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And the Word for Today is Immunity: A Look at Selected Criminal Procedure and 1983 Cases from the Supreme Court's 1997-98 Term

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AND THE WORD FOR TODAY IS "IMMUNITY": A LOOK AT SELECTED CRIMINAL PROCEDURE AND § 1983 CASES FROM THE SUPREME COURT'S 1997-98 TERM*

Melissa L. Koehn†

My interest in procedure, particularly how procedures can affect decisions on substantive issues, fuels two of my teaching interests—§ 1983 and adjudicatory criminal procedure.[1] Teaching in these areas requires, of course, staying on top of the latest word from the Supreme Court. In its 1997-98 term, the Supreme Court issued a hodge podge of disparate opinions in these two areas. Rather than catalog these diverse cases, I will focus only on those that cluster around the concept of immunity.[2]

Anyone who has worked with § 1983 cases knows that immunity is a crucial concept. Before an attorney can even draft a proper complaint, she must wade through the intricacies of the Court's immunity jurisprudence to determine who can be a defendant and under what circumstances. To put it another way, she must know who can be sued in what capacity and when. While the Supreme Court did not issue any earthshaking immunity decisions this term, it did reiterate a number of important rulings. These reiterations should help clarify and alleviate any lingering confusions on the part of the lower federal courts.

Immunity is not a topic we normally think of in connection with criminal proceedings. Although there are the occasional cases of diplomatic immunity, none were on the Court's docket this term. Immunity does, however, regularly arise in the context of two constitutional provisions: the Fifth Amendment's clause prohibiting self-incrimination[3] and the Fifth Amendment's prohibition against double jeopardy.[4]

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1. This is the third year I have spoken at Tulsa's annual program. The first year I focused on habeas corpus procedures, *see* Melissa L. Koehn, *A Line in the Sand: The Supreme Court and the Writ of Habeas Corpus*, 32 TULSA L.J. 389 (1997), and last year I focused on § 1983 decisions, *see* Melissa L. Koehn, *The New American Caste System: the Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 MICH. J. L. REF. 49 (1998).

2. In addition to the § 1983 and criminal procedure cases, the Court also had on its docket another type of immunity case: one involving tribal sovereign immunity. *See* Kiowa v. Manufacturing Technologies, 118 S. Ct. 1700 (1998). Because this case is essentially a breach of contract action, as opposed to a criminal proceeding or a § 1983 suit, it is outside the scope of this essay. For a brief discussion of *Kiowa*, see Judith V. Royster, *Decontextualizing Federal Indian Law: The Supreme Court's 1997-98 Term*, 34 TULSA L.J. 329 (1999).

The Fifth Amendment's self-incrimination provision is basically an immunity from having to open your mouth and speak the words which might help convict you. The Double Jeopardy Clause is, at its essence, also an immunity provision. Put very basically, if the state has already subjected you to one criminal proceeding, you are thereafter immune from a second one (with, of course, certain exceptions). The Court's two Fifth Amendment decisions were not really surprising, although its two double jeopardy opinions did contain a few mild (but only mild) surprises.

Indeed, "surprise," or the lack thereof, is the second theme of this article. The Supreme Court's immunity decisions spark reactions ranging from no surprise to merely mild surprise. There just was not much there that was hotly contested or unexpected.[5] That is not to say, however, that the Court's decisions are unimportant. In fact, many of them have a great deal of practical significance and others signal that the Court is definitely moving in a new direction.

I. THE § 1983 IMMUNITY DECISIONS

"Section 1983" is a short hand way of referencing suits filed under 42 U.S.C. § 1983. That statute provides a procedural mechanism for filing complaints alleging that a state actor has violated someone's federally protected rights.[6] Most commonly, § 1983 is used to sue states and state employees who violate, or allegedly violate, the plaintiff's constitutional rights.[7] In its 1997-98 term, the Supreme Court decided nine § 1983 cases. Five of those decisions focused on immunity. Three of these immunity decisions—*Kalina v. Fletcher*,[8] *Bogan v. Scott-Harris*,[9] and *Wisconsin Department of Corrections v. Schacht*[10]—were straightforward and contained no surprises. Indeed, all three were unanimous. The two other immunity decisions—*Ohio Adult Parole Authority v. Woodard*[11] and *Crawford-El v. Britton*[12] contained mild

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3. "No person... shall be compelled in any criminal case to be a witness against himself...." U.S. CONST. amend. V.

4. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb...." U.S. CONST. amend. V.

5. Of course, in many ways, this is also a theme of the Court's entire term. Although there were major decisions, the Court was much quieter than it has been in recent years. *See* Debra Cassens, *A Constitutional Siesta*, ABA JOURNAL 38 (September 1998).

6. The actual language of § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, 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.

42 U.S.C. § 1983 (1994).

7. Section 1983 provides protection for "rights, privileges, or immunities secured by the constitution and laws." 42 U.S.C. § 1983 (1994). Thus, the right at issue can be established and protected either by the U.S. Constitution or by a federal statute. *See, e.g.*, Blessing v. Freestone, 520 U.S. 329 (1997). The cases discussed in this article all concern alleged violations of constitutional rights, so I will concentrate on those as opposed to statutory violations.

8. 118 S. Ct. 502 (1997).

9. 118 S. Ct. 966 (1998).

10. 118 S. Ct. 2047 (1998).

11. 118 S. Ct. 1244 (1998).

12. 118 S. Ct. 1584 (1998).

surprises, but nothing that was terribly startling.

A. The No Surprise Cases

1. *Kalina v. Fletcher* and Prosecutorial Immunity

Nowhere in the language of § 1983 does the statute mention that defendants sued under it may raise a defense of immunity. The Supreme Court, however, has interpreted § 1983 to bring with it all the relevant common law immunities that existed at the time the statute was enacted.[13] Some defendants possess absolute immunity from suit, some possess qualified immunity, and some possess no immunity at all. The Court determines whether a defendant possesses an immunity defense by looking at history, at whether such a defendant possessed a common law immunity at the time Congress enacted § 1983.[14]

Prosecutors generally possess absolute immunity from suit.[15] The actual type of immunity shielding a defendant in a given case, however, is dependent on the character of the defendant's challenged action—whether it was judicial, legislative, or executive.[16] In other words, the courts will look at the character of the challenged action and not solely at the defendant's job description. That means prosecutors do not automatically possess absolute immunity by virtue of their job. Rather, they possess absolute immunity when "initiating and pursuing a criminal prosecution."[17] *Kalina* presented the Court with a straightforward opportunity to reiterate these propositions and to clarify once again which actions by a prosecutor are protected by absolute immunity and which are protected by only a qualified immunity.

Kalina began when a prosecutor filed three documents in a Washington state court.[18] Those three documents were an information (containing a charge of burglary naming Rodney Fletcher as the defendant), a motion for an arrest warrant, and an affidavit in support of the motion.[19] The prosecutor prepared all three documents.[20] The first two were unsworn pleadings.[21] The third one, however, by its very nature was a sworn statement containing factual assertions.[22] The prosecutor did not merely prepare this affidavit—she was also the affiant, personally vouching for the truth of the facts.[23]

The burglary charges against Fletcher were dismissed within a month (on the

13. The wisdom and accuracy of this decision has been explored by other commentators. *See, e.g.*, Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

14. *See* Richardson v. McKnight, 117 S. Ct. 2100 (1997).

15. *See* Imbler v. Pachtman, 424 U.S. 409 (1976).

16. *See, e.g.*, Clinton v. Jones, 520 U.S. 681 (1997).

17. *Imbler*, 424 U.S. at 410.

18. Kalina v. Fletcher, 118 S. Ct. 502, 505 (1997).

19. *See id.*

20. *See id.*

21. *See id.*

22. *See id.*

23. *See id.*

prosecutor's motion).[24] At some point thereafter, Fletcher filed a § 1983 action against the prosecutor, claiming a violation of his Fourth Amendment right to be free from unreasonable seizures.[25] His complaint focused on the fact that the prosecutor's affidavit contained two key inaccuracies.[26] The prosecutor moved for summary judgment on the basis of immunity.[27] The district court denied the motion, and the Ninth Circuit affirmed.[28]

The issue before the Supreme Court was whether the prosecutor was entitled to absolute immunity.[29] As its first step in answering this question, the Court looked at the history and policies underlying absolute prosecutorial immunity.[30] After exploring those topics, the Court concluded that:

> These cases make it clear that the absolute immunity that protects the prosecutor's role as an advocate is not grounded in any special "esteem for those who perform these functions, and certainly not from a desire to shield abuses of office, but because any lesser degree of immunity could impair the judicial process itself." Thus, in determining immunity, we examine "the nature of the function performed, not the identity of the actor who performed it."[31]

Once the Court reached this conclusion, its natural second step was to examine the nature of the work at issue in the case. The prosecutor argued that the Court should examine all three documents as a whole, as a unit.[32] The Court, however, rejected that approach and instead examined each document separately. The Court had no trouble deciding that the prosecutor's "activities in connection with the preparation and filing of . . . the information and the motion for an arrest warrant are protected by absolute immunity."[33] The sticking point, however, was the third document, the affidavit.

In holding that the prosecutor could not claim absolute immunity with respect to the affidavit, the Court declared:

> Although the law required that document to be sworn or certified under penalty of perjury, neither federal nor state law made it necessary for the prosecutor to make that certification. In doing so, petitioner performed an act that any competent

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24. *See* Kalina v. Fletcher, 118 S. Ct. 502, 505 (1997).
25. *See id.*
26. *See id.* The burglary charge arose out of the theft of some school computer equipment. In her affidavit, the prosecutor stated that Fletcher had never possessed permission to be in the school, yet his fingerprints were on a glass partition. In reality, Fletcher had installed partitions in the school and did have permission to be there. Second, the affidavit asserted that a witness had identified Fletcher from a photo montage; the witness did not in fact identify Fletcher. *See id.*
27. *See id.*
28. *See id.*
29. *See id.* at 506.
30. *See* Kalina v. Fletcher, 118 S. Ct. 502, 506-09 (1997).
31. *Id.* at 508 (citations omitted).
32. *See id.* at 509-10.
33. *Id.* at 509.

witness might have performed.[34]

This, indeed, is what caused the problem. The Court carefully noted that the preparation and filing of the affidavit were protection functions;[35] the problem here was that the prosecutor went beyond mere preparation and filing and actually became a witness. Because serving as a witness is not a traditional function of prosecutorial advocacy, Kalina could not claim the protections of absolute immunity.[36]

Kalina v. Fletcher contained no surprises. In fact, the only surprise would have been if it had been decided differently. It is still a helpful case, however, as it provides a clear and concise example of how to break down and analyze a prosecutor's actions. Such an example should help lower courts resolve claims of absolute prosecutorial immunity.

2. *Bogan v. Scott-Harris* and Legislative Immunity

As mentioned above, the Supreme Court has repeatedly held that the type of immunity available to a § 1983 defendant depends on the character of the defendant's actions. Although the Court has consistently held that legislative actions warrant absolute immunity, the Court has never explicitly addressed the situation of local legislators. The Court remedied that lack this past term with *Bogan v. Scott-Harris*.[37]

Janet Scott-Harris was the administrator and only permanent employee of Fall River, Massachusetts Department of Health and Human Services.[38] When the mayor of Fall River prepared his 1992 budget, he proposed the elimination of the Department of HHS.[39] This would, of course, be the end of Scott-Harris' job. The City Council Ordinance Committee, and ultimately the City Council itself, approved the mayor's proposal.[40] Scott-Harris filed suit against various city officials, claiming that her job was eliminated as a result of racial animus and in retaliation against her for exercising her First Amendment rights.[41] The issue which ultimately came before the Supreme Court was whether the defendants' actions were protected by absolute legislative immunity.[42]

The Court began its analysis by reiterating that it looks to history and common law to determine what type of immunity attaches to a particular type of action.[43] As a result of its review of both history and of the policies underlying absolute legislative immunity, the Court had little trouble declaring that:

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34. *Id.*
35. *See id.*
36. *See* Kalina v. Fletcher, 118 S. Ct. 502, 509 (1997).
37. 118 S. Ct. 966 (1998).
38. *See id.* at 969.
39. *See id.*
40. *See id.*
41. *See id.* Specifically, Scott-Harris had prepared termination charges against a temporary HHS employee. That temporary employee was politically connected and used those connections to turn the dismissal into a 60 day suspension. *See id.*
42. *See id.*
43. *See* Bogan v. Scott-Harris, 118 S. Ct. 966, 970-71 (1998).

> Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.[44]

Although the Court had never specifically addressed immunity for local legislators, this holding was not a surprise. It fit squarely within the Court's repeated holding that the type of immunity rests both on history and on the character of the defendant's actions. The Court has never found that legislative actions warrant less than absolute immunity, and there was no real reason to think that local legislators would be any different. Indeed, the Court noted that it had implicitly reached this conclusion in its 1979 decision *Lake Country Estates v. Tahoe Regional Planning Agency.*[45]

The real dispute in *Bogan* was not whether absolute immunity attaches to local legislative action, but rather whether the defendants' actions were "legislative." Scott-Harris argued that the defendants were not actually engaged in legislation; instead, they were engaged in retaliatory, discriminatory acts targeted at a particular individual.[46] According to Scott-Harris, these motivations meant that the defendants' actions could not be "legislative."[47]

The Supreme Court rejected this argument, stating that the Court looks only at the nature of the challenged action; it will not "pierce" through the action to examine motivation or intent.[48] This holding was no surprise. If the Court had reached the opposite result, it would have seriously damaged the tidy analysis developed in previous immunity cases. The "nature" of an action is relatively easy to determine. If federal courts start probing behind the "nature" of an action to determine its "motivation," the scheme will be infinitely more difficult to administer. In addition, these inquiries would all but destroy the value of absolute immunity. The purpose of absolute immunity is to save legislators the time, trouble, expense, and embarrassment of litigation. Accordingly, immunity decisions need to be made as early as possible in the litigation if they are to serve their function. Subjective inquiries into motivations almost inevitably turn on credibility issues, which means they cannot be made until after trial. That would defeat the purpose of the immunity and render it a nullity.[49] Consequently, it came as no surprise that the Court refused to go beyond the "nature" of the challenged action.

Once the Court refused to look past the nature of the action, it was left

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44. *Id.* at 970.
45. 440 U.S. 391 (1979).
46. *See Bogan*, 118 S. Ct. at 972.
47. *Id.*
48. *See id.* at 973.
49. Indeed, it was exactly this problem that led the Supreme Court to abandon the subjective inquiry prong of qualified immunity. *See* Harlow v. Fitzgerald, 457 U.S. 800 (1982).

> . . . with the question whether, stripped of all considerations of intent and motive, [defendants'] actions were legislative. We have little trouble concluding that they were. Most evidently, [defendant] Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. [Defendant] Bogan's introduction of a budget and signing into law an ordinance were also formally legislative, even though [as the mayor] he was an executive official. We have recognized that officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions . . . . Bogan's actions were legislative because they were integral steps in the legislative process.
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> . . . We need not determine whether the formally legislative character of [defendants'] actions is alone sufficient to entitle [defendants] to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents. . . . Thus, [defendants'] actions were undoubtedly legislative.[50]

No surprise.

3. *Wisconsin Department of Corrections v. Schacht* and Eleventh Amendment Immunity

The final "no surprise" decision relating to immunity and § 1983 revolves around the interaction between the removal provisions and the states' Eleventh Amendment immunity in particular federal court actions. In *Wisconsin Department of Corrections v. Schacht*,[51] Keith Schacht filed a § 1983 complaint against the Wisconsin Department of Corrections and several of its employees.[52] The case was a pretty run-of-the-mill due process suit, with two exceptions. First, the plaintiff was not a prisoner; he was a prison guard who was fired for stealing. Second, he filed his complaint in state, as opposed to federal, court.[53] Section 1983 does not provide for exclusive federal jurisdiction, so state courts are fully capable of hearing these cases. The defendants, however, opted to have a federal court hear the case, so they exercised their right to remove the case to federal court.[54] From there, the case proceeded in a typical fashion, with the District Court ultimately granting the defendants' motion to dismiss on some counts and their motion for summary judgment on the others.[55]

The case took an interesting turn, however, on appeal to the Seventh Circuit. That court sua sponte raised a question about the propriety of the removal.

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50. *Bogan*, 118 S. Ct. at 973.
51. 118 S. Ct. 2047 (1998).
52. *See id.* at 2050.
53. *See id.*
54. *See id.*
55. *See id.*

Specifically, the court of appeals noted that the complaint contained allegations against the state of Wisconsin.[56] Because the Eleventh Amendment bars federal courts from hearing such claims, the Seventh Circuit concluded that the "presence of even one such claim in an otherwise removable case deprived the federal courts of removal jurisdiction over the entire case."[57] This, then, was the question before the Supreme Court—does the presence of a claim barred by the Eleventh Amendment destroy removal jurisdiction?[58]

This seems like a strange question to even ask, but it came about due to a bizarre Seventh Circuit argument. That court cobbled together two concepts to reach the result that the presence of one claim barred by the Eleventh Amendment destroys removability: first, that claims based on sovereign immunity are special; and second, that the presence of one nondiverse party destroys diversity and renders a case unremovable.[59]

This argument is bizarre for two reasons. First, when determining the removability of a particular lawsuit, courts use the "well pleaded complaint" rule and look only at the complaint itself; courts do not examine possible defenses.[60] The Eleventh Amendment is generally considered to provide states with a defense against being hauled into federal court. It must be a defense, rather than an absolute bar, because states are free to waive it[61] and courts are free to ignore it if a state does not waive it.[62] Courts are not, however, free to ignore jurisdictional defects. Thus, it seems strange to consider an Eleventh Amendment defense in determining the removability of Schacht's complaint. And Schacht's complaint clearly presented a federal question. He filed suit under a federal statute, 42 U.S.C. § 1983, and alleged violations of his Fourteenth Amendment rights.

The Seventh Circuit's argument is also bizarre considering the relationship between the Eleventh Amendment and § 1983's requirement that the defendant be a "person."[63] The Supreme Court's interpretation of the Eleventh Amendment has a long and tortured history,[64] but the part that is pertinent here can be stated easily. As a definitional matter, § 1983 provides for a cause of action only against "persons."[65] States, state agencies, and state employees sued in their official capacity for damages

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56. *See id.* Although Schacht did not actually name Wisconsin as a defendant, he did name a state agency, as well as suing the individual defendants in both their personal and official capacities. Suits against state agencies are considered the same as suits against the state itself. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). The same goes for official capacity suits against state employees. *See id.*

57. Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2051 (1997) (referencing Schacht v. Wisconsin Dep't of Corrections, 116 F.3d 1151, 1152-53 (1997)).

58. *See id.*

59. *See* Schacht v. Wisconsin Dep't of Corrections, 116 F.3d 1151, 1152 (1997).

60. *See Wisconsin Dep't of Corrections*, 118 S. Ct. at 2053 (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283 (1938)).

61. *See, e.g.*, Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).

62. *See, e.g.*, Patsy v. Board of Regents, 457 U.S. 496, 524 (1982).

63. 42 U.S.C. § 1983 (1994).

64. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION (2d ed. 1994); Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 MICH. J. L. REF. 49 (1998).

65. 42 U.S.C. § 1983 (1994).

are not "persons" under the terms of the statute.[66] Thus, a federal court faced with a plaintiff seeking monetary damages from a state agency and from state employees in their official capacity must dismiss the case, not for Eleventh Amendment immunity reasons, but simply because the statute does not provide a cause of action against those defendants. This is not to say that the state does not also have an Eleventh Amendment defense, just that a federal court will never reach it, as the case can be resolved on non-constitutional grounds.

The relationship between the Eleventh Amendment, § 1983, and suits against particular defendants has occasionally caused confusion for lower courts. Indeed, an example of this confusion came before the Supreme Court during its 1996-97 term in *Arizonans for Official English v. Arizona*.[67] The Court, however, used that case as a vehicle to reiterate the basic rule that states, state agencies, and state employees sued for damages in their official capacities are not persons under § 1983. Indeed, the Court's opinion was issued before the Seventh Circuit issued its *Schacht* opinion, and the state pointed it out. The Seventh Circuit even cited *Arizonans for Official English* in its *Schacht* opinion.[68] This, perhaps, is the surprising thing—that a lower federal court is still confused about this basic rule. The Supreme Court had no difficulty, however, in correcting the mistake, and its decision is likely important for that very reason.[69] The Court reversed the Seventh Circuit and held that the existence of a claim barred by the Eleventh Amendment does not destroy removability of a complaint. As indicated, the Supreme Court's decision rested on the nature of Eleventh Amendment immunity and the fact that defenses are not normally considered when determining removability. The Court's decision came as no surprise, since it constituted a simple application of well-established principles.

B. The Mild Surprise Cases

1. *Ohio Adult Parole Authority v. Woodard*, the Fifth Amendment, and Self-Incrimination in Clemency Proceedings

I have placed *Ohio Adult Patrol Authority v. Woodward*[70] under the "mild surprise" prong, but it is a difficult case to categorize, as it raises two distinct issues. Eugene Woodard was convicted in an Ohio state court of aggravated murder and sentenced to death.[71] His conviction was affirmed on direct appeal.[72] As of 45 days

66. *See* Will v. Michigan Dep't State Police, 491 U.S. 58 (1989).
67. 520 U.S. 3 (1997).
68. *See* Schacht v. Wisconsin Dep't of Corrections, 116 F.3d 1151, 1153 (1997).
69. Justice Kennedy, while joining in the Court's opinion, did write a separate concurrence to emphasize that the Court did not reach the question of whether removal constituted a waiver of the Eleventh Amendment defense. *See* Wisconsin Dep't of Corrections v. Schacht, 118 S. Ct. 2047, 2053 (1997). His concurrence urged the Court to reach that question in some future case. *See id.*
70. 118 S. Ct. 1244 (1998).
71. *See id.* at 1248.
72. *See id.*

before his scheduled execution, Woodard had not obtained a stay of execution.[73] Thus, in accordance with the procedures mandated by Ohio law, the Ohio Adult Parole Authority commenced its clemency proceedings.[74] As part of those proceedings, Woodard was given the option of participating in an interview with the parole board.[75] No attorneys are allowed at the interview.[76] Woodard filed a § 1983 suit alleging that these procedures violated his due process rights under the Fourteenth Amendment and his Fifth Amendment privilege against self-incrimination.[77]

The Fifth Amendment challenge is obviously the one that fits within the "immunity" theme of this paper. The Court issued a unanimous answer to that question, holding that the Fifth Amendment privilege against self-incrimination simply does not apply to clemency procedures.[78] The self-incrimination portion of the Fifth Amendment declares that "no person shall be compelled to be a witness against himself."[79] That clause applies, then, only when a person is being "compelled" to speak.

Nothing in Ohio's clemency procedures mandated Woodard's participation in the interview. Indeed, those procedures explicitly stated that such participation was voluntary.[80] Thus, Woodard could not argue that compulsion existed in the traditional sense. Instead, he argued that the compulsion worked in a more subtle way. Because Ohio provided only one guaranteed clemency proceeding, Woodard argued that he was forced to choose between taking full advantage of the clemency proceeding (and possibly compromising his ongoing post conviction remedies) or possibly forfeiting his one meaningful chance at clemency. Woodard also argued that if he participated in the interview, he might be put in the position of having to reveal information about other crimes for which he could still face prosecution.[81] According to Woodard, this untenable choice amounted to a "compulsion" that he take part in the interview.[82]

The Court unanimously rejected this argument, and did so in a straightforward and unsurprising way, declaring:

> It is difficult to see how a voluntary interview could "compel" [Woodard] to speak. He merely faces a choice quite similar to the sorts of choices that a criminal defendant must make in the course of criminal proceedings, none of which has ever been held to violate the Fifth Amendment.

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73. *See id.*
74. *See id.*
75. *See id.*
76. *See* Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1244, 1248 (1998).
77. *See id.*
78. *See id.* at 1252-53.
79. U.S. CONST. amend. V.
80. *See Woodard*, 118 S. Ct. at 1252.
81. *See id.*
82. *Id.*

> . . . In each of these situations [such as deciding whether or not to testify at trial], there are undoubted pressures—generated by the strength of the Government's case against him—pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute "compulsion" for Fifth Amendment purposes.
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> . . . .
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> Here, [Woodard] has the same choice of providing information to the Authority—at the risk of damaging his case for clemency or for postconviction relief—or of remaining silent. But this pressure to speak in the hope of improving his chance of being granted clemency does not make the interview compelled.[83]

As the Court states, this conclusion follows logically from precedent. And indeed, such precedent makes a good deal of sense in light of the purposes behind the Fifth Amendment's protections. The State of Ohio did not force Woodard to provide, from his own mouth, the evidence that would convict him. Instead, Woodard had an honest choice as to whether to participate in the clemency proceedings. One alternative—participating in the hopes of at least getting his death sentence commuted—may be more attractive than the other, but that is simply not the type of compulsion the Fifth Amendment was designed to protect against.

If the Fifth Amendment claim had been the only issue in the case, I would have put this discussion under the "no surprise" prong of the paper. I ultimately decided to put it under the "mild surprise" prong as a result of the vote on the second issue in the case—whether Ohio's clemency procedures are subject to the strictures of the Fourteenth Amendment's Due Process Clause. That Clause prohibits a state from depriving a person of life, liberty, or property without due process of law.[84] Accordingly, due process protections do not exist in a vacuum; they are triggered when a state seeks to "deprive" someone of "life, liberty, or property."[85]

In addition to his Fifth Amendment claim, Woodard argued that Ohio's clemency procedures violated his due process rights. Woodard contended that his interest in "life" was at stake during the proceedings, as the clemency process provided an opportunity to have his death sentence commuted. This "life"interest triggered the Due Process Clause, which Woodard argued, was violated because

> (1) Ohio gave him insufficient notice of the interview and hearing;
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> (2) he did not have a meaningful opportunity to prepare his clemency application, in light of the fact that his post-conviction petitions were still ongoing;
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> (3) his attorney was not allowed to participate in the interview and could

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83. *Id.* at 1252-53.
84. *See* U.S. CONST. amend. XIV, § 1.
85. *Id.*

participate in the hearing only at the discretion of the parole board; and

(4) he was precluded from testifying or submitting documentary evidence at the hearing.[86]

Once you examine the three opinions issued by the Court in this case and count up the votes, you will discover that the Court decided by a 5-4 vote that the Due Process Clause does apply to clemency procedures.[87]

I found slightly surprising the four votes holding that the Due Process Clause does not apply to such proceedings. Those four Justices rested their decision on two basic prongs. First, they looked to prior (non-capital) cases in which the Court had refused to find a liberty interest in clemency proceedings.[88] Those prior cases had declared that clemency is simply not the business of the courts—a petition for clemency is a "unilateral hope" submitted to the executive branch.[89] Appeals for clemency are matters of grace and, as such, are the exclusive domain of the executive.

The second strand of the four Justices' argument centered around the nature of Woodard's interest. The Justices in the minority felt that Woodard had no "life" interest, and could not have a "life" interest, in the clemency procedures because, for all intents and purposes, that interest was extinguished at his trial when he received a death sentence. Thus, the determination as to Woodard's life "has already been made with all required due process protections."[90] Accordingly, it could not trigger the Due Process Clause in the clemency proceeding, especially since clemency is not an "integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant."[91]

The five Justices in the majority vehemently disagreed with this approach, declaring that "a prisoner under a death sentence remains a living person and consequently has an interest in his life."[92] While clemency proceedings do not require the full panoply of due process, such as at a criminal trial, they must satisfy the basic elements of due process.[93] All five justices in the majority would reserve a role for the courts to intervene in clemency proceedings in the event a state begins administering those proceedings in a completely arbitrary manner, such as by a coin toss. The

86. *See Woodard,* 118 S. Ct. at 1254 (O'Connor, J. concurring in part and in the judgment).

87. The five votes in favor of the Due Process Clause applying are found in two places: the four votes for Justice O'Connor's concurring opinion (Justices O'Connor, Souter, Ginsburg, and Breyer) and Justice Steven's vote in his opinion concurring in part and dissenting in part. The four votes concluding that the Due Process Clause does not apply are found in Part II of the main opinion (authored by Chief Justice Rehnquist and joined by Justices Scalia, Kennedy and Thomas).

88. *See Woodard,* 118 S. Ct. at 1249-50.

89. *Id.* at 1249 (quoting Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981)).

90. *Id.* at 1252 n.5. While these Justices conceded that Woodard did have some residual "life" interest, for example in not being summarily executed by a prison guard, he cannot invoke this interest as to the clemency proceedings. *See id.* at 1250.

91. *Id.* at 1252 (quoting Evitts v. Lucey, 469 U.S. 387, 393 (1985)).

92. *Id.* at 1253 (O'Connor, J. concurring); *see also* Justice Steven's dissenting opinion stating: "There is, however, no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does." *Id.* at 1255.

93. *See id.* at 1253-54 (O'Connor, J. concurring); *id.* at 1255 (Stevens, J. concurring in part and dissenting in part).

difference between Justice Stevens and the other four Justices was how to apply this basic requirement to Woodard. Justice Stevens agreed with the Court of Appeals' determination that the case should be remanded to the District Court for an evidentiary hearing as to whether Ohio's clemency procedures met the minimum requirements of due process.[94] The four other Justices, however, felt the record was sufficient to hold that Woodard had not been deprived of due process.[95]

Thus, eight Justices determined that Ohio had not violated Woodard's constitutional rights during its clemency proceedings. The dispute between the Justices over the applicability of the Due Process Clause was of no real significance on the facts of this particular case. That might, however, not be true in future cases. Future litigants can take comfort in the fact that, at least for the moment, the basic elements of due process apply to clemency proceedings. The close vote and the make-up of the two camps, however, is a signal that this is an issue to watch; the Court may change directions in the future. It is also significant that four Justices on the Court are ready and willing to take a somewhat restrictive view of the Due Process Clause, at least in the context of the criminal justice system.

2. *Crawford-El v. Britton* and the Relationship Between Qualified Immunity and Unconstitutional Motive Cases

As discussed above,[96] the Supreme Court has interpreted § 1983 to incorporate the vast array of common law immunities that existed at the time Congress enacted the statute. The type of immunity available to a given defendant depends on the nature of the challenged action. Judicial actions are shielded by absolute immunity, as are legislative actions; executive actions, however, are covered only by a qualified immunity. It follows, then, that most § 1983 actions are brought against those exercising executive authority. After all, a qualified immunity defense has at least the possibility of being defeated; an absolute immunity is insurmountable. Consequently, the Supreme Court and the lower federal courts have issued a great number of opinions defining the contours and applicability of the qualified immunity defense.

One more such opinion came from the Supreme Court last term—the decision in *Crawford-El v. Britton*.[97] Although presenting very ordinary, run of the mill, prisoner litigation facts (the plaintiff was a vocal prisoner who filed suit against a corrections officer alleging that she took several actions against him in retaliation for his statements and activities), the case presented a very interesting question—the relationship between the requirements of qualified immunity and the elements of the underlying constitutional violation.

The current era of qualified immunity began in 1982 with the Supreme Court's decision in *Harlow v. Fitzgerald*.[98] Prior to *Harlow*, the defense of qualified

94. *See* Ohio Adult Parole Authority v. Woodard, 118 S. Ct. 1245, 1256-57 (1998).
95. *See id.* at 1254.
96. *See supra* text at Part I.A.1.
97. 118 S. Ct. 1584 (1998).
98. 457 U.S. 800 (1982).

immunity contained both a subjective and an objective component; in other words, a plaintiff could overcome the defense by showing either that:

> (1) the defendant "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]," or (2) "he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]."[99]

The second prong of this test, the subjective prong, proved to be essentially unworkable in practice. One of the primary purposes of qualified immunity is to protect government officials from non-meritorious suits, as these suits needlessly waste the official's time and energy, as well as consume public money that could be better spent. These things are wasted simply by virtue of the pretrial and trial process; the verdict is irrelevant. Thus, to properly protect officials, these frivolous suits must be eliminated early in the pretrial process. Otherwise, qualified immunity has not served its purpose. Litigants and courts quickly discovered that the subjective prong provided a quick way to circumvent a qualified immunity defense, as all a plaintiff needed to do was allege that the defendant acted maliciously.

To resolve this difficulty, and prevent bare allegations of malice from defeating an otherwise proper qualified immunity defense, the Supreme Court eliminated the subjective prong of the test and reformulated a new test that was purely objective. In *Harlow*, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[100] Nine years later, in *Siegert v. Gilley*,[101] the Court clarified the procedures a court should use in considering a qualified immunity defense. According to the Court, a lower court confronted with this issue should first determine whether one of the plaintiff's constitutional rights was violated.[102] If so, the court should proceed to the second question and determine whether that right was "clearly established" at the time of the violation in question.[103]

Allegations of malice, then, are irrelevant to the second question—the qualified immunity question. But allegations of malice or improper intent may still be relevant to the first question—the constitutional violation. Many constitutional violations, such as retaliation or discrimination, require a showing of improper motive on the part of the defendant. Should some sort of heightened standard of proof be required in these cases to avoid the same sorts of problems resolved by the Supreme Court in *Harlow*? To prevent frivolous allegations of constitutional violations from

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99. *Crawford-El*, 118 S. Ct. at 1591 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).
100. *Harlow*, 457 U.S. at 818.
101. 500 U.S. 226 (1991).
102. *See id.* at 231. Or a statutory right, if that's what the suit is premised on.
103. *See id.* (quoting *Harlow*, 457 U.S. at 815). "Clearly established" has essentially become a term of art. Although jurisdictions can differ about its exact contours, generally speaking a right is "clearly established" if it has been decided by the relevant U.S. Court of Appeals or by the Supreme Court.

proceeding to trial? This was the question at the heart of *Crawford-El.* In that case, the D.C. Circuit Court, sitting en banc, held that a plaintiff alleging an improper motive must prove that improper motive by clear and convincing evidence to avoid summary judgment and to prevail at trial.

The Supreme Court agreed to hear the case and, by a 5-4 vote, reversed.[104] The majority's decision rested on three basic premises. First, the Court held that the policies supporting the elimination of the subjective prong of the qualified immunity test are not the same policies at issue with respect to the substantive constitutional violation. In the latter situation, countervailing concerns come into play and tip the balance the other direction. Specifically:

> While there is obvious unfairness in imposing liability—indeed, even in compelling the defendant to bear the burdens of discovery and trial—for engaging in conduct that was objectively reasonable when it occurred, no such unfairness can be attributed to holding one accountable for actions that she knew, or should have known, violated the constitutional rights of the plaintiff. . . .
>
> . . . Social costs that adequately justified the elimination of the subjective component of an affirmative defense do not necessarily justify serious limitations upon "the only realistic" remedy for the violation of constitutional guarantees.[105]

As its second reason, the Court pointed out that there are already mechanisms in place to prevent suits based on "bare allegations" of improper motive from proceeding to trial. These mechanisms include causation requirements, discovery procedures, motions to dismiss, and motions for summary judgment.[106]

Third, and finally, any restrictions on the way in which improper motive suits proceed would require "fashioning a special rule for constitutional claims that require proof of improper intent." In light of the Court's first two reasons, that precedent does not demand such a rule and that some procedures already exist, the majority felt that this type of special rule required straying too far "from the traditional limits on judicial authority."[107] In other words, it is an activity best suited for the legislature. And since Congress has just recently fashioned new rules for prisoner civil rights suits,[108] and those rules made no mention of special proofs in improper motive cases, the Court should not intrude into that arena.

The four dissenters, although they did not all agree on one test, had no problem with the Court fashioning a new test to handle improper motive cases. For their test,

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104. *See id.* at 227. The majority opinion was written by Justice Stevens and garnered the votes of Justices Kennedy, Souter, Ginsburg, and Breyer. Chief Justice Rehnquist wrote a dissenting opinion, which was joined by Justice O'Connor. Justice Scalia also dissented, and Justice Thomas joined in his opinion.

105. Crawford-El v. Britton, 118 S. Ct. 1584, 1593 (quoting Harlow, 457 U.S. at 814).

106. *See id.* at 1594, 1596-98.

107. *Id.* at 1595.

108. *See* Prisoner Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-66, 1321-77 (42 U.S.C. § 1997) (1996).

Justices Scalia and Thomas went so far as to say that "once the trial court finds that the asserted grounds for the official action were objectively valid (*e.g.*, the person fired for alleged incompetence was indeed incompetent), it would not admit any proof that something other than those reasonable grounds was the genuine motive (*e.g.*, the incompetent person fired was a Republican)."[109] Chief Justice Rehnquist and Justice O'Connor would not have gone quite that far; they would give the plaintiff an opportunity to prove (through objective evidence) that the proffered reason was a pretext.[110]

Although I was definitely pleased by the decision, I was a bit surprised. The Supreme Court rarely passes up an opportunity to ratchet up the procedural requirements in § 1983 cases, particularly when the plaintiff is a prisoner.[111] It is good to see the Court draw a line and say "this is too much; this goes too far." The decision was, however, a close call. Four justices voted for significant burdens to be placed on plaintiffs who accuse government officials of improper motives. As the majority pointed out, the dissenters' willingness to impose these burdens is especially troublesome considering § 1983 was enacted in large part to curb state officials from acting with unconstitutional motives, *e.g.*, in racially discriminatory ways.[112]

Despite its victory for plaintiffs, the case, particularly the decisions by the D.C. Circuit and the votes of the four dissenting Supreme Court Justices, demonstrates how far the federal courts are willing to go to protect state government officials and to create procedures to quickly "clear the decks" of § 1983 complaints. This is very disturbing, especially in light of the fact that these suits are supposed to vindicate our constitutional rights. While these procedural hurdles do eliminate many of the frivolous complaints, they also take with them many meritorious complaints. Most § 1983 complaints are inartfully drafted, as they are filed by pro se litigants. It is terribly easy for a pro se litigant to inadvertently sink his or her case by running afoul of one of the complicated procedural rules that litter this area. Fortunately, *Crawford-El* avoided adding one more shoal to that ocean.

II. THE CRIMINAL PROCEDURE IMMUNITY DECISIONS

As mentioned earlier, two clauses in the Fifth Amendment concern immunity issues—the Self-incrimination Clause and the Double Jeopardy Clause. The Supreme Court decided two self-incrimination cases in its 1997-98 term. One of those, *Woodard*, was about self-incrimination and clemency proceedings, and since it arose in the context of a § 1983 action, I discussed it above. The second one concerned the scope of the "sovereign" in the clause—to put it more specifically, can you rely on the privilege if you are afraid of prosecution by a foreign government, or

109. *Crawford-El*, 118 S. Ct. at 1604 (Scalia, J. dissenting).
110. *See id.* (Rehnquist, C.J. dissenting).
111. *See* Melissa L. Koehn, *The New American Caste System: The Supreme Court and Discrimination Among Civil Rights Plaintiffs*, 32 MICH. J.L. REF. 49 (1998).
112. *See Crawford-El*, 118 S. Ct. at 1595 n.16.

does it protect only against prosecutions by the federal and state governments? I think one can probably guess the answer to this question based on the Court's past criminal procedure decisions; therefore, I categorize it as a "no surprise" case.

The Court's double jeopardy decisions are more controversial and a bit more surprising (although not by much); thus, I have labeled them "mild surprise" cases. As a practical matter, though, my categorization of these three cases is somewhat arbitrary. In all three cases, there were plausible arguments on both sides of the litigation, and the Supreme Court resolved the disputes by applying rather narrow interpretations of prior precedent or by overruling prior opinions. Therefore, in some sense, all three are "mild surprise" cases and, at the same time, "no surprise" cases.

A. No Surprise—U.S. v. Balsys *and the Right Against Self-Incrimination*

Aloyzas Balsys immigrated to the United States in 1961.[113] According to his application, he served in the Lithuanian army from 1934 to 1940 and spent 1940 to 1944 in hiding. Eventually, however, the Office of Special Investigation turned its focus on Balsys, suspecting that he might have participated in Nazi persecution during World War II. When the OSI subpoenaed him, Balsys invoked his Fifth Amendment privilege against self-incrimination, citing a fear of prosecution in Lithuanian, Israel, and Germany. The question, then, became whether the Fifth Amendment's protection extends to criminal prosecutions by a foreign sovereign.[114]

The Fifth Amendment provides, in relevant part, that "no person . . . shall be compelled in any criminal case to be a witness against himself."[115] The dispute in *Balsys* centered around the meaning of the phrase "any criminal case."[116] There was no argument that the clause extended to Balsys, a resident alien, and that the U.S. government was seeking to "compel" his testimony in a way that had the potential to make him a "witness against himself."[117] There also was no dispute that Balsys' fear of criminal prosecution, at least by Lithuania and Israel, was a reasonable fear.[118] Thus, the Court was squarely faced with the question of whether the self-incrimination clause applies only to prosecutions by domestic sovereigns (*e.g.*, the states and the federal government) or whether it also applies to foreign criminal prosecutions.

A majority of the Court looked to the context of the clause, the history of the privilege against self-incrimination, and the Court's own precedent to conclude that "any criminal case" should not be interpreted literally to mean *any* criminal case; instead, the phrase referred to any criminal prosecution by a sovereign within the United States.[119] This conclusion did require the Court to limit its prior decision in

113. United States v. Balsys, 118 S. Ct. 2218, 2221 (1998).
114. *See id.* at 2221-22.
115. U.S. CONST. amend. V.
116. *See Balsys*, 118 S. Ct. at 2222-23.
117. *See id.*
118. *See id.*
119. *See id.* at 2222-31.

Murphy v. Waterfront Commission of N.Y. Harbor.[120] After a detailed examination of history, however, the Court had little trouble concluding that *Murphy* had strayed a bit far afield in suggesting that the Fifth Amendment's protection against self-incrimination might reach farther than criminal prosecutions within the United States.

The Court could have stopped with this conclusion, as it would have resolved the case. Five justices, however, went further and looked at the policies embodied in the Self-incrimination Clause.[121] (Seven justices joined in the Court's historical section, but Justices Scalia and Thomas did not join in the Court's policy analysis). The Justices had no trouble concluding that the basic policies furthered by the Clause were fulfilled by an interpretation that applied the Clause only to domestic criminal prosecutions; the policies did not require the Clause to be extended any farther.[122]

I have slotted *Balsys* as a "no surprise" case primarily because that was my immediate reaction upon hearing the Court's verdict. When I discovered the Court had agreed to address the question of whether the self-incrimination clause extends to cover fear of foreign criminal prosecution, I thought, "this is a no-brainer." This Court is certainly not inclined to extend the existing reach of any of the constitutional criminal procedural protections. And, indeed, that was the outcome of the case.

Upon closer scrutiny, however, the issue was not quite so simple. While the Court had not clearly faced this question before, its precedent contained sufficient breadth to give comfort to both sides of the issue. In other words, in looking at the prior decisions of the Court (as opposed to just looking at the issue), the decision could have easily gone either way. Still, however, the result was predictable, given this Court's inclination to restrict the procedural protections available to defendants in criminal cases.

The Court's decision, though, does illustrate an important point about the malleability of history. As a prior commentator has noted, the Court is not very good at "doing" history.[123] Part of the reason is that a look at history rarely supplies an easy yes or no answer. History is more complex than that, and historical actions depend on a vast web of causes and effects. The Court's tendency to do an one-dimensional historical analysis allows it to justify any answer it wants. That is a dangerous way to decide cases, and an unconvincing one, as it leaves the door open for dissenters to sift through history for evidence that supports the opposite result. And the dissenters in *Balsys*, Justices Breyer and Ginsburg, did just that. So, despite the Court's attempt to use history and policy to support its result, what we are really left with is the realization that the Court did not want to extend the self-incrimination clause any further, so it plucked select bits of history and policy and presented them as the basis for the decision. Accordingly, I decided to leave this case in the "no suprise" category.

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120. 378 U.S. 52 (1964).

121. *See Balsys*, 118 S. Ct. at 2231-35.

122. *See id.*

123. *See* Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741 (1987).

B. *Mild Surprise—The Double Jeopardy Decisions*

The Fifth Amendment's Double Jeopardy Clause states that "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."[124] At its heart, then, this clause is an immunity provision. In its most basic form, the Double Jeopardy Clause provides immunity against the rigors of a second criminal trial. Of course, constitutional interpretation is rarely that simple, and the Court's analysis of the Double Jeopardy Clause is no exception.

The Supreme Court has declared that, at its core, the Double Jeopardy Clause protects against a second criminal prosecution for the same offense and against multiple criminal punishments for the same offense (but only if the punishments are imposed in separate proceedings).[125] This interpretation set the Court on the course of having to determine what counts as a "criminal prosecution" and what counts as a "criminal punishment." These tasks have led the Court to develop a variety of tests that result in a great patchwork of double jeopardy rules.[126] One of the most problematic issues in recent years has been determining when a civil fine should be counted as a criminal punishment. The Court took up that issue again this past term in *Hudson v. United States*.[127] The Court also addressed the scope of the double jeopardy protections in sentencing proceedings.[128]

1. *Hudson v. United States* and Whether a Monetary Penalty Is "Criminal"

The Supreme Court has interpreted the Double Jeopardy Clause to prohibit multiple criminal punishments from being imposed for a single offense, provided the punishments are imposed in successive proceedings. This interpretation has raised the question of how to determine whether a given proceeding and a given punishment are "criminal" and when they are merely "civil." The Double Jeopardy Clause prohibits only multiple criminal punishments—it does not apply when one punishment is civil and the other is criminal.

The Court has long promulgated a general, two part test for handling this question.[129] In the first step of the test, the Court looks at whether the legislature has labeled the statutory provision or scheme at issue as either civil or criminal. The Court will give a great deal of deference to the legislative label. If the legislature calls the provision "criminal," that will be the end of the inquiry, and it will count as "punishment" for purposes of the Double Jeopardy Clause. If the legislature has labeled the provision "civil," however, then the Court will continue to the second

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124. U.S. CONST. amend. V.

125. *See generally* North Carolina v. Pearce, 395 U.S. 711 (1969).

126. The Court itself has described its double jeopardy holdings as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981).

127. 118 S. Ct. 488 (1997).

128. *See, e.g.*, Monge v. California, 118 S. Ct. 2246 (1998).

129. *See* United States v. Ward, 448 U.S. 242 (1980); Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Rex Trailer Co. v. United States, 350 U.S. 148 (1956).

stage of the test.

In the second stage, the Court looks at whether the statutory scheme is "'so punitive either in purpose or effect' as to 'transfor[m] what was clearly intended as a civil remedy into a criminal penalty.'"[130] In conducting this inquiry, the Court employs a multi-factor analysis, including:

(1) "whether the sanction involves an affirmative disability or restraint";
(2) "whether it has historically been regarded as a punishment";
(3) "whether it comes into play only on a finding of scienter";
(4) "whether its operation will promote the traditional aims of punishment—retribution and deterrence";
(5) "whether the behavior to which it applies is already a crime";
(6) "whether an alternative purpose to which it may rationally be connected is assignable for it"; and
(7) "whether it appears excessive in relation to the alternative purpose assigned."[131]

Deference to the legislature is also apparent here, as this analysis must demonstrate by the "clearest proof" that the civil remedy is actually a criminal punishment.[132]

While this has been the basic rule for some time, the Court did create a small exception to it with its 1989 decision in *United States v. Halper*.[133] Irwin Halper was convicted of 65 counts of filing false Medicare claims with the government. After his criminal trial was completed, and sentence was imposed, the government began civil proceedings against Halper for the same false claims. The civil statute essentially provided for a statutory fine of $2,000 for each false claim. Thus, Halper was facing a fine of $130,000 for defrauding the government of $585.

In reviewing Halper's case, the Supreme Court held that the fine was so disproportionate to Halper's wrongdoing that it was, in essence, transformed from a civil remedy into a criminal punishment. Since Halper had already been punished once in a prior proceeding for the same conduct, the Double Jeopardy Clause barred the imposition of the fine. The Court did, however, emphasize that this was a narrow exception, applicable only in the "rare case" where the fine is overwhelming disproportionate to the damages inflicted.[134]

Despite this cautionary note, the lower federal courts were quickly faced with a flood of cases in which litigants tried to shoehorn their fine into the *Halper* exception. In *Hudson v. United States,* the Supreme Court said "enough." It overruled *Halper* as "unworkable," thereby eliminating the *Halper* exception and leaving litigants with only the basic test.[135] And while proportionality between the

130. *Hudson*, 118 S. Ct. at 493 (quoting *Ward*, 448 U.S. at 248-49; *Rex Trailer*, 350 U.S. at 154).
131. *Id.* at 493 (quoting *Kennedy*, 372 U.S. at 168-69).
132. *See id.* at 494.
133. 490 U.S. 435 (1989).
134. *See id.* at 449.
135. *Hudson*, 118 S. Ct. at 494.

harm and the fine is part of that test, it is only a small part of a larger test in which courts are supposed to give great deference to legislative labels.

In abandoning *Halper*, however, the Court noted that litigants were not without other protections. The Due Process Clause, the Equal Protection Clause, and the Excessive Fines Clause all exist to protect litigants from excessive and irrational fines.[136] This reassurance, though, is not likely to prove too comforting, especially in light of the Court's decision this term in *United States v. Bajakajian*.[137] In *Bajakajian*, the Court gave us, for the first time, an actual test to use in applying the Eighth Amendment's Excessive Fines Clause. Two holdings in that case severely undercut the Excessive Fines Clause's protections in these circumstances.

First, the Court noted that the Clause applies only to payments that constitute "punishment."[138] This holding, of course, leads right back to the deference *Hudson* gives to legislative labeling. It also means that the Excessive Fines Clause is irrelevant to the entire category of civil in rem forfeitures.

Nevertheless, this limitation did not prohibit the Clause from applying to Bajakajian, as the fine at issue in his case was imposed as part of a criminal sentencing proceeding and was clearly considered by the legislature to be punitive in nature. That led the Court to its second major holding—the Court rejected any type of strict proportionality test, and instead adopted the "standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents."[139] The Court then proceeded to apply this test and affirm the lower courts' decisions that the proposed fine was unconstitutional. Thus, while the Excessive Fines Clause provides only minimal protection, we at least have an illustration of when it is violated.

2. *Monge v. California* and Sentencing Proceedings

With one exception (concerning capital proceedings), the Supreme Court has steadfastly refused to extend the protections of the Double Jeopardy Clause to sentencing proceedings. The Court succinctly summarized the reasons for this reluctance in *Monge v. California*:[140]

> Historically, we have found double jeopardy protections inapplicable to sentencing proceedings, . . . because the determinations at issue do not place a defendant in jeopardy for an "offense." . . . Nor have sentence enhancements been construed as additional punishment for the previous offense; rather, they act to increase a sentence "because of the manner in which [the defendant] committed the crime of conviction." . . . An enhanced sentence imposed on a persistent offender thus "is not to be viewed as either a new jeopardy or additional penalty for the earlier

136. *See id.* at 495.
137. 118 S. Ct. 2028 (1998).
138. *See id.* at 2033.
139. *Id.* at 2037.
140. 118 S. Ct. 2246 (1998).

> crimes" but as "a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one. . . .
>
> Sentencing decisions favorable to the defendant, moreover, cannot generally be analogized to an acquittal. We have held that where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence of guilt, that finding is comparable to an acquittal, and the Double Jeopardy Clause precludes a second trial. Where a similar failure of proof occurs in a sentencing proceeding, however, the analogy is inapt. The pronouncement of sentence simply does not "have the qualities of constitutional finality that attend an acquittal."[141]

Thus, double jeopardy does not prohibit either resentencing or an increased punishment on resentencing. The Court, however, has carved out one exception to this general rule. In *Bullington v. Missouri*[142] the Court addressed the applicability of double jeopardy to capital sentencing procedures. Bullington had been convicted of murder at the guilt phase of his trial, but at the sentencing phase, the jury opted to impose a life sentence rather than death. Bullington's conviction and sentence were later reversed, however, for constitutional errors regarding jury selection. Upon retrial, the prosecutor again sought the death penalty. The Supreme Court held that Bullington's first penalty phase bore all the "hallmarks of [a] trial on guilt or innocence,"[143] so the Double Jeopardy Clause forbade the prosecutor from seeking the death penalty a second time; instead, the prosecutor was restricted to the life sentence imposed by the original jury.[144]

The scope of the *Bullington* exception was at issue in the recent case of *Monge v. California*.[145] That case evolved out of California's sentencing procedures. Monge was charged and convicted of several counts involving the possession and sale of marijuana. California sought to enhance his sentence due to his prior assault conviction. California state law establishes a strict procedure that must be followed before the sentencing enhancement can be applied. Specifically, "[d]efendants may invoke the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination; the prosecution must prove the allegations beyond a reasonable doubt; and the rules of evidence apply."[146] The trial court applied the enhancement, but the appellate courts reversed on the grounds that the prosecutor presented insufficient evidence to establish the relevant facts regarding the prior conviction.[147] The question then arose as to whether the prosecutor could seek the enhancement again, or whether that action was prohibited by the Double Jeopardy Clause.

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141. *Id.*
142. 451 U.S. 430 (1981).
143. *Id.* at 439.
144. *Id.*
145. *Monge*, 118 S. Ct. at 2246.
146. *Id.*
147. *See id.* at 2249.

Monge argued that the *Bullington* exception applied to his case, as his sentencing procedure bore all the "hallmarks" of a criminal trial and the prosecution failed to present sufficient evidence to carry its burden.[148] Eight Justices of the Supreme Court rejected this argument and refused to extend *Bullington* outside the realm of capital sentencing procedures.[149] The majority agreed that *Bullington* rested in part on the nature of the sentencing proceedings, but held that the key factor in that case was not the nature of the procedures themselves, but rather the fact that it was a capital sentencing procedure.[150] As the Court has repeatedly stated, death is different, and that difference mandated the result in *Bullington*.[151] Accordingly, the *Bullington* rule is not applicable in noncapital sentencing proceedings, and the Double Jeopardy Clause therefore does not prevent California from seeking a second time to enhance Monge's sentence.

Justice Stevens dissented from this holding, arguing that the purpose of the Double Jeopardy Clause is to prevent the prosecution from having a "second bite" at the apple when the error at the first trial was caused by a failure of proof.[152] His was the sole voice, however, for this conclusion. The surprising opinion was not Justice Stevens', but rather the dissenting opinion of Justice Scalia, who was joined by Justices Souter and Ginsburg.

Those three justices argued that the Double Jeopardy Clause *should* apply to California's attempt to enhance Monge's sentence, although not for the reasons Monge argued.[153] Rather, they took issue with whether the enhancement was really a "sentencing proceeding" or whether it was essentially an element of the crime. As pointed out in the dissent, California's criminal code "is full of 'sentencing enhancements' that look exactly like separate crimes, and that expose the defendant to additional maximum punishment."[154] By labeling these elements "sentencing enhancements," California was successful in preventing the double jeopardy protections from reaching them. The dissenters feared that this was the first step in a trend of moving critical components of proof to the sentencing phase to avoid the applicability of the various criminal procedural protections. Accordingly, the dissenters would look past the legislative label of "sentencing" to reach what is actually happening. Because the "enhancement" in Monge's case looked more like an element of the crime, the dissenters would have applied the Double Jeopardy Clause and prevented a retrial.[155]

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148. *See id.*

149. Four justices joined in Justice O'Connor's majority opinion (Chief Justice Rehnquist and Justices Kennedy, Thomas and Breyer). Two Justices (Souter and Ginsburg) joined in Justice Scalia's dissenting opinion, which disagreed with the majority's result, but not its reasoning on this issue.

150. *See id.*

151. *See* Monge v. California, 118 S. Ct. 2246, 2252-53 (1998).

152. *See id.* at 2253-54 (Stevens, J. dissenting).

153. *See id.* at 2255-57.

154. *Id.* at 2256 (Scalia, J. dissenting).

155. *See id.*

III. CONCLUSION

As far as the immunity decisions go, then, the Supreme Court did not unveil any big surprises this past term. That is not, however, necessarily a bad thing. The Supreme Court used most of its immunity decisions this past term to clarify its prior precedent and to illustrate how to apply the established law to particular circumstances. Academics, lawyers, and lower federal courts often complain that the Court issues sweeping pronouncements with little care or concern for those who must struggle to turn broad statements into practical rules of decision. We should not, then, complain when the Court eschews the broad policy pronouncements in favor of practical guidance.