police brutality cases into fourth amendment terms because they are looking to knock out a lot of procedural due process cases under *Parratt v. Taylor*.⁷⁵ At some point, the Court is going to say that a procedural due process violation should be heard in state court rather than in federal court, which is an extension of the *Parratt* alternate state remedy approach.⁷⁶ But, before the Court can do that, it must clear out the more obvious fourth amendment cases and say that these

71. See *Mallard v. United States Dist. Court*, 109 S. Ct. 1814 (1989).

72. *Id.* at 1817.

73. *Id.* at 1823.

74. 109 S. Ct. 1865 (1989). For remarks by Professor Schwartz, see *supra* notes 11-30 and accompanying text.

75. 451 U.S. 527 (1981).

76. In *Parratt*, the Supreme Court ruled that, when a state employee's random and unauthorized conduct negligently deprives an individual of a protected property interest, that person will have no cause of action in federal court if the state provides a meaningful post-deprivation remedy. *Id.* at 535-44. This principle was extended to intentional random and unauthorized property deprivations in *Hudson v. Palmer*, 468 U.S. 517 (1984).

Later Supreme Court case law overruled that part of *Parratt* permitting negligent conduct to implicate the due process clause of the fourteenth amendment. Davidson

are fourth amendment or substantive due process violations. Then, when they close the door on procedural due process, some of the more sympathetic cases already will be inside.

But, that is a cynical view of why the cases end up the way they do. You have to ask yourself why, if you shoot and kill somebody, it is a seizure; but, if you hit him so hard that he cannot walk, that is not a seizure. I thought that either one was punishment without due process of law. However, the Court says a seizure is a *meaningful* interference with your freedom of movement.⁷⁷ If you are shot dead, then you are not going to move anymore.

Now, a little later on we will hear about the employment discrimination cases. In that area, the outcome was not a mixed bag. There were some sixteen cases involving a conflict between an employer and an employee, and, in those sixteen cases, there were only two cases in which the employee won.⁷⁸ So, cases such as *Wards Cove Packing Co. v. Atonio*,⁷⁹ *Patterson v. McLean Credit Union*,⁸⁰ and *Jett v. Dallas Independent School District*⁸¹ are quite significant in terms of changing the legal landscape and making it much more difficult for an employee to succeed under Title VII,⁸² under age discrimination,⁸³ and under various employee protection laws.⁸⁴

Section 1983, as I said, was a mixed bag. Let me go over a couple of the procedural cases. There were two statute of limitations cases and the Supreme Court, in both of those cases, found in favor of the claimant. Some states have dual statutes of limitation. A few years ago, in a case called *Wilson v. Garcia*,⁸⁵ the Supreme Court said that the state statute of limita-

v. Cannon, 474 U.S. 344, 347-48 (1986); *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

77. See *Graham*, 109 S. Ct. at 1871 n.10.

78. See *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989); *Frazee v. Illinois Dep't of Employment Sec.*, 109 S. Ct. 1514 (1989).

79. 109 S. Ct. 2115 (1989).

80. 109 S. Ct. 2363 (1989).

81. 109 S. Ct. 2702 (1989).

82. 42 U.S.C. § 2000e (1982).

83. See *id.*

84. *Id.*

85. 471 U.S. 261 (1985).

tions for personal injury actions is the measure of a section 1983 statute of limitations.⁸⁶ But, some states, New York included, have, arguably, two relevant statutes of limitations. We have a very short assault statute of limitations—one year,⁸⁷ and we have a longer general personal injury statute of limitations—three years.⁸⁸ What happens if a policeman is accused of assaulting someone and is sued under section 1983?

In the old days, five years ago or more, courts would look to the most analogous state statute of limitations, which in most section 1983 claims is usually the assault statute. That is not done anymore. Now, courts utilize the general personal injury statute of limitations.⁸⁹ And the Supreme Court, nine-to-zero, found in favor of the longer statute of limitations.⁹⁰

There was also a tolling case out of Michigan.⁹¹ A prisoner was in prison for the period of time that tolls the statute of limitations.⁹² Should that apply to a section 1983 case? The Supreme Court again found that it did.⁹³ So, procedurally, those two cases generally have kept the door open in section 1983 cases.

The three substantive cases about which I want to talk, and they were all losers from the individual's point of view, are *Kentucky Department of Corrections v. Thompson*,⁹⁴ a prison case; *Will v. Michigan Department of State Police*,⁹⁵ an eleventh amendment case; and, then, the real heartbreaker, *DeShaney*, out of Wisconsin.⁹⁶

First, the prisoner cases. It is hard to win a prison case in the Supreme Court these days. The only right that the Court seems to recognize these days is the constitutional right of a

86. *Id.* at 279-80.

87. N.Y. CIV. PRAC. L. & R. § 215 (McKinney 1990).

88. *Id.* § 214 (McKinney 1990).

89. *See Owens v. Okure*, 109 S. Ct. 573 (1989).

90. *Id.* at 574.

91. *Hardin v. Straub*, 109 S. Ct. 1998 (1989).

92. *Id.* at 1999.

93. *Id.* at 2003.

94. 109 S. Ct. 1904 (1989).

95. 109 S. Ct. 2304 (1989).

96. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998 (1989).

prisoner to marry.⁹⁷ If a regulation infringes on that right, the Supreme Court will take a close look at it.

But, in almost every other area, the Court is cutting back on prisoner rights. In a first amendment case last year,⁹⁸ a prisoner's first amendment rights, as established in *Procunier v. Martinez*,⁹⁹ were overruled.¹⁰⁰ The Court now says that prisoners have a first amendment right to send out expressive material. However, there is no first amendment right to receive expressive material. A prison regulation restricting that right is not subject to strict scrutiny. It is subject to the much looser rational relationship test of whether the regulation is rationally related to the need to control prisoners.¹⁰¹ So, the Court split up correspondence and denigrated the first amendment rights of prisoners.

Another prisoner case the Court decided was *Kentucky Department of Corrections v. Thompson*,¹⁰² dealing with the right to visitation. The Court applied its "mandatory language" rule.¹⁰³ A prisoner has a liberty right to a benefit or to some sort of freedom only if the regulation has the requisite mandatory language.¹⁰⁴ For example, if a prisoner accumulates enough good time credit, he can go to a work camp, or get a furlough, or get parole under certain conditions. But, unless the regulation has the requisite mandatory language, the prisoner does not acquire the liberty interest, and we know that acquiring a liberty interest is desirable because it cannot be taken away without procedural due process.¹⁰⁵

In determining whether there has been a deprivation of procedural due process, the Court has used a two-step approach in prison cases. First, look at the regulation to see whether the

97. *Turner v. Safley*, 482 U.S. 78, 96 (1987).

98. *Thornburgh v. Abbott*, 109 S. Ct. 1874 (1989).

99. 416 U.S. 396 (1974).

100. *Abbott*, 109 S. Ct. at 1881.

101. *Id.*

102. 109 S. Ct. 1904 (1989).

103. *Id.* at 1910. The Court noted that mandatory language is explicit language in the regulation that confers upon the prisoner a liberty interest in the consequences flowing from particular conduct. *Id.*

104. *Id.*

105. *Id.* at 1910-11.

benefit to the prisoner is mandatory or within the discretion of prison officials. If the regulation utilizes the mandatory language, then the liberty interest exists and the court moves to the second prong to determine whether the prisoner was given procedural due process in the deprivation of those rights.¹⁰⁶ The *Thompson* Court held that the Kentucky regulation did not have the requisite mandatory language.¹⁰⁷ Thus, no interest was negated, and the aggrieved prisoner could not sue in federal court when his "rights" were taken away.¹⁰⁸

One of the eleventh amendment cases last Term was *Will v. Michigan Department of State Police*.¹⁰⁹ This case dealt with the question of whether an individual could sue the state in state court under section 1983.¹¹⁰ The eleventh amendment only applies to the federal judicial power, and Congress can establish a federal cause of action that must be heard in state court where the eleventh amendment is inapplicable.¹¹¹ Indeed, the whole eleventh amendment jurisprudence is one of those areas in which the losers never give up. Practically every one of the eleventh amendment cases is five-to-four, and Justices Brennan, Marshall, Blackmun, and Stevens say that our eleventh amendment jurisprudence has been wrong for twenty years, and they are not going to accept this ridiculous eleventh amendment jurisprudence—they are waiting for someone to come along and help them.¹¹²

Well, they did not get any help last Term. In *Will*, it was decided that, even though the eleventh amendment does not apply to state courts, our limitations on suing states in federal

106. *Id.* at 1909-10.

107. *Id.* at 1910-11.

108. *Id.*

109. 109 S. Ct. 2304 (1989).

110. *Id.* at 2305.

111. In *Maher v. Gagne*, 448 U.S. 122 (1980), the Court noted in a footnote that the eleventh amendment does not apply in state court. *Id.* at 130 n.2; *Nevada v. Hall*, 440 U.S. 410, *reh'g denied*, 441 U.S. 917 (1979). Therefore, a state could be sued in state court under section 1983. *Maine v. Thiboutot*, 448 U.S. 1, 10-11 (1980).

112. See, e.g., *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 469 (1987) (Brennan, J., dissenting); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985) (Brennan, J., dissenting).

courts—our eleventh amendment jurisprudence—should carry over into our interpretation of section 1983.¹¹³ Therefore, a state is not a “person” for purposes of section 1983.¹¹⁴ This case is another historical review, another one of those examinations of what Congress thought when it passed the law in 1871.¹¹⁵ The Court reasoned that Congress thought counties and cities were persons, but that states were not persons.¹¹⁶

There were four eleventh amendment cases last year so, from a pedagogical standpoint, it was a terrific eleventh amendment year. The eleventh amendment says that the federal judicial power shall not extend to a suit between a citizen and a state¹¹⁷ and, generally, you cannot sue a state in federal court. The amendment originally prohibited suits between the citizen of one state and another state, but that has been interpreted since *Hans v. Louisiana*¹¹⁸ as prohibiting a suit in federal court between an individual and the individual’s own state as well. So, one cannot sue a state in federal court.

What you can do is sue a state official for injunctive relief. Under a case called *Ex Parte Young*,¹¹⁹ if a state official violates the Constitution, you may sue him because the minute he acts unconstitutionally, he is acting *ultra vires*, and he loses his state sovereign immunity.¹²⁰ If he is a sovereign, he can do no wrong; if he does wrong, he is not a sovereign anymore; therefore, you can sue him for prospective relief in federal court, but you cannot sue the state as such.¹²¹ The theory is that you want to be sure that you are protecting the state treasury against lawsuits by individuals.¹²² So, you can sue an individual state officer for prospective relief if he violates the Constitution.

113. *Will*, 109 S. Ct. at 2309.

114. *Id.* at 2310.

115. *Id.*

116. *Id.* at 2311.

117. U.S. CONST. amend. XI.

118. 134 U.S. 1 (1890).

119. 209 U.S. 123 (1908).

120. *Id.* at 159-60.

121. *Id.* at 168.

122. *Edelman v. Jordan*, 415 U.S. 651, 663 (1973).

The Supreme Court also has said that Congress can abrogate eleventh amendment immunity.¹²³ Congress can pass a law to take away state immunity and make state treasuries available for lawsuits. Odd to see how they can do that. Initially, the Court said that the fourteenth amendment, which came later than the eleventh amendment,¹²⁴ is so much of an overruling or modification of the eleventh amendment as was necessary to implement the fourteenth amendment.¹²⁵ So, if you are enforcing the fourteenth amendment, you can pass a law that allows you to sue the states. For example, plaintiffs can sue the states under Title VII.¹²⁶

Now, they had a case last year where Congress was abrogating eleventh amendment immunity under the commerce clause.¹²⁷ Commerce clause? I thought that came before the eleventh amendment. So, the Court said that timing is not an issue anymore,¹²⁸ and Congress can abrogate eleventh amendment immunity, relying on the commerce clause or, for that matter, the copyright clause.¹²⁹ Of course, the states can waive their eleventh amendment rights.¹³⁰ So, there are ways around it.

The last cases I want to talk about involve the concept of state action. In *National Collegiate Athletic Association v. Tarkanian*,¹³¹ the NCAA ordered the University of Nevada at Las Vegas to discipline Jerry Tarkanian, the basketball coach.¹³² The University did not want to do it; they were reluctant; but they ordered him suspended, and Tarkanian claimed

123. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

124. The eleventh amendment was adopted in 1798. The fourteenth amendment was adopted in 1868.

125. *Fitzpatrick*, 427 U.S. at 452-56.

126. *Id.* at 447-49.

127. *Pennsylvania v. Union Gas Co.*, 109 S. Ct. 2273 (1989).

128. See *id.* at 2282-86.

129. Several courts have intimated that the eleventh amendment can be abrogated by the copyright clause. *E.g.*, *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979); *Johnson v. University of Virginia*, 606 F. Supp. 321 (D. Va. 1985).

130. See, *e.g.*, *Parden v. Terminal Ry. of Alabama State Docks Dep't*, 377 U.S. 184 (1964) (Alabama constructively waived its sovereign immunity to negligence claims brought by Alabama citizens under the Federal Employer's Liability Act).

131. 109 S. Ct. 454 (1988).

132. *Id.* at 456.

a procedural due process violation.¹³³ The question was whether that constituted state action.¹³⁴ The Supreme Court said that, in *Tarkanian*, it was not the government ordering the private party to do something, it was a private entity, the NCAA, ordering a state entity to do something it did not want to do.¹³⁵ Is that state action recognizable under section 1983? The answer is no; it is not.¹³⁶

But, let me get to the *DeShaney* case. *DeShaney v. Winnebago County*¹³⁷ is, in many ways, both individually and conceptually, the most important section 1983 case of the Term. A father had custody of his child after a divorce action, and he was reported for abusing the child.¹³⁸ Indeed, the local social services agency had come in and, at least temporarily, had taken custody away from the father.¹³⁹ The agency was absolutely aware that this man had problems. It was in the file.¹⁴⁰ But, they put the father and the son back together again.¹⁴¹ Shortly thereafter, the father really hurt the child, causing serious brain damage.¹⁴² The child is now profoundly retarded and is expected to be institutionalized for life.¹⁴³ Suit was brought by the child, and by the mother on behalf of the child, against the social services agency.¹⁴⁴ The Supreme Court, in a very literal and narrow decision, said that the social services agency did not do anything wrong.¹⁴⁵ It was the father who had committed the wrong and, as a general proposition, the state has no duty to protect one person from physical abuse by another person unless the state has undertaken the responsibil-

133. *Id.*

134. *Id.* at 457.

135. *Id.* at 465.

136. *Id.* at 456-57.

137. 109 S. Ct. 998 (1989).

138. *Id.* at 1001.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 1002.

143. *Id.*

144. *Id.*

145. *Id.* at 1007.

ity.¹⁴⁶ The state has no duty to protect A against B, unless there are some very extraordinary circumstances present.

There is a rule called the "special relationship rule."¹⁴⁷ For example, suppose a wife has an order of protection against a husband—there are a number of such cases, by the way—the wife calls up the police and says she has an order of protection, but her husband is there and he is bothering her. She asks the police to come over and do something, but the police do not come over. A number of cases say that such a situation would be cognizable under section 1983.¹⁴⁸ The order of protection obligates the state to take responsibility, come over, and intervene.

In addition, there are incidents when a child is placed in foster care. That foster parent is, in effect, an arm of the state. The state has taken the responsibility of protecting the child. It is their responsibility; they delegated it to a foster parent, but it is their responsibility.

In the *DeShaney* case, the Court did not fit the problem into one of those special categories. Now, I do not have time to go through all the problems with the Court's approach, so I will recommend to you the latest issue of the Record of the Association of the Bar of the City of New York.¹⁴⁹ In his Cardozo lecture, Laurence Tribe of Harvard talks about the *DeShaney* case, and he makes the point that the state did assume responsibility.¹⁵⁰ When the state sets up a social service agency and says that this is the exclusive device for protecting children (and if you, an individual, go out and try to protect the child by yourself or with some self-help, you are doing something wrong), then the state has established responsibility. Justice Blackmun, in his very eloquent dissent to *DeShaney*, talks about poor Joshua. Poor Joshua looked to the state for help, all

146. *Id.*

147. *See, e.g.,* Estate of Bailey v. County of York, 768 F.2d 503 (3d Cir. 1985); Jensen v. Conrad, 570 F. Supp. 91 (D.S.C. 1983), *aff'd*, 747 F.2d 185 (4th Cir. 1984); RESTATEMENT (SECOND) OF TORTS § 315 (1977).

148. *See, e.g.,* Dudosh v. City of Allentown, 629 F. Supp. 849 (E.D. Pa. 1985).

149. Tribe, *Law's Geometry and the Curvature of Constitutional Space*, 44 REC. A. B. CITY N.Y. 575-600 (1989).

150. *Id.* at 580.

it did was turn its back, and this was the pathetic result.¹⁵¹ This is a case that really has both serious human and legal implications.

Thank you very much.

Judge George Pratt:

Leon, I was very interested in your "more cynical" view of the shift to fourth amendment from substantive due process and what you said with reference to *Parratt v. Taylor*¹⁵² closing the door on due process cases. Are you so cynical as to think that perhaps further down the road there will be a complete closing of the door on section 1983 cases on the theory that the Bill of Rights itself applies to the states only by way of the due process clause of the fourteenth amendment? *Parratt* says that, when there is an adequate state remedy, there is no constitutional violation, at least where the misconduct is unauthorized.¹⁵³ Can you comment on that? Do you view it quite that cynically?

Leon Friedman:

I mean that would be an outrage. But, the Court did take a major *Parratt* case last Term, *Zinerman v. Burch*,¹⁵⁴ dealing with the issue of whether *Parratt v. Taylor* only applies to property deprivations.¹⁵⁵ This is a liberty case and it implicates all of the situations. Now again, I do not believe that the Justices sit around in a hotel room and conspire to get section 1983 cases out of federal court. But, it seems to me that they are taking it in two steps: first, get the more outrageous fourth amendment cases into the fourth amendment area so at least those will be preserved. If the Court really attempted to get rid

151. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1012-13 (1989) (Blackmun, J., dissenting).

152. 451 U.S. 527 (1981).

153. *Id.* at 544.

154. *Burch v. Apalachee Community Mental Health Servs.*, 840 F.2d 797 (11th Cir. 1988) (en banc), *aff'd*, *Zinerman v. Burch*, 110 S. Ct. 975 (1990) (*Parratt* doctrine applies to liberty but not to deprivation by officials authorized to provide process).

155. *See id.* at 801 ("*Parratt* does not apply to procedural due process violations when the state is in a position to provide predeprivation process.").

of those also, then they would not have to take the other step of putting the cases into the fourth amendment bag.

But, conceptually, you are right. The way the fourth and first amendment apply to states is through a form of liberty protection upon which the states cannot infringe without due process of law under the fourteenth amendment. That is the problem of *Parratt v. Taylor*. Where is the logical stopping point? If there is an alternate state remedy besides due process, then you really are not deprived of a constitutional right because you have an alternate state remedy.

Question from Panelist Eileen Kaufman:

I have one question to direct to both Professor Schwartz and Professor Friedman. You both noted that the Term was marked by some hostility towards civil rights plaintiffs, but that the Court preserved, somewhat generously, the section 1988¹⁵⁶ attorney fees remedy. I wondered whether either of you would offer any predictions as to whether next Term, or perhaps two Terms from now, the Supreme Court will apply the *Crawford*¹⁵⁷ holding, which, though not a civil rights case, limited awards of expert fees to the statutory \$30 a day amount.

Martin Schwartz:

When you say that the Court preserved the section 1988 remedy for brutality cases, what you are saying is that the essence of the remedy remains. What the Court's decisions accomplished last Term is a way to deal with the details of that remedy. And, the details involve shifts backwards and forwards. Sometimes, as you know, we argue the batting average; sometimes, it is pro-plaintiff and sometimes pro-defendant, and, to a large extent, that is what has happened with respect to the fee remedy. I think that, from an overall perspective, the fee remedy for prevailing plaintiffs remains a meaningful remedy. Certainly, the Court has said, for example, that public interest groups can recover fees under the same basis as com-

156. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982).

157. *Crawford Fitting Co. v. Gibbons, Inc.*, 482 U.S. 437 (1987).

pensated attorneys;¹⁵⁸ so the heart of the fee remedy remains intact. That does not mean that, from the civil libertarian standpoint, there are no decisions that are subject to criticism. The case dealing with simultaneous negotiation of the merits and fees¹⁵⁹ is a highly contentious decision that some would say is anti-plaintiff. What they will do with the witness issue is hard to guess. To crystallize the issue, the question is whether the fee award can include whole compensation for the expenditures made when an expert witness is retained by the plaintiff, and there is a split on this issue in the lower federal courts.¹⁶⁰ I think that the legislative history is probably inconclusive, and, given this split of opinion and inconclusive legislative history, it is hard for me to guess how that issue will come out when it does get to the Court. And I do think it is an important issue.

Question from Panelist Gary Shaw:

I have a comment, and then I will ask whether the panel agrees with it. I want to focus for a moment on the *DeShaney*¹⁶¹ case. I agree with you, Leon, that it is obviously a heartrending case. The state knew about the child's situation and yet the Court, as you said, did not fit it into a special relationship or any other exception it might have found. Instead, the Court came down with the concept that inaction does not equal state action. My comment is that I think this is an incredibly important case, not only in this area but in other areas as well. You can already see the Supreme Court referring to *DeShaney* in other cases such as *Webster v. Reproductive Health Services*,¹⁶² the abortion case from last Term, when determining the issue of whether Missouri could preclude state hospitals from performing abortions.¹⁶³ The Court said yes, be-

158. *Blum v. Stenson*, 405 U.S. 886 (1984).

159. *Evans v. Jeff D.*, 475 U.S. 717 (1986).

160. See M. SCHWARTZ & J. KIRKLIN, *supra* note 4, § 21.8 (Supp. 1989). The Court recently accepted a case on this issue. See *West Virginia Univ. Hosp. v. Casey*, 885 F.2d 11 (3d Cir. 1989), *cert. granted*, 110 S. Ct. 1294 (1990).

161. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 988 (1989).

162. 109 S. Ct. 3040 (1989).

163. *Id.* at 3051.

cause now they simply will not be doing anything—inaction does not equal state action.¹⁶⁴

Leon Friedman:

I agree. I think it really does have a lot of implications because the whole theory of inaction simply avoids a constitutional duty requiring you to do something. The Court is simply saying that the state has the means to look the other way. And, I agree, it is one of those things that waits out there. The Court eventually will start eroding a lot of the other institutional requirements as well. For instance, do they have a duty to protect people such as foster children or those in an institution?

Martin Schwartz:

I agree that we have not heard the end of the *DeShaney*-type case. Because what is left open in *DeShaney* is the type of situation where a public official enhances the risk of injury to a private individual. The majority in *DeShaney* said that the public officials did not enhance the risk of injury to the child in that case.¹⁶⁵ Now, the next realm of cases is going to be: did the official enhance the private individual's risk of danger of being injured by somebody else, and does that matter? There are cases that present these problems. For example, a police officer makes an arrest and impounds the car, arrests the male driver, and leaves the female stranded. The female companion hitches a ride and is assaulted by the generous driver. Did the police officer in that case enhance the danger of the female companion?

Judge George Pratt:

That brings us to the end of the section 1983 cases.

164. *Id.*

165. *DeShaney v. Winnebago County Dep't of Social Servs.*, 109 S. Ct. 998, 1006 (1989).