Section 1983 Primer

dri™
The Voice of the Defense Bar

This publication and the works of its authors contained herein is for general information only and is not intended to provide and should not be relied upon for legal advice in any particular circumstance or fact situation or as a substitute for individual legal research. Neither DRI nor the authors make any warranties or representations of any kind about the contents of this publication, the accuracy or timeliness of its contents, or the information or explanations given. DRI and the authors disclaim any responsibility arising out of or in connection with any person's reliance on this publication or on the information contained within it and for any omissions or inaccuracies. The reader is advised to consult with an attorney to address any particular circumstance or fact situation. Any opinions expressed in this publication are those of the authors and not necessarily those of DRI or its leadership.

DRI
222 South Riverside Plaza, Suite 1870
Chicago, Illinois 60606
dri.org

Produced in the United States of America

Section 1983 Primer

Edited by Kurt M. Simatic and Kristy W. Dugan

dri The Voice of the Defense Bar™

Editors

Kurt M. Simatic is an attorney with Stafford Rosenbaum LLP, with offices in Madison and Milwaukee, Wisconsin, where he focuses his practice on commercial, real estate, and governmental liability litigation. Kurt is also an active member of the DRI Governmental Liability Committee and is chair of publications. He received his B.A. from the University of Wisconsin-Madison and his J.D. from Marquette University Law School.

Stafford Rosenbaum LLP | 608.259.2646 | ksimatic@staffordlaw.com

Kristy W. Dugan is an attorney with Frazer Greene LLC in Mobile, Alabama. A former state prosecutor, she handles business litigation, professional liability and civil rights defense matters. Kristy has published articles for the DRI Governmental Liability Committee and is currently vice chair of publications. She received her B.A. from Haverford College and her J.D. from Tulane University Law School.

Frazer Greene LLC | 251.431.6036 | kwd@frazergreene.com

Nathaniel M. Jordan (past editor) is a partner at Yoder Ainlay Ulmer & Buckingham LLP in Goshen, Indiana. He handles state and federal lawsuits of many kinds, both at the trial court level and on appeal. As part of his litigation practice, he has argued before the Indi-ana Supreme Court and the United States Court of Appeals for the Seventh Circuit. Mr. Jordan also represents employers and governmental officials in general legal matters, and he writes, edits publications, and gives talks in his practice areas. He served as the previous publications chair for the DRI Governmental Liability Committee and newsletter editor for the committee. He is also a member of Defense Trial Counsel of Indiana.

Yoder Ainlay Ulmer & Buckingham LLP | 574.533.1171 | njordan@yaub.com

Table of Contents

Introduction

Not so long ago, if the government violated a person's rights, that person could not sue. But as times changed, so did the law, and today people can file civil lawsuits against governmental actors for many kinds of rights violations. People have taken note, and the number of lawsuits has climbed.

DRI's Governmental Liability Committee brings together lawyers that defend the government from civil lawsuits. We committee lawyers are joined in common cause by 42 U.S.C. §1983 of the Civil Rights Act of 1871, the federal law permitting federal rights deprivations claims against governmental actors. And in that cause we gather, speak, and write to share knowledge in governmental defense.

This primer extends that sharing. It covers claim types, immunity defenses, damages, and discovery in governmental lawsuits, and it looks at the interplay between federal and state law when the government is sued. We hope that it gives fast foundational knowledge to lawyers new to governmental defense. If it is a friend to you when the first §1983 lawsuit hits your desk, then it has succeeded.

As we release a third edition of this primer, we would be remiss not to recognize the vision and efforts of our previous publications chair, Nathaniel M. Jordan, in creating the primer's first edition.

We thank the excellent writers who have worked hard to create, and update, this primer, and we wish you, the reader, many successes in governmental defense.

Kurt M. Simatic
Stafford Rosenbaum LLP
DRI Governmental Liability Committee Publications Chair

Kristy W. Dugan
Frazer Greene Upchurch & Baker LLC
DRI Governmental Liability Committee Publications Vice Chair

Foreword

We are pleased to issue this third edition of the DRI Governmental Liability Committee's *Section 1983 Primer*, a publication that was conceived by the many talented lawyers that comprise this dynamic committee, and who saw the need for a desk reference for §1983 defense lawyers and claims professionals—from neophyte to master. This primer is a living and growing publication, that began in 2018 with the first five foundational chapters in this area of law, and expanded on a yearly basis in 2019 and 2020 with additional chapters addressing further aspects and areas in the §1983 field.

The Governmental Liability Committee extends its thanks to current Publications Chair Kurt M. Simatic and Publications Vice Chair Kristy Dugan, under whose leadership this publication has been updated; the authors of the included chapters; and the staff of DRI's Publishing Services Department for their time and dedication to this compendium. We look forward to other members of this committee continuing to add to this sterling resource with further chapters in the years to come.

David J. MacMain
The MacMain Law Group, LLC
Chair, DRI Governmental Liability Committee

Christopher L. Heigele
Baty Holm Numrich & Otto PC
Co-Vice Chair, DRI Governmental Liability Committee

Jody Corbett
Berke Law Firm, PLLC
Co-Vice Chair, DRI Governmental Liability Committee

Chapter 1

An Introduction to Section 1983 Claims and Their Elements

By Dale Conder, Jr.

Section 1983: A Brief History

Congress passed §1983 in 1871 in response to "the reign of terror imposed by the [Ku Klux] Klan upon black citizens and their white sympathizers…."[1] The outrages included "arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation" that were "often committed in disguise and under cover of night.[2] "These acts of lawlessness went unpunished… because Klan members and sympathizers controlled or influenced the administration of state criminal justice."[3]

The present text of Section 1983 provides:

> 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."[4]

Before 1961, federal courts interpreted §1983 as "attack[ing] the so-called 'Black Codes' passed by the Southern states after the civil war, not private torts."[5] In other words, §1983 only applied if a defendant violated a federal constitutional or statutory right while acting in a manner authorized by state law. But what if the defendant's conduct was inconsistent with state law? The Court answered this question in *Monroe v. Pape*.[6]

In *Monroe*, the plaintiffs sued Chicago police officers for violating their Fourth Amendment rights by making them stand naked while the officers ransacked the house.[7] The officers argued that because their conduct violated the Illinois Constitution, they could not have acted "under color of any statute, ordinance,

---

1 Briscoe v. LaHue, 460 U.S. 325, 337 (1983).

2 *Id.*

3 *Id.*

4 442 U.S.C. §1983.

5 Crawford-El v. Britton, 93 F.3d 813, 830 (D.C. Cir. 1996) (Silberman, J. concurring), *judgment vacated by* Crawford-El v. Britton, 523 U.S. 574 (1998).

6 365 U.S. 167 (1961), *overruled by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978)).

7 *Id.* at 169–70.

regulation, custom, or usage, of any State."[8] After reviewing §1983's history, the Court rejected this argument and held that §1983's color-of-state-law requirement is as broad as the Fourteenth Amendment's state-action requirement.[9] In other words: state action satisfies the color-of-state-law requirement.[10] Finally, the Court rejected the claim that the plaintiffs had to show that the officers specifically and knowingly intended to violate the plaintiffs' constitutional rights, and the Court held that because §1983 is supplementary to state law, the plaintiffs did not have to exhaust their state-law remedies before pursuing a §1983 claim in federal court.[11] The Court's decision in *Monroe* transformed §1983 from a statute that in its first 50 years generated 21 cases to a statute that today produces tens of thousands of cases in federal court.[12]

Despite *Monroe*'s revolutionary effect, it continued to exclude municipalities from §1983 liability. The Court could not "believe that the word 'person' was used in this particular Act to include" municipalities.[13] But a short 17 years later the Court's belief changed. In *Monell v. Department of Social Services*,[14] the Court determined "that Congress *did* intend municipalities and other local government units to be included among those persons to whom §1983 applies."[15]

The Elements of a §1983 Cause of Action

The basic elements of a §1983 claim are "(1) deprivation of a federally protected right by (2) an actor acting under color of state law."[16] And when the local government is a defendant, you have the added element of proving that the violation resulted from the implementation of a policy, custom, or procedure.

It is important to remember that "section 1983 does not create substantive rights";[17] rather, it is the mechanism "for vindicating federal rights conferred elsewhere."[18] And the most prolific source of these rights is the federal Constitution. "Section 1983 has been [used] to litigate a broad spectrum of constitutional claims, including First Amendment freedoms, Fourth Amendment protections, and the rights of privacy, travel, and the right to vote, as well as due process and equal protection rights."[19] A plaintiff who believes that she has been deprived of one of her constitutional rights must show that the deprivation was committed under color of state law. The Thirteenth Amendment is the one exception to the state-actor requirement.[20]

---

[8] *Id.* at 172.

[9] *Id.* at 187.

[10] *Id.*

[11] *Id.* at 183.

[12] *See* Crawford-El v. Britton, 523 U.S. 574, 611 (1998) (Scalia, J. dissenting).

[13] Monroe, 365 U.S. at 191.

[14] 436 U.S. 658 (1978).

[15] *Id.* at 690 (emphasis in original).

[16] Section 1983 does not cover violations of state constitutions or statutes. Baker v. McCollan, 443 U.S. 137, 146 (1979); Schaffer v. Salt Lake City Corp., 814 F.3d 1151, 1155 (10th Cir. 2016).

[17] Levin v. Madigan, 692 F.3d 607, 611 (7th Cir. 2012).

[18] *Id.*

[19] 1A Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation: Claims and Defenses, §3.2, at 117 (3d ed. 1997).

[20] Gonzalez-Trapaga v. Mayaguez Med. Ctr. Dr. Ramon Emeterio Betances, Inc., Civ. No. 15-1342 (DRD), 2016 WL 1261056, at *10 (D. P.R. Mar. 30, 2016).

Determining if the State-Actor Requirement Is Satisfied

One of Section 1983's purposes "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights…."[21] A government employee who acts in his official capacity under state, local, territorial, or District of Columbia law is a state actor.[22] Section 1983, however, does not apply to federal officials[23] or to private persons or individuals.[24] But a private person or entity that "willfully participate[s] in joint action with state agents" can be liable under §1983.[25]

Deciding whether private conduct in this latter situation is fairly attributable to the state is a fact-specific inquiry.[26] There are four tests for determining whether a private individual or private entity is a state actor, *i.e.*, whether private conduct is fairly attributable to the state.

Public-function Test

Under this test, private conduct is attributable to the state when the private entity exercises powers that are "traditionally *exclusively* reserved to the state."[27] It is rare that one will find private activity that meets the public-function test.[28] The activities that satisfy this test include "the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and, in at least limited circumstances, the operation of a municipal park."[29] The narrowness of this category of activity is seen in the Supreme Court's discussion in *Rendell-Baker v. Kohn*.[30] The simple fact that a private actor is performing a public function is not enough to satisfy this test.[31]

State-compulsion Test

The plaintiff must show that "the state has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[32] The government's approval of a private entity's actions is not state compulsion.[33]

---

[21] Wyatt v. Cole, 504 U.S. 158, 161 (1992).

[22] Schwartz & Kirklin, *supra*, note 19, §5.4, at 489.

[23] Haines v. Fed. Motor Carrier Safety Admin., 814 F.3d 417, 429 (6th Cir. 2016).

[24] Moody v. Farrell, 868 F.3d 348, 352 (5th Cir. 2017).

[25] Memphis, Tenn. Area Local, Am. Postal Workers Union, AFL-CIO v. City of Memphis, 361 F.3d 898, 905 (6th Cir. 2004).

[26] Santiago v. Puerto Rico, 655 F.3d 61, 68 (1st Cir. 2011).

[27] *Id.* at 69.

[28] *Id.*

[29] *Id.* (quoting Perkins v. Londonderry Basketball Club, 196 F.3d 13, 19 (1st Cir. 1999)).

[30] 457 U.S. 830, 842 (1982) (holding that a private school that receives state funds to educate "maladjusted high school students" is not a state actor under the public-function test because "until recently," before 1982, the state did not undertake to provide services to students who could not be served by the traditional public schools.)

[31] *Id.* at 842.

[32] Turturro v. Cont'l Airlines, 334 F. Supp. 2d 383, 395 (S.D.N.Y. 2004).

[33] Wolotsky v. Huhn, 960 F.2d 1331, 1335 (6th Cir. 1992).

Nexus or Symbiotic-relationship Test

This "requires a sufficiently close relationship between… the state and the private actor so that the action taken may be attributed to the state."[34]

Pervasive-entwinement Test

The Supreme Court announced this test in *Brentwood Academy v. Tennessee Secondary School Ass'n*.[35] To satisfy this test, the plaintiff must show that the private defendant "is entwined with governmental policies or that the government is 'entwined in [the private entity's] management or control."[36] In *Brentwood Academy*, a private school sued the state interscholastic athletic association under §1983. The defendant argued that it was not a state actor; therefore, §1983 did not apply.[37] In rejecting the defendant's argument, the Supreme Court held that "the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association…."[38]

Federal Statutes Actionable Under §1983

It is not easy to determine whether a statute is actionable under §1983. In *Maine v. Thiboutot*,[39] the Court held that the phrase "and laws" means any federal statute.[40] Later, however, the Court began looking not to the phrase "and laws," but focusing on congressional intent in the specific federal statute.[41] Congress can make a particular statute actionable under §1983 by expressly saying so. Likewise, Congress can expressly state that the statute is not actionable under §1983. Or by "by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under §1983," Congress can remove a statute from §1983 enforcement.[42] To determine if a federal statute creates a cause of action under §1983, one should look to the specific statutory provision and to the caselaw interpreting that provision.

Causes of Action Under the Federal Constitution

First Amendment

There are many circumstances in which the government or its employees can violate one's First Amendment rights. For example, the government, acting as an employer, could violate an employee's free speech rights by suspending or firing the employee.[43] And the government acting as sovereign can violate the First Amendment by prohibiting individuals from engaging in certain acts.[44]

---

[34] Ellison v. Garbarino, 48 F.3d 192, 195 (6th Cir. 1995).

[35] 531 U.S. 288 (2001).

[36] Marie v. Am. Red Cross, 771 F.3d 344, 363 (6th Cir. 2014).

[37] Brentwood Academy, 531 U.S. at 293.

[38] *Id.* at 291.

[39] 448 U.S. 1 (1980).

[40] *Id.* at 4.

[41] *See* Blessing v. Freestone, 520 U.S. 329, 341 (1997).

[42] *Id.*

[43] Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016).

[44] Bible Believers v. Wayne Cty., 805 F.3d 228 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 2013 (2016).

The Government as Employer

"[S]peech by a government employee is protected by the First Amendment [if] the speech [is] on a matter of public concern[.]"[45] And if "the employee's interest in expressing herself on this matter [is] not… outweighed by any injury the speech could cause to the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[46] But the First Amendment does not protect speech that is required by her job duties.

For example, in *Bonn v. City of Omaha*,[47] the plaintiff was the city's public safety auditor.[48] Bonn published a report in which she connected the police department's estrangement from the minority community to the police department's enforcement practices.[49] Bonn admitted that publishing this report was part of her job duties.[50] Because Bonn did not speak as a citizen on a matter of public concern, but rather as an employee, her speech was not protected by the First Amendment.[51]

Generally, government officials cannot dismiss or demote "an employee because of the employee's engagement in constitutionally protected political activity."[52] In *Heffernan v. City of Paterson*, the city demoted Heffernan because the mayor thought, incorrectly as it turned out, that Heffernan supported the mayor's opponent.[53] Heffernan sued the city for violating his First Amendment rights. How would the mistaken belief about Heffernan's political views affect the case? The Court concluded that it was the employer's motive and the facts as the employer reasonably understood the facts that controlled.[54] The city intended to punish Heffernan for his political views; therefore, Heffernan could pursue a §1983 action.[55] Heffernan would still have to show that his discharge was not under a neutral policy that prohibited "officers from overt involvement in any political campaign."[56]

The Government as Sovereign

The government has more power to act in its role as an employer because its "interest in achieving its goals as effectively and efficiently as possible is elevated from [the] relatively subordinate interest… it [occupies] when [the government] acts as sovereign."[57]

When looking at the government's conduct in its role as sovereign, the courts follow a three-step inquiry: "first, [is] the speech at issue… afforded constitutional protection; second, [what is] the nature of the forum where the speech was made;" and third, was the "government's action in shutting off the speech…

---

45 Waters v. Churchill, 511 U.S. 661, 668 (1994).

46 *Id.*

47 623 F.3d 587 (8th Cir. 2010).

48 *Id.* at 592.

49 *Id.* at 589.

50 *Id.* at 592.

51 *Id.*

52 Heffernan, 136 S. Ct. at 1416.

53 *Id.*

54 *Id.* at 1418.

55 *Id.* at 1418–19.

56 *Id.* at 1419.

57 Waters, 511 U.S. at 675.

legitimate…."[58] In *Bible Believers v. Wayne County*, the court examined whether Wayne County violated the Bible Believers' First Amendment rights when it interfered with the group's protests at the annual Arab International Festival.[59] The court's description of the behavior of the Bible Believers organization does not lead one to naturally sympathize with the Bible Believers organization.[60] The Wayne County Sheriff's Office eventually forced the Bible Believers to leave the festival based on the angry reaction of the crowd.[61] But the First Amendment's "protection applies to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted."[62] After all, the latter speech does not need protection. After the Sixth Circuit reviewed the First Amendment cases, the en banc court concluded that when the sheriff's office forced the Bible Believers to leave the festival because of their speech, it violated the First Amendment. This case is worth reading if you have a First Amendment case or are considering one. It highlights that the government's effectiveness and efficiency have almost no applicability in the context of the government's conduct as sovereign.

Fourth Amendment Claims Under §1983

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[63] The Fourth Amendment is the basis for §1983 claims arising out of use of excessive force, malicious prosecution, searches without warrants, searches with invalid warrants, warrants with the wrong address, etc.

Excessive Force

Excessive-force cases run the gamut from pushing a suspect to killing a suspect. But in all of these cases the issue is whether the police officer's use of force was reasonable under the circumstances confronting the officer. Because "[n]ot every push or shove" violates the Fourth Amendment,[64] the excessive-force analysis includes consideration of the severity of the crime, the threat to safety of the officer or others in the area, and the resistance to the arrest.[65] Because this is an objective inquiry, the officer's motives are not considered.[66]

For an excessive-force claim, there must be a seizure through a use of force that is objectively unreasonable. There is no doubt that a seizure occurs when an officer makes an arrest or an investigatory stop.[67] But it is not always so easy to decide whether a seizure is involved. Is a seizure involved, for example, when a suspect runs into the path of the police car?

In answering this question, one must keep in mind that a Fourth Amendment seizure requires more than a "governmentally caused and governmentally desired termination of an individual's freedom of

---

[58] Bible Believers, 805 F.3d at 242.

[59] *Id.* at 240–41.

[60] *Id.* at 238–41.

[61] *Id.* at 239–41.

[62] *Id.* at 243.

[63] Missouri v. McNeely, 569 U.S. 141, 148 (2013) (citing U.S. Const. amend. IV.).

[64] Graham v. Connor, 490 U.S. 386, 396 (1989).

[65] *See*, *e.g.*, Cunningham v. Reid, 337 F. Supp. 2d 1064, 1071 (W.D. Tenn. 2004).

[66] Graham, 490 U.S. at 397.

[67] *See* Weigel v. Broad, 544 F.3d 1143, 1151 (10th Cir. 2008).

movement."[68] A Fourth Amendment seizure requires "a governmental termination of freedom of movement *through means intentionally applied*."[69] There is no seizure where the suspect is hit when he runs into the path of the police car because the suspect was not stopped "through means intentionally applied."[70] And the same is true during a high-speed chase when the officer accidentally crashes into the fleeing car.[71]

Failure to Intervene

"It is widely recognized that all law enforcement officers have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence."[72] A failure-to-intervene claim arises when an officer fails to intervene after she "observes or has reason to know (1) that excessive force is being used; (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official."[73] Before the officer can be held liable, the plaintiff must show that the "officer had a realistic opportunity to intervene to prevent harm from occurring."[74] Whether a realistic opportunity existed "is a question of fact for the jury unless, based on all the evidence, a reasonable jury could not possibly conclude otherwise."[75]

For example, in *Kent v. Oakland County*, the officer was in the room for most of the incident, she talked to the deputy who ultimately used force, she was talking to the suspect when the other deputy warned that he would use the Taser, and she was close enough to handcuff the suspect after the deputy used the Taser.[76] Based on these facts, the appellate court concluded that the evidence was sufficient for the jury to decide the failure-to-intervene claim.[77] Where, however, there is no evidence that the officer saw the use of excessive force, summary judgment is appropriate on the failure-to-intervene claim.[78] And video evidence can make the difference between summary judgment and a jury question.[79]

The Innocent Bystander

Does an innocent bystander who is injured during a shootout or high-speed chase have a constitutional claim for injuries? Yes, but not under the Fourth Amendment. Courts allow these claims under the so-called sub-

---

[68] Brower v. Cty. of Inyo, 489 U.S. 593, 597 (1989) (emphasis omitted).

[69] *Id.*

[70] *See* Swift v. McNatt, No. 15-1009, 2015 WL 9165967 (W.D. Tenn. Dec. 16, 2015) (involving a suspect who ran in front of the officer's car).

[71] *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 844 (1998).

[72] Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994).

[73] Bunkley v. City of Detroit, 902 F.3d 552, 565 (6th Cir. 2018).

[74] *Id.* at 566.

[75] *Id.*

[76] Kent v. Oakland Cty., 810 F.3d 384, 397 (6th Cir. 2016).

[77] *Id.*

[78] Turner v. Scott, 119 F.3d 425, 429 (6th Cir. 1997).

[79] *Compare* Knight v. Walton, 660 F. App'x 110, 113 (3d Cir. 2016) ("The video evidence… contradicted [plaintiff's] claims of excessive force [and] failure to intervene.") *with* Laury v. Rodriguez, 659 F. App'x 837, 847–48 (6th Cir. 2016) (The booking-room video contradicted the defendant officer's claim that he did not see the use of force or have the opportunity to intervene because he was busy with another prisoner.)

stantive due process clause of the Fourteenth Amendment.[80] In *County of Sacramento v. Lewis*, the Supreme Court established "that an officer can be liable for a substantive due process violation resulting from a high-speed pursuit of a dangerously fleeing suspect only if the officer intended to cause harm."[81] But can there be liability based on a standard lower than the intent-to-cause-harm standard?[82]

The First Circuit requires that the officer's conduct shock the conscience, but hasn't found a substantive due process violation in the high-speed-chase context.[83] The Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits apply the intent-to-harm standard to all high-speed pursuits even if the circumstances afforded the officers time to deliberate.[84] In the Third Circuit, the "level of culpability required to shock the conscience exists on a spectrum tied to the amount of time a government official has to act."[85] And in the context of a police pursuit, the officer's justification for the pursuit matters.[86] The Fourth Circuit probably applies the intent-to-harm standard.[87]

Where Is the Line Between the Fourth Amendment and the Fourteenth Amendment?

There is no doubt that the Fourth Amendment applies at the time of arrest, but which amendment provides protection between the time of arrest and arraignment? The Supreme Court has not decided "the question of 'whether the Fourth Amendment continues to provide protection against deliberate use of excessive force beyond the point at which arrest ends and pretrial detention begins.'"[88] In warrantless-arrest cases, the majority of circuits apply the Fourth Amendment until the probable-cause hearing.[89] As noted in *Aldini*, when the arrest is based on a warrant, the Fourteenth Amendment applies much earlier because a court has already made a probable cause determination.[90]

---

[80] *See* Green v. Post, 574 F.3d 1294, 1307–09 (10th Cir. 2009) (discussing how the different circuits have handled such cases).

[81] Sauers v. Borough of Nesquehoning, 905 F.3d 711, 720 (3d Cir. 2018) (discussing Lewis).

[82] *Id.*

[83] DePoutot v. Raffaelly, 424 F.3d 112, 119 (1st Cir. 2005).

[84] Bingue v. Prunchak, 512 F.3d 1169, 1177 (9th Cir. 2008); O'Neal v. Cazes, 257 F. App'x 710, 713–14 (5th Cir. 2007) (per curiam); Meals v. City of Memphis, 493 F.3d 720, 730 n.8 (6th Cir. 2007); Sanders v. City of Union Springs, 207 F. App'x 960, 965 (11th Cir. 2006); Pena v. DePrisco, 432 F.3d 98, 113 (2d Cir. 2005); Carter v. Simpson, 328 F.3d 948, 952 (7th Cir. 2003); Helseth v. Burch, 258 F.3d 867, 871 (8th Cir. 2001); Childress v. City of Arapaho, 210 F.3d 1154, 1157–58 (10th Cir. 2000).

[85] Sauers, 905 F.3d at 722.

[86] *Id.*

[87] Johnson v. Montminy, 285 F. Supp. 2d 673, 676 (D. Md. 2003) (citing Onossian v. Block, 175 F.3d 1169 (9th Cir. 1999); and Epps. v. Lauderdale Cty., 45 F. App'x 332 (6th Cir. 2002) for the proposition that Lewis applies to innocent bystanders).

[88] Aldini v. Johnson, 609 F.3d 858, 864 (6th Cir. 2010).

[89] *Id.* at 867 n.6.

[90] *Id.* at 867 n.8.

The Fourteenth Amendment and the Eighth Amendment

Once the arrestee has had his probable-cause hearing, his treatment during his pretrial detention phase is governed by the Fourteenth Amendment. Although the Eighth Amendment does not apply until there has been a conviction, the Fourteenth Amendment's standards governing the conditions of confinement of the pretrial detainee are the same as the Eighth Amendment's protections for the convicted inmate.[91] When it comes to providing medical care, the test is whether the jail was deliberately indifferent to the pretrial detainee's serious medical needs.[92] And this is the Eighth Amendment standard for those who have been convicted.[93]

When it comes to a pretrial detainee's excessive-force claim, the standard is one of objective reasonableness.[94] In opting for an objective-reasonableness test, the Court rejected the argument that the plaintiff must show that the force was applied with intent to punish.[95]

The Eighth Amendment's prohibition against cruel and unusual punishment applies to a convicted prisoner's excessive-force claim.[96] The Eighth Amendment prohibits "the unnecessary and wanton infliction of pain."[97] In Eighth Amendment excessive-force cases, the question is whether the defendant "applied [the force] in a good-faith effort to maintain or restore discipline, or maliciously and sadistically for the very purpose of causing harm."[98] And this subjective standard under the Eighth Amendment has not changed, yet.[99]

Malicious Prosecution and the Fourth Amendment

Although the Supreme Court has never held that malicious-prosecution claims can be brought under §1983,[100] the majority of circuits recognize this cause of action.[101] The circuits that recognize this Fourth Amendment claim fall into one of two groups. On one hand, the Second, Third, Ninth, and Eleventh Circuits require the plaintiff to prove a Fourth Amendment violation and the state common-law elements of malicious prosecution.[102] This requires that the plaintiff prove the defendant's subjective malice.[103] On the other hand, the First, Fourth, Fifth, Sixth, and Tenth Circuits follow a purely constitutional approach and require

---

91 *See* Smith v. Dart, 803 F.3d 304, 310 (7th Cir. 2015).

92 Melton v. Abston, 841 F.3d 1207, 1230 (11th Cir. 2016).

93 Smith, 803 F.3d at 310.

94 Kingsley v. Hendrickson, 135 S. Ct. 2466, 2473–74 (2015).

95 *Id.* at 2477 (Scalia, J. dissenting).

96 *See* Kingsley, 135 S. Ct. at 2475.

97 Whitley v. Albers, 475 U.S. 312, 319 (1986), *abrogated on other grounds by* Wilkins v. Gaddy, 559 U.S. 34 (2010).

98 *Id.* at 320–21.

99 Kingsley, 135 S. Ct. at 2476 (The Court acknowledged that its "view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees [under] the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.").

100 Wallace v. Kato, 549 U.S. 384, 390 n.2 (2007).

101 *See* Hernandez-Cuevas v. Taylor, 723 F.3d 91, 99 (1st Cir. 2013).

102 *Id.*

103 *Id.*

only proof of a Fourth Amendment violation.[104] Because subjective intent is not required, the Sixth Circuit has suggested that the constitutional tort "might more aptly be called 'unreasonable prosecutorial seizure.'"[105]

The Fourteenth Amendment's Due Process Clause

The Fourteenth Amendment's due process clause "prohibits state and local governments from depriving any person of life, liberty, or property, without due process of law."[106] The due process clause contains both procedural and substantive components.[107] The procedural component requires that "government action depriving a person of life, liberty, or property… be implemented in a fair manner."[108] The substantive component "'prevents the government from engaging in conduct that shocks the conscience… or interferes with rights implicit in the concept of ordered liberty.'"[109] The courts, however, are careful to scrutinize substantive due process claims. Therefore, when another constitutional provision provides an explicit textual source for protection that amendment is applied, not the "more generalized notion of substantive due process."[110]

In a due process case, there must be a life at stake, or a liberty or property interest. Although it is not difficult to determine if the case involves deprivation of life, determining if a liberty or property interest is involved is a little more difficult. In the procedural context, the property interest that is protected must be created by "rules and understandings that stem from an independent source such as state law."[111] The liberty interests, however, "may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies."[112]

"[T]he substantive component of the Due Process Clause protects those rights that are 'fundamental,' that is, rights that are 'implicit in the concept of ordered liberty.'"[113] Therefore, "there is generally no substantive due process protection for state-created property rights."[114] The one exception is when state law creates a property right that is infringed by legislative act. Under this circumstance, the government is prohibited from acting arbitrarily in taking away that right.[115]

As for liberty interests under the substantive component, the Supreme Court has been reluctant to extend substantive due process protection to liberty interests that are outside of certain enumerated rights.[116] To the extent that the Court has extended this protection, the Court has limited it to the privacy interest in

---

[104] *Id.* at 99, 100.

[105] King v. Harwood, 852 F.3d 568, 580 (6th Cir. 2017).

[106] Epperson v. City of Humboldt, 140 F. Supp. 3d 676, 687 (W.D. Tenn. 2015).

[107] EJS Props., LLC v. City of Toledo, 698 F.3d 845, 855 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1635 (2013).

[108] United States v. Salerno, 481 U.S. 739, 746 (1987).

[109] Prater v. City of Burnside, 289 F.3d 417, 431 (6th Cir. 2002) (quoting Salerno, 481 U.S. at 746).

[110] Graham, 490 U.S. at 395.

[111] Lucas v. Monroe Cty., 203 F.3d 964, 978 (6th Cir. 2000).

[112] Wilkinson v. Austin, 545 U.S. 209, 221 (2005) (citation omitted).

[113] Kenter v. City of Sanibel, 750 F.3d 1274, 1279 (11th Cir. 2014) (quoting McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc)).

[114] *Id.*

[115] *Id.*

[116] Canada v. Thomas, 915 F. Supp. 145, 149 (W.D. Mo. 1996).

personal decisions concerning marriage, procreation, contraception, family relationships, child rearing, and education.[117]

Municipal Liability

"A municipality can be held liable under §1983 only if the challenged conduct occurs pursuant to a municipality's 'official policy,' such that the municipality's promulgation or adoption of the policy can be said to have caused one of its employees to violate the plaintiff's constitutional rights."[118] Ultimately, this requires proof that the constitutional violation resulted from the implementation of a policy, custom, or procedure attributable to the municipality.

Failure to Train

A municipality can be liable for failing to train its employees if the plaintiff can prove "(1) that a training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [municipality]'s deliberate indifference; and (3) that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury."[119] Deliberate indifference requires proof of "prior instances of unconstitutional conduct demonstrating that the [municipality] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury."[120] A plaintiff can establish "deliberate indifference through evidence of a single violation of federal rights, accompanied by a showing that the [municipality] had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation."[121]

Supervisory Liability

A supervisor can be liable under §1983 only for the supervisor's own conduct.[122] Because supervisors are not liable for the conduct of those they supervise, the term "'supervisory liability' is a misnomer.[123] For the supervisor to be liable, there must be proof that "the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in" the misconduct.[124] This requires proof that "the [supervisor] at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct."[125]

---

[117] *Id.*

[118] Epperson, 140 F. Supp. 3d at 684.

[119] Plinton v. Cty. of Summit, 540 F.3d 459, 464 (6th Cir. 2008).

[120] Fisher v. Harden, 398 F.3d 837, 849 (6th Cir. 2005).

[121] Harvey v. Campbell Cty., 453 F. App'x 557, 562–63 (6th Cir. 2011).

[122] Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009).

[123] *Id.*

[124] Peatross v. City of Memphis, 818 F.3d 233, 242 (6th Cir. 2016).

[125] *Id.*

Conclusion

The post-Civil War Congress enacted §1983 to fight violence against the newly freed slaves—violence that was committed, if not by the government's direct hand, at least with its sanction. For most of the act's first 100 years the Court interpreted it in such a way as to deprive it of real meaning. In the early 1960s, however, the Court abandoned the idea that if the harmful behavior was contrary to state law, then the harm was not committed "under state law." Once this interpretive logjam was broken, it was only a short time before the Court gave "person" an expansive interpretation to cover local governments. Now, §1983 claims cover the various rights protected by the federal Constitution as well as many federal statutory rights, too.

AUTHOR

Dale Conder, Jr. is a member of the law firm Rainey, Kizer, Reviere & Bell, P.L.C., with offices in Memphis, Jackson, and Nashville, Tennessee. He practices in the firm's Jackson office. His practice focuses on defense of municipalities and their employees, particularly police officers in §1983 litigation, appellate law, and employment law. Mr. Conder has published and lectured in the areas of civil rights litigation, trial practice, civil procedure, and employment law. He is a member of DRI and the Tennessee Defense Lawyers Association.

Rainey Kizer Reviere & Bell PLLC | 731.426.8130 | dconder@raineykizer.com

Chapter 2

Defenses: Absolute and Qualified Immunity and Statute of Limitations

By Kurt M. Simatic

Federal, state, and local officials sued in their personal capacities under §1983 may be able to defeat liability by asserting an affirmative defense of either absolute immunity or qualified immunity. These immunities derive from the common law. Additionally, statute of limitations issues also arise in §1983 actions and may be a viable defense.

Congress passed the original version of §1983 in the 1871 Civil Rights Act. The present text of §1983 does not mention immunities, but the Supreme Court has concluded that in enacting the original §1983 in 1871 Congress did not intend to abolish all common law immunities.[1] Therefore, if an official claiming immunity under §1983 "can point to a common-law counterpart to the privilege he asserts," and that immunity was recognized at common law when the Civil Rights Act was enacted in 1871, *and* that immunity is compatible with the history or purpose of §1983, it is recognized and incorporated into §1983.[2] While this approach is used to a great degree with absolute immunity, the Supreme Court has used a much different approach with qualified immunity. Of course, absolute immunity and qualified immunity apply to federal claims under §1983, whether against federal, state, or local officials. State law immunities do not apply to §1983 claims.

Statutes of limitation may also be a viable defense in §1983 actions. It is important that defense counsel determine the proper limitation period, when a cause of action accrues, and whether the limitation period should be tolled.

Absolute Immunity

Origin/Policy

Officials such as legislators, judges, and prosecutors are protected from personal liability under §1983 by

[1] *See*, *e.g.*, Will v. Mich. Dep't of St. Police, 491 U.S. 58, 67 (1989); Malley v. Briggs, 475 U.S. 335, 339 (1986); Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981). Stump v. Sparkman, 435 U.S. 349, 356 (1978); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974); Pierson v. Ray, 386 U.S. 547, 554 (1967); and Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

[2] Malley, 475 U.S. 335, 339–40 (1986) (quoting Tower v. Glover, 467 U.S. 914 (1984)).

absolute immunity. Typically, the exercise of legislative, judicial, and prosecutorial authority is protected by absolute immunity, while executive and administrative activity receives only qualified immunity. The Supreme Court has termed this dichotomy the "functional approach."[3] In helping to determine if the official's function is entitled to absolute immunity, courts look to the common law (*i.e.*, whether the function, or its nearest equivalent, was accorded immunity in 1871).[4]

It is not always easy to classify what function an official is performing, and therefore whether absolute or qualified immunity is available. Officials, by the nature of their office, may engage in more than one function. In addition, the Supreme Court "has generally been quite sparing in its recognition of claims to absolute official immunity."[5]

Legislative Immunity

Absolute immunity for legislators applies to any legislative acts, regardless of motive behind the acts.[6] "Legislators are immune from deterrents to the uninhabited discharge of their legislative duty…."[7] The privilege of absolute immunity "would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives."[8] This immunity applies to state, regional, and local legislators.[9] Action is legislative in nature when it is (1) legislative in form, following what is considered to be "integral steps" legislative process (*i.e.*, introducing and voting for legislation), or (2) legislative in substance.[10] Legislative immunity bars monetary, injunctive, and declaratory relief.[11] Of course, legislators can engage in executive or judicial functions (and therefore, legislative immunity would not apply).

Judicial Immunity

"[J]udges have long enjoyed a comparatively sweeping form of immunity…."[12] Judges sued under §1983 are protected by absolute immunity for their "judicial acts" as long as they do not act in the "clear absence of all jurisdiction."[13] In determining whether a judge has performed a judicial act, "the relevant inquiry is the 'nature' and 'function of the act,' not the 'act itself.' In other words, [courts] look to the particular action's relation to the general function normally performed by a judge…."[14] This definition of judicial acts is quite

---

[3] Forrester v. White, 484 U.S. 219, 224 (1988).

[4] Rehberg v. Paulk, 132 S. Ct. 1497, 1503 (2012).

[5] Forrester, 484 U.S. at 224.

[6] Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).

[7] Tenney, 341 U.S. at 377.

[8] *Id.*

[9] *Id.* at 376 (state legislators); Bogan, 523 U.S. 44 (local legislators); Lake Country Estates v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979) (regional legislators, such as in a compact agreement).

[10] Bogan, 523 U.S. at 55–56 (1998). Interestingly, *Bogan* did not answer whether the presence of only one factor is sufficient to make an action legislative in nature.

[11] Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 732 (1980).

[12] Forrester v. White, 484 U.S. 219, 225 (1988).

[13] Stump, 435 U.S. at 356–57.

[14] Mireles v. Waco, 502 U.S. 9, 13 (1991) (quoting Stump, 435 U.S. at 362).

broad and covers a number of actions related to judicial acts. A judge acting in the "clear absence of all jurisdiction" is not protected by judicial immunity, however. "Where there is clearly no jurisdiction over the subject matter, any authority exercised is a usurped authority."[15] However, a judge's ruling that was "flawed by the commission of grave procedural errors" will not defeat absolute immunity.[16]

Prosecutorial Immunity

Unsurprisingly, prosecutors are often the target of §1983 claims. In short, a prosecutor's advocacy functions are protected by absolute immunity, while investigative and administrative functions are generally not.[17] Even if a prosecutor acted unlawfully, or even maliciously, absolute immunity may still apply, similar to judicial immunity.[18] However, the immunity applies only to monetary relief and is not immunity from criminal prosecution or disciplinary proceedings.[19]

Procedural Considerations

Of course, absolute immunity can be brought on a motion to dismiss, as well as motions for summary judgment or judgment as a matter of law. If the nature of the official's function is unclear, however, discovery may be necessary. Regardless, the application of absolute immunity is an issue of law decided by the court. Denials of absolute immunity are immediately appealable to the court of appeals under the collateral order doctrine.[20]

Qualified Immunity

Underlying Policy

The doctrine of qualified immunity exists to prevent the potentially devastating effect of unimpeded claims against officials and the distraction of litigation, which could deter individuals from entering public service altogether. But as *Harlow v. Fitzgerald*,[21] the seminal qualified immunity decision, makes clear, these considerations must be balanced against the fact that "an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." Qualified immunity is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[22]

For more than 30 years, qualified immunity has been a powerful defense, with success at the Supreme Court down to the district courts. Since *Harlow*,

---

[15] Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351–52 (1872).

[16] Stump, 435 U.S. at 359.

[17] Imbler v. Pachtman, 424 U.S. 409, 431 (1986). While *Imbler* is silent as to whether a prosecutor enjoys absolute immunity for investigative or administrative functions, "post-*Imbler* Supreme Court decisions have normally limited absolute immunity to the prosecutor's advocacy functions." 1A Martin A. Schwartz, Sec. 1983 Claims & Defenses, §9.05 (4th ed. 2017 Supp.).

[18] Imbler, 424 U.S. at 427 n.27.

[19] *Id.* at 429.

[20] Mitchell v. Forsyth, 472 U.S. 511, 525 (1985); Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978).

[21] 457 U.S. 800, 814 (1982).

[22] Mitchell, 472 U.S. at 526; *see also* R.F.J. v. Fla. Dep't of Children and Families, ___ F. App'x. ___, 2018 WL 3752227, *3 (11th Cir. 2018) ("Qualified Immunity is not a last exit before liability. Instead, qualified immunity is a right to be free from litigation altogether once the defense is established.").

> the Supreme Court has confronted the issue of qualified immunity in over thirty cases. Plaintiffs have prevailed in two of those cases: *Hope v. Pelzer* and *Groh v. Ramirez*. In eight of the cases, including *Kisela v. Hughes*, the Court reversed denials of qualified immunity in per curiam summary dispositions. Five of the eight per curiam decisions were unanimous.… In eleven cases between 2012 and 2018, the Court exercised its discretion to jump to the second prong of the qualified immunity analysis, granting qualified immunity because the law was not clearly established and leaving unresolved the "merits" question of prong one. In four cases, the Court granted certiorari, vacated, and remanded for reconsideration of the qualified immunity determination []. In three of those cases, the respective circuits granted immunity on reconsideration.[23]

Nevertheless, the doctrine of qualified immunity has come under increasing scrutiny, and criticism, in recent years. Some courts and commentators criticize what they perceive to be the "kudzu-like creep of the modern immunity regime,"[24] while others believe that qualified immunity (in addition to other practical and procedural barriers) leaves victims without redress and no remedy for the violation of constitutional rights, such that the doctrine amounts to "unqualified impunity."[25] Recently, even members of the Supreme Court have signaled their willingness to reevaluate the doctrine or at least have indicated their uneasiness over the "disturbing trend regarding the use of th[e] Court's resources" in qualified immunity cases,[26] particularly the Court's increasing use of the "extraordinary remedy of a summary reversal" in these cases.[27]

Who May Receive Qualified Immunity?

Qualified immunity is available for federal, state, and local employees sued in their individual capacities.[28] Qualified immunity is not available to officials sued in their official capacities, as they are treated as claims against the municipality,[29] and it is not available to municipalities themselves.[30]

Qualified immunity may also not be available to certain private contractors. In *Richardson v. McKnight*,[31] the Supreme Court held that privately employed prison guards cannot assert qualified immunity. Later, in *Filarsky v. Delia*,[32] the Court considered whether a private lawyer who worked part time for a municipality was eligible for qualified immunity on federal claims arising from his public work. The Court determined that the

---

[23] Karen M. Blum, Qualified Immunity: Time to Change the Message, 93 Notre Dame L. Rev. 1887, 1887–89 (2018).

[24] Zadeh v. Robinson, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., dissenting).

[25] *See*, *e.g.*, David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021, 2023 (2018) (discussing the application of qualified immunity in the context of prisoner claims).

[26] Salazar-Limon v. Houston, 137 S. Ct. 1277, 1282 (2017) (Sotomayor, J., dissenting from denial of certiorari).

[27] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 512–13 (2001) (Stevens, J., dissenting). *See also id.* (arguing that "a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers); Ziglar v. Abassi, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence.").

[28] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Alexander v. City of Milwaukee, 474 F.3d 437, 443 (7th Cir. 2007).

[29] Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 690 n.55 (1978).

[30] Owen v. City of Independence, 445 U.S. 622, 638 (1980).

[31] 521 U.S. 399, 401 (1997).

[32] 566 U.S. 377 (2012).

lawyer was protected by qualified immunity, holding that "immunity under §1983 should not vary depending on whether an individual working for the government does so as a full-time employee, or on some other basis."[33] *Filarsky* did not overrule *Richardson*. Instead, *Filarsky* reaffirmed the holding of *Richardson*, which categorically rejected immunity for the private prison employees.[34] The *Filarsky* Court reached its conclusion by asking whether the person asserting qualified immunity would have been immune from liability under the common law in 1871.[35] The Sixth Circuit applied *Filarsky*'s historical approach and held that a privately employed doctor working for a state prison could not invoke qualified immunity.[36] The Sixth Circuit concluded that

> the absence of any indicia that a paid physician (whether remunerated from the public or private fisc) would have been immune from suit at common law, convince[s] us that there was no common-law tradition of immunity for a private doctor working for a public institution at the time that Congress passed §1983.[37]

Recently, the Fifth Circuit, on the facts before it, came to a contrary conclusion on the question of whether qualified immunity is available to private employed doctors.[38] Noting that the circuits are split on "whether privately employed doctors who provide services at prisons or public hospitals pursuant to state contracts" may assert qualified immunity, the Fifth Circuit concluded that "general principles of immunity at common law" and the purposes of qualified immunity weighed in favor of allowing the defense.[39]

The Basic Contours of Qualified Immunity

Generally speaking, qualified immunity can only be defeated if the official deprived the plaintiff of a constitutionally protected right, the right was "clearly established" at the time of the challenged conduct, and every reasonable official would have known that the conduct engaged in violated a constitutional right.[40]

Courts are free to decide in which order to consider these issues.[41] For example, assuming that a constitutional violation occurred, a court may consider first whether there is a clearly established right at the time of the challenged conduct.

Circuits have developed different analyses that have two- or three-part tests. It is important that a practitioner become familiar with the test employed in each circuit. For instance, the Seventh Circuit employs a two-part test: first, determine whether the defendant's alleged conduct constitutes a constitutional violation, and second, determine whether the right was clearly established.[42] However, the Fifth Circuit casts the qualified immunity analysis as a three-part inquiry: (1) whether there was a constitutional violation, (2) whether

---

[33] *Id.* at 389.

[34] *Id.* at 392–94.

[35] *See id.* at 384.

[36] McCullum v. Tepe, 693 F.3d 696, 697 (6th Cir. 2012).

[37] *Id.* at 704.

[38] Perniciaro v. Lea, 901 F.3d 241, 251–55 (5th Cir. 2018).

[39] *Id.* at 251–53.

[40] *See* Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011); Anderson v. Creighton, 483 U.S. 635, 639–41 (1987).

[41] Pearson v. Callahan, 555 U.S. 223, 236 (2009).

[42] Jones v. Wilhelm, 425 F.3d 455, 460–61 (7th Cir. 2005).

the law was clearly established, and (3) even if there was a constitutional violation of a clearly established right, was the defendant's conduct objectively reasonable?[43]

Regardless, no Supreme Court precedent has broken down qualified immunity into multi-part tests, apart from *Pearson*'s option to let courts decide first either the merits of the claim or qualified immunity. And, the Court essentially folds the reasonable officer standard into the inquiry of whether, under the particular circumstances, an official's conduct violated clearly established law. Lastly, no matter how a court analyzes qualified immunity, it must make an individualized determination as to each defendant.[44]

What Is "Clearly Established" Law?

Federal courts look to their own case law to determine what is "clearly established."[45] A prior case exactly on point is not necessarily required,[46] only that an official had "fair warning"[47] based on the case law that his or her conduct would infringe on a constitutional right. However, "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.'"[48] In other words, "existing precedent must have placed the statutory or constitutional question beyond debate."[49] "[I]f the test of 'clearly established law' were to be applied at [a high] level of generality,… [p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights."[50] "This exacting standard 'gives government officials breathing room to make reasonable but mistaken judgments' by 'protect[ing] all but the plainly incompetent or those who knowingly violate the law.'"[51]

---

[43] Gates v. Tex. Dep't of Protective and Regulatory Servs., 537 F.3d 404, 418–19 (5th Cir. 2008); *see also* Estate of Cummings v. Davenport, 906 F.3d 934, 940 (11th Cir. 2018) (acknowledging that the Eleventh Circuit requires, as part of its qualified immunity analysis, a defendant show that he or she was acting within his or her discretionary authority); Easley v. City of Riverside, 890 F.3d 851, 862 (9th Cir. 2018) (Pratt, D.J., dissenting) ("In essence, there are three inquiries we must perform to determine whether an official is entitled to qualified immunity: (1) whether the official's conduct violated a plaintiff's constitutional right; (2) whether the constitutional right asserted by the plaintiff was clearly established in the law as it was at the time of the official's conduct; and (3) whether the law at the time would have made it clear to a reasonable official that the alleged conduct was unlawful under the circumstances."); Halley v. Huckaby, 902 F.3d 1136, 1144 (10th Cir. 2018) (quoting Shero v. City of Grove, 510 F.3d 1196, 1204 (10th Cir. 2007)) ("If a plaintiff demonstrates the officials violated a clearly established right, we consider a third question: whether extraordinary circumstances—such as reliance on the advice of counsel or on a statute—so prevented the official from knowing that his or her actions were unconstitutional that he or she should not be imputed with knowledge of a clearly established right.").

[44] Williams v. Cline, 902 F.3d 643, 652 (7th Cir. 2018).

[45] *But see* Marin v. King, 720 F. App'x 923, 938 n.9 (10th Cir. 2018) ("Although the 'clearly established' prong of the qualified immunity analysis centers on the law as clearly established by the federal courts, in the absence of a binding federal precedent on a matter central to the 'clearly established' analysis, a court may consider relevant decisions of state courts.").

[46] al-Kidd, 563 U.S. at 741.

[47] Hope v. Pelzer, 536 U.S. 730, 743 (2002) (citing United States v. Lanier, 520 U.S. 259 (1997)).

[48] City & Cty. of S.F. v. Sheehan, 135 S. Ct. 1765, 1774 (2015).

[49] al-Kidd, 563 U.S. at 741 (citing Anderson, 483 U.S. at 640).

[50] Anderson, 483 U.S. at 639.

[51] Sheehan, 135 S. Ct. at 1774 (quoting al-Kidd, 563 U.S. at 743).

However, in *Hope v. Pelzer*, the Supreme Court cautioned the lower courts against requiring identical factual similarity to existing precedent. In *Hope*, prison guards handcuffed plaintiff to a hitching post for seven hours, shirtless, in the hot sun, while allegedly taunting him, denying him bathroom breaks, and providing him very little water, in violation of his Eighth and Fourteenth Amendment rights.[52] The Eleventh Circuit affirmed the district court's grant of qualified immunity, holding that "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory, and established, not by 'abstractions,' but by cases that are 'materially similar' to the facts in the case in front of us."[53] The Supreme Court reversed, concluding that the Eleventh Circuit erred in holding that unless the facts of precedent were "material similar" to the pending case qualified immunity would apply.[54] Instead, the proper inquiry was whether, given the state of the law at the time of the alleged constitutional violation, the defendant official had "fair warning" that his or her conduct was unconstitutional.[55] Given the precedent in the Fifth (before the 1981 split) and Eleventh Circuits, Alabama state corrections regulations, and U.S. Department of Justice guidance to the Alabama Department of Corrections (even if the individual defendants were unaware of this guidance), together with the "obvious cruelty" of the individual defendants' conduct, the Court held that prison guards have fair warning that the use of a hitching post violates the Eighth Amendment.[56]

In their arguments against the assertion of qualified immunity, plaintiffs normally frame generally established constitutional rights (*i.e.*, the right to be free from unreasonable searches and seizures) that give defendants fair warning that their conduct is unconstitutional. This approach should normally fail, as it violates the express command of applying the law to the particular facts confronting a defendant; in other words, plaintiffs usually state a right at too high a level of generality. However, defendants have also been accused of framing a particular issue at too high of a level of specificity, arguing that the pending case is too different from the relevant precedent and that therefore there is no clearly established law.

How old must be precedent be before it is considered "clearly established"? The Third Circuit recently held that two days was not enough time for law to have been clearly established in case involving customs officers and cabin searches.[57] However, the Eleventh Circuit concluded that a circuit opinion handed down just nine days before an officer-involved shootout was enough time to govern the actions of law enforcement as clearly established law.[58]

What Law Controls—Supreme Court Precedent or Circuit Precedent?

In *Wilson v. Layne*,[59] the Supreme Court provided some guidance on what law controls the meaning of "clearly established." In that case, the Court found that the alleged Fourth Amendment right was not clearly estab-

---

[52] Hope, 536 U.S. at 733–35.

[53] *Id.* at 736 (citing 240 F.3d 975, 981 (11th Cir. 2001)).

[54] *Id.* at 741.

[55] *Id.*

[56] *Id.* at 741–46.

[57] Bryan v. United States, 913 F.3d 356 (3d Cir. 2019).

[58] O'Kelley v. Craig, No. 18-14512, 2019 WL 3202928 (11th Cir. July 16, 2019). For further discussion of O'Kelley, *see* Phillip E. Friduss, Nine-Day Old Circuit Precedent Held Sufficiently Clearly Established to Strip Deputies of Qualified Immunity. Wait, What?, DRI Gov't Liability Newsletter (Fall 2019).

[59] 526 U.S. 603 (1999).

lished because the plaintiffs failed to demonstrate either a controlling Supreme Court case, "controlling authority in their [circuit] at the time of the incident which clearly established" the law, or "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful."[60]

Given the Court's pronouncement in *Wilson*, a split of authority among the circuits is a strong signal that a particular right is not clearly established. Interestingly, more recent Supreme Court cases appear to cast doubt on whether circuit precedent can clearly establish the law, especially if there is no controlling authority from the Court itself.[61]

The Supreme Court Reaffirms the Particularization Requirement for Clearly Established Law

Over the last several years, the Supreme Court has emphasized to the lower courts that overgeneralized statements of constitutional rights will not suffice under the standard enunciated in *Anderson*. In five cases—*Sheehan*,[62] *Mullenix v. Luna*,[63] *White v. Pauly*,[64] *District of Columbia v. Wesby*,[65] and *Kisela v. Hughes*[66]—the Supreme Court has explicitly admonished four different circuit courts for their failure to examine whether a right was clearly established "in a more particularized… sense." "Specificity is especially important in the Fourth Amendment context, where the [Supreme] Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine… will apply to the factual situation the officer confronts."[67] While particularization is, at least theory, no less important in the Eighth Amendment context, in those cases courts may be more willing to conclude that a "general constitutional rule… may apply with obvious clarity… even though the very action in question has not previously been held unlawful."[68]

First, in *Sheehan*, officers used force to subdue a mentally disturbed and armed group home resident.[69] The resident sued the officers for, in part, violating her Fourth Amendment right to be free from excessive force.[70] On appeal, the Ninth Circuit relied on the Fourth Amendment's objective reasonableness test when it concluded that it was clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no

---

60 *Id.* at 617; *see also* Halley, 2018 WL 4056971, at *3 (citing Redmond v. Crowther, 882 F.3d 927, 935 ("A Supreme Court or Tenth Circuit decision on point or the weight of authority from other courts can clearly establish a right.").

61 *See*, *e.g.*, Taylor v. Barkes, 135 S. Ct. 2042, 2044 (2015) (per curiam) ("And to the extent that a robust consensus of cases of persuasive authority in the Court of Appeals could itself clearly establish the federal right respondent alleges…."); Sheehan, 135 S. Ct. at 1776; Caroll v. Carman, 135 S. Ct. 348, 350 (2014) ("Assuming for the sake of argument that a controlling circuit precedent could constitute clearly established federal law in these circumstances….").

62 135 S. Ct. 1765 (2015).

63 136 S. Ct. 305 (2015) (per curiam).

64 137 S. Ct. 548 (2017) (per curiam).

65 138 S. Ct. 577 (2018).

66 138 S. Ct. 1148 (2018) (per curiam).

67 Id. at 1152 (quoting Mullenix, 136 S. Ct. at 308); *see also* Sauers v. Borough of Nesquehoning, 905 F.3d 711, 719 (3d. Cir. 2018) ("When qualified immunity is at issue, context matters.").

68 Thompson v. Commonwealth of Virginia, 878 F.3d 89, 98 (4th Cir. 2017) (quoting Hope, 536 U.S. at 741).

69 135 S. Ct. at 1771.

70 *Id.*

objective need for immediate entry."[71] The Supreme Court reversed, concluding that the objective reasonableness test governing excessive force claims is "far too general a proposition to control this case…. Qualified immunity is no immunity at all if 'clearly established' law can be simply defined as the right to be free from unreasonable searches and seizures."[72]

The next term, in *Mullenix*, the Supreme Court considered another excessive force case involving a fleeing suspect and a high speed pursuit.[73] The Fifth Circuit concluded that the defendant officer was not entitled to qualified immunity because "'the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.'"[74] While slightly more particularized than the Ninth Circuit's reliance on the objective reasonableness test in *Sheehan*, the Supreme Court rejected this formulation as well, saying, "[w]e have repeatedly told courts… not to define clearly established law at a high level of generality."[75] A court's inquiry into what constitutes clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition."[76] In *Mullenix*, the officer "confronted a reportedly intoxicated figure, set on avoiding capture through high-speed vehicular flight, who twice during his flight had threatened to shoot police officers, and who was moments away" from encountering another officer.[77] "The relevant inquiry," the Supreme Court concluded, "is whether existing precedent placed the conclusion that Mullenix acted unreasonably *in these circumstances* beyond debate."[78] The *Mullenix* Court held that it did not.

In the October 2016 term, in *White*, the Supreme Court decided another excessive force case—this one involving an officer who "arrived late at an ongoing police action" and witnessed several shots being fired before shooting and killing an armed individual without first giving a warning.[79] The plaintiffs claimed that the officer violated the decedent's right to be free from excessive force.[80] The Tenth Circuit affirmed the district court's denial of qualified immunity, holding that it was clearly established that the Fourth Amendment's reasonableness principle required the officer to give a warning.[81] On appeal, the Supreme Court rejected the Tenth Circuit's formulation of the right at issue, stating, "it is again necessary to reiterate the longstanding principle that clearly established law should not be defined at a high level of generality."[82] The [Tenth Circuit] "misunderstood the 'clearly established' analysis. It failed to identify a case where an officer *acting under similar circumstances* as Officer White was held to have violated the Fourth Amendment."[83]

---

[71] *Id.* at 1772 (quoting 743 F.3d 211, 1229 (9th Cir. 2014)).

[72] *Id.* at 1775–76.

[73] 136 S. Ct. at 306–07.

[74] *Id.* at 308 (quoting 773 F.3d 712, 725 (5th Cir. 2014)).

[75] *Id.*

[76] *Id.* (quoting Brosseau v. Haugen, 543 U.S. 194, 198 (2004)).

[77] *Id.* at 309.

[78] *Id.* (emphasis added).

[79] 137 S. Ct. at 549.

[80] *Id.* at 550.

[81] *Id.* at 551.

[82] *Id.* at 552.

[83] *Id.* (emphasis added).

This past term, the Court continued to reiterate its specificity requirement for what constitutes clearly established law. In *Wesby*,[84] the Court confronted another Fourth Amendment case in which several guests were arrested in a vacant house that was used for a party with loud music and a makeshift strip club. The party goers asserted Fourth Amendment claims for false arrest as the police did not have probable cause.[85] The district court and the D.C. Circuit both agreed that the officers lacked probable cause and that they were not entitled to qualified immunity; the D.C. Circuit ruled that it was "perfectly clear" that those who believed they had a right to enter (i.e., the partygoers who did not know that they did not have permission to be in the house) lacked the necessary intent for unlawful entry.[86] The Supreme Court reversed on both the merits (the officers had probable cause) and qualified immunity. The Court restated its precedent on clearly established law and the requirement of specificity, particularly in the Fourth Amendment context, as probable cause requires factual assessment and cannot be reduced to "a neat set of legal rules."[87] In the Court's estimation, it would not have been clear to every reasonable officer that, "in these circumstances, the partygoers' bona fide belief that they were invited to the house was "uncontroverted."[88]

Finally, in *Kisela*, officers called to a scene were confronted with a woman holding a large knife, walking toward another woman with the knife, and ignoring orders to drop the knife.[89] An officer shot the knife-wielding woman, who then claimed excessive force in violation of her Fourth Amendment rights.[90] The district court granted summary judgment to the officer, but the Ninth Circuit reversed, holding that not only did the plaintiff sufficiently demonstrate a Fourth Amendment violation when the facts were viewed in the light most favorable to her, but that the constitutional violation was obvious and therefore violated clearly established law.[91] The Supreme Court granted the petition for certiorari and reversed.[92] The Court jumped to the second prong of the qualified immunity analysis, yet again admonished the Ninth Circuit for defining clearly established law at a high level of generality, and again emphasized the importance of specificity in the Fourth Amendment context.[93] The Court concluded that the Ninth Circuit failed to "implement" the "clearly established analysis "in a correct way" by relying on general statements of the law.[94] "Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for trial on the question of reasonableness."[95]

---

[84] 138 S. Ct. 577 (2018).

[85] *Id.* at 584.

[86] *Id.* at 585.

[87] *Id.* at 586.

[88] *Id.* at 592.

[89] 138 S. Ct. 1148, 1150 (2018) (per curiam).

[90] *Id.* at 1151.

[91] *Id.*

[92] *Id.* at 1151–52.

[93] *Id.* at 1152.

[94] *Id.* at 1153.

[95] *Id.*

Procedural Considerations

Because qualified immunity is a defense[96] the doctrine must be pled and asserted as soon as possible. As to which party bears the burden of proof for each element of the qualified immunity defense, the various circuits take different approaches. In a majority of circuits, the defendant has the initial burden to raise the defense of qualified immunity; the burden then shifts to the plaintiff to show that he suffered an underlying constitutional violation and the defendant's conduct violated clearly established law.[97] In a minority of circuits, the burden of establishing all of the elements is on the defendant.[98] A district court may raise the issue of qualified immunity *sua sponte* as long as it is affirmatively pleaded by a defendant official.[99]

"A defendant's motion for a more definite statement is appropriate to 'facilitate an early resolution of the qualified immunity issue.'"[100]

The advantage of asserting qualified immunity in a motion to dismiss is that a defendant has at least two more opportunities (summary judgment and an "interlocutory" appeal) to assert it later if the motion is unsuccessful. In theory, the more exacting standards that complaints must meet under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), should defeat those complaints containing conclusory allegations and legal conclusions couched as factual allegations. "Asserting a qualified immunity defense via a Rule 12(b)(6) motion, however, subjects the defendant to a more challenging standard of review than would apply on summary judgment."[101] On a motion to dismiss, "it is the defendant's conduct as alleged in the complaint that is scrutinized for objective legal reasonableness."[102]

Another opportunity to assert qualified immunity may come after some amount of discovery on a motion for summary judgment. But, again, because the issue of qualified immunity should be resolved at the earliest possible stage in litigation, and if possible prior to discovery, the district courts have "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery,"[103] if it is needed at all.

---

[96] *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980).

[97] *See*, *e.g.*, Estate of Cummings, 906 F.3d at 940; Erwin v. Daley, 92 F.3d 521, 525 (7th Cir. 1996).

[98] *See*, *e.g.*, Mitchell v. City of N.Y., 841 F.3d 72, 79 (2d Cir. 2011).

[99] Easley, 890 F.3d at 855 (stating that "a district court is not proscribed from directing the parties to brief the issue when it has been properly raised").

[100] Olson v. Ako, 724 F. App'x 160, 165 (3d Cir. 2018) (quoting Thomas v. Independence Twp., 463 F.3d 285, 300 (3d Cir. 2006)).

[101] Peterson v. Jensen, 371 F.3d 1199, 1201 (10th Cir. 2004).

[102] Thomas v. Kaven, 765 F.3d 1183, 1194 (10th Cir. 2004); *see also* Stanley v. Finnegan, 899 F.3d 623, 627 (8th Cir. 2018).

[103] Crawford-El v. Britton, 523 U.S. 574, 600 (1998); *see also* Backe v. LeBlanc, 691 F.3d 645, 648 (5th Cir. 2012)

> [T]his court has established a careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense. As we explained in *Wicks*, a district court must first find "that the plaintiff's pleadings assert facts which, if true, would overcome the defense of qualified immunity." Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity. *After* the district court finds a plaintiff has so pled, if the court remains "unable to rule on the immunity defense without further clarification of the facts," it may issue a discovery order "narrowly tailored to uncover only those facts needed to rule on the immunity claim."

How courts treat the issue of qualified immunity on summary judgment can be a bit confusing. For example, the Seventh Circuit has stated that "[w]hen reasonable minds could differ, in the typical summary judgment decision the balance tips in favor of the nonmovant while in the qualified immunity context the balance favors the movant."[104] However, as the Federal Rules of Civil Procedure dictate, "[a]t the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party."[105] In qualified immunity cases, "this usually means adopting… the plaintiff's version of the facts."[106]

Unlike a typical interlocutory appeal, a defendant may immediately appeal an order on a dispositive motion on the basis of qualified immunity without leave of the district court.[107] Appellate jurisdiction "is based on district courts' '*decisions*,' not on the particular arguments parties make in their briefs below."[108] "[I]f the district court explicitly decided the qualified immunity question," then a court of appeals "will usually have jurisdiction over an interlocutory appeal."[109] However, "[a] district court's *failure* to expressly decide the qualified immunity question does not necessarily mean that" an appellate court lacks jurisdiction "because the district court's silence can operate as an implicit denial that is immediately appealable.[110]

On an interlocutory appeal, circuit courts are limited in their review of the district court decision. Certainly, circuit courts may review a district court's legal determination that the defendant's conduct violated a constitutional right or that the right was clearly established.[111] And, a circuit court may review whether the district court properly assessed the undisputed evidence of record,[112] and whether the district court's determination was "blatantly contradicted by the record, so that no reasonable jury could believe it."[113] However, an appellate court may not review "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial."[114] Circuit courts have interpreted this rule from *Johnson v. Jones* as prohibiting them from reviewing what actually occurred or why an action was taken or omitted,[115] who did it,[116] or even the inferences drawn by the district court.[117] These narrow interpretations of *Johnson* are not without their critics. In

---

(citations omitted).

[104] Ellis v. Wynalda, 999 F.2d 243, 246 n.2 (7th Cir. 1993).

[105] Scott v. Harris, 550 U.S. 372, 380 (2007) (quoting Fed. Rule Civ. Proc. 56(c)). *But see id.* ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a curt should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

[106] *Id.* at 378.

[107] Mitchell, 472 U.S. at 530.

[108] Montoya v. Vigil, 898 F.3d 1056, 1063 (10th Cir. 2018) (quoting 28 U.S.C. §1291).

[109] *Id.*

[110] *Id.* In this situation, it is important that a defendant explicitly raised the issue.

[111] Mitchell, 472 U.S. at 530.

[112] Plumhoff v. Rickard, 134 S. Ct. 2012, 2018 (2014).

[113] Scott, 550 U.S. at 380.

[114] Johnson v. Jones, 515 U.S. 304, 313 (1995).

[115] Ortiz v. Jordan, 562 U.S. 180, 190 (2011).

[116] DiLuzio v. Vill. of Yorkville, 796 F.3d 604, 609 (6th Cir. 2015).

[117] Thompson v. Cope, 900 F.3d 414, 419 (7th Cir. 2018); *see also* Wagner v. Bay City, 227 F.3d 316, 320 (5th Cir. 2000) ("In deciding an interlocutory appeal of a denial of qualified immunity, we can review the *materiality* of any factual disputes, but not their *genuineness*.").

a recent dissent from a Sixth Circuit decision, Judge Sutton took the panel majority to task for dismissing an interlocutory appeal on the ground that the court of appeals lacked subject matter jurisdiction to review fact inferences drawn by the district court.[118] Judge Sutton's critique of how his circuit and others have misinterpreted Johnson is worth quoting at length:

> This approach gives *Johnson v. Jones* a bad name, cannot be reconciled with Supreme Court precedent, and makes little sense. If appellate courts have no jurisdiction to review the inferences drawn by a district court judge in resolving a claim of qualified immunity at summary judgment, how are they supposed to apply de novo review to the district court's decision, as Supreme Court decisions since *Johnson* do?
>
> …
>
> *Johnson* establishes an important principle—but a limited principle. An officer may not appeal the denial of a qualified immunity ruling solely on the ground that the plaintiff's record-supported facts are wrong. In the rare case in which that is all the officer does—saying in effect only that the plaintiff is lying—an appellate court should dismiss the appeal for lack of jurisdiction. Otherwise, we have jurisdiction to decide—on de novo review—whether, after reading the factual record in the light most favorable to the plaintiff, the officer should win as a matter of law on the first or second prong of qualified immunity. That's all there is to it. Each of our too-many-to-count additional glosses on *Johnson* is needlessly complicated, inconsistent with later Supreme Court cases, contradicts our duty to apply fresh review to a district court's summary judgment decision, and ultimately is hurtful to the party it is designed to help: the plaintiff.[119]

In very narrow circumstances, an appellate court may also consider the underlying merits of the case at the same time it considers the question of qualified immunity under the doctrine of pendent appellate jurisdiction.[120]

Finally, "[w]here the defendant's pretrial motions are denied because there are genuine issues of fact that are determinative of the qualified immunity issue, special jury interrogatories may be used to resolve those factual issues."[121] Also, a defendant may assert qualified immunity during and after trial through a motion (or renewed motion) for judgment as a matter of law.

Statute of Limitations

Another important consideration for defense counsel is in a §1983 action is the statute of limitations. Generally, the statute of limitation is an affirmative defense that must be raised in an answer or it is waived,[122] but some circuits permit affirmative defenses like statute of limitations for the first time in a dispositive motion absent prejudice.[123]

---

[118] Barry v. O'Grady, 895 F.3d 440, 445–49 (6th Cir. 2018) (Sutton, J., dissenting).

[119] *Id.* at 445–46 (citation omitted).

[120] For an explanation of the doctrine of pendent appellate jurisdiction, *see* Swint v. Chambers Cty. Comm'n, 514 U.S. 35 (1995), and Abelesz v. OTP Bank, 692 F.3d 638 (7th Cir. 2012).

[121] Simmons v. Bradshaw, 879 F.3d 1157, 1164 (11th Cir. 2018). The issue of whether a defendant is entitled to qualified immunity should not be submitted to a jury, only issues of historical fact.

[122] *See*, *e.g.*, Alameda Books, Inc. v. Los Angeles, 631 F.3d 1031, 1044 (9th Cir. 2011).

[123] *See*, *e.g.*, Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1374 (3d Cir. 1993).

Section 1983 lacks a statute of limitations, so pursuant to 42 U.S.C. §1988(a), federal courts must look to state law for the controlling limitations period, as long as "the importation of state law will not frustrate the implementation of national policies."[124] For purposes of selecting the proper limitations period, the Supreme Court has held that all §1983 actions should be characterized as actions for personal injuries.[125] Even if a state has a specific statute of limitation for §1983, a federal court must select the "most appropriate statute of limitations for all §1983 claims."[126] If a state has a general personal injury period and specific periods for particular torts, the general period controls for purposes of §1983.[127]

Unlike the limitations period for a §1983 action, the accrual of a §1983 action in federal court is a matter of federal law. Circuit courts have applied the rule that "a cause of action accrues when plaintiff knows or has reason to know of the injury that is the basis of the action."[128]

If there is no applicable federal tolling law, then the federal court must borrow the state's tolling law.[129]

Conclusion

When available to individual defendants, absolute immunity is a sweeping grant of protection based on the functional conduct of a legislative, judicial, or prosecutorial official, not necessarily based on his or her title.[130] Qualified immunity can also be a powerful defense. Determining what is clearly established law and applying it to the particular circumstances facing a defendant official has proven difficult in practice.[131]

AUTHOR

Kurt M. Simatic is an attorney with Stafford Rosenbaum LLP, with offices in Madison and Milwaukee, Wisconsin, where he focuses his practice on commercial, real estate, and governmental liability litigation. Kurt is also an active member of the DRI Governmental Liability Committee and is chair of publications. He received his B.A. from the University of Wisconsin-Madison and his J.D. from Marquette University Law School.

Stafford Rosenbaum LLP | 608.259.2646 | ksimatic@staffordlaw.com

[124] Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977).

[125] Wilson v. Garcia, 471 U.S. 261 (1985).

[126] *Id.* at 275.

[127] Owens v. Okure, 488 U.S. 235 (1989).

[128] Belanus v. Clark, 796 F.3d 1021, 1025 (9th Cir. 2015).

[129] Board of Regents v. Tomanio, 446 U.S. 478 (1980).

[130] For further reading on absolute immunity, *see* T. Leigh Anenson, "Absolute Immunity from Civil Liability: Lessons for Litigation Lawyers," 31 Pepp. L. Rev. 915 (2004); Irene Merker Rosenberg, "Whatever Happened to Absolute Judicial Immunity?" 21 Hous. L. Rev. 875 (1984).

[131] For further reading on qualified immunity, *see* Karen M. Blum, "Qualified Immunity: A User's Manual," 26 Ind. L. Rev. 187 (1993); Alan K. Chen, "The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law," 47 Am. U. L. Rev. 1 (1997); Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, "Qualified Immunity Developments: Not Much Hope Left for Plaintiffs," 29 Touro L. Rev. 633 (2013); Essay, Kit Kinports, "The Supreme Court's Quiet Expansion of Qualified Immunity," 100 Minn. L. Rev. Headnotes 62 (2016).

Chapter 3

Municipal Liability Under 42 U.S.C. §1983

By Dale Conder, Jr.

Monell v. Department of Social Services: The Foundation Case for Municipal Liability

The Supreme Court's decision in *Monroe v. Pape*,[1] represented a major transformation in §1983 litigation. In *Monroe*, the Court held that state action satisfies §1983's under-color-of-law requirement.[2] The Court, however, did not extend liability to governmental entities.[3] The Court did not "believe that the word 'person' was used in this particular Act to include" municipalities.[4] The Court's interpretation of "person" changed 17 years later when it decided *Monell v. Department of Social Services*.[5] In *Monell*, the Court held "that Congress *did* intend municipalities and other local government units to be included among those persons to whom §1983 applies."[6] Lawyers and judges refer to municipal or municipal liability as *Monell* liability.

Elements of a *Monell* or municipal-entity claim

After the *Monell* decision, municipalities, counties, townships, etc. can be liable under §1983.[7] The two basic elements of a *Monell* claim are (1) that a constitutional violation occurred; and (2) the governmental entity is responsible for the violation.[8] To ensure that the plaintiff satisfies the second element, the plaintiff must show that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that [governing unit]'s officers."[9] Local governments can also be liable for unconstitutional conduct that results from a custom of the local government even

[1] 365 U.S. 167 (1961).

[2] *Id.* at 187.

[3] *Id.* at 191.

[4] *Id.*

[5] 436 U.S. 658 (1978).

[6] *Id.* at 690 (emphasis in original).

[7] *Id.*

[8] *See* Graham v. Cty. of Washtenaw, 358 F.3d 377, 383 (6th Cir. 2004).

[9] Monell, 436 U.S at 690.

though the entity's decision makers have not formally approved the custom.[10] Local governments, however, cannot be liable under respondeat superior.[11]

A plaintiff who establishes a constitutional violation caused by the governmental entity's policies, customs, or procedures can recover compensatory damages and prospective relief in the form of an injunction or declaratory judgment.[12] The policy, custom, or procedure requirement applies whether the plaintiff is seeking monetary damages, prospective relief, or both.[13] If the governmental entity defends the case solely on the lack of a constitutional violation, the entity waives defenses under *Monell*.[14]

Defenses to the *Monell* claim

Governmental entities do not enjoy the benefit of good-faith immunity. A "municipality may not assert the good faith of its officers or agents as a defense to liability under §1983."[15] Governmental entities, however, unlike individuals, are immune from suit for punitive damages.[16]

A plaintiff's *Monell* claim fails if (1) there is no constitutional violation; (2) the plaintiff does not properly plead[17] and prove the existence of a policy, custom, or procedure; or (3) the plaintiff cannot establish that the policy, custom, or procedure caused the constitutional violation. In defending *Monell* claims, it is important to analyze separately the issue of whether a constitutional violation caused the plaintiff's injury and the issue of whether the municipality is liable.[18]

Municipal policy

There are three ways to establish municipal policy. The first, and easiest for the plaintiff, is "written policy statements, ordinances, or regulations." The second is "a widespread practice that is so common and well-settled as to constitute a custom that fairly represents municipal policy." Finally, "a single decision may constitute municipal policy in 'rare circumstances' when the official or entity possessing 'final policymaking authority' for an action 'performs the specific act that forms the basis of the §1983 claim.'"[19]

---

[10] *Id.*

[11] *Id.* at 691.

[12] *Id.* at 690.

[13] Los Angeles Cty. v. Humphries, 562 U.S. 29, 37–39 (2010).

[14] *See* Kinnison v. City of San Antonio, 480 F. App'x 271, 274–75 (5th Cir. 2012).

[15] Owen v. City of Independence, 445 U.S. 622, 638 (1980); *see also* Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166 (1993) ("Unlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified under—§1983.").

[16] City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981).

[17] *See*, *e.g.*, Hutchison v. Metro. Gov. of Nashville & Davidson Cty., 685 F.Supp.2d 747, 751 (M.D. Tenn. 2010) (dismissing plaintiff's claim because the complaint did not meet *Iqbal*'s plausibility requirement).

[18] Collins v. City of Harker Heights, 503 U.S. 115, 120 (1995).

[19] Webb v. Town of Saint Joseph, 925 F.3d 209, 215 (5th Cir. 2019).

Written policy statements, ordinances, or regulations

If a municipal ordinance caused a constitutional violation, the plaintiff can establish the existence of the policy by relying on the ordinance.[20] In *Hardrick*, the plaintiffs sued Detroit because one section of its animal-control ordinance authorized animal-control officers "to enter 'any… real property within the City for the purpose of capturing, collecting, or restraining any animal,' whether [the officers] have a warrant or not."[21] The plaintiffs' reliance on this ordinance cleared *Monell*'s policy-requirement hurdle.[22] Of course, the plaintiffs still had to show that the ordinance caused the constitutional violations. For some plaintiffs, the court noted, the ordinance did not cause their injuries because the officers seized the dogs under a recognized exception to the warrant requirement, *i.e.*, exigent circumstances, and in other situations, the plaintiffs surrendered their dogs to animal-control officers.[23]

Widespread practice

The second of the three methods for establishing municipal liability is by showing that a custom that has the force of law caused the constitutional injury.[24] This requires a showing that the practice is "so well settled and widespread that the policymaking officials… can be said to have either actual or constructive knowledge of [the practice] yet did nothing to end the practice."[25] "It is difficult to discern from the caselaw the quantum of allegations needed to survive a motion to dismiss a pattern and practice claim."[26] But courts have held that one, two, or three incidents are insufficient to establish a widespread custom.[27] Context is critical in determining the quantum of incidents necessary for proof of custom.[28]

For example, *Pineda v. City of Houston* involved claims that Houston's Southwest Gang Task Force had a custom of warrantless entry into residences.[29] The plaintiffs offered eleven incidents of warrantless entries to establish the "well settled and widespread" custom.[30] The court held that 11 incidents of warrantless entries into residences "cannot support a pattern of illegality in one of the Nation's largest cities and police forces."[31] These 11 incidents were over a four-year period.[32] This is another factor in deciding whether prior incidents show a

---

[20] *See* Hardrick v. City of Detroit, 876 F.3d 238, 244–45 (6th Cir. 2017).

[21] *Id.* at 242.

[22] *Id.* at 244–45.

[23] *Id.* at 245–46.

[24] Bd. of Cty. Comm'rs v. Brown, 520 U.S. 397, 404 (1997).

[25] Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir. 1989).

[26] Gonzalez v. Cty. of Merced, 289 F.Supp.3d 1094, 1099 (E.D. Cal. 2017).

[27] Wilson v. Cook County, 742 F.3d 775, 780 (7th Cir. 2014); Davis v. City of Ellensburg, 869 F.2d 1230 (9th Cir. 1989) (the manner of one arrest failed to establish custom); Meehan v. Cty. of Los Angeles, 856 F.2d 102 (9th Cir. 1988) (two incidents are insufficient to establish custom).

[28] Peterson v. City of Fort Worth, 588 F.3d 838, 851 (5th Cir. 2009).

[29] Pineda v. City of Houston, 291 F.3d 325, 329 (5th Cir. 2002).

[30] *Id.*

[31] *Id.*

[32] *See* Flanagan v. City of Dallas, 48 F.Supp.3d 941, 954 (N.D. Tex. 2014) (citing Pineda v. City of Houston, 124 F. Supp. 2d 1057, 1070 (S.D. Tex. 2007).

custom.[33] In *Peterson v. City of Fort Worth*, the court concluded that 27 incidents over a three-year period were not sufficient to prove custom.[34] The court held that the failure of this evidence was because of lack of context.[35] Without evidence regarding the size of the department or the number of arrests during the period of time from which the 27 incidents were drawn, the court could not say that these incidents were evidence of custom.[36]

In *Flanagan v. City of Dallas*, the plaintiffs claimed, among other things, that the city had a custom of using excessive force.[37] A Dallas police officer shot plaintiffs' son during the officer's attempt to arrest him.[38] Plaintiffs offered evidence that included 12 shootings of unarmed individuals during the year in which the officer shot the decedent.[39] And in their complaint, plaintiffs discussed the facts of three of these shootings to establish similarity between those cases and the shooting at issue.[40] Plaintiffs also pleaded facts showing that a city council member had told the media about training problems that caused the shootings of unarmed individuals by Dallas police officers and the high incidents of officer misconduct.[41] Based on these allegations, the district court denied, in part, the city's motion to dismiss.[42] (The case went to trial and at the close of plaintiffs' proof, the district court granted the city's Fed.R.Civ.P. 50(a) motion, and the jury returned a verdict in favor of the officer.)[43]

The well-settled-and-widespread requirement is to ensure that the government's policymaker has notice of the custom. The events relied upon must be before the incident gives rise to the lawsuit. "[C]ontemporaneous or subsequent conduct [is insufficient to] establish a pattern of violations that would provide 'notice to the cit[y] and the opportunity to conform to constitutional dictates…."[44]

Policy from a single decision

A single action by a municipality's governing body can constitute municipal policy that leads to liability.[45] Although not addressed specifically in *City of Newport v. Fact Concerts, Inc.* or *Owen v. City of Independence*, these cases show that a single decision by the final policymaker can lead to municipal liability.[46] In

---

[33] *See* Peterson, 588 F.3d at 850.

[34] *Id.* at 851.

[35] *Id.* at 851–52.

[36] *Id.* at 852.

[37] 48 F.Supp.3d at 953.

[38] *Id.* at 944–45.

[39] *Id.* at 953.

[40] *Id.* at 954.

[41] *Id.* at 953.

[42] *Id.* at 954.

[43] Flanagan v. City of Dallas, No. 3:13-CV-04231-M, 2018 WL 1046624 at *1 (N.D. Tex. February 23, 2018) (denying motion for a new trial), *aff'd*, 762 F. App'x 187 (5th Cir. 2019).

[44] Connick v. Thompson, 563 U.S. 51, 63 n. 7 (2011) (quoting City of Canton v. Harris, 489 U.S. 378, 395 (1989) (O'Connor, J., concurring in part and dissenting in part)).

[45] *See* City of Newport, 453 U.S. 247 (1981) (the city council voted to cancel license that permitted a concert); Owen, 445 U.S. 622 (1980) (city council passed resolution firing plaintiff).

[46] *See* Pembaur v. City of Cincinnati, 475 U.S. 469, 480–81 (1986), *superseded in part by statute*, Civil Rights Act of 1991, Pub. 2. No. 102-166, 105 Stat. 1072 (1991).

Fact Concerts and *Owen*, the municipalities' governing bodies took the action, but an individual, who is the final policymaker, can be the one whose single act creates liability.[47] To establish that this person is a final policymaker requires more than merely showing that this person has discretion to act in exercising certain functions.[48] "The official must also be responsible for establishing final government policy respecting such activity before the municipality can be held liable."[49] For example, a county sheriff might "have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy."[50] In this situation, the sheriff's decisions regarding employment would not lead to municipal liability.[51] Only decisions by the person or body that has final decision-making authority on the relevant subject will lead to municipal liability.[52]

In *Pembaur v. City of Cincinnati*, deputy sheriffs had warrants to arrest individuals who the deputies believed were hiding in a clinic.[53] The deputies, however, did not have search warrants.[54] When Dr. Pembaur refused to let the deputies in to arrest the individuals, the deputies eventually called their supervisor.[55] Their supervisor told the deputies to call the county prosecutor for advice.[56] The prosecutor told the deputies to "'go in and get [the witnesses].'"[57] When the deputies were not able to open the door, city officers, who were there to assist, got an axe and chopped down the door.[58] The issue in the case was whether the county prosecutor's single act of telling the deputies to enter the clinic and arrest the witnesses was a policy of Hamilton County, Ohio.[59] The Supreme Court held that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances."[60] It does not matter that the municipality has no plans to apply the policy in the future.[61] Nor does it matter that the policy is not in writing.[62] The Court determined that the county prosecutor had "final authority to establish municipal policy with respect to the action ordered."[63] Therefore, the county prosecutor established county policy when he told the deputy sheriffs to enter the clinic by force.[64]

---

47 *Id.*

48 *Id.* at 481–82.

49 *Id.* at 482–83.

50 *Id.* at 183, n.12.

51 *Id.*

52 *Id.*

53 *Id.* at 472.

54 *Id.* at 474.

55 *Id.* at 472–73.

56 *Id.* at 473.

57 *Id.* (alterations in original).

58 *Id.*

59 *Id.* at 476–77.

60 *Id.* at 480.

61 *Id.* at 480–81.

62 *Id.* at 480.

63 *Id.* at 481.

64 *Id.* at 485.

In *City of St. Louis v. Praprotnik*,[65] the Supreme Court had to decide if the supervisors' decision to transfer Praprotnik was a municipal policy.[66] Praprotnik's supervisor suspended him for accepting outside employment without first getting approval.[67] On appeal, the city civil service commission reversed the suspension, awarded backpay, and changed the discipline to a reprimand.[68] Praprotnik's supervisors were unhappy with the civil service commission's decision.[69] Eventually, a supervisor transferred Praprotnik to a different department.[70] After a series of conflicts with his new supervisors, Praprotnik sued, among others, the City of St. Louis.[71] The Court had to decide if the supervisors were final policymakers on employment matters.[72] The Court determined that the city's charter gave this power to the civil service commission.[73] Praprotnik's supervisors had discretion to act within policies; therefore, they were not final policymakers.[74]

Policymakers who delegate their policymaking authority create municipal liability when the subordinate acts in response to this delegation. In addition, a policymaker's ratifying a subordinate's decision can also create municipal liability.[75] "A subordinate official possesses delegated final policymaking authority when that official acts (1) free of review and (2) without any constraints imposed as a matter of policy by the original policymaker."[76] If the subordinate's decision is subject to review by the original policymaker, whether the review is exercised or not, there has not been a delegation of policymaking authority.[77]

A final policymaker can ratify the subordinate's decision or action by taking affirmative action "to approve both the decision and the basis for the decision."[78] "[R]atification requires both knowledge of the alleged unconstitutional violation, and proof that the policymaker specifically approved of the subordinate's act."[79] Whether a policymaker has ratified a subordinate's decision is a fact question for the jury.[80]

---

[65] 485 U.S. 112 (1988).

[66] *Id.* at 116.

[67] *Id.* at 114–15.

[68] *Id.* at 115.

[69] *Id.*

[70] *Id.* at 115–16.

[71] *Id.* at 116–17.

[72] *Id.* at 128.

[73] *Id.* at 128–29.

[74] *Id.* at 130.

[75] *See* Slotesz v. Rushmore Plaza Civic Ctr., 847 F.3d 941, 946 (8th Cir. 2017).

[76] *Id.*

[77] *Id.* at 947.

[78] *Id.*

[79] *Id.*

[80] *Id.*

How do courts determine who the policymaker is?

The discussion above alludes to the answer: the courts look to state law to identify the policymaker.[81] This inquiry also takes into account valid local ordinances and regulations.[82] "When an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality.[83]

Although the rule for deciding who is a policymaker is easy to state, it is not always so easy to apply. But it is a question of law for the judge to decide before submitting the case to the jury.[84] A district court's failure to determine the policymaker before submitting the case to jury will require setting aside the jury verdict.[85]

Municipalities can be liable for their policies in many areas. For example, inadequate training, inadequate hiring, or inadequate supervision or discipline.

Inadequate training

A municipality can be liable for failing to train its employees if the plaintiff can prove "(1) that a training program is inadequate to the tasks that the officers must perform; (2) that the inadequacy is the result of the [municipality]'s deliberate indifference; and (3) that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury."[86] Deliberate indifference requires proof of "prior instances of unconstitutional conduct demonstrating that the [municipality] has ignored a history of abuse and was clearly on notice that the training in this particular area was deficient and likely to cause injury."[87] A plaintiff can establish "deliberate indifference through evidence of a single violation of federal rights, accompanied by a showing that the [municipality] had failed to train its employees to handle recurring situations presenting an obvious potential for such a violation."[88]

Inadequate screening or hiring

A municipality can be liable for hiring decisions where the policymaker did not conduct adequate screening.[89] A failure to screen applicants for law enforcement positions rises to the level of deliberate indifference "[o]nly where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be the deprivation of a third party's federally protected right."[90] "[T]he mere probability that any officer inadequately screened will

---

81 Praprotnik, 485 U.S. at 124.

82 *See id.* at 124–25.

83 *Id.* at 127.

84 Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 737 (1989).

85 Soltesz, 847 F.3d at 947 (8th Cir. 2017).

86 Plinton v. Cty. of Summit, 540 F.3d 459, 464 (6th Cir. 2008) (quoting Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir. 1989)).

87 Fisher v. Harden, 398 F.3d 837, 849 (6th Cir. 2005).

88 Harvey v. Campbell Cty., 453 F. App'x 557, 562–63 (6th Cir. 2011).

89 Brown, 520 U.S. at 410.

90 *Id.* at 411.

inflict any constitutional injury" is insufficient to hold a municipality liable.[91] The plaintiff must plead facts that plausibly show "that *this* officer was highly likely to inflict the *particular* injury suffered."[92]

Failure to discipline

A "purported failure to discipline a single officer, as opposed, to a systematic policy, cannot support a claim of municipal liability."[93] In addition, the plaintiff "must show… contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents and circumstances under which the supervisor's actions or inaction could be found to have communicated a message of approval to the offending subordinate."[94]

Failure to adopt policies

"[T]o establish municipal liability… for… failure to adopt policies to prevent constitutional violations, the plaintiff must demonstrate that there was deliberate indifference to" this issue.[95] Deliberate indifference requires "proof that a municipal actor disregarded a known or obvious consequence of his action or inaction."[96]

Official-capacity actions

A claim against a government employee in the employee's official capacity is the same as suing the municipality.[97] When the plaintiff names the entity in addition to the official-capacity action, the courts should dismiss the official-capacity claims as redundant.[98]

Conclusion

Municipalities can be liable under §1983, but only for their own actions. In other words, the municipality's policies are the only way to get to the municipality. The simple fact the municipality hired a wrongdoer is insufficient to impose liability on the municipality. The policies for which the municipality can be answerable must come from the entity's policymaker. To determine who the policymaker is, the courts look to state law, and the judge must identify the policymaker before the case goes to the jury.

Often the policies are in written form, but they need not be. In addition to ordinances and regulations, policies can result from well-settled and widespread practices that create a custom for operation. Municipal policy can also result from a single decision of the policymaker for the act at issue.

---

[91] *Id.* at 412.

[92] *Id.*

[93] Sexton v. Kenton Cty. Det. Ctr., 702 F. Supp. 2d 784, 791 (E.D. Ky. 2010) (quoting Meas v. City and Cty. of San Francisco, 681 F. Supp. 2d 1128 (N.D. Cal. 2010)).

[94] Kirksey v. Ross, 372 F. Supp. 3d 256, 265–66 (E.D. Pa. 2019) (quoting Montgomery v. De Simore, 159 F.3d 120, 127 (3d. Cir. 1998)).

[95] Cookson v. City of Lewiston, No. 2:11-CV-460-DBH, 2013 WL 945502 at *7 (D. Me Feb. 7, 2013).

[96] *Id.*

[97] Epperson v. City of Humboldt, 140 F. Supp. 3d 676, 683 (W.D. Tenn. 2015).

[98] *Id.*

When defending municipalities it is important to challenge, if the facts allow it, not merely the constitutional injury, but the issue of who is the policymaker and did the policy cause the injury. If the defense only raises the constitutional injury, then it waives the *Monell* defenses.

AUTHOR

Dale Conder, Jr., is a member of the law firm Rainey Kizer Reviere & Bell PLC, with offices in Memphis, Jackson, Nashville, and Chattanooga, Tennessee. He practices in the firm's Jackson office. His practice focuses on defense of municipalities and their employees, particularly police officers in §1983 litigation, appellate law, and employment law. Mr. Conder has published and lectured in the areas of civil rights litigation, trial practice, civil procedure, and employment law. He is a member of DRI, the Tennessee Defense Lawyers Association, and the Tennessee Bar Association.

Rainey Kizer Reviere & Bell PLC | 731.426.8130 | dconder@raineykizer.com

Chapter 4

Recoverable Damages Under 42 U.S.C. Section 1983

By R. Eric Sanders and Jeffrey K. Lewis

The purpose of 42 U.S.C. Section 1983 is to compensate a party for injuries caused by the deprivation of a constitutional right. Once it is found that a constitutional deprivation has occurred, the ultimate question is what, if any, damages are available to the plaintiff? Sometimes, the Section 1983 claim is not about monetary gain but rather remedying the constitutional deprivation(s). For instance, remedying a deprivation involving the right to protest in a public square may not necessarily require an award of monetary damages, but remedying any deprivation of the right to protest is crucial to our free society. On the other hand, some constitutional deprivations (false arrest, malicious prosecution) may require a significant award of damages to make the plaintiff whole following a constitutional deprivation. Accordingly, assuming that a plaintiff is successful in his or her Section 1983 claim, the plaintiff has an opportunity to recover a broad range of compensatory damages, nominal damages, punitive damages, and attorneys' fees. However, the availability of certain damages depends on a significant number of factors including but not limited to: the nature of the constitutional deprivation, the damages proven, the type of defendant, and the nature of the acts of the defendant(s).

This chapter provides a brief overview of the types of damages recoverable under a successful Section 1983 claim, as well as the conditions and limitations of each category of damages. Moreover, this chapter also discusses a major driver of Section 1983 suits: the ability to recover attorneys' fees for the successful prosecution of a claim. Lastly, this chapter discusses utilizing "Offers of Judgment" under Fed. R. Civ. P. 68 to "cut-off" attorneys' fees and litigation costs earlier rather than later in the litigation.

Compensatory Damages

Congress adopted the common-law system of recovery when it established liability for "constitutional torts." Consequently, the basic purpose of Section 1983 damages is "to *compensate persons for injuries* that are caused by the deprivation of constitutional rights."[1]

When a plaintiff prevails on a Section 1983 claim for constitutional violations and can prove actual damages, a plaintiff is entitled to recover compensatory damages.[2] Compensatory damages (or actual damages) are "damages sufficient in an amount to indemnify the injured person for the loss suffered."[3] Specifically,

[1] Carey v. Piphus, 435 U.S. 247, 254 (1978) (emphasis added).

[2] *See id.* at 254–55.

[3] Black's Law Dictionary 174 (3rd pocket ed. 2006).

compensatory damages are designed to provide "*compensation* for the injury caused to plaintiff by defendant's breach of duty."[4]

The United States Supreme Court has expressly rejected the notion that Section 1983 authorizes an award of compensatory damages based on the fact-finder's assessment of the value or importance of the substantive constitutional right which has been violated.[5] Rather, the key inquiry is what injuries did the plaintiff suffer as a result of the constitutional deprivation and how can the plaintiff be compensated.

As in tort law, compensatory damages may include but are not limited to:

- Out-of-pocket losses;
- Medical bills;
- Impairment of reputation, personal humiliation;
- Lost or diminished earnings; and
- Financial, psychological, or physical injuries caused by the wrongful conduct.[6]

Compensatory damages are grounded in "concrete" damages and must be proven with some certainty. Unless a plaintiff can prove actual damages, a successful plaintiff is entitled to receive only nominal damages.[7]

While out-of-pocket damages and medical bills are easier to prove, emotional distress damages regularly concern defense counsel given the potential value range of the claim. The United States Supreme Court in *Carey v. Piphus*, 435 U.S. 247 (1978), held that "neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages without proof that such injury actually was caused."[8] The Court further held that "[a]lthough essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an award of damages must be supported by competent evidence concerning the injury."[9]

Carey involved a high school student and an elementary school student suspended for smoking marijuana; the students claimed that they were denied procedural due process because they were suspended without an opportunity to respond to the charges against them. The Court of Appeals for the Seventh Circuit held that even if the suspension was justified, the student could recover substantial compensatory damages simply because of the insufficient procedures used to suspend them from school. The Supreme Court reversed, and held that the students could recover compensatory damages *only* if they proved actual injury caused by the denial of their constitutional rights. The Court noted: "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests…."[10] Where no injury was

---

[4] 2 F. Harper, F. James, & O. Gray, *Law of Torts* §25.1, at 490 (2d ed. 1986) (emphasis in original); *see also* Carey, 435 U.S. at 255; Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 395, 397 (1971).

[5] Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 308 (1986).

[6] *See* **Stachura**, 477 U.S. at 307; Carey, 435 U.S. at 264 (mental and emotional distress constitute compensable injury in §1983 cases); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); **Akouri v. Fla. Dept. of Transp.**, 408 F.3d 1338, 1345 (11th Cir. 2005); **Randall v. Prince George's County**, 302 F.3d 188, 208 (4th Cir. 2002); **Coleman v. Rahija**, 114 F.3d 778, 786 (8th Cir. 1997).

[7] Carey, 435 U.S. at 266–67.

[8] *Id.* at 264.

[9] *Id.* at 264 n.20.

[10] Carey, 435 U.S. at 254.

present, no "compensatory" damages could be awarded.[11] The Court further held that in the absence of proof of actual injury, the students were entitled to receive only nominal damages, not to exceed one dollar, from the school officials.[12]

When a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate.[13] "In those circumstances, presumed damages may roughly approximate the harm that the plaintiff suffered and thereby compensate for harms that may be impossible to measure."[14]

However, there is a split of authority as to when compensatory damages are available in a §1983 claim for a violation of a constitutional right. As discussed *supra*, the Supreme Court has recognized that common-law tort principles protect interests that are parallel to the interests protected by the Constitution.[15] As such, the Court has agreed that an appropriate starting point for an inquiry under §1983 are the common-law tort principles.[16] Nevertheless, "[i]t is not clear… that common-law tort rules of damages will provide a complete solution to the damages issue in every §1983 case."[17] In cases where the interest protected by a particular constitutional right is not also protected by analogous common-law tort principle, the judiciary is tasked with adapting the common-law rules of damages to "provide fair compensation for injuries caused by the deprivation of a constitutional right."[18]

The split of authority rests on how broadly a court is to interpret the interests protected by a constitutional right.[19] For example, the Tenth Circuit has held that the Fourth Amendment protects a person's liberty, property, and privacy interests.[20] The Tenth Circuit takes the broad view that "any damage award available for a Fourth-Amendment violation under 42 U.S.C. §1983 should be tailored to compensating losses of liberty, property, privacy, and a person's sense of security and individual dignity."[21]

In *Train v. City of Albuquerque*, plaintiff was incarcerated for ten months in a federal facility after a handgun was discovered in an apartment, allegedly belonging to plaintiff, after an illegal search and seizure in violation of plaintiff's Fourth Amendment right.[22] Plaintiff sought compensatory damages stemming from his criminal defense fees, ten months of lost income due to his incarceration and emotional distress damages resulting from defending himself against the criminal charges and from residing in a federal prison.[23]

---

[11] *Id.* at 254–55.

[12] *Id.* at 266–67.

[13] Carey, 435 U.S. at 262; *see also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 760–61 (1985) (opinion of Powell, J.); Gertz, 418 U.S. at 349.

[14] Stachura, 477 U.S. at 311.

[15] Carey, 435 U.S. at 257–58.

[16] *Id.* at 258.

[17] *Id.*

[18] *Id.*

[19] Train v. City of Albuquerque, 629 F. Supp. 2d 1243, 1251 (D. N.M. 2009) (observing that the Third Circuit adopted a narrow interpretation of *Carey* and of the Fourth Amendment.).

[20] *Id.* at 1252; *see also* Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179, 1196 (10th Cir. 2001).

[21] *Id.* at 1252.

[22] *Id.* at 1244–46.

[23] *Id.* at 1246.

Using Tenth Circuit precedent, the District Court of New Mexico found that "[f]ederal criminal charges, federal detention, and all of the negative consequences of those charges and attendant to federal custody implicated [plaintiff's] interest in liberty and his sense of security and individual dignity."[24] The district court reasoned that the losses to plaintiff's sense of security and individual dignity "should be compensable, given that they implicate the interests that the Tenth Circuit has explained the Fourth Amendment protects."[25]

The Second and Third Circuits have both interpreted the interests protected by the Fourth Amendment, and the holding in *Carey*, more narrowly than the Tenth Circuit.[26] The Third Circuit found that damages for post-indictment legal processes subsequent to an unlawful search are "too unrelated to the Fourth Amendment's privacy concerns."[27] Both circuit courts reasoned that

> [v]ictims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy—including (where appropriate) damages for physical injury, property damage, injury to reputation, etc.; but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence and consequent criminal prosecution."[28] Essentially, the courts argue that damages should be proportionate to the interests protected by a constitutional right and not all damages sustained will flow from the violation of a plaintiff's constitutional right.[29]

In *Hector v. Watt*, plaintiff initiated a §1983 action after 80 pounds of hallucinogenic mushrooms were seized in violation of his Fourth Amendment rights.[30] Plaintiff sought compensatory damages for costs incurred during his criminal prosecution.[31] The Third Circuit affirmed the district court's decision to deny plaintiff's compensatory damages.[32] The court concluded that plaintiff was unable to establish a common law tort claim for his Fourth Amendment violation.[33] Moreover, the court found that the "liability [plaintiff] seeks under §1983 could often have little relation to the seriousness of the Fourth Amendment violation."[34] The court explained that police officers are not free from liability for the invasion of privacy in a Fourth Amendment violation but allowing recovery for costs incurred after the invasion of privacy is complete would be disproportionate to the interests protected by the Fourth Amendment.[35]

The split of authority suggests that the amount of compensatory damages a plaintiff may recover for a constitutional violation is determined by how broadly or narrowly a court is willing to view the interests pro-

---

[24] *Id.* at 1252.

[25] *Id.*

[26] Townes v. City of New York, 176 F.3d 138, 148 (2d Cir. 1999) (holding that "[t]he evil of an unreasonable search or seizure is that it invades privacy, not that it uncovers crime, which is no evil at all."); *see also* Hector v. Watt, 235 F.3d 154, 157 (3d Cir. 2000) ("When we reflect on the interests protected by the Fourth Amendment, we believe that it follows that a plaintiff cannot recover the litigation expenses incurred because police officers discovered criminal conduct during an unconstitutional search."),

[27] Hector, 235 F.3d at 157.

[28] *Id.* (quoting Townes, 176 F.3d at 148).

[29] *Id.* at 160.

[30] *Id.* at 155.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 159.

[34] *Id.* at 160.

[35] *Id.*

tected by the Constitution. Even if a plaintiff were to be in a jurisdiction in which the precedent establishes broad protection of the scope of interests, the plaintiff must still establish that the constitutional violation was the proximate cause of their harm. Proximate cause is similarly interpreted differently amongst district and circuit courts across the country.

Proximate cause "is shorthand for a concept: Injuries have countless causes, and not all should give rise to legal liability."[36] Proximate cause is not just any cause of the injury, but a cause "with a sufficient connection to the result."[37] The Supreme Court has held that a proximate cause inquiry is a "flexible concept" with a basic requirement that there is a direct relation between the harm and the conduct alleged.[38] Proximate cause is often explained in terms of "foreseeability or the scope of risk created by the predicate conduct."[39] Thus, proximate cause severs liability in situations "where the causal link between conduct and result is so attenuated that the consequence is more aptly described as mere fortuity."[40]

Using the Fourth Amendment example, courts are divided as to whether a Fourth Amendment violation can be the proximate cause for a plaintiff's damages for the events that occur after the violation.[41] The standard used by different jurisdictions depends on how flexible they are willing to be with proximate causation. Some courts find that independent acts of the judicial process are enough to be an intervening cause, severing the causal link between the alleged damages and the constitutional violation.[42] Other courts have found that the constitutional violation itself is sufficient to establish proximate cause for a plaintiff's compensatory damages.[43]

Compensatory damages can be tricky to establish, and without clear direction from the Supreme Court, what a plaintiff can recover for compensatory damages largely depends on the jurisdiction in which the constitutional violation occurs.

---

[36] CSX Transp., Inc. v. McBride, 564 U.S. 685, 692 (2011).

[37] Paroline v. U.S., 134 S. Ct. 1710, 1719 (2014).

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Compare* Martin v. Marinez, 934 F.3d 594, 605–06 (7th Cir. 2019) (holding that a violation of the plaintiff's Fourth Amendment right was certainly the actual cause of the plaintiff's imprisonment, but other superseding, intervening events, such as the discovery of the contraband or the independent decision to deny the plaintiff bail, broke the chain of causation.) *with* Train, 629 F.Supp.2d at 1252–53 (holding that "a reasonable jury may infer from the evidence that the constitutional deprivation proximately caused [a plaintiff's] asserted losses").

[42] *See* Townes, 176 F.3d at 147 (holding "[i]t is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment."); *see also* Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989) (finding the decisions of the prosecutor, grand jury, judge, and jury intervene).

[43] *See* Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988) (en banc) (stating that a "plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. §1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations" and holding that the decision to prosecute was not an intervening cause); Kerr v. City of Chicago, 424 F.2d 1134, 1142 (7th Cir. 1970) (finding that a "plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a… criminal action where the expenditure is a foreseeable result of the acts of the defendant").

Nominal Damages

Sometimes a plaintiff can establish constitutional liability but is unable to establish actual injury. The redressing of a constitutional wrong is vital to both the plaintiff and to society even when the plaintiff suffered no real articulable injury or monetary damages. In such cases, "nominal damages" are available to the plaintiff who is successful at trial. Nominal damages are defined as "[a] trifling sum awarded when a legal injury is suffered but there is no substantial loss or injury to be compensated."[44] A typical nominal damages award is one dollar, and rarely ever exceeds two dollars.[45]

The United States Supreme Court has approved the award of nominal damages and has even emphasized the importance of the ability to recover nominal damages:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights.[46]

While nominal damages may seem *de minimis*, they must still be thoroughly analyzed because they might allow for both punitive damages and attorneys' fees.

Punitive Damages

Punitive damages are "[d]amages awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit."[47] In *City of Newport v. Fact Concerts, Inc.*, the Supreme Court held that "[p]unitive damages by definition are not intended to compensate the injured party, but rather to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct."[48] In *Smith v. Wade*, the Supreme Court held that Section 1983 authorizes the award of punitive damages against state or local officials in their individual capacity.[49] Specifically, the Supreme Court held that "[a] jury [is] permitted to assess punitive damages in an action under Section 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."[50]

Although punitive damages are available to a Section 1983 plaintiff, punitive damages can only be assessed against the individual responsible for constitutional deprivation and cannot be awarded against the

---

[44] *Black's Law Dictionary* 472 (10th ed. 2014).

[45] *See* Moore v. Liszewski, 838 F.3d 877, 878 (7th Cir. 2016) ("It's a considerable mystery why nominal damages, which rarely exceed $2 and more commonly are as in this case only $1, are ever awarded.").

[46] Carey, 435 U.S. at 266.

[47] *Black's Law Dictionary* 474 (10th ed. 2014).

[48] City of Newport v. Fact Concerts, 453 U.S. 247, 266–67, (1981); *see also* Restatement (Second) of Torts §908 (1979); W. Prosser, *Law of Torts*, at 9–10 (4th ed. 1971).

[49] **Smith v. Wade**, 461 U.S. 30 (1983).

[50] *Id.* at 56.

municipality or government entity.[51] The Supreme Court has held that punitive damages against municipal entities do not serve the retributive purpose of punitive damages:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. These damages are assessed over and above the amount necessary to compensate the injured party. Thus, there is no question here of equitably distributing the losses resulting from official misconduct. Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction of public services for the citizens footing the bill. Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.[52]

A plaintiff can obtain punitive damages even when nominal damages are awarded if it is established that the deprivation of rights were malicious.[53]

Attorneys' Fees

Once a plaintiff has established liability under Section 1983, he or she may recover reasonable attorneys' fees.[54] Specifically, 42 U.S.C. Section 1988(b) states in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title… the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.[55]

Moreover, in addition to awarding attorneys' fees under Section 1988(b), the court, in its discretion, may include expert fees as part of the attorneys' fee.[56] Generally, "[t]he appropriate fee under Section 1988 is the market rate for the legal services reasonably devoted to the successful portion of the litigation."[57]

Even when a jury awards only nominal damages, the plaintiff is a "prevailing party" under Section 1988.[58] Nevertheless, "a reasonable attorney's fee for a nominal victor is usually zero." [59] This is in line with the Supreme Court's "admonition that fee awards under §1988 were never intended to 'produce windfalls to attorneys.'"[60] To determine whether a prevailing party is entitled to attorneys' fees after receiving nom-

---

[51] Newport, 453 U.S. at 267.

[52] *Id.* at 267 (citations omitted).

[53] *See* Carey, 435 U.S. at 267.

[54] *See* 42 U.S.C. §1988(b).

[55] *Id.*

[56] 42 U.S.C. §1988(c).

[57] Richardson v. City of Chi., 740 F.3d 1099, 1103 (7th Cir. 2014).

[58] Farrar v. Hobby, 506 U.S. 103, 112 (1992); *see also* Aponte v. City of Chi., 728 F.3d 724, 726 (7th Cir. 2013).

[59] Aponte, 728 F.3d at 727; *see also* Farrar, 506 U.S. at 115 ("When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all.") (internal citations omitted).

[60] Farrar, 506 U.S. at 115 (quoting City of Riverside v. Rivera, 477 U.S. 561, 580 (1986) (plurality)).

inal damages in a Section 1983 action, the United States Supreme Court in *Farrar v. Hobby* established a three-factor test. Those factors are:

1. The difference between the amounts sought and recovered;
2. The significance of the issue on which the plaintiff prevailed relative to the issues litigated; and
3. Whether the case accomplished some public goal.[61]

The first factor is the difference between the amounts sought and recovered. "In deciding whether to award attorney's fees to a nominally prevailing party, the most significant of the three factors is the difference between the judgment recovered and the recovery sought."[62] In *Briggs v. Marshall*, the Seventh Circuit upheld the district court's determination that the first factor was not met when "during closing arguments, the plaintiffs requested $75,000 in compensatory damages plus significant punitive damages, yet the jury awarded a total of four dollars."[63]

The second factor is the significance of the issue on which the plaintiff prevailed relative to the issues litigated. This is considered the "least significant" factor.[64] In *Aponte v. City of Chicago*, the plaintiff brought two claims—one for unreasonably executing a warrant and one for "failing to prevent an unreasonable search"—against each of the four officers.[65] The plaintiff "lost seven of his eight Fourth Amendment claims and three of the four defendants were victorious."[66] The Seventh Circuit concluded that this victory was "not significant."[67]

Lastly, the third factor is whether the case accomplished some public goal. "The more important the right at stake and the more egregious the violation the more likely it is that the victory serves a public purpose. An award of punitive damages, therefore, is strong evidence that the victory served a public purpose."[68]

Even if the plaintiff is a prevailing party and is entitled to attorneys' fees, the party seeking costs carries the burden of proving "that the requested costs were necessarily incurred and reasonable."[69] Typically, parties file a Form AO 133 "Bill of Costs," which includes a sworn affidavit, and both an itemization and documentation of the requested costs. 28 U.S.C. Section 1924 requires all bills of costs to be supported by a sworn affidavit. Courts analyze costs based on category and review corresponding documentation.[70]

---

[61] *Id.* at 120–22 (O'Connor, J., concurring).

[62] Briggs v. Marshall, 93 F.3d 355, 361 (7th Cir. 1996).

[63] *Id.*

[64] *Id.*

[65] Aponte, 728 F.3d at 725 (7th Cir. 2013).

[66] *Id.* at 727.

[67] *Id.* at 731.

[68] Cartwright v. Stamper, 7 F.3d 106, 110 (7th Cir. 1993); *see also* Estate of Borst v. O'Brien, 979 F.2d 511, 517 (7th Cir. 1992) (punitive damage award reflects "both the value of the victory in finding a violation of constitutional rights and the deterrence value of the suit"); Ustrak v. Fairman, 851 F.2d 983, 989 (7th Cir. 1988) ("A judicial decision that finds a violation of constitutional rights and punishes the perpetrator with an award of punitive damages not only vindicates constitutional principles but is a deterrent to future violations, to the benefit not only of the plaintiff but of others in similar situations.").

[69] Trs. of the Chi. Plastering Inst. Pension Tr. v. Cork Plastering Co., 570 F.3d 890, 906 (7th Cir. 2009); *see also* Little v. Mitsubishi Motors N. Am., Inc., 514 F.3d 699, 702 (7th Cir. 2008).

[70] *See*, *e.g.*, Northbrook Excess & Surplus Ins. Co. v. Proctor & Gamble, Co., 924 F.2d 633, 643 (7th Cir. 1991) (requiring a bill of costs that provides "the best breakdown obtainable from retained records").

The Rule 68 Offer

As stated above, sometimes the recovery for a constitutional rights violation can be small, but the attorneys' fees can be the main motivation for plaintiff's counsel's pursuit of the case. Rule 68 of the Federal Rules of Civil Procedure can be a powerful mechanism for curtailing litigation and motivating a plaintiff to a reasonable settlement. Rule 68 states:

> **Rule 68. Offer of Judgment**
>
> (a) *Making an Offer; Judgment on an Accepted Offer.* At least 14 days before the date set for trial, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.
>
> (b) *Unaccepted Offer.* An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.
>
> (c) *Offer After Liability Is Determined.* When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time—but at least 14 days—before the date set for a hearing to determine the extent of liability.
>
> (d) *Paying Costs After an Unaccepted Offer.* If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Accordingly, when a Rule 68 offer is made to the plaintiff, and the plaintiff accepts the offer, the clerk enters judgment according to the offer's terms.[71] However, if the judgment that the offeree finally obtains is not more favorable than an unaccepted offer, the offeree must pay the costs incurred after the offer was made.[72]

While attorneys' fees are sometimes considered separate from costs, in an action for attorneys' fees under 42 U.S.C. Section 1988, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee *as part of the costs*…."[73] Therefore, attorneys' fees qualify as "costs" for purposes of a motion for attorneys' fees under Section 1988.[74] The logical question defense counsel will have is "if my client makes a Rule 68 offer that is rejected, and a plaintiff obtains a judgment that is not more favorable than the unaccepted offer, must the plaintiff pay my attorneys' fees?" The Supreme Court in *Marek v. Chesny*, 473 U.S. 1 (1985), the above-cited case that discussed Rule 68 and Section 1983 actions, did not address this question. However, a Southern District of New York case analyzed the issue in the negative:

> [A]lthough fees are generally awarded to a prevailing plaintiff under §1988, a prevailing defendant may only recover such fees if the action was "frivolous, unreasonable, or groundless, or… the plaintiff continued to litigate after it clearly became so." Thus, aside from the fact that a defendant eligible to receive costs under Rule 68 cannot be considered prevailing—since a defendant may recover costs under Rule

---

[71] Fed. R. Civ. P. 68(a).

[72] Fed. R. Civ. P. 68(d).

[73] 42 U.S.C. §1988(b) (emphasis added).

[74] *See*, *e.g.*, Marek v. Chesny, 473 U.S. 1, 9 (1985) ("Since Congress expressly included attorney's fees as 'costs' available to a plaintiff in a §1983 suit, such fees are subject to the cost-shifting provision of Rule 68.") (superseded by 42 U.S.C. §1981(c) on other grounds).

> 68 only if the plaintiff obtains a judgment in his favor—a defendant entitled to costs under Rule 68 would only be able to recover attorneys' fees if the action were "frivolous, unreasonable, or groundless." If the action were not "frivolous, unreasonable, or groundless," the defendant would not be entitled to attorneys' fees under §1988 and thus there would be no fees to shift to the plaintiff as part of the "costs" under Rule 68.[75]

Although it has not directly addressed the issue in the Section 1983 Rule 68 context, the Supreme Court declined to award a "prevailing defendant" attorneys' fees absent a finding that the matter was "frivolous, unreasonable, without foundation, or brought in bad faith" in a case brought under Title VII of the Civil Rights Act of 1964:

> That §706(k) allows fee awards only to *prevailing* private plaintiffs should assure that this statutory provision will not in itself operate as an incentive to the bringing of claims that have little chance of success. To take the further step of assessing attorney's fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII. Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense.[76]

A fair reading of the Supreme Court's holding in *Christianburg* leads one to believe that if presented with the issue of "prevailing defendant" attorneys' fees in a Section 1983 case, it is unlikely that the Supreme Court would award a defendant its attorneys' fees following a rejected Rule 68 offer.

Should defense counsel desire to formulate a Rule 68 offer to plaintiff's counsel, defense counsel should review their circuit's analysis regarding Rule 68 offers and be specific as to what the offer entails with regards to relief. Although all circuits are different, the Seventh Circuit has held that specificity is key to determining the enforceability of a Rule 68 offer:

> Because Rule 68 puts plaintiffs at their peril whether or not they accept the offer, the defendant must make clear whether the offer is inclusive of fees when the underlying statute provides fees for the prevailing party. As with costs, the plaintiff should not be left in the position of guessing what a court will later hold the offer means. This holding is consistent with the rule of contract construction requiring that ambiguities in a contract be construed against the drafter. The defendant is always free to offer a lump sum in settlement of liability, costs and fees, but that is not what [defendant] did here. [Defendant]'s offer was silent as to fees and costs, and under these circumstances, the court may then award an additional amount to cover costs and fees.[77]

---

[75] Jolly v. Coughlin, No. 92 Civ. 9026 (JGK), 1999 WL 20895, at 12 (S.D.N.Y. Jan. 19, 1999).

[76] Christiansburg Garment Co. v. Equal Emp't Opportunity Comm'n, 434 U.S. 412, 422 (1978) (emphasis in original) (footnotes omitted).

[77] Webb v. James, 147 F.3d 617, 623 (7th Cir. 1998) (internal citations omitted); *see also* Sanchez v. Prudential Pizza, Inc., 709 F.3d 689, 692–93 (7th Cir. 2013):

> [Defendant] argues that its offer was not silent regarding fees… [Defendant] points out that its offer referred to plaintiff's "claims for relief," and that [plaintiff] requested attorney fees and costs in her amended complaint. Thus, [defendant] contends, it would be "illogical" to conclude that attorney fees were not included in the defendant's Rule 68 offer.

The danger of a non-compliant Rule 68 offer could potentially mean hundreds of thousands of dollars in unanticipated costs.

Conclusion

At the beginning of a suit, defense counsel must determine what, if any, constitutional deprivation occurred. Once the constitutional deprivation and liability have been analyzed, defense counsel will need to review what, if any, remedies are available, and remember that under Section 1988, a plaintiff might be entitled to punitive damages and attorneys' fees even if nominal damages are awarded. Lastly, defense counsel should always review whether a Rule 68 offer is warranted under the circumstances.

AUTHORS

R. Eric Sanders is an attorney for Rolfes Henry in Indianapolis and is a member of the Governmental Liability Committee of DRI. His practice primarily focuses on insurance defense litigation in insurance coverage and bad faith, and defense of claims brought pursuant to 42 U.S.C. Section 1983. Mr. Sanders has litigated numerous Section 1983 claims in both state and federal courts and has argued before the U.S. Court of Appeals for the Seventh Circuit. Prior to attending law school, Mr. Sanders served as a police officer in Indiana.

Rolfes Henry Co., LPA | 513.579.0080 | esanders@rolfeshenry.com

Jeffrey K. Lewis is a recent graduate of Capital University Law School and has been with Rolfes Henry Co. LPA since 2017. Before Rolfes Henry, Jeff was a legal intern at Wright & Moore Law Co. and externed for Magistrate Judge Preston-Deavers and Chief Judge Sargus of the United States District Court for the Southern District of Ohio. A first-generation lawyer, Jeff was the first in his family to attend college, graduating from Ohio State University with a Bachelor of Science in Business Administration. Jeff founded the First Generation Law Students of Capital University and has given back to his community by developing a "court camp" to help educate young students about the legal profession with hopes of inspiring the next generation of legal professionals.

Rolfes Henry Co., LPA | 614.469.7130 | jlewis@rolfeshenry.com

---

We reject this argument. [Defendant's] logic would allow a defendant to force a plaintiff to guess the meaning of the offer, which the Rule and *Webb* do not permit. Rule 68(a) requires the offer to include "specified terms." If [defendant's] offer was meant to include attorney fees and costs, the offer was not specific. It simply did not refer to [plaintiff's] attorney fees or costs. It referred to [plaintiff's] "claims" but failed to specify what those claims were, such as whether they included her claim against the other defendant.

Chapter 5

Discovery and Section 1983

By Charles R. Starnes

As experienced practitioners will tell you, Section 1983 claims are fact-intensive and require significant discovery to develop. There are often reams of documents to review and numerous witnesses to depose. Multiple experts may be required to address liability and determine damages. However, as the United States Supreme Court stated in *Wilson v. Garcia*, 471 U.S. 261 (1985), civil rights claims closely resemble personal injury claims. The same skills required for developing a medical malpractice or products liability case apply equally to Section 1983 claims.

Individual Claims vs. Entity Claims

Discovery often proceeds along two tracks in Section 1983 claims. The first centers on the incident forming the basis of the claims against the individual defendants, while the second focuses on the derivative *Monell* claim against the government entity that employed the individuals. For claims against individual defendants, discovery proceeds as it would in any tort claim. The basic questions of who, what, where, when, how, and why must be answered. The focus in time is on the incident itself and, possibly, what followed.

Discovery on the *Monell* claim involves an entirely separate set of questions. As there is no *respondeat superior* liability under Section 1983, liability against the defendant government entity must be based on a constitutionally deficient policy, practice, or custom that can be said to have caused the underlying constitutional violation. The *Monell* claim, in essence, explores the institutional ecosystem created by supervisors and policy-making officials and asks whether that environment made the alleged unconstitutional acts more likely to occur. Discovery on these issues generally focuses on what occurred prior to the incident. Were there any previous complaints? What training did the individual defendants receive? Were employees disciplined for similar prior infractions? Was there a process to review and investigate complaints? Have there been any previous lawsuits alleging similar constitutional violations? The question of entity liability often requires expert opinion and testimony as the quality of police tactical training or correctional medical protocols are far outside lay experience.

Document Retention and Preservation

The first step in every case, whether the matter is in litigation or only a potential claim, is to ensure relevant documents and other evidence are preserved. Upon notice of a claim or potential claim, counsel should immediately provide the client with a litigation hold notice. The notice should explain the reason for the hold, the types of documents or other materials to be preserved, and the potential consequences for destruction of evidence.

A growing area of concern is the preservation of electronically stored data including emails, text messages, meeting minutes, audio recordings, and videos. These should be copied and provided to counsel. Gathering this data can be a problem depending on the electronic retention policies of the government entity and the technical aspects of its recording and electronic storage systems. Often, defense counsel are faced with situations where only certain electronic records were saved. This oversight is often due to supervisors who focused on only the period immediately preceding the underlying incident without understanding that actions further back in time could be important. There are also often breakdowns in communications or equipment that can lead to lost or corrupted files or storage devices. Every effort should be made to identify witnesses and policymakers as soon as possible so the litigation hold can be communicated before relevant documents are lost or deleted.

In addition, counsel should work with clients prospectively to tailor retention policies and educate officials on when to preserve files and how much to retain. When a questionable event occurs, the focus should be on more retention rather than less. Every death, significant use of force, or record of criminal activity (recorded confessions, drug buys, etc.) should trigger an automatic review and downloading of all available electronic data. For a correctional death unrelated to a use of force, this could include multiple weeks of footage prior to the death. This process can be time-consuming and expensive, but it is cheaper than sanctions for spoliation or an adverse inference at trial.

Retention and the availability of electronic recordings may also be an area for expert discovery. Plaintiff's counsel in correctional cases will often complain that the entire facility is not covered by cameras while ignoring the prohibitive costs of such an arrangement. Certain police departments may not use mandatory body cameras or the cameras may not have activated during the incident. Some less than lethal systems are now capable of recording footage of their use on suspects. These are all areas where expert testimony may be necessary to explain the existence or lack of electronic recordings.

The Initial Investigation

When a claim is first received, counsel should review the complaint or other notice of claim and identify any individuals or entities likely to have documents or information relating to the case. A background search of the plaintiff should be performed including criminal and civil docket searches. Counsel should pay special attention to crimes of *crimen falsi*, which may be used to attack a plaintiff's credibility. Other criminal or bad acts may also be useful for attacking credibility or in developing the defense's position on damages. Background searches of the named defendants or defense witnesses should also be considered to avoid unpleasant surprises regarding character or credibility.

In addition to the criminal and litigation background checks, a plaintiff's social media accounts should be quickly identified and relevant materials preserved. Everyone has heard war stories where a plaintiff claiming physical injuries posted a picture of themselves shoveling snow or finishing a mud run. Time is of the essence as it is not uncommon for a plaintiff to wait until after litigation is filed to clean up, make private, or deactivate their accounts. Counsel should never friend or otherwise interact with a plaintiff online as it as it would violate ethics rules against contacting a represented party. If a plaintiff's social media accounts are set to private, their posts can be acquired during written discovery.

A list of needed documents should be provided to the client as soon as possible. The documents needed for an initial investigation will depend on the context of the claims. Many Section 1983 claims will involve a report on the underlying incident. For example, police and correctional facilities create reports for nearly

every significant event. This documentation is essential. Often, the outcome of a civil claim (or criminal prosecution) turns on the quality of incident reports. These reports provide an invaluable source of recollection to the individual defendants. This is particularly important given the timeframes involved in litigation where depositions and trial can occur three or more years after the underlying incident. In addition, plaintiff's counsel will often use poorly written or incomplete reports to attack a witness' credibility. As the saying goes, if it is not in the report, it didn't happen.

Counsel should request the personnel files of all the individual defendants and other witness employees. Be aware that, on occasion, there are separate files for training, discipline, or internal investigations which are not kept as part of the individual's personnel file. For *Monell* claims related to training, lack of discipline, or failure to abide by written policy, a review of personnel files belonging to other employees at the same site or entity may be advisable. This will allow counsel to determine whether other employees not named as defendants have experienced related discipline or re-training.

In addition, all written policies, procedures, or directives relevant to the incident should be obtained. There will often be one or more sets of policies that encompass both general employee policies for a larger governmental entity such as a county or municipality, along with a set of standard operating procedures applicable solely to the relevant agency such as a police department, district attorney's office, or prison. Both sets should be obtained as agency policies will often not address general employment issues such as codes of ethics, disciplinary procedures, or First Amendment protections that may be relevant. In addition, if the entity provides any relevant training, those records and materials should also be obtained. Law enforcement and correctional agencies often have training officers or supervisors who can provide information and documents and can serve as an internal expert on policies and procedures. For claims involving criminal prosecutions or proceedings before administrative bodies such as a zoning board or city council, transcripts or audio recordings should be requested.

Request a list of any other complaints, claims, or suits against the defendants. Plaintiffs will always ask about prior complaints as this is the one of the primary means of prosecuting a *Monell* claim. If a prior matter was litigated, you may need to be prepared to produce litigation files. This situation is more common for larger entities that are subject to more numerous claims over similar issues. Production of prior litigation files can significantly complicate the current case as issues which seemed irrelevant in the prior litigation could now be central to the instant matter. Careful review of prior depositions and written discovery is necessary to determine whether harmful admissions were made and what additional discovery is needed to explain or limit prior statements.

Arrangements should be made to meet with the defendants and policymakers as soon as possible. This meeting is an opportunity for counsel to introduce themselves and develop a rapport with clients. Before discussing the underlying incident, review the litigation process and explain what the clients can expect. This explanation should include the initial pleadings, discovery process, dispositive motions, settlement, and trial. This case could be the first time a client has been sued, and counsel should make every effort to explain how a civil action proceeds and the need for patience in what could be a years-long process. Warn clients not to discuss the suit with anyone and refrain in general from posting on social media about the case or any controversial topics. Also explain that, under no circumstances, should they attempt to "clean up" their social media accounts. Instead, they should change their privacy settings to limit the plaintiff's ability to scrutinize their online presence.

Counsel may also wish to discuss the possible damages available to a successful plaintiff as this is often a prime concern of the individual defendants. It can be helpful to explain what damages are insurable and what are not and under what circumstances punitive damages can be awarded. If counsel discusses damages with the client, it is better not to spring this on them at the end of the initial meeting. Rather, explain the damages available and move on to the facts of the incident so clients don't walk out of the initial meeting obsessing over whether they could lose their house. This conversation is useful in setting client expectations and can assist later when discussing settlement.

Once the clients understand what to expect, counsel should explain what has been factually alleged, the types of claims that are being brought, and the proofs required for each claim. Allow the clients to then tell their story and explain how the events occurred. Copies of the relevant reports or other documents can be provided to refresh their recollection. Discuss any inconsistencies or gaps between the documents and the clients' memories. Review the factual averments of the complaint and allow the clients to explain each in turn. Discuss the government entity's policies and the individual defendant's relevant training, including internal training programs, outside schools or programs attended, and any mandatory training. Create a chronology of events based on the information collected.

Written Discovery

When to Begin

If a motion to dismiss is filed, defense counsel will often take the position that no discovery should be served until after the motion is decided. This practice relies on the inherent power of the court to stay discovery.[1] If a plaintiff presses for discovery where a pending motion to dismiss may dispose of all claims, a motion to stay discovery should be filed.[2] In federal court, where an answer or partial motion to dismiss is filed, discovery should begin once the discovery conference is held. The parties must hold this conference at least 21 days prior to the Rule 16 scheduling conference. *See* F.R.C.P. 26(f). The parties are required to meet and discuss the possibility of settlement, initial disclosures, and the discovery plan which is to be submitted to the court.

Initial Disclosures

Federal Rule of Civil Procedure 26 requires the parties to exchange their initial disclosures, including persons that likely have discoverable information, relevant documents, a computation of damages, and any applicable insurance agreements. Counsel should provide the relevant reports, transcripts, policies, and other documents that are obviously relevant and provide supplemental disclosures if additional documents are later discovered. The plaintiff's initial disclosures should be reviewed for any witnesses not previously identified and criminal background searches should be considered for newly identified witnesses. Sometimes a plaintiff will also identify the specific nature of the damages they are claiming or provide medical or business records in support of their claims. These documents may assist counsel in determining what damages experts will be needed.

---

[1] Landis v. North American Co., 299 U.S. 248, 254–55 (1936).

[2] *See*, *e.g.*, Mann v. Brenner, 375 F. App'x 232, 239 (3d Cir. 2010) ("[I]t may be appropriate to stay discovery while evaluating a motion to dismiss where, if the motion is granted, discovery would be futile.").

Another consideration is whether a protective order is needed. Generally, counsel should discuss whether a protective order should be entered at the Rule 16 conference, if not earlier. Whenever producing personnel files, policies of a law enforcement or correctional agency, or other sensitive documents such as medical records, defense counsel should insist that a protective order be entered prior to disclosure. If all counsel are agreeable, this is often a simple matter of drafting a standard order for counsel to sign and submitting it to the court along with a motion. Be mindful that what is standard is specific to the jurisdiction.

Third Parties

During the initial review of the file, counsel will often determine that third parties have relevant documents. Subpoenas should be sent as soon as possible. Recipients may be slow to respond, resist producing the requested materials, or require authorizations. These delays are particularly true for medical providers (especially those who provide psychological or addiction services) who often have their own unique authorizations. Plaintiff's counsel may object. Motions to quash or for a protective order may be filed. Thus, early service of third-party subpoenas is necessary to minimize delays and allow the case to proceed.

If counsel is aware the plaintiff has a criminal record, request all files from the relevant police departments, district attorney's offices, or correctional institutions. If the matter is not yet in suit and the entity possessing the needed documents is a government agency, counsel may be able to obtain them through a right to know request (also known as a public records request or open records request). A call from counsel to the third party or their attorney explaining that you represent a government entity and their employees or officials often assists with timely production. This is especially true when representing law enforcement clients.

Any medical or mental health provider that treated a plaintiff—including prison medical services—should receive a subpoena along with a HIPAA-compliant authorization and release signed by the plaintiff. Often, plaintiffs will produce medical documents either with their initial disclosures or in response to written discovery requests. Do not rely solely on such productions as they may be incomplete, particularly if treatment is ongoing. Depending on the magnitude of the claim, once in litigation, every provider should receive a subpoena for records. If the plaintiff continues to treat and the matter is approaching trial or mediation, serve a second subpoena for any additional treatment records created during the life of the case.

Complete production by third-parties, especially medical providers, is advisable prior to taking a plaintiff's deposition. In order to fully explore damages issues, defense counsel must have a plaintiff's medical records. Such records are also necessary for any damages experts. A second round of third-party subpoenas will often be necessary following a plaintiff's deposition as they will often provide the identities of previously undisclosed medical providers.

Interrogatories

Federal Rule of Civil Procedure 33 limits a party to 25 interrogatories, although more can be served with leave of court. Counsel should ask pointed questions aimed at providing a basic outline that can be built upon in subsequent discovery requests and depositions. First, ask standard interrogatories common to all tort claims including background questions relating to a plaintiff's family history, residence, and employment. The plaintiff should be asked whether they have obtained statements from any witnesses or spoken to any representative or employee of the defendants. Are any expert witnesses expected and what fact witnesses are expected to testify at trial? Does the plaintiff maintain any social media accounts? In addition, interroga-

tories seeking the plaintiff's criminal history (including arrests, complaints, and abuse allegations) and prior involvement in litigation should be served.

Once the plaintiff's background is explored, the plaintiff should be asked questions related to the alleged incident. Inquire as to whether any other complaint related to the alleged constitutional violations was ever made or if the plaintiff is aware of any other alleged unconstitutional acts by the defendants. Counsel should tailor additional interrogatories as needed addressing the specific allegations in the complaint.

Finally, the plaintiff should be asked to specifically identify all damages they contend resulted from the alleged incident. If physical or emotional damages are claimed, interrogatories requesting the identity of all medical and mental health providers who treated the plaintiff before and after the incident should be served. Inquire as to whether insurance covered any of the cost of the treatment. If the plaintiff is a commercial entity, interrogatories related to economic damages should ask how the damages are calculated and by who.

Counsel should carefully review a plaintiff's responses for follow-up. This is especially true for responses to damages questions which are routinely vague to the point of meaninglessness and lack specific dollar amounts for matters as simple to quantify as lost wages. Motions to compel are often necessary to obtain full and complete responses. Be aware that, prior to filing such a motion, local rules generally require counsel to meet and confer in good faith to resolve discovery disputes. Document as much as possible in email communications with plaintiff's counsel as these will provide much of the documentary evidence supporting a motion to compel.

Requests for Production

Unlike interrogatories, requests for production *are not* limited in number by the Rules of Civil Procedure. Counsel should begin with a broad request of all documents, tangible things, and electronic files in the plaintiff's possession which support, refute, or relate to the allegations in the complaint. Requests should be made for all witness statements, text messages, emails, expert witness reports and *curricula vitae*, notes kept by the plaintiff, and all social media posts and messages related to the incident. To flesh out the plaintiff's damages claim, counsel should request medical records including all treatment or counseling notes and financial records such as W-2's and tax returns. For commercial entity plaintiffs seeking lost revenue, requests for all financial statements and projections and any and all documents supporting a projection or used in calculating damages should be sought. Regarding timeframes, requests for medical records should go back at least 10 years unless counsel has reason to believe relevant treatment occurred at an earlier date while five years is generally sufficient for tax or other financial records. If possible, interrogatories and requests for production should be served with the initial disclosures.

Requests for Admissions

Requests for admissions can be utilized to establish specific facts and telegraph the weakness of a plaintiff's case to their counsel in advance of a settlement conference or mediation. Requests for admissions may be sent after the plaintiff provides responses to the defendant's initial interrogatories and requests for production. Alternatively, requests for admissions may be served after the key witnesses have been deposed to support a motion for summary judgment and statement of undisputed facts.

Responding to Written Discovery

In federal court, responses to written discovery are due in 30 days.[3] If additional time is necessary, request an extension from opposing counsel *in writing*. Note that if objections to individual interrogatories are not produced in the 30-day period, they are waived.[4] In addition, responses to requests for admissions must be served within 30 days or the fact is deemed admitted. Further, a general denial is not acceptable and the admission must be specifically denied.[5]

Regarding requests for production, plaintiffs often seek an individual defendant or witness' entire personnel file. This is overbroad and, in response to such a request, counsel should produce only applications, training, and evaluations. Under no circumstances should documents relating to a defendant's family or finances be produced, particularly if the defendant is a law enforcement or correctional officer. Be aware that state law may also make portions of a public employee's personnel file confidential.

Plaintiffs also often request all discipline, complaints, or suits against the individual defendants or municipalities. This is also overbroad. Prior discipline, complaints, or suits that allege the same misconduct described in the complaint are relevant, not whether an individual defendant suffers from chronic tardiness. In addition, a plaintiff is generally not entitled to discipline, complaints, or suits that occurred after the alleged unconstitutional action. An incident that occurred after the one described in the complaint is arguably irrelevant as it could not place a government entity on notice of the need for a policy change, discipline, or additional training prior to the individual defendant's alleged unconstitutional act.[6] For production of prior incidents, defense counsel will often argue a 3-year timeframe is appropriate while plaintiff will seek a 10-year period. Five years appears to an acceptable compromise by courts.

Depending on the circumstances of the case, a privilege log may need to be produced listing any documents withheld. The log must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." F.R.C.P. 26(b)(5)(A)(ii). What satisfies this requirement and the extent of detail necessary is jurisdiction specific. Local rules may provide guidance on these issues.

Depositions

Taking and defending depositions is a vital skill that cannot be adequately addressed in this short introduction to discovery. However, as with written discovery, counsel should plan their questioning with an eye towards summary judgment and trial. The alleged unconstitutional incident must be fully explored along with the plaintiff's alleged damages. For the depositions of individual defendants, it is important to fully explore the training that they received and their understanding of the law surrounding the alleged unconstitutional act. For example, in an excessive force case, have an officer explain the use of force continuum, if applicable, and when the use of a particular type of force may be applied. For a false arrest claim, have them

---

[3] F.R.C.P. 33, 34, 36.

[4] F.R.C.P. 33.

[5] F.R.C.P. 36.

[6] *See*, *e.g.*, Connick v. Thompson, 131 S.Ct. 1350, 1356 (2011) (failure-to-train claim dismissed as plaintiff did not prove a pattern of similar violations); Montgomery v. De Simone, 159 F.3d 120, 127 (3d Cir. 1998) (for *Monell* claim, plaintiff must show "contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents…").

explain the concept of probable cause. Address all internal training programs or outside schools. If there is state-mandated training, review the requirements. Such questions are necessary in establishing that the defendant government entity provided adequate training. Note that for deposition of an incarcerated person, a motion must be filed with the court under Federal Rule of Civil Procedure 30(a)(2)(B).

Prior to their deposition, counsel should meet with every defense witness at least once to prepare them. Depositions are an alien and incredibly stressful event for most people. First, explain the deposition process. It is often helpful to provide the witness, especially those unacquainted with the deposition process, with a system for answering questions. While every attorney will develop their own system to assist witnesses, the first rule is always tell the truth. Similar to an initial meeting, have the deponent review any documents that they authored to refresh their recollection. Review and discuss any relevant policies or training. For documents which the deponent did not draft, carefully consider what they should review. Plaintiff's counsel can and will ask them what documents they reviewed in preparation for the deposition and examine them based on these documents.

It is important to be aware of the "usual stipulations" and conventions for objecting at a deposition in your jurisdiction. For example, the local practice may be to limit objections to form and privilege whereas another jurisdiction's informal practice may allow for much more robust objections and back and forth between counsel. Counsel may also need to reserve the deponent's right to review and sign the transcript on the record where this is considered a standard practice in another area.

Depositions are limited to one day of seven hours. F.R.C.P. 30(d)(1). If necessary, a court may increase this period. Extensions sometimes occur when counsel wrongly limits the questions they will allow their client to answer or additional third-party sources of information are identified at the initial deposition. As discussed above, it is important that defense counsel obtain and review all available third-party materials which could have reasonably been obtained prior to a plaintiff's deposition. It is one thing to ask the court to allow additional time to complete a deposition where a plaintiff only revealed they were currently treating at their initial deposition. It is quite another to request additional time when the provider was listed in the initial disclosures and no one bothered to request the records.

Regarding the order of witness depositions, it appears that the general practice is to take the deposition of the plaintiff as soon as the written discovery is complete and first round of third-party records are obtained. Defense counsel will often object to the deposition of defense witnesses being taken prior to that of a plaintiff. However, there is no rule requiring the plaintiff's deposition occur first. As such, defense counsel should act quickly to notice the plaintiff in order to preserve their desired deposition sequence, thereby allowing the defense to prepare their own witnesses after having fully explored a plaintiff's version of events and to obtain any additional third-party documents identified at the plaintiff's deposition.

Expert Discovery

Expert discovery is frequently required on the issue of damages and questions of *Monell* liability. Where a plaintiff claims physical or emotional damages, counsel should have them submit to an independent medical exam. A forensic accountant may be needed to assess a business' alleged lost revenue. Regarding any *Monell* claim, experts will need to review policies and training to determine whether they are consistent with generally accepted practice in the field. Experts can also be useful in explaining why an individual defendant acted in a certain way based on the defendant's training and experience. This is particularly important where an individual defendant may not be articulate or is uncomfortable with testifying.

Regarding a plaintiff's expert, the focus of their deposition should be on undermining the expert's qualifications and the basis for their opinions. Attack their lack of experience in a particular area or identify similar cases where they have opined contrary to their current report. Establish whether they examined all the relevant documents and transcripts. The DRI Governmental Liability Committee's Community discussion board is a valuable tool in obtaining helpful deposition transcripts and background on an opposing expert, as other members may have dealt with them in the past.

Conclusion

Section 1983 claims require counsel to be proactive. Early planning ensures the case continues to move forward despite unexpected issues or contentious discovery motions. A thorough initial investigation permits counsel to assess whether early resolution is advisable. Prompt service of written discovery allows for early depositions while providing defense experts adequate time to review the necessary materials and draft their reports without haste. Stay away from boilerplate discovery and tailor requests to the case at hand. By controlling the pace of discovery, the defendants ensure summary judgment, settlement, or trial occurs on ground of their choosing.

AUTHOR

Charles R. Starnes is an attorney at Leib Knott Gaynor LLC in Milwaukee where he represents public and private entities throughout Wisconsin in employment, civil rights, and medical malpractice matters. He is a member of the Employment and the Civil Rights and Governmental Liability Sections of DRI. Charles publishes on developments in civil rights in the Seventh Circuit for the Governmental Liability Committee newsletter. He received his B.A. from Centenary College of Louisiana, his M.A. from Villanova University, and attended law school at the Temple University Beasley School of Law.

Leib Knott Gaynor LLC | 414.276.2102 | cstarnes@lkglaw.net

Chapter 6

A Tangled Web

The Interplay of State and Federal Law in Section 1983 Litigation

By Lisa Arthur and Josh Harper

Attorneys regularly representing local governmental entities and officials in Section 1983 litigation typically are no strangers to federal law claims and defenses and are comfortable in their local United States District Courthouse. But these practitioners must also know their way around state law claims and procedures. This chapter provides an overview of the interplay between state and federal law commonly seen in Section 1983 litigation and provides some guidance for the effective defense of clients when both state and federal law is implicated in a particular case.

Section 1983 practitioners are well aware that a single set of operative facts can give rise to both federal and state law causes of action. Often, plaintiff's counsel will bring both types of claims in a single action, but there is an increasing trend of seeking to avoid the cost and rigid oversight of federal courts by foregoing federal causes of action and bringing only state law claims. The table on page 35 sets out some of the most common §1983 causes of action and their state law analogs.

There are also situations in which state and federal law are not simply parallel, but rather fully intertwined. The most obvious example is in the context of statutes of limitations; as Section 1983 does not provide a federal statute of limitations, courts will generally apply state statutes of limitations for the most analogous state law claim.[1] Similarly, when a Section 1983 claim is litigated in state court, state courts will look to federal immunities and defenses rather than state immunities.[2]

---

[1] The Supreme Court has explained that "[t]he statute of limitations for a §1983 claim is generally the applicable state-law period for personal-injury torts." City of Rancho Palos Verdes, Cal. v. Abrams, 544 U.S. 113, 123 n.5 (2005) (citing Wilson v. Garcia, 471 U.S. 261, 275, 276 (1985) and Owens v. Okure, 488 U.S. 235, 240–241(1989)). However, "[i]n 1990, Congress enacted 28 U.S.C. §1658(a)… which provides a 4-year, catchall limitations period applicable to 'civil action[s] arising under an Act of Congress enacted after' December 1, 1990." *Id.* (alterations in original). Thus, for Section 1983 claims "made possible by a post-1990 [congressional] enactment," the four-year statute of limitations period found in 28 U.S.C. §1658(a) applies. *Id.* (citing Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 382 (2004)) (brackets in original); *see also* Baker v. Birmingham Bd. of Educ., 531 F.3d 1336, 1337 (11th Cir. 2008) (applying 28 U.S.C. §1658(a)'s four-year statute of limitations, instead of state's two-year statute of limitations that would otherwise be applicable, to Section 1983 claim alleging violation of 1991 amendment to 42 U.S.C. §1981).

[2] Howlett v. Rose, 496 U.S. 356, 376 (1990) ("Municipal defenses—including an assertion of sovereign immunity—to a federal right of action are, of course, controlled by federal law."); Felder v. Casey, 487 U.S. 131, 139 (1988) ("Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy.").

Common §1983 causes of action and their state law analogs

Constitutional Right	Section 1983 Claim	State Law Analogous Claim
Fourth Amendment: claims predicated on arrest, investigatory stop, or other seizure*	Excessive Force	Assault Battery
	Unreasonable Search or Seizure Unlawful Arrest	False Arrest False Imprisonment
Eighth Amendment: claims by prisoners	Cruel and Unusual Punishment Excessive Force**	Assault Battery
Fourteenth Amendment: claims by pretrial detainees; claims that fall outside of the Fourth or Eighth Amendment	Deprivations of Liberty Without Due Process of Law Excessive Force***	All claims listed above Malicious Prosecution Abuse of Process Negligent Hiring and/or Supervision

* Graham v. Connor, 490 U.S. 386 (1989).

** Plaintiff must show that the force was applied "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320–21 (1986) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)).

*** Excessive force claims are not "governed by a single generic standard"; instead, because Section 1983 is "a method for vindicating federal rights" conferred by other federal laws, excessive force claims can be brought under the Fourth, Eighth, or Fourteenth Amendment. Graham, 490 U.S. at 393–94. However, Section 1983 excessive force claims can only be brought under the Fourteenth Amendment's "more generalized" due process clause if they are not "covered by" the "explicit textual source[s] of constitutional protection" found in the Fourth or Eighth Amendments. *See* Cty. of Sacramento v. Lewis, 523 U.S. 833, 842–43 (1998); Graham, 490 U.S. at 394. For example, the Supreme Court has applied substantive due process analysis to excessive force claims brought prior to an arrest, such as in high-speed police chases, and to claims brought by pretrial detainees, who have yet to be convicted of any crime. *See* Lewis, 523 U.S. 833 (high-speed police chase); Kingsley v. Hendrickson, 135 S. Ct. 2466 (2015) (claim brought by pretrial detainee). In *Lewis*, the Court reiterated that "in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." Lewis, 523 U.S. at 847, n.8. In *Kingsley*, however, the Court held that, at least in the pretrial detainee context, "to prove an excessive force claim [under substantive due process analysis], a pretrial detainee must show… only that the officers' use of that force was *objectively* unreasonable." Kingsley, 135 S. Ct. at 2470. Excessive force claims are thus highly context-specific, and defense counsel should closely analyze complaints to see whether the allegations properly state a claim under the specific constitutional right that was allegedly violated.

With these examples in mind, this chapter focuses on three key areas of interplay: (1) immunity defenses; (2) pleading standards; and (3) abstention and preclusion and related doctrines.

The Difference Between Qualified Immunity and Its State Law Analog

Qualified Immunity

Qualified immunity protects governmental actors from being sued in their individual capacities in Section 1983 litigation. The defense is based on the objective reasonableness of an official's action in light of the clearly established law at the time of the alleged action. Reviewing courts consider whether a reasonable official would understand that his or her actions violate a plaintiff's clearly established constitutional right.[3] Qualified immunity is a powerful defense, as it protects "all but the plainly incompetent or those who knowingly violate the law."[4]

If a defendant's conduct is found "objectively reasonable" by a court analyzing a federal qualified immunity defense, that reasonableness finding sometimes can be used to defeat companion state law claims. Such an argument is logical: if an official's actions are "objectively reasonable" under the qualified immunity standard, then those same actions cannot also be negligent or wrongful, as required to prove most state law tort claims.[5] Defeating a state law tort claim in this way may allow a defendant to avoid arguments that state immunity defenses have been waived or are otherwise unavailable.[6]

Governmental Immunity

Governmental immunity is generally available to local governments and governmental employees who perform discretionary acts while engaged in the scope of their employment. Governmental immunity protects individual defendants from tort claims brought against them in their official capacities. Some states have passed Tort Claims Acts that statutorily prohibit certain causes of action against public entities or identify areas where the immunity cannot be waived.[7] Others have enacted statutes clearly defining the waiver of

---

[3] Anderson v. Creighton, 483 U.S. 635, 640 (1987); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) ("We therefore hold 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.").

[4] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[5] *See* Sigman v. Town of Chapel Hill, 161 F.3d 782, 788–89 (4th Cir. 1998) (wrongful death claim under North Carolina law requiring negligence or other wrongful conduct failed when policeman's actions found reasonable under qualified immunity analysis); Dodson v. Prince George's Cty., Civ. No. JKS 13-2916, 2016 WL 67255 (D. Md. Jan. 6, 2016) (applying Maryland law); Russell v. Wright, 916 F. Supp. 2d 629 (W.D. Va. 2013) (applying Virginia law); Bell v. Dawson, 144 F. Supp. 2d 454, 464 (W.D. N.C. 2001) ("In North Carolina, findings… that a law enforcement officer's use of force was 'reasonable' for the purposes of finding qualified immunity to a §1983 excessive force claim are fatal to the Plaintiff's state law tort claims.").

[6] Sigman, 161 F.3d. at 789 (police officer's actions found reasonable under qualified immunity analysis; same actions "cannot be negligent or wrongful" as required for state law wrongful death claim; in turn, "[b]ecause the plaintiffs have no state law claim," Fourth Circuit found that "we need not reach the issue of whether state governmental immunity was waived").

[7] *See*, *e.g.*, Cal. Gov't Code §815 ("A public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person."); S.C. Code Ann. §15-78-60 (itemizing situations where a governmental entity is not liable).

governmental immunity.[8] Many states have extensive common law defining the limits of governmental immunity.

Public Official Immunity

Some states allow for public official immunity, which protects certain public officials (usually police officers) from personal liability in tort claims if the official was acting within the scope of his or her employment and was not acting with malice, bad faith, corruption, or willful or wanton conduct. However, caselaw is often unclear as to what facts are sufficient to show the conduct or mindset necessary to defeat the defense, and in some instances, a self-serving affidavit from a plaintiff is sufficient to withstand summary judgment based on a defense of public official immunity.[9] Further, in some states an allegation that an arrest lacks probable cause is sufficient to show malice on the part of the police officer and prevent the application of public official immunity, rendering the defense all but impotent.[10]

---

[8] *See*, *e.g.*, N.C. Gen. Stat. §160A-485; Minn. Stat. Ann. §466.06.

[9] *See*, *e.g.*, Ledbetter v. City of Durham, No. COA 14-656, 2014 WL 7473069 (N.C. Ct. App. Dec. 31, 2014). This case demonstrates how a plaintiff's self-serving affidavit can defeat a motion for summary judgment based on the (relatively) nebulous standards of a state immunity defense, even when a court applying the federal qualified immunity defense to the same facts would likely grant a defendant's motion for summary judgment. In *Ledbetter*, the plaintiff alleged that a police officer used unnecessarily excessive force when arresting the plaintiff during a drug sting. *Id.* at *1. The officer moved for summary judgment based on public official immunity. *Id.* The court denied the officer's motion, applying the complicated "malice" analysis that is part of the defense of public official immunity. *Id.* at *2. The court noted that the plaintiff's affidavit stated that, contrary to the officer's testimony, he did not turn to run away, and the plaintiff's version of events was supported by sworn affidavits from eyewitnesses. *Id.* at *3. However, these eyewitnesses were very likely the plaintiff cocaine dealer's neighbors (since he was arrested "near his home"). *Id.* at *1. In view of the following facts, it seems likely to the authors that a court applying federal law's qualified immunity defense would have found the officer's actions "objectively reasonable" and granted summary judgment. For example, (1) the police officer did not use any weapons, but merely tackled the plaintiff; (2) the arrest resulted in police "seizing over two ounces of cocaine" from the plaintiff; (3) the officer testified that the plaintiff was a drug dealer "known to run"; (4) that when the officer ordered the plaintiff to get on the ground, the plaintiff turned as if he was about to run; and (5) the officer testified that he did not intend to hurt the plaintiff, but simply wanted to prevent the plaintiff from escaping. *Id.* at *1, *3. Nevertheless, the court held that under North Carolina's public official immunity defense, summary judgment was not appropriate.

[10] Bennett v. R & L Carriers Shared Servs., LLC, 744 F. Supp. 2d 494, 522 (E.D. Va. 2010), *aff'd*, 492 F. App'x 315 (4th Cir. 2012) ("In Virginia, under certain circumstances, the want of probable cause alone *can* serve as legally sufficient evidence to support an inference of malice."); Soukup v. Law Offices of Herbert Hafif, 139 P.3d 30, 52 (Cal. 2006) ("Malice may also be inferred from the facts establishing lack of probable cause."); Mejia v. Bowman, No. COA 15-777, 2016 WL 1336607, at *8 (N.C. Ct. App. Apr. 5, 2016) ("Further, it is well established that in the context of a claim for malicious prosecution, for purposes of satisfying the malice element of the plaintiff's *prima facie* case, malice may be inferred from [the] want of probable cause.") (alteration in original).

Difference between Federal and State Pleading Standard

The federal pleading standard of plausibility established by *Twombly* and *Iqbal*[11] has yet to be adopted by many states. Most states have a less stringent notice pleading standard,[12] although a minority of states require "fact pleading,"[13] which one scholar has described as "a pleading standard that is *higher* than" federal courts' plausibility standard.[14] However, in the majority of state courts that apply a notice pleading standard, courts consider whether the allegations of the complaint state a claim for which relief can be granted under *some* legal theory.[15]

A potential interplay between federal and state pleading standards arises when a plaintiff alleges both federal and state claims. While a court analyzing both the federal and state claims at the same time will apply the pleading standard of the forum court,[16] an interesting situation is presented when a federal court

---

[11] Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[12] More than 30 states generally base their rules of civil procedure on the federal version. John B. Oakley, "A Fresh Look at the Federal Rules in State Courts," 3 Nev. L.J. 354, 356–57 (2003). However, one legal scholar states that only a few states have adopted the *Twombly*/*Iqbal* pleading standard. *See* Hon. John P. Sullivan, "Do the New Pleading Standards Set Out in Twombly & Iqbal Meet the Needs of the Replica Jurisdictions?," 47 Suffolk U.L. Rev. 53, 65, 66, 67, 69 (2014). These states include Maine, Massachusetts, South Dakota, and the District of Columbia. *Id.* (citing Potomac Dev. Corp. v. District of Columbia, 28 A.3d 531 (D.C. 2011)); Bean v. Cummings, 939 A.2d 676 (Me. 2008); Iannacchino v. Ford Motor Co., 888 N.E.2d 879 (Mass. 2008); Sisney v. Best Inc., 754 N.W.2d 804 (S.D. 2008)); *see also* Warne v. Hall, 373 P.3d 588, 595 (Colo. 2016); McDaniel v. Commonwealth, 495 S.W.3d 115, 121 n.6 (Ky. 2016) (citing *Twombly* and *Iqbal* with approval when discussing the Kentucky "counterpart" to Fed. R. Civ. P. 8(a)(2)).

[13] Univ. of Denver Inst. for the Advancement of the Am. Legal Sys., "Fact-Based Pleading: A Solution Hidden in Plain Sight," at p. 1 (2010), available at http://www.uscourts.gov/sites/default/files/iaals_fact-based_pleading_-_a_solution_hidden_in_plain_sight.pdf ("While fact-based pleading has not been a part of the federal civil process since the 1930s, it remains alive and well in many of the country's biggest and busiest state courts, including California, New York, Pennsylvania, Florida, Texas, Missouri, Virginia, Illinois, New Jersey, Connecticut and Louisiana.").

[14] William H.J. Hubbard, "A Fresh Look at Plausibility Pleading," 83 U. Chi. L. Rev. 693, 738 (2016).

[15] *See*, *e.g.*, CommScope Credit Union v. Butler & Burke, LLP, 790 S.E.2d 657, 659 (N.C. 2016) ("In considering a motion to dismiss under [North Carolina's] Rule 12(b)(6), the Court must decide whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory."); *see also* Osage Nation v. Bd. of Commr's of Osage Cty., 394 P.3d 1224, 1234 (Okla. 2017) ("Motions to dismiss are generally disfavored and granted only when there are no facts *consistent with the allegations* under any cognizable legal theory or there are insufficient facts under a cognizable legal theory."); Colafranceschi v. Briley, 355 P.3d 1261, 1264 (Idaho 2015) ("A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle [the plaintiff] to relief.") (alteration in original); Cherokee Funding LLC v. Ruth, 802 S.E.2d 865, 867 (Ga. Ct. App. 2017) ("A motion to dismiss for failure to state a claim should be sustained if the allegations of the complaint reveal, with certainty, that the plaintiff would not be entitled to relief under any state of provable facts asserted in support of the complaint."); T.H. v. Univ. of Kansas Hosp. Auth., 388 P.3d 181, 186 (Kan. App. 2017) ("The petition is to be liberally construed by the district court which is required to draw any reasonable inferences from [the facts pled] and determine whether the facts and inferences state a claim… on any possible theory the court can divine.") (alteration in original).

[16] *See*, *e.g.*, Maney v. Fealy, 2013 WL 3779053, at *7 (M.D. N.C. July 18, 2013) ("Although the Court applies North Carolina substantive law to Plaintiff's state law claims, pleading standards are a matter of procedural law governed in this Court by federal, not state, law.").

analyzes just the federal claims and does not address the pendent state law claims. In *Fox v. City of Greensboro*, the plaintiff alleged both federal and state claims.[17] The federal court dismissed the federal claims pursuant to *Twombly*/*Iqbal* but declined to exercise supplemental jurisdiction over the state law claims.[18] The plaintiff refiled those claims in state court, and the defendant moved to dismiss on the basis that the plaintiff was collaterally estopped from bringing these claims because parallel claims had already been dismissed.[19] The North Carolina Court of Appeals provided the following analysis:

> However, our review of the pertinent statutes and case law demonstrates that the standard under Federal Rule 12(b)(6), which the federal court here held Plaintiffs failed to meet, is a different, *higher* pleading standard than mandated under our own General Statutes. In other words, the fact that Plaintiffs' allegations of proximate cause in the federal complaint did not meet the pleading standard under Federal Rule 12(b)(6) does not *necessarily* mean that their allegations of proximate cause would have resulted in dismissal pursuant to North Carolina Rule 12(b)(6).[20]

Therefore, the court held that the plaintiff was not collaterally estopped from bringing state law claims even though the federal court had dismissed federal claims with the same elements based on the same set of operative facts.[21]

Thus, it is possible that defendants will have to endure two rounds of litigation—one at the federal level and one at the state level—on facts and claims that are essentially identical. Practitioners evaluating a state court complaint containing state and federal causes of action for possible removal to federal court may want to add this consideration to their analysis.

Of course, both the federal and state pleading standards become more lenient in a case involving a pro se plaintiff, a common occurrence in Section 1983 litigation.[22]

Abstention and Preclusion

Sometimes Section 1983 cases are so entangled with questions of state law that a federal court will abstain from judgment to allow related, ongoing state proceedings to conclude. In other situations, the federal court will find that it is precluded from rendering judgment because a state court has already ruled on the same claim or issue. Thus, whether related litigation could have been initiated, is currently being litigated, or has previously been litigated in a state forum are factors that can significantly impact the outcome of Section 1983 claims in federal court.

Abstention

Abstention is a "judge-made" doctrine whereby federal courts decline to exercise jurisdiction over a case, even though the case involves issues of federal law, to allow a state court to conclude related proceed-

---

[17] Fox v. City of Greensboro, 807 F. Supp. 2d 476, 480 (M.D. N.C. 2011).

[18] *Id.* at 500.

[19] Fox v. Johnson, 777 S.E.2d 314, 317 (N.C. Ct. App. 2015).

[20] *Id.* at 324.

[21] *Id.* at 325.

[22] Estelle v. Gamble, 429 U.S. 97, 106 (1976) ("[A] pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'") (quoting Haines v. Kerner, 404 U.S. 519, 520–21 (1972)).

ings.[23] Two abstention doctrines that may apply in Section 1983 litigation are *Pullman* abstention and *Younger* abstention.

Pullman Abstention

Pullman abstention "is usually applied when a plaintiff properly invokes federal court jurisdiction *in the first instance* on a federal claim."[24] A federal court may abstain when an issue of state law could be decided in such a way that the federal constitutional issue becomes moot.[25] By abstaining, the federal court is able to "avoid unnecessary constitutional adjudication," as well as "promote a harmonious federal system by avoiding a collision between the federal courts and state (including local) legislatures."[26] Under *Pullman*, the federal court abstains only from deciding the state law issues; jurisdiction over the federal issues is merely postponed.[27]

Judge Posner's opinion in *Waldron v. McAtee* provides a good example of *Pullman* abstention. In *Waldron* the Seventh Circuit considered a Section 1983 claim where the plaintiff alleged that a city's loitering ordinance was unconstitutionally vague.[28] On appeal, Judge Posner reasoned that since "[o]nly a state court can authoritatively interpret its own state's statutes and ordinances," the federal district court should abstain from deciding whether the loitering ordinance violated the constitution until after the plaintiff "sue[d] the defendants in an Indiana state court to determine the applicability of the loitering ordinance to his conduct."[29] The court noted that the meaning given by the state court to the ordinance could "significantly alter the constitutional issue that Waldron wants us to decide, and maybe save the ordinance from being struck down."[30] Judge Posner further observed that "in fact[,] the state proceeding might moot out the federal case altogether, which makes this an even stronger case for abstention."[31] By abstaining, the federal court avoided creating a situation where it held that the loitering ordinance violated the Federal Constitution based on its non-authoritative interpretation of the ordinance, only for a state court to later authoritatively interpret the ordinance to have a different, constitutionally permissible meaning.[32]

Younger Abstention

The *Younger* doctrine allows federal courts to "refrain from exercising their jurisdiction when relief may interfere with certain state proceedings."[33] For *Younger* abstention to be appropriate, the state proceeding at issue must be one that is "judicial in nature, involves important state interests, provides the plaintiff an ade-

---

[23] Zwickler v. Koota, 389 U.S. 241, 248 (1967) (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941)).

[24] Ivy Club v. Edwards, 943 F.2d 270, 279 (3d Cir. 1991) (citing Allen v. McCurry, 449 U.S. 90, 101 n.17 (1980)).

[25] "To warrant *Pullman* abstention: (1) there must be substantial uncertainty over the meaning of the state law at issue; and (2) there must be a reasonable possibility that the state court's clarification of the law will obviate the need for a federal constitutional ruling." Rivera-Puig v. Garcia-Rosario, 983 F.2d 311, 322 (1st Cir. 1992) (citing Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 236–37 (1983)).

[26] Waldron v. McAtee, 723 F.2d 1348, 1351 (7th Cir. 1983).

[27] Ivy Club, 943 F.2d at 279.

[28] Waldron, 723 F.2d at 1350.

[29] *Id.* at 1352, 1355.

[30] *Id.* at 1353.

[31] *Id.*

[32] *Id.* at 1352.

[33] Ewell v. Toney, 853 F.3d 911, 916 (7th Cir. 2017).

quate opportunity to raise the federal claims" and constitutional issues, and there must not be any "exceptional circumstances" making abstention inappropriate.[34] In addition, *Younger* abstention only applies when state court proceedings are initiated "before any proceedings of substance on the merits have taken place in the federal court…."[35] *Younger* abstention is typically invoked when the state proceeding is an ongoing criminal case in which the person who is trying to file the federal lawsuit is a defendant.[36]

In contrast to the *Pullman* doctrine, the *Younger* doctrine does not allow a federal claimant to return to federal court for the resolution of federal issues after the state court proceedings have concluded.[37] A federal court's decision to abstain under *Younger* until state court proceedings have concluded often leads to application of one of the preclusion doctrines discussed below.

Preclusion and Related Doctrines

Under 28 U.S.C. §1738, "Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever the courts of the State from which the judgments emerged would do so…."[38] The Supreme Court has explained that "[t]his statute has long been understood to encompass the doctrines of res judicata, or 'claim preclusion,' and collateral estoppel, or 'issue preclusion.'"[39] In *Allen v. McCurry*, the Supreme Court held that these preclusion doctrines apply in the context of Section 1983 claims.[40] Thus, if a state court has already ruled on a claim or issue, federal courts deciding related Section 1983 claims will apply the preclusion doctrines of collateral estoppel and res judicata to give effect to those state court judgments.[41] (Note that this is a different result from the pleading standard issue discussed above, in which a federal court decision on the viability of a claim was not given preclusive effect by the state court over a parallel claim.)

The related *Rooker-Feldman* doctrine "prevents federal courts from second-guessing state court decisions by barring the lower federal courts from hearing de facto appeals from state-court judgments…." [42] Under *Rooker-Feldman*, when

> claims raised in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling or require the district court to interpret the application of state laws or procedural rules, then the federal complaint must be dismissed for lack of subject matter jurisdiction.[43]

---

[34] *Id.*

[35] *Id.* (citing Hicks v. Miranda, 422 U.S. 332, 349 (1975)).

[36] Simpson v. Rowan, 73 F.3d 134, 137 (7th Cir. 1995) ("In *Younger*, the Supreme Court held that absent extraordinary circumstances federal courts should abstain from enjoining ongoing state criminal proceedings.").

[37] Ivy Club, 943 F.2d at 280 ("[A] decision under *Younger* terminates the federal litigation (or ends the state litigation if the federal plaintiff is successful)….")

[38] Allen v. McCurry, 449 U.S. 90, 96 (1980).

[39] San Remo Hotel, L.P. v. City & Cty. of S.F., Cal., 545 U.S. 323, 336 (2005) (citing Allen, 449 U.S. at 94–96).

[40] Allen, 449 U.S. at 104 (finding "no reason to believe that Congress intended to provide a person claiming a federal right an unrestricted opportunity to relitigate an issue already decided in state court simply because the issue arose in a state proceeding in which he would rather not have been engaged at all.").

[41] San Remo Hotel, 545 U.S. at 336.

[42] Bianchi v. Rylaarsdam, 334 F.3d 895, 898 (9th Cir. 2003).

[43] *Id.*

It applies when "the losing party in state court file[s] suit in federal court after the state proceedings [have] ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment."[44] The *Rooker-Feldman* doctrine is an excellent tool in a governmental litigator's kit when faced with a disgruntled and defeated plaintiff who is seeking a second bite at the apple in a different forum.

Another related preclusion theory well-known to Section 1983 practitioners is the *Heck* doctrine. This applies when an individual convicted or sentenced in state court files a Section 1983 claim seeking money damages based on allegations that government behavior related to the state court proceedings violated a constitutional right. In these situations, "the district court must consider whether a judgment in favor of the plaintiff [in the Section 1983 claim] would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated."[45] However, if a federal court judgment in favor of the plaintiff would not call into question the validity of the state court's criminal judgment against the plaintiff, then the Section 1983 claim may proceed.[46]

For years, federal courts interpreted *Heck* generously in favor of defendants; more recently, however, courts have begun to apply this doctrine more selectively, often precluding only certain aspects of a litigant's Section 1983 claim.[47] Courts applying *Heck* in this more restrictive manner have tried to distinguish the conduct forming the basis of the constitutional claim, either "conceptually" or "temporally," from the conduct forming the basis of the plaintiff's criminal conviction.[48] For example, a defendant might be validly convicted of resisting arrest in state court, but if a policeman exerted excessive force in response to the defendant's resistance, *Heck* potentially may not bar the defendant's Section 1983 claim if it can be shown that the officer may have acted in an alleged unconstitutional manner *after* the defendant's illegal behavior ceased.[49] Similarly, other courts have distinguished *Heck* by explaining that "a *lawful* arrest can sometimes be carried out in an *unlawful* manner," and that a holding that the arrest was carried out unlawfully does not invalidate a conviction itself.[50] In addition, if the government invokes doctrines such as independent source,

---

[44] Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291 (2005).

[45] Heck v. Humphrey, 512 U.S. 477, 487 (1994).

[46] *Id.*

[47] *See*, *e.g.*, Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005) (defendant in criminal case pled guilty to assault of police officers that occurred before officers illegally searched defendant's house; only defendant's excessive force claim, not unreasonable seizure and unlawful entry claims, was barred under *Heck* during subsequent Section 1983 claim).

[48] Bush v. Strain, 513 F.3d 492 (5th Cir. 2008); *see also* Ballard v. Burton, 444 F.3d 391 (5th Cir. 2006) (holding that plaintiff convicted of simple assault on one police officer could bring excessive force claim against different police officer who shot plaintiff during altercation because claim was conceptually distinct from simple assault charge).

[49] Bush, 513 F.3d at 498 (holding that Heck did not bar "a claim that excessive force occurred after the arrestee has ceased his or her resistance," because this holding "would not necessarily imply the invalidity of a conviction for the earlier resistance."); *see also* Medley v. City of Detroit, No. 07-15046, 2008 WL 4279360, at *12 (E.D. Mich. Sept. 16, 2008) (noting that "courts have consistently allowed §1983 claims arising out of allegations that the excessive force occurred *after* the arrest.").

[50] Ickes v. Grassmeyer, 30 F. Supp. 3d 375, 388 (W.D. Pa. 2014); *see also* Lora-Pena v. F.B.I., 529 F.3d 503, 506 (3d Cir. 2008) (holding that *Heck* did not present a complete bar to the plaintiff's Section 1983 claim because the plaintiff's "convictions for resisting arrest and assaulting officers would not be inconsistent with a holding that the officers, during a lawful arrest, used excessive (or unlawful) force in response to [the plaintiff's] unlawful actions").

inevitable discovery, or harmless error to save improper police behavior from application of the exclusionary rule (which gives effect to the Fourth Amendment's prohibition against unreasonable searches and seizures), then a Section 1983 claim based on the alleged improper police behavior does not invalidate the criminal conviction.[51]

Notwithstanding the plaintiff-friendly exceptions discussed above, if defending a Section 1983 case in federal court that involves a related state court case, be sure to evaluate whether any of the abstention or preclusion doctrines apply. Often Section 1983 defendants can weaken their adversary's case by convincing a federal court to abstain until a state court enters a criminal judgment against the Section 1983 plaintiff, or (if the state court proceedings have concluded) by invoking one of the preclusion doctrines so that the federal court will give effect to a favorable state court judgment.

Conclusion

Considering the tangled web woven by the interplay of federal and state law claims in Section 1983 litigation, it is important for practitioners to be cognizant of the overlapping claims, immunities and defenses, and abstention and preclusion doctrines to defend against these claims most effectively. Lack of familiarity with these concepts may result in you or your client getting stuck in the web.

AUTHORS

Lisa Arthur is a member of Fox Rothschild LLP's Litigation Practice Group in Greensboro, North Carolina. She focuses her practice on defending municipalities in a variety of disputes in state and federal court, including excessive force claims, negli-gence actions, constitutional claims, and zoning disputes. Lisa also handles a variety of business litigation matters, including cases involving breach of contract, breach of non-competition clauses, and condemnation actions. Lisa is a member of DRI's Governmental Liability Committee.

Fox Rothschild LLP | 336.378.5318 | larthur@foxrothschild.com

Josh Harper is an attorney with The Harper Law Firm PLLC, in Sylva, North Carolina.

The Harper Law Firm PLLC | 828.586.3305 | josh@harperlaw.com

[51] Pearson v. Weischedel, 349 F. App'x 343 (10th Cir. 2009) (holding that Section 1983 claim was not barred when police officers found drugs *before* committing alleged constitutional violations).