

# Section 1983 Litigation

## *Second Edition*

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## Preface and Acknowledgments

This monograph analyzes the fundamental issues that arise in litigation under 42 U.S.C. § 1983, the statute for redressing constitutional and federal statutory violations, and the case law interpreting those issues. Research for this edition concluded with the October 2007 Supreme Court term and covers courts of appeals decisions reported through June 30, 2008.

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# I. Introduction to § 1983 Litigation

## A. *The Statute*

Section 1983 of Title 42 of the U.S. Code (42 U.S.C. § 1983) is a vital part of American law. The statute authorizes private parties to enforce their federal constitutional rights, and some federal statutory rights, against defendants who acted under color of state law. Section 1983 reads as follows:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 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.<sup>1</sup>

## B. *Historical Background*

When interpreting § 1983, the Supreme Court has considered congressional intent, common-law practices, policy concerns, and principles of federalism. The Supreme Court has relied on the historical background behind the statute in several major decisions interpreting § 1983.<sup>2</sup> Congress passed 42 U.S.C. § 1983 in 1871 as section 1 of the “Ku Klux Klan Act.” The statute, however, did not emerge as a tool for

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1. 42 U.S.C. § 1983 (1996).

2. *See, e.g.*, *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66–71 (1989) (states and state agencies are not suable “persons”); *Patsy v. Bd. of Regents*, 457 U.S. 496, 501–02 (1982) (exhaustion of state remedies not required under § 1983); *Quern v. Jordan*, 440 U.S. 332, 341–42 (1979) (Congress enacted original version of § 1983 pursuant to § 5 of Fourteenth Amendment but did not intend to override Eleventh Amendment); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978) (municipalities are suable persons under § 1983 but not on basis of respondeat superior liability); *Monroe v. Pape*, 365 U.S. 167, 170–71 (1961) (§ 1983 provides federal remedy independent of state law remedies and is available even when state official acted in violation of state law), *rev'd on other grounds*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

checking abuses by state officials until 1961, when the Supreme Court decided *Monroe v. Pape*.<sup>3</sup> In *Monroe*, the Court articulated three purposes for passage of the statute: (1) to “override certain kinds of state laws”; (2) to provide “a remedy where state law was inadequate”; and (3) “to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.”<sup>4</sup>

The *Monroe* Court resolved two important issues that allowed 42 U.S.C. § 1983 to become a powerful statute for enforcing rights secured by the Fourteenth Amendment. First, it held that actions taken by state governmental officials in carrying out their official responsibilities, even if contrary to state law, were nevertheless actions taken “under color of law.”<sup>5</sup> Second, the Court held that injured individuals have a federal remedy under 42 U.S.C. § 1983 even if the officials’ actions also violated state law.<sup>6</sup> In short, the Court in *Monroe* held that Congress enacted § 1983 to provide an independent federal remedy supplemental to available state law remedies. The federal judicial forum was necessary to vindicate federal rights because, according to Congress in 1871, state courts could not protect Fourteenth Amendment rights because of their “prejudice, passion, neglect, [and] intolerance.”<sup>7</sup>

With *Monroe* opening the door to the federal courthouse, constitutional litigation against state officials developed. Later, plaintiffs seeking monetary damages sued not only state officials but began to sue cities and counties as well.<sup>8</sup> They also sought prospective injunctive relief against state officials. Ultimately, the federal court became the place to reform state and local governmental practices.

In *Monell v. Department of Social Services*,<sup>9</sup> the Supreme Court overruled the part of *Monroe* that had found that Congress did not intend to subject municipal entities to liability under § 1983. Employing a “fresh analysis” of the legislative history of the Civil Rights Act of 1871, the Court found that Congress intended to subject municipal entities to

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3. 365 U.S. 167 (1961), *rev'd on other grounds*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).

4. *Monroe*, 365 U.S. at 173–74.

5. *Id.* at 186.

6. *Id.* at 183–87.

7. *Id.* at 180.

8. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978).

9. 436 U.S. 658 (1978).

### I. Introduction to § 1983 Litigation

liability under § 1983, though not on the basis of respondeat superior. *Monell* held that Congress intended that municipal entities would be liable under § 1983 only when an official's unconstitutional action carried out a municipal policy or practice.<sup>10</sup>

In *Hudson v. Michigan*,<sup>11</sup> the Supreme Court acknowledged that § 1983 has undergone a “steady expansion” since *Monroe*, including the recognition of municipal liability claims in *Monell* and the availability of attorneys’ fees under 42 U.S.C. § 1988(b). The Court in *Hudson* rejected the exclusionary rule for violations of the Fourth Amendment knock-and-announce rule, in part because a § 1983 damages claim provided an adequate alternative remedy.<sup>12</sup> The Court emphasized the importance of the fee remedy:

Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney’s fees for civil-rights plaintiffs. This remedy was unavailable in the heyday of our exclusionary-rule jurisprudence, because it is tied to the availability of a cause of action. For years after *Mapp*, “very few lawyers would even consider representation of persons who had civil rights claims against the police,” but now “much has changed. Citizens and lawyers are much more willing to seek relief in the courts for police misconduct.” The number of public-interest law firms and lawyers who specialize in civil-rights grievances has greatly expanded.<sup>13</sup>

In short, the Court affirmed § 1983’s goal in providing a federal remedy for unconstitutional state action and § 1988’s role in granting attorneys’ fees to foster § 1983 litigation.

### C. Nature of § 1983 Litigation

A wide array of claimants file § 1983 lawsuits in federal and state courts, including alleged victims of police misconduct; prisoners; present and former public employees and licensees; property owners; and applicants for and recipients of public benefits. Claimants may name as de-

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10. See *infra* Part X.

11. 126 S. Ct. 2159, 2167 (2006).

12. *Id.* (citing Michael Avery, David Rudovsky, & Karen Blum, *Police Misconduct: Law and Litigation*, p. v (3d ed. 2005)).

13. *Id.* at 2167.

defendants state and municipal officials, municipal entities, and private parties, who act under color of state law.

Section 1983 litigation often requires courts to examine complex, multifaceted issues. Courts may have to interpret the federal Constitution, federal statutes (including § 1983 itself), and even state law. In addition, even if a plaintiff establishes a violation of a federally protected right, she may not necessarily obtain relief. Courts may deny relief after resolving numerous other issues: jurisdictional questions, such as the *Rooker–Feldman* doctrine, the Eleventh Amendment, and standing and mootness; affirmative defenses, such as absolute and qualified immunity; and other issues, such as the statute of limitation, preclusion, and various abstention doctrines.

The three most recurring issues in § 1983 cases are (1) whether a plaintiff has established the violation of a federal constitutional right; (2) whether qualified immunity protects an official from personal monetary liability; and (3) whether a plaintiff has established municipal liability through enforcement of a municipal policy, a municipal practice, or a decision of a municipal policy maker.

The last stage of a § 1983 action is normally an application by the prevailing party for attorneys’ fees under the Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. § 1988(b). Section 1988 fee applications often generate a wide range of issues, including whether the plaintiff was a “prevailing party”; whether “special circumstances” justify the courts’ denying fees to a prevailing plaintiff; whether a prevailing defendant should be awarded fees; what constitutes a reasonable hourly rate; what constitutes a reasonable number of billable hours; and whether the circumstances justify an upward or downward departure from the “lodestar” (the number of reasonable hours times the reasonable hourly market rates for lawyers in the community with comparable background and experience).<sup>14</sup>

Each year the federal courts face dockets filled with huge numbers of § 1983 cases. The lower court decisional law is voluminous. Courts should therefore be aware that there might be conflicts in approaches among the circuits.

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14. *Blum v. Stenson*, 465 U.S. 886 (1984).

*D. Jury Instructions*

Because § 1983 litigation is frequently multifaceted and complex, the jury instructions may encompass a wide range of issues and run for many pages. In addition to the general instructions used for civil actions, such as the preponderance-of-the-evidence standard, instructions are needed to explain the function of § 1983, the elements of the § 1983 claim for relief, the elements of the constitutional claims, causation, and state action. Instructions may also be necessary for such issues as municipal liability, supervisory liability, and damages. The district court's challenge is to provide the jury with complete and accurate instructions in language lay jurors can understand.<sup>15</sup>

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15. For an extensive compilation of § 1983 instructions with commentary and annotations, see Martin A. Schwartz & George C. Pratt, *Section 1983 Litigation: Jury Instructions* (2007).

## II. Elements of Claim, Functional Role, Pleading, and Jurisdiction

### A. Elements of the § 1983 Claim

Section 1983 authorizes an injured person to assert a claim for relief against a person who, acting under color of state law, violated the claimant's federally protected rights. The Supreme Court has identified two elements for a plaintiff's prima facie case in § 1983 litigation: The plaintiff must allege both (1) a deprivation of a federal right and (2) that the person who deprived the plaintiff of that right acted under color of state law.<sup>16</sup> In the authors' view, courts often examine four major elements for a § 1983 claim. The plaintiff must establish

1. conduct by a "person";
2. who acted "under color of state law";
3. proximately causing;
4. a deprivation of a federally protected right.

In addition, if the plaintiff is seeking to establish municipal liability, she must show that the deprivation of her federal right was attributable to the enforcement of a municipal custom or policy.<sup>17</sup> The plaintiff bears the burden of establishing each element of the claim for relief by a preponderance of the evidence.<sup>18</sup>

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16. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). If a § 1983 complaint "does not state a constitutional claim it is subject to dismissal under Rule 12(b)(6), not Rule 12(b)(1)." *Doe v. Metro. Police Dep't*, 445 F.3d 460, 467 (D.C. Cir. 2006).

17. *See infra* Part X.

18. *Valance v. Wisel*, 110 F.3d 1269, 1278–79 (7th Cir. 1997); *Larez v. Holcomb*, 16 F.3d 1513, 1517–18 (9th Cir. 1994); *Ruggiero v. Krzeminski*, 928 F.2d 558, 562 (2d Cir. 1991); *Shaw v. Leatherberry*, 706 N.W. 2d 299, 304 (Wis. 2005). *See also* *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006) (requiring plaintiff to plead and prove "absence of probable cause" as an element of a *Bivens* First Amendment retaliatory prosecution claim); *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (rejecting imposition of clear and convincing evidence burden on plaintiffs who assert wrongful motive claim subject to qualified immunity defense raised on summary judgment); *Clark v. Mann*, 562 F.2d 1104, 1117 (8th Cir. 1977) (§ 1983 plaintiffs "ordinarily retain the burden of proof throughout the trial"). *See generally* *Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (Individuals With Disabilities Education Act (IDEA) action) (referring to "default rule" that "plaintiffs bear the burden of persuasion regarding the essential aspects of their claims").

## II. Elements of Claim, Functional Role, Pleading, and Jurisdiction

The text of § 1983 does not state that a plaintiff must prove that an official acted with a particular state of mind.<sup>19</sup> However, the particular constitutional right may require the plaintiff to establish that the defendant acted with a particular state of mind. For example, a complaint stating a violation of the substantive due process component of the Fourteenth Amendment or a violation of procedural due process will require the plaintiff to establish that a state or local official intentionally or deliberately caused a deprivation of life, liberty, or property; negligent conduct will not suffice.<sup>20</sup> A complaint raising racial- or gender-based discrimination will invoke heightened judicial scrutiny only if a plaintiff establishes intentional discrimination.<sup>21</sup> A prisoner's complaint asserting the denial of adequate medical care under the Eighth Amendment would require a prisoner to demonstrate that he was a victim of deliberate indifference to a serious medical need;<sup>22</sup> in other words, medical malpractice does not establish a constitutional violation merely because the plaintiff is a prisoner.<sup>23</sup> Because plaintiffs may seek enforcement of a wide range of federal constitutional rights under § 1983,<sup>24</sup> courts should evaluate each claim to determine whether it requires the plaintiff to prove that the defendant acted with a particular state of mind.

### B. Functional Role of § 1983

Section 1983 does not itself create or establish any federally protected right. Instead, it creates a cause of action for plaintiffs to enforce federal rights created elsewhere—federal rights created by the federal Constitution or, in some cases, by other federal statutes.<sup>25</sup> In other

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19. *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986).

20. *Daniels*, 474 U.S. at 328–30. *See also* *Davidson v. Cannon*, 474 U.S. 344, 347 (1986). *See also infra* Part IV.D.

21. *See, e.g., Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (race); *Washington v. Davis*, 426 U.S. 229, 240–42 (1976) (race); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 274 (1979) (gender).

22. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

23. *Id.*

24. *See Wilson v. Garcia*, 471 U.S. 261, 273 (1985). *See infra* Part IV.

25. *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Graham v. Connor*, 490 U.S. 386, 393–94 (1989); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (§ 1983 “creates no substantive rights; it

words, § 1983 fulfills the procedural or remedial function of authorizing plaintiffs to assert a claim for relief against a defendant who, acting under color of state law, violated the plaintiffs' federal rights. In addition, § 1983 provides the exclusive available federal remedy for violations of federal constitutional rights under color of state law. Thus, plaintiffs may not avoid the limitations of a § 1983 claim for relief by asserting a claim directly under the Constitution.<sup>26</sup>

### C. Pleading § 1983 Claims

Federal § 1983 complaints are governed by the “notice pleading” standard established by the Federal Rules of Civil Procedure. Federal Rule of Civil Procedure 8(a) provides that the complaint must set forth “(1) a short and plain statement of the grounds on which the court’s jurisdiction depends, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks.”<sup>27</sup> Although Federal Rule of Civil Procedure 9 requires that certain issues be pled “with particularity” (e.g., fraud and mistake), it does not apply to § 1983 claims. In fact, Rule 9(a) provides that “[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally.” State-of-mind issues arise in some § 1983 cases depending on the particular constitutional claim alleged, such as intentional race discrimination

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merely provides remedies for deprivations of rights established elsewhere”); *Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979).

26. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 735 (1989); *Wax ’n Works v. City of St. Paul*, 213 F.3d 1016, 1019 (8th Cir. 2000); *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 732 n.3 (7th Cir. 1994); *Azul-Pacifico, Inc. v. City of Los Angeles*, 973 F.2d 704, 705 (9th Cir. 1992), *cert. denied*, 506 U.S. 1081 (1993); *Santiago v. N.Y. State Dep’t of Corr. Servs.*, 945 F.2d 25, 30–31 (2d Cir. 1991); *Tarpley v. Greene*, 684 F.2d 1, 9–11 (D.C. Cir. 1982); *Pauk v. Bd. of Trustees of City Univ. of New York*, 654 F.2d 856, 865 (2d Cir. 1981).

27. The Supreme Court has held that pro se complaints are subject to “less stringent standards than formal pleadings drafted by lawyers” and should be liberally construed in the plaintiff’s favor. *Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520 (1972). *Accord* *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). District courts should read the pleadings of a pro se plaintiff “liberally” and “interpret them to raise the strongest arguments that they suggest.” *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). *Accord* *McPherson v. Coombe*, 174 F.3d 276, 280 (2d Cir. 1999). However, pro se status does not exempt a party from compliance with procedural rules. *Traguth v. Zuck*, 710 F.2d 90, 95 (2d Cir. 1983).

II. Elements of Claim, Functional Role, Pleading, and Jurisdiction

under the Equal Protection Clause of the Fourteenth Amendment and prisoner Eighth Amendment challenges to conditions of confinement.<sup>28</sup>

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>29</sup> the Supreme Court rejected a “heightened” pleading requirement for § 1983 municipal liability claims because Rules 8 and 9 do not authorize it. The Court held that the generally applicable notice pleading standard set forth in the Federal Rules of Civil Procedure governs § 1983 municipal liability claims. The notice pleading standard “is by no means onerous; instead, it is designed to ensure that the complaint ‘will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.’”<sup>30</sup>

The Supreme Court similarly rejected a heightened pleading standard for Title VII (of the Civil Rights Act of 1964) and Age Discrimination in Employment Act (ADEA) claims in *Swierkiewicz v. Sorema, N.A.*<sup>31</sup> As in *Leatherman*, the Court determined that the notice pleading standard created by Rule 8 applies to Title VII and ADEA claims. The Court’s decisions in *Leatherman* and *Swierkiewicz* strongly support the conclusion that notice pleading applies to all § 1983 claims.<sup>32</sup>

The Court in *Leatherman*, however, left open whether a heightened pleading standard applies to claims asserting individual liability, specifically personal capacity claims in which officials may assert the affirmative defense of qualified immunity. Applying the rationale of

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28. *Erickson*, 127 S. Ct. 2197 (prisoner complaint asserting Eighth Amendment medical treatment claim satisfied notice pleading standard); *Kikumura v. Osagie*, 461 F.3d 1269, 1294 (10th Cir. 2006) (prisoner Eighth Amendment deliberate indifference medical treatment claim: plaintiff “is merely required to provide ‘a short and plain statement’ of his Eighth Amendment claims, Fed. R. Civ. P. 8(a), and ‘[m]alice, intent, knowledge, and other conditions of mind of a person may be averred generally’ in the complaint, Fed. R. Civ. P. 9(b)”; allegations that defendant “knew” that plaintiff “‘require[d] prompt medical attention and . . . that delay would exacerbate [his] health problem,’ but deliberately ‘disregarded that risk’” satisfied “pleading requirement of Rule 8(a) for the subjective component of a deliberate indifference claim”).

29. 507 U.S. 163, 164 (1993).

30. *Slade v. Hampton Roads Reg’l Jail*, 407 F.3d 243, 252 (4th Cir. 2005) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

31. 534 U.S. 506 (2002).

32. See *Erickson*, 127 S. Ct. at 2200; *Jones v. Bock*, 127 S. Ct. 910, 919–20 (2007); *Hill v. McDonough*, 126 S. Ct. 2096, 2103–04 (2006); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 66–67 (1st Cir. 2004); *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002).

*Leatherman* and *Swierkiewicz*, the great majority of courts of appeals have held that, like other § 1983 claims, the notice pleading standard applies to personal capacity claims subject to qualified immunity.<sup>33</sup> The courts have several tools to eliminate meritless personal capacity claims early in the litigation, including ordering the plaintiff to file either a detailed reply to the defendant's answer under Federal Rule of Civil Procedure 7, or a more definite statement under Rule 12(e), or, under Rule 26(c), tailoring discovery to protect the defendant from unnecessary embarrassments or burdens.<sup>34</sup>

Although a conspiracy is not an element of a § 1983 claim for relief, § 1983 plaintiffs sometimes plead conspiracies to (1) establish state action through a conspiracy between a private party and a public official,<sup>35</sup> (2) enhance the probability of recovering punitive damages,<sup>36</sup> or (3) broaden the potential scope of admissible evidence.<sup>37</sup> The federal courts have traditionally imposed a heightened pleading standard for § 1983 conspiracy claims on the theory that plaintiffs may readily plead these claims but then not be able to prove them.<sup>38</sup> In light of the rea-

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33. *Thomas v. Independence Twp.*, 463 F.3d 285, 294–95 (3d Cir. 2006). *See, e.g.*, *Evancho v. Fisher*, 423 F.3d 347, 351–52 (3d Cir. 2005); *Doe v. Cassel*, 403 F.3d 986, 988–89 (8th Cir. 2005); *Educadores Puertorriquenos*, 367 F.3d at 66–67; *Goad v. Mitchell*, 297 F.3d 497, 504–05 (6th Cir. 2002); *Currie v. Doran*, 242 F.3d 905, 916 (10th Cir.), *cert. denied*, 534 U.S. 1019 (2001). *See also* *Iqbal v. Hasty*, 490 F.3d 143, 158–59 (2d Cir. 2007), *cert. granted*, 128 S. Ct. \_\_\_\_ (2008) (*Bivens* claim). *Contra* *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1369 (11th Cir. 1998). In *Educadores Puertorriquenos en Accion v. Hernandez*, the First Circuit stated that

in a civil rights action as in any other action subject to notice pleading standards, the complaint should at least set forth minimal facts as to who did what to whom, when, where, and why—although why, where, when means the actor's state of mind, can be averred generally. . . . [T]he requirements of Rule 8(a)(2) are minimal—but “minimal requirements are not tantamount to nonexistent requirements.”

*Educadores Puertorriquenos*, 367 F.3d at 68.

34. *See, e.g.*, *Crawford-El v. Britton*, 523 U.S. 574, 597–98 (1998); *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (en banc); *Doe v. Cassel*, 403 F.3d 986, 989 (8th Cir. 2005). *See infra* Part XI.

35. *Dennis v. Sparks*, 449 U.S. 24, 27–29 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970). *See infra* Part VII.

36. *See infra* Part XXI.

37. *See, e.g.*, Fed. R. Evid. 801(d)(2)(E) (coconspirator hearsay exemption).

38. *See* 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.06 (4th ed. 2004). *See, e.g.*, *Reasonover v. St. Louis County*, 447 F.3d 569, 582 (8th Cir. 2006) (§ 1983 conspiracy claim requires plaintiff to “allege with particularity and specifically demon-

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soning in *Leatherman* and *Swierkiewicz*, it seems courts should also apply the notice pleading standard to these claims.<sup>39</sup>

The Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*<sup>40</sup> has generated considerable uncertainty and confusion over the pleading standards for all federal court complaints, including those filed under § 1983. Although *Bell Atlantic* is an antitrust case, the language used by the Court indicates that the decision is not limited to antitrust cases and applies to federal complaints generally, including those filed under § 1983.

The Court ruled in *Bell Atlantic* that although Federal Rule of Civil Procedure 8(a)(2) notice pleading does not require "detailed factual allegations," the complaint must provide some factual allegations of the nature of the claim and the grounds on which the claim rests. The plaintiff must plead "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."<sup>41</sup> The Court said that the "[f]actual allegations must be enough to raise a right to relief above the speculative level" to a "plausibility" level.<sup>42</sup>

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.<sup>43</sup>

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strate material facts that the defendants reached an agreement") (quoting *Marti v. City of Maplewood*, 57 F.3d 680, 685 (8th Cir. 1995)); *Ciambriello v. County of Nassau*, 292 F.3d 307, 325 (2d Cir. 2002) ("complaints containing only conclusory, vague, or general allegations that defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights are properly dismissed; diffuse and expansive allegations are insufficient, unless amplified by specific instances of misconduct"); *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir. 1989).

39. See *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (notice pleading governs § 1983 conspiracy claims).

40. 127 S. Ct. 1955 (2007).

41. *Id.* at 1964–65.

42. *Id.* at 1965–66, 1970.

43. *Id.* at 1967 (citing Frank H. Easterbrook, Comment, *Discovery as Abuse*, 69 B.U. L. Rev. 635–38 (1989)).

The Court also ruled in *Bell Atlantic* that federal courts should no longer rely on the frequently quoted statement from *Conley v. Gibson*<sup>44</sup>

“that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” . . . [A]fter puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard; once a claim has been stated adequately, it may be supported by showing a set of facts consistent with the allegations in the complaint.<sup>45</sup>

Although *Bell Atlantic* could be read as imposing some form of “heightened” pleading requirement, the Supreme Court disavowed any intent to do so. The Court acknowledged that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations” and that it was not requiring “heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”<sup>46</sup> Furthermore, the Court made no attempt to modify its decisions in *Leatherman* and *Swierkiewicz*. In fact, just two weeks after its decision in *Bell Atlantic*, the Court, in *Erickson v. Pardus*,<sup>47</sup> applied notice pleading to a pro se prisoner’s § 1983 Eighth Amendment medical treatment claim. Citing, inter alia, *Bell Atlantic* and *Swierkiewicz*, the Court in *Erickson* held that the § 1983 complaint satisfied Rule 8’s notice pleading standard. The Eighth Circuit had dismissed the complaint on the ground that it was conclusory, but the Supreme Court summarily reversed.

The complaint in *Erickson* alleged that the defendant doctor’s “decision to remove [plaintiff] from his prescribed hepatitis C medication was ‘endangering his life,’” and that “[plaintiff’s] medication was withheld ‘shortly after’ [plaintiff] had commenced a treatment program that would take one year, and that he was ‘still in need of treatment of his disease,’ and that the prison officials were in the meantime refusing to provide treatment.”<sup>48</sup> The Supreme Court held that these allegations

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44. 355 U.S. 41, 45–46 (1957).

45. *Bell Atlantic*, 127 S. Ct. at 1968–69.

46. *Id.* at 1974.

47. 127 S. Ct. 2197 (2007).

48. *Id.* at 2200.

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were sufficient to satisfy Rule 8 of the Federal Rules of Civil Procedure.<sup>49</sup> *Erickson* strongly supports the conclusion that *Bell Atlantic* did not modify the “notice pleading” standard established by *Leatherman* and *Swierkiewicz* for § 1983 civil rights complaints.

In *Iqbal v. Hasty*,<sup>50</sup> the Second Circuit, in an insightful opinion by Judge Jon Newman, carefully analyzed the implications of *Bell Atlantic* for civil rights complaints.<sup>51</sup> Judge Newman detailed the “conflicting signals” in *Bell Atlantic* and the “uncertainties as to the intended scope of the Court’s decision.”<sup>52</sup> The Second Circuit found that *Bell Atlantic* does not require “a universal standard of heightened fact pleadings but is instead requiring a flexible ‘plausibility standard,’ which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible.”<sup>53</sup>

### D. Federal Court Jurisdiction

#### 1. Subject-Matter Jurisdiction

Section 1983 itself does not grant the federal courts subject-matter jurisdiction, but federal district courts have subject-matter jurisdiction over § 1983 claims under either 28 U.S.C. § 1343(a)(3)<sup>54</sup> or the general

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49. The Court noted that the complaint also included other, more specific factual allegations.

50. 490 F.3d 143 (2d Cir. 2007), *cert. granted*, 128 S. Ct. \_\_\_\_ (2008).

51. *Iqbal* was actually a *Bivens* action, but the same pleadings issues exist in *Bivens* and § 1983 actions.

52. *Iqbal*, 490 F.3d at 157.

53. *Id.* at 157–58. The Second Circuit in *Iqbal* specifically held that a *Bivens* claim subject to qualified immunity is not subject to a heightened pleading requirement.

The circuit courts have rather consistently applied *Bell Atlantic* to § 1983 claims. *See, e.g.,* Alvarado Aguilera v. Negron, 509 F.3d 50, 53 (1st Cir. 2007); Estate of Sims v. County of Bureau, 506 F.3d 509, 512 (7th Cir. 2007); Watts v. Fla. Int’l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007); Stevenson v. Carroll, 495 F.3d 62, 66 (3d Cir. 2007) (plaintiffs “have met their obligation to provide grounds for their entitlement to relief by presenting factual allegations sufficient to raise their right to relief above a speculative level”), *cert denied*, 128 S. Ct. 1223 (2008).

54. *See* Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 615–20 (1979).

federal question jurisdiction statute, 28 U.S.C. § 1331.<sup>55</sup> Federal courts may nevertheless at times lack jurisdiction because of some other jurisdictional doctrine (such as the *Rooker–Feldman* doctrine), because of the Eleventh Amendment,<sup>56</sup> or because of an abstention doctrine.<sup>57</sup>

## 2. *Rooker–Feldman* Doctrine

In some federal court § 1983 actions, a party who lost in state court may try to “make a federal case of it” by seeking to overturn the state court judgment. This stratagem generally fails because of the “*Rooker–Feldman* doctrine,” named after the Supreme Court’s decisions in *Rooker v. Fidelity Trust Co.*<sup>58</sup> and *District of Columbia Court of Appeals v. Feldman*.<sup>59</sup> This doctrine provides that a federal district court does not have jurisdiction to overturn a state court judgment, even when the federal court complaint alleges that the state court judgment violates the plaintiff’s federal constitutional rights. In creating this jurisdictional bar, the Supreme Court reasoned that because federal district courts have only original jurisdiction, they lack appellate jurisdiction to review state court judgments. The Court explained that only the Supreme Court has federal court appellate jurisdiction over state court judgments.<sup>60</sup>

The lower federal courts have struggled to determine the contours of the *Rooker–Feldman* doctrine.<sup>61</sup> In *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*,<sup>62</sup> the Supreme Court found that some lower federal courts had interpreted *Rooker–Feldman* “far beyond” its intended contours by “overriding Congress’ conferral of federal court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law under 28 U.S.C. § 1738.”<sup>63</sup>

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55. A federal court with subject-matter jurisdiction over a § 1983 claim in some circumstances may decline to exercise that jurisdiction under one or more of the abstention doctrines. See *infra* Part XX.

56. See *infra* Part XIII.

57. See *infra* Part XX.

58. 263 U.S. 413 (1923).

59. 460 U.S. 462 (1983).

60. 28 U.S.C. § 1257 (2006).

61. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.07 (4th ed. 2004).

62. 544 U.S. 280 (2005).

63. *Id.* at 292–94. *Accord* *Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006).

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The Court in *Exxon Mobil* clarified that the *Rooker–Feldman* doctrine is confined to federal court actions “brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced.”<sup>64</sup> *Exxon Mobil* resolved that the *Rooker–Feldman* doctrine does not apply merely because “parallel” suits have been filed in state and federal court, even if the state suit comes to judgment during the pendency of the federal suit. The Court reiterated that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.”<sup>65</sup>

In noticing that “[s]ince *Feldman*, this Court has never applied *Rooker–Feldman* to dismiss an action for want of jurisdiction,”<sup>66</sup> the *Exxon Mobil* Court emphasized the narrowness of the doctrine.<sup>67</sup> *Exxon Mobil* acknowledged that the *Rooker–Feldman* doctrine does not “override or supplant” preclusion and abstention doctrines, and that these doctrines may be relevant when the federal court action parallels a state court suit. Unfortunately, the decision in *Exxon Mobil* provided no guidance on the issue that has given the lower federal courts the most difficulty, namely, determining whether the federal court complaint contests the validity of a state court judgment. The critical inquiry is “whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment.”<sup>68</sup> This principle is easy to state, though often difficult to apply.

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64. *Exxon Mobil*, 544 U.S. at 281. *Accord Lance*, 126 S. Ct. at 1201. See *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 85 (2d Cir. 2005) (for *Rooker–Feldman* doctrine to apply: (1) plaintiff must have lost in state court; (2) the state court judgment must have been rendered before the district court proceeding commenced; (3) plaintiff must complain of injuries caused by the state court judgment; and (4) plaintiff must invite district court review and rejection of the state court judgment); *Kougasian v. TMSL, Inc.*, 359 F.3d 1136, 1140 (9th Cir. 2004) (“*Rooker–Feldman* thus applies only when the federal plaintiff both asserts as her injury legal error or errors by the state court *and* seeks as her remedy relief from the state court judgment.”).

65. *Exxon Mobil*, 544 U.S. at 292 (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

66. *Exxon Mobil*, at 287.

67. See *Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006) (noting that Court in *Exxon Mobil* found that *Rooker–Feldman* “is a narrow doctrine”).

68. *Kougasian*, 359 F.3d at 1140 (“If a federal plaintiff asserts as a legal wrong an allegedly erroneous decision by a state court, and seeks relief from a state court judgment

The Supreme Court has recognized that the *Rooker–Feldman* doctrine may apply even when the claim asserted in federal court was not determined in the state court proceeding if that claim was “inextricably intertwined” with the state court judgment.<sup>69</sup> The lower federal courts have experienced difficulties applying this concept.<sup>70</sup>

The *Rooker–Feldman* doctrine does not apply to interlocutory state court orders but only to federal cases brought “after the state proceedings ended.”<sup>71</sup> The *Rooker–Feldman* doctrine does not apply to a federal suit brought by a plaintiff who was not a party to the state court proceeding.<sup>72</sup> In *Lance v. Dennis*,<sup>73</sup> the Supreme Court held that the *Rooker–Feldman* doctrine does not bar federal suit when the federal plaintiff was not a party to the state court judgment, even if, for the purpose of preclusion, the federal plaintiff was in privity with a party to the state judgment.<sup>74</sup> As in *Exxon Mobil*, the Court in *Lance* stressed the

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based on that decision, *Rooker–Feldman* bars subject-matter jurisdiction in federal district court. If, on the other hand, a federal plaintiff asserts as a legal wrong an allegedly illegal act or omission by an adverse party, *Rooker–Feldman* does not bar jurisdiction . . . *Rooker–Feldman* thus applies only when the federal plaintiff both asserts as [an] injury legal error or errors by the state court and seeks as [a] remedy relief from the state court judgment.” (citations omitted). *Accord* *Guttman v. Khalsa*, 446 F.3d 1027, 1031–32 (10th Cir. 2006); *Kenmen Eng’g v. City of Union*, 314 F.3d 468, 476 (10th Cir. 2002); *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996).

69. *Exxon Mobil*, 544 U.S. at 286 n.1 (citing *D.C. Ct. of App. v. Feldman*, 460 U.S. 462, 483 n.16 (1983)).

70. A federal claim is “inextricably intertwined” with the state court judgment when “the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.” *Allstate Ins. Co. v. W. Va. State Bar*, 233 F.3d 813, 819 (4th Cir. 2000).

71. *Exxon Mobil*, 544 U.S. at 291; *Guttman*, 446 F.3d at 1032; *Federacion de Maestros de P.R. v. Junta de Relaciones del Trabajo de P.R.*, 410 F.3d 17, 26 (1st Cir. 2005) (for *Rooker–Feldman* doctrine to apply, state proceedings must have “ended with respect to the issues that the federal plaintiff seeks to have removed in federal court, even if other matters remain to be investigated” (emphasis in original)).

72. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994); *Holiday Amusement Co. of Charleston, Inc. v. South Carolina*, 40 F.3d 534, 537 (4th Cir. 2005); *Twin City Fire Ins. Co. v. Adkins*, 400 F.3d 293, 297 (6th Cir. 2005).

73. 126 S. Ct. 1198 (2006).

74. The Court in *Lance* hedged its ruling ever so slightly, stating that it need not decide “whether there are any circumstances, however limited, in which *Rooker–Feldman* may be applied against a party not named in an earlier state proceeding—e.g., where an estate takes a *de facto* appeal in a district court of an earlier state court decision involving the decedent.” *Id.* at 1202 n.2.

narrowness of the *Rooker–Feldman* doctrine and that it is distinct from preclusion. The Supreme Court has also held that the *Rooker–Feldman* doctrine does not apply when the federal court plaintiff seeks review of a state administrative or executive determination.<sup>75</sup>

### 3. Supplemental Jurisdiction

In many § 1983 actions the federal court plaintiff asserts both a federal claim and one or more state law claims. In these cases, the plaintiff normally is unable to establish diversity jurisdiction over the state law claim because the parties are not citizens of different states. Nevertheless, the state law claim may come within the federal court’s supplemental jurisdiction. The supplemental jurisdiction statute, 28 U.S.C. § 1367, codifies the *United Mine Workers v. Gibbs of America*<sup>76</sup> doctrine of pendent jurisdiction. Section 1367(a) grants supplemental jurisdiction to the federal district courts for “all other claims that are so related to claims” over which the federal district court has original jurisdiction “that they form part of the same case or controversy under Article III.”<sup>77</sup> In *Gibbs*, the Supreme Court held that a pendent claim is part of an Article III controversy when the pendent claim arises out of “a common nucleus of operative fact” as the jurisdictional conferring claim.<sup>78</sup>

Like pendent jurisdiction, supplemental jurisdiction is a matter of both power and discretion. Thus, § 1367(c) provides that the district court may *decline* to exercise its supplemental jurisdiction when the supplemental claim “raises a novel or complex issue of state law,” when the state law claim “substantially predominates over” the jurisdiction conferring claim, when the district court has dismissed the jurisdiction conferring claim, or in other “exceptional circumstances.”<sup>79</sup>

To illustrate, assume that a plaintiff asserts a non-insubstantial § 1983 constitutional claim against Officer Jones. Under § 1367, the plaintiff may assert a “supplemental” state law claim arising out of the

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75. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 644 n.3 (2002).

76. 383 U.S. 715 (1966).

77. 28 U.S.C. § 1367(a) (1990).

78. *Gibbs*, 383 U.S. at 725.

79. 28 U.S.C. § 1367(c) (1990).

same incident against Jones. The plaintiff might also choose to assert a “supplemental” state law claim against a new “supplemental party” defendant—for example, a state law vicarious liability claim against the city, even though there is no independent jurisdictional basis for that claim.<sup>80</sup> In other words, the supplemental jurisdiction statute encompasses both pendent claim and pendent party jurisdiction.<sup>81</sup> It also encompasses counter-claims, cross-claims, and impleader claims.<sup>82</sup>

In *City of Chicago v. International College of Surgeons*,<sup>83</sup> the Supreme Court held that a state court judicial review claim may come within supplemental jurisdiction.<sup>84</sup> On the other hand, the supplemental jurisdiction statute does not override the Eleventh Amendment and thus does not authorize district courts to exercise supplemental jurisdiction over claims against nonconsenting states.<sup>85</sup>

Section 1367(d) of the supplemental jurisdiction statute provides for the tolling of the limitations period for supplemental claims while they are pending in federal court and for thirty days following a federal court’s dismissal of a supplemental claim, unless state law provides for a longer tolling period.<sup>86</sup> The supplemental jurisdiction tolling provision does not apply when a federal court dismisses a supplemental

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80. See *Jinks v. Richland County, S.C.*, 538 U.S. 456, 465–67 (2003) (supplemental jurisdiction may be asserted in § 1983 actions against municipalities).

81. See *Exxon Mobil Corp. v. Allapattah*, 125 S. Ct. 2611, 2620–21 (2005) (Recognizing that § 1367 overturned *Finley v. United States*, 490 U.S. 545 (1989), which had rejected pendent party jurisdiction in actions under Federal Tort Claims Act; stating “The last sentence of § 1367 makes it clear that the grant of supplemental jurisdiction extends to claims involving joinder or intervention of additional parties. . . . [Section] 1367(a) is a broad jurisdictional grant with no distinctions drawn between pendent-claim and pendent-party cases. . . . The terms of § 1367 do not acknowledge any distinction between pendent jurisdiction and the doctrine of so-called ancillary jurisdiction.”).

82. *Id.* at 2633.

83. 522 U.S. 156, 166 (1997).

84. Federal courts in New York have been very reluctant to exercise supplemental jurisdiction over state judicial review claims. See *Morningside Supermarket Co. v. N.Y. State Dep’t of Health*, 432 F. Supp. 2d 334, 346–47 (S.D.N.Y. 2006) (citing cases).

85. *Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 536 (2002). Cf. *Jinks*, 538 U.S. at 466–67 (supplemental jurisdiction may be asserted in § 1983 action against municipality).

86. See *Jinks*, 538 U.S. at 461, 464–67 (§ 1367(d) tolling provision is within Congress’s legislative power, does not impermissibly intrude on states’ rights, and encompasses claims against municipal entities).

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claim against a state on Eleventh Amendment grounds.<sup>87</sup> The tolling provision does apply, however, to claims against municipal entities.<sup>88</sup>

### 4. Removal Jurisdiction

Defendants sued in state court under § 1983 may generally remove the action to federal court.<sup>89</sup> If a state court complaint alleged a § 1983 federal claim and a state law claim, the defendants may remove the action to federal court, and the federal court *may* exercise supplemental jurisdiction over the state law claim.<sup>90</sup> In addition, if a state court complaint asserted a § 1983 personal capacity claim and a § 1983 claim against a state entity that is barred by the Eleventh Amendment, the defendants may still remove the action to federal court, which can hear the non-barred, personal capacity claim.<sup>91</sup> When seeking removal, the state waives its Eleventh Amendment immunity from liability on a state law claim on which the state had already waived its sovereign immunity in the state court.<sup>92</sup>

### E. State Court Jurisdiction

State courts have concurrent jurisdiction over § 1983 claims.<sup>93</sup> When plaintiffs assert federal claims in state court, “federal law takes the state courts as it finds them.”<sup>94</sup> In other words, “[s]tates may establish the rules of procedure governing litigation in their own courts[,]” such as neutral rules of procedure governing service of process and substitution of parties.<sup>95</sup> State courts, however, may not apply state rules that

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87. *Raygor*, 534 U.S. at 544.

88. *Jinks*, 538 U.S. at 465–67.

89. 28 U.S.C. § 1441(a)–(b) (1986).

90. *City of Chi. v. Int’l Coll. of Surgeons*, 522 U.S. 156, 172–73 (1997).

91. *Wis. Dep’t of Corr. v. Schacht*, 524 U.S. 381, 389–90 (1998).

92. *Lapides v. Bd. of Regents*, 535 U.S. 613, 619–20 (2002). See *infra* Part XIII (Eleventh Amendment).

93. *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582, 588–89 (1995); *Howlett v. Rose*, 496 U.S. 356, 375 (1990); *Felder v. Casey*, 487 U.S. 131, 139 (1988); *Ark. Writers’ Project v. Ragland*, 481 U.S. 221, 234 (1987); *Patsy v. Bd. of Regents*, 457 U.S. 496, 506–07 (1982). See Steven H. Steinglass, Section 1983 Litigation in State Courts (West 2006).

94. Steinglass, *supra* note 93, § 10.1, p. 10-1 (quoting Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)).

95. *Felder v. Casey*, 487 U.S. 131, 138, 145 (1988).

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unduly burden, frustrate, or discriminate against the federal claim for relief. For example, a state court may not apply a state notice-of-claim requirement to a § 1983 claim because notice-of-claim provisions discriminate and unduly burden plaintiffs with claims against governmental entities.<sup>96</sup>

In state courts, federal law provides the elements of the § 1983 claim for relief and the defenses to the claim, and state law may not alter either the elements or defenses.<sup>97</sup> The Supreme Court, in *Howlett v. Rose*,<sup>98</sup> held that state courts may not apply state law immunity defenses to § 1983 claims. In cases arising from state court § 1983 actions, the Supreme Court has generally held that the same rules that govern the litigation of § 1983 actions in federal court also govern the litigation of § 1983 actions in state court.<sup>99</sup>

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96. *Id.* at 138 (state notice-of-claim rule not applicable to § 1983 claims). *See generally* *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 298–99 (1949) (local practice rules may not unduly burden the federal right). *See infra* Part XVI.

97. *Howlett v. Rose*, 496 U.S. 356, 375–76 (1990).

98. 496 U.S. 356 (1990).

99. *See Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 586 (1995) (policies of Tax Injunction Act apply in state court § 1983 actions challenging state tax policies); *Howlett*, 496 U.S. at 383 (state law immunity defense does not apply to § 1983 municipal liability claim); *Felder*, 487 U.S. at 138 (state notice-of-claim rules do not apply in state or federal court § 1983 actions); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (state liability under § 1983: whether plaintiffs file a § 1983 claim in state or federal court, states and state entities are not suable “persons” under § 1983). State courts, however, are not obligated to grant § 1983 defendants an interlocutory appeal from the denial of qualified immunity, even when federal law would permit an interlocutory appeal in federal court. *Johnson v. Fankel*, 520 U.S. 911, 913 (1997). *See infra* Part XV.

### III. Section 1983 Plaintiffs

#### A. Persons Entitled to Bring Suit Under § 1983

The right to bring suit under § 1983 is available to a wide range of plaintiffs. This right is not limited to U.S. citizens. Legal and even illegal aliens are entitled to sue under § 1983.<sup>100</sup> Nor is the right to sue limited to individuals. Both for-profit and not-for-profit organizations may sue under § 1983.<sup>101</sup> However, the Supreme Court held that a Native American tribe that sought to vindicate its sovereign status was not entitled to sue under § 1983.<sup>102</sup> The Court reasoned “[s]ection 1983 was designed to secure private rights against government encroachment, . . . not to advance a sovereign’s prerogative to withhold evidence relevant to a criminal investigation.”<sup>103</sup>

#### B. Standing

Whether the plaintiff is a “person” entitled to sue under § 1983 is a question separate and distinct from whether the plaintiff has standing to sue. For example, Michael Newdow, who sought to challenge the constitutionality of a school policy requiring teacher-led recitation of the Pledge of Allegiance, was clearly a “person” entitled to sue under

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100. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 2 (4th ed. 2004). See, e.g., *Graham v. Richardson*, 403 U.S. 365 (1971) (legal aliens); *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal aliens).

101. See 1 Schwartz, *supra* note 100, § 2. Although labor unions have been permitted to sue under § 1983, the Tenth Circuit held that an unincorporated association may not sue under § 1983. *Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006) (“We conclude . . . that the Dictionary Act of 1871, the common understanding regarding unincorporated associations in 1871, and the legislative history of Section 1 of the Civil Rights Act of 1871 fail to indicate a congressional intent to include unincorporated associations within the ambit of the term ‘person’ set forth in 42 U.S.C. § 1983.”).

102. *Inyo County, Cal. v. Paiute-Shoshone Indians*, 538 U.S. 701, 712 (2003) (citing *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 66 (1989)).

103. *Id.* See also *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 514–15 (9th Cir. 2005) (en banc) (plaintiff tribe asserted “communal fishing rights reserved to it, as a sovereign, by a treaty it entered into with the United States”; court held tribe could not assert its treaty-based rights under § 1983 because tribe not a “person” entitled to sue under § 1983 for violation of a sovereign prerogative; nor were tribe members entitled to sue, because asserted fishing treaty rights were communal rights of tribe, even though individual members benefit from these rights).

§ 1983, but the Supreme Court held that he lacked standing.<sup>104</sup> The Court decided that Newdow could not assert the rights of his daughter because the girl's mother, and not Newdow, had legal custody.

Article III has three standing requirements: (1) an actual or a threatened injury; (2) that injury is fairly traceable to the defendant's conduct; and (3) there is a sufficient likelihood that a favorable decision on the merits will redress the injury.<sup>105</sup> In addition to the Article III requirements, the Supreme Court has formulated "prudential" standing requirements. The most important of the prudential rules is the rule against third-party standing that generally requires the plaintiff to assert her own rights and not the rights of a third party.<sup>106</sup>

The Supreme Court has established a specific standing doctrine when the plaintiff seeks injunctive relief. In *City of Los Angeles v. Lyons*,<sup>107</sup> a § 1983 action, the plaintiff sought both damages for a chokehold applied by a police officer during a traffic stop and a permanent injunction against the City of Los Angeles to ban its police officers from using chokeholds on him or others unless the officer is threatened with serious harm.<sup>108</sup> The Court determined that the plaintiff had standing for his request for damages from the chokehold during the traffic stop, but did not have standing to seek prospective injunctive relief.<sup>109</sup>

To establish standing for prospective relief, the Court declared that Lyons must demonstrate a realistic probability that he will again be subjected to the same injurious conduct.<sup>110</sup> The Supreme Court held that standing for injunctive relief depended on whether police officers were likely to use a chokehold on Lyons in the future.<sup>111</sup> The fact that

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104. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004).

105. See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth v. Seldin*, 422 U.S. 490, 498–500 (1975). *Accord* *Daimler Chrysler Corp. v. Cuno*, 126 S. Ct. 1854, 1861 (2006).

106. See Erwin Chemerinsky, *Federal Jurisdiction*, § 2.3.4 (5th ed. 2007). Exceptions to the rule against third-party standing allow a party to assert the rights of a third party when the rights of the litigant before the court and the rights of the third party are closely related (e.g., physician and patient) or where an obstacle prevents the third party from asserting her own claim. *Singleton v. Wulff*, 428 U.S. 106, 113–16 (1976).

107. *City of L.A. v. Lyons*, 461 U.S. 95, 101–02 (1983).

108. *Id.* at 98.

109. *Id.* at 113.

110. *Id.* at 101–02.

111. *Id.* at 105.

III. Section 1983 Plaintiffs

the officers had used a chokehold on Lyons and others in the past was not dispositive of whether there was a sufficient probability that Lyons would be subjected to it in the future.<sup>112</sup> Nor was Lyons' subjective fear that he would again be choked without justification sufficient to confer standing.<sup>113</sup> For the Court, speculation or conjecture that officers might subject the plaintiff to the chokehold in the future did not demonstrate "any real or immediate threat that the plaintiff [would] be wronged again."<sup>114</sup> Furthermore, the Court explained that the plaintiff could litigate the legality of the challenged conduct on his claim for damages. Thus, the Court discerned an adequate remedy at law.<sup>115</sup>

The Court explained that to establish standing to seek injunctive relief, Lyons would have had not only to allege that he would have another encounter with the police, but also to make the incredible assertion either that "all police offices in Los Angeles *always* choke any citizen with whom they happen to have an encounter" or that "the City ordered or authorized police officers to act in such manner."<sup>116</sup> Because Lyons did not demonstrate a sufficient likelihood that he would again be subjected to the chokehold, the Court determined that he lacked standing to seek prospective relief.

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112. *Id.*

113. *Id.* at 98.

114. *Id.* at 111. The Court relied on its prior decisions in *O'Shea v. Littleton*, 414 U.S. 488 (1974), and *Rizzo v. Goode*, 423 U.S. 362 (1976).

115. *Lyons*, 461 U.S. at 111.

116. *Id.* at 105, 106.

## IV. Constitutional Rights Enforceable Under § 1983

### A. Generally

Plaintiffs may enforce a wide range of federal constitutional rights under § 1983 against defendants who acted under color of state law.<sup>117</sup> The Fourteenth Amendment creates numerous rights enforceable under § 1983, namely substantive and procedural due process, the equal protection of the laws, and those rights from the Bill of Rights incorporated by the Due Process Clause of the Fourteenth Amendment. These incorporated rights include rights protected by the First Amendment free speech and religion clauses (the free exercise and establishment clauses), the Fourth Amendment protection against unreasonable searches and seizures, and the Eighth Amendment protection against cruel and unusual punishment.

Section 1983 also safeguards some other constitutional rights. In *Dennis v. Higgins*,<sup>118</sup> the Supreme Court held that the Dormant Commerce Clause, also referred to as the “negative implications” of the Commerce Clause, which imposes constitutional limitations on the power of the states to regulate interstate commerce, is enforceable under § 1983.<sup>119</sup> The Court in *Dennis* made clear that § 1983 is not limited to the enforcement of Fourteenth Amendment rights. In *Golden State Transit Corp. v. City of Los Angeles*,<sup>120</sup> however, the Supreme Court held that the Supremacy Clause does not create rights that are enforceable under § 1983. Rather, the Supremacy Clause dictates that state and local laws in conflict with federal statutes are unenforceable.<sup>121</sup> When state action is alleged to violate a federal statute, the pertinent issue is whether the particular federal statutory provision creates rights enforceable under § 1983.<sup>122</sup>

Whether the plaintiff has alleged a proper constitutional claim under § 1983 depends on the meaning of the particular constitutional

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117. See *infra* Part V.

118. 498 U.S. 439 (1991).

119. *Id.* at 446–47.

120. 493 U.S. 103 (1989).

121. *Id.* at 107.

122. See *infra* Part V.

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provision at issue, not on an interpretation of § 1983. For example, in *Graham v. Connor*,<sup>123</sup> the Supreme Court held that claims of excessive force during an arrest, investigatory stop, or other seizure are evaluated under a Fourth Amendment objective reasonableness standard.<sup>124</sup> The Court in *Graham* rejected the existence of “a generic ‘right’ to be free from excessive force, grounded . . . in ‘basic principles of § 1983 jurisprudence.’”<sup>125</sup> “In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force.”<sup>126</sup> Federal § 1983 complaints also frequently assert Fourth Amendment challenges to warrantless arrests. The key issue in these cases is whether the arresting officer had probable cause to arrest.<sup>127</sup> Large numbers of § 1983 complaints allege free speech retaliation claims. These claims frequently give rise to difficult legal issues and sharply contested factual issues.<sup>128</sup> The majority of these claims are asserted by present and former public employees. First Amendment retaliation claims are also asserted by government contractors, individuals subject to criminal prosecution, prisoners, and landowners, among others. The key issues in these cases are whether the plaintiff’s speech was pursuant to her official duties; whether the plaintiff spoke out on a matter of public concern; whether the defendant took adverse action against the plaintiff

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123. 490 U.S. 386 (1989).

124. The Court in *Graham* held that “all claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest . . . should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.” *Graham*, 490 U.S. at 395. See also *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (deadly force); *Graham*, 490 U.S. at 396–97. Fourth Amendment excessive force claims are subject to qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 203 (2001) (see *infra* Part XV).

125. *Graham*, 490 U.S. at 393.

126. *Id.* at 394. Excessive force claims asserted by convicted prisoners are governed by the Eighth Amendment prohibition against cruel and unusual punishment. To establish an Eighth Amendment violation, the plaintiff must show that the force was applied “maliciously and sadistically to cause harm” rather than “in a good-faith effort to maintain or restore discipline.” *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992); *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986). Excessive force claims asserted by pretrial detainees are governed by the due process prohibition against the infliction of “punishment” on pretrial detainees. See generally *Bell v. Wolfish*, 441 U.S. 520, 535 (1979), discussed *infra* Part IV.E.3.

127. See *infra* Part IV.F.

128. See 1 Schwartz, *supra* note 100, § 3.12.

for engaging in protected speech; and whether the governmental interest outweighs the plaintiff's free speech interests.<sup>129</sup>

An allegation of a conspiracy does not itself state a claim for relief under § 1983; the plaintiff must also allege a constitutional deprivation.<sup>130</sup> In other words, without a deprivation of a constitutional right, conspiracy allegations do not give rise to a § 1983 claim.

State law rights are not enforceable under § 1983.<sup>131</sup> When governmental conduct is not proscribed by a textually explicit provision of the Bill of Rights, the Supreme Court has generally rejected substantive due process protections and left the plaintiff to available state tort remedies.<sup>132</sup> For example, in *Estelle v. Gamble*,<sup>133</sup> the Supreme Court held that “[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner.” In *Baker v. McCollan*,<sup>134</sup> the Court held that “[f]alse imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.”<sup>135</sup> Similarly, in *Paul v. Davis*,<sup>136</sup> the Court held that defama-

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129. *Id.*

130. *Thore v. Howe*, 466 F.3d 173, 179 (1st Cir. 2006) (complaint must allege a conspiracy to violate a constitutional right); *Cefau v. Village of Elk Grove*, 211 F.3d 416, 423 (7th Cir. 2000); *Young v. County of Fulton*, 160 F.3d 899, 904 (2d Cir. 1998).

131. *See, e.g.*, *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Voyticky v. Village of Timberlake*, 412 F.3d 669, 678 (6th Cir. 2005) (intentional infliction of emotional distress does not itself give rise to § 1983 constitutional claim). Violations of state constitutional rights are not enforceable under § 1983. *See, e.g.*, *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 314 (6th Cir. 2005) (“[A] claimed violation of a state constitutional right is not cognizable under § 1983.”); *Bookman v. Shubzda*, 945 F. Supp. 999, 1009 (N.D. Tex. 1996).

132. *See, e.g.*, *Collins v. City of Harker Heights*, 503 U.S. 115, 129–30 (1992) (safe working conditions); *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 201–02 (1989) (protection of children from parental abuse); *Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (defamation). The Supreme Court recognized substantive due process protection in high-speed police pursuit cases, but imposed a very demanding burden on plaintiffs. *See County of Sacramento v. Lewis*, 523 U.S. 833, 853–54 (1998) (passengers killed or injured as result of high-speed police pursuit may assert substantive due process claim under “shocks-the-conscience standard” and must show pursuing officer acted with intent to cause harm).

133. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976).

134. 443 U.S. 137 (1979).

135. *Id.* at 146.

136. 424 U.S. 693 (1976).

IV. Constitutional Rights Enforceable Under § 1983

tion by a government official does not itself violate the Constitution.<sup>137</sup> It stated that § 1983 is not a “font of tort law to be superimposed upon whatever systems may already be administered by the States.”<sup>138</sup>

In *Collins v. City of Harker Heights*,<sup>139</sup> the Supreme Court held that a claim that the city breached its duty of care to its employees by failing to provide a safe working environment was “analogous to a fairly typical state law tort claim” and was not cognizable under § 1983.<sup>140</sup> The Court stated:

Because the Due Process Clause “does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society” . . . we [reject] claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.<sup>141</sup>

In some cases, however, state law may have a significant, even decisive, impact on a federal constitutional right. Whether the plaintiff has a protected property interest for the purpose of the Due Process Clause of the Fourteenth Amendment depends on whether state law creates a reasonable expectation in the particular interest. In *Board of Regents v. Roth*,<sup>142</sup> the Supreme Court held that “[p]roperty interests . . . are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.”<sup>143</sup> Further, when the deprivation of property or liberty results from “random and unauthorized” governmental action, the availability of an adequate state post-deprivation remedy will satisfy procedural due process.<sup>144</sup>

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137. *Id.* at 711–12.

138. *Id.* at 701.

139. 503 U.S. 115, 128 (1992).

140. *Id.* at 128–30.

141. *Id.* at 128 (citing *Daniels v. Williams*, 474 U.S. 327, 332–33 (1986); *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis*, 424 U.S. 693, 701 (1976)).

142. 408 U.S. 564 (1972).

143. *Id.* at 577.

144. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Parratt v. Taylor*, 451 U.S. 527, 538 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). *See also Zinermon v. Burch*, 494 U.S. 113, 129–38 (1990) (demonstrating the difficulty of determin-

### *B. Selected Constitutional Rights: Due Process*

The Due Process Clause of the Fourteenth Amendment encompasses three kinds of federal claims enforceable through 42 U.S.C. § 1983: (1) claims for the deprivation of those rights in the Bill of Rights made applicable to the states through incorporation; (2) claims under the substantive component of the Due Process Clause “that bars certain arbitrary, wrongful government actions, ‘regardless of the fairness of the procedures used to implement them’”;<sup>145</sup> and (3) claims under the procedural component of the Due Process Clause that prohibits the deprivation of life, liberty, or property without fair procedure.<sup>146</sup>

When a plaintiff asserts a violation of an incorporated right or a right protected under the substantive component of the Due Process Clause, the violation is complete at the time of the challenged conduct, and the § 1983 remedy is available, regardless of remedies provided under state law.<sup>147</sup> In contrast, when the plaintiff asserts a violation of procedural due process, an available state remedy may provide adequate process.

### *C. Procedural Due Process*

A § 1983 claim based on denial of procedural due process challenges the constitutional adequacy of state law procedural protections accompanying an alleged deprivation of a constitutionally protected interest in life, liberty, or property. The deprivation of life, liberty, or property alone is a necessary, but not sufficient, condition; to be actionable, the deprivation must have been without adequate process.

#### 1. Two-Step Approach

A procedural due process analysis addresses two questions. The “first asks whether there exists a [life,] liberty or property interest which has been interfered with by the state; the second examines whether the procedures attendant upon that deprivation were constitutionally suffi-

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ing whether conduct was “random and unauthorized”; the majority held that the conduct was not random and unauthorized, but four justices dissented).

145. *Zinerman*, 494 U.S. at 125 (quoting *Daniels*, 474 U.S. at 331).

146. *Id.*

147. *Id.*

cient.”<sup>148</sup> A court encountering a procedural due process claim must first determine whether the plaintiff has been deprived of a life, liberty, or property interest that is constitutionally protected as a matter of substantive law.<sup>149</sup> While liberty interests may be derived directly from the Due Process Clause of the Constitution<sup>150</sup> or be created by state law,<sup>151</sup> property interests “are created from an independent source such as state law.”<sup>152</sup>

## 2. Property

In *Board of Regents v. Roth*,<sup>153</sup> the Supreme Court provided the following guidance for determining when a party has a property interest safeguarded by procedural due process:

To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

...

Property interests . . . are not created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>154</sup>

An individual has a “legitimate claim of entitlement” to a government dispensed commodity when the state establishes fairly objective stan-

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148. *Ky. Dep’t of Corr. v. Thompson*, 490 U.S. 454, 460 (1989) (citations omitted).

149. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). *See, e.g.*, *Paul v. Davis*, 424 U.S. 693, 712 (1976) (holding that “the interest in reputation asserted in this case is neither ‘liberty’ nor ‘property’ guaranteed against state deprivation without due process of law”).

150. *See, e.g.*, *Washington v. Harper*, 494 U.S. 210, 221–22 (1990) (Due Process Clause confers on prisoners a liberty interest in being free from involuntary administration of psychotropic drugs); *Vitek v. Jones*, 445 U.S. 480, 493–94 (1980) (Due Process Clause confers on prisoners a liberty interest in not being involuntarily committed to a state mental hospital).

151. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (state law created a liberty interest in a “shortened prison sentence” that resulted from good time credits).

152. *Cleveland Bd. of Educ.*, 470 U.S. at 538 (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

153. 408 U.S. 564 (1972).

154. *Id.* at 577.

dards of eligibility for receiving the commodity. The Supreme Court has found protected property interests in a variety of government dispensed commodities made available to those who satisfy objective eligibility standards, including public assistance,<sup>155</sup> Social Security disability benefits,<sup>156</sup> driver's licenses,<sup>157</sup> public school education,<sup>158</sup> municipal furnished utility services,<sup>159</sup> and public employment.<sup>160</sup> On the other hand, the Supreme Court held that there was no property interest in police enforcement of a domestic abuse restraining order, even though the order and a state statute were couched in mandatory terms requiring police enforcement. The Court determined that the mandatory language had to be read together with the tradition of broad discretion afforded law enforcement officers.<sup>161</sup> In addition, except in the area of public employment, federal courts have been reluctant to find that a private party's contract with a state or municipality creates a protected property interest, because doing so runs the risk that routine breach-of-contract claims could be converted into § 1983 due process claims.<sup>162</sup>

### 3. Liberty: Prisoners' Rights Cases

Prisoners' rights cases frequently require a determination of whether the plaintiff has suffered a deprivation of liberty. In *Sandin v. Conner*,<sup>163</sup>

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155. *Goldberg v. Kelly*, 397 U.S. 254, 264 (1970).

156. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

157. *Bell v. Burson*, 402 U.S. 535, 539 (1971).

158. *Goss v. Lopez*, 419 U.S. 565, 573–74 (1975).

159. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 11 (1978).

160. *See, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538–39 (1985).

161. *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805–06 (2005).

162. *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 196 (2001) (breach of contract by state did not give rise to procedural due process claim because state law provided “ordinary breach-of-contract suit”); *Ramirez v. Arlequin*, 447 F.3d 19, 25 (1st Cir. 2006) (claim of breach of contract by state actor, without allegation state would refuse to remedy breach, does not state procedural due process claim); *Redondo-Borges v. United States Dep’t of Hous. & Urban Dev.*, 421 F.3d 1, 6–7 (1st Cir. 2005); *Dover Elevator Co. v. Ark. State Univ.*, 64 F.3d 442, 446 (8th Cir. 1995) (“It is well established that ‘a simple breach of contract does not give rise to the level of a constitutional deprivation.’” (quoting *Med. Laundry Servs. v. Bd. of Trs. of Univ. of Ala.*, 906 F.2d 571, 573 (11th Cir. 1990))); *Gannett Fleming W., Inc. v. Vill. of Angel Fire*, 375 F. Supp. 2d 1104, 1108 (D.N.M. 2004); *Bock Assocs. v. Chronister*, 951 F. Supp. 969, 975 (D. Kan. 1996).

163. 515 U.S. 472 (1995).

an inmate placed in disciplinary segregation for thirty days asserted a violation of procedural due process. The Supreme Court held that, despite the mandatory language of the applicable prison regulation, a prisoner's constitutionally protected liberty interest will generally be "limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."<sup>164</sup> Under *Sandin*, mandatory language of a state prison regulation is still a necessary, but no longer a sufficient, prerequisite for finding a liberty interest.<sup>165</sup> Courts must also look to the substance of the deprivation and assess the hardship imposed on the inmate relative to the ordinary incidents of prison life.<sup>166</sup>

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164. *Id.* at 484.

165. Prior to *Sandin v. Conner*, the Supreme Court held that convicted prisoners have a liberty interest in parole release only if a state statute or regulation creates a reasonable expectation, rather than a mere possibility, of being granted parole. *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 11–12 (1979). The Court in *Greenholtz* found that Nebraska's statutory parole "shall" release "unless" scheme created a protected liberty interest.

166. *See, e.g.*, *Hanrahan v. Doling*, 331 F.3d 93 (2d Cir. 2003) (120 months solitary confinement is deprivation of liberty); *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999) (deprivation of yard time to inmate in solitary confinement is atypical and significant hardship); *Jones v. Baker*, 71 F.3d 192 (5th Cir. 1995) (two and one-half years administrative segregation for prisoner implicated in killing of prison guard during prison riot was not "atypical and significant hardship"), *cert. denied*, 517 U.S. 1196 (1996); *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997) ("Exposure to the conditions of administrative custody for periods as long as 15 months 'falls within the expected parameters of the sentence imposed [on him] by a court of law.'"); *Brooks v. DiFasi*, 112 F.3d 46, 49 (2d Cir. 1997) ("After *Sandin*, in order to determine whether a prisoner has a liberty interest in avoiding disciplinary confinement, a court must examine the specific circumstances of the punishment."); *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997) ("*Sandin* did not create a per se blanket rule that disciplinary confinement may never implicate a liberty interest. Courts of appeals in other circuits have apparently come to the same conclusion, recognizing that district courts must examine the circumstances of a confinement to determine whether that confinement affected a liberty interest."); *Dominique v. Weld*, 73 F.3d 1156, 1160 (1st Cir. 1996) (finding no liberty interest in work release status); *Bulger v. United States Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (holding no liberty interest in job assignment); *Orellana v. Kyle*, 65 F.3d 29, 31–32 (5th Cir. 1995) (suggesting that only deprivations "that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status"), *cert. denied*, 516 U.S. 1059 (1996); *Whitford v. Boglino*, 63 F.3d 527, 533 (7th Cir. 1995) (observing that "[t]he holding in *Sandin* implies that states may grant prisoners liberty interests in being in the general population only if the conditions of confinement in segregation are significantly more restrictive than those in the general population").

Courts normally decide whether the discipline imposed “atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life” as a matter of law. The Second Circuit, however, recognizes that the issue can involve factual determinations.<sup>167</sup> But even when there are factual issues, “the ultimate issue of atypicality is one of law.”<sup>168</sup>

*Sandin* did not disturb *Wolff v. McDonnell*,<sup>169</sup> which held that a state may create a liberty interest on the part of inmates in the accumulation of good-conduct time credits.<sup>170</sup> Thus, if disciplinary action would inevitably affect the duration of the inmate’s confinement, a liberty interest would be recognized under *Wolff*.<sup>171</sup> Likewise, prisoners’ claims not based on procedural due process, such as First Amendment retaliatory transfer or retaliatory discipline claims, are not affected by *Sandin*.<sup>172</sup>

In *Wilkinson v. Austin*,<sup>173</sup> the Supreme Court acknowledged that “[i]n *Sandin*’s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.”<sup>174</sup> The Court

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167. *Teller v. Fields*, 280 F.3d 69, 80 (2d Cir. 2000).

168. *Sealey v. Giltner*, 197 F.3d 578, 585 (2d Cir. 1999).

169. 418 U.S. 539 (1974).

170. *Id.* at 557. *See* *Madison v. Parker*, 104 F.3d 765, 769 (5th Cir. 1997). Before being deprived of good time credits, an inmate must be afforded (1) twenty-four-hour advance written notice of the alleged violations; (2) the opportunity to be heard before an impartial decision maker; (3) the opportunity to call witnesses and present documentary evidence (when such presentation is consistent with institutional safety); and (4) a written decision by the fact finder stating the evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563–71.

171. *See, e.g., Whitford v. Boglino*, 63 F.3d 527, 532 n.5 (7th Cir. 1995). Note, however, that “the mere opportunity to earn good-time credits” has been held not to “constitute a constitutionally cognizable liberty interest sufficient to trigger the protection of the Due Process Clause.” *Luken v. Scott*, 71 F.3d 192, 193–94 (5th Cir. 1995) (per curiam).

172. *See, e.g., Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997); *Cornell v. Woods*, 69 F.3d 1383, 1388 n.4 (8th Cir. 1995); *Pratt v. Rowland*, 65 F.3d 802, 806–07 (9th Cir. 1995). A unanimous Court held that Oklahoma’s Preparole Conditional Supervision Program, “a program employed by the State of Oklahoma to reduce the overcrowding of its prisons[,] was sufficiently like parole that a person in the program was entitled to the procedural protections set forth in *Morrissey v. Brewer*, 408 U.S. 471 . . . (1972), before he could be removed from it.” *Young v. Harper*, 520 U.S. 143, 144–45 (1997).

173. 545 U.S. 209 (2005).

174. *Id.* at 223.

found it unnecessary to resolve that issue because it found that placement of the plaintiff prisoner in a “supermax facility” imposed “atypical and significant hardship under any plausible baseline.”<sup>175</sup>

#### 4. Liberty: Defamation

In *Paul v. Davis*,<sup>176</sup> the Supreme Court held that mere government injury to an individual’s reputation is not a deprivation of liberty. The Court stated, however, that a deprivation of liberty arises if the injury to reputation occurs in conjunction with the deprivation of some tangible interest, even if the tangible interest is not itself a protected property interest, such as “at will” public employment.<sup>177</sup> This has come to be known as the “stigma-plus” doctrine. In other words, to establish a deprivation of liberty, the plaintiff must demonstrate government publication of the stigma in conjunction with the deprivation of a tangible interest.

#### 5. Procedural Safeguards: The *Parratt–Hudson* Doctrine

Once a protected interest has been identified, a court must examine the process that accompanies the deprivation of that protected interest and decide whether the procedural safeguards built into the process are constitutionally adequate.<sup>178</sup> The issue of which procedural safeguards must accompany a state’s deprivation of a constitutionally protected interest is a matter of federal law.<sup>179</sup>

When the procedural due process claim contests the adequacy of notice, the court must determine whether the § 1983 plaintiff was given

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175. *Id.*

176. 424 U.S. 693 (1976).

177. The Court in *Davis*, 424 U.S. at 709, cited *Board of Regents v. Roth*, 408 U.S. 564 (1972), to illustrate this point. *See, e.g., Patterson v. City of Utica*, 370 F.3d 322, 330 (2d Cir. 2004) (“In order to fulfill the requirements of a stigma-plus claim arising from the termination from government employment, a plaintiff must first show that the government made stigmatizing statements about him—statements that call into question plaintiff’s good name, reputation, honor, or integrity. Statements that denigrate the employee’s competence as a professional and impugn the employee’s professional reputation in such a fashion as to effectively put a significant roadblock in that employee’s continued ability to practice his or her profession may also fulfill this requirement. A plaintiff generally is required only to raise the falsity of these stigmatizing statements as an issue, not prove they are false.” (internal quotation marks, citations, and footnotes omitted)).

178. *Zinermon v. Burch*, 494 U.S. 113, 126 (1990).

179. *Vitek v. Jones*, 445 U.S. 480, 491 (1980).

“notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the [proceeding] and afford them an opportunity to present their objections.”<sup>180</sup> When the procedural due process claim concerns some aspect of the opportunity to be heard, the courts employ the *Mathews v. Eldridge*<sup>181</sup> balancing formula to determine the procedures required by the Due Process Clause.

In *Mathews*, the Court set forth three competing factors to be weighed in determining the sufficiency of procedural safeguards accompanying deprivations caused by the government:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.<sup>182</sup>

Federal courts normally determine the procedures required by *Mathews* balancing as a matter of law. Generally, due process requires some notice and an opportunity to be heard *prior* to the deprivation of a protected interest.<sup>183</sup> In certain cases, however, a post-deprivation remedy is adequate. For example, the Supreme Court held that a state

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180. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See *Jones v. Flowers*, 126 S. Ct. 1708 (2006); *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988); *Menonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983); *Greene v. Lindsey*, 456 U.S. 444 (1982); *Armstrong v. Manzo*, 380 U.S. 545 (1965).

181. 424 U.S. 319 (1976).

182. *Id.* at 335. See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 228 (2005) (applying *Mathews* balancing formula, Court found Ohio’s procedures for placement of prisoners in supermax facility satisfied procedural due process because inmate was guaranteed multiple levels of review, notice of factual basis for placement, and fair opportunity for rebuttal; given strong security interest in prison security, fact Ohio did not allow inmate to call witnesses “or provide other attributes of an adversary hearing” did not violate procedural due process because to do so might jeopardize control of the prisoner and the prison); *Washington v. Harper*, 494 U.S. 210, 229–33 (1990) (mentally ill state prisoner challenged the prison’s administering antipsychotic drugs to him against his will without a judicial hearing to determine the appropriateness of such treatment, and prison policy required the treatment decision to be made by a hearing committee consisting of a psychiatrist, psychologist, and the prison facility’s associate superintendent; Court applied the *Mathews* balancing test and found the established procedure constitutionally sufficient).

183. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985).

did not violate the Due Process Clause of the Fourteenth Amendment by failing to provide notice and a hearing before suspending without pay a university police officer who had been arrested and charged with drug possession.<sup>184</sup> The arrest and the filing of the charges by a third party, and the employer's need to expeditiously dismiss employees in a position of "great public trust," strongly weighed against granting a predeprivation hearing.<sup>185</sup>

A due process claim may be based on a deprivation of life, liberty, or property by state officials acting pursuant to an established state procedure that failed to provide for predeprivation process.<sup>186</sup> In this situation, procedural due process generally requires a predeprivation hearing if the challenged conduct was "authorized," the erroneous deprivation foreseeable, and predeprivation process was practicable.<sup>187</sup>

In contrast, under the *Parratt-Hudson* doctrine,<sup>188</sup> there is no procedural due process violation where the deprivation was unforeseeable, random, and unauthorized, and where the state provided an adequate postdeprivation remedy.<sup>189</sup> This doctrine represents a "special case of the general *Mathews* analysis, in which post-deprivation tort remedies are all the process that is due, simply because they are the only remedies that the state could be expected to provide."<sup>190</sup> The value of a pre-

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184. *Gilbert v. Homar*, 520 U.S. 924 (1997).

185. *Id.* at 932.

186. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435–36 (1982).

187. *Zinerman v. Burch*, 494 U.S. 113, 136 (1990). A strong state interest in acting quickly may justify dispensing with predeprivation process, in which case a post-deprivation opportunity to be heard will satisfy procedural due process. *See Gilbert v. Homar*, 520 U.S. 924, 930 (1997); *Barry v. Barchi*, 443 U.S. 55, 64–65 (1979).

188. *Hudson v. Palmer*, 468 U.S. 517, 531–33 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543 (1981), *overruled in part*, *Daniels v. Williams*, 474 U.S. 327 (1986). In *Daniels*, the Court overruled *Parratt* to the extent that the *Parratt* case had held that a deprivation within the meaning of the Fourteenth Amendment Due Process Clause could be effected by mere negligent conduct. *Daniels*, 474 U.S. at 330–31.

189. *Compare, e.g., Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 536–37 (1st Cir. 1995) (concluding that officials' failure to adhere to sex education policy was "random and unauthorized" within meaning of *Parratt-Hudson* doctrine), *cert. denied*, 516 U.S. 1159 (1996), *with Alexander v. Ieyoub*, 62 F.3d 709, 712 (5th Cir. 1995) (finding that defendants' conduct—delaying forfeiture proceeding for nearly three years—was authorized under state law where defendants had discretion to institute proceedings whenever they wanted).

190. *Zinerman*, 494 U.S. at 128.

deprivation procedural safeguard for unforeseeable conduct is “negligible” in preventing the deprivation.<sup>191</sup>

It is not always easy to determine whether official action is “random and unauthorized.” In *Zinerman v. Burch*,<sup>192</sup> the plaintiff, Darrell Burch, was admitted to a state mental hospital as a “voluntary” patient under circumstances that clearly indicated he was incapable of informed consent. Burch alleged that his five-month hospitalization deprived him of liberty without due process of law. In holding that Burch’s complaint did not allege random and unauthorized conduct, and was sufficient to state a procedural due process claim, the Supreme Court stated:

Burch’s suit is neither an action challenging the facial adequacy of a State’s statutory procedures, nor an action based only on state officials’ random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.<sup>193</sup>

#### D. Substantive Due Process Claims

The protections afforded by the substantive component of the Due Process Clause have generally been limited to “matters relating to marriage, family, procreation, and the right to bodily integrity.”<sup>194</sup> Noting that “the guideposts for responsible decisionmaking in this [uncharted] area [of substantive due process] are scarce and open-ended,”<sup>195</sup> the Supreme Court has in recent years expressed a reluctance to expand the scope of substantive due process protection.<sup>196</sup> Whenever “an ex-

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191. *Id.* at 129.

192. 494 U.S. 113 (1990). *Zinerman* has been interpreted as creating a category of procedural due process claims that falls outside “two clearly delineated categories; those involving a direct challenge to an established state procedure or those challenging random and unauthorized acts.” *Mertik v. Blalock*, 983 F.2d 1353, 1365 (6th Cir. 1993).

193. *Zinerman*, 494 U.S. at 136.

194. *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (plurality opinion).

195. *Id.* (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

196. See *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); *Albright*, 510 U.S. at 271; *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992). *But see* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (holding Due Process Clause prohibits state from imposing “grossly excessive” punishment on tortfeasor).

plicit textual source of constitutional protection” addresses particular governmental behavior, courts must rely on the more explicit source of protection to analyze the claim, rather than the amorphous and open-ended concept of substantive due process.<sup>197</sup> However, substantive due process may provide protection when egregious governmental conduct is not forbidden by any of the explicit provisions of the Bill of Rights. For example, substantive due process protects individuals who have been subjected to excessive force in a nonseizure, nonprisoner context because neither the Fourth nor Eighth Amendment applies.<sup>198</sup>

#### 1. Shocks the Conscience

The Supreme Court, in *County of Sacramento v. Lewis*,<sup>199</sup> ruled that the substantive due process standard depends on whether the plaintiff is challenging legislative action or executive action and, if the challenge is to executive action, the type of executive action. When the challenge is to legislative action and the legislative policy does not infringe upon a fundamental constitutional right, the test is whether the legislative policy is reasonably related to a legitimate governmental interest.<sup>200</sup> When, as in *County of Sacramento*, the challenge is to executive action, the question is whether the government action is shocking to the judicial conscience.<sup>201</sup>

The Court in *County of Sacramento* divided executive actions into two categories. When the executive official had time to deliberate, but the official was nevertheless deliberately indifferent, the deliberate indifference shocks the conscience and violates substantive due proc-

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197. *Albright*, 510 U.S. at 273 (citing *Graham v. Connor*, 490 U.S. 386, 395 (1989)); accord *County of Sacramento*, 523 U.S. at 843.

198. See *County of Sacramento*, 523 U.S. at 843 (stating “[s]ubstantive due process analysis is therefore inappropriate . . . only if [the] claim is ‘covered by’ the Fourth Amendment”).

199. 523 U.S. 833 (1998).

200. The Court in *County of Sacramento* cited, as an example of a substantive due process challenge to a state legislative policy, the decision in *Washington v. Glucksberg*, 521 U.S. 702 (1997) (rejecting substantive due process challenge to state criminalization of physician assisted suicide).

201. See also *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

ess.<sup>202</sup> On the other hand, when executive officers did not have time to deliberate, their actions shock the conscience only if they acted with a purpose to cause harm that is unrelated to a legitimate law enforcement interest. The officers in *County of Sacramento* were involved in a high-speed police pursuit and did not have a realistic opportunity to deliberate. The Court held that their actions did not violate substantive due process because they did not act with a purpose to cause harm unrelated to a legitimate law enforcement interest.

In some cases the district judge may be able to decide that, as a matter of law, the contested conduct does not violate substantive due process because a reasonable jury could not find that the conduct shocks the conscience.<sup>203</sup> In *County of Sacramento*, the Court held that the complaint allegations did not state a substantive due process claim. However, in cases where the complaint allegations satisfy the shock-the-conscience standard, and the evidence allows a reasonable jury to find that the contested conduct was conscience shocking, the issue should be submitted to the jury under instructions incorporating the *County of Sacramento* standards.

## 2. Professional Judgment

The courts have applied a “professional judgment” standard to certain substantive due process claims. The Supreme Court articulated this standard in *Youngberg v. Romeo*,<sup>204</sup> holding that state officials are liable for treatment decisions concerning involuntarily committed mental patients only if the officials’ decisions were “such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the deci-

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202. The Court said that the provision of medical care to detainees was an example of executive action with time to deliberate. *County of Sacramento*, 523 U.S. at 834 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)).

203. See, e.g., *McConkie v. Nichols*, 446 F.3d 258 (1st Cir. 2006) (affirming district court’s grant of summary judgment to defendant on substantive due process claim on ground no reasonable juror could find defendant’s conduct conscience shocking); *Moore v. Nelson*, 394 F. Supp. 2d 1365, 1368–69 (M.D. Ga. 2005) (Plaintiff’s evidence did not create genuine issue of material fact as to whether defendants’ conduct shocked the conscience: “From the evidence before the Court, no reasonable juror could find that Defendants’ conduct violated Plaintiff’s Fourteenth Amendment rights. Therefore, Defendants are entitled to summary judgment on Plaintiff’s § 1983 claim.”).

204. 457 U.S. 307 (1982).

sion on such a judgment.”<sup>205</sup> Some courts have applied the professional judgment standard to due process claims asserted on behalf of involuntarily placed foster children.<sup>206</sup>

### 3. *DeShaney* and Affirmative Duty Cases

In *DeShaney v. Winnebago County Department of Social Services*,<sup>207</sup> the Supreme Court held that the Due Process Clause of the Fourteenth Amendment generally does not create an affirmative duty on the part of the state to “protect the life, liberty, and property of its citizens against invasion by private actors.”<sup>208</sup> The Court concluded that “[a]s a general matter . . . a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”<sup>209</sup> In other words, the Due Process Clause prohibits the state from engaging in certain conduct that deprives individuals of life, liberty, or property, but it does not generally require the state to engage in affirmative actions to protect individuals from being harmed by third parties, even when the state is aware of the risk of harm and may have the ability to prevent it. Thus, the Court in *DeShaney* held that the state did not have a due process duty to protect Joshua DeShaney from being abused by his father, even though the state at one point took Joshua into its custody and state officials were aware of the risk of harm.

However, the Court in *DeShaney* recognized that the state has an affirmative “duty to protect” a person whom the state has incarcerated or involuntarily institutionalized.<sup>210</sup> Plaintiffs who have not been incar-

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205. *Id.* at 323.

206. *See, e.g., Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893–94 (10th Cir. 1992) (adopting professional judgment standard, rather than deliberate indifference, in foster care setting).

207. 489 U.S. 189 (1989).

208. *Id.* at 195.

209. *Id.* at 197. Many readers are no doubt familiar with the tragic facts of *DeShaney*. Joshua, a four-year-old boy, had been repeatedly beaten by his father. The county child protection agency had monitored Joshua’s case through social workers and at one point took custody of him, but failed to protect him from his father’s last beating, which left the child permanently brain damaged. *Id.* at 192–93.

210. *Id.* at 199–200; *see, e.g., Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994) (state has constitutional duty to protect prisoners from attacks by fellow prisoners) (*see infra* Part IV.H); *Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding substantive due process com-

cerated or involuntarily institutionalized may assert substantive due process duty-to-protect claims based on allegations that: (1) the plaintiff was in the “functional custody” of the state when harmed, or (2) the state created or increased the danger to which the plaintiff was exposed.

*a. Functional Custody*

Where the state’s affirmative duty to protect is grounded in the concept of “custody,” a number of courts have taken the position that the plaintiff must have been *involuntarily* in the state’s custody when harmed.<sup>211</sup> In *DeShaney*, the Court acknowledged that a situation where the state removes a child from “free society” and places him or her in a foster home might be “sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect.”<sup>212</sup> The majority of federal circuit courts that have ruled on the issue since *DeShaney* have recognized a constitutional right to protection from unnecessary harm for foster children involuntarily placed by the state in foster care.<sup>213</sup>

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ponent of Fourteenth Amendment Due Process Clause imposes duty on state to provide for safety and medical needs of involuntarily committed mental patients); *Estelle v. Gamble*, 429 U.S. 97 (1976) (state has constitutional duty to provide adequate medical care to incarcerated prisoners).

211. See, e.g., *Walton v. Alexander*, 44 F.3d 1297, 1304 (5th Cir. 1995) (en banc) (“Recurring throughout [the] cases that we have decided since *DeShaney* is the iteration of the principle that if the person claiming the right of state protection is *voluntarily* within the care or custody of a state agency, he has no substantive due process right to the state’s protection from harm inflicted by third party non-state actors. We thus conclude that *DeShaney* stands for the proposition that the state creates a ‘special relationship’ with a person only when the person is involuntarily taken into state custody and held against his will through the affirmative power of the state; otherwise, the state has no duty arising under the Constitution to protect its citizens against harm by private actors.”).

At least one circuit has suggested that the concept of “in custody” for triggering an affirmative duty to protect under *DeShaney* entails more than a “simple criminal arrest.” See *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1175 (7th Cir. 1997) (“The Supreme Court’s express rationale in *DeShaney* for recognizing a constitutional duty does not match the circumstances of a simple criminal arrest. . . . This rationale on its face requires more than a person riding in the back seat of an unlocked police car for a few minutes.”).

212. *DeShaney*, 489 U.S. at 201 n.9.

213. See, e.g., *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (holding that “when the state places a child in state-regulated foster care, the state has entered into a

On the other hand, the circuit courts have consistently rejected arguments that public schoolchildren, by virtue of compulsory attendance laws, are in the “functional custody” of the state during school hours.<sup>214</sup> These courts have held that the state does not have a duty to

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special relationship with that child which imposes upon it certain affirmative duties”); *Camp v. Gregory*, 67 F.3d 1286, 1297 (7th Cir. 1995) (noting that “when a DCFS caseworker places a child in a home knowing that his caretaker cannot provide reasonable supervision, and the failure to provide that degree of supervision and care results in injury to the child outside of the home, it might be appropriate, depending upon the facts culminating in the injury, for the caseworker to be held liable for a deprivation of liberty”); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994) (analogizing state placement of children in foster homes to incarceration and institutionalization); *Norfleet v. Ark. Dep’t of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993) (recognizing that “[c]ases from this and other circuits clearly demonstrate that imprisonment is not the only custodial relationship in which the state must safeguard an individual’s civil rights”); *Yvonne L. v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (holding that children placed in foster homes by the state have “a constitutional right to be safe from harm,” and if the state agents placing them there knew or should have known of danger, they may be liable if harm occurs). *But see D.W. v. Rogers*, 113 F.3d 1214, 1218 (11th Cir. 1997) (holding that “the state’s affirmative obligation to render services to an individual depends not on whether the state has legal custody of that person, but on whether the state has physically confined or restrained the person”); *White v. Chambliss*, 112 F.3d 731, 738 (4th Cir. 1997) (“Given the state of this circuit’s law on the issue and the absence of controlling Supreme Court authority, we cannot say that a right to affirmative state protection for children placed in foster care was clearly established at the time of [child’s] death.”); *Wooten v. Campbell*, 49 F.3d 696, 699–701 (11th Cir. 1995) (finding no “substantive due process right is implicated where a public agency is awarded legal custody of a child, but does not control that child’s physical custody except to arrange court-ordered visitation with the non-custodial parent”).

214. *See, e.g., Hasenfus v. LaJeunesse*, 175 F.3d 68, 73–74 (1st Cir. 1999) (school officials do not have due process duty to protect student from attempting suicide); *Doe v. Hillsboro Indep. Sch. Dist.*, 113 F.3d 1412, 1415 (5th Cir. 1997) (en banc) (joining “every circuit court that has considered the issue [of the ‘duty of school officials to protect students from private actors’] in holding that compulsory school attendance . . . does not create the custodial relationship envisioned by *DeShaney*”); *Doe v. Claiborne County*, 103 F.3d 495, 510 (6th Cir. 1996) (holding that school’s “in loco parentis status or a state’s compulsory attendance laws do not sufficiently ‘restrain’ students to raise a school’s common-law obligation to the rank of a constitutional duty”); *Nabozny v. Podlesny*, 92 F.3d 446, 458–59 (7th Cir. 1996) (concluding that “local school administrations have no affirmative substantive due process duty to protect students [from ‘the risk of bodily harm’ at the hands of third parties]”); *Walton v. Alexander*, 44 F.3d 1297, 1305 (5th Cir. 1995) (en banc) (holding that, where attendance at boarding school was not coerced by the state and there was a right to leave at will, child’s “status as a resident student [did not place] him within the narrow class of persons who are entitled to claim from the state a

protect students from harm inflicted by fellow students or other private actors.<sup>215</sup> The dominant rationale of these decisions is that even while in public school, the student remains in her parents' custody. Courts have likewise rejected the notion that individuals in public housing<sup>216</sup> or employees of a public entity<sup>217</sup> are in the "functional custody" of the state and thus owed an affirmative duty of protection. In *Collins v. City of Harker Heights*,<sup>218</sup> the Supreme Court unanimously held that "the Due Process Clause does not impose an independent federal obligation

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constitutional duty of protection from harm at the hands of private parties"); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir. 1994) (stating that "[t]o date, every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional duty to protect students from harm by non-state actors has rejected the existence of any such duty" (citations omitted)); *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1371–72 (3d Cir. 1992) (en banc) (state did not have due process duty to protect female students from molestation by male students); *J.O. v. Alton Sch. Dist.*, 909 F.2d 267, 272–73 (7th Cir. 1990) (holding that the state does not have a due process duty to protect public school students, as it does with mental patients and prisoners); see also *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (1995) ("While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional 'duty to protect,' we have acknowledged that for many purposes 'school authorities act *in loco parentis*,' with the power and indeed the duty to 'inculcate the habits and manners of civility.'" (citations omitted)).

215. Schoolchildren have a liberty interest in their bodily integrity that is protected by the Due Process Clause against deprivation by the state. See *Ingraham v. Wright*, 430 U.S. 651, 673–74 (1977). Therefore, *DeShaney* does not apply where the alleged harm is attributed to a state actor, generally a teacher or other school official. See, e.g., *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 724 (3d Cir. 1989) (distinguishing this situation from *DeShaney* because the injury here—sexual molestation—resulted from the conduct of a state employee, not a private actor).

216. See, e.g., *Dawson v. Milwaukee Hous. Auth.*, 930 F.2d 1283, 1285 (7th Cir. 1991) (holding that presence in publicly subsidized housing is not the functional equivalent of being "in custody").

217. See, e.g., *Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997) ("[P]rison guards ordered to stay at their posts are not in the kind of custodial setting required to create a special relationship for 14th Amendment substantive due process purposes."); *Liebson v. N.M. Corr. Dep't*, 73 F.3d 274, 276 (10th Cir. 1996) (holding that librarian assigned to provide library services to inmates housed in maximum security unit of state penitentiary was not in state's custody or held against her will; employment relationship was "completely voluntary"); *Lewellen v. Metro. Gov't of Nashville*, 34 F.3d 345, 348–52 (6th Cir. 1994) (workman accidentally injured on school construction project has no substantive due process claim).

218. 503 U.S. 115 (1992).

upon municipalities to provide certain minimal levels of safety and security in the workplace.”<sup>219</sup>

*b. State-Created Danger*

In holding that the state had not deprived Joshua DeShaney of any constitutionally protected rights, the Supreme Court suggested that the result might have been different if the state had played a role in creating the dangers to which Joshua was exposed or if it had increased his vulnerability to these dangers.<sup>220</sup> While *DeShaney* makes clear that the state’s mere awareness of a risk of harm to an individual will not suffice to impose an affirmative duty to provide protection,<sup>221</sup> most circuits hold that if the state creates the danger confronting the individual, it may then have a corresponding duty to protect.<sup>222</sup> Moreover, the Su-

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219. *Id.* at 130. See also *Kaucher v. County of Bucks*, 455 F.3d 418, 424–30 (3d Cir. 2006); *Estate of Phillips v. District of Columbia*, 455 F.3d 397, 406–08 (D.C. Cir. 2006); *Walker v. Rowe*, 791 F.2d 507, 510–11 (7th Cir. 1986).

220. *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 201 (1989).

221. *Id.* at 200 (“The affirmative duty to protect arises not from the State’s knowledge of the individual’s predicament or from its expressions of intent to help him.”). See also *Pinder v. Johnson*, 54 F.3d 1169, 1175 (4th Cir. 1995) (en banc) (“By requiring a custodial context as the condition for an affirmative duty, *DeShaney* rejected the idea that such a duty can arise solely from an official’s awareness of a specific risk or from promises of aid.”).

222. See, e.g., *Breen v. Tex. A&M Univ.*, 485 F.3d 325, 333–37 (5th Cir. 2007) (state-created danger doctrine requires showing defendant created risk of danger and acted with deliberate indifference, and there was “identifiable” victim); *McQueen v. Beecher Cmty. Schs.*, 433 F.3d 460, 464, 469 (6th Cir. 2006) (holding that state-created danger doctrine requires showing of “an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from public at large, and the requisite degree of state culpability”—namely, deliberate indifference, which means “subjective recklessness”); *Pena v. DePrisco*, 432 F.3d 98, 108 (2d Cir. 2005) (adopting state-created danger doctrine); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005) (“Under the state-created danger theory, [plaintiffs] must prove 1) they were members of a limited, precisely definable group, 2) [city’s] conduct put them at significant risk of serious, immediate, and proximate harm, 3) the risk was obvious or known to [city], 4) [city] acted recklessly in conscious disregard of the risk, and 5) in total, Little Rock’s conduct shocks the conscience.”); *Estate of Smith v. Marasco*, 430 F.3d 140, 153 (3d Cir. 2005) (“In order to prevail on a state-created danger claim, a plaintiff must prove ‘(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the [harm] to occur.’” (citation omitted)); *Estate of Amos v. City of*

preme Court's decision in *Collins v. City of Harker Heights*,<sup>223</sup> that there is no substantive due process right to a safe work environment,<sup>224</sup> does not necessarily preclude the imposition of constitutional liability on state officials who deliberately or intentionally place public employees in a dangerous situation without adequate protection.<sup>225</sup>

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Page, 257 F.3d 1086, 1091 (9th Cir. 2001) (“[C]ommon to our cases recognizing a cognizable section 1983 claim under the ‘danger creation’ exception is an *affirmative* act by the police that leaves the plaintiff ‘in a more dangerous position than the one in which they found him.’” (emphasis added)); *Estate of Stevens v. City of Green Bay*, 105 F.3d 1169, 1177 (7th Cir. 1997) (“To recover under this [state-created danger] theory, the estate must demonstrate that the state greatly increased the danger to [victim] while constricting access to self-help; it must cut off all avenues of aid without providing a reasonable alternative. Only then may a constitutional injury have occurred.”); *Seamons v. Snow*, 84 F.3d 1226, 1236 (10th Cir. 1996) (noting that “[i]n addition to the ‘special relationship’ doctrine, we have held that state officials can be liable for the acts of third parties where those officials ‘created the danger’ that caused the harm”); *Pinder v. Johnson*, 54 F.3d 1169, 1177 (4th Cir. 1995) (en banc) (observing that “[w]hen the state itself creates the dangerous situation that resulted in a victim’s injury, the absence of a custodial relationship may not be dispositive”); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993) (holding that “plaintiffs . . . may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been”); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir. 1993) (finding *DeShaney* not controlling where plaintiff alleged that defendant—officers had made demonstrators more vulnerable to assaults); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir. 1990) (noting “[*DeShaney*] analysis establishes the possibility that a constitutional duty to protect an individual against private violence may exist in a non-custodial setting if the state has taken affirmative action which increases the individual’s danger of, or vulnerability to, such violence beyond the level it would have been at absent state action”); *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) (concluding affirmative duty to protect was owed plaintiff by police officer who arrested driver of car in which plaintiff was passenger, impounded the vehicle, and left plaintiff stranded in high-crime area at 2:30 a.m., resulting in rape of plaintiff). The courts of appeals that have adopted the state-created danger doctrine have not agreed about the test that should govern the claim; for a circuit-by-circuit breakdown of state-created danger decisions, see 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 3.09[E] (4th ed. 2004).

223. 503 U.S. 115 (1992).

224. *Id.* at 130.

225. See, e.g., *L.W. v. Grubbs*, 974 F.2d 119, 120–21 (9th Cir. 1992) (concluding that plaintiff, a registered nurse, stated a constitutional claim against defendant-correctional officers, where defendants knew inmate was a violent sex offender, likely to assault plaintiff if alone with her, yet defendants intentionally assigned inmate to work alone with plaintiff in clinic); *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 359 (11th Cir. 1989) (holding that where defendants had put plaintiff, a town clerk, in a “unique position of

*E. Use of Force by Government Officials*

Government officials may be subject to § 1983 lawsuits when they use force to control criminal suspects, pretrial detainees, and convicted prisoners. The source of the right for claims against these officials depends on the plaintiff's status at the time the officials used force: the Fourth Amendment<sup>226</sup> applies to arrestees and other "seized" individuals and prohibits the use of unreasonable force;<sup>227</sup> the Due Process Clause applies to pretrial detainees and protects them against "excessive force that amounts to punishment";<sup>228</sup> and the Eighth Amendment<sup>229</sup> applies to prisoners and prohibits cruel and unusual punishment.<sup>230</sup> Because the Fourth and Eighth Amendment rights have been incorporated by the Due Process Clause of the Fourteenth Amendment, state officials are subject to § 1983 lawsuits under these amendments.

Under the substantive due process component of the Fourteenth Amendment, use-of-force claims are actionable if they constitute a deprivation of "liberty . . . without due process of law."<sup>231</sup> A substantive due process claim challenging the use of force may lie only if neither

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danger" by causing inmates who were inadequately supervised to be present in town hall, then "under the special danger approach as well as the special relationship approach . . . the defendants owed [the plaintiff] a duty to protect her from the harm they created"). *But see* Mitchell v. Duval County Sch. Bd., 107 F.3d 837, 839–40 (11th Cir. 1997) (per curiam) (noting that "*Cornelius* may not have survived *Collins v. City of Harker Heights*, where the Supreme Court held that a voluntary employment relationship does not impose a constitutional duty on government employers to provide a reasonably safe work environment," but holding that even if *Cornelius* has not been undermined, plaintiff did not make out a state-created danger claim where "the school neither placed [plaintiff] in a dangerous location nor placed the assailants in the place where [plaintiff] was").

226. U.S. Const. amend. IV (stating that "the right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated").

227. *See* *Graham v. Connor*, 490 U.S. 386, 388–95 (1989).

228. *Id.* at 395 (citing *Bell v. Wolfish*, 441 U.S. 520, 535–39 (1979)).

229. U.S. Const. amend. VIII (stating that "cruel and unusual punishments [shall not be] inflicted").

230. *See* *Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992); *Whitley v. Albers*, 475 U.S. 312, 318–19 (1986).

231. U.S. Const. amend. XIV § 1 (stating that "[n]o State shall . . . deprive any person of life, liberty . . . without due process of law").

the Fourth nor the Eighth Amendment applies.<sup>232</sup> For example, if the use of force constituted a “seizure” within the meaning of the Fourth Amendment, the claim must be analyzed only under the Fourth Amendment “reasonableness” standard.<sup>233</sup> In other words, the textually explicit Fourth Amendment protection preempts the more generalized substantive due process protection. In contrast, if officers engaged in a high-speed pursuit did *not* “seize” the claimant, the Fourth Amendment would not apply, and the use-of-force claim may be actionable only under the substantive due process component of the Fourteenth Amendment.<sup>234</sup>

Although the “Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment,”<sup>235</sup> it is unclear if a plaintiff can be both a pretrial detainee and a suspect “seized” within the meaning of the Fourth Amendment. The Supreme Court has stated, “Our cases have not resolved the question whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins . . . .”<sup>236</sup> As a result, some lower courts question whether the Fourth Amendment applies to force claims asserted by pretrial detainees.<sup>237</sup>

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232. *Graham v. Connor*, 490 U.S. 386, 395 (1989); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 842–43 (1998); *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality opinion).

233. *Graham*, 490 U.S. at 395 n.10.

234. *County of Sacramento*, 523 U.S. at 842–45. *Cf. Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) (termination of high-speed pursuit by ramming pursued vehicle from behind constituted Fourth Amendment “seizure”).

235. *Graham*, 490 U.S. at 395 n.10.

236. *Id.*

237. *See, e.g., Riley v. Dorton*, 115 F.3d 1159, 1163–64 (4th Cir. 1997) (detailing the conflict in the circuits: “The Second, Sixth, and Ninth Circuits extend Fourth Amendment coverage to the period the suspect remains with the arresting officers. . . . [However], we agree with the Fifth, Seventh, and Eleventh Circuits that the Fourth Amendment does not embrace a theory of ‘continuing seizure’ and does not extend to the alleged mistreatment of arrestees or pretrial detainees in custody”); *see generally Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring) (stating that a person had been “seized” within meaning of Fourth Amendment by his arrest and conditional release after posting bail); 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 3.12[D][4][b] (4th ed. 2004).

### 1. Unreasonable Force Claims Under the Fourth Amendment

Whether police officers have violated the Fourth Amendment during an investigatory stop or arrest depends on the resolution of two issues: (1) In using force, did officials “seize” the suspect within the meaning of the Fourth Amendment?<sup>238</sup> and, if so, (2) Was the force objectively unreasonable?<sup>239</sup> If officers both seized the plaintiff and used objectively unreasonable force, then the plaintiff has established a Fourth Amendment violation. If no seizure occurred, then the use of force is not actionable under the Fourth Amendment; the force, however, might be actionable under the Fourteenth Amendment.<sup>240</sup> Resolving these two issues requires scrutiny of the Supreme Court’s definition of a “seizure” and of “objectively unreasonable” force.

The Supreme Court has articulated the following three definitions for determining when officers have seized an individual:

1. Whether “the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”<sup>241</sup>
2. Whether a “reasonable person would have believed that he was not free to leave,” and the person in fact submitted to the assertion of authority.<sup>242</sup>
3. Whether there was “a governmental termination of freedom of movement through means intentionally applied.”<sup>243</sup>

These definitions focus on the assertion of governmental authority and the use of physical force. When officers use physical force, the first

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238. See *Graham*, 490 U.S. at 395–96; see also *Brower v. County of Inyo*, 489 U.S. 593, 595–600 (1989) (determining that use of blind roadblock was a Fourth Amendment seizure, and remanding to determine, inter alia, if seizure was reasonable).

239. See *Graham*, 490 U.S. at 395–96, and *Brower*, 489 U.S. at 595–600.

240. See generally *County of Sacramento v. Lewis*, 523 U.S. 833, 842–43 (1998) (stating that if police officer’s use of force during high-speed pursuit did not result in seizure, substantive due process analysis is appropriate).

241. *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968).

242. *California v. Hodari D.*, 499 U.S. 621, 628 (1991); see also *INS v. Delgado*, 466 U.S. 210, 215 (1984); *United States v. Mendenhall*, 446 U.S. 544, 554–55 (1980) (Stewart & Rehnquist, JJ.).

243. *Brower*, 489 U.S. at 597–99 (use of roadblock to stop fleeing motorist constituted seizure; whether act was intentional is an objective inquiry—the question is whether a reasonable officer would have believed that the means used would have caused suspect to stop). *Accord Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

and third definitions of seizure are applicable. The first definition simply states that the use of physical force can effectuate a seizure; the third definition, articulated twenty-one years later, requires that the application of force be “intentional.” Thus, if a police officer accidentally hits someone with his vehicle, the officer used physical force, but no seizure occurred because the force was not intentional.<sup>244</sup>

*a. Tennessee v. Garner*

Determining whether officers used unreasonable force when they seized a suspect is a fact-specific inquiry using the Fourth Amendment standard of reasonableness. In *Tennessee v. Garner*,<sup>245</sup> the Court held that the use of deadly force was objectively unreasonable where a police officer, who had reason to believe that a suspect had just burglarized a home, commanded the fleeing suspect to stop, and shot and killed him when he did not stop.<sup>246</sup> The Court held that a policy that allows the use of deadly force against *all* fleeing felons violates the Fourth Amendment; the use of deadly force is reasonable only if the officer has probable cause to believe that the suspect poses a risk of serious harm to the officer or others.<sup>247</sup> The Court stated that “if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.”<sup>248</sup> Because burglary does not necessarily involve

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244. *County of Sacramento*, 523 U.S. at 843–44 (stating that no seizure occurred when officer accidentally hit passenger of pursued motorcyclist). Most excessive force claims under the Fourth Amendment involve the infliction of physical injury; however, claims involving psychological injury are also actionable. *See, e.g., McDonald v. Haskins*, 966 F.2d 292, 294–95 (7th Cir. 1992) (holding that nine-year-old child stated valid unreasonable force claim under Fourth Amendment by alleging that an officer held a gun to child’s head while executing a search warrant, even though he posed no threat to the officer and did not attempt to flee); *see generally Hudson v. McMillian*, 503 U.S. 1, 16 (1992) (Blackmun, J., concurring) (psychological harm can constitute “cruel and unusual punishment”) (citing *Wisniewski v. Kennard*, 901 F.2d 1276, 1277 (5th Cir. 1990)) (“guard placing a revolver in inmate’s mouth and threatening to blow prisoner’s head off”).

245. 471 U.S. 1 (1985).

246. *Id.* at 3–4, 9–11.

247. *Id.* at 11. *Cf. Scott v. Harris*, 127 S. Ct. 1769 (2007), discussed *infra* notes 259–81 and accompanying text.

248. *Garner*, 471 U.S. at 11.

the infliction of “serious physical harm and because the suspect posed no danger to the officer or the community, the officer’s use of deadly force violated the Fourth Amendment.”<sup>249</sup>

The courts of appeals have prescribed caution in relying on the officer’s version of a deadly force encounter when the victim is not available to counter it. For example, in *Scott v. Henrich*,<sup>250</sup> the Ninth Circuit stated:

Deadly force cases pose a particularly difficult problem under this regime because the officer defendant is often the only surviving eyewitness. Therefore, the judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify. The judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer’s story is internally consistent and consistent with other known facts. In other words, the court may not simply accept what may be a self-serving account by the police officer. It must also look at the circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably.<sup>251</sup>

*b. Graham v. Connor*

In *Graham v. Connor*,<sup>252</sup> the Supreme Court extended *Garner*’s objective reasonableness standard to any use of force by a law enforcement officer during an arrest, investigatory stop, or other seizure. The Court in *Graham* held “that *all* claims that law enforcement officers have

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249. *Id.* at 21–22.

250. 39 F.3d 912 (9th Cir. 1994).

251. *Id.* at 915; *see also* *Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006) (noting that because a deceased suspect is not available to contradict a police officer’s version of events, courts must critically assess all other evidence in the case and “may not simply accept what may be a self-serving account by the police officer”); *O’Bert v. Vargo*, 331 F.3d 29, 37–38 (2d Cir. 2003) (holding that summary judgment should not be granted to defendant officer in a deadly force case based solely on what may be officer’s self-serving account of incident; court must “consider ‘circumstantial evidence that, if believed, would tend to discredit the police officer’s story, and consider whether this evidence would convince rational factfinder that officer acted unreasonably’” (quoting *Scott*, 39 F.3d at 915 (9th Cir. 1994))); *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999).

252. 490 U.S. 386 (1989).

used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its reasonableness standard, rather than a ‘substantive due process’ approach.”<sup>253</sup> It held that three factors were relevant in determining the reasonableness of force: (1) “the severity of the crime at issue”; (2) “whether the suspect poses an immediate threat to the safety of the officers or others”; and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.”<sup>254</sup> In articulating these factors, the Court did not state that these were the only factors relevant to the reasonableness inquiry. Reasonableness requires a balancing of interests, evaluating the circumstances present at the time of the officer’s act, and allowing the officers some deference because they often have to make “split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”<sup>255</sup> This reasonableness inquiry is an objective one: “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.”<sup>256</sup> Although plaintiffs need not prove that officers acted in bad faith in order to demonstrate that the use of force violated the Fourth Amendment,<sup>257</sup> such evidence may be admissible to impeach the officers’ credibility.<sup>258</sup>

*c. Scott v. Harris*

In *Scott v. Harris*,<sup>259</sup> the Supreme Court applied the Fourth Amendment objective reasonableness standard to a police officer’s use of force to end a high-speed police pursuit. The Court held that the defendant “police officer’s attempt to terminate a dangerous high-speed car chase

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253. *Id.* at 395. The Court in *Graham* acknowledged that the Fourth Amendment “has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.” *Id.* at 396.

254. *Id.* at 396.

255. *Id.* at 396–97. Fourth Amendment excessive force claims are subject to qualified immunity. See *Saucier v. Katz*, 533 U.S. 194 (2001); see also *infra* discussion Part XV.

256. *Graham*, 490 U.S. at 397.

257. *Id.*

258. *Id.* at 399 n.12.

259. 127 S. Ct. 1769 (2007).

that threatens the lives of innocent bystanders [by ramming the motorist's car from behind] does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>260</sup>

Victor Harris, nineteen years old at the time, was clocked traveling seventy-three miles per hour in a fifty-five mile per hour zone. Timothy Scott, the deputy sheriff, activated his blue lights and siren, but Harris failed to pull over, instead accelerating his speed. The videotape of the chase made from the pursuing police cruiser showed Harris's

vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury.<sup>261</sup>

Deputy Scott had initially decided to terminate the encounter by employing a "Precision Intervention Technique" (PIT) maneuver, which causes a fleeing vehicle to spin to a stop, but instead "applied his push bumper to the rear of [Harris's] vehicle. As a result, [Harris] lost control of his vehicle, which left the roadway, ran down an embankment, overturned, and crashed. [Harris] was badly injured and was rendered quadriplegic."<sup>262</sup>

Justice Antonin Scalia wrote the opinion for the Court. The Court agreed with Harris that Deputy Scott's actions constituted a seizure because the officer terminated Harris's freedom of movement through the means intentionally applied, namely, ramming Harris's car from behind.<sup>263</sup> The Court, however, held that the seizure did not violate the

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260. *Id.* at 1779.

261. *Id.* at 1775–76 (footnotes omitted).

262. *Id.* at 1773 (footnote omitted).

263. *Id.* at 1776. When termination of a high-speed pursuit does not culminate in a seizure, the officer's actions are evaluated under a substantive due process, "shocks the conscience" purpose-to-cause-harm standard. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

Fourth Amendment because it was objectively reasonable. Significantly, the summary judgment evidence included the videotape of the chase made from the pursuing police cruiser; the Court posted the video on its website. Justice Stephen G. Breyer, in his concurring opinion, found that the videotape made a difference, and urged the reader to view it.

Excessive force cases frequently present genuine disputed issues of material facts that make resolution on summary judgment inappropriate. In *Harris*, however, the Court held that the videotape enabled resolution of the case in favor of the defendant on summary judgment. There were no allegations or indications that the videotape was doctored or altered, or that it distorted the incident. The Court said that when the material facts are not in dispute, the reasonableness of the use of force “is a pure question of law.”<sup>264</sup> Even so, the Court had to “slosh [its] way through the factbound morass of ‘reasonableness.’”<sup>265</sup>

The Court found *Tennessee v. Garner*<sup>266</sup> distinguishable. In *Garner*, the Court held that it was unreasonable for the police “to kill a ‘young, slight, and unarmed’ burglary suspect, by shooting him ‘in the back of the head’ while he was running away on foot, and when the officer ‘could not reasonably have believed that [the suspect] . . . posed any threat,’ and ‘never attempted to justify his actions on any basis other than the need to prevent an escape.’”<sup>267</sup> The Court in *Scott v. Harris* stressed that the “necessity” for using deadly force referred to in *Garner* was not the necessity to prevent escape, but the necessity to prevent serious physical harm to the officers or others.<sup>268</sup> “By way of example only, *Garner* hypothesized that deadly force may be used ‘if necessary to prevent escape’ when the suspect is known to have ‘committed a crime involving the infliction or threatened infliction of serious physical harm,’ so that his mere being at large poses an inherent danger to society.”<sup>269</sup> *Harris* did not involve a police officer’s shooting of an un-

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264. *Harris*, 127 S. Ct. at 1773.

265. *Id.* at 1778.

266. 471 U.S. 1 (1985).

267. *Harris*, 127 S. Ct. at 1777 (citations omitted) (following *Brower v. County of Inyo*, 489 U.S. 593, 596–97 (1989)).

268. *Harris*, 127 S. Ct. at 1776–77 n.8.

269. *Id.* at 1777.

armed, unthreatening suspect, but an officer's bumping a fleeing motorist whose flight posed an extreme danger to innocent individuals.

The Court said that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.' *Garner* was simply an application of the Fourth Amendment's 'reasonableness' test to the use of a particular type of force in a particular situation."<sup>270</sup> Further, it ruled that, in assessing the reasonableness of the officer's use of force, it is appropriate to consider the relative culpability of the parties. It was significant that Victor Harris

intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight that ultimately produced the choice between two evils that Scott confronted. Multiple police cars, with blue lights flashing and sirens blaring, had been chasing [Harris] for nearly 10 miles, but he ignored their warning to stop. By contrast, those who might have been harmed had Scott not taken the action he did were entirely innocent.<sup>271</sup>

The Court also ruled that the police were not required to take the chance of calling off the pursuit and hoping for the best: "Whereas Scott's action—ramming [Harris] off the road—was *certain* to eliminate the risk that [Harris] posed to the public, ceasing pursuit was not. . . . [T]here would have been no way to convey convincingly to [Harris] that the chase was off, and that he was free to go."<sup>272</sup> Furthermore, the Court said that it was

loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive *so recklessly* that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. . . . Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the

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270. *Id.* (citation omitted).

271. *Id.* at 1778.

272. *Id.* at 1778–79.

Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death.<sup>273</sup>

The Court thus held that, because the car chase that Harris initiated posed substantial and immediate risk of serious physical injury to others, Deputy Scott's attempt to terminate the chase by forcing Harris off the road was reasonable. Since no reasonable jury could find otherwise, Scott was entitled to summary judgment.

Justice Ruth Bader Ginsburg, concurring, said that she did not read the Court's opinion as creating a mechanical *per se* rule, but rather as based on a fact-specific evaluation of reasonableness. Among the relevant considerations are: "Were the lives and well-being of others (motorists, pedestrians, police officers) at risk? Was there a safer way, given the time, place, and circumstances, to stop the fleeing vehicle?"<sup>274</sup> By contrast, Justice Breyer read the Court's decision as articulating a *per se* rule, namely, "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death."<sup>275</sup> Breyer found that this statement by the majority "is too absolute," and that "whether a high-speed chase violates the Fourth Amendment may well depend upon more circumstances than the majority's rule reflects."<sup>276</sup>

Justice John Paul Stevens, the sole dissenter in *Harris*, argued that "[w]hether a person's actions have risen to a level warranting deadly force is a question of fact best reserved for a jury,"<sup>277</sup> and that the Supreme Court in this case usurped the function of the jury by adopting a "*per se* rule that presumes its own version of the facts."<sup>278</sup> Justice Stevens sarcastically referred to "eight of the jurors on this Court"<sup>279</sup> and "[m]y colleagues on the jury."<sup>280</sup> Stevens opined that the *police* action created unacceptable inherent risks of harm, particularly when less drastic measures were available, such as the use of "stop sticks," a "de-

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273. *Id.*

274. *Id.*

275. *Id.* at 1781 (Breyer, J., concurring) (quoting majority opinion).

276. *Id.* (Breyer, J., concurring).

277. *Id.* at 1784 (Stevens, J., dissenting).

278. *Id.* at 1785 (Stevens, J., dissenting).

279. *Id.* at 1781 (Stevens, J., dissenting).

280. *Id.* at 1782 (Stevens, J., dissenting).

vice which can be placed across the roadway and used to flatten a vehicle's tires slowly to safely terminate a pursuit.”<sup>281</sup>

*d. Other Fourth Amendment Excessive Force Issues*

The circuit courts have taken different positions on whether an officer's conduct prior to the use of force should be considered in evaluating the objective reasonableness of his actions.<sup>282</sup> Some courts consider only actions immediately before force was used, holding that the officer's pre-shooting conduct is “not relevant and inadmissible.”<sup>283</sup> The Second Circuit view is that the “[shooting officer's] actions leading up to the shooting are irrelevant to the objective reasonableness of his conduct at the moment he decided to employ deadly force.”<sup>284</sup> The Second Circuit considers only “the officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force.”<sup>285</sup> By contrast, the First Circuit considers “the actions of the government officials leading up to the seizure,” not just at the moment of the shooting.<sup>286</sup>

The Third Circuit holds that the circumstances considered in evaluating the objective reasonableness of the force used should not automatically exclude “all context and causes prior to the moment” force is employed because, after all, “[h]ow is the reasonableness of a bullet striking someone to be assessed if not by examining the preceding events?”<sup>287</sup> As a slight variation, the Tenth Circuit holds that consideration may be given to the police officer's conduct in the moments leading up to the *suspect's* threat to use force if the officer's conduct was so “immediately connected” to the suspect's threat that it should be considered in evaluating the reasonableness of the officer's forceful response.<sup>288</sup>

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281. *Id.* at 1785 n.9 (Stevens, J., dissenting).

282. See *Billington v. Smith*, 292 F.3d 1177, 1187–88 (9th Cir. 2002) (explaining different circuits' approaches); see also 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 3.12[D] (4th ed. 2004).

283. *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

284. *Salim v. Proulx*, 93 F.3d 86, 92 (2d Cir. 1996).

285. *Id.*

286. *St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995); accord *Young v. City of Providence*, 404 F.3d 4, 22 (1st Cir. 2005).

287. *Abraham v. Raso*, 183 F.3d 279, 291 (3d Cir. 1999).

288. *Allen v. Muskogee*, 119 F.3d 837, 840–41 (10th Cir. 1997).

Prior to the Supreme Court's decision in *Scott v. Harris*,<sup>289</sup> some courts held that when deadly force is used,<sup>290</sup> the district court's instructions should not merely articulate the general *Graham* objective reasonableness standard, but should include the more specific "detailed" and "demanding" *Garner* standard.<sup>291</sup> In deadly force cases, these decisions reasoned, the general *Graham* standard does not adequately inform the jury about when a police officer may constitutionally use deadly force.<sup>292</sup> The decision in *Harris*—that *Garner* was simply an application of the generally applicable Fourth Amendment "objective reasonableness" standard—has led some courts to hold that a special instruction on deadly force is no longer required.<sup>293</sup>

Whether an officer used excessive force in violation of the Fourth Amendment is normally a factual issue for the jury, and "summary judgment . . . in excessive force cases should be granted sparingly."<sup>294</sup> However, some Fourth Amendment excessive force cases can be decided on summary judgment,<sup>295</sup> especially when qualified immunity is asserted as a defense.<sup>296</sup> Further, summary judgment may be appropri-

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289. 127 S. Ct. 1769 (2007). See *supra* Part IV.E.1.c.

290. The federal courts generally define "deadly force" for Fourth Amendment purposes as force carrying a "substantial risk of causing death or serious bodily injury." *Gutierrez v. San Antonio*, 139 F.3d 441, 446 (5th Cir. 1998). *Accord* *Smith v. City of Hemet*, 394 F.3d 689 (9th Cir.) (en banc), *cert. denied*, 125 S. Ct. 2938 (2005); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586 (7th Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998).

291. *Rahn v. Hawkins*, 464 F.3d 813, 817–18 (8th Cir. 2006); *Monroe v. City of Phoenix*, 248 F.3d 851, 859–60 (9th Cir. 2001).

292. *Rahn*, 464 F.3d at 817–18; *Monroe*, 248 F.3d at 859–60.

293. *Acosta v. Hill*, 504 F.3d 1323 (9th Cir. 2007) (overruling *Monroe v. City of Phoenix*, 248 F.3d 851 (9th Cir. 2001)); *Blake v. City of New York*, No. 05-Civ. 6652 (BSJ), 2007 U.S. Dist. LEXIS 49160 (S.D.N.Y. July 3, 2007).

294. *Abdullahi v. City of Madison*, 423 F.3d 763, 773 (7th Cir. 2005); *accord* *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005).

295. See *Scott v. Harris*, 127 S. Ct. 1769 (2007); *Untalan v. City of Lorain*, 430 F.3d 312, 314–17 (6th Cir. 2005) (upholding district court's decision to grant defendant police officer's summary judgment motion based on qualified immunity because, based on the evidence, no reasonable juror could find that the officer violated decedent's Fourth Amendment rights).

296. *Saucier v. Katz*, 533 U.S. 194, 200–01 (2001) (stressing "the importance of resolving immunity questions at the earliest possible stage in litigation"); see *infra* Part XV.

ate when there is a videotape of the incident that was not doctored or altered, and that accurately depicts the incident.<sup>297</sup>

Fourth Amendment excessive force claims are often accompanied by due process claims of failure to provide medical treatment. In *City of Revere v. Massachusetts General Hospital*,<sup>298</sup> the Supreme Court held that due process requires the state “to provide medical care to persons . . . who have been injured while being apprehended by the police.”<sup>299</sup> The Court did not articulate a particular due process standard, but it did state that “the due process rights of [detainees] are at least as great as the Eighth Amendment protections available to a convicted prisoner.”<sup>300</sup> To prove an Eighth Amendment violation, a convicted prisoner must demonstrate deliberate indifference to a serious medical need.<sup>301</sup> Many circuits adopt the Eighth Amendment deliberate indifference standard for detainee medical care cases.<sup>302</sup>

## 2. Prisoner Excessive Force Claims Under the Eighth Amendment

Although malice is not an element of a Fourth Amendment excessive force claim, it is the central inquiry under the Eighth Amendment for a prisoner’s claim alleging the use of excessive force by prison guards. The Eighth Amendment standard is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”<sup>303</sup> In two decisions, the Supreme Court held that this standard applied to the use of force to control prisoners, whether to diffuse a riot<sup>304</sup> or to impose discipline.<sup>305</sup>

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297. *Harris*, 127 S. Ct. at 1775.

298. 463 U.S. 239 (1983).

299. *Id.* at 244.

300. *Id.*

301. *Estelle v. Gamble*, 429 U.S. 97, 102–05 (1976).

302. *See, e.g.*, *Estate of Moreland v. Dieter*, 395 F.3d 747, 758 (7th Cir. 2005); *Watkins v. City of Battle Creek*, 273 F.3d 682, 685–86 (6th Cir. 2001); *Napier v. Madison County*, 238 F.3d 739, 742 (6th Cir. 2001); *Wagner v. Bay City*, 227 F.3d 316, 324 (5th Cir. 2000); *Horn v. Madison County Fiscal Ct.*, 22 F.3d 653, 660 (6th Cir. 1994).

303. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *accord Whitley v. Albers*, 475 U.S. 312, 320–21 (1986).

304. *Whitley*, 475 U.S. at 321–22.

305. *Hudson*, 503 U.S. at 6–10.

In *Whitley v. Albers*,<sup>306</sup> the Supreme Court held that five factors are relevant in determining whether officers acted maliciously when they used force to quell a prison riot: (1) the need for force; (2) “the relationship between the need and the amount of force that was used”; (3) “the extent of injury inflicted”; (4) “the extent of the threat to the safety of staff and inmates”; and (5) “any efforts made to temper the severity of a forceful response.”<sup>307</sup> The Court in *Whitley* said that courts should defer to the judgment of prison officials, who typically have to make decisions regarding the use of force in pressured, tense circumstances.<sup>308</sup>

The Supreme Court later applied the *Whitley* standards in *Hudson v. McMillian*,<sup>309</sup> where officials did not face the exigencies of a prison riot. The Court in *Hudson* held that prisoners who assert Eighth Amendment excessive force claims are not required to establish “significant injury.”<sup>310</sup> However, plaintiffs must allege something more than a de minimus injury unless the force used was “repugnant to the conscience of mankind.”<sup>311</sup> Thus, the extent of an injury became just one factor in determining whether the official acted with malice.

In *Whitley*, the Supreme Court stated that “[u]nless it appears that the evidence, viewed in the light most favorable to the plaintiff, will support a reliable inference of wantonness in the infliction of pain under the [Eighth Amendment] standard we have described, the case should not go to the jury.”<sup>312</sup>

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306. 475 U.S. 312 (1986).

307. *Id.* at 321.

308. *See id.* at 320; *accord Hudson*, 503 U.S. at 6.

309. 503 U.S. 1 (1992).

310. *Id.* at 9.

311. *Id.* at 9–10 (citation omitted); *see Norman v. Taylor*, 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc) (holding that de minimus injury does not violate Eighth Amendment); *see also Cummings v. Malone*, 995 F.2d 817, 822–23 (8th Cir. 1993) (asserting that prisoner’s excessive force claim required showing of “actual” physical injury); *Rankin v. Klevenhagen*, 5 F.3d 103, 108 (5th Cir. 1993) (noting that although “*Hudson* removed the ‘serious’ . . . injury requirement, . . . ‘certainly *some* injury is still required’”).

312. *Whitley v. Albers*, 475 U.S. 312, 322 (1986).

### 3. Pretrial Detainee Excessive Force Claims Under the Fourteenth Amendment

In *Graham v. Connor*,<sup>313</sup> the Supreme Court, citing *Bell v. Wolfish*,<sup>314</sup> stated that “the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”<sup>315</sup> More recently, however, the Court held, in *County of Sacramento v. Lewis*,<sup>316</sup> that to violate the substantive due process component of the Fourteenth Amendment, an official’s actions must “shock the conscience.”<sup>317</sup> Officials commit conscience-shocking actions when they use force with an intent to harm that is “unrelated to the legitimate object of arrest.”<sup>318</sup> The Court derived this malice standard by likening a police officer’s actions during a high-speed pursuit to a prison guard’s actions during a riot:<sup>319</sup> both must act quickly with little time for reflection. However, the Court did not state that the “shocks-the-conscience” standard applies to excessive force claims raised by pretrial detainees.

There is a conflict among the circuits concerning the appropriate due process standard for detainee excessive force claims.<sup>320</sup> For example, the First Circuit applies the *Bell* punishment standard,<sup>321</sup> while the Third, Fourth, and Fifth Circuits have adopted a malice standard, i.e., whether the force was applied in a good-faith effort to restore discipline or maliciously and sadistically to cause harm.<sup>322</sup> The Seventh Circuit holds that the *Bell* standard applies to detainee due process challenges to general practices, rules, and restrictions on pretrial confinement, but that detainee challenges to specific acts or failures to act by government officials are governed by the deliberate indifference test.<sup>323</sup>

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313. 490 U.S. 386 (1989).

314. 441 U.S. 520 (1979).

315. *Graham*, 490 U.S. at 395 n.10 (dictum).

316. 523 U.S. 833 (1998).

317. *Id.* at 846–47 (citing *Rochin v. California*, 342 U.S. 165, 172–73 (1952)).

318. *Id.* at 836.

319. *Id.* at 852–53.

320. See 1 Schwartz, *supra* note 282, § 3.16[A].

321. *O’Connor v. Huard*, 117 F.3d 12 (1st Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

322. *Carr v. Deeds*, 453 F.3d 593, 605 (4th Cir. 2006); *Fuentes v. Wagner*, 206 F.3d 335, 347–48 (3d Cir. 2000); *Valencia v. Wiggins*, 981 F.2d 1440, 1445–46 (5th Cir. 1993). See also *United States v. Walsh*, 194 F.3d 37, 48 (2d Cir. 1999).

323. *Tesch v. City of Green Lake*, 157 F.3d 465 (7th Cir. 1998).

A federal district judge faced with a detainee excessive force claim must apply the controlling circuit decisional law.<sup>324</sup> If such decisional law does not exist, the authors recommend application of the *Bell* standard.

The Court, in *Bell*, analyzing the substantive due process rights of pretrial detention in detail, stated:

In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. . . .

A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on “whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it and whether it appears excessive in relation to the alternative purpose. . . .” Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to “punishment.” Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.<sup>325</sup>

In the authors’ view, *Graham* and *Bell* strongly support the application of the due process standard to detainee excessive force claims.<sup>326</sup>

#### *F. Arrests and Searches*

Section 1983 complaints challenging law enforcement arrests and searches require the federal district court to determine the Fourth Amendment limitations on arrests and searches. Given that the Supreme Court has decided more than 300 Fourth Amendment cases

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324. See compilation of courts of appeals decisions in 1 Schwartz, *supra* note 282, § 3.16[A][1].

325. *Bell*, 441 U.S. at 535–39.

326. *O’Connor*, 117 F.3d 12.

since its decision in *Boyd v. United States*<sup>327</sup>—the first Supreme Court decision seriously considering the Fourth Amendment—comprehensive coverage of this voluminous subject is beyond the scope of this monograph.

The critical issue in most § 1983 unconstitutional arrest cases is whether the officer had probable cause to arrest. Probable cause is a complete defense to a § 1983 unconstitutional arrest claim brought under the Fourth Amendment.<sup>328</sup> Probable cause exists when the “facts and circumstances within the officer’s knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”<sup>329</sup> Because probable cause is a wholly objective, “reasonable officer” standard, the officer’s subjective motivation is irrelevant.<sup>330</sup> A warrantless arrest in a public place comports with the Fourth Amendment so long as there was probable cause to arrest the suspect for *some* crime—the probable cause need not be for the crime articulated by the arresting officer, or even for a “closely related” crime.<sup>331</sup> An arrest in the arrestee’s home generally requires an arrest warrant and reason to believe the suspect is in the home.<sup>332</sup>

There is a conflict in the circuits as to who has the burden of proof on a § 1983 unconstitutional arrest claim.<sup>333</sup> Some courts hold that the plaintiff has the burden of proving that the arrest violated the Fourth

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327. 116 U.S. 616 (1886).

328. See *Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996); *Singer v. Fulton County Sheriff*, 63 F.3d 110, 118–19 (2d Cir. 1995).

329. *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979); accord *Maryland v. Pringle*, 540 U.S. 366, 370–71 (2003).

330. *Whren v. United States*, 517 U.S. 806, 813 (1996) (“Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.”).

331. *Devenpeck v. Alford*, 543 U.S. 146, 153–54 (2004).

332. *Payton v. New York*, 445 U.S. 573, 587–88 (1980). An in-home arrest without a warrant is constitutional only if the officer either gets consent to enter the home or reasonably finds exigent circumstances. *Id.* See also *Brigham City v. Stuart*, 126 S. Ct. 1943, 1947–48 (2006) (law enforcement officer may enter home without warrant if officer reasonably believes entry is needed to render emergency assistance “to injured occupant or to protect an occupant from imminent injury”).

333. See *Davis v. Rodriguez*, 364 F.3d 424, 434 n.8 (2d Cir. 2004) (describing conflict among the circuits).

Amendment.<sup>334</sup> The Ninth Circuit, for instance, has held that a § 1983 plaintiff “at all times had the ultimate burden of proving to the jury that she had been seized unreasonably in violation of the Fourth Amendment.”<sup>335</sup> In a subsequent decision, the Ninth Circuit explained that

[a]lthough the plaintiff bears the burden of proof on the issue of unlawful arrest, she can make a prima facie case simply by showing that the arrest was conducted without a valid warrant. At that point, the burden shifts to the defendant to provide some evidence that the arresting officers had probable cause for a warrantless arrest. The plaintiff still has the ultimate burden of proof, but the burden of production falls on the defendant.<sup>336</sup>

The Eleventh Circuit has ruled that “[t]he burden of going forward with evidence establishing the existence of probable cause is on the defendant in a 1983 action.”<sup>337</sup> Similarly, other circuits have ruled that when a § 1983 plaintiff alleges that she was arrested without probable cause, the defendant has the burden of proving probable cause.<sup>338</sup> The position finds support in the common-law principle that probable cause is a defense to a false arrest claim—a principle that has been held to apply to § 1983 unconstitutional arrest claims.<sup>339</sup>

Courts of appeals decisions consistently state that probable cause normally presents a question of fact for the jury, “unless there is only one reasonable determination possible.”<sup>340</sup> Therefore, “a district court may conclude ‘that probable cause did exist as a matter of law if the evidence, viewed most favorably to Plaintiff, reasonably would not support a contrary factual finding,’ and may enter summary judgment

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334. See, e.g., *Dubner v. San Francisco*, 266 F.3d 959, 965 (9th Cir. 2001); *Rankin v. Evans*, 133 F.3d 1425, 1436 (11th Cir. 1998); *Larez v. Holcomb*, 16 F.3d 1513, 1517 (9th Cir. 1994).

335. *Larez*, 16 F.3d at 1517.

336. *Dubner*, 266 F.3d at 965.

337. *Rankin*, 133 F.3d at 1436.

338. *Karr v. Smith*, 774 F.2d 1029, 1031 (10th Cir. 1985).

339. See, e.g., *Raysor v. Port Auth.*, 768 F.2d 34, 40 (2d Cir. 1985) (holding that “the defendant has the burden of proving that the arrest was authorized”).

340. *Logsdon v. Hains*, 492 F.3d 334, 341 (6th Cir. 2007); *Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 302 (6th Cir. 2005); see *Montgomery v. De Simone*, 159 F.3d 120, 124 (3d Cir. 1998).

accordingly.”<sup>341</sup> It seems that federal courts are able to resolve a large percentage of probable cause issues as a matter of law. Further, Fourth Amendment challenges to arrests and searches are subject to qualified immunity.<sup>342</sup>

In some § 1983 Fourth Amendment cases it is necessary to analyze the different components of the law enforcement officer’s actions separately. The Supreme Court’s decision in *Muehler v. Mena*<sup>343</sup> provides a valuable illustration. In that case, the plaintiff, an occupant of the premises being searched, was detained, handcuffed, and questioned while the officers executed the search warrant; the Court analyzed each of these actions separately and found no violation of the Fourth Amendment.<sup>344</sup> On the detention issue, the Court held that its decision in *Michigan v. Summers*<sup>345</sup> established that police officers who execute a search warrant may detain any individuals on the premises.<sup>346</sup> An officer’s authority to detain incident to a search supported by probable cause is “implicit”; it does not depend on the “quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.”<sup>347</sup> On the handcuffing claim, the *Muehler* Court held that the plaintiff’s “detention in handcuffs for the length of the search was consistent with . . . *Michigan v. Summers*.”<sup>348</sup> Justice Kennedy, concurring, pointed out that excessively tight or prolonged handcuffing may give rise to a § 1983 Fourth Amendment excessive force claim.<sup>349</sup> Finally, the Court held that police questioning of a person detained during the execution of a search warrant does not require independent probable cause because “‘mere police questioning does not constitute a seizure.’”<sup>350</sup>

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341. *Estate of Smith v. Marasco*, 318 F.3d 497, 514 (3d Cir. 2003) (citation omitted). *Accord Walczyk v. Rio*, 496 F.3d 139, 157 (2d Cir. 2007) (where facts not in dispute, existence of probable cause is issue of law for court).

342. *See infra* Part XV.

343. 544 U.S. 93 (2005).

344. *Id.* at 95, 98–101.

345. 452 U.S. 692 (1981).

346. *Muehler*, 544 U.S. at 98.

347. *Summers*, 452 U.S. at 705 & n.19.

348. *Muehler*, 544 U.S. at 95, 98–99.

349. *Id.* at 103–04 (Kennedy, J., concurring).

350. *Id.* at 100–01.

*G. Malicious Prosecution Claims Under the Fourth Amendment*

The federal courts frequently have difficulty determining whether a § 1983 complaint states a proper malicious prosecution claim. In *Albright v. Oliver*,<sup>351</sup> the Supreme Court held that an arrestee's § 1983 claim—that he was prosecuted without probable cause—could not be based on substantive due process.<sup>352</sup> The Court indicated that such a claim *could* be based on the Fourth Amendment, but that Albright failed to establish the requisite standards for such claims because he failed to present a Fourth Amendment claim to the Supreme Court; thus, the Court merely declared what is *not* a malicious prosecution claim.<sup>353</sup>

Prior to *Albright*, some lower courts used the common-law elements of a malicious prosecution tort to establish a constitutional violation of substantive due process.<sup>354</sup> These common-law elements are (1) institution of a criminal proceeding; (2) without probable cause; (3) with malice; and (4) termination in favor of the criminal defendant.<sup>355</sup> In *Albright*, however, the Court held that Albright's malicious prosecution claim was not actionable under the substantive due process component of the Fourteenth Amendment. The justices wrote six separate opinions reflecting a variety of views about substantive due process. The plurality opinion by Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Ginsburg, rejected substantive due process as a base for a malicious prosecution claim and interpreted the record as not alleging a violation of procedural due process or of a Fourth Amendment right.<sup>356</sup> Chief Justice Rehnquist noted that the lower courts had differing views as to what a plaintiff must allege to state a constitutional claim for "malicious prosecution."<sup>357</sup> Some courts had held that the constitutional claim was identical to the common-law claim; others had required the plaintiff to establish some type of egre-

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351. 510 U.S. 266 (1994).

352. *Id.* at 271–74.

353. *Id.* at 275.

354. *Id.* at 270 n.4. Some courts had also required the challenged governmental conduct to be "egregious." *Id.*

355. 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 3.18 (4th ed. 2004).

356. *Albright*, 510 U.S. at 268–71, 275.

357. *Id.* at 270 n.4.

gious conduct.<sup>358</sup> The Chief Justice stated that the Fourth Amendment applied to “pretrial deprivations of liberty,” but expressed no view as to whether the plaintiff’s allegations stated a claim under the Fourth Amendment.<sup>359</sup>

Justice Scalia, concurring, also rejected substantive due process as a basis for Albright’s suit, reiterating his strong opposition to the Court using substantive due process when a plaintiff alleges “unspecified” liberty interests.<sup>360</sup>

Justice Ginsburg, in her concurring opinion, found that the Fourth Amendment did apply to the facts of Albright’s case, reasoning that the restraint imposed on Albright constituted a “continuing seizure” within the meaning of the Fourth Amendment and suggesting that the basis of his claim may have been that the arresting officer was responsible for “effectuating and maintaining” the seizure.<sup>361</sup>

Justice Kennedy, joined by Justice Thomas, concurred in the judgment, asserting that a malicious prosecution claim is one actually alleging a violation of procedural due process.<sup>362</sup> In contrast to Justice Scalia, Justice Kennedy affirmed that the Due Process Clause protects more than the liberty interests specified in the Bill of Rights; however, he stated that “the due process requirements for criminal proceedings do not include a standard for the initiation of a criminal prosecution.”<sup>363</sup> Justice Kennedy stated that, in some circumstances, the challenged governmental actions may state a violation of procedural due process, but found that such a claim was not viable in this case because state law provided the plaintiff with a remedy.<sup>364</sup>

Justice Souter rejected the substantive due process claim for two reasons. First, he reasoned such a claim is available only when another amendment does not apply and the claim is “substantial.”<sup>365</sup> Second, the types of injuries alleged were compensable under the Fourth

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358. *Id.*

359. *Id.* at 274–75.

360. *Id.* at 275 (Scalia, J., concurring).

361. *Id.* at 276–79 (Ginsburg, J., concurring).

362. *Id.* at 285–86 (Kennedy, J., concurring).

363. *Id.* at 283.

364. *Id.* at 285–86.

365. *Id.* at 286–87 (Souter, J., concurring).

Amendment, yet Albright had not relied on it.<sup>366</sup> Justice Souter recognized that sometimes injuries may occur before there is a Fourth Amendment seizure; whether these injuries are actionable under substantive due process, he stated, was not addressed by the facts of this case.<sup>367</sup>

In contrast to his colleagues, Justice Stevens, joined by Justice Blackmun, concluded that the plaintiff had stated a violation of substantive due process.<sup>368</sup> He found the initiation of criminal proceedings against Albright “shocking” and stated that the Bill of Rights specifically protects against pretrial deprivations of liberty.<sup>369</sup> Analogizing to the Grand Jury Clause of the Fifth Amendment, Justice Stevens reasoned that the liberty interest “against arbitrary accusations” is specified by the Grand Jury Clause of the Fifth Amendment.<sup>370</sup> He also noted that in criminal procedure cases the Court “has identified numerous violations of due process that have no counterparts in the specific guarantees of the Bill of Rights.”<sup>371</sup>

Thus, although a majority of the Court in *Albright* held that malicious prosecution claims were not viable substantive due process claims, there was no clear majority with respect to the constitutional basis for these claims. If, however, Justice Souter’s opinion can be interpreted as establishing such claims under the Fourth Amendment, then a majority of the Court would likely find these claims actionable under the Fourth Amendment.

Given the wide variety of views articulated by the justices in *Albright*, it is not surprising that the decision has “spawned controversy and confusion in the lower courts.”<sup>372</sup> The circuit courts disagree over (1) whether there are circumstances in which an alleged malicious prosecution may violate due process, and (2) when malicious prosecu-

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366. *Id.* at 289.

367. *Id.* at 290–91.

368. *Id.* at 302–06 (Stevens, J., dissenting).

369. *Id.* at 293–96.

370. *Id.* at 302–03.

371. *Id.* at 304.

372. *Kerr v. Lyford*, 171 F.3d 330, 342 (5th Cir. 1999) (concurring opinion); see *Wallace v. Kato*, 127 S. Ct. 1091, 1096 n.2 (2007) (citing 1 Schwartz, *supra* note 355, § 3.18[C], p. 3-605, 3-629); *Becker v. Kroll*, 494 F.3d 904, 913 (10th Cir. 2007) (referring to “murky waters” of § 1983-based malicious prosecution claims).

tion violates the Fourth Amendment.<sup>373</sup> It is clear, however, that referring to the § 1983 claim as a malicious prosecution clouds rather than clarifies the analysis because, when all is said and done, the plaintiff must establish a violation of a federally protected right.

#### *H. Conditions-of-Confinement Claims Under the Eighth Amendment*

When challenging their conditions of confinement, prisoners must prove that the conditions constituted “cruel and unusual punishment” within the meaning of the Eighth Amendment. The Eighth Amendment does not require comfortable prisons, but forbids inhumane conditions.<sup>374</sup> The Supreme Court has defined the Eighth Amendment standard as containing both subjective and objective components.<sup>375</sup> The subjective component requires proof that prison officials acted with subjective deliberate indifference,<sup>376</sup> while the objective component requires proof that the deprivation was “sufficiently serious.”<sup>377</sup> Several Supreme Court decisions shed light on the meaning of these two components.

In *Estelle v. Gamble*,<sup>378</sup> a case involving medical care of prisoners, the Supreme Court held that to state a claim under the Eighth Amendment, a prisoner must prove officials were deliberately indifferent to the prisoner’s “serious medical needs.”<sup>379</sup> The Court determined that the Eighth Amendment was not violated by negligent medical care; thus, medical malpractice is not a constitutional violation simply because the plaintiff is a prisoner.<sup>380</sup>

Fifteen years later, in *Wilson v. Seiter*,<sup>381</sup> the Court interpreted *Estelle* to govern all claims challenging prison conditions.<sup>382</sup> The majority narrowly defined both the subjective and objective components, holding that the subjective deliberate indifference component is a nec-

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373. 1 Schwartz, *supra* note 355, § 3.18.

374. *Wilson v. Seiter*, 501 U.S. 294, 298–303 (1991).

375. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

376. *Id.*

377. *Id.*

378. 429 U.S. 97 (1976).

379. *Id.* at 106.

380. *Id.* at 105–06.

381. 501 U.S. 294 (1991).

382. *Id.* at 302–03.

essary element of all prison condition claims.<sup>383</sup> Inhumane prison conditions alone do not constitute an Eighth Amendment violation.<sup>384</sup> The Court also held that the objective component requires proof that the deprivation was “serious,” that is, one addressing a specific, basic human need like “food, warmth, or exercise.”<sup>385</sup> “Nothing so amorphous as ‘overall conditions’ can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists.”<sup>386</sup> The Court left open whether inadequate funding was a defense to a finding of subjective deliberate indifference.<sup>387</sup> The concurrence, however, noted that the courts of appeals have rejected such a “cost” defense.<sup>388</sup>

Subsequently, the Supreme Court held, in *Helling v. McKinney*,<sup>389</sup> that a prisoner had stated an Eighth Amendment claim in challenging his confinement with a cellmate who smoked five packs of cigarettes a day.<sup>390</sup> The Court held that this case was similar to *Estelle* because the challenge concerned a prisoner’s health, and the Court explained that the Eighth Amendment applies to both claims involving current physical harm and those alleging conditions that may cause harm to prisoners in the future.<sup>391</sup>

In *Farmer v. Brennan*,<sup>392</sup> the Court defined the term “deliberate indifference.”<sup>393</sup> Recognizing a duty on the part of prison officials to protect prisoners from harming each other, the Court explained that the “deliberate indifference” standard in this context is subjective, not objective; it requires proof that the official actually knew of a substantial risk of serious harm and failed to act.<sup>394</sup> The Court flatly rejected objective deliberate indifference—a showing that officials knew or

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383. *Id.* at 300–03.

384. *Id.* at 304–05.

385. *Id.*

386. *Id.* at 305.

387. *Id.* at 301–02.

388. *Id.* at 311 & n.2 (White, J., concurring).

389. 509 U.S. 25 (1993).

390. *Id.* at 32–35.

391. *Id.*

392. 511 U.S. 825 (1994).

393. *Id.* at 829 (“requiring a showing that the official was subjectively aware of the risk”).

394. *Id.* at 832–34.

should have known of the harm, regardless of their actual state of mind—as the correct standard in “inhumane conditions of confinement” cases.<sup>395</sup> Because deliberate indifference “describes a state of mind more blameworthy than negligence,”<sup>396</sup> the Court favored subjective deliberate indifference as protection for the prison official who either is not aware of the facts giving rise to the risk of harm, or who fails to deduce the risk of serious harm.<sup>397</sup> The jury, however, can infer that the official actually knew of the risk based on the same type of circumstantial evidence that is used to prove objective deliberate indifference, i.e., a risk of harm sufficiently apparent that the officer should have known of it.<sup>398</sup> The Court said that this issue of fact can be demonstrated “in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.”<sup>399</sup>

The subjective and objective components analyzed in conditions-of-confinement claims under the Eighth Amendment are also part of the Court’s analysis of prisoner excessive force claims under the Eighth Amendment. In *Hudson v. McMillian*,<sup>400</sup> the Court held that the subjective component required proof that the prison officials acted maliciously.<sup>401</sup> The Court added that proof of malicious conduct automatically establishes the objective component, as long as there was more than a *de minimus* injury.<sup>402</sup>

The Court has thus recognized two different subjective components under the Eighth Amendment—deliberate indifference and malice.<sup>403</sup> The Court derived these different states of mind by balancing a prisoner’s interest in bodily integrity against the need for institutional order.<sup>404</sup> Malice is the proper standard in prisoner excessive force cases, because in the prison discipline or riot contexts exigencies exist;

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395. *Id.* at 837–38.

396. *Id.* at 835.

397. *Id.* at 837–38.

398. *Id.* at 843 n.8.

399. *Id.* at 842.

400. 503 U.S. 1 (1992).

401. *Id.* at 6–7.

402. *Id.* at 8–10.

403. *See id.* at 5–7.

404. *Id.* at 6.

however, in general prison condition litigation, where prison officials do not encounter these difficult circumstances, deliberate indifference is the proper standard.<sup>405</sup>

### *I. First Amendment Claims*

Two frequently raised claims by government employees involve the First Amendment right to free speech. The first type of claim addresses adverse employment decisions that were based on employees' affiliations with political parties. The second type questions adverse employment decisions based on employees' speech.

#### 1. Political Patronage Claims

In four decisions, the Supreme Court has specified the circumstances under which public employers may make political patronage the dispositive reason for adverse employment decisions. A plurality of the Court first held, in *Elrod v. Burns*,<sup>406</sup> that patronage dismissals generally violate the First Amendment and must be limited to "policy-making positions." Four years later, in *Branti v. Finkel*,<sup>407</sup> the Supreme Court modified the *Elrod* rule, stating that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position," but whether the hiring authority can demonstrate that party affiliation is "an appropriate requirement for the effective performance of the public office involved."<sup>408</sup> The *Branti* Court indicated that the plaintiff makes out a prima facie case by showing that he or she was discharged because of her political affiliation.<sup>409</sup> In *Rutan v. Republican Party of Illinois*,<sup>410</sup> the Supreme Court held that the First Amendment prohibits political patronage as the sole basis for decisions concerning "promotions, transfers, and recalls after layoffs." The Court explained that the government's right to take action against deficient performance effectively protects the government's interests when addressing the employment of staff members. However, when evaluating high-level em-

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405. *Id.* at 5–6.

406. 427 U.S. 347, 367–68 (1976).

407. 445 U.S. 507 (1980).

408. *Id.* at 518.

409. *Id.* See *Wilhelm v. City of Calumet City*, 409 F. Supp. 2d 991, 999 (N.D. Ill. 2006) (citing *Lohorn v. Michael*, 913 F.2d 327, 334 (9th Cir. 1998)).

410. 497 U.S. 62, 74–75 (1990).

ployees, the government may consider “who will loyally implement its policies.”<sup>411</sup>

Although the Court recognized two classes of employees—staff members and high-level employees—it nevertheless explained that performance is the central issue, with patronage being a permissible factor with respect only to the higher-level employees. The Court, in *O’Hare Truck Service, Inc. v. City of Northlake*,<sup>412</sup> held that government contractors have First Amendment protection against adverse action because of their political affiliation. The *O’Hare* Court rejected drawing a distinction between independent contractors and public employees, because contractors are not less dependent on income than are employees.<sup>413</sup>

## 2. Public Employee Free Speech Retaliation Claims

When public employees claim that their employers made adverse employment decisions because of the employees’ speech, three issues are central: (1) whether the speech was pursuant to the employee’s official duties;<sup>414</sup> (2) whether the speech was a “matter of public concern”; and, if the speech was not pursuant to official duties and was a matter of public concern, (3) whether it undermined an effective work environment.<sup>415</sup>

The First Amendment requires balancing the need for employees to speak out on a matter of public concern against the need for an effective working relationship.<sup>416</sup> In determining what constitutes a matter of public concern, courts should consider “the content, form and context” of the statement.<sup>417</sup> An employee’s mere personal grievance is not a matter of public concern; the speech must have broader social or political interest.<sup>418</sup> The employee must speak on “matters in which the public might be interested as distinct from wholly personal griev-

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411. *Id.* at 74.

412. 518 U.S. 712, 720 (1996).

413. *Id.* at 722–23.

414. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

415. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

416. *Id.* at 568.

417. *Connick v. Meyers*, 461 U.S. 138, 147–48 (1983).

418. *Id.*

ances.”<sup>419</sup> Whether the speech was a matter of public concern is an issue of law for the court.<sup>420</sup> Employers need not determine what the employee actually said;<sup>421</sup> they must only reasonably investigate the nature of the employee’s speech.<sup>422</sup> If there was a substantial likelihood that the employee engaged in protected speech, a manager must investigate before making an adverse employment decision regarding the employee.<sup>423</sup> Only procedures outside the range of what a reasonable manager would use will be found unreasonable. The reasonableness standard is objective; the subjective good faith of the employer is not controlling.<sup>424</sup>

There are situations, however, where speech on a matter of public concern may nevertheless be unprotected under the First Amendment. A public employee’s speech is not protected, even if it was a matter of public concern, if it was part of the employee’s official responsibilities.<sup>425</sup> Further, under the balancing test established in *Pickering v. Board of Education*,<sup>426</sup> the employee’s speech will not be protected if the employee’s speech interests are outweighed by the government’s interest in efficient operations. Under *Pickering* balancing, government interests are likely to prevail when the employment relationship requires confidentiality or personal loyalty, or where the speech threatens maintenance of employment discipline or harmony.<sup>427</sup> In evaluating the disruptive impact of the employee’s speech, courts are to show “a wide degree of deference to the employer’s judgment” when “a close work-

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419. *Dishnow v. Sch. Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996).

420. *Connick*, 461 U.S. at 147 n.7. When the public concern issue is close, a court may assume arguendo that the speech was of public concern and proceed directly to “*Pickering* balancing” (see *infra* notes 426–30 and accompanying text). *Blackman v. New York City Transit Auth.*, 491 F.3d 95, 97, 99–100 (2d Cir. 2007).

421. *Waters v. Churchill*, 511 U.S. 661, 678–79 (1994) (O’Connor, J.) (plurality opinion joined by Rehnquist, C.J., Souter & Ginsburg, JJ.).

422. *Id.* at 677–79.

423. *Id.* at 678 (plurality opinion).

424. *Id.*

425. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).

426. 391 U.S. 563 (1968).

427. *Id.* at 570 n.3. However, “[t]o trigger the *Pickering* balancing test, a public employee must, with specificity, demonstrate the speech at issue created workplace disharmony, impeded the plaintiff’s performance or impaired working relationships.” *Lindsey v. City of Orrick*, 491 F.3d 892, 900 (8th Cir. 2007).

ing relationship [is] essential to fulfilling public responsibilities.”<sup>428</sup> If, however, an employee does not have a “confidential, policymaking, or public contact role,” the level of disruptiveness would probably be “minimal.”<sup>429</sup> *Pickering* balancing is an issue of law for the court.<sup>430</sup>

### 3. Prisoner Retaliation Claims

Prisoners frequently allege that prison officials retaliated against them because the prisoner engaged in constitutionally protected activity, such as the filing of a judicial proceeding or prison grievance.<sup>431</sup> To establish a First Amendment retaliation claim, the prisoner must show that (1) he engaged in constitutionally protected speech or conduct, (2) the defendant took adverse action against the plaintiff, and (3) there was a causal connection between the protected activity and the adverse action.<sup>432</sup> The adverse action must be “sufficient to deter a person of ordinary firmness” from exercising his constitutional rights.<sup>433</sup> The causal connection requires the plaintiff to prove that the adverse action would not have been taken “but for” the prisoner’s constitutionally protected activity.<sup>434</sup> An inmate alleging a First Amendment retaliation claim need not prove that he had an independent liberty interest in the privilege he was denied.<sup>435</sup>

Federal courts approach prisoner First Amendment retaliation claims “with skepticism and particular care” because “virtually any adverse action taken against a prisoner by a prison official—even those

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428. *Connick v. Meyers*, 461 U.S. 138, 151–52 (1983).

429. *Rankin v. McPherson*, 483 U.S. 378, 390–91 (1987).

430. *Jackson v. State of Ala.*, 405 F.3d 1276, 1285–86 (11th Cir. 2005); *Lewis v. Cowen*, 165 F.3d 154, 164 (2d Cir. 1999). The court in *Jackson*, 405 F.3d at 1285, acknowledged that *Pickering* balancing may generate subsidiary issues of fact.

431. A prisoner’s filing of a judicial proceeding or prison grievance is constitutionally protected activity. *Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996); *Franco v. Kelly*, 854 F.2d 584, 590 (2d Cir. 1988).

432. *Rausser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001); *Dawes v. Walker*, 239 F.3d 489, 492 (2d Cir. 2001); *Allah v. Seiverling*, 229 F.3d 220, 225 (3d Cir. 2000).

433. *Rausser*, 241 F.3d at 333 (quoting *Allah*, 229 F.3d at 224–25).

434. *McDonald v. Hall*, 610 F.2d 16, 18 (1st Cir. 1979). See *Moots v. Lombardi*, 453 F.3d 1020, 1023 (8th Cir. 2006) (“[A] defendant may successfully defend a [prisoner’s] retaliatory discipline claim by showing ‘some evidence’ that the inmate actually committed a rule violation. . . . The fact that the conduct violation was later expunged does not mean that there was not some evidence for its imposition.”).

435. *Rausser*, 241 F.3d at 333.

otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act.”<sup>436</sup> In other words, prisoner retaliation claims are “prone to abuse since prisoners can claim retaliation for every decision they dislike.”<sup>437</sup> On the other hand, the prisoner is not necessarily required to produce direct evidence to establish retaliatory motive. “[W]here . . . circumstantial evidence of a retaliatory motive is sufficiently compelling, direct evidence is not invariably required.”<sup>438</sup> “[C]ircumstantial evidence may be . . . sufficient to raise a genuine issue of material fact [regarding the prison official’s retaliatory motives] precluding the grant of summary judgment.”<sup>439</sup>

#### 4. Retaliatory Prosecution

In *Hartman v. Moore*,<sup>440</sup> the Supreme Court held that a plaintiff who asserts a First Amendment claim of retaliatory prosecution against a law enforcement officer who sought to bring about the prosecution must plead and demonstrate an absence of probable cause. In other words, the absence of probable cause is an essential ingredient of a retaliatory prosecution claim. The Court reasoned that when there is probable cause for the prosecution, the causal relationship between the law enforcement officer’s conduct and the prosecutor’s decision to prosecute is too uncertain to allow the claim for relief to proceed.<sup>441</sup>

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436. *Dawes v. Walker*, 239 F.3d 489, 491 (2d Cir. 2001).

437. *Graham v. Henderson*, 89 F.3d 75, 79 (2d Cir. 1996); *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir. 1983).

438. *Bennett v. Goord*, 343 F.3d 133, 139 (2d Cir. 2003).

439. *Gayle v. Gonyea*, 313 F.3d 677, 684 (2d Cir. 2002).

440. 547 U.S. 250 (2006) (*Bivens* action).

441. A claim against the prosecutor based on her decision to prosecute would be barred by prosecutorial immunity. *Hartman*, 547 U.S. at 261–62. *See also infra* Part XIV.C.

For post-*Hartman* decisions, *see Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007) (*Hartman* applicable “even where intervening actions by a prosecutor are not present”) (following *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006)); *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006) (search and seizure of property in retaliation for exercise of First Amendment rights states proper claim even if search and seizure supported by probable cause; court distinguished *Hartman* as based on complexity of causation issue in retaliatory prosecution cases); *Swiecicki v. Delgado*, 463 F.3d 489 (6th Cir. 2006) (not citing *Hartman* and holding that arrest in retaliation for verbal protest to police action would violate First Amendment).

## V. Enforcement of Federal Statutes Under § 1983

Some federal statutory rights may be enforced under 42 U.S.C. § 1983. In *Maine v. Thiboutot*,<sup>442</sup> the Supreme Court rejected the argument that only federal statutes dealing with “equal rights” or “civil rights” are enforceable under § 1983. The Court held that § 1983’s reference to “laws” of the United States means what it says, and, therefore, all federal statutes are enforceable under § 1983 against defendants who acted under color of state law. However, as discussed below, subsequent Supreme Court decisions substantially cut back the decision in *Thiboutot* by holding that not all federal statutes are enforceable under § 1983.<sup>443</sup> These decisions hold that a federal statute will not be enforceable under § 1983 if it either (1) does not unambiguously create a federal right in the plaintiffs or (2) contains enforcement remedies intended by Congress to be the exclusive means of enforcement.

### A. Enforcement of Federal “Rights”

For a federal statute to be enforceable under § 1983, “a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*.”<sup>444</sup> The Supreme Court has identified three factors to determine whether a particular federal statutory provision creates a federal right:

First, Congress must have intended that the provision in question benefit the plaintiff.<sup>445</sup>

Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so “vague and amorphous” that its enforcement would strain judicial competence.<sup>446</sup>

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442. 448 U.S. 1 (1980).

443. See, e.g., *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120–21 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002); *Suter v. Artist M.*, 503 U.S. 347, 363 (1992); *Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n*, 453 U.S. 1, 10–11 (1981).

444. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989)). Accord *Gonzaga Univ. v. Doe*, 536 U.S. 273, 282 (2002).

445. *Blessing*, 520 U.S. at 340 (citing *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 430 (1987)).

446. *Id.* at 340–41 (quoting *Wright*, 479 U.S. at 430).

Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.<sup>447</sup>

The pertinent issue is not whether the federal statutory *scheme* creates enforceable rights, but whether the *specific* federal statutory provision at issue creates enforceable rights.<sup>448</sup>

In *Pennhurst State School & Hospital v. Halderman*,<sup>449</sup> the Supreme Court held that 42 U.S.C. § 6009, the “bill of rights” provision of the Developmental Disabilities Assistance and Bill of Rights Act, did not create enforceable rights in favor of the developmentally disabled.<sup>450</sup> The Court identified the inquiry as whether the provision “imposed an obligation on the States to spend state money to fund certain rights as a condition of receiving federal moneys under the Act or whether it spoke merely in precatory terms.”<sup>451</sup> Noting that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously[,]”<sup>452</sup> the Court concluded that “the provisions of § [6009] were intended to be hortatory, not mandatory.”<sup>453</sup> “Congress intended to encourage, rather than mandate, the provision of better services to the developmentally disabled.”<sup>454</sup> Accordingly, § 6009 did not create substantive rights in favor of the mentally disabled to “appropriate treatment” in the “least restrictive” environment, and thus § 6009 was not enforceable through § 1983.<sup>455</sup>

In the next several decisions, the Supreme Court found that federal statutes created enforceable rights. In *Golden State Transit Corp. v. City of Los Angeles*,<sup>456</sup> the Court held that Golden State could sue for damages under § 1983 to remedy the violation of its right under the Na-

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447. *Id.* at 341 (citing *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498, 500 (1990); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

448. *Blessing*, 520 U.S. at 342.

449. 451 U.S. 1 (1981).

450. *Id.* at 18 (citing former § 6010, which is now § 6009).

451. *Id.*

452. *Id.* at 17.

453. *Id.* at 23.

454. *Id.* at 20.

455. *Id.* at 10–11.

456. 493 U.S. 103 (1989).

tional Labor Relations Act<sup>457</sup> not to have the renewal of its taxi license conditioned on the settlement of a pending labor dispute.<sup>458</sup> In *Wright v. City of Roanoke Redevelopment & Housing Authority*,<sup>459</sup> the Court determined that the Brooke Amendment to the U.S. Housing Act and implementing regulations created enforceable rights. The defendant was a public housing authority subject to the Brooke Amendment's "ceiling for rents charged to low-income people living in public housing projects."<sup>460</sup> The Department of Housing and Urban Development (HUD) had, in its implementing regulations, "consistently considered 'rent' to include a reasonable amount for the use of utilities."<sup>461</sup> Public housing tenants brought suit under § 1983 alleging that the Roanoke Housing Authority had "imposed a surcharge for 'excess' utility consumption that should have been part of petitioners' rent and deprived them of their statutory rights to pay only the prescribed maximum portion of their income as rent."<sup>462</sup> The Court determined that the Brooke Amendment and implementing HUD regulations gave low-income tenants specific and definable rights to a reasonable utility allowance that were enforceable under § 1983, and that the regulations were fully authorized by the statute.<sup>463</sup>

The Court, in *Wilder v. Virginia Hospital Ass'n*,<sup>464</sup> also found an enforceable right in the Boren Amendment to the Medicaid Act,<sup>465</sup> which required a participating state to reimburse health care providers at "reasonable rates."<sup>466</sup> The Court concluded that health care providers were clearly intended beneficiaries of the Boren Amendment,<sup>467</sup> that the amendment was cast in mandatory terms, imposing a "binding obligation" on participating states to adopt reasonable rates of reimbursement for health care providers, and that this obligation was en-

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457. See 29 U.S.C. §§ 151–169 (1988 & Supp. V).

458. *Golden State*, 493 U.S. at 112–13.

459. 479 U.S. 418 (1987).

460. *Id.* at 420 (citations omitted).

461. *Id.*

462. *Id.* at 421.

463. *Id.* at 430.

464. 496 U.S. 498 (1990).

465. See 42 U.S.C. §§ 1396–1396v (1998 & Supp. V).

466. 42 U.S.C. § 1396a(a)(13)(A) (1998 & Supp. V).

467. *Wilder*, 496 U.S. at 510.

forceable under § 1983.<sup>468</sup> Rejecting the argument that the obligation imposed by the Boren Amendment was “too vague and amorphous” to be capable of judicial enforcement,<sup>469</sup> the Court noted that “the statute and the Secretary’s regulations set out factors which a State must consider in adopting its rates,” including “the objective benchmark of an ‘efficiently and economically operated facility’ providing care in compliance with federal and state standards while at the same time ensuring ‘reasonable access’ to eligible participants.”<sup>470</sup>

The decisions in *Golden State*, *Wright*, and *Wilder* represent a liberal approach to enforcement of federal statutes under § 1983. In contrast, the Court in *Suter v. Artist M.*<sup>471</sup> took a restrictive approach. The Court in *Suter* did not find an enforceable right in a provision of the Adoption Assistance and Child Welfare Act of 1980.<sup>472</sup> The Act provides for federal reimbursement of certain expenses incurred by a state in administering foster care and adoption services, conditioned upon the state’s submission of a plan for approval by the Secretary of Health and Human Services.<sup>473</sup> To be approved, the plan must satisfy certain requirements, including one that mandates that the state make “reasonable efforts” to keep children in their homes.<sup>474</sup>

The issue before the Court in *Suter* was whether “Congress, in enacting the Adoption Act, unambiguously confer[ed] upon the child beneficiaries of the Act a right to enforce the requirement that the State make ‘reasonable efforts’ to prevent a child from being removed from his home, and once removed to reunify the child with his family.”<sup>475</sup> The Court held that it did not. The Court concluded that the only unambiguous requirement imposed by 42 U.S.C. § 671(a) was that the state submit a plan to be approved by the Secretary.<sup>476</sup>

The Court in *Suter* emphasized that in *Wilder* it had “relied in part on the fact that the statute and regulations set forth in some detail the

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468. *Id.* at 512.

469. *Id.* at 519.

470. *Id.*

471. 503 U.S. 347 (1992).

472. *Id.* at 350. See 42 U.S.C. §§ 620–628, 670–679a (1998 & Supp. V).

473. 42 U.S.C. §§ 620–628, 670–679a (1998 & Supp. V).

474. 42 U.S.C. § 671(a)(15) (1998).

475. *Suter*, 503 U.S. at 357.

476. *Id.*

factors to be considered in determining the methods for calculating rates,”<sup>477</sup> whereas the Child Welfare Act contained “[n]o further statutory guidance . . . as to how ‘reasonable efforts’ are to be measured.”<sup>478</sup>

In *Blessing v. Freestone*,<sup>479</sup> a unanimous Court rejected an attempt by custodial parents to enforce, through a § 1983 action, a general, undifferentiated right to “substantial compliance” by state officials with a federally funded child-support enforcement program that operates under Title IV-D of the Social Security Act.<sup>480</sup> While the Court did not foreclose the possibility that certain provisions of Title IV-D might give rise to private, enforceable rights, it faulted the court of appeals for taking a “blanket approach” and for painting “with too broad a brush” in determining whether Title IV-D creates enforceable rights.<sup>481</sup> The Supreme Court remanded the case and instructed the plaintiffs to articulate with particularity the rights they were seeking to enforce. *Blessing* forces plaintiffs to break their claims down into “manageable analytic bites” so that the court can “ascertain whether each separate claim

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477. *Id.* at 359.

478. *Id.* at 360. Congress responded to *Suter* by passing an amendment to the Social Security Act, which provides that in all pending and future actions

brought to enforce a provision of the [Social Security Act], such provision is not to be deemed unenforceable because of its inclusion in a section of this chapter requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such ground applied in *Suter v. Artist M.* [cite omitted], but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that this section is not intended to alter the holding in *Suter v. Artist M.* [cite omitted] that section 471(a)(15) [42 U.S.C. § 671(a)(15)] of this title is not enforceable in a private right of action.

42 U.S.C. § 1320a-2 (amended October 20, 1994).

Thus, while the holding of *Suter* with respect to the “reasonable efforts” provision remains good law, “the amendment overrules the general theory in *Suter* that the only private right of action available under a statute requiring a state plan is an action against the state for not having that plan. Instead, the previous tests of *Wilder* and *Pennhurst* apply to the question of whether or not the particulars of a state plan can be enforced by its intended beneficiaries.” *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1283 (E.D. Wis. 1995). *See also* *Harris v. James*, 127 F.3d 993, 1002–03 (11th Cir. 1997).

479. 520 U.S. 329 (1997).

480. Title IV-D of the Social Security Act, as added, 88 Stat. 2351 and as amended, 42 U.S.C.A. §§ 651–669b (Supp. 1997).

481. *Blessing*, 520 U.S. at 342–43.

satisfies the various criteria [the Supreme Court has] set forth for determining whether a federal statute creates rights.”<sup>482</sup>

In *Gonzaga University v. Doe*,<sup>483</sup> the Supreme Court held unenforceable under § 1983 a provision of the Family Educational Rights and Privacy Act (FERPA) directing that federal funds shall not be made available to an educational institution that “has a policy of permitting the release of educational records . . . of students without the written consent of their parents.”<sup>484</sup> The Court acknowledged that its decisions governing enforcement of federal statutes under § 1983 contained inconsistent language and created “confusion” in the lower courts.<sup>485</sup> It found that the FERPA provision was not enforceable under § 1983 because it failed to create “in clear and unambiguous terms” a federal right in the plaintiffs.<sup>486</sup> The Court pointed out, *inter alia*, that FERPA has an aggregate approach directed to the U.S. Secretary of Education to deny federal funds to educational institutions that have a policy or practice of disclosing education records.<sup>487</sup>

*B. Specific Comprehensive Scheme Demonstrating Congressional Intent to Foreclose § 1983 Remedy*

If the plaintiff demonstrates that a federal statute creates an enforceable right, there is “a rebuttable presumption that the right is enforceable under § 1983.”<sup>488</sup> The defendant has the burden of rebutting the presumption by showing that Congress intended to preclude enforcement under § 1983.<sup>489</sup> Congress may preclude enforcement under § 1983 either expressly or impliedly by creating a remedial scheme that is so

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482. *Id.* at 342.

483. 536 U.S. 273 (2002).

484. 20 U.S.C. § 1232g(b)(1) (1994).

485. *Gonzaga Univ.*, 536 U.S. at 278, 283.

486. *Id.* at 290.

487. *Id.*

488. *Blessing*, 520 U.S. at 341. *Accord* *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005).

489. *See* *Smith v. Robinson*, 468 U.S. 992 (1984). *See also* *City of Rancho Palos Verdes*, 544 U.S. at 120.

comprehensive as to demonstrate a congressional intent to preclude enforcement under § 1983.<sup>490</sup>

In *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*,<sup>491</sup> an association claimed that the County Sewerage Authority discharged and dumped pollutants, violating the Federal Water Pollution Control Act<sup>492</sup> and the Marine Protection, Research, and Sanctuaries Act of 1972.<sup>493</sup> In addition, the County Sewerage Authority allegedly violated the terms of its permits.<sup>494</sup> Although the issue before the Court was “whether [the Association] may raise either of these claims in a private suit for injunctive and monetary relief, where such a suit is not expressly authorized by either of these Acts,”<sup>495</sup> the Court addressed, *sua sponte*, the enforceability of these Acts pursuant to § 1983. Noting that both statutes contained “unusually elaborate enforcement provisions[,]”<sup>496</sup> the Court held that “[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983.”<sup>497</sup>

Similarly, in *Smith v. Robinson*, the Court concluded that the “carefully tailored administrative and judicial mechanism”<sup>498</sup> embodied in the Education of the Handicapped Act (EHA)<sup>499</sup> reflected Congressional intent that the EHA be “the exclusive avenue through which a plaintiff may assert [an equal protection claim to a publicly financed special education].”<sup>500</sup> The dissent disagreed:

The natural resolution of the conflict between the EHA, on the one hand, and . . . [section] 1983, on the other, is to require a plaintiff with a claim covered by the EHA to pursue relief through the administrative channels

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490. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981).

491. 453 U.S. 1 (1981).

492. *See* 33 U.S.C. §§ 1251–1387 (1988 & Supp. V).

493. *See id.* §§ 1401–1445.

494. *See Middlesex County Sewerage Auth.*, 453 U.S. at 12.

495. *Id.*

496. *Id.* at 13.

497. *Id.* at 20.

498. *Smith v. Robinson*, 468 U.S. 992, 1009 (1984).

499. *See* 20 U.S.C. §§ 1400–1485 (1988 & Supp. V). In 1991, the Act was renamed Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400–1491 (1994).

500. *Smith*, 468 U.S. at 1009.

established by that Act before seeking redress in the courts under . . . [section] 1983.<sup>501</sup>

The dissent's position became the law when, in response to *Smith*, Congress amended the EHA to provide explicitly that parallel constitutional claims were not preempted by the EHA and could be raised in conjunction with claims based on it.<sup>502</sup>

A congressional remedy that is very specific and circumscribed may also imply a congressional intent to preclude enforcement under § 1983. In *City of Rancho Palos Verdes v. Abrams*,<sup>503</sup> the Supreme Court held that specific provisions of the federal Telecommunications Act (TCA) were not enforceable under § 1983 because the TCA has its own highly specific circumscribed remedy. This carefully circumscribed remedy included a short thirty-day limitations period, the requirement that a court hear and decide a TCA claim “on an expedited basis,” and limited remedies, “perhaps” not including compensatory damages and not authorizing awards of attorneys’ fees and costs.<sup>504</sup> The Court found that this highly specific remedy indicated a congressional intent to foreclose rather than supplement the § 1983 remedy for a TCA violation.

### C. Current Supreme Court Approach

The foregoing analysis shows a clear trend in recent Supreme Court decisions of substantially tightening the standards for enforcing federal statutes under § 1983.<sup>505</sup> *Gonzaga University v. Doe*<sup>506</sup> is the most significant of these decisions. The Court in *Gonzaga* instructed the lower courts that to find that Congress intended to create an enforceable federal statutory right, Congress “must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights under an implied private right of action.”<sup>507</sup> The Court

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501. *Id.* at 1024 (Brennan, J., joined by Marshall & Stevens, JJ., dissenting).

502. *See* 20 U.S.C. § 1415(f) (1988 & Supp. V).

503. 544 U.S. 113, 120–21 (2005).

504. *Id.* at 114.

505. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992).

506. 536 U.S. 273, 290 (2002).

507. *Id.* at 290.

also strongly indicated that federal statutes enacted under the Spending Clause are unlikely to create private enforceable rights.<sup>508</sup> It pointed out that only twice has it found Spending Clause legislation enforceable under § 1983.<sup>509</sup>

*D. Enforcement of Federal Regulations Under § 1983*

The lower courts are in disagreement as to when a federal regulation is enforceable under § 1983.<sup>510</sup> Most recent decisions on the issue hold that “a federal regulation alone may not create a right enforceable through section 1983 not already found in the enforcing statute.”<sup>511</sup> Under this view, “regulations give rise to a right of action [under § 1983] only insofar as they construe a personal right that a statute creates.”<sup>512</sup> This position finds support in the Supreme Court’s statement in *Alexander v. Sandoval*<sup>513</sup> that “language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not.” Although the Court, in *Wright v. City of Roanoke Redevelopment & Housing Authority*,<sup>514</sup> found a federal regulation enforceable under § 1983, the regulation was promulgated pursuant to a federal statute that itself created rights enforceable under § 1983.

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508. *Id.* at 281.

509. See *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990); *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418 (1987).

510. See 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 4.04[A] (4th ed. 2004).

511. *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 790 (3d Cir. 2001), *cert. denied*, 123 S. Ct. 2621 (2002). See also *Johnson v. City of Detroit*, 446 F.3d 614, 628–29 (6th Cir. 2006); *Harris v. James*, 127 F.3d 993 (11th Cir. 1997).

512. *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of Pittsburgh*, 382 F.3d 412, 424 (3d Cir. 2004).

513. 532 U.S. 275, 291 (2001).

514. 479 U.S. 418 (1987).

## VI. Section 1983 Defendants

Section 1983 authorizes assertion of a claim for relief against a “person” who acted under color of state law. A suable § 1983 “person” encompasses state and local officials sued in their personal capacities, municipal entities, and municipal officials sued in an official capacity, but not states and state entities.

In *Will v. Michigan Department of State Police*,<sup>515</sup> the Supreme Court held that a suable “person” under § 1983 does not include a state, a state agency, or a state official sued in her official capacity for damages. However, the Court ruled that a state official sued in an official capacity is a § 1983 “person” when sued for prospective relief.<sup>516</sup> In *Hafer v. Melo*,<sup>517</sup> the Supreme Court held that a state official sued for damages in her personal capacity is a § 1983 person, even though the claim for relief arose out of the official’s official responsibilities. In *Monell v. Department of Social Services*,<sup>518</sup> the Supreme Court held that municipalities and municipal officials sued in an official capacity are suable § 1983 persons.<sup>519</sup> Since a claim against a municipal official in her official capacity is tantamount to a suit against the municipal entity,<sup>520</sup> when claims are asserted against both the municipal entity and a municipal official in her official capacity, federal courts typically dismiss the official capacity claim as “redundant” to the municipal-entity claim.<sup>521</sup>

Courts sometimes have to decide whether an official is a state as opposed to municipal policy maker in a particular subject area or on a particular issue. This is an important issue because municipal entities are suable § 1983 persons while state entities are not. In addition, Eleventh Amendment sovereign immunity protects state entities from fed-

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515. 491 U.S. 58 (1989).

516. *Id.* at 71 n.10.

517. 502 U.S. 21, 27 (1991).

518. 436 U.S. 658, 690 (1978).

519. “The District of Columbia is a municipality for the purpose of § 1983.” *People for Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425 (D.C. Cir. 2005).

520. *See infra* Part IX.

521. *See, e.g.*, *Anemone v. Metro. Transp. Auth.*, 410 F. Supp. 2d 255, 264 n.2 (S.D.N.Y. 2006); *Wilhelm v. City of Calumet City*, 409 F. Supp. 2d 991, 994 n.1 (N.D. Ill. 2006); *Robinson v. District of Columbia*, 403 F. Supp. 2d 39, 49 (D.D.C. 2005).

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eral court liability but provides no protection for municipal entities.<sup>522</sup> In *McMillian v. Monroe County*,<sup>523</sup> the Supreme Court held that whether an official is a state or municipal policy maker is “dependent on an analysis of state law.”<sup>524</sup> The Court recognized that a particular official (e.g., the county sheriff) may be considered a state official in one state and a municipal official in another state.<sup>525</sup> Furthermore, an official may be considered a state official for the purpose of one function and a municipal official for the purpose of another function.<sup>526</sup> For example, district attorneys are normally considered state officials when prosecuting crimes, but are considered municipal officials when carrying out their administrative duties, such as training staff.<sup>527</sup>

Municipal departments, offices, and commissioners are normally not considered suable entities.<sup>528</sup> This is a matter of form rather than substance. It means simply that instead of naming, for example, the “police department” as a party defendant, the plaintiff must name as defendant the municipality (city, town, or village) of which the department is a part.

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522. See *infra* Part XIII.

523. 520 U.S. 781, 786 (1997).

524. See *infra* Part X.

525. *McMillian*, 520 U.S. at 795.

526. *Id.* at 785–86.

527. *Id.*

528. See *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992) (“[S]heriffs departments and police departments are not usually considered legal entities subject to suit.”).

## VII. Color of State Law and State Action

An essential ingredient of a § 1983 claim is that the defendant acted under color of state law.<sup>529</sup> Furthermore, the Fourteenth Amendment imposes limitations only on state action; it does not reach the conduct of private parties, no matter how discriminatory or harmful.<sup>530</sup> Neither § 1983 nor the Fourteenth Amendment reaches the conduct of federal officials<sup>531</sup> or of purely private persons. “[P]ersons victimized by the tortious conduct of private parties must ordinarily explore other avenues of redress.”<sup>532</sup>

The Supreme Court and the lower federal courts have generally treated color of state law and state action as meaning the same thing.<sup>533</sup> A finding that the defendant was engaged in state action means that the defendant acted under color of state law.<sup>534</sup> If the defendant was not engaged in state action, the Fourteenth Amendment is not implicated, and there is no reason for a court to determine whether the defendant acted under color of state law.

### A. State and Local Officials

The clearest case of state action (and action under color of state law) is a public official who carried out his official responsibilities in accordance with state law. *Polk County v. Dodson*<sup>535</sup> is the only Supreme Court case that has found that a state or local official who carried out his official responsibilities was not engaged in state action. The Court

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529. *Flagg Bros. v. Brooks*, 436 U.S. 149, 155 (1978).

530. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999) (§ 1983 is not implicated by “merely private conduct, no matter how discriminatory or wrongful”); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349 (1974).

531. 1 Schwartz, *supra* note 510, § 5.07. See *District of Columbia v. Carter*, 409 U.S. 418, 424–25 (1973) (“actions of the Federal Government and its officers are at least facially exempt from [§ 1983’s] proscriptions”); *McCloskey v. Mueller*, 446 F.3d 262, 271 (1st Cir. 2006) (“a section 1983 claim ordinarily will not lie against a federal actor”).

532. *Roche v. John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 253 (1st Cir. 1996).

533. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 929 (1982). However, color of state law would not constitute state action if color of state law were interpreted to mean merely acting “with the knowledge of and pursuant to [a] statute.” *Id.* at 935 n.18 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 n.23 (1970)).

534. *West v. Atkins*, 487 U.S. 42, 49–50 (1988); *Lugar*, 457 U.S. at 935.

535. 454 U.S. 312 (1981).

VII. Color of State Law and State Action

held that a public defender's representation of an indigent criminal defendant was not under color of state law.<sup>536</sup> The Court reasoned that although the public defender is employed and paid by the state, when representing a criminal defendant he acts not for the state, but as an adversary of the state, and not under color of state law, but pursuant to the attorney–client relationship with undivided loyalty to his client.<sup>537</sup>

In *West v. Atkins*,<sup>538</sup> the Supreme Court held that a private physician who provides medical services to prisoners pursuant to a contract with the state acts under color of state law. Unlike the public defender in *Polk County*, the prison physician is not an adversary of the state. Although the physician's exercise of professional judgment may seem to suggest professional judgment and independent autonomy, the prison physician exercises professional judgment on behalf of the state and in furtherance of the state's obligation to provide medical care to inmates. The decision in *West* is based primarily on the fact that the prison physician performs a governmental function and carries out the state's constitutional obligation of providing medical care to prison inmates.<sup>539</sup>

State and local officials who abuse their official power act under color of state law. The governing principle is that “[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken “under color of” state law.”<sup>540</sup>

Courts often must determine whether an official abused governmental power or acted as a private individual, e.g., as an irate spouse. The issue often arises with respect to off-duty police officers. To determine whether an off-duty police officer acted under color of state

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536. See *West v. Atkins*, 487 U.S. 42, 50 (1988) (discussing *Polk County*).

537. However, as the Court in *Polk County* acknowledged, a public defender may be sued under § 1983 for carrying out her administrative functions. See *Powers v. Hamilton County Public Defender Comm'n*, 501 F.3d 592, 612 (6th Cir. 2007). Further, a public defender may be sued under § 1983 if she conspired with a state actor, even if the state actor is immune from § 1983 liability. *Tower v. Glover*, 467 U.S. 914, 919–20 (1984).

538. 487 U.S. 42 (1988).

539. See *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 55–58 (1999) (discussing *West*).

540. *Monroe v. Pape*, 365 U.S. 167, 184 (1961) (quoting *United States v. Classic*, 313 U.S. 299, 325–26 (1946)).

law, courts consider such factors as whether an ordinance deemed the officer on duty for twenty-four hours; the officer identified herself as a police officer; the officer had or showed her service revolver or other police department weapon; the officer flashed her badge; the officer conducted a search or made an arrest; the officer intervened in an existing dispute pursuant to police department regulations (as opposed to instigating a dispute).<sup>541</sup>

### *B. State Action Tests*

Courts frequently must determine whether a private party's involvement with state or local government justifies the conclusion that the party was engaged in "state action" for the purpose of the Fourteenth Amendment. The state action doctrine is designed to preserve a private sphere free of constitutional restraints, as well as to ensure "that constitutional standards are invoked when it can be said that the state is responsible for the specific conduct of which the plaintiff complains."<sup>542</sup> The Supreme Court state action decisional law has advanced the following state action tests:

- symbiotic relationship;
- public function;
- close or joint nexus;
- joint participation; and
- pervasive entwinement.

The fact that these tests can be culled from the Supreme Court state action decisional law does not mean that all Supreme Court state action holdings have been based on one of the above doctrines. At times, the Court has found state action based on ad hoc evaluations of a variety of connections between the private party and the state.<sup>543</sup> The Court

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541. See, e.g., *Pickrel v. City of Springfield*, 45 F.3d 1115, 1118 (7th Cir. 1995); *Pitchell v. Callahan*, 13 F.3d 545, 548 (2d Cir. 1994); *United States v. Tarpley*, 945 F.2d 806, 809 (5th Cir. 1991), *cert. denied*, 504 U.S. 917 (1992); *Bonsignore v. City of New York*, 683 F.2d 635, 638–39 (2d Cir. 1982); *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980); *Stengel v. Belcher*, 522 F.2d 438, 440–41 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976).

542. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (citations, quotation marks, and brackets omitted).

543. See *Georgia v. McCollum*, 505 U.S. 42 (1992) (criminal defense attorney's exercise of race-based preemptory challenge); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (private civil litigants exercise of race-based preemptory challenge); *West v. Atkins*,

has acknowledged that its state action decisions “have not been a model of consistency.”<sup>544</sup> The nature of the government involvement with the private party can give rise to disputed questions of fact. Nevertheless, the courts decide a large percentage of state action issues as a matter of law.

### 1. Symbiotic Relationship

The Supreme Court’s decision in *Burton v. Wilmington Parking Authority*<sup>545</sup> is often cited to support the principle that state action is present when the state and private party have a symbiotic relationship.<sup>546</sup> Although *Burton* has not been overruled, the Court read *Burton* very narrowly as supporting a finding of state action only when the state profited from the private wrong.<sup>547</sup> Furthermore, the Court has denigrated *Burton* as one of its “early” state action decisions containing “vague” “joint participation” language.<sup>548</sup>

### 2. Public Function

Supreme Court decisions state that there is state action when a private party carries out a function that has been historically and traditionally the “exclusive” prerogative of the state.<sup>549</sup> This is a demanding standard that § 1983 plaintiffs find difficult to satisfy. While many functions may be historically and traditionally governmental functions, few are “exclusively” governmental functions. The Supreme Court has found state action under the public function doctrine in cases involving political primaries<sup>550</sup> and has stated that eminent domain is an example of an exclusively governmental power.<sup>551</sup> The Court’s decision in *West v. At-*

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487 U.S. 42 (1988) (private physician’s provision of medical care to inmates). See also *Brennwood Acad.*, 531 U.S. 288.

544. *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 378 (1995) (quoting *Edmondson*, 500 U.S. at 632 (O’Connor, J., dissenting)).

545. 365 U.S. 715 (1961).

546. See *Moose Lodge v. Irvis*, 407 U.S. 163, 175 (1972) (describing holding in *Burton*).

547. *Rendell-Baker v. Kohn*, 457 U.S. 830, 831 (1982); *Blum v. Yaretsky*, 457 U.S. 991, 1011 (1982).

548. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 57 (1999).

549. *Flagg Bros. v. Brooks*, 436 U.S. 149, 157–58 (1978); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

550. *Terry v. Adams*, 345 U.S. 461, 469 (1953).

551. See discussion in *Jackson*, 419 U.S. at 353.

*kins*,<sup>552</sup> that a private physician's provision of medical care to prison inmates constitutes state action, was based in part on the fact that the physician carries out a governmental function of providing medical care to inmates.<sup>553</sup>

The Supreme Court has held that the following functions do not satisfy the public function doctrine because they are not "exclusively" governmental functions:

1. insurance companies' suspension of workers' compensation benefits pending utilization committee review;<sup>554</sup>
2. education of maladjusted children;<sup>555</sup>
3. nursing home care;<sup>556</sup>
4. coordination of amateur athletics;<sup>557</sup>
5. dispute resolution through forced sale of goods by a warehouse company to enforce a possessory lien;<sup>558</sup>
6. operation of a shopping mall;<sup>559</sup> and
7. provision of utility services.<sup>560</sup>

### 3. Close Nexus Test

Under the "sufficiently close nexus" test, state action is present if the state has ordered the private conduct, or "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."<sup>561</sup> The federal courts have held that the following are not sufficient to satisfy this test:

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552. 487 U.S. 42 (1988).

553. *See Am. Mfrs.*, 526 U.S. at 55–58 (discussing *West*).

554. *Id.* at 55.

555. *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

556. *Blum v. Yaretsky*, 457 U.S. 991, 993 (1982).

557. *S.F. Arts & Athletics v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987). *See also* *NCAA v. Tarkanian*, 488 U.S. 179, 197 n.18 (1988).

558. *Flagg Bros. v. Brooks*, 436 U.S. 149, 159–60 (1978).

559. *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976).

560. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–53 (1974).

561. *Blum*, 457 U.S. at 1004.

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1. state authorization of private conduct;<sup>562</sup>
2. a private party's use of a state furnished dispute resolution mechanism;<sup>563</sup>
3. a private party's request for police assistance;<sup>564</sup>
4. a private party's attempt to influence governmental action;<sup>565</sup>
5. state licensing and regulation, even if pervasive;<sup>566</sup> and
6. state financial assistance, even if extensive.<sup>567</sup>

The Supreme Court has found no state action even when several of these indicia of government involvement coalesced in the same case. The Court has held that private parties (such as a utility company, a private school, and a nursing home) that were extensively regulated by the state, received substantial governmental assistance, carried out an important societal function, and acted pursuant to state authority, were not engaged in state action.<sup>568</sup>

4. Joint Participation

A private party who jointly participates in the alleged constitutional wrongdoing with a state or local official is engaged in state action.<sup>569</sup> Joint participation requires (1) some type of conspiracy, agreement, or concerted action between the state and private party; (2) a showing that the state and private party shared common goals; and (3) conduct pursuant to the conspiracy, agreement, or concerted action that violated the plaintiff's federally protected rights. In *Dennis v. Sparks*,<sup>570</sup> the Supreme Court held that private parties who corruptly conspire with a

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562. *Flagg Bros.*, 436 U.S. at 164; *Jackson*, 419 U.S. at 354.

563. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999).

564. *See, e.g., Ginsberg v. Healey Car & Truck Leasing*, 189 F.3d 268, 271–72 (2d Cir. 1999).

565. *NCAA v. Tarkanian*, 488 U.S. 179, 193–94 (1988).

566. *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982); *Blum*, 457 U.S. at 1008; *Jackson*, 419 U.S. at 350.

567. *Rendell-Baker*, 457 U.S. at 840 (no state action even though educational institution received almost all of its funding from state). *See also Jackson*, 419 U.S. at 351–52 (state grant of monopoly power).

568. *See Rendell-Baker*, 457 U.S. at 840–41 (school); *Blum*, 457 U.S. at 1008 (nursing home); *Jackson*, 419 U.S. at 350–54 (utility company).

569. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 941 (1982); *Dennis v. Sparks*, 449 U.S. 24, 27–28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

570. 449 U.S. 24 (1980).

judge act under color of state law, even though the judge is protected by judicial immunity.<sup>571</sup> In *National Collegiate Athletic Ass'n v. Tarkanian*,<sup>572</sup> the Supreme Court held that there was no joint action between the NCAA, a private entity, and the state university because they had diametrically opposite goals. The NCAA's goal was that the university's head basketball coach be suspended while the university sought to retain its prominent head coach. Although a private party's mere use of a state statute, alone, does not constitute state action,<sup>573</sup> when combined with the presence of state officials it can signify state action.<sup>574</sup> In *Lugar v. Edmondson Oil Co.*,<sup>575</sup> the Supreme Court held that a creditor who used a state prejudgment attachment statute acted under color of state law because, in attaching the debtor's property, with help from the court clerk and sheriff, the creditor used state power. The assistance from state officials made the creditor a joint participant in state action.<sup>576</sup>

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571. A court's issuance of a judgment is clearly state action. *Shelley v. Kraemer*, 334 U.S. 1, 14–20 (1948). However, “merely resorting to the courts and being on the winning side of a lawsuit does not make a party co-conspirator or joint actor with the judge.” *Sparks*, 449 U.S. at 28.

572. 488 U.S. 179 (1988).

573. *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–66 (1978).

574. *Lugar*, 457 U.S. at 939–42.

575. 457 U.S. 922 (1982).

576. *Id.* at 937. The Court explained that in this context the alleged “deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible.” *Id.* A private party who misused or abused the state process does not engage in state action. *Id.* at 941. In a footnote, the Supreme Court in *Lugar* stated that its analysis was limited to prejudgment seizures of property. *Id.* at 939 n.21. The lower federal courts have generally been reluctant “to extend the relatively low bar of *Lugar's* so-called ‘joint action’ test outside the context of challenged prejudgment attachment or garnishment proceedings.” *Revis v. Meldrum*, 489 F.3d 273, 289 (6th Cir. 2007).

The joint action issue also arises in cases involving a private party's repossession of property in which a law enforcement officer plays some role. The Eighth Circuit stated that “there is no state action if the officer merely keeps the peace, but there is state action if the officer affirmatively intervenes to aid the reposessor enough that the repossession would not have occurred without the officer's help.” *Moore v. City of Poplar Bluff*, 404 F.3d 1043 (8th Cir. 2006). For an insightful analysis of the issue, see *Barrett v. Harwood*, 189 F.3d 297, 302 (2d Cir. 1999) (case law does not provide “bright line” but a “spectrum” of police involvement in the repossession), *cert. denied*, 530 U.S. 1262 (2000).

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5. Pervasive Entwinement

In *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*,<sup>577</sup> the Supreme Court held that a statewide interscholastic athletic association was engaged in state action because the state was “pervasively entwined” with the association. The Court relied heavily on the fact that because almost all of the state’s public schools were members of the association, there was a “largely overlapping identity” between the association and the state’s public schools. The Court also relied on the facts that the association’s governing board was dominated by public school officials, most of the association’s revenue was derived from governmental funds, and the association carried out a function that otherwise would have to be carried out by the state board of education. Unfortunately, the Court failed to provide a definition of “pervasive entwining,” thereby leaving it to the lower courts to determine on a case-by-case basis.

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In shoplifting cases, the prevailing view is the store’s detention of a suspected shoplifter is state action if the store and police have a “prearranged plan” pursuant to which the police agree to arrest anyone identified by the store as a shoplifter. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 5.16[A] (4th ed. 2004).

577. 531 U.S. 288 (2001).

## VIII. Causation

Section 1983 by its terms authorizes the imposition of liability only on a defendant who “subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights” guaranteed by federal law. The Supreme Court has read this language as imposing a proximate cause requirement on § 1983 claims.<sup>578</sup> The great weight of judicial authority equates § 1983’s causation requirement with common-law proximate cause.<sup>579</sup> This reading of § 1983 is consistent with the fundamental principle that § 1983 should be interpreted “against the background of tort liability that makes a [person] responsible for the natural consequences of his [or her] actions.”<sup>580</sup>

A § 1983 defendant “may be held liable for ‘those consequences attributable to reasonably foreseeable intervening forces, including acts of third parties.’”<sup>581</sup> On the other hand, a § 1983 defendant may not be held liable when an intervening force was not reasonably foreseeable or when the link between the defendant’s conduct and the plaintiff’s injuries is too remote, tenuous, or speculative.<sup>582</sup> “In the context of criminal law enforcement, courts have differed as to the circumstances under which acts of subsequent participants in the legal system are su-

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578. *Martinez v. California*, 444 U.S. 277, 284–85 (1980).

579. *Murray v. Earle*, 405 F.3d 278, 290 (5th Cir. 2005) (proximate cause under § 1983 is evaluated under common-law standards); *McKinley v. City of Mansfield*, 404 F.3d 418, 438 (6th Cir. 2005) (“causation in the constitutional sense is no different than causation in the common law sense”).

580. *Monroe v. Pape*, 365 U.S. 167, 187 (1961). *Accord Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986).

581. *Warner v. Orange County Dep’t of Prob.*, 115 F.3d 1068, 1071 (2d Cir. 1996) (quoting *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 561 (1st Cir. 1989)). “Where multiple ‘forces are actively operating,’ . . . plaintiffs may demonstrate that each defendant is a concurrent cause by showing that his or her conduct was a ‘substantial factor in bringing [the injury] about.’ In a case of concurrent causation, the burden of proof shifts to the defendants in that ‘a tortfeasor who cannot prove the extent to which the harm resulted from other concurrent causes is liable for the whole harm’ because multiple tortfeasors are jointly and severally liable.” *Lippoldt v. Cole*, 468 F.3d 1204, 1219 (10th Cir. 2006) (quoting *Northington v. Marin*, 102 F.3d 1564, 1568–69 (10th Cir. 1996)).

582. *See, e.g., Martinez*, 444 U.S. at 284–85; *Wray v. City of N.Y.*, 490 F.3d 189, 193 (2d Cir. 2007); *Murray*, 405 F.3d at 291; *Townes v. City of New York*, 176 F.3d 138, 146–47 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999).

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perseding causes that avoid liability of an initial actor.”<sup>583</sup> Causation in § 1983 actions is usually a question of fact for the jury.<sup>584</sup>

Causation frequently plays a significant role in § 1983 municipal liability claims based on inadequate training, supervision, or hiring practices.<sup>585</sup> For these municipal liability claims, Supreme Court decisional law states that the municipal policy or practice must be the “moving force” for, “closely related” to, a “direct causal link” to, or “affirmatively linked” to the deprivation of the plaintiff’s federally protected rights.<sup>586</sup> It is unclear whether these standards are alternative ways of articulating common-law proximate cause or are intended to impose a more stringent causation requirement.<sup>587</sup>

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583. *Zahrey v. Coffey*, 221 F.3d 342, 351 (2d Cir. 2000). See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 6.03 (4th ed. 2005).

584. See, e.g., *Young v. City of Providence*, 404 F.3d 4, 23 (1st Cir. 2005) (questions of causation “are generally best left to the jury”) (citing *Wortley v. Camplin*, 333 F.3d 284, 295 (1st Cir. 2003)); *Rivas v. City of Passaic*, 365 F.3d 181, 193 (3d Cir. 2004).

585. *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 402–04 (1997); *City of Canton v. Harris*, 489 U.S. 378, 385–86 (1989). See *infra* Part X.

586. *Bd. of County Comm’rs*, 520 U.S. at 402–04; *City of Canton*, 489 U.S. at 385–86.

587. The Court has stated that for municipal liability claims based on inadequate training or deficient hiring, the fault and causation standards are stringent. See *infra* Part X.

## IX. Capacity of Claim: Individual Versus Official Capacity

A claim against a state or municipal official in her official capacity is treated as a claim against the entity itself.<sup>588</sup> In *Kentucky v. Graham*,<sup>589</sup> the Supreme Court stated that an official capacity claim is simply “‘another way of pleading an action against an entity of which an officer is an agent.’ As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity.”<sup>590</sup> Therefore, when a § 1983 complaint asserts a claim against a municipal entity and municipal official in her official capacity, federal district courts routinely dismiss the official capacity claim as duplicative or redundant.<sup>591</sup> By contrast, a personal- (or individual-) capacity claim seeks monetary recovery payable out of the responsible official’s personal finances.<sup>592</sup> Therefore, a personal capacity claim is not redundant or duplicative of a claim against a governmental entity.

In *Hafer v. Melo*,<sup>593</sup> the Supreme Court outlined the distinctions between personal capacity and official capacity suits:

1. Because an official capacity claim against an official is tantamount to a claim against a governmental entity, and because there is no *respondeat superior* liability under § 1983, in official capacity suits the plaintiff must show that enforcement of the

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588. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 n.55 (1978); *Abusaid v. Hillsborough County Bd. of County Comm’rs*, 405 F.3d 1298, 1302 n.3 (11th Cir. 2005) (claim against officer in official capacity is “another way of pleading an action against an entity of which an officer is an agent”).

589. 473 U.S. 159 (1985) (citations omitted).

590. *Id.* at 165–66 (quoting *Monell*, 436 U.S. at 690 n.55 (1978)). *See, e.g.*, *Nivens v. Gilchrist*, 444 F.3d 237, 249 (4th Cir. 2006) (claim against North Carolina district attorney in his official capacity was considered claim against state for purpose of Eleventh Amendment).

591. *See, e.g.*, *Cotton v. District of Columbia*, 421 F. Supp. 2d 83, 86 (D.D.C. 2006); *Baines v. Masiello*, 288 F. Supp. 2d 376, 384 (W.D.N.Y. 2003); *McCachren v. Blacklick Valley Sch. Dist.*, 217 F. Supp. 2d 594, 599 (W.D. Pa. 2002).

592. *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

593. *Id.*

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entity's policy or custom caused the violation of the plaintiff's federally protected right.

2. In official capacity suits the defendant may assert only those immunities the entity possesses, such as the states' Eleventh Amendment immunity and municipalities' immunity from punitive damages.
3. Liability may be imposed against defendants in personal capacity suits even if the violation of the plaintiff's federally protected right was not attributable to the enforcement of a governmental policy or practice. "[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right."<sup>594</sup>
4. Personal capacity defendants may assert common-law immunity defenses—that is, either an absolute or qualified immunity.<sup>595</sup>

The § 1983 complaint should clearly specify the capacity (or capacities) in which the defendant is sued. Unfortunately, many § 1983 complaints fail to do so. When the capacity of claim is ambiguous, most courts look to the "course of proceedings" to determine the issue.<sup>596</sup> For example, when a municipal official is sued under § 1983, assertion of a claim for punitive damages is a strong indicator that the claim was asserted against the official in his personal capacity, because municipalities are immune from punitive damages under § 1983. By the same token, when the defendant official asserts an absolute or qualified immunity as a defense, this strongly indicates that the claim was asserted against the official personally because these defenses are available only against personal capacity claims.

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594. *Id.* (quoting *Kentucky v. Graham*, 473 U.S. 159 (1985)). See *supra* Part VIII.

595. See *infra* Part XIV (absolute immunities) and Part XV (qualified immunity).

596. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 6.05 (4th ed. 2004). See, e.g., *Moore v. City of Harriman*, 272 F.3d 769, 722–73 (6th Cir. 2001); *Biggs v. Meadows*, 66 F.3d 56, 59–60 (4th Cir. 1995) (adopting majority view of looking to "substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when plaintiff fails to allege capacity"). Some courts, however, have held that when the capacity in which the defendant is sued is ambiguous, there is a presumption against personal capacity claims. See, e.g., *Nix v. Norman*, 879 F.2d 429, 431 (8th Cir. 1989).

## X. Municipal Liability

In its landmark decision in *Monell v. Department of Social Services*,<sup>597</sup> the Supreme Court held that municipal entities are subject to § 1983 liability, but not on the basis of respondeat superior.<sup>598</sup> Therefore, a municipality may not be held liable under § 1983 solely because it hired an employee who became a constitutional wrongdoer. *Monell* established that a municipality is subject to liability under § 1983 only when the violation of the plaintiff's federally protected right can be attributable to the enforcement of a municipal policy, practice, or decision of a final municipal policy maker.<sup>599</sup> “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.”<sup>600</sup>

The Supreme Court, in *Owen v. City of Independence*,<sup>601</sup> held that a “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.” “[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified under § 1983.”<sup>602</sup> Although compensatory damages and

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597. 436 U.S. 658 (1978).

598. State law cannot authorize respondeat superior under § 1983. *Coon v. Town of Springfield*, 404 F.3d 683, 687 (2d Cir. 2005) (“Just as states cannot extinguish municipal liability under § 1983 via state law, they cannot enlarge it either.”). The rule against respondeat superior extends to private party state actors. *Rojas v. Alexander’s Dep’t Store, Inc.*, 924 F.2d 406, 408–09 (2d Cir. 1990) (“Although *Monell* dealt with municipal employers, its rationale has been extended to private businesses.”); *Mejia v. City of New York*, 228 F. Supp. 2d 234, 243 (E.D.N.Y. 2002) (“neither a municipality nor a private corporation can be held vicariously liable under § 1983 for the actions of its employees”).

599. A suit against a municipal official in his or her official capacity is considered a suit against the municipality itself. *Brandon v. Holt*, 469 U.S. 464, 471–72 (1985). *Accord Kentucky v. Graham*, 473 U.S. 159, 166 (1985). *See supra* Part IX.

600. *Monell*, 436 U.S. at 694. The municipal policy or practice requisite is often very difficult to satisfy. *See Wimberly v. City of Clovis*, 375 F. Supp. 2d 1120, 1127 (D.N.M. 2004) (“[T]he *Monell* standard is very difficult for any plaintiff to reach. Even plaintiffs that proceed to trial against individual defendants often are unable to keep the municipality in the case.”).

601. 445 U.S. 622, 638 (1980).

602. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993). *See, e.g., Burge v. Parish of St. Tammany*, 187 F.3d 452, 466–67 (5th Cir. 1999) (absolute prosecutorial immunity not available in official capacity suit); *Goldberg v.*

## X. Municipal Liability

equitable relief may be awarded against a municipality under § 1983,<sup>603</sup> the Court, in *City of Newport v. Fact Concerts, Inc.*,<sup>604</sup> held that municipalities are immune from punitive damages. The Court found that because an award of punitive damages against a municipality would be payable from taxpayer funds, the award would not further the deterrent and punishment goals of punitive damages. These goals are best accomplished by awards of punitive damages against officials in their personal capacity. As discussed *infra* Part XXI, punitive damages may be awarded under § 1983 against a state or municipal official in her individual capacity.

Under Supreme Court decisional law, municipal liability may be based on (1) an express municipal policy, such as an ordinance, regulation, or policy statement; (2) a “widespread practice that, although not authorized by written law or express municipal policy, is ‘so permanent and well settled as to constitute a custom or usage’ with the force of law”;<sup>605</sup> or (3) the decision of a person with “final policymaking authority.”<sup>606</sup> The following types of municipal policies and practices may give rise to § 1983 liability:

1. deliberately indifferent training;<sup>607</sup>
2. deliberately indifferent supervision or discipline;<sup>608</sup>
3. deliberately indifferent hiring;<sup>609</sup> and

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Town of Rocky Hill, 973 F.2d 70, 72 (2d Cir. 1992) (municipality may not assert legislative immunity). Further, state law immunities may not be asserted by municipalities sued under § 1983. *Howlett v. Rose*, 496 U.S. 356, 375–76 (1990) (state court § 1983 action). *See also* *Alden v. Maine*, 527 U.S. 706, 740 (1994) (reaffirming *Howlett*).

603. *Monell*, 436 U.S. at 690.

604. 453 U.S. 247 (1981).

605. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167–68 (1970)).

606. *Praprotnik*, 485 U.S. at 123. *See also* *Pembaur v. City of Cincinnati*, 475 U.S. 469, 481–83 (1986).

607. *See* *City of Canton v. Harris*, 489 U.S. 378, 380 (1989).

608. *See* 2 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 7.18 (4th ed. 2007).

609. *Bd. of County Comm’rs v. Brown*, 520 U.S. 397, 410–11 (1997).

4. deliberately indifferent failure to adopt policies necessary to prevent constitutional violations.<sup>610</sup>

There must be a sufficient causal connection between the enforcement of the municipal policy or practice and the violation of the plaintiff's federally protected right. A municipality may be held liable under § 1983 only when the enforcement of the municipal policy or practice was the "moving force" behind the violation of the plaintiff's federally protected right.<sup>611</sup> The courts have also described this causal connection as a "direct causal link," "closely related," and "affirmatively linked."<sup>612</sup>

In *Collins v. City of Harker Heights*,<sup>613</sup> the Supreme Court stressed that the issue of whether there is a basis for imposing municipal liability for the violation of the plaintiff's federally protected rights is an issue separate and distinct from the issue of whether there was a violation of the plaintiff's federal rights. The Court stated that a "proper analysis requires [the separation of] two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation."<sup>614</sup>

#### A. Officially Promulgated Policy

Usually the easiest cases concerning § 1983 municipal liability arise out of claims contesting the enforcement of an officially promulgated municipal policy. There was such a policy in the *Monell* case.<sup>615</sup>

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610. See, e.g., *Oviatt v. Pearce*, 954 F.2d 1470, 1477 (9th Cir. 1992) ("[T]he decision not to take any action to alleviate the problem of detecting missed arraignments constitutes a policy for purposes of § 1983 municipal liability.").

611. *Bd. of County Comm'rs*, 520 U.S. at 400; *City of Canton v. Harris*, 489 U.S. 378, 389 (1989).

612. *Canton*, 489 U.S. at 385 (there must be "a direct causal link between a municipal policy or custom and the alleged constitutional deprivation").

613. 503 U.S. 115 (1992).

614. *Id.* at 120.

615. See also *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252 (1981) (vote of city council to cancel license for rock concert was official decision for *Monell* purposes); *Owen v. City of Independence*, 445 U.S. 622, 633 (1980) (personnel decision made by city council constitutes official city policy). *Fact Concerts* and *Owen* demonstrate that decisions officially adopted by the government body itself need not have general or recurring application in order to constitute official "policy."

## X. Municipal Liability

The challenged policy statement, ordinance, regulation, or decision must have been adopted or promulgated by the local entity. A local government's *mere enforcement* of state law, as opposed to express incorporation or adoption of state law into local regulations or codes, has been found insufficient to establish *Monell* liability.<sup>616</sup> In *Cooper v. Dillon*,<sup>617</sup> the Eleventh Circuit held that the city could be held liable under § 1983 for its enforcement of an unconstitutional state statute because the city, by ordinance, had adopted the state law as its own. Furthermore, enforcement of the law was by the city police commissioner, an official with policy-making authority.

### B. Municipal Policy Makers

#### 1. Authority and Liability

Supreme Court decisional law holds that municipal liability may be based on a single decision by a municipal official who has final policy-making authority.<sup>618</sup> Whether an official has final policy-making authority is an issue of law to be determined by the court by reference to state and local law.<sup>619</sup> The mere fact that a municipal official has discretionary authority is not a sufficient basis for imposing municipal liability.<sup>620</sup> It is not always easy to determine whether a municipal offi-

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616. See, e.g., *Surplus Store & Exchange, Inc. v. City of Delphi*, 928 F.2d 788, 793 (7th Cir. 1991). But see *McKusick v. City of Melbourne*, 96 F.3d 478, 484 (11th Cir. 1996) (holding that development and implementation of administrative enforcement procedure, going beyond terms of state court injunction, leading to arrest of all anti-abortion protesters found within buffer zone, including persons not named in injunction, amounted to cognizable policy choice); *Garner v. Memphis Police Dep't*, 8 F.3d 358, 364 (6th Cir. 1993) (rejecting defendants' argument that they had no choice but to follow state "fleeing felon" policy, holding that "[d]efendants' decision to authorize use of deadly force to apprehend nondangerous fleeing burglary suspects was . . . a deliberate choice from among various alternatives"), *cert. denied*, 510 U.S. 1177 (1994). See also *Vives v. City of N.Y.*, 524 F.3d 346 (2d Cir. 2008) (carefully analyzing the issue).

617. 403 F.3d 1208, 1222 (11th Cir. 2005).

618. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988); *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

619. See *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989); *Praprotnik*, 485 U.S. at 123.

620. *Pembaur*, 475 U.S. at 481–82 ("The fact that a particular official—even a policy-making official—has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of the discretion."). See *Killinger*

cial has policy-making authority or discretionary authority to enforce policy.<sup>621</sup>

In *Pembaur v. City of Cincinnati*,<sup>622</sup> a majority of the Court held that a single decision by an official with policy-making authority in a given area could constitute official policy and be attributed to the government itself under certain circumstances.<sup>623</sup> The county prosecutor ordered local law enforcement officers to “go in and get” two witnesses who were believed to be inside the medical clinic of their employer, a doctor who had been indicted for fraud concerning government payments for medical care provided to welfare recipients. The officers had *capiases* for the arrest of the witnesses, but no search warrant for the premises of the clinic. Pursuant to the county prosecutor’s order, they broke down the door and searched the clinic.<sup>624</sup>

In holding that the county could be held liable for the county prosecutor’s order that resulted in the violation of the plaintiff’s constitutional rights, the Court described the “appropriate circumstances” in which a single decision by policy makers may give rise to municipal liability. For example, the Court noted cases in which it had held that a single decision by a “properly constituted legislative body . . . constitute[d] an act of official government policy.”<sup>625</sup> But *Monell*’s language also encompasses other officials “whose acts or edicts” could constitute official policy.<sup>626</sup> Thus, where a government’s authorized decision maker adopts a particular course of action, the government may be

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v. Johnson, 389 F.3d 765, 771 (7th Cir. 2004) (“mere authority to implement pre-existing rules is not authority to set policy”).

621. See *Williams v. Butler*, 863 F.2d 1398, 1403 (8th Cir. 1988) (en banc) (“a very fine line exists between delegating final policymaking authority to an official . . . and entrusting discretionary authority to that official”).

622. 475 U.S. 469 (1986).

623. Justice White wrote separately to make clear his position (concurring in by Justice O’Connor) that a decision of a policy-making official could not result in municipal liability if that decision were contrary to controlling federal, state, or local law. *Pembaur*, 475 U.S. at 485–87 (White, J., concurring).

624. *Id.* at 472, 473.

625. *Id.* at 480 (citing *Owen v. City of Independence*, 445 U.S. 622 (1980) (“City Council passed resolution firing plaintiff without a pretermination hearing”) and *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981) (“City Council cancelled license permitting concert because of dispute over content of performance”)).

626. *Pembaur*, 475 U.S. at 480 (citing *Monell*, 436 U.S. at 694).

X. Municipal Liability

responsible for that policy “whether that action is to be taken only once or to be taken repeatedly.”<sup>627</sup>

Justice William J. Brennan, Jr., writing for a plurality in *Pembaur*, concluded that “[m]unicipal liability attaches only where the decision-maker possesses final authority to establish municipal policy with respect to the action ordered.”<sup>628</sup> Whether an official possesses policy-making authority with respect to particular matters will be determined by state law. Policy-making authority may be bestowed by legislative enactment, or it may be delegated by an official possessing policy-making authority under state law.<sup>629</sup>

In *City of St. Louis v. Praprotnik*,<sup>630</sup> the Court again attempted “to determin[e] when isolated decisions by municipal officials or employees may expose the municipality itself to liability under [section] 1983.”<sup>631</sup> Justice O’Connor, writing for a plurality, reinforced the principle articulated in *Pembaur* that state law will be used to determine policy-making status.<sup>632</sup> Furthermore, identifying a policy-making official is a question of law for the court to decide by reference to state law, not one of fact to be submitted to a jury.<sup>633</sup> The plurality also un-

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627. *Id.* at 481.

628. *Id.* (Part II-B of Court’s opinion: Brennan, J., joined by White, Marshall & Blackmun, JJ.).

629. *Id.* at 483. Whether municipal entity delegated final policy-making authority to a particular official may present an issue of fact. *Bouman v. Block*, 940 F.2d 1211, 1231 (9th Cir.), *cert. denied*, 502 U.S. 1005 (1991). *See also* *Kujawski v. Bd. of Comm’rs*, 183 F.3d 734, 739 (7th Cir. 1999) (“[T]here remains a genuine issue of fact as to whether the Board had, as a matter of custom, delegated final policymaking authority to [the chief probation officer] with respect to [personnel decisions of] community corrections employees.”). *But see* *Gros v. City of Grand Prairie*, 181 F.3d 613, 617 (5th Cir. 1999) (“[T]he district court should have determined whether any such delegation had occurred as a matter of state law.”).

630. 485 U.S. 112 (1988).

631. *Id.* at 114. The Court reversed a decision by the Eighth Circuit Court of Appeals, which had found the city liable for the transfer and layoff of a city architect in violation of his First Amendment rights. The Eighth Circuit had allowed the plaintiff to attribute to the city adverse personnel decisions made by the plaintiff’s supervisors where such decisions were considered “final” because they were not subject to *de novo* review by higher-ranking officials. *City of St. Louis v. Praprotnik*, 798 F.2d 1168, 1173–75 (8th Cir. 1986).

632. *Praprotnik*, 485 U.S. at 124.

633. *Id.* In *Praprotnik*, the relevant law was found in the St. Louis City charter, which gave policy-making authority in matters of personnel to the mayor, alderman, and Civil Service Commission. *Id.* at 126. *See also* *Dotson v. Chester*, 937 F.2d 920, 928 (4th Cir. 1991)

derscored the importance of “finality” to the concept of policy making, and reiterated the distinction set out in *Pembaur* between authority to make final policy and authority to make discretionary decisions.<sup>634</sup> “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.”<sup>635</sup> Finally, the plurality noted that for a subordinate’s decision to be attributable to the government entity, “the authorized policymakers [must] approve [the] decision and the basis for it. . . . Simply going along with discretionary decisions made by one’s subordinates . . . is not a delegation to them of authority to make policy.”<sup>636</sup>

In *Jett v. Dallas Independent School District*,<sup>637</sup> the Supreme Court analyzed the functions of the judge and jury when municipal liability is sought to be premised upon the single decision of a policy maker. The Court stated:

As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local government unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well as “custom or usage’ having the force of law” . . . , the trial judge

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(court examines state law and county code to find sheriff final policy maker as to operation of county jail).

634. See *Killinger v. Johnson*, 389 F.3d 765, 771 (7th Cir. 2004) (“mere authority to implement pre-existing rules is not authority to set policy”); *Quinn v. Monroe County*, 330 F.3d 1320, 1326 (11th Cir. 2003) (a municipal “decisionmaker” is one “who had the power to make official decisions and thus may be held *individually* liable,” while a municipal “policymaker” is one “who takes actions that may cause [the governmental entity] to be held liable for a custom or policy”). *Accord Kamensky v. Dean*, 148 F. App’x 878, 879–80 (11th Cir. 2005).

635. *Praprotnik*, 485 U.S. at 127. See, e.g., *Auriemma v. Rice*, 957 F.2d 397, 400 (7th Cir. 1992) (“Liability for unauthorized acts is personal; to hold the municipality liable . . . the agent’s action must implement rather than frustrate the government’s policy.”).

636. *Praprotnik*, 485 U.S. at 128–30. See, e.g., *Gillette v. Delmore*, 979 F.2d 1342, 1348 (9th Cir. 1992) (concluding that mere inaction on part of policy maker “does not amount to ‘ratification’ under *Pembaur* and *Praprotnik*”). In *Christie v. Iopa*, 176 F.3d 1231 (9th Cir.), *cert. denied*, 528 U.S. 928 (1999), the court recognized that ratification is ordinarily a question for the jury, and that ratification requires showing approval by a policy maker, not a mere refusal to overrule a subordinate’s action.

637. 491 U.S. 701 (1989).

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must identify those officials of governmental bodies who speak with final policy-making authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights.<sup>638</sup>

Although mentioned merely in passing without elaboration, the Court's reference to "custom or usage having the force of law" is significant. In *Praprotnik*, Justice O'Connor's plurality opinion and Justice Brennan's concurring opinion recognized that municipal liability may be based on a practice that is at variance with a formally adopted announced policy.<sup>639</sup> The existence of a custom or practice normally presents an issue of fact for the jury.<sup>640</sup> In *Mandel v. Doe*,<sup>641</sup> the Eleventh Circuit stated that "[t]he court should examine not only the relevant positive law, including ordinances, rules and regulations, but also the relevant customs and practices having the force of law."<sup>642</sup> There is, then, a potential tension in *Jett* between the Court's holding that the identification of final policy makers is a question of law for the court, and its statement that the court should review the "legal materials," including a "custom or usage' having the force of law." Nevertheless, when the issue of whether an official is a final policy maker has been raised, the courts have usually given little attention to *Jett's* reference to "custom and usage" and treated the final policy-making authority as a matter of state law for the court.

Because local ordinances, charters, regulations, and manuals may not be readily accessible, counsel should provide copies of the pertinent provisions to the court. In *Wulf v. City of Wichita*,<sup>643</sup> the issue was

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638. *Id.* at 737.

639. *Praprotnik*, 485 U.S. at 130–31 (plurality opinion), 145 n.7 (Brennan, J., concurring).

640. *Worsham v. City of Pasadena*, 881 F.2d 1336, 1344 (5th Cir. 1989) (Goldberg, J., concurring in part and dissenting in part).

641. 888 F.2d 783, 793 (11th Cir. 1989).

642. *See also Gros v. City of Grand Prairie*, 181 F.3d 613, 616 (5th Cir. 1999) (district court should have considered state and local law "as well as evidence of the City's customs and usages in determining which City officials or bodies had final policymaking authority over the policies at issue in this case").

643. 883 F.2d 842 (10th Cir. 1989).

whether the city manager or the chief of police had policy-making authority over employment decisions. The Tenth Circuit observed that the record lacked “official copies of the City Charter or the relevant ordinances or procedure manuals for the City of Wichita.”<sup>644</sup> Nevertheless, the Tenth Circuit was able to resolve the policy-making issue because the record contained testimony of the city manager about his duties, and the court was provided pertinent quotations from city ordinances. From these sources, the court found that only the city manager had final decision-making authority. The court was apparently willing to accept these alternative sources only because the parties had briefed the appeal prior to the Supreme Court’s determination in *Praprotnik* that the federal court should look to state law to decide where policy-making authority resides.<sup>645</sup>

In this post-*Praprotnik* era, however, counsel should submit copies of the pertinent local law provisions to the court. As noted, federal courts are not likely to have easy access to these materials and should not have to expend considerable effort tracking them down. Further, because the contents of these legal documents are in issue, the original document rule would normally render it improper for a court to rely on alternative materials, such as the testimony and quotations considered in *Wulf*.<sup>646</sup>

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644. *Id.* at 868.

645. *Id.* at 868 n.34.

646. Fed. R. Evid. Article X. If the pertinent local legislative materials are made available to the federal court, the court may take judicial notice of their contents. Fed. R. Evid. 201(d). In *Melton v. City of Oklahoma City*, 879 F.2d 706, 724 (10th Cir. 1989), cert. denied, 502 U.S. 906 (1991), the Tenth Circuit took judicial notice of the fact that the city charter lodged final policy-making authority over the city’s personnel matters in the city manager. Although “[t]here seem[ed] to be two conflicting lines of cases in [the Tenth Circuit] on the question of judicial notice of city ordinances,” the *Melton* court concluded that the “better rule” allows for the taking of judicial notice. *Melton*, 879 F.2d at 724 n.25. As the court recognized, the Federal Rules of Evidence authorize the taking of judicial notice of a fact not subject to reasonable dispute because it is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be determined.” Fed. R. Evid. 201(b). See also discussion of judicial note in *Getty Petroleum Marketing v. Capital Terminal Co.*, 391 F.3d 312 (1st Cir. 2004).

*X. Municipal Liability*

2. State Versus Municipal Policy Maker

Federal courts frequently have to determine whether an official is a state or municipal policy maker. In *McMillian v. Monroe County*,<sup>647</sup> the Supreme Court held that, like the identification of municipal policy makers, this issue, too, is determined by reference to state law. The Court acknowledged that an official may be a state policy maker for one purpose and a municipal policy maker for another purpose. For example, courts commonly hold that district attorneys are state policy makers when prosecuting criminal cases, but are municipal policy makers for purposes of carrying out administrative and supervisory functions, such as training of assistant district attorneys.<sup>648</sup>

In *McMillian*, a five-member majority of the Supreme Court held that a county sheriff in Alabama is not a final policy maker for the county in the area of law enforcement.<sup>649</sup> It noted that

the question is not whether Sheriff Tate acts for Alabama or Monroe County in some categorical, “all or nothing” manner. Our cases on the liability of local governments under § 1983 instruct us to ask whether governmental officials are final policy makers for the local government in a particular area, or on a particular issue. . . . Thus, we are not seeking to make a characterization of Alabama sheriffs that will hold true for every type of official action they engage in. We simply ask whether Sheriff Tate represents the State or the County when he acts in a law enforcement capacity.<sup>650</sup>

The Court emphasized the role that state law plays in a court’s determination of whether an official has final policy-making authority for a local government entity. As the Court noted,

[t]his is not to say that state law can answer the question for us by, for example, simply labeling as a state official an official who clearly makes county policy. But our understanding of the actual function of a govern-

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647. 520 U.S. 781, 786–87 (1997).

648. See, e.g., *Carter v. Philadelphia*, 181 F.3d 339, 351 (3d Cir.), cert. denied, 528 U.S. 1005 (1999); *Walker v. City of New York*, 974 F.2d 293, 301 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993); *Baez v. Hennessy*, 853 F.2d 73, 76–77 (2d Cir. 1988), cert. denied, 488 U.S. 1014 (1989).

649. *McMillian*, 520 U.S. at 785–86.

650. *Id.* at 785.

mental official, in a particular area, will necessarily be dependent on the definition of the official's functions under relevant state law.<sup>651</sup>

Relying heavily on the Alabama constitution and the Alabama supreme court's interpretation of the state constitution that sheriffs are state officers, the U.S. Supreme Court found that Alabama sheriffs, when executing their law enforcement duties, represent the state of Alabama, not their counties. Even the presence of the following factors was not enough to persuade the majority of the Court otherwise: (1) the sheriff's salary is paid out of the county treasury; (2) the county provides the sheriff with equipment, including cruisers; (3) the sheriff's jurisdiction is limited to the borders of his county; and (4) the sheriff is elected locally by the voters in his county.<sup>652</sup>

### C. Custom or Practice

In *Monell v. Department of Social Services*,<sup>653</sup> the Supreme Court recognized that § 1983 municipal liability may be based on a municipal "custom or usage" having the force of law, even though it has "not received formal approval through the body's official decision-making channels." More recently the Supreme Court acknowledged that "[a]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."<sup>654</sup> The critical issue is whether there was a particular custom or practice that was "so well settled and widespread that the policymaking officials of the municipality can be said to

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651. *Id.* at 786.

652. *Id.* at 791–93. In dissent, however, Justice Ginsburg wrote:

A sheriff locally elected, paid, and equipped, who autonomously sets and implements law enforcement policies operative within the geographic confines of a county, is ordinarily just what he seems to be: a county official. . . . The Court does not appear to question that an Alabama sheriff may still be a county policymaker for some purposes, such as hiring the county's chief jailor. . . . And, as the Court acknowledges, under its approach sheriffs may be policymakers for certain purposes in some States and not in others. . . . The Court's opinion does not call into question the numerous Court of Appeals decisions, some of them decades old, ranking sheriffs as county, not state, policymakers.

*Id.* at 804–05 (Ginsburg, J., joined by Stevens, Souter & Breyer, JJ., dissenting).

653. 436 U.S. 658, 691 (1978).

654. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 404 (1997).

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have either actual or constructive knowledge of it yet did nothing to end the practice.”<sup>655</sup>

In *Sorlucco v. New York City Police Department*,<sup>656</sup> the Second Circuit considered the sufficiency of the evidence showing that the New York Police Department (NYPD) engaged in a pattern of disciplining probationary officers that discriminated against female officers. The plaintiff, Ms. Sorlucco, was a probationary police officer of the NYPD. In 1983, John Mielko, a tenured NYPD officer, brutally and sexually assaulted her for six hours in her Nassau County apartment. Mielko had located Ms. Sorlucco’s service revolver in her apartment, threatened her with it, and fired it into her bed.

Upon learning of the alleged attack, the NYPD made a perfunctory investigation that culminated in departmental charges being filed against *her* for failing to safeguard her service revolver and for failing to report that it had been fired. While this was going on in New York City, Nassau County officials were subjecting her to vulgar and abusive treatment and, in fact, filed criminal charges against her for having falsely stated that she did not know the man who raped her. Ultimately, the NYPD fired Ms. Sorlucco “for initially alleging and maintaining (for four days before she actually identified Mielko) that her attacker was simply named ‘John,’ while Mielko, the accused rapist, subsequently retired from the NYPD with his regular police pension.”<sup>657</sup>

Ms. Sorlucco brought suit under § 1983 and Title VII alleging that her termination was the product of unlawful gender discrimination. Her theory of liability on the § 1983 municipal liability claim was “that the NYPD engaged in a pattern of disciplining probationary officers, who had been arrested while on probation, in a discriminatory . . . manner based upon . . . gender.”<sup>658</sup> Although the jury tendered a verdict in favor of the plaintiff, the district court granted the NYPD’s motion for judgment n.o.v., setting aside the verdict on the § 1983 claim. (Judgment n.o.v. is now referred to as “judgment as a matter of law,” Fed. R. Civ. P. 50.) The district court found (1) that there was no evidence linking the police commissioner to Ms. Sorlucco’s discrimina-

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655. *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989).

656. 971 F.2d 864 (2d Cir. 1992).

657. *Id.* at 869.

658. *Id.* at 871.

tory termination and (2) “that no reasonable jury could infer an unconstitutional pattern or practice of gender discrimination from the evidence of disparate disciplinary treatment between male and female probationary officers who had been arrested.”<sup>659</sup>

On the first point, the Second Circuit concluded that “[w]hile discrimination by the Commissioner might be sufficient, it was not necessary.”<sup>660</sup> Although the court did not elaborate, what it apparently meant was that although a final decision of a municipal *policy maker* provides a potential basis for imposing municipal liability, so does a widespread custom or practice, even if of subordinates.<sup>661</sup> On the second point, the Second Circuit found, contrary to the district court’s evaluation, that Ms. Sorlucco introduced “sufficient evidence from which the jury could reasonably infer an unconstitutional NYPD practice of sex discrimination.”<sup>662</sup>

The plaintiff’s evidence of a practice of sex discrimination can be broken down into three categories: (1) the way in which the NYPD investigated the plaintiff’s complaint, including, most significantly, the dramatically different way it reacted to Mr. Mielko and Ms. Sorlucco;<sup>663</sup> (2) expert testimony from an experienced former NYPD lieutenant with Internal Affairs that the “department’s investigation of Mielko was dilatory and negligent”;<sup>664</sup> and (3) a statistical study prepared by the NYPD regarding actions taken against probationary officers who had been arrested between 1980 and 1985. During this period, forty-seven probationary officers were arrested, twelve of whom resigned. Of the remaining thirty-five, thirty-one were male: twenty-two of the male officers were terminated and nine reinstated. All four of the female officers who had been arrested were terminated. The court of appeals disagreed with the district court’s conclusion that the study was “statistically insignificant” because only four female officers were fired.

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659. *Id.* at 870.

660. *Id.* at 871.

661. *Id.* (“a § 1983 plaintiff may establish a municipality’s liability by demonstrating that the actions of subordinate officers are sufficiently widespread to constitute the constructive acquiescence of senior policymakers”) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988)).

662. *Id.* at 870.

663. *Id.* at 872–73.

664. *Id.* at 872.

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The four women represented over 10% of the thirty-five probationary officers who were disciplined. While 100% of the female officers were terminated, only 63% of the male officers were fired. Although the statistical evidence by itself would probably have been an insufficient basis on which to find an NYPD discriminatory policy, it was sufficient when considered together with the evidence of the discriminatory treatment afforded Ms. Sorlucco.<sup>665</sup> The way the investigation of her complaint was handled made the cold statistics come alive, at least to the extent that the jury could rationally reach the result it did.<sup>666</sup>

The decision in *Sorlucco* is important because of its careful analysis of the legal, factual, and evidentiary aspects of the custom and practice issue. Relatively few decisions have analyzed these issues with such care. The case also demonstrates how the plaintiff's counsel creatively pieced together a case of circumstantial evidence substantiating the constitutionally offensive practice.

In contrast to the sufficient evidence of a municipal practice found in *Sorlucco*, in *Pineda v. City of Houston*,<sup>667</sup> the Fifth Circuit held on summary judgment that the plaintiff submitted insufficient evidence to create a triable issue that the Houston Southwest Gang Task Force was “engaged in a pattern of unconstitutional searches pursuant to a custom of the City.” Plaintiffs produced reports of eleven warrantless entries into residences, but the court found that

[e]leven incidents each ultimately offering equivocal evidence of compliance with the Fourth Amendment cannot support a pattern of illegality in one of the Nation's largest cities and police forces. The extrapolation fails both because the inference of illegality is truly unconvincing—giving presumptive weight as it does to the absence of a warrant—and because the sample of alleged unconstitutional events is just too small.<sup>668</sup>

The Fifth Circuit also found that the evidence was insufficient to impute constructive knowledge to the city's policy makers. The opinions of plaintiffs' experts that there was a pattern of unconstitutional conduct were also insufficient to create a triable issue of fact. “Such opinions as to whether or not policy makers had constructive knowl-

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665. See also *Watson v. Kansas City*, 857 F.2d 690, 695–96 (10th Cir. 1988).

666. *Sorlucco*, 971 F.2d at 872.

667. 291 F.3d 325, 329–31 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 892 (2003).

668. *Id.*

edge do not create a fact issue, as the ‘experts’ were unable to muster more than vague attributions of knowledge to unidentified individuals in ‘management’ or the ‘chain of command.’”<sup>669</sup>

In *Gillette v. Delmore*,<sup>670</sup> the plaintiff firefighter alleged that he had been suspended from his employment in retaliation for exercising his free speech rights. The Ninth Circuit held that the plaintiff failed to introduce sufficient proof of an alleged practice “that public safety employees wishing to criticize emergency operations should ‘be silent, cooperate, and complain later’ or risk disciplinary reprisals.”<sup>671</sup> The plaintiff failed to introduce evidence of a pattern of such disciplinary reprisals, or that the city manager or city council helped formulate or was even aware of such a policy. Further, the plaintiff presented no evidence as to how long the alleged practice had existed. Although the fire chief testified “that remaining silent during an emergency and complaining later was ‘a practice [among fire fighters] that we want to have followed,’” it was “too large a leap” to infer from the chief’s testimony that this reflected city policy.<sup>672</sup>

#### D. Inadequate Training

In *City of Canton v. Harris*,<sup>673</sup> the Supreme Court held that deliberately indifferent training may give rise to § 1983 municipal liability. The Court rejected the city’s argument that municipal liability can be imposed only where the challenged policy itself is unconstitutional and found that “there are limited circumstances in which an allegation of a ‘failure to train’ can be the basis for liability under § 1983.”<sup>674</sup> The Court held that § 1983 municipal liability may be based on inadequate training “only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come in contact,” and that deliberate indifference was the moving force of the violation of the plaintiff’s federally protected right.<sup>675</sup> The plaintiff must demon-

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669. *Id.* at 331.

670. 979 F.2d 1342 (9th Cir.), *cert. denied*, 510 U.S. 932 (1992).

671. *Gillette*, 979 F.2d at 1348.

672. *Id.* at 1349.

673. 489 U.S. 378 (1989).

674. *Id.* at 387.

675. *Id.* at 388. Prior to the decision in *Canton*, the Court in *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985), held that a police officer’s use of excessive force, even if “un-

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strate *specific* training deficiencies and either (1) a pattern of constitutional violations of which policy-making officials can be charged with knowledge, or (2) that training is obviously necessary to avoid constitutional violations, e.g., training on the constitutional limits on a police officer's use of deadly force.<sup>676</sup> The plaintiff must show that "the need for more or different training was so obvious, and the inadequacy so likely to result in the violation of constitutional rights," as to amount to a municipal policy of deliberate indifference to citizens' constitutional rights.<sup>677</sup> The Court in *Canton* held that negligent or even grossly negligent training does not by itself give rise to a § 1983 municipal liability claim. The plaintiff must also demonstrate a sufficiently close causal connection between the deliberately indifferent training and the deprivation of the plaintiff's federally protected right.<sup>678</sup>

The Supreme Court has stressed that the "objective obviousness" deliberate indifference standard for municipal liability inadequate training claims differs from the Eighth Amendment *Farmer v. Brennan*<sup>679</sup> deliberate indifference standard under which the official must be "subjectively" aware of the risk of "serious harm."<sup>680</sup> The Court later

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usually excessive," did not warrant an inference that it was caused by deliberate indifference or grossly negligent training.

676. The Court observed:

[I]t may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

*Canton*, 489 U.S. at 390 (footnotes omitted).

677. *Id.*

678. *Id.* at 391–92. Similarly, the Second Circuit has held that to establish municipal liability based on a deliberately indifferent failure to train, a plaintiff must show:

[1] [T]hat a policymaker knows "to a moral certainty" that her employees will confront a given situation. Thus, a policymaker does not exhibit deliberate indifference by failing to train employees for rare or unforeseen events. . . . [2] [T]hat the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation . . . [and] [3] The wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights.

*Walker v. City of New York*, 974 F.2d 293, 297 (2d Cir. 1992) (citations omitted).

679. 511 U.S. 825, 828–29 (1994).

680. *Id.* See *supra* Part IV.H.

explained that its “objective obviousness” deliberate indifference standard in *Canton* was “for the . . . purpose of identifying the threshold for holding a city responsible for the constitutional torts committed by its inadequately trained agents.”<sup>681</sup>

The Court in *Canton* ruled that a plaintiff must identify a particular deficiency in the training program and prove that the identified deficiency was the actual cause of the plaintiff’s constitutional injury.<sup>682</sup> The plaintiff will not prevail merely by showing that the particular officer was inadequately trained, or that there was negligent administration of an otherwise adequate program, or that the conduct resulting in the injury could have been avoided by more or better training.<sup>683</sup> The federal courts are not to become involved “in an endless exercise of second-guessing municipal employee-training programs.”<sup>684</sup>

In *Canton*, the Court acknowledged that the trier of fact will be confronted with difficult factual issues concerning alleged deliberately indifferent training deficiencies and causation. “Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the fact-finder, particularly since matters of judgment may be involved and since officers who are well trained are not free from error and perhaps might react much like [an] untrained officer.”<sup>685</sup> Nevertheless, the Court expressed optimism that judges and juries would be able to resolve these issues.

In her concurring opinion, Justice O’Connor elaborated on how a plaintiff could show that a municipality was deliberately indifferent to an obvious need for training. First, where there is “a clear constitutional duty implicated in recurrent situations that a particular employee is certain to face, . . . failure to inform city personnel of that duty will create an extremely high risk that constitutional violations will ensue.”<sup>686</sup>

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681. *Collins v. City of Harker Heights*, 503 U.S. 115, 124 (1992).

682. *Canton*, 498 U.S. at 390–91.

683. *Id.*

684. *Id.* at 392.

685. *Id.* at 391.

686. *Id.* at 396 (O’Connor, J., concurring in part and dissenting in part). For example, all of the justices agreed that there is an obvious need to train police officers as to the constitutional limitations on the use of deadly force (*see Tennessee v. Garner*, 471 U.S. 1 (1985)) and that a failure to so train would be so certain to result in constitutional viola-

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Justice O'Connor also recognized that municipal liability on a "failure to train" theory might be established "where it can be shown that policy makers were aware of, and acquiesced in, a pattern of constitutional violations involving the exercise of police discretion. . . . Such a [pattern] could put the municipality on notice that its officers confront the particular situation on a regular basis, and that they often react in a manner contrary to constitutional requirements."<sup>687</sup>

Thus, *Canton* identifies two different approaches to a failure-to-train case.<sup>688</sup> First, deliberate indifference may be established by demonstrating a failure to train officials in a specific area where there is an obvious need for training in order to avoid violations of citizens' constitutional rights.<sup>689</sup> Second, a municipality may be held responsible under § 1983 where a pattern of unconstitutional conduct is so pervasive as to imply actual or constructive knowledge of the conduct on the part of policy makers, whose deliberate indifference to the unconstitutional practice is evidenced by a failure to correct the situation once the need for training became obvious.<sup>690</sup>

*Canton* imposes stringent standards for fault ("deliberate indifference") and causation ("moving force"). As noted earlier, the Court in

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tions as to reflect the "deliberate indifference" to constitutional rights required for the imposition of municipal liability. *Canton*, 498 U.S. at 390 n.10.

687. *Id.* at 397 (O'Connor, J., concurring in part and dissenting in part).

688. *See also* *Cornfield v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993) (setting out an analysis that clearly illustrates the two different methods of establishing *Canton* deliberate indifference); *Thelma D. v. Bd. of Educ.*, 934 F.2d 929, 934-45 (8th Cir. 1991) (same).

689. *See also* *Allen v. Muskogee*, 119 F.3d 837, 843 (10th Cir. 1997) (finding a need for different training obvious where "[c]ity trained its officers to leave cover and approach armed suicidal, emotionally disturbed persons and to try to disarm them, a practice contrary to proper police procedures and tactical principles"); *Zuchel v. City & County of Denver*, 997 F.2d 730, 741 (10th Cir. 1993) (finding evidence "clearly sufficient to permit the jury reasonably to infer that Denver's failure to implement . . . recommended [periodic live 'shoot-don't shoot' range training] constituted deliberate indifference to the constitutional rights of Denver citizens"); *Davis v. Mason County*, 927 F.2d 1473, 1483 (9th Cir. 1991) ("Mason County's failure to train its officers in the legal limits of the use of force constituted 'deliberate indifference' to the safety of its inhabitants").

690. *See, e.g.*, *Chew v. Gates*, 27 F.3d 1432, 1445 (9th Cir. 1994) (where city requires police officers with police dogs that inflict injury in significant number of cases, failure to adopt policies governing the dogs' use and constitutional limits on their use constitutes deliberate indifference).

*Canton* expressly stated that federal courts should not lightly second-guess municipal training policies. Although numerous municipal liability claims based on inadequate training have been alleged, a relatively small percentage of these claims have succeeded.<sup>691</sup>

### *E. Inadequate Hiring*

In limited circumstances, § 1983 municipal liability may be based on deficiencies in hiring. In *Board of County Commissioners v. Brown*,<sup>692</sup> the Supreme Court held that municipal liability can be premised upon a municipality's deliberately indifferent hiring of a constitutional wrongdoer, but only if the plaintiff demonstrates that the hired officer "was highly likely to inflict the *particular* injury suffered by the plaintiff." The Court acknowledged that the fault and causation standards for inadequate hiring claims are even more stringent than for inadequate training claims.<sup>693</sup> In order to "prevent municipal liability for a hiring decision from collapsing into respondeat superior liability, a court must carefully test the link between the policy maker's inadequate decision and the particular injury alleged."<sup>694</sup>

In *Brown*, Sheriff B.J. Moore hired his son's nephew, Stacy Burns, despite Burns's extensive "rap sheet" that included numerous violations and arrests, but no felonies. Plaintiff Brown suffered a severe knee injury when Reserve Deputy Burns forcibly extracted her from the car driven by her husband, who had avoided a police checkpoint. She sued both Burns and the county under § 1983.<sup>695</sup>

In a five–four opinion written by Justice O'Connor, the Supreme Court held that the county did not violate the plaintiff's rights by hiring Reserve Deputy Burns. It distinguished Brown's claim, involving a single lawful hiring decision that ultimately resulted in a constitutional violation, from a claim that "a particular municipal action *itself* violates federal law, or directs an employee to do so."<sup>696</sup> As the Court noted, its prior cases recognizing municipal liability based on a single act or de-

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691. See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 7.17[B], [C] (4th ed. 2005).

692. 520 U.S. 397, 412 (1997).

693. *Id.* at 415–16.

694. *Id.* at 410.

695. *Id.* at 400–02.

696. *Id.* at 405.

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cision by a government entity involved decisions of local legislative bodies or policy makers that directly effected or ordered someone to effect a constitutional deprivation.<sup>697</sup> The majority also rejected the plaintiff's effort to analogize inadequate screening to a failure to train.<sup>698</sup>

The majority said that the plaintiff was required to produce evidence from which a jury could find that, had Sheriff Moore adequately screened Deputy Burns' background, Moore "should have concluded that Burns' use of excessive force would be a plainly obvious consequence of the hiring decision."<sup>699</sup> The plaintiff's evidence of the sheriff's scrutiny of Burns' record did not enable the jury to make such a finding.<sup>700</sup>

Justice Souter, joined by Justices Breyer and Stevens, dissented, characterizing the majority opinion as an expression of "deep skepticism" that "converts a newly-demanding formulation of the standard of fault into a virtually categorical impossibility of showing it in a case like this."<sup>701</sup>

Justice Breyer, joined by Justices Ginsburg and Stevens, criticized the "highly complex body of interpretive law" that has developed to maintain and perpetuate the distinction adopted in *Monell* between direct and vicarious liability, and called for a reexamination of "the legal soundness of that basic distinction itself."<sup>702</sup>

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697. See, e.g., *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 (1986) (county prosecutor, acting as final decision maker for the county, gave order that resulted in constitutional violation); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 252 (1981) (decision of city council to cancel license permitting concert directly violated constitutional rights); *Owen v. City of Independence*, 445 U.S. 622, 633 n.13 (1980) (city council discharged employee without due process). In such cases, there are no real problems with respect to the issues of fault or causation. See also *Bennett v. Pippin*, 74 F.3d 578, 586 n.5 (5th Cir. 1996) (holding county liable for sheriff's rape of murder suspect, where sheriff was final policy maker in matters of law enforcement).

698. *Brown*, 520 U.S. at 409–11.

699. *Id.* at 412.

700. *Id.* at 410–13.

701. *Id.* at 421 (Souter, J., dissenting).

702. *Id.* at 430–31 (Breyer, J., dissenting).

*F. Pleading Municipal Liability Claims*

In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*,<sup>703</sup> the Supreme Court held that federal courts may not impose a heightened pleading requirement for § 1983 municipal liability claims.<sup>704</sup> This means that the Federal Rules of Civil Procedure notice pleading standard governs § 1983 municipal liability claims. However, even after *Leatherman*, some courts reject wholly conclusory allegations of municipal policy or practice.<sup>705</sup>

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703. 507 U.S. 163 (1993).

704. *Id.* For post-*Leatherman* decisions involving pleading against local government entities, see *Atchinson v. District of Columbia*, 73 F.3d 418, 423 (D.C. Cir. 1996) (“A complaint describing a single instance of official misconduct and alleging a failure to train may put a municipality on notice of the nature and basis of a plaintiff’s claim.”) and *Jordan v. Jackson*, 15 F.3d 333, 339 (4th Cir. 1994) (“We believe it is clear . . . that the Supreme Court’s rejection of the Fifth Circuit’s ‘heightened pleading standard’ in *Leatherman* constitutes a rejection of the specific requirement that a plaintiff plead multiple instances of similar constitutional violations to support an allegation of municipal policy or custom.”).

705. See, e.g., *Spiller v. Texas City*, 130 F.3d 162, 167 (5th Cir. 1997). A federal district court found it unclear whether a “bold” or “naked” allegation of municipal policy or custom is sufficient to satisfy notice pleading. *Luthy v. Proulx*, 464 F. Supp. 2d 69, 75 (D. Mass. 2006).

## XI. Supervisory Liability

In many § 1983 actions, the plaintiff seeks to impose liability not only on the officer who directly engaged in the unconstitutional conduct (e.g., a police officer) but also on a supervisory official (e.g., the chief of police). The supervisory liability claim is normally premised upon allegations that the supervisor knew or should have known there was danger that the subordinate would engage in the unconstitutional conduct and the supervisor had the authority to take steps to prevent the conduct, yet failed to act. Like municipal liability claims, supervisory liability claims normally seek to impose liability upon one party (the supervisor) for a wrong directly inflicted by another party (the subordinate). In some cases, however, a supervisor may have directly inflicted the harm or participated in doing so. Like § 1983 municipal liability, § 1983 supervisory liability may not be based on *respondeat superior* but only on the supervisor's own wrongful acts or omissions.<sup>706</sup> And, like municipal liability, there must be a sufficient causal link or nexus between the supervisor's wrongful conduct and the violation of the plaintiff's federally protected right.<sup>707</sup>

On the other hand, there are important differences between supervisory liability and municipal liability:

1. Supervisory liability is a form of personal liability; municipal liability is a form of entity liability.<sup>708</sup>
2. Because supervisory liability imposes personal liability, supervisors may assert a common-law absolute or qualified immunity defense.<sup>709</sup> Municipalities may not assert these immunity

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706. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 n.58 (1978). Supervisory liability "must be based on more than the right to control employees. Likewise, simple awareness of employees' misconduct does not lead to supervisory liability." *Leary v. Daeschner*, 349 F.3d 888, 903 (6th Cir. 2003) (citations and internal quotation marks omitted).

707. See, e.g., *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999); *Aponte Matus v. Toledo Davila*, 135 F.3d 182, 192 (1st Cir. 1998); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994).

708. *Clay v. Conlee*, 815 F.2d 1164, 1170 (8th Cir. 1987) ("[W]hen supervisory liability is imposed, it is imposed against the supervisory official in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates.").

709. See *Poe v. Leonard*, 282 F.3d 123, 134 (2d Cir. 2002) (finding that a supervisory official is protected by qualified immunity unless both federal right and basis of supervi-

defenses, although municipalities sued under § 1983 are absolutely immune from punitive damages (discussed *supra* Part X).

3. A municipal entity may be liable under § 1983 only when the violation of the plaintiff's federal right is attributable to the enforcement of a municipal policy or practice. By contrast, supervisory liability does not depend on a municipal policy or practice.

The Supreme Court has yet to formulate culpability standards for supervisory liability. The courts of appeals have articulated slightly varied standards, but generally require a showing (1) that the supervisory defendant either acquiesced in or was deliberately indifferent to the subordinate's unconstitutional conduct; and (2) that the supervisor's action or inaction was "affirmatively linked" to the deprivation of the plaintiff's federal rights.<sup>710</sup> However, there may be some disagreement

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sory liability were clearly established); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 6 (1st Cir. 1998) (holding that when a supervisory official asserts qualified immunity, plaintiff will prevail only if it is shown that "(1) the subordinate's actions violated a clearly established federal right, and (2) it was clearly established that a supervisor would be liable for constitutional violations perpetrated by his subordinates in that context"), *cert. denied*, 525 U.S. 1105 (1999).

710. *Rizzo v. Goode*, 423 U.S. 362, 371 (1976).

Below is a breakdown of circuit standards for supervisory liability:

*First Circuit:* *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 25 (1st Cir. 2006) (absent participation in the challenged conduct, supervisor can be liable only if subordinate committed constitutional violation *and* supervisor's action or inaction was "affirmatively linked" to the violation in that it constituted supervisory encouragement, condonation, acquiescence, or gross negligence amounting to deliberate indifference); *Aponte Matos v. Toledo Davila*, 135 F.3d 182, 192 (1st Cir. 1998) (supervisory encouragement, condonation, acquiescence, or deliberate indifference). *See also* *Wilson v. Town of Mendon*, 294 F.3d 1, 12–13 (1st Cir. 2002); *Camilo-Robles v. Hoyos*, 151 F.3d 1, 12–13 (1st Cir. 1998), *cert. denied*, 525 U.S. 1105 (1999).

*Second Circuit:* *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (direct participation in wrongdoing, failure to remedy wrong after being informed of it, creation of policy or custom, grossly negligent supervision, or deliberately indifferent failure to act on information about constitutional violations). *See also* *Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003); *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002).

*Third Circuit:* *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988) (supervisor must have personally directed or have had knowledge of and acquiesced in unlawful conduct). *See also* *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190–91 (3d Cir. 1995).

*Fourth Circuit:* *Carter v. Morris*, 164 F.3d 215, 221 (4th Cir. 1999) (actual or constructive knowledge of risk of constitutional injury and deliberate indifference to that risk and

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affirmative link between supervisor's inaction and constitutional injury); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir.), *cert. denied*, 513 U.S. 813, 814 (1994) (plaintiff must establish: "(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed 'a pervasive and unreasonable risk' of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show 'deliberate indifference to or tacit authorization of the alleged offensive practices;' and (3) that there was an 'affirmative causal link' between the supervisor's inaction and the particular constitutional injury suffered" (quoting *Miller v. Bearn*, 896 F.2d 848, 854 (4th Cir. 1990))). *See also* *Randall v. Prince George's County*, 302 F.3d 188, 206 (4th Cir. 2002).

*Fifth Circuit:* *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 254 (5th Cir. 2005) ("supervisors may be liable for constitutional violations committed by subordinate employees when supervisors act, or fail to act, with *deliberate indifference* to violations of others' constitutional rights committed by their subordinates"; court adopted *Farmer v. Brennan*, 511 U.S. 825 (1994), definition of deliberate indifference); *Roberts v. City of Shreveport*, 397 F.3d 287, 292 (5th Cir. 2005) (supervisory liability requires a showing of deliberately indifferent training or supervision causally linked to violation of plaintiff's rights).

*Sixth Circuit:* *Gregory v. City of Louisville*, 444 F.3d 725, 751 (6th Cir. 2006) ("Plaintiff must also show that the supervisor somehow encouraged or condoned the actions of their inferiors. Plaintiff, however, presents evidence only that [the] supervisors . . . failed to review their subordinates' work." (citations omitted)); *Doe v. City of Roseville*, 296 F.3d 431, 440 (6th Cir. 2002) ("Supervisor liability [under § 1983] occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional deprivation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he [or she] fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant, and of continued duration, rather than isolated occurrences.") (citing *Braddy v. Fla. Dep't of Labor & Employment Sec.*, 133 F.3d 797, 802 (11th Cir. 1998)); *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir. 1999) (supervisory liability cannot be based on mere failure to act; the supervisor must have "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending [subordinate] officers") (citing *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir.), *cert. denied*, 459 U.S. 833 (1982)); *Poe v. Haydon*, 853 F.2d 418, 429 (6th Cir. 1988). *See also* *Combs v. Wilkinson*, 315 F.3d 548, 558 (6th Cir. 2002).

*Seventh Circuit:* *Jones v. Chicago*, 856 F.2d 985, 992–93 (7th Cir. 1988) (conduct of subordinate must have occurred with supervisor's knowledge, consent, or deliberate indifference). *See also* *Gossmeier v. McDonald*, 128 F.3d 481, 494 (7th Cir. 1997).

*Eighth Circuit:* *Andrews v. Fowler*, 98 F.3d 1069, 1078 (8th Cir. 1996) (supervisor may be liable under § 1983 if (1) she had notice of subordinates' unconstitutional actions; (2) she "[d]emonstrated deliberate indifference to or tacit authorization of the offensive acts"; and (3) her failure to act "proximately caused injury").

*Ninth Circuit:* *Cunningham v. Gates*, 229 F.3d 1271, 1292 (9th Cir. 2000) ("Supervisors can be held liable for: 1) their own culpable action or inaction in the training, supervision,

as to whether the requisite culpability for supervisory inaction can be established on the basis of a single incident of subordinates' misconduct, or whether a pattern or practice of constitutional violation must be shown.<sup>711</sup>

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or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) conduct that showed a reckless or callous indifference to the rights of others.”).

*Tenth Circuit:* Lankford v. City of Hobart, 73 F.3d 283, 287 (10th Cir. 1996) (“personal direction” or actual knowledge of wrongdoing and acquiescence) (following Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992), cert. denied, 509 U.S. 923 (1993)).

*Eleventh Circuit:* Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003) (supervisor (1) personally participated in unconstitutional conduct; (2) failed to correct widespread violations; (3) initiated custom or policy that was deliberately indifferent to constitutional rights; or (4) directed subordinates to act unconstitutionally or knew they would do so yet failed to stop them from doing so). See also Dalrymple v. Reno, 334 F.3d 991, 995–96 (11th Cir. 2003).

*D.C. Circuit:* Barham v. Ramsey, 434 F.3d 565, 578 (D.C. Cir. 2006) (supervisory liability requires showing “supervisor . . . [knew] about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what he might see”); Int’l Action Center v. United States, 365 F.3d 20, 25–28 (D.C. Cir. 2004) (actual or constructive knowledge of past transgressions or responsible for or aware of “clearly deficient” training); Haynesworth v. Miller, 820 F.2d 1245, 1259–60 (D.C. Cir. 1987) (breach of duty to instruct subordinate to prevent constitutional harm).

711. Compare Howard v. Adkison, 887 F.2d 134, 138 (8th Cir. 1989) (“[A] single incident, or a series of isolated incidents, usually provides an insufficient basis upon which to assign supervisory liability. However, as the number of incidents grows and a pattern begins to emerge, a finding of tacit authorization or reckless disregard becomes more plausible.”), with Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 567 (1st Cir. 1989) (“An inquiry into whether there has been a pattern of past abuses or official condonation thereof is only required when a plaintiff has sued a municipality. Where . . . plaintiff has brought suit against the defendants as individuals . . . plaintiff need only establish that the defendants’ acts or omissions were the product of reckless or callous indifference to his constitutional rights and that they, in fact, caused his constitutional deprivations.”).

## XII. Relationship Between Individual and Municipal Liability

When claims are brought against both a state or local official individually and against a municipal entity, the district court has discretion to either bifurcate the claim or try them jointly.<sup>712</sup> Section 1983 plaintiffs generally favor a joint trial because the plaintiff may be allowed to introduce evidence of wrongdoing by other officers or by the municipal entity, albeit with limiting instructions. Section 1983 defendants normally seek bifurcation in order to thwart this strategy.

In *Los Angeles v. Heller*,<sup>713</sup> the plaintiff asserted § 1983 false arrest and excessive force claims; the complaint alleged personal capacity and municipal liability claims. The Supreme Court held that a determination in the first phase that the individual officer did not violate the plaintiff's federally protected rights required dismissal of the municipal liability claim. The Court reasoned that, because the municipal liability claim was premised on the city's allegedly having adopted a policy of condoning excessive force in making arrests, the city could not be liable under § 1983 unless some official violated the plaintiff's federally protected rights under the alleged "policy."<sup>714</sup>

Some courts have read *Heller* broadly as meaning that if the personal capacity claim is dismissed, the municipal liability claim *must* be dismissed.<sup>715</sup> However, other courts have recognized situations in which the named subordinate defendant did not violate the plaintiff's federally protected rights, but the plaintiff's rights were violated by the joint action of a group of officers, or by a nondefendant, or by policy-making officials.<sup>716</sup> Under these circumstances, dismissal of the claim against the individual officer-defendant should not result in automatic dismissal of the municipal liability claim.<sup>717</sup>

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712. Fed. R. Civ. P. 42(b). See, e.g., *Amato v. City of Saratoga Springs*, 170 F.3d 311, 316 (2d Cir. 1999). See also 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 7.14 (4th ed. 2005).

713. 475 U.S. 796 (1986).

714. *Id.* at 796–99.

715. See 1A Schwartz, *supra* note 712, § 7.13.

716. *Id.*

717. See *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002); *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002); *Barrett v. Orange County*, 194 F.3d 341, 350 (2d Cir.

The fact that the plaintiff's claim against the individual officer–defendant is defeated by qualified immunity should not automatically result in dismissal against the municipality, because an officer who is protected by qualified immunity may have violated the plaintiff's federally protected rights. The qualified immunity determination may mean only that the defendant did not violate the plaintiff's *clearly established* federally protected rights.<sup>718</sup> While qualified immunity may be asserted by an official sued in his personal capacity, it may not be asserted by a municipal entity (discussed *supra* Part X).

The interplay of the rules governing qualified immunity and municipal liability results in a cost-allocation scheme among the municipality, the individual officer, and the plaintiff whose federally protected rights were violated. The Supreme Court, in *Owen v. City of Independence*,<sup>719</sup> explained how the “costs” are allocated:

1. The municipality will be held liable when the violation of the plaintiff's federally protected right is attributable to enforcement of a municipal policy or practice.
2. The individual officer will be held liable when she violated plaintiff's clearly established federally protected right and, therefore, she is not shielded by qualified immunity.
3. The plaintiff whose federally protected right was violated will not be entitled to monetary recovery and will “absorb the loss” when the violation of his right is not attributable to a municipal policy or practice and the individual officer did not violate plaintiff's clearly established federal rights.

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1999); *Anderson v. Atlanta*, 778 F.2d 678, 686 (11th Cir. 1985); *Garcia v. Salt Lake County*, 768 F.2d 303, 310 (10th Cir. 1985).

718. See, e.g., *Doe v. Sullivan County*, 956 F.2d 545, 554 (6th Cir.) (holding that “the dismissal of a claim against an officer asserting qualified immunity in no way logically entails that the plaintiff suffered no constitutional deprivation, nor . . . that a municipality . . . may not be liable for that deprivation”), *cert. denied*, 506 U.S. 864 (1992).

719. 445 U.S. 622, 657 (1980).

## XIII. State Liability: The Eleventh Amendment

### A. Generally

Under the Eleventh Amendment, the states have immunity from suit in federal courts.<sup>720</sup> Although the Eleventh Amendment language refers to a suit brought by a citizen of one state against *another* state, the Supreme Court has long interpreted the amendment as granting the states sovereign immunity protection even when a state is sued in federal court by one of its own citizens.<sup>721</sup> The Court's rationale is that there is a broader state sovereign immunity underlying the Eleventh Amendment, and that this broader immunity should be read into the Eleventh Amendment.

### B. State Liability in § 1983 Actions

The Supreme Court holds that the Eleventh Amendment applies to § 1983 claims against states and state entities because, in enacting the original version of § 1983, Congress did not intend to abrogate the states' Eleventh Amendment immunity.<sup>722</sup> Therefore, a federal court award of § 1983 damages against a state, state agency, or state official sued in an official capacity is barred by the Eleventh Amendment.<sup>723</sup>

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720. U.S. Const. amend. XI. The circuits are in conflict over whether a federal court must reach an Eleventh Amendment defense before addressing the merits. See authorities cited in *Nair v. Oakland County Community Mental Health Authority*, 443 F.3d 469, 474–77 (6th Cir. 2006).

721. *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (holding that a citizen could not sue a state in federal court without that state's consent). See *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (reaffirming *Hans*).

722. *Quern v. Jordan*, 440 U.S. 332, 342 (1979).

723. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (stating that “when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its [Eleventh Amendment] sovereign immunity from suit even though individual officials are nominal defendants”) (quoting *Ford Motor Co. v. Dep't of Treasury*, 323 U.S. 459, 464 (1945)). Even if a third party agrees to indemnify the state, the Eleventh Amendment still protects the state from a federal court monetary judgment. *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 431 (1997). Because the Eleventh Amendment operates to bar suits against states only in federal court, a question emerged as to whether a state could be sued under § 1983 in *state* court. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), the Supreme Court held that neither a state nor a state official in his *official* capacity is a “person” for purposes of a § 1983 damages action. *Will*, 491 U.S. at 71. Thus, even if a state is found to have waived its Eleventh

However, under the doctrine of *Ex parte Young*,<sup>724</sup> prospective relief against a state official in his official capacity to prevent future federal constitutional or federal statutory violations is not barred by the Eleventh Amendment. The Court in *Young* reasoned that a state official who violated federal law is “stripped of his official or representative character” and, therefore, did not act for the state, but as an individual. Because the Eleventh Amendment protects states and state entities, and not individuals, the claim for prospective relief is not barred by the Eleventh Amendment. The rationale behind the *Young* doctrine is fictitious because *Young* prospective relief operates in substance against the state and may have a substantial impact on the state treasury. The *Young* doctrine “permits federal courts to enjoin state officials to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury.”<sup>725</sup> The *Young* fiction was born of necessity to enable the federal courts to ensure prospective compliance by the states with federal law.

To determine whether a plaintiff has alleged a proper *Young* claim, the federal court “need only conduct a ‘straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.’”<sup>726</sup> In addition, the plaintiff must name as defendant the state official who is responsible for enforcing the contested statute in her official capacity;<sup>727</sup> a claim for prospective relief against the state itself, or a state agency, will be

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enth Amendment immunity in federal court, or even if a § 1983 action is brought in state court, where the Eleventh Amendment is not applicable, *Will* precludes a damages action against the state government entity. *Id.* This holding does not apply when a state official is sued in his official capacity for prospective injunctive relief. *Id.* at 71 n.10.

724. 209 U.S. 123 (1908).

725. *Milliken v. Bradley*, 433 U.S. 267, 289 (1977). *But see* *Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002) (observing that “simply because the implementation of such prospective relief would require the expenditure of substantial sums of [state] money does not remove a claim from the *Ex Parte Young* exception”).

726. *Verizon Md. Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 296 (1997) (O’Connor, J., concurring)).

727. *See Greenawalt v. Ind. Dep’t of Corr.*, 397 F.3d 587, 589 (7th Cir. 2005) (noting that “section 1983 does not permit injunctive relief against state officials sued in their individual as distinct from their official capacity”).

barred by the Eleventh Amendment.<sup>728</sup> Declaratory relief is within the *Young* doctrine's reach, but only when there are ongoing or threatened violations of federal law.<sup>729</sup>

When a federal court grants *Young* prospective relief, the court has power to enforce that relief, including by ordering monetary sanctions payable out of the state treasury.<sup>730</sup> Similarly, a federal court's enforcement against a state of a consent decree that is based on federal law does not violate the Eleventh Amendment.<sup>731</sup> The rationale "[i]s that in exercising their prospective powers under *Ex Parte Young*, federal courts are not reduced to [granting prospective relief] and hoping for compliance. Once issued, an injunction may be enforced. Many of the court's most effective enforcement weapons involve financial penalties."<sup>732</sup>

In *Pennhurst State School & Hospital v. Halderman*,<sup>733</sup> the Supreme Court held that the *Young* doctrine does not apply to state law claims that are pendent ("supplemental") to the § 1983 claim. Therefore, a supplemental state law claim that seeks to compel the state to comply with state law is barred by the Eleventh Amendment. The Court in *Pennhurst* reasoned that the *Young* fiction was born of the necessity of federal supremacy to enable the federal courts to compel state compliance with federal law, a factor not present when the plaintiff claims a violation of state law.<sup>734</sup> The Court in *Pennhurst* viewed federal court relief requiring a state to comply with state law as a great intrusion on state sovereignty.<sup>735</sup>

### C. Personal Capacity Claims

The Eleventh Amendment does not grant immunity when a § 1983 claim for damages is asserted against a state official in her personal capacity.<sup>736</sup> The monetary relief awarded on such a claim would not be

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728. See, e.g., *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

729. See *Green v. Mansour*, 474 U.S. 64, 73 (1985).

730. See *Hutto v. Finney*, 437 U.S. 678, 691 (1978).

731. See *Frew v. Hawkins*, 540 U.S. 431, 440 (2004).

732. *Hutto*, 437 U.S. at 690.

733. 465 U.S. 89 (1984).

734. *Id.* at 99–100.

735. *Id.*

736. *Hafer v. Melo*, 502 U.S. 21, 30–31 (1991).

payable out of the state treasury, but would come from the state official's personal funds, which are not protected by the Eleventh Amendment.<sup>737</sup> The fact that the state agreed to indemnify the state official for a personal capacity monetary judgment does not create Eleventh Amendment immunity because the decision to indemnify is a voluntary policy choice of state government; it is not compelled by mandate of the federal court.<sup>738</sup>

#### *D. Municipal Liability; The Hybrid Entity Problem*

The Eleventh Amendment does not protect municipalities.<sup>739</sup> Thus, in contrast to a § 1983 federal court damage award against a state entity, a § 1983 damage award against a municipality is not barred by the Eleventh Amendment. Many governing bodies have attributes of both state and local entities. For example, an entity may receive both state and local funding, or an entity that carries out a local function may be subject to state oversight. Federal courts frequently have to determine whether such a “hybrid entity” should be treated as an arm of the state or of local government.<sup>740</sup> In making this determination, the most im-

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<sup>737</sup>. *Id.*

<sup>738</sup>. *See, e.g., Stoner v. Wis. Dep't of Agric.*, 50 F.3d 481, 482–83 (7th Cir. 1995).

<sup>739</sup>. *See Missouri v. Jenkins*, 495 U.S. 33, 56 n.20 (1990); *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978); *Mt. Healthy City Sch. Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280–81 (1977). *See also* *N. Ins. Co. of N.Y. v. Chatham County*, 126 S. Ct. 1689, 1694 (2006) (sovereign immunity does not protect municipalities); *People for Ethical Treatment of Animals v. Gittens*, 396 F.3d 416, 425 (D.C. Cir. 2005) (“The District of Columbia is a municipality for the purpose of § 1983.”).

<sup>740</sup>. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). The circuit courts have articulated a variety of formulas to determine whether an entity is an arm of the state or of local government, *see* 1A Schwartz, *supra* note 712, § 8.10. *See, e.g., Febres v. Camden Bd. of Educ.*, 445 F.3d 227, 229–30 (3d Cir. 2006) (explaining that the court decides whether an entity is “arm of state” by giving “equal consideration” to three factors: “(1) whether the payment of the judgment would come from the state, (2) what status the entity has under state law, and (3) what degree of autonomy the entity has”; in close cases, the “prime guide” should be protecting the state from federal court judgments payable out of the state treasury); *Ernst v. Rising*, 427 F.3d 351, 359 (6th Cir. 2005) (en banc) (holding that to determine whether an entity is “arm of state” or of local government, court should consider “(1) whether the state would be responsible for a judgment . . . ; (2) how state law defines the entity; (3) what degree of control the state maintains over the entity; and (4) the source of the entity’s funding”; whether the state will be liable for judgment is the most important inquiry).

portant factor is whether the federal court judgment can be satisfied from state or municipal funds,<sup>741</sup> because the Eleventh Amendment is designed to protect the *state* treasury. A “hybrid entity” asserting Eleventh Amendment immunity bears the burden of demonstrating that it is an arm of the state protected by Eleventh Amendment immunity.<sup>742</sup>

In *Mt. Healthy City School District Board of Education v. Doyle*,<sup>743</sup> the Supreme Court found that because the defendant school board was more like a municipality than an arm of the state, it was not entitled to assert Eleventh Amendment immunity. The school board received significant state funding and was subject to some oversight from the state board of education, but it also had power to raise its own funds by issuing bonds and levying taxes, and state law did not consider the school board an arm of the state. The Court found that, “[o]n balance,” the school board was “more like a county or city than it [was] like an arm of the state.”<sup>744</sup>

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>745</sup> the Court followed its *Mt. Healthy* approach and adopted the presumption that an interstate compact agency would not be entitled to Eleventh Amendment immunity “[u]nless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose . . . .”<sup>746</sup>

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741. See *Ernst*, 427 F.3d at 359 (interpreting Supreme Court decision in *Regents of University of California v. Doe*, 519 U.S. 425, 431 (1997), as holding that to determine whether an entity is an arm of the state, the foremost factor “is the state treasury’s *potential* legal liability for judgment, not whether the state treasury will pay for the judgment in *that* case”).

742. *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 237–39 (2d Cir. 2006).

743. 429 U.S. 274 (1977).

744. *Id.* at 280–81.

745. 440 U.S. 391 (1979).

746. *Id.* at 401. See also *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 52 (1994) (holding that injured railroad workers could assert a federal statutory right under the Federal Employers Liability Act to recover damages against the Port Authority, and that concerns underlying the Eleventh Amendment—“the States’ solvency and dignity”—were not touched).

### *E. Eleventh Amendment Waivers*

A state may voluntarily waive its Eleventh Amendment immunity, but these waivers are relatively rare. The Supreme Court invokes a strong presumption against Eleventh Amendment waiver and has held that waiver will be found only if the state agrees to subject itself to liability in federal court by “express language or . . . overwhelming [textual] implications.”<sup>747</sup> The Supreme Court found a deliberate waiver of Eleventh Amendment immunity, however, where the state official removed a state suit to federal court.<sup>748</sup> The Court reasoned that it “would seem anomalous or inconsistent” for a state to invoke the judicial power of the federal court while, at the same time, asserting that the Eleventh Amendment deprived the federal court of judicial power.<sup>749</sup>

### *F. Eleventh Amendment Appeals*

In *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,<sup>750</sup> the Supreme Court held that a district court’s denial of Eleventh Amendment immunity is immediately appealable to the court of appeals. The Court relied on the fact that the Eleventh Amendment grants states not only immunity from liability, but also “immunity from suit” and from the burdens of litigation.<sup>751</sup> It found that an immediate appeal was necessary to vindicate this immunity as well as the states’ “dignitary interests.”<sup>752</sup>

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747. A state’s waiver of sovereign immunity from liability in state court is not a waiver of Eleventh Amendment immunity in the federal courts. *Fla. Dep’t of Health v. Fla. Nursing Home Ass’n*, 450 U.S. 147, 150 (1981) (per curiam).

748. *Lapides v. Bd. of Regents*, 535 U.S. 613 (2002).

749. *Id.* at 619.

750. 506 U.S. 139 (1993). The law of the First Circuit, that the Commonwealth of Puerto Rico is treated as a state for purposes of the Eleventh Amendment, was not challenged in the Supreme Court, and the Court expressed no view on the issue. *Id.* at 141 n.1.

751. *Id.* at 144.

752. *Id.* at 146.

## XIV. Personal Capacity Claims: Absolute Immunities

### A. Absolute Versus Qualified Immunity: The Functional Approach

Officials sued for monetary relief in their personal capacities may be entitled to assert a common-law defense of absolute or qualified immunity. In general, judges, prosecutors, witnesses, and legislators may assert absolute immunity, while executive and administrative officials may assert qualified immunity. Most officials are entitled only to qualified immunity.

Whether an official may assert absolute or qualified immunity depends on “the nature of the function performed, not the identity of the actor who performed it.”<sup>753</sup> Thus, an official may be entitled to absolute immunity for carrying out one function but only to qualified immunity for another. For example, a judge may assert absolute judicial immunity for carrying out her judicial functions, but only qualified immunity for carrying out administrative and executive functions, such as hiring and firing court employees.<sup>754</sup> And, as discussed below, prosecutors may claim absolute prosecutorial immunity for their advocacy functions, but only qualified immunity for their investigatory and administrative functions.

### B. Judicial Immunity

The law has long recognized a broad absolute judicial immunity.<sup>755</sup> A judge does not lose absolute immunity simply because he acted in excess of jurisdiction; absolute immunity is lost only when the judge either did not perform a judicial act or when the judge “acted in the clear absence of all jurisdiction.”<sup>756</sup> A judge who acts in excess of jurisdiction, or without personal jurisdiction, or who makes grave procedural errors, or who acts “maliciously or corruptly” or “in excess of

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753. *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997) (quoting *Forrester v. White*, 484 U.S. 219, 229 (1988)).

754. See *Forrester*, 484 U.S. 219.

755. *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356–57 (1978). See also *Pierson v. Ray*, 386 U.S. 547, 553–54 (1967); *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

756. *Stump*, 435 U.S. at 356–57 (quoting *Bradley*, 80 U.S. at 351).

authority,” does not necessarily act in the clear absence of all jurisdiction.<sup>757</sup> To determine whether the judge performed a “judicial act,” courts consider whether the judge engaged in action normally performed by a judge, and whether the parties dealt with the judge in her judicial capacity.<sup>758</sup>

In *Pierson v. Ray*,<sup>759</sup> the Court held that the judicial functions of determining guilt and sentencing a criminal defendant are protected by absolute immunity.<sup>760</sup> Judicial immunity was deemed proper for two reasons: the common law of 1871 (when the original version of § 1983 was enacted) supported the immunity, and the policy behind § 1983 was not to deter judges from performing their jobs. The Court stated:

[Judicial immunity] “is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that

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757. *Stump*, 435 U.S. at 356.

758. *Mireles*, 502 U.S. at 12 (judge who ordered bailiff to use excessive force to bring attorney to courtroom performed judicial act); *Stump*, 435 U.S. at 362 (acts are judicial even though informal and irregular, e.g., no docket number, no filing with clerk’s office, and no notice to minor who was subject to sterilization order). *See also* *Sibley v. Lando*, 437 F.3d 1067, 1070 (11th Cir. 2005) (“Whether a judge’s actions were made while acting in his judicial capacity depends on whether: (1) the act complained of constituted a normal judicial function; (2) the events occurred in the judge’s chambers or in open court; (3) the controversy involved a case pending before the judge; and (4) the confrontation arose immediately out of a visit to the judge in his judicial capacity.”); *Lowe v. Lestinger*, 772 F.2d 308, 312 (7th Cir. 1985) (to determine whether act is “judicial,” courts examine (1) whether act is purely ministerial or requires exercise of discretion; (2) whether it is type of action normally performed by judge; and (3) the “expectations of the parties, i.e., whether the parties dealt with the judge as judge”).

*Examples of Judicial Acts*: *Brookings v. Clunk*, 389 F.3d 614, 622 (6th Cir. 2004) (state judge “was engaged in a judicial act in swearing out a criminal complaint against [defendant] upon learning that he had committed a crime in his court”); *Barrett v. Harrington*, 130 F.3d 246, 260 (6th Cir. 1997) (“a judge instigating a criminal investigation against a disgruntled litigant who has harassed her is a judicial act”); *Martinez v. Winner*, 771 F.2d 424, 434–35 (10th Cir. 1985) (holding that installations of courtroom cameras was a judicial act; judge was both entitled and required to take steps to prevent criminal conduct in his courthouse).

*Examples of Nonjudicial Acts*: *Archie v. Lanier*, 95 F.3d 438, 441 (6th Cir. 1996) (holding that “stalking and sexually assaulting a person, no matter the circumstances, do not constitute ‘judicial acts’”); *Zarcone v. Perry*, 572 F.2d 52, 53 (2d Cir. 1978) (ordering coffee vendor handcuffed and subjecting him to “pseudo-official inquisition” because judge did not like his coffee are not judicial acts), *cert. denied*, 439 U.S. 1072 (1979).

759. 386 U.S. 547 (1967).

760. *Id.* at 553–55.

XIV. Personal Capacity Claims: Absolute Immunities

the judges should be at liberty to exercise their functions with independence and without fear of consequences.” It is a judge’s duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation.<sup>761</sup>

In short, absolute immunity is necessary to protect the judicial system. The remedy for judicial errors is an appeal, not a § 1983 lawsuit for damages.

The Supreme Court has had to define the boundaries of “judicial” actions. In *Stump v. Sparkman*,<sup>762</sup> the Court held that Judge Harold D. Stump had performed a judicial act when he ordered a mentally retarded girl to undergo a tubal ligation at the request of her mother.<sup>763</sup> The Court explained that absolute immunity applies to actions taken by judges “in error, . . . maliciously, or . . . in excess of [their] authority,” but not in the “clear absence of all jurisdiction.”<sup>764</sup> To distinguish between these two standards, the Court provided an example:

[I]f a probate judge, with jurisdiction over only wills and estates should try a criminal case, he would be acting in the clear absence of jurisdiction. . . . [O]n the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction.<sup>765</sup>

Furthermore, an action can be judicial even if it lacks the formality often associated with court proceedings; the question is whether the action is one normally performed by a judge. For example, in *Stump*, the Court recognized absolute immunity for the judge’s act of ordering a tubal ligation, even though there had been no docket number, no filing with the clerk’s office, and no notice to the minor. Similarly, in *Mireles v. Waco*,<sup>766</sup> the Court determined that a judge had performed a judicial act in ordering a bailiff to use excessive force to compel an

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761. *Id.* at 553–54 (quoting *Scott v. Stansfield*, L.R. 3 Ex. 220, 223 (1868)).

762. 435 U.S. 349, 360–64 (1978).

763. *Id.* at 364.

764. *Id.* at 356–57.

765. *Id.*

766. 502 U.S. 9 (1991).

attorney to attend court proceedings because directing officers to bring counsel to court for a pending case is a function normally performed by a judge.<sup>767</sup> Even though judges do not have the authority to order police officers to commit battery, they have broad authority to maintain court proceedings.

A judge is protected only by qualified immunity when carrying out administrative functions. In *Forrester v. White*,<sup>768</sup> the Supreme Court held that when a judge fired a probation officer, he performed an administrative act and was thus protected only by qualified immunity.<sup>769</sup> The Court rejected the argument that judges should have absolute immunity for employment decisions because an incompetent employee can impair the judge's ability to make sound judicial decisions. The Court reasoned that employment decisions made by judges "cannot meaningfully be distinguished from" employment decisions made by district attorneys and other executive officials, and "no one claims they give rise to absolute immunity from liability in damages under § 1983."<sup>770</sup>

Judicial immunity is primarily at issue when the plaintiff seeks monetary relief against a state court judge. In *Pulliam v. Allen*,<sup>771</sup> the Supreme Court held that judicial immunity did not encompass claims for prospective relief and attorneys' fees against a judge in her judicial capacity. The Federal Court Improvements Act of 1996 amended § 1983 and its attorneys' fees provision, 42 U.S.C. § 1983(b), to provide that injunctive relief and § 1988 fees generally may not be granted against a judicial officer. Section 1983 was amended to provide that "injunctive relief shall not be granted" in a § 1983 action against "a judicial officer for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." Section 1988(b) was amended to provide that attorneys' fees may not be awarded against a judicial officer based on conduct in a judicial capacity, unless the officer's conduct was in clear excess of the officer's jurisdiction.

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767. *Id.* at 13.

768. 484 U.S. 219 (1988).

769. *Id.* at 230.

770. *Id.* at 229.

771. 466 U.S. 522 (1984).

In some circumstances, administrative hearing officers may claim absolute quasi-judicial immunity. Whether absolute immunity is appropriate depends primarily on whether the hearing officer is politically independent and if the hearing affords sufficient procedural safeguards to ensure that the administrative process fairly resembles the judicial process.<sup>772</sup> On the other hand, court reporters may not assert absolute immunity because they do not engage in the kind of discretionary decision making or exercise of judgment protected by judicial immunity.<sup>773</sup> Circuit court authority holds that judicial law clerks may claim absolute immunity “where they are performing discretionary acts of a judicial nature.”<sup>774</sup>

### C. Prosecutorial Immunity

Prosecutors are absolutely immune when acting as an advocate for the state by engaging in conduct that is “intimately associated with the judicial phase of the criminal process.”<sup>775</sup> Supreme Court decisional law

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772. *Compare* Butz v. Economou, 438 U.S. 478, 512–14 (1978) (holding that federal hearing officers are entitled to assert absolute immunity), *with* Cleavinger v. Saxner, 474 U.S. 193, 204–06 (1985) (finding that prison officials who held disciplinary hearings were not entitled to claim absolute immunity because of a lack of independence and insufficient procedural safeguards). In *Cleavinger*, the Court held that a committee of prison officials did not perform a judicial act in deciding to discipline a prisoner after a hearing. Noting that the committee members were not administrative law judges, the Court characterized them as employees “temporarily diverted from their usual duties.” Similarly, in *Wood v. Strickland*, 420 U.S. 308, 320 (1975), the Court held that absolute immunity was not necessary to protect school board members’ ability to exercise discretion in deciding how to discipline students.

The First Circuit held that in determining whether an official is entitled to absolute judicial immunity, courts should engage in the following analysis:

First, does a Board member, like a judge, perform a traditional “adjudicatory” function, in that he decides facts, applies law, and otherwise resolves disputes on the merits (free from direct political influence)? Second, does a board member, like a judge, decide cases sufficiently controversial that, in the absence of absolute immunity, he would be subject to numerous damages actions? Third, does a Board member, like a judge, adjudicate disputes against a backdrop of multiple safeguards designed to protect [the parties’] constitutional rights?

*Bettencourt v. Bd. of Registration*, 904 F.2d 772, 783 (1st Cir. 1990), *quoted in* *Dotzel v. Ashbridge*, 438 F.3d 320, 325 (3d Cir. 2006).

773. *Antoine v. Byers & Anderson*, 508 U.S. 429, 436–37 (1993).

774. *Oliva v. Heller*, 839 F.2d 37, 39–40 (2d Cir. 1988), *cert. denied*, 519 U.S. 1118 (1997). *Accord* *Moore v. Brewster*, 96 F.3d 1240 (9th Cir. 1996).

775. *Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976).

holds that “acts undertaken by a prosecutor in preparing for the initiation of judicial proceedings or for trial, and which occur in the course of his role as an advocate for the State, are entitled to the protection of absolute immunity.”<sup>776</sup> Prosecutors are not absolutely immune for administrative actions or investigative functions not related to trial preparation. Prosecutorial immunity does protect the prosecutor even if she acted “with an improper state of mind or improper motive.”<sup>777</sup> Further, “a prosecutor is absolutely immune from a civil conspiracy charge when his alleged participation in the conspiracy consists of otherwise immune acts.”<sup>778</sup>

In *Imbler v. Pachtman*,<sup>779</sup> the Court held that a prosecutor was entitled to absolute immunity for “initiating a prosecution and in presenting the State’s case.”<sup>780</sup> The Court found that the immunity protected even the knowing use of false testimony at trial and deliberate suppression of exculpatory evidence.<sup>781</sup> The Court granted absolute immunity after considering two issues: (1) the availability of immunity at common law and (2) whether absolute immunity would undermine the goals of § 1983. At common law, prosecutors had immunity from suits based on malicious prosecution and defamation. In addition, the Court reasoned that immunity properly shields prosecutors from suits by disgruntled criminal defendants and protects their ability to act decisively, results consistent with the goals of § 1983. The Court found, on the one hand, that qualified immunity would not adequately protect prosecutors and, on the other hand, that the remedies of professional self-discipline and criminal sanctions would serve as adequate checks on the broad discretion of prosecutors.<sup>782</sup>

Prosecutors are absolutely immune to carry out such advocacy actions as

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776. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

777. *Shmueli v. City of New York*, 424 F.3d 231, 237 (2d Cir. 2005) (citing *Bernard v. County of Suffolk*, 356 F.3d 495 (2d Cir. 2004)).

778. *Reasonover v. St. Louis County*, 447 F.3d 569, 580 (8th Cir. 2006).

779. 424 U.S. 409 (1976).

780. *Id.* at 431.

781. *Id.*

782. *Id.* at 430–31.

XIV. Personal Capacity Claims: Absolute Immunities

- deciding whether to prosecute;
- engaging in pretrial litigation activities concerning applications for arrest and search warrants, bail applications, and suppression motions;
- preparing for trial, including interviewing witnesses and evaluating evidence;
- introducing evidence; and
- plea bargaining.<sup>783</sup>

Prosecutors, however, may not claim absolute immunity for investigative and administrative functions not related to trial preparation.<sup>784</sup> Thus, prosecutors may assert only qualified immunity for such administrative and investigative functions as

- holding a press conference;<sup>785</sup>
- engaging in investigative activity prior to the establishment of probable cause to arrest; and<sup>786</sup>
- providing the police with legal advice during the investigative phase.<sup>787</sup>

Courts must draw fine distinctions in determining whether the prosecutor's actions should be characterized as advocacy, or as investigative or administrative.<sup>788</sup> In *Burns v. Reed*,<sup>789</sup> the § 1983 complaint challenged (1) the prosecutor's misleading presentation of a police officer's testi-

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783. See 1A Martin A Schwartz, Section 1983 Litigation: Claims and Defenses § 9.03[B] (4th ed. 2005). It should be noted that while a § 1983 malicious prosecution claim against a prosecutor would be barred by absolute prosecutorial immunity, such a claim may be assertable against a law enforcement officer who influenced a prosecutor to initiate a prosecution. *Hartman v. Moore*, 547 U.S. 250, 265–66 (2006). See *supra* Part IV.G.

784. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993).

785. *Id.* at 277–78.

786. *Id.*

787. *Burns v. Reed*, 500 U.S. 478, 492–96 (1991).

788. *Buckley*, 509 U.S. at 273 (“There is a difference between the advocate’s role in evaluating evidence and interviewing witnesses as he prepares for trial, on the one hand, and the detective’s role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested, on the other hand. When a prosecutor performs the investigative functions normally performed by a detective or police officer, it is ‘neither appropriate nor justifiable that, for the same act, immunity should protect the one and not the other.’” (quoting *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973), *cert. denied*, 415 U.S. 917 (1974))).

789. 500 U.S. 478 (1991).

mony at a probable cause hearing for the issuance of a search warrant, and (2) the prosecutor's legal advice to police officers about the use of hypnosis as an investigative tool and the existence of probable cause to arrest the plaintiff.<sup>790</sup> The Supreme Court held that the prosecutor had absolute immunity for his participation at the probable cause hearing,<sup>791</sup> but only qualified immunity for his legal advice to the police.<sup>792</sup> The Court reasoned that absolute immunity is necessary only when there is "interference with . . . conduct closely related to the judicial process."<sup>793</sup> While the prosecutor at the hearing acted as an "advocate for the state"<sup>794</sup> and his appearance was "intimately associated with the judicial phase of the criminal process,"<sup>795</sup> "advising the police in the investigative phase" was deemed too remote from the judicial process.<sup>796</sup> Moreover, it would be "incongruous" to afford prosecutors absolute immunity "from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice."<sup>797</sup>

The Supreme Court reiterated the importance of linking the challenged action to the judicial process in *Buckley v. Fitzsimmons*.<sup>798</sup> The Court held that the prosecutor did not have absolute immunity for two challenged actions: (1) conspiring "to manufacture false evidence that would link [the plaintiff's] boot with the boot print the murderer left on the front door," and (2) conducting a press conference defaming the plaintiff shortly before the defendant's election and the grand jury's indictment of the plaintiff.<sup>799</sup> In neither instance did the prosecutor act as an "advocate" for the state.<sup>800</sup>

The *Buckley* Court attempted to create a bright line for distinguishing prosecutorial acts from investigative acts by holding that a prosecu-

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790. *Id.* at 487.

791. *Id.* at 492.

792. *Id.* at 496.

793. *Id.* at 494.

794. *Id.* at 491.

795. *Id.* at 492.

796. *Id.* at 493.

797. *Id.* at 495 (emphasis added).

798. 509 U.S. 259, 270–71 (1993).

799. *Id.* at 272–77.

800. *Id.* at 274–78.

tor's "advocacy" starts when he has probable cause to make an arrest.<sup>801</sup> The Court, however, narrowed this rule by stating that the presence or absence of probable cause is not dispositive of the issue of absolute immunity; even after a prosecutor has probable cause, he may perform investigative work protected only by qualified immunity.<sup>802</sup> In *Buckley*, the prosecutor did not have probable cause to arrest the plaintiff before he allegedly manufactured false evidence and thus was not entitled to absolute immunity. With respect to the defamatory press conference, the Court found that even if media relations is an important part of a prosecutor's job, it is not functionally tied to the judicial process.

In *Kalina v. Fletcher*,<sup>803</sup> however, the Court did not refer to the presence or absence of probable cause in deciding whether actions performed by a prosecutor were protected by absolute immunity. Instead, the Court focused on whether the prosecutor had filed sworn or unsworn pleadings. The Court held that the prosecutor had absolute immunity for filing two unsworn pleadings—an information and a motion for an arrest warrant, because these were advocacy functions—but not for the act of personally vouching for the truthfulness of facts set forth in a document called a "Certification for Determination of Probable Cause," because this was akin to the traditional function of a complaining witness. The Court refused to extend absolute immunity to a prosecutor's witness-like act because it interpreted the common law as not providing this type of broad immunity.<sup>804</sup>

The decisional law thus draws some very fine distinctions between prosecutorial actions protected by absolute immunity because they resemble advocacy, and prosecutorial actions that are not protected by absolute immunity because they are investigative or administrative in nature. A useful rule of thumb is that "[t]he more distant a function is from the judicial process, the less likely absolute immunity will attach."<sup>805</sup>

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801. *Id.* at 274.

802. *Id.* at 274 n.5.

803. 522 U.S. 118 (1997).

804. As discussed in the next section concerning witness immunity, complaining witnesses are not protected by absolute immunity.

805. *Snell v. Tunnell*, 920 F.2d 673, 687 (10th Cir. 1990).

#### D. Witness Immunity

In *Briscoe v. LaHue*,<sup>806</sup> the Supreme Court held that witnesses, including police officers who testify in judicial proceedings, are protected by absolute immunity, even if the witness gave perjured testimony. The Court reasoned that denying absolute immunity might make some witnesses reluctant to testify or cause them to distort their testimony for fear of liability.<sup>807</sup> It found that “[s]ubjecting . . . police officers to damages liability under § 1983 for their testimony might undermine not only their contribution to the judicial process but also the effective performance of their other public duties.”<sup>808</sup> Complaining witnesses, however, are not protected by absolute immunity.<sup>809</sup> “[T]he term ‘complaining witness’ is something of a misnomer, as the complainant need not testify as a witness so long as he played a significant role in initiating or procuring the prosecution.”<sup>810</sup>

#### E. Legislative Immunity

State and local legislators enjoy absolute immunity for their legislative acts.<sup>811</sup> Under the functional approach to immunities, the critical issue is whether the official was engaged in legislative activity.<sup>812</sup> The determination of an act’s legislative or executive character “turns on the nature of the act, rather than on the motive or intent of the official per-

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806. 460 U.S. 325 (1983).

807. *Id.* at 333.

808. *Id.* at 343.

809. See *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997); *Malley v. Briggs*, 475 U.S. 335, 340 (1986); *Cervantes v. Jones*, 188 F.3d 805, 809–10 (7th Cir. 1999), *cert. denied*, 528 U.S. 1154 (2000); *White v. Frank*, 855 F.2d 956, 961 (2d Cir. 1988).

810. *Cervantes*, 188 F.3d at 810 (citation omitted).

811. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

812. See, e.g., *Bogan*, 523 U.S. at 55 (city council member who introduced budget eliminating plaintiff’s employment position and mayor who signed bill into law were protected by absolute immunity); *Sup. Ct. of Va. v. Consumers Union of the U.S.*, 446 U.S. 719, 734 (1980) (state judges’ promulgation of attorney professional responsibility rules was protected by absolute immunity); *Tenney*, 341 U.S. at 377 (legislators who carried out a legislative investigation were protected by absolute immunity because “investigations, whether by standing or special committees, are an established part of representative government”).

forming it.”<sup>813</sup> Legislative action involves the formulation of policy, while executive action enforces and applies the policy in particular circumstances.<sup>814</sup>

In *Bogan v. Scott-Harris*,<sup>815</sup> the Supreme Court held that local legislators are entitled to absolute immunity for their legislative activities.<sup>816</sup> The common law afforded local legislators absolute immunity and, under the functional approach, local legislators are engaged in the same types of activities as their state counterparts. The Court thus unanimously extended absolute immunity to a city council member and mayor whose challenged actions were promulgating a new city budget and signing a law that eliminated the plaintiff’s position after she complained about racial epithets in the workplace.

The decision in *Bogan* demonstrates (1) that an official who is not a legislative official, such as the mayor, may be protected by absolute legislative immunity if her conduct was an integral step in the legislative process;<sup>817</sup> and (2) that an official who engages in legislative action may be protected by absolute immunity even if the legislative acts affected only one individual.<sup>818</sup>

In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*,<sup>819</sup> the Supreme Court determined that a decision by the Tahoe Regional Planning Agency (TRPA) regarding land use was a legislative act. TRPA was an agency created by the states of California and Nevada, with the approval of Congress, for the purpose of creating a regional plan for “land use, transportation, conservation, recreation, and public services.”<sup>820</sup> The Court held that absolute immunity applied to “the [individual] members of the TRPA acting in a legislative capacity,” even

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813. *Bogan*, 523 U.S. at 54. See also *Torress-Rivera v. Calderon-Serra*, 412 F.3d 205, 213–14 (1st Cir. 2005) (governor’s signing of bill into law was protected by absolute immunity, regardless of his motive or intent).

814. See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 9.08[B][5] (4th ed. 2005).

815. 523 U.S. 44 (1998).

816. *Id.* at 48–49 (noting that absolute legislative immunity is “fully applicable to local legislators”).

817. *Id.* at 55.

818. *Id.*

819. 440 U.S. 391 (1979).

820. *Id.* at 394.

though there was no common-law immunity for such an entity and even though all the members of the agency were appointed, not elected.

In *Supreme Court of Virginia v. Consumers Union of the United States*,<sup>821</sup> the U.S. Supreme Court determined that the justices of the Virginia Supreme Court had performed a legislative act in promulgating professional responsibility rules for attorneys.<sup>822</sup> The Supreme Court stated that the Virginia court had exercised “the State’s entire legislative power with respect to regulating the bar, and its members are the State’s legislators for the purpose of issuing” the rules.<sup>823</sup> By focusing on the action performed, not the job description of the actor, the Court emphasized the functional nature of absolute immunity.

Unlike most common-law immunities, legislative immunity is not limited to monetary relief; it also encompasses injunctive and declaratory relief.<sup>824</sup>

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821. 446 U.S. 719 (1980).

822. *Id.* at 731–34.

823. *Id.* at 734.

824. *Id.* at 732; *Scott v. Taylor*, 405 F.3d 1251, 1257 (11th Cir. 2005); *Star Distrib. Ltd. v. Marino*, 613 F.2d 4, 6 (2d Cir. 1980).

## XV. Personal Liability: Qualified Immunity

Qualified immunity may well be the most important issue in § 1983 litigation. It is very frequently asserted as a defense to § 1983 personal capacity claims for damages.<sup>825</sup> Furthermore, courts decide a high percentage of § 1983 personal capacity claims for damages in favor of the defendant on the basis of qualified immunity. The Supreme Court holds that qualified immunity is not just immunity from liability, but also “immunity from suit,” that is, from the burdens of having to defend the litigation.<sup>826</sup>

Qualified immunity protects an executive official who violated the plaintiff’s federally protected right so long as the official did not violate *clearly established* federal law. Therefore, when qualified immunity is asserted as a defense, the critical issue is whether the defendant official violated federal law that was clearly established at the time she acted.<sup>827</sup> That the official may have violated clearly established *state* law is generally irrelevant.<sup>828</sup>

Qualified immunity protects officials who acted in an objectively reasonable manner. An official who violated clearly established federal law did not act in an objectively reasonable manner, while an official who violated federal law, but not clearly established federal law, did act in an objectively reasonable manner.<sup>829</sup> The official’s subjective moti-

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825. Qualified immunity is not applicable to claims for injunctive relief. *Behrens v. Pelletier*, 516 U.S. 299, 312 (1996).

826. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). *Accord Saucier v. Katz*, 533 U.S. 194, 200–01 (2001).

827. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). *See also Brossseau v. Haugen*, 543 U.S. 194, 198 (2004); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004); *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *Saucier*, 533 U.S. at 201; *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991); *Anderson v. Creighton*, 483 U.S. 635, 638–39 (1987); *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986); *Davis v. Scherer*, 468 U.S. 183, 190–91 (1984). Several of the Supreme Court qualified immunity decisions are in *Bivens* actions. The same qualified immunity analysis applies in § 1983 suits and *Bivens* suits. *Wilson*, 526 U.S. at 609; *Davis*, 468 U.S. at 194.

828. *Davis*, 468 U.S. at 191.

829. Although the courts have articulated a variety of two- and three-part qualified immunity tests, the authors believe that the essential qualified immunity question is whether the officer violated clearly established federal law. 1A Schwartz, *supra* note 814, § 9A.04. *See, e.g., Walczyk v. Rio*, 496 F.3d 139 (2d Cir. 2007) (three-part test); *Causey v. City of Bay City*, 443 F.3d 524, 528 n.2 (6th Cir. 2006) (observing that Sixth Circuit employs

vation is irrelevant to the qualified immunity defense but may be relevant to the constitutional claim asserted.<sup>830</sup>

The Supreme Court has described the qualified immunity test as a “fair warning” standard—that is, if the federal law was clearly established, the official is on notice that violation of the federal law may lead to personal monetary liability.<sup>831</sup> Under qualified immunity, public officials “are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.”<sup>832</sup>

In *Saucier v. Katz*,<sup>833</sup> the Supreme Court stressed that qualified immunity protects an officer’s reasonable mistakes about what the law requires. In *Hope v. Pelzer*,<sup>834</sup> the Court held that, under the particular circumstances, the defendant prison officials’ cuffing an inmate to a hitching post for a lengthy period of time while shirtless in the hot Alabama sun violated clearly established Eighth Amendment standards. It found that the Eleventh Circuit had erred in applying a rigid rule that for the federal law to be clearly established the facts of the existing precedent must be “materially similar” to the facts of the instant case. “[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.”<sup>835</sup> The Court found that the defendants in *Hope* had fair warning that their conduct was unconstitutional from (1) the reasoning of Eleventh Circuit precedent, although this precedent was not factually on all fours; (2) a regulation of the state Department of Corrections relating to use of the hitching post—a regulation that had been ignored by prison officials; and (3) a Department of Justice (DOJ) transmittal to the State Department of Corrections advising it that its use of the hitching post was unconstitutional.

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both two- and three-part tests); *Frederick v. Morse*, 439 F.3d 1114, 1122–23 (9th Cir. 2006) (three-part test); *Borges-Colon v. Roman Abreu*, 438 F.3d 1, 18–19 (1st Cir. 2006) (three-part test); *Wilson v. Flynn*, 429 F.2d 465, 467 (4th Cir. 2005) (two-part approach); *Tinker v. Beasley*, 429 F.3d 1324, 1326 (11th Cir. 2005) (three-step approach). For a cogent criticism of multi-part tests, see *Walczyk*, 496 F.3d at 165–71 (Sotomayor, J., concurring).

830. *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998).

831. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *United States v. Lanier*, 520 U.S. 259, 270 (1997).

832. *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992). *Accord Abdouch v. Burger*, 426 F.3d 982, 987 (8th Cir. 2005); *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004).

833. 533 U.S. 194, 205 (2001).

834. 536 U.S. 730 (2002).

835. *Id.* at 741.

The Supreme Court relied on this last factor, even though the record did not show that DOJ's position had been communicated to the defendant state officials.<sup>836</sup>

*A. Who May Assert Qualified Immunity?*

State and local officials who carry out executive and administrative functions may assert qualified immunity.<sup>837</sup> So far the Supreme Court has not allowed private party state actors to assert qualified immunity. In *Richardson v. McKnight*,<sup>838</sup> the Supreme Court held that private prison guards are not entitled to assert qualified immunity. In *Wyatt v. Cole*,<sup>839</sup> the Court held that a creditor who employed a state replevin procedure could not assert qualified immunity. However, in *Richardson* and *Wyatt* the Court left open whether the defendants in those cases were entitled to assert a good-faith defense. Some lower courts have allowed a private party state actor defendant to assert a good-faith defense that implicates the defendant's subjective intent.<sup>840</sup>

The Court in *Richardson* and *Wyatt* did not resolve whether private party state actors who carry out public functions, such as mental

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836. The fact that an official claims to have acted on advice of counsel or pursuant to orders of a superior normally will not protect the official if he violated clearly established federal law. See 1A Schwartz, *supra* note 814, § 9A. See, e.g., *Lawrence v. Reed*, 406 F.3d 1224, 1230–31 (10th Cir. 2005). However, in some circumstances, official conduct pursuant to advice of counsel may render the official's conduct objectively reasonable and, therefore, protected by qualified immunity. See, e.g., *Sueiro Vazquez v. Torregrosa de la Rosa*, 494 F.3d 227, 236 (1st Cir. 2007) (while acknowledging that acting on advice of counsel alone will not provide protection under qualified immunity, court ruled that defendants were protected by qualified immunity because their reliance on advice of government counsel, which they were required to follow, was not unreasonable). An official who acted pursuant to a presumptively constitutional state statute will very likely be protected by qualified immunity. See, e.g., *Connecticut v. Crotty*, 346 F.3d 84, 104 (2d Cir. 2003).

837. See, e.g., *Brosseau v. Haugen*, 543 U.S. 194, 197 (2004); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004); *Saucier*, 533 U.S. at 200–01; *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Malley v. Briggs*, 475 U.S. 335, 340 (1986).

838. 521 U.S. 399 (1997).

839. 504 U.S. 158 (1992).

840. See *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1277 (3d Cir. 1994); *Wyatt v. Cole*, 994 F.2d 1113, 1118 (5th Cir.), *cert. denied*, 510 U.S. 977 (1993).

evaluations or civil commitments, may assert qualified immunity.<sup>841</sup> An important factor may be whether the defendant acted under government supervision. In *Richardson*, the Court regarded the lack of government supervision over the private prison guards as an important factor justifying denial of the right to assert qualified immunity.

### *B. Clearly Established Federal Law*

Normally, a controlling precedent of the Supreme Court, the particular circuit, or the highest court in the state is necessary to clearly establish federal law. The right must be clearly established in a fairly

particularized . . . sense: the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.<sup>842</sup>

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841. For post-*Richardson* decisions, compare, e.g., *Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (forensic odontologist retained by district attorney's office to evaluate bite-mark evidence as part of criminal investigation was engaged in state action and entitled to assert qualified immunity), and *Camilo-Robles v. Hoyos*, 151 F.3d 1, 10 (1st Cir. 1998) (psychiatrists under contract with state to assist police department in evaluating police officers entitled to assert qualified immunity because they performed necessary function within police department), cert. denied, 525 U.S. 1105 (1999), with *Jensen v. Lane County*, 222 F.3d 570, 577 (9th Cir. 2000) (private physician who provided services to county relating to civil commitment not entitled to assert qualified immunity), and *Halvorsen v. Baird*, 146 F.3d 680, 685 (9th Cir. 1998) (private not-for-profit organization providing municipality with involuntary commitment services for inebriates not entitled to assert qualified immunity; fact that organization was not for profit was not a sufficient basis for distinguishing *Richardson*).

The Second Circuit held that a private defendant who conspired with government officials is not entitled to assert qualified immunity. *Toussie v. Powell*, 323 F.3d 178, 182–83 (2d Cir. 2003).

For pre-*Richardson* decisions allowing the private party defendant to assert qualified immunity, see *Young v. Murphy*, 90 F.3d 1225, 1234 (7th Cir. 1996) (private doctor hired by county to evaluate individual's mental competency); *Sherman v. Four County Counseling Center*, 987 F.2d 397, 403 (7th Cir. 1993) (private hospital that accepted and treated mental patients pursuant to court order). See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 9.15 (4th ed. 2005).

842. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). See also *Saucier v. Katz*, 533 U.S. 194, 201 (2001) (qualified immunity analysis “must be undertaken in light of the specific

For federal law to be clearly established, there must be fairly close factual correspondence between the prior precedents and the case at hand.<sup>843</sup> Federal law is less likely to be clearly established when it depends on an ad hoc balancing of competing interests between the state and the individual.<sup>844</sup> Decisions from outside the controlling jurisdiction do not clearly establish federal law absent “a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.”<sup>845</sup> In some cases, the federal law might be clearly established even in the absence of controlling precedent. For example, the type of conduct engaged in by the defendant may be so obviously unconstitutional that there was no need to litigate the issue previously.<sup>846</sup> On the other hand, a conflict in the lower courts is a strong indicator that federal law was not clearly established.<sup>847</sup>

#### 1. Application of Qualified Immunity to Fourth Amendment Claims

The qualified immunity “objective reasonableness” defense applies even to Fourth Amendment challenges to arrests and searches where the constitutional standard itself is objective reasonableness.<sup>848</sup>

In *Malley v. Briggs*,<sup>849</sup> the Court held that police officers who executed an invalid arrest warrant may nevertheless assert the defense of qualified immunity.<sup>850</sup> The Court recognized two standards of reasonableness: conduct unreasonable under the Fourth Amendment could

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context of the case, not as a broad general proposition”). *Accord* *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

843. *Anderson*, 483 U.S. at 640. However, the facts of the existing precedent need not be “materially similar” to those of the instant case. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The issue is necessarily a question of degree.

844. *See* *Dorheim v. Sholes*, 430 F.3d 919, 926 (8th Cir. 2005) (need to weigh competing interests makes it difficult for plaintiff “to overcome a qualified immunity defense in the context of a child abuse investigation”); *Manzano v. S.D. Dep’t of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (same).

845. *Wilson v. Layne*, 526 U.S. 603, 617 (1999).

846. *See* *Wilson*, 526 U.S. at 620–21 (Stevens, J., dissenting). *See also* *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

847. *Wilson*, 526 U.S. at 617.

848. *Anderson v. Creighton*, 483 U.S. 635, 643–45 (1987); *Malley v. Briggs*, 475 U.S. 335, 344–45 (1986).

849. 475 U.S. 335 (1986).

850. *Id.* at 343–46.

still be objectively reasonable for the purpose of qualified immunity.<sup>851</sup> It noted that it had similarly recognized two standards of reasonableness when creating the objective good-faith exception to the exclusionary rule.<sup>852</sup> Under that exception, even if officers obtained evidence by committing an unreasonable search or seizure in violation of the Fourth Amendment, the evidence could nevertheless be used in the case in chief if the officers acted in “objective” good-faith reliance on a search warrant. This objective good-faith standard asks whether a “reasonably well-trained officer” with a “reasonable knowledge of what the law prohibits” would have known that the challenged action violated the Fourth Amendment.<sup>853</sup>

In *Anderson v. Creighton*,<sup>854</sup> the Supreme Court affirmed this dual standard of reasonableness as it addressed whether police officers could assert qualified immunity for a warrantless search of the plaintiff’s home. The Court conceded that the general principles of the Fourth Amendment are clear: a warrantless search of an individual’s home, absent probable cause and exigent circumstances, is unreasonable. It explained, however, that these general principles did not determine whether the officers were protected by qualified immunity. Whether the officers violated “clearly established” law requires consideration of the “contours of a [constitutional] right.”<sup>855</sup> The proper inquiry is whether the contours of the right were “sufficiently clear that a reasonable official would understand that what he [did] violate[d] that right.”<sup>856</sup>

The *Anderson* Court gave little guidance as to how to assess the “contours” of a right. It stated that a police officer may “reasonably,

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851. *Id.* at 344–45.

852. *Id.* at 344 (citing *United States v. Leon*, 468 U.S. 897 (1984) (objective reasonableness is standard for search pursuant to invalid search warrant)).

853. *United States v. Leon*, 468 U.S. 897 (1984).

854. 483 U.S. 635, 636–41 (1987).

855. *Id.* at 640.

856. *Id.* The Supreme Court adhered to this approach in its later per curiam decision, *Hunter v. Bryant*, 502 U.S. 224 (1991). In *Hunter*, the Court explained that the proper inquiry is whether the officials “acted reasonably under settled law in the circumstances, not whether another, or more reasonable interpretation of events can be constructed.” *Hunter*, 502 U.S. at 228.

but mistakenly, conclude that probable cause is present.”<sup>857</sup> Similarly, a police officer may reasonably but mistakenly conclude that exigent circumstances exist. If there is a “legitimate question” as to the unlawfulness of the conduct, qualified immunity protects the officer.<sup>858</sup> The decision further states, “[T]he very action in question, [however, need not have] been previously held unlawful,” but if “in the light of preexisting law the unlawfulness [was] apparent,” then qualified immunity does not apply.<sup>859</sup>

Similarly, in *Saucier v. Katz*,<sup>860</sup> the Supreme Court held that the qualified immunity objective reasonableness test applies to Fourth Amendment excessive force arrest claims that are governed by the *Graham v. Connor*<sup>861</sup> objective reasonableness standard.<sup>862</sup> The Court in *Saucier* ruled that the pertinent qualified immunity inquiry is whether the officer reasonably, though mistakenly, believed that his use of force complied with the Fourth Amendment. In other words, the critical issue is whether the officer made a reasonable mistake about the state of the law.

Applying qualified immunity to Fourth Amendment constitutional claims governed by an objective reasonableness standard gives the official two layers of reasonableness protection, one under the amendment itself, and another under qualified immunity. This can lead to the awkward conclusion that an official acted in a reasonable manner for immunity purposes though unreasonably for constitutional purposes.<sup>863</sup> Courts typically try to avoid this linguistic awkwardness of an official acting “reasonably unreasonably” by asking whether the official had *arguable* probable cause, or whether the officer reasonably believed there was probable cause, or whether a reasonable officer could have mistakenly concluded there was probable cause.<sup>864</sup> So, too, in

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857. *Anderson*, 483 U.S. at 641.

858. *Id.*

859. *Id.* at 640.

860. 533 U.S. 194 (2001).

861. 490 U.S. 386 (1989).

862. *Brosseau v. Haugen*, 543 U.S. 194, 198–99 (2004); *Saucier*, 533 U.S. at 201–02.

863. *Saucier*, 533 U.S. at 203; *Anderson*, 483 U.S. at 643.

864. *See, e.g.*, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). *See Zellner v. Summerlin*, 494 F.3d 344, 370 (2d Cir. 2007) (“arguable” probable cause does not mean “almost” probable

Fourth Amendment excessive force cases, courts inquire whether the officer reasonably, though mistakenly, believed that his use of force was constitutional.<sup>865</sup>

## 2. Intent or Motive as Element of Constitutional Claims

There is a potential tension between a constitutional claim, which implicates the defendant's subjective intent, such as a free speech retaliation claim, and qualified immunity, which is an objective reasonableness standard under which the defendant's subjective intent is irrelevant. The Supreme Court, in *Crawford-El v. Britton*,<sup>866</sup> held that when the constitutional claim implicates the defendant official's subjective intent, the lower courts should follow the Federal Rules of Civil Procedure and not place special burdens on plaintiffs who are faced with summary judgment qualified immunity motions. The Court in *Crawford-El* said that the federal courts should not rewrite the Federal Rules of Civil Procedure, that placing unduly harsh burdens on plaintiffs may rob meritorious claims of their fair day in court, and that existing pleading, motion, and discovery rules, and the Prison Litigation Reform Act, adequately protect defendants against insubstantial constitutional claims.

### C. Procedural Aspects of Qualified Immunity

Qualified immunity is an affirmative defense that the defendant has the burden of pleading.<sup>867</sup> Although failure to raise qualified immunity can operate to waive the defense, federal courts have generally been reluctant to find the defense waived.<sup>868</sup>

The great weight of lower court authority rejects a heightened pleading requirement for § 1983 personal capacity claims subject to

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cause; essential inquiry is whether it was objectively reasonable to conclude there was probable cause).

865. *Saucier*, 533 U.S. at 205.

866. 523 U.S. 574 (1998).

867. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). *Accord Crawford-El*, 523 U.S. at 586; *Siebert v. Gilley*, 500 U.S. 226, 231 (1991); *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Thomas v. Independence Twp.*, 463 F.3d 285, 293 (3d Cir. 2006). *See* Fed. R. Civ. P. 8(C) (affirmative defense must be raised in the answer). The plaintiff does not have the burden of pleading facts relevant to the qualified immunity defense. *Thomas*, 463 F.3d at 292–94.

868. 1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 9A.14[C][b] (4th ed. 2005).

qualified immunity.<sup>869</sup> The courts of appeals disagree somewhat on the burden of persuasion. The prevailing view is that once the defendant properly raises qualified immunity, the plaintiff has the burden of overcoming the immunity by showing that the defendant violated the plaintiff's clearly established federal right.<sup>870</sup> However, the Second Circuit places the burden of persuasion on the defendant.<sup>871</sup> Qualified immunity is normally raised on a motion for summary judgment, sometimes on a motion to dismiss, and sometimes on a Rule 50 motion for judgment as a matter of law.<sup>872</sup> In addition, courts may consider renewed motions for qualified immunity. These motions may occur after the plaintiff has presented her case, at the close of both sides, after the jury's special verdict, or in a motion for a new trial.<sup>873</sup> Resolution is possible during these trial stages if the defendant is entitled to judgment as a matter of law.

Qualified immunity may be raised on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief may be granted.<sup>874</sup> On a Rule 12(b)(6) motion, the district court assumes the plaintiff's factual allegations are true and determines whether the allegations state a claim for relief. A Rule 12(b)(6) motion

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869. See *supra* Part II.C.

870. See, e.g., *Roska v. Sneddon*, 437 F.3d 964, 971 (10th Cir. 2006) ("To overcome a qualified immunity defense, a plaintiff must first establish a violation of a constitutional or statutory right and then show that the right was clearly established."); *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006) (when defense of qualified immunity is raised, plaintiff bears burden of proving that defendant official is not entitled to qualified immunity defense); *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir. 2002) (en banc) ("When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense."); *Hicks v. Feeney*, 850 F.2d 152, 159 (2d Cir. 1988) (qualified immunity is affirmative defense that defendant has burden to plead and prove). See also *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) ("once the defendant establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that qualified immunity is not appropriate").

871. *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997); *Varrone v. Bilotti*, 123 F.3d 75, 78 (2d Cir. 1997) ("Since qualified immunity is an affirmative defense, the defendants bear the burden of showing that the challenged act was objectively reasonable in light of the law existing at that time."); *In re State Police Litig.*, 88 F.3d 111, 123 (2d Cir. 1996).

872. Qualified immunity has been asserted most frequently on summary judgment.

873. See, e.g., *Warlik v. Cross*, 969 F.2d 303, 306 (7th Cir. 1992).

874. See *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004); *Williams v. Ala. State Univ.*, 102 F.3d 1179, 1182 (11th Cir. 1997).

to dismiss based on qualified immunity should be granted unless the complaint states facts showing that the defendant violated the plaintiff's clearly established federal right.<sup>875</sup>

### 1. Qualified Immunity Summary Judgment Motions Before and After Discovery

The Supreme Court's goal in defining qualified immunity in wholly objective terms is to enable the district courts to resolve qualified immunity, to the greatest extent possible, as a matter of law, pretrial and even pre-discovery.<sup>876</sup> In *Hunter v. Bryant*,<sup>877</sup> the Supreme Court held that qualified "[i]mmunity ordinarily should be decided by the court long before trial."<sup>878</sup> The Court criticized the lower court for "routinely plac[ing] [qualified] immunity in the hands of the jury."<sup>879</sup>

Officials may raise the qualified immunity defense in summary judgment motions under Federal Rule of Civil Procedure 56(c) both before<sup>880</sup> and after discovery.<sup>881</sup> Under Rule 56(c), summary judgment is permitted if there are no disputed material facts and the defendant is entitled to judgment as a matter of federal law.<sup>882</sup>

Summary judgment qualified immunity motions before discovery may be appropriate in some circumstances because qualified immunity is not only a defense to liability but also an "immunity from suit."<sup>883</sup> Under *Harlow v. Fitzgerald*,<sup>884</sup> discovery is not to occur if the plaintiff has not alleged a violation of clearly established law. If, however, the plaintiff has alleged a violation of clearly established federal law, and the defendant alleges actions that a reasonable officer could have

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875. *Williams*, 102 F.3d at 1182.

876. See *Hunter v. Bryant*, 502 U.S. 224, 227–28 (1991). See also *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

877. 502 U.S. 224 (1991).

878. *Id.* at 228.

879. *Id.* Accord *Anderson*, 483 U.S. at 646 n.6.

880. *Anderson*, 483 U.S. at 646 n.6; *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982).

881. *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996).

882. See also *id.* at 306 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." (internal quotation marks and citation omitted)).

883. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (plurality opinion).

884. 457 U.S. 800, 818 (1982).

thought were lawful, then courts must grant discovery tailored to the immunity question.<sup>885</sup>

When responding to a summary judgment qualified immunity motion, a plaintiff seeking discovery must file an affidavit with a Rule 56(f) motion demonstrating “how discovery will enable [him] to rebut a defendant’s showing of objective reasonableness or . . . demonstrate a connection between the information he would seek in discovery and the validity of the defendant’s qualified immunity assertion.”<sup>886</sup>

In *Crawford-El v. Britton*,<sup>887</sup> the Supreme Court described various options that the district court can invoke when facts concerning the defendant’s alleged retaliatory motive are in dispute:

1. allow the plaintiff to take a “focused deposition” of the defendant on the issue of retaliatory motive;
2. allow discovery only on “historical facts” before allowing discovery on the defendant’s motive; and
3. order the plaintiff to file a reply or grant the defendant’s motion for a more definite statement requiring specific factual allegations of defendant’s conduct and motive before allowing any discovery.<sup>888</sup>

Under Federal Rule of Civil Procedure 26, district courts may limit the number of depositions and interrogatories, the length of depositions, the “time, place, and manner of discovery,” and the sequence of discovery.<sup>889</sup> District courts may also limit discovery to an issue that

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885. *Anderson*, 483 U.S. at 646 n.6.

886. *Lewis v. City of Fort Collins*, 903 F.2d 752, 758 (10th Cir. 1990) (quotation omitted). *See* Fed. R. Civ. P. 56(f).

887. 523 U.S. 574 (1998).

888. *See also* *Iqbal v. Hasty*, 490 F.3d 143, 158 (2d Cir. 2007), *cert. granted*, 128 S. Ct. \_\_\_\_ (2008) (*Bivens* claim).

889. *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998). In *Iqbal*, the Second Circuit ruled that even if the complaint survives a motion to dismiss, the district court, in order to protect officials asserting qualified immunity, may exercise discretion

to permit some limited and tightly controlled reciprocal discovery so that a defendant may probe for amplification of a plaintiff’s claims and a plaintiff may probe such matters as a defendant’s knowledge of relevant facts and personal involvement in challenged conduct. . . . [A] district court might wish to structure such limited discovery by examining written responses to interrogatories and requests to admit before authorizing depositions, and by deferring discovery directed to high-level officials until discovery of front-line officials has been completed and has demonstrated the need for discovery higher up the ranks.

*Iqbal*, 490 F.3d at 158 (*Bivens* claim).

may resolve the lawsuit before allowing discovery as to an official's intent. For example, an official "may move for partial summary judgment on objective issues that are potentially dispositive and are more amenable to summary disposition than disputes about the official's intent, which frequently turn on credibility assessments."<sup>890</sup> In contrast, Federal Rule of Civil Procedure 56(f) gives district courts discretion to postpone deciding an official's motion for summary judgment if discovery is necessary to establish "facts essential to justify the [plaintiff's] opposition."<sup>891</sup>

In addition, district courts can safeguard officials' right to be free from frivolous lawsuits by imposing sanctions under Federal Rule of Civil Procedure 11 or granting dismissal under 28 U.S.C. § 1915(e)(2), a statute permitting dismissal of "frivolous or malicious" in forma pauperis suits.<sup>892</sup> In short, district courts have "broad discretion in the management of the factfinding process."<sup>893</sup>

Although material facts are disputed in many cases in which qualified immunity is asserted, summary judgment would be possible if, interpreting the facts in the light most favorable to the plaintiff, the district court determines that these facts do not state a violation of clearly established federal law.<sup>894</sup> In this situation, the immunity defense relieves officials from the burdens of trial, protecting their "immunity from suit."<sup>895</sup> If, however, the facts as interpreted in the light most favorable to the plaintiff indicate a violation of clearly established federal law, and the discovery indicates material facts are in dispute, then summary judgment is not possible. At this point, the "immunity from suit" is properly lost and the case must go to trial.

## 2. Role of Judge and Jury

Supreme Court decisions state that, whenever possible, the issue of qualified immunity should be decided pretrial and even prediscovery,

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890. *Crawford-El*, 523 U.S. at 599.

891. *Id.* at 599 n.20.

892. *Id.* at 600 (quoting 28 U.S.C. § 1915(e)(2) (Supp. 1998)).

893. *Id.* at 601.

894. *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

895. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

normally on a motion for summary judgment.<sup>896</sup> When qualified immunity cannot be decided on a motion for summary judgment because facts relevant to qualified immunity are in dispute, it may be proper for the district court to submit the factual issues and the immunity defense to the jury under proper instructions that (1) tell the jury what the clearly established federal law is and (2) describe the nature of qualified immunity; or, alternatively, the court may submit the factual issues that are material to qualified immunity to the jury by special verdicts, while reserving for itself the power to determine the immunity defense in light of the jury's responses to the special verdicts. Most courts have chosen this second option because it seems to best reflect the jury's function as finder of fact and the court's expertise in determining the law.<sup>897</sup> Under this approach, the defendant official is "not entitled to a jury instruction regarding qualified immunity, since it is a legal question for the court to decide."<sup>898</sup>

### 3. Court Should First Decide Constitutional Issue

Supreme Court decisional law holds that when qualified immunity is asserted as a defense, the court must first determine if the complaint

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896. See *Hunter v. Bryant*, 502 U.S. 224, 228 (1991). See also *Mitchell*, 472 U.S. at 526; *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982).

897. See, e.g., *Curley v. Klem*, 499 F.3d 199, 211–15 (3d Cir. 2007); *Willingham v. Crooke*, 412 F.3d 553, 560 (4th Cir. 2005); *Littrell v. Franklin*, 388 F.3d 578, 584–85 (8th Cir. 2004); *Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004); *Stephenson v. Doe*, 332 F.3d 68, 80–81 (2d Cir. 2003); *Johnson v. Breedon*, 280 F.3d 1308, 1319 (11th Cir. 2002). But see *McCoy v. Hernandez*, 203 F.3d 371, 376 (5th Cir. 2000) (jury may decide qualified immunity defense); *Presley v. City of Benbrook*, 4 F.3d 405, 409 (5th Cir. 1993) (same). See also *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (citations omitted):

Once the jury has resolved any disputed facts that are material to the qualified immunity issue, the ultimate determination of whether the officer's conduct was objectively reasonable is to be made by the court. . . . To the extent that a particular finding of fact is essential to a determination by the court that the defendant is entitled to qualified immunity, it is the responsibility of the defendant to request that the jury be asked the pertinent question. If the defendant does not make such a request, he is not entitled to have the court, in lieu of the jury, make the needed factual finding.

898. *Rodriguez-Marin v. Rivera-Gonzales*, 438 F.3d 72, 83 (1st Cir. 2006). *Accord Curley*, 499 F.3d at 215 (qualified immunity focuses on "established legal standards and requires a review of relevant case law, a review a jury simply cannot make").

states a violation of a federally protected right.<sup>899</sup> The rationale for this methodology is that if courts always examined qualified immunity first, it would be hard for constitutional standards to develop. “Deciding the constitutional question before addressing the qualified immunity question . . . promotes clarity in the legal standards for official conduct.”<sup>900</sup>

#### *D. Qualified Immunity Appeals*

When the district court denies qualified immunity on a summary judgment motion, the defendant may take an immediate appeal from the denial of qualified immunity to the court of appeals *if* the immunity appeal can be decided as a matter of law.<sup>901</sup> However, it is not always clear whether a qualified immunity appeal presents an issue of law or fact. If the district court denies a defendant’s summary judgment qualified immunity motion because there are disputed issues of material fact, the defendant may not take an immediate appeal that contests the district court’s factual determinations.<sup>902</sup> However, even when the district court denies a summary judgment qualified immunity motion on the ground that there are disputed issues of material fact, the defendant may take an immediate appeal if the appeal can be decided as a matter of law. Thus, an immediate qualified immunity appeal lies when the appellant:

1. contests the materiality of a disputed issue of fact found by the district court; or

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899. *Harris*, 127 S. Ct. at 1774; *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999); *County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998); *Siegert v. Gilley*, 500 U.S. 226, 231 (1991).

900. *Wilson*, 526 U.S. at 604. *See also Saucier*, 533 U.S. at 201. Nevertheless, some courts at times prefer to reach the immunity issue first. *See, e.g., Brosseau v. Haugen*, 543 U.S. 194, 197–200 (2004); *Horne v. Coughlin*, 191 F.3d 244, 245–50 (2d Cir. 1999); *Harris*, 127 S. Ct. at 1774 n.4 (“There has been doubt expressed regarding the wisdom of *Saucier*’s decision to make the threshold inquiry mandatory . . . .”) (citing authorities). The Supreme Court may reexamine the issue. *Pearson v. Callahan*, 128 S. Ct. 1702 (2008).

901. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Johnson v. Jones*, 515 U.S. 304, 311 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). The jurisdictional basis for this appeal is 28 U.S.C. § 1291, which provides that the “courts of appeal . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”

902. *Johnson*, 515 U.S. at 313.

2. claims entitlement to qualified immunity even on the basis of the facts alleged by the plaintiff.

Furthermore, an immediate appeal may be taken from the denial of qualified immunity raised on a motion to dismiss, because in this circumstance the appeal presents an issue of law, namely whether, assuming the facts alleged by the plaintiff to be true, the defendant is entitled to qualified immunity.<sup>903</sup> The courts of appeals at times find that they have jurisdiction over parts of an immunity appeal raising questions of law, though not over other parts raising questions of fact.

A § 1983 defendant may be entitled to take multiple interlocutory qualified immunity appeals. In *Behrens v. Pelletier*,<sup>904</sup> the Supreme Court held that the defendant may take an immediate appeal from the denial of qualified immunity raised on a motion to dismiss and, if still unsuccessful, from a subsequent denial of qualified immunity raised on summary judgment, provided the summary judgment immunity appeal can be decided as a matter of law.

Qualified immunity appeals are very costly to civil rights plaintiffs in terms of litigation resources and delay of litigation. Qualified immunity appeals normally stay proceedings on the § 1983 claim in the district court.<sup>905</sup> However, the plaintiff may ask the district court to certify that an interlocutory qualified immunity appeal is frivolous.<sup>906</sup> “This practice . . . enables the district court to retain jurisdiction pending summary disposition of the appeal and thereby minimizes disruption of the ongoing proceedings.”<sup>907</sup>

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903. See, e.g., *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004).

904. 516 U.S. 299, 306–07 (1996).

905. *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

906. *Behrens*, 516 U.S. at 310–11; *Chan v. Wodnicki*, 67 F.3d 137, 139 (7th Cir. 1995); *Yates v. City of Cleveland*, 941 F.2d 444, 448 (6th Cir. 1991); *Apostol*, 870 F.2d at 1339.

907. *Behrens*, 516 U.S. at 310–11. The circuit court also determines whether it has jurisdiction after the district court has determined the appeal to be frivolous. See, e.g., *Dickerson v. McClellan*, 37 F.3d 251, 252 (8th Cir. 1994).

## XVI. Exhaustion of State Remedies

### A. State Judicial Remedies: Parratt–Hudson Doctrine

State judicial remedies generally need not be exhausted in order to bring a § 1983 action. “The federal [§ 1983] remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.”<sup>908</sup> When a § 1983 plaintiff has pursued a state judicial remedy, or was an involuntary state court litigant (such as a criminal defendant), the state court judgment may be entitled to preclusive effect in the § 1983 action.<sup>909</sup>

Under the *Parratt–Hudson*<sup>910</sup> doctrine, when a deprivation of liberty or property results from “random and unauthorized” official conduct, the availability of an adequate post-deprivation judicial remedy satisfies procedural due process.<sup>911</sup> The *Parratt–Hudson* doctrine does not apply when the deprivation results from enforcement of the established state procedure<sup>912</sup> or from actions by officials with authority to both cause deprivations and provide predeprivation process.<sup>913</sup> *Parratt–Hudson* is not an exhaustion doctrine: When the *Parratt–Hudson* doctrine is applicable, it results in rejection of procedural due process claims on the merits, not for failure to exhaust. A post-deprivation remedy may be adequate under *Parratt–Hudson* even if it does not afford all of the relief available under § 1983, such as an award of attorneys’ fees.<sup>914</sup>

### B. Preiser, Heck, and Beyond

In *Preiser v. Rodriguez*,<sup>915</sup> the Supreme Court held that a prisoner’s constitutional claim that challenges the fact or duration of her confinement and seeks immediate or speedier release must be brought under federal habeas corpus, following exhaustion of state remedies, even though

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908. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

909. *See infra* Part XVII.

910. *Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Parratt v. Taylor*, 451 U.S. 527, 541 (1981).

911. *See supra* Part IV.C.5.

912. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

913. *Zinermon v. Burch*, 494 U.S. 113, 135–36 (1990).

914. *Parratt*, 451 U.S. at 544.

915. 411 U.S. 475, 489–90 (1973).

such a claim may come within the literal terms of § 1983. In these circumstances, federal habeas corpus is the exclusive remedy. The Court in *Preiser* reasoned that the more specific federal habeas remedy should prevail over the more general § 1983 remedy, and that prisoners should not be allowed to evade the federal habeas exhaustion requirement by filing the claim under § 1983.

The decision in *Preiser*, however, does not preclude prisoners from utilizing § 1983 either to challenge the conditions of their confinement or to enforce procedural due process protections. In *Wilkinson v. Dotson*,<sup>916</sup> the Supreme Court held that the prisoners' challenge to parole release procedures may be asserted under § 1983 because the prisoners sought only enhanced process; they did not challenge either the fact or length of their confinement and did not seek immediate or speedier release from confinement. If successful, the plaintiffs, at most, could obtain new parole release hearings. In *Nelson v. Campbell*,<sup>917</sup> the Supreme Court held that a death row inmate may assert a § 1983 challenge to the constitutionality of a medical procedure that would have been a precursor to his lethal injection. The Court viewed the claim as a "condition of confinement" medical treatment claim.<sup>918</sup> It did not decide whether a challenge to the method of execution itself, e.g., lethal injection, may be asserted under § 1983.

In *Heck v. Humphrey*,<sup>919</sup> the Supreme Court held that a § 1983 plaintiff who seeks damages on a § 1983 claim that necessarily implicates the constitutionality of the claimant's conviction or sentence must demonstrate that the conviction or sentence has been overturned, either judicially or by executive order. Strictly speaking, *Heck* is not an exhaustion doctrine. In fact, the *Heck* doctrine is more onerous than an exhaustion requirement because, unless and until the conviction is overturned, the § 1983 claim is not cognizable. Lower courts often have a difficult time determining whether a § 1983 claim "necessarily implicates" the validity of a conviction.<sup>920</sup> The *Heck* doctrine has implica-

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916. 544 U.S. 74, 82 (2005).

917. 541 U.S. 637, 644 (2004).

918. See also *Hill v. McDonough*, 126 S. Ct. 2096, 2102 (2006) (constitutional challenge to three-drug sequence used to execute by lethal injection may be brought under § 1983).

919. 512 U.S. 477, 486–87 (1994).

920. See 1A Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 10.06 (4th ed. 2005).

tions for the date of accrual for the purpose of the statute of limitations because a § 1983 claim that necessarily implicates the validity of a conviction or sentence is not cognizable and thus does not accrue until the conviction has been overturned.

In *Wallace v. Kato*,<sup>921</sup> the Supreme Court indicated that whether a § 1983 claim attacks the validity of a conviction within the meaning of the *Heck* doctrine should be evaluated as of the date the § 1983 claim accrued. In *Wallace*, the plaintiff's § 1983 challenge to his warrantless arrest accrued on the date he was bound over for trial, which was long before he was convicted.<sup>922</sup> On that date there was obviously no conviction that could be attacked. In other words, as the Court in *Wallace* expressly acknowledged, the *Heck* doctrine does not encompass *future* convictions. The Court said that the “impracticability” of applying *Heck* to future convictions was “obvious,” i.e., it would invite speculation about whether there will be a conviction and, if so, whether the federal § 1983 action would impugn the conviction.<sup>923</sup>

In *Edwards v. Balisok*,<sup>924</sup> the Supreme Court held that the *Preiser-Heck* doctrine applies to prisoner procedural due process claims that necessarily implicate the validity of a prison disciplinary sanction. On the other hand, in *Muhammad v. Close*,<sup>925</sup> the Supreme Court held that a prisoner's challenge to some aspect of a prison disciplinary proceeding that does not implicate either the finding of “guilt” or the disciplinary sanction is not governed by the *Heck* doctrine.

In *Spencer v. Kemna*,<sup>926</sup> five justices in concurring and dissenting opinions took the position that the *Heck* doctrine does not apply to § 1983 claimants who are not in state custody and who therefore cannot seek relief in a federal habeas corpus proceeding. The lower courts are in conflict over whether the positions of these five justices should be viewed as binding precedent.<sup>927</sup>

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921. 127 S. Ct. 1091, 1097–98 (2007).

922. See *infra* Part XVIII.C.

923. *Wallace*, 127 S. Ct. at 1097–98.

924. 520 U.S. 641, 645 (1997).

925. 540 U.S. 749, 754–55 (2004).

926. 523 U.S. 1 (1998).

927. See 1A Schwartz, *supra* note 920, § 10.06[F].

*C. State Administrative Remedies; Prison Litigation Reform Act*

In *Patsy v. Board of Regents*,<sup>928</sup> the Supreme Court held that state administrative remedies need not be exhausted in order to bring suit under § 1983. The Court reasoned that individuals should not have to seek relief from the state and local authorities against whom § 1983 guarantees immediate judicial access. Nevertheless, the Prison Litigation Reform Act (PLRA) requires prisoners to exhaust administrative remedies before bringing suit to contest the conditions of their confinement.<sup>929</sup>

In *Booth v. Churner*,<sup>930</sup> the Supreme Court held that prisoners who seek money damages judicially must satisfy the PLRA exhaustion requirement even when the available administrative procedures do not afford a monetary remedy, so long as some type of relief is available administratively. In *Porter v. Nussle*,<sup>931</sup> the Supreme Court held that prisoner excessive force claims are challenges to conditions of confinement and thus subject to the PLRA exhaustion requirement. The Court in *Porter* found “that the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.”<sup>932</sup>

In *Woodford v. Ngo*,<sup>933</sup> the Supreme Court held that the PLRA exhaustion requirement is not satisfied by the filing of an untimely or otherwise procedurally defective administrative grievance. Rather, the PLRA requires “proper exhaustion,” i.e., the claims must be in compliance with the agency’s deadlines and other procedural rules. The Court left open the possibility that there should be an exception for cases in which “prisons might create procedural requirements for the purpose of tripping up all but the most skillful prisoners.”<sup>934</sup> The Court

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928. 457 U.S. 496 (1982).

929. 42 U.S.C. § 1997e(a) (1996).

930. 532 U.S. 731, 734 (2001).

931. 534 U.S. 516 (2002).

932. *Id.* at 532.

933. 126 S. Ct. 2378 (2006).

934. *Id.* at 2392–93. In some cases courts have held that the PLRA exhaustion requirement should not apply when the failure to exhaust was not the prisoner’s fault. For example, when a prison official’s threats toward an inmate inhibit the inmate’s ability to pursue an administrative grievance procedure, the defendant should be estopped from

also noted that “the PLRA exhaustion requirement is not jurisdictional, and thus [allows] a district court to dismiss plainly meritless claims without first addressing what may be a much more complex question, namely, whether the prisoner did in fact properly exhaust available administrative remedies.”<sup>935</sup>

When a prisoner’s § 1983 complaint is dismissed for failure to satisfy the PLRA exhaustion requirement, dismissal should almost always be without prejudice so that it does not bar reinstatement after exhaustion is satisfied.<sup>936</sup>

In *Jones v. Bock*,<sup>937</sup> the Supreme Court held that the plaintiff prisoner is not required to plead compliance with the PLRA exhaustion requirement. Rather, failure to exhaust is an affirmative defense. The Court also held that exhaustion is not per se inadequate merely because a prison official, sued in the § 1983 action, was not named in the administrative grievance. The Court acknowledged, however, that under *Woodford v. Ngo*, prisoners must comply with the grievance procedures and that a grievance procedure may require the prisoner to name a particular official. “The level of detail necessary on a grievance to comply with the grievance procedure will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper exhaustion.”<sup>938</sup> Finally, the Court held that the PLRA does not require dismissal of the entire action when “the prisoner has failed to exhaust some, but not all of the

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asserting failure to exhaust. *Ziamba v. Wezner*, 366 F.3d 161, 163–64 (2d Cir. 2003). In addition, exhaustion is not required where administrative remedies are unavailable to an inmate for various reasons beyond the prisoner’s control. *Giano v. Goard*, 380 F.3d 670, 677 (2d Cir. 2004).

935. *Woodford*, 126 S. Ct. at 2392.

936. *Ford v. Johnson*, 362 F.3d 395, 401 (7th Cir. 2004) (“all dismissals under § 1997(e)(a) should be without prejudice”); *Steele v. Fed. Bureau of Prisons*, 355 F.3d 1204, 1212–13 (10th Cir. 2003); *McKinney v. Carey*, 311 F.3d 1198, 1200–01 (9th Cir. 2002); *Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001); *Brown v. Tombs*, 139 F.3d 1102, 1104 (6th Cir.), cert. denied, 523 U.S. 833 (1998). See also *Burrell v. Powers*, 431 F.3d 282, 285 (7th Cir. 2005); *Walker v. Thompson*, 288 F.3d 1005, 1009 (7th Cir. 2002) (dismissal for failure to comply with PLRA exhaustion requirement is without prejudice and does not bar reinstatement of suit unless it is too late to exhaust).

937. 127 S. Ct. 910 (2007).

938. *Id.* at 923.

claims asserted in the complaint.”<sup>939</sup> A “total exhaustion” rule could have the unwholesome effect of inmates filing more separate lawsuits “to avoid the possibility of an unexhausted claim, tainting the others. That would certainly not comport with the purpose of the PLRA to reduce the quantity of inmate suits.”<sup>940</sup>

#### D. Notice of Claim

In *Felder v. Casey*,<sup>941</sup> the Supreme Court held state notice-of-claim rules may not be applied to § 1983 claims. Because a notice-of-claim rule is not one of those universally recognized rules necessary for fair procedure, like a limitation defense or a survivorship rule, the absence of a federal notice-of-claim rule is not a “deficiency” in the federal law requiring resort to state law under 42 U.S.C. § 1988(a). Furthermore, the Court found that state notice-of-claim rules unduly burden and discriminate against civil rights claimants. However, it acknowledged that state notice-of-claim rules may be applied to state law claims that are supplemental to § 1983 claims.

#### E. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank*,<sup>942</sup> the Supreme Court imposed stringent two-prong ripeness requirements for § 1983 regulatory takings claims. First, *Williamson* requires that the § 1983 takings plaintiff obtain a final determination from land use authorities concerning the permissible use of the property. This requirement is satisfied when the permissible uses of the property are known to a reasonable degree of certainty.<sup>943</sup> The second *Williamson* ripeness prong requires the plaintiff to obtain a final determination from state court of the right to just compensation. When the § 1983 takings claimant has pursued a claim for just compensation in state court in order to satisfy this second requirement, normal preclusion principles will apply in the federal § 1983 action.<sup>944</sup> The interplay of

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939. *Id.*

940. *Id.* at 925.

941. 487 U.S. 131, 140 (1988).

942. 473 U.S. 172, 186 (1985).

943. *Palazzolo v. Rhode Island*, 533 U.S. 606, 620 (2001).

944. *San Remo Hotel v. San Francisco*, 545 U.S. 323, 337–38 (2005).

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ripeness and preclusion is a potentially lethal “catch-22” for § 1983 takings claimants.

## XVII. Preclusion Defenses

### A. State Court Judgments

Under the full-faith and credit statute, 28 U.S.C. § 1738, federal courts in § 1983 actions must give state court judgments the same preclusive effect they would receive in state court under state law.<sup>945</sup> This principle controls so long as the federal litigant against whom preclusion is asserted had a full and fair opportunity to litigate his federal claims in state court. A full and fair opportunity to be heard requires only that state judicial procedures meet minimal procedural due process requirements.<sup>946</sup>

The full-faith and credit statute governs even with respect to federal claims asserted by involuntary state court litigants, like criminal defendants<sup>947</sup> and takings claimants who were required to pursue a state court just-compensation remedy in order to satisfy ripeness requirements.<sup>948</sup> Furthermore, the full-faith and credit statute governs even if the federal court § 1983 claimant has no alternative federal remedy, as when, under *Stone v. Powell*,<sup>949</sup> a Fourth Amendment claim is not assertable in a federal habeas corpus proceeding.<sup>950</sup> The full-faith and credit statute applies even to claims that could have been, but were not, litigated in the state court proceeding, if state preclusion law encompasses the doctrine of claim preclusion.<sup>951</sup> The Supreme Court has directed the federal courts not to carve out exceptions to preclusion required by § 1983, even when there may be good policy reasons for doing so.<sup>952</sup>

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945. *Id.*; *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 81 (1984); *Allen v. McCurry*, 449 U.S. 90, 94–95 (1980). *See also* *Haring v. Prosise*, 462 U.S. 306, 313–14 (1983).

946. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 480–81 (1982); *Allen*, 449 U.S. at 95.

947. *Allen*, 449 U.S. at 103–04.

948. *San Remo Hotel v. San Francisco*, 545 U.S. 323, 337–38 (2005).

949. 428 U.S. 465, 489–90 (1976).

950. *Allen*, 449 U.S. at 103–04.

951. *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83–85 (1984).

952. *San Remo Hotel*, 545 U.S. at 335.

*B. Administrative Res Judicata*

In *University of Tennessee v. Elliott*,<sup>953</sup> the Supreme Court held that an agency's fact findings may preclude relitigation of the facts in a § 1983 action. Under *Elliott*, "when a state agency 'acting in a judicial capacity . . . resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate,' . . . federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled in the State's courts."<sup>954</sup> The decision in *Elliott* was not based on the full-faith and credit statute, but on federal common-law preclusion principles.

*C. Arbitration Decisions*

In *McDonald v. City of West Branch*,<sup>955</sup> the Supreme Court held that arbitration decisions are not entitled to preclusive effect in § 1983 actions. The Court found that an arbitration proceeding is not a judicial proceeding within the meaning of the full-faith and credit statute. Furthermore, Congress intended § 1983 to be judicially enforced, and arbitration is not an adequate substitute for judicial enforcement.

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953. 478 U.S. 788 (1986).

954. *Id.* at 799 (quoting *United States v. Utah Constr. Mining Co.*, 384 U.S. 394, 422 (1966)).

955. 466 U.S. 284, 287 (1984).

## XVIII. Statute of Limitations

### A. Limitations Period

There is no federal statute of limitations for § 1983 claims. When federal law is silent on an issue in a federal § 1983 action, 42 U.S.C. § 1988(a) requires the federal court to borrow state law on the issue, provided it is consistent with the policies underlying § 1983.<sup>956</sup> Therefore, § 1988(a) requires federal courts to borrow a state's limitations period. In *Wilson v. Garcia*,<sup>957</sup> the Supreme Court held that the federal court should borrow the state's limitations period for personal injury actions, so long as the period is not inconsistent with the policies of § 1983. This means that the governing limitations period for federal § 1983 actions may differ from state to state. A state's unduly short limitations period, e.g., six months, is inconsistent with the policies of § 1983.<sup>958</sup> “[W]here state law provides multiple statutes of limitations for personal injury actions, courts . . . should borrow the general or residual statute for personal injury actions.”<sup>959</sup>

### B. Relation Back

Whether an amended complaint “relates back” to the filing of the original complaint for limitations purposes is governed by Federal Rule of Civil Procedure 15(c). Under Rule 15(c), the amended complaint will relate back to the filing of the original complaint if the claim in the amended complaint arose out of the same conduct or transaction in the original complaint. If an amended complaint “changes” the

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956. Because there is no federal survivorship law for § 1983 claims, § 1988(a) requires federal courts to borrow state survivorship policy, so long as the state policy is not inconsistent with the policies of § 1983. See *infra* Part XIX. However, § 1988(a) does not allow federal courts to incorporate an entire state cause of action into the § 1983 action. *Moor v. County of Alameda*, 411 U.S. 693, 703–04 (1973) (“we do not believe that section [1988], without more, was meant to authorize the wholesale importation into federal law of state causes of action”); *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 701 n.66 (1978) (“42 U.S.C. § 1988 cannot be used to create a federal cause of action where § 1983 does not otherwise provide one”).

957. 471 U.S. 261, 265 (1985).

958. See *Burnett v. Grattan*, 468 U.S. 42, 48–50 (1984).

959. *Owens v. Okure*, 488 U.S. 235, 236 (1989). A state-by-state table of limitations periods in § 1983 actions is set forth in 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 12.02[B] (4th ed. 2006).

party defendant, the amended complaint will relate back to the filing of the original complaint if the amended complaint arose out of the same conduct as the original complaint; if the newly named defendant, within the period for service of the summons and complaint, received notice of the institution of the action that will avoid prejudice in defending the action; and the newly named defendant “knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.”<sup>960</sup> Rule 15(c) provides that when, as in § 1983 actions, state law governs the limitation period, a state law “relation back” doctrine that is more forgiving than Rule 15(c)’s “relation back” doctrine will govern the issue.<sup>961</sup>

Most courts hold that an amendment of a complaint substituting a John Doe defendant with the names of the actual officers does not relate back to the filing of the original complaint.<sup>962</sup> The rationale of these decisions is that lack of knowledge about the names of the alleged wrongdoer defendants is not a “mistake” within the meaning of Rule 15(c).<sup>963</sup>

### C. Accrual

Unlike the selection of the limitations period, which is determined by reference to state law, the accrual of a § 1983 claim is a question of federal law.<sup>964</sup> Section 1983 claims generally accrue when the plaintiff knows or has reason to know of the injury, which is the basis of her

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960. Fed. R. Civ. P. 15(c)(3)(B).

961. See Advisory Committee note to 1991 amendment to Fed. R. Civ. P. 15.

962. *Garrett v. Fleming*, 362 F.3d 692, 696–97 (10th Cir. 2004); *Wayne v. Jarvis*, 197 F.3d 1098, 1102–04 (11th Cir. 1999), *cert. denied*, 529 U.S. 1115 (2000); *Jacobsen v. Osborne*, 133 F.3d 315, 320 (5th Cir. 1998); *Cox v. Treadway*, 75 F.3d 230, 240 (6th Cir.), *cert. denied*, 519 U.S. 821 (1996); *Barrow v. Wethersfield Police Dep’t*, 66 F.3d 466, 468 (2d Cir. 1995), *modified*, 74 F.3d 1366 (2d Cir. 1996); *Worthington v. Wilson*, 8 F.3d 1253, 1256–57 (7th Cir. 1993).

963. *But see Singletary v. Pa. Dep’t of Corr.*, 266 F.3d 186, 194–95 (3d Cir. 2001) (rejecting lack-of-mistake rationale, but denying relation back because newly named official had not received notice of action within requisite time period). See also *Goodman v. Praxair, Inc.*, 494 F.3d 458, 471 (4th Cir. 2007) (non-§ 1983) (dicta).

964. *Wallace v. Kato*, 127 S. Ct. 1091, 1095 (2007).

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claim.<sup>965</sup> In applying this standard, courts seek to determine “what event should have alerted the typical lay person to protect his or her rights.”<sup>966</sup> In *Wallace v. Kato*,<sup>967</sup> the Supreme Court stated that a § 1983 claim accrues when the plaintiff has “a complete and present cause of action.”<sup>968</sup> It is unclear whether this is the same as the “know or should know of the injury” standard. In *Heck v. Humphrey*,<sup>969</sup> the Court held that a § 1983 “cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated.”

The determination of the proper accrual date is not always obvious, especially when the *Heck* doctrine is at issue. In *Wallace*, the Court held that the § 1983 plaintiff’s Fourth Amendment challenge to his warrantless arrest accrued when legal process issued, i.e., when he appeared before the examining magistrate judge and was bound over for trial.

Because there were a number of plausible accrual dates in *Wallace*, it is necessary to pay especially close attention to the sequence of events. In January 1994, the Chicago police questioned Andre Wallace, then fifteen years of age, about a recent homicide. After an all-night interrogation lasting into the early morning hours, Wallace waived his *Miranda* rights and confessed to the murder. He was arrested (without an arrest warrant) sometime that day. Subsequently—we are not told

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965. See 1C Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 12.04 (4th ed. 2006). See, e.g., *Calero-Colon v. Betancourt-Lebron*, 68 F.3d 1, 3 (1st Cir. 1995) (section 1983 claims accrue when the plaintiff knows or has reason to know of the injury that is the basis of her claim); *Harris v. Hegmann*, 198 F.3d 153, 157 (5th Cir. 1999) (“[A] § 1983 action generally accrues when a plaintiff knows or has reason to know of the injury which is the basis for the action.”).

966. *Dixon v. Anderson*, 928 F.2d 212, 215 (6th Cir. 1991). See also *Wallace v. Kato*, 127 S. Ct. 1091, 1097 (2007) (claim accrues when wrongful act results in damages even if full extent of damages is not then known or predictable); *United States v. Kubrick*, 444 U.S. 111, 121–22 (1979) (non-§ 1983) (patient’s medical malpractice claim accrued when he was “aware of his injury and its cause”; accrual should not be further delayed until plaintiff learns of his legal rights regarding the claim).

967. 127 S. Ct. 1091 (2007).

968. *Id.* at 1095 (quoting *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997), in turn quoting *Rawlings v. Ray*, 312 U.S. 96, 98 (1941)).

969. 512 U.S. 477, 489–90 (1994). See *supra* Part XVI.B.

exactly when—he appeared before the examining magistrate judge and was bound over for trial. If the state wants to hold a suspect who was subject to a warrantless arrest, the Fourth Amendment requires a probable cause determination from a magistrate judge within a reasonable time; forty-eight hours after the arrest is a presumptively reasonable time.<sup>970</sup>

Prior to trial, Wallace’s defense attorney unsuccessfully sought to suppress Wallace’s confession and other statements he gave the police. Wallace was convicted of murder. But in 2001, the conviction was reversed on appeal on the ground that Wallace was arrested without probable cause, and his incriminating statements were the product of the illegal arrest. Although the state appeals court ordered a new trial, in 2002 the prosecutors dropped the charges against Wallace, and he was released.

In 2003, seven years after his arrest but only a year after the charges were dropped, Wallace filed a federal court § 1983 action asserting, *inter alia*, a claim for damages against several Chicago police officers based on his illegal arrest. The parties agreed that the governing limitations period was the Illinois two-year personal injury period. But they sharply disagreed over when the limitations period began to run, i.e., when Wallace’s § 1983 claim accrued. There were several possible accrual dates:

1. The date Wallace was arrested in 1994. This would render the § 1983 claim untimely.
2. The date Wallace appeared before the magistrate judge. This, too, would render the § 1983 action untimely because more than two years elapsed between that date and the filing of the § 1983 suit, “even leaving out of the count the period before [Wallace] reached his majority.”<sup>971</sup>
3. The date (August 31, 2001) the appellate court reversed Wallace’s conviction and remanded for a new trial, which would render the § 1983 claim timely.

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970. *City of Riverside v. McLaughlin*, 500 U.S. 44 (1981); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

971. *Wallace*, 127 S. Ct. at 1097.

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4. The date (April 10, 2002) when prosecutors dropped the charges against Wallace, which also would have rendered the § 1983 suit timely.

The Court held that Wallace's § 1983 claim accrued on the date he appeared before the magistrate judge and was bound over for trial, rendering the § 1983 action untimely. Although the plaintiff's § 1983 claim was premised upon a violation of Fourth Amendment rights, the Supreme Court relied heavily on common-law concepts governing false arrest, false imprisonment, and malicious prosecution.

The Court said that the plaintiff "*could have* filed suit as soon as the alleged wrongful arrest occurred, subjecting him to the harm of involuntary detention."<sup>972</sup> Since the plaintiff had a "complete" cause of action on the date of his arrest, the limitations period "would *normally* commence to run from that date."<sup>973</sup> There was a "refinement," however, stemming from the common law's treatment of false arrest and false imprisonment. These two torts overlap in the sense that false arrest is a "species" of false imprisonment; every confinement is an imprisonment. The Court found that the closest common-law analogy to Wallace's § 1983 warrantless arrest/Fourth Amendment claim was false imprisonment based on "*detention without legal process*."<sup>974</sup> The common-law rule is that such a claim for relief accrues when the false imprisonment comes to an end. "Since false imprisonment consists of detention *without* legal process, a false imprisonment claim accrues when the victim becomes held *pursuant* to such *process*—when he is bound over by a magistrate or arraigned on charges."<sup>975</sup> The claim for relief accrues at this time even though the claim could have been filed at the earlier time of the arrest. Furthermore, the claim accrues at this time even "assuming . . . that all damages for detention pursuant to legal process could be regarded as consequential damages attributable to the unlawful arrest."<sup>976</sup>

Under the common law, after legal process is issued, any damages for unlawful detention would be based not on false arrest but on mali-

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972. *Id.* at 1095 (emphasis added).

973. *Id.* (emphasis added).

974. *Id.*

975. *Id.* at 1096.

976. *Id.* at 1097. The Court did not decide the damages issue.

cious prosecution. Malicious prosecution “remedies detention accompanied, not by absence of legal process, but by *wrongful institution of legal process*.”<sup>977</sup> The Court in *Wallace* rejected the plaintiff’s argument that his false imprisonment ended and his claim accrued when the state dropped the criminal charges against him and he was released from custody. Rather, the false imprisonment ended much earlier when legal process was issued against Wallace, i.e., when he appeared before the examining magistrate judge. Holding firm to the common-law rule, the Court also rejected Wallace’s argument that his release from custody should be the proper accrual date because, he argued, the unconstitutional arrest “set the wheels in motion,” leading to the coerced confession, conviction, and incarceration.

Wallace argued, again in vain, that under *Heck* his § 1983 claim could not accrue until the state dropped the criminal charges against him. The Court found the *Heck* doctrine inapplicable. It reasoned that on the date Wallace was held pursuant to legal process, there was no criminal conviction that the § 1983 cause of action could impugn. Moreover, the Court held that the *Heck* doctrine does not extend to *possible future convictions*. It stated that the “impracticability” of applying *Heck* to future convictions is “obvious,” namely, it would invite speculation whether there will be a conviction and, if so, whether the pending federal § 1983 action would impugn the conviction.<sup>978</sup>

The decision in *Wallace* indicates that when there is more than one plausible accrual date, the Supreme Court appears inclined to pick the earlier date.<sup>979</sup> This has also been true in § 1983 public employment cases. In employment termination cases, for example, the Supreme

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977. *Id.* The Court did not resolve whether this damages principle governs damages for a § 1983 false arrest claim. Because Wallace did not assert a § 1983 malicious prosecution claim, the Court did not analyze whether such a claim would have been cognizable.

978. The Court said that should a § 1983 Fourth Amendment false arrest claim be filed during the pendency of the criminal proceeding, which may be necessary for the claim to be timely, the federal court might choose to stay the § 1983 suit under one of the abstention doctrines. “If the plaintiff is ultimately convicted, and if the stayed suit would impugn that conviction, *Heck* will require dismissal; otherwise, the civil action will proceed, absent some other bar to suit.” *Wallace*, 127 S. Ct. at 1098.

979. See generally 1B Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 12.039[B], pp. 12–42 (4th ed. 2006).

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Court held that the § 1983 claim accrues when the employee is notified of the termination, not when the termination became effective.<sup>980</sup>

Federal courts have generally been reluctant to apply the continuing violation doctrine in § 1983 actions.<sup>981</sup> In *National Railroad Passengers Corp. v. Morgan*,<sup>982</sup> a Title VII action, the Supreme Court held that a discrete act, such as employment termination, failure to promote, denial of transfer, refusal to hire, or a retaliatory adverse employment decision, is a *separate* unlawful employment practice for accrual purposes. The Court ruled that the continuing evaluation doctrine does not apply to these discrete acts merely because they are plausibly or sufficiently related to each other. The Court distinguished these claims from racial or sexual hostile environment claims, which involve repeated conduct and the cumulative effect of continued acts. These claims are not time barred if the acts are part of the same unlawful employment practice and at least one act falls within the governing limitations period. The courts of appeals have consistently applied *Morgan* to § 1983 actions.<sup>983</sup>

*D. Tolling*

The Supreme Court in *Wallace v. Kato* stated that in § 1983 suits it has “generally referred to state law for tolling rules . . . .”<sup>984</sup> The Court found that Illinois tolling law did not provide for tolling during the pendency of the criminal proceeding. The Court also rejected the dissent’s position that the limitations period should be equitably tolled during the pendency of the criminal proceedings and during any period in which the criminal defendant challenges the conviction in state

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980. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981).

981. 1B Schwartz, *supra* note 979, § 12.03[B][11]. *See, e.g., Pike v. City of Mission*, 731 F.2d 655, 660 (10th Cir. 1984) (en banc) (court declined to apply continuing violation doctrine because “a plaintiff may not use the continuing violation theory to challenge discrete actions that occurred outside the limitations period even though the impact of the acts continues to be felt”).

982. 536 U.S. 101, 113 (2002).

983. 1B Schwartz, *supra* note 979, § 12.03[B].

984. *Wallace*, 127 S. Ct. at 1098–99 (citing *Hardin v. Straub*, 490 U.S. 536, 538–39 (1989); *Bd. of Regents of Univ. of N.Y. v. Tomanio*, 446 U.S. 478, 484–86 (1980)). Federal courts borrow state tolling rules unless the state rule is inconsistent with the policies of § 1983. 1B Schwartz, *supra* note 979, § 12.05.

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court on the same basis as that underlying the § 1983 suit. The majority reminded the dissent that “[e]quitable tolling is a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs.”<sup>985</sup> In other words, it is fairly common for a § 1983 action to relate to pending criminal proceedings.

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985. *Wallace*, 127 S. Ct. at 1098–99.

## XIX. Survivorship and Wrongful Death

### A. Survivorship

Survivorship of § 1983 claims is not covered by federal law. In *Robertson v. Wegmann*,<sup>986</sup> the Supreme Court held that to remedy this deficiency in federal law, 42 U.S.C. § 1988(a) requires federal courts to borrow state survivorship law, so long as the state survivorship policy is not inconsistent with the policies of § 1983. The Court in *Robertson* ruled that the mere fact that the particular § 1983 plaintiff's claim abates under state law does not mean that the state law is inconsistent with the policies of § 1983. Rather, whether state survivorship law is compatible with the policies of § 1983 depends on whether that state law is generally hospitable to the survival of § 1983 claims.<sup>987</sup> The Court in *Robertson* held that the Louisiana law was not inconsistent with the policies of § 1983 despite causing the *particular* § 1983 claim to abate. However, it indicated that the result might be different where the “deprivation of federal right caused death.”<sup>988</sup>

### B. Wrongful Death

The Supreme Court has not resolved whether a wrongful death claim may be brought under § 1983. There is considerable disagreement on this issue in the lower courts.<sup>989</sup> For example, some courts have viewed the absence of a federal § 1983 wrongful death policy as a deficiency in federal law and, under 42 U.S.C. § 1988(a), have borrowed state wrongful death law.<sup>990</sup> Other courts have inquired whether the defendant's conduct, which caused a death, violated the constitutionally protected rights of a surviving relative.<sup>991</sup> There is also scholarship supporting the

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986. 436 U.S. 584, 590 (1978).

987. See, e.g., *Banks v. Yokemick*, 177 F. Supp. 2d 239, 249–50 (S.D.N.Y. 2001) (New York survivorship law, which denies recovery for loss of enjoyment of life, is inconsistent with § 1983 policies of compensation and deterrence).

988. *Robertson*, 436 U.S. at 594.

989. See *Carringer v. Rodgers*, 331 F.3d 844, 850 n.9 (11th Cir. 2003) (the “right to wrongful death recovery under § 1983 has generated considerable debate amongst our sister circuits”).

990. See, e.g., *Brazier v. Cherry*, 293 F.2d 401, 404–06 (5th Cir. 1961).

991. See, e.g., *Trujillo v. Bd. of County Comm'rs*, 768 F.2d 1186, 1189–90 (10th Cir. 1985).

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argument that § 1983 itself authorizes a wrongful death remedy.<sup>992</sup> Of course, the § 1983 plaintiff may attempt to assert a state law wrongful death claim under the federal court's supplemental jurisdiction.

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<sup>992</sup>. See Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 Ind. L.J. 559 (1985). The various § 1983 wrongful death theories are discussed in 1B Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* §§ 13.03–13.07 (4th ed. 2006).

## XX. Abstention Doctrines

Even though a federal court has subject-matter jurisdiction over a § 1983 action, the court may decline to exercise that jurisdiction if the case falls within one or more of the abstention doctrines. These are intended to be narrow doctrines. The Supreme Court has described a federal court's obligation to adjudicate claims properly within its jurisdiction as "virtually unflagging."<sup>993</sup> Accordingly, "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule,"<sup>994</sup> and the Court has limited the circumstances appropriate for abstention.

The major abstention doctrines in § 1983 actions are *Pullman*,<sup>995</sup> *Younger*,<sup>996</sup> *Colorado River*,<sup>997</sup> and *Burford*.<sup>998</sup> The domestic relations doctrine has been raised in some § 1983 actions, but much less frequently than the other abstention doctrines. The Tax Injunction Act normally bars federal § 1983 actions contesting state and local tax policies.<sup>999</sup>

### A. *Pullman* Abstention

Under *Pullman* abstention, named after *Railroad Commission of Texas v. Pullman Co.*,<sup>1000</sup> a federal court may abstain when the contested state law is ambiguous and susceptible to a state court interpretation that may avoid or modify the federal constitutional issue. The Supreme Court said that "when a federal constitutional claim is premised on an unsettled question of state law, the federal court should stay its hand in order to provide the state courts an opportunity to settle the underlying state-law question and thus avoid the possibility of unnecessarily deciding a constitutional question."<sup>1001</sup> *Pullman* abstention is applicable only when the issue of state law is unsettled and is "sufficiently likely"

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993. See, e.g., *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976).

994. *Colorado River*, 424 U.S. at 813.

995. *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

996. *Younger v. Harris*, 401 U.S. 37 (1971).

997. *Colorado River*, 424 U.S. 800.

998. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

999. 28 U.S.C. § 1341 (2006).

1000. 312 U.S. 496 (1941).

1001. *Harris County Comm'rs Court v. Moore*, 420 U.S. 77, 83 (1975) (interpreting *Pullman*).

to be subject to an interpretation that will avoid or modify the federal constitutional question.<sup>1002</sup> When a federal court invokes *Pullman* abstention, the § 1983 claimant must seek a state court interpretation of the state law from the highest court in the state. In some cases this may be accomplished expeditiously pursuant to a state certification procedure.<sup>1003</sup>

In *Arizonans for Official English v. Arizona*,<sup>1004</sup> the Supreme Court suggested that, where available, a state certification procedure should be used instead of *Pullman* abstention. State certification procedures allow federal courts to directly certify unsettled, dispositive questions of state law to the highest court of the state for authoritative construction. The Court explained:

Certification today covers territory once dominated by a deferral device called “*Pullman* abstention” . . . Designed to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues, the *Pullman* mechanism remitted parties to the state courts for adjudication of the unsettled state-law issues. If settlement of the state-law question did not prove dispositive of the case, the parties could return to the federal court for decision of the federal issues. Attractive in theory because it placed state-law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court . . . Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State’s highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.<sup>1005</sup>

After completion of state court proceedings, the § 1983 claimant may return to federal court unless she has voluntarily litigated her federal claims fully in state court.<sup>1006</sup> The plaintiff may make an “*England* reservation” on the state court record of her right to litigate the federal claim in federal court.<sup>1007</sup>

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1002. *Lake Carriers’ Ass’n v. MacMullan*, 406 U.S. 498, 512 (1972).

1003. *See Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).

1004. *Id.*

1005. *Id.* at 75–76.

1006. *England v. La. State Bd. of Med. Exam’rs*, 375 U.S. 411, 415–16 (1964).

1007. *Id.* at 421–22.

In *England v. Louisiana State Board of Medical Examiners*,<sup>1008</sup> the Court set out the procedures litigants must follow when *Pullman* abstention is invoked. A party has the right to return to the district court for a final determination of its federal claim once the party has obtained the authoritative state court construction of the state law in question.<sup>1009</sup> A party can, but need not, expressly reserve this right, and in no event will the right be denied, “unless it clearly appears that he voluntarily . . . fully litigated his federal claim in the state courts.”<sup>1010</sup> A party may elect to forego the right to return to federal court by choosing to litigate the federal constitutional claim in state court.<sup>1011</sup>

Under *Pullman* abstention, a district court generally retains jurisdiction over the case, but stays its proceedings while the state court adjudicates the issue of state law. Thus, *Pullman* abstention does not “involve the abdication of jurisdiction, but only the postponement of its exercise.”<sup>1012</sup>

### B. *Younger Abstention*

The most frequently invoked abstention doctrine in § 1983 actions is *Younger* abstention, named after the leading case of *Younger v. Harris*.<sup>1013</sup> *Younger* abstention generally prohibits federal courts from granting relief that interferes with pending state criminal prosecutions, or with pending state civil proceedings that implicate important state interests.<sup>1014</sup> The *Younger* doctrine “espouse[s] a strong federal policy against federal-court interference with pending state judicial proceed-

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1008. 375 U.S. 411 (1964).

1009. *Id.* at 417.

1010. *Id.* at 421–22.

1011. *Id.* at 419. If a party so elects, the Supreme Court has held that, even in § 1983 cases, the sole fact that the state court’s decision may have been erroneous will not be sufficient to lift the preclusion bar to relitigation of federal issues decided after a full and fair hearing in state court. *Allen v. McCurry*, 449 U.S. 90, 101 (1980).

1012. *Harrison v. NAACP*, 360 U.S. 167, 177 (1959).

1013. 401 U.S. 37 (1971).

1014. *Id.* See also *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987) (federal court may not interfere with enforcement of state civil judgment); *Moore v. Sims*, 442 U.S. 415 (1979) (child abuse proceedings); *Trainor v. Hernandez*, 431 U.S. 434 (1977) (attachment of welfare benefits allegedly obtained by fraud); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (quasi-criminal nuisance proceeding to enjoin allegedly obscene movie).

ings.”<sup>1015</sup> The doctrine is based primarily on principles of federalism that require federal court non-interference with state judicial proceedings.

In *Younger*, the Supreme Court held that a federal district court generally should not enjoin a pending state criminal prosecution. The Supreme Court, however, has substantially broadened the reach of *Younger* abstention. In *Samuels v. Mackell*,<sup>1016</sup> the Court held that the *Younger* doctrine encompasses claims for declaratory relief. The Court stated that in federal cases where a state criminal prosecution had begun prior to the federal suit, “where an injunction would be impermissible under [*Younger*] principles, declaratory relief should ordinarily be denied as well.”<sup>1017</sup> Although the Supreme Court has not directly addressed whether *Younger* applies when a federal plaintiff is seeking only monetary relief with respect to matters that are the subject of a

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1015. *Middlesex County Ethics Comm. v. Garden State Bar Ass’n*, 457 U.S. 423, 431 (1982).

1016. 401 U.S. 66 (1971).

1017. *Id.* at 73. In *Steffel v. Thompson*, 415 U.S. 452 (1974), the Court addressed the issue of the availability of declaratory relief when no state criminal prosecution is pending. Noting that the relevant principles of equity, comity, and federalism carry little force in the absence of a pending state proceeding, the Court unanimously held that “federal declaratory relief is not precluded when no state prosecution is pending and a federal plaintiff demonstrates a genuine threat of enforcement of a disputed state criminal statute.” *Steffel*, 415 U.S. at 475. The genuine threat of enforcement would give the plaintiff standing to seek prospective relief. *See supra* Part III. The Court’s decision in *Steffel*, however, must be read in conjunction with its subsequent decision in *Hicks v. Miranda*, 422 U.S. 332 (1975), holding that where state criminal proceedings are commenced against a federal plaintiff after the federal complaint has been filed, but “before any proceedings of substance on the merits have taken place in the federal court,” the *Younger* doctrine applies “in full force.” *Hicks*, 422 U.S. at 349.

The Court has held that the granting of preliminary injunctive relief (*see* *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 927–28 (1975)) or permanent injunctive relief (*see* *Wooley v. Maynard*, 430 U.S. 705, 709–10 (1977)) is not necessarily barred by *Younger* principles when no criminal proceeding is pending.

state criminal proceeding,<sup>1018</sup> the Court has implied that *Colorado River* abstention (discussed *infra*) might be appropriate in such situations.<sup>1019</sup>

In a number of decisions, beginning with *Huffman v. Pursue, Ltd.*,<sup>1020</sup> the Court has extended the application of *Younger* to bar federal interference with various state civil proceedings. In *Huffman*, the Court noted that the civil nuisance proceeding at issue in the case was in important respects “more akin to a criminal prosecution than are most civil cases,” because the state was a party to the proceeding, and the proceeding itself was in aid of and closely related to criminal statutes.<sup>1021</sup> Thus, while refusing to make any general pronouncements as to *Younger*’s applicability to all civil litigation, the Court held that the district court should have applied *Younger* principles in deciding whether to enjoin the state civil nuisance proceeding.<sup>1022</sup>

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1018. In *Deakins v. Monaghan*, 484 U.S. 193 (1988), the Court held that a district court “has no discretion to dismiss rather than to stay claims for monetary relief that cannot be redressed in the state proceeding.” *Id.* at 202.

1019. See *Heck v. Humphrey*, 512 U.S. 477, 487 n.8 (1994) (“[I]f a state criminal defendant brings a federal civil-rights lawsuit during the pendency of his criminal trial, appeal, or state habeas action, abstention may be an appropriate response to the parallel state-court proceedings.” (citing *Colorado River*)). See also *Wallace v. Kato*, 127 S. Ct. 1091, 1098 (2007). The Court held in *Heck* that when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff 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. *Heck*, 512 U.S. at 486–87. See *supra* Part XVI.

1020. 420 U.S. 592 (1975).

1021. *Id.* at 604. In *Moore v. Sims*, 442 U.S. 415, 423 (1979), the Court treated the case as governed by *Huffman* because the state was a party to the state proceedings in question, and the temporary removal of a child in a child abuse context was in aid of and closely related to enforcement of criminal statutes.

1022. *Huffman*, 420 U.S. at 607. In *Trainor v. Hernandez*, 431 U.S. 434, 444 (1977), the Court held that the principles of *Younger* and *Huffman* were broad enough to apply to interference by a federal court with ongoing civil attachment proceedings “brought by the State in its sovereign capacity” to vindicate important state policies. *Trainor*, 431 U.S. at 444. See also *Juidice v. Vail*, 430 U.S. 327, 335 (1977) (holding that principles of “comity” and “federalism” applied to a case where the state was not a party, but where the state’s judicial contempt process was involved and the state’s interest in the contempt process is of “sufficiently great import to require application of the principles of *Younger*”); *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 5–10, 13–14 & n.12 (1987) (reversing lower court’s granting of federal court injunction against a state court requirement that Texaco post bond in excess of \$13 billion in order to prevent the execution of a judgment against it while an

In *Middlesex County Ethics Committee v. Garden State Bar Ass'n*,<sup>1023</sup> the Court was faced with the question of whether pending state bar disciplinary hearings were subject to the principles of *Younger*. In holding *Younger* applicable, the Court underscored the judicial nature of the proceedings, the “extremely important” state interest involved, and the availability of an adequate opportunity for raising constitutional claims in the state process. The Court said that three inquiries are relevant to *Younger* abstention:

1. is there an “ongoing” state judicial proceeding;
2. does the state proceeding “implicate important state interests”; and
3. “is there an adequate opportunity in the state proceedings to raise constitutional challenges.”<sup>1024</sup>

The Supreme Court has extended the *Younger* doctrine to quasi-judicial administrative proceedings. In *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*,<sup>1025</sup> the Court held that *Younger* abstention applies to quasi-judicial administrative proceedings implicating important state interests, so long as there is an adequate opportunity to litigate the federal claims either in the administrative proceeding or in a state court judicial review proceeding.<sup>1026</sup>

There are very narrow exceptions to the *Younger* doctrine. One exception requires a showing that the state prosecution was undertaken in bad faith, meaning not to secure a valid conviction, but to retaliate

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appeal was pursued; holding that the rationale of *Younger* applied to this civil proceeding, observing the state’s interest in protecting “the authority of the judicial system, so that its orders and judgments are not rendered nugatory”). *But see* *New Orleans Public Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989) (holding that *Younger* abstention does not apply to state judicial proceedings “reviewing legislative or executive action”).

1023. 457 U.S. 423 (1982).

1024. *Id.* at 432.

1025. 477 U.S. 619 (1986).

1026. In *Ohio Civil Rights*, the Court emphasized that the application of *Younger* to pending administrative proceedings is fully consistent with the rule that litigants need not exhaust administrative remedies before they can bring a § 1983 suit in federal court (*see Patsy v. Bd. of Regents*, 457 U.S. 496 (1982)), because “the administrative proceedings here are coercive rather than remedial[;] began before any substantial advancement in the federal action took place[;] and involve an important state interest.” *Ohio Civil Rights*, 477 U.S. at 127–28 n.2.

against or chill the exercise of constitutionally protected rights.<sup>1027</sup> There is also an exception when the pending state proceedings fail to afford a full and fair opportunity to litigate the federal claim, but this is rarely found to be the case.<sup>1028</sup>

### C. Colorado River Abstention

Under *Colorado River* abstention, named after *Colorado River Water Conservation District v. United States*,<sup>1029</sup> a federal court may abstain when there is a “parallel” concurrent proceeding pending in state court. Even when a “parallel” state court proceeding is pending, a federal court should invoke *Colorado River* abstention only in “exceptional circumstances.” The federal court’s task “is not to find some substantial reason for the exercise of federal jurisdiction,”<sup>1030</sup> but to determine whether exceptional circumstances “justify the surrender of that jurisdiction.”<sup>1031</sup>

In *Colorado River*, the federal government had brought suit in federal court seeking a declaration of water rights on its own behalf and on behalf of two Indian tribes.<sup>1032</sup> Soon thereafter, a defendant in the federal suit moved to join the United States in a state court proceeding adjudicating the same water rights. The federal district court subsequently dismissed the suit, abstaining in deference to the state court proceedings.<sup>1033</sup> Although the Supreme Court found that *Pullman, Bur-*

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1027. See 1B Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 14.03[I] (4th ed. 2006).

1028. “A federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.” *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 14–15 (1987). Therefore, the federal plaintiff bears the burden of showing that state procedural law barred presentation of her constitutional claim. *Id.* at 14; *Moore v. Sims*, 442 U.S. 415, 432 (1979); *Nivens v. Gilchrist*, 444 F.3d 237, 243 (4th Cir. 2006) (critical issue is whether state law allows federal court plaintiff to raise her federal claim in state court, not whether state court agrees with the claim); *31 Foster Children v. Bush*, 329 F.3d 1255, 1279 (11th Cir. 2003). See, e.g., *Gibson v. Berryhill*, 411 U.S. 564 (1973) (*Younger* abstention inapplicable because state board was incompetent by reason of bias to adjudicate issues before it).

1029. 424 U.S. 800 (1976).

1030. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 (1983).

1031. *Id.* at 26.

1032. *Colorado River*, 424 U.S. at 805.

1033. *Id.* at 806.

*ford*, and *Younger* abstentions did not apply to the facts of this case,<sup>1034</sup> it held that dismissal was proper on another ground—one resting not on considerations of state–federal comity or on avoidance of constitutional decisions, as do *Younger*, *Pullman*, and *Burford* abstentions, but “on considerations of ‘wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’”<sup>1035</sup>

The Court noted the general rule that “the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.”<sup>1036</sup> It recognized, however, that exceptional circumstances might permit dismissal of a federal suit in the face of concurrent state court proceedings.<sup>1037</sup> The Court identified four factors to be considered in determining whether such exceptional circumstances exist: (1) the problems created by two courts exercising concurrent jurisdiction over a res; (2) the relative inconvenience of the federal forum; (3) the goal of avoiding piecemeal litigation; and (4) the order in which the state and federal forums obtained jurisdiction.<sup>1038</sup> In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*,<sup>1039</sup> the Court underscored the need for exceptional circumstances before a federal court surrenders its jurisdiction over a case on the ground that there is a duplicative proceeding pending in state court.<sup>1040</sup> In addition, the Court announced that another factor to be given great weight in the balancing of considerations is the presence of a question of federal law.<sup>1041</sup> This factor, of course, weighs heavily in favor of retention of federal court jurisdiction.

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1034. *Id.* at 813–17.

1035. *Id.* at 817 (quoting *Kerotest Mfg. Co. v. C-O Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952)).

1036. *Colorado River*, 424 U.S. at 817 (citing *McClellan v. Carland*, 217 U.S. 268, 282 (1910)).

1037. *Colorado River*, 424 U.S. at 818.

1038. *Id.* (noting that no one factor is determinative and “only the clearest of justifications will warrant dismissal”).

1039. 460 U.S. 1 (1983). The case involved parallel state and federal proceedings addressing the issue of whether a contract between the parties was subject to arbitration.

1040. *Id.* at 25–26.

1041. *Id.* at 23.

While the Court has left open whether the proper course when employing *Colorado River* abstention is a stay or a dismissal without prejudice, it is clear that “resort to the federal forum should remain available if warranted by a significant change of circumstances.”<sup>1042</sup> A dismissal or stay of a federal action is improper unless the concurrent state action has jurisdiction to adjudicate the claims at issue in the federal suit.<sup>1043</sup>

In *Wilton v. Seven Falls Co.*,<sup>1044</sup> the Supreme Court resolved a conflict among the circuits regarding the standard to be applied by a district court in deciding whether to stay a declaratory judgment action in deference to parallel state proceedings. The Court held that “[d]istinct features of the [federal] Declaratory Judgment Act . . . justify a standard vesting district courts with greater discretion in declaratory judgment actions than that permitted under the ‘exceptional circumstances’ test of *Colorado River* and *Moses H. Cone*. . . . In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.”<sup>1045</sup>

A stay order granted under *Colorado River* abstention is final and immediately appealable.<sup>1046</sup> However, an order refusing abstention un-

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1042. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 n.21 (1983). To safeguard against the running of the statute of limitations should the state litigation leave some issues unresolved, the preferable course would be to stay, rather than dismiss, the federal action. See *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 n.2 (1995) (noting that “where the basis for declining to proceed is the pendency of a state proceeding, a stay will often be the preferable course, insofar as it [ensures] that the federal action can proceed without risk of a time bar if the state case, for any reason, fails to resolve the matter in controversy”).

1043. *San Carlos Apache Tribe*, 463 U.S. at 560.

1044. 515 U.S. 277 (1995).

1045. *Id.* at 281. The Court found that the discretionary standard announced in *Brillhart v. Excess Insurance Co. of America*, 316 U.S. 491 (1942), was not supplanted by the “exceptional circumstances” test of *Colorado River* and *Moses H. Cone*. *Wilton*, 515 U.S. at 282–87. *Brillhart*, like *Wilton*, involved an insurer seeking a federal declaratory judgment of nonliability in the face of a state court coercive suit seeking coverage under the policy. *Wilton*, 515 U.S. at 282. See also *NY Life Distributors, Inc. v. Adherence Group, Inc.*, 72 F.3d 371, 382 (3d Cir. 1995) (holding that “the discretionary standard enunciated in *Brillhart* governs a district court’s decision to dismiss an action commenced under the interpleader statute during the pendency of parallel state court proceedings”).

1046. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983).

der *Colorado River* is “inherently tentative” and is not immediately appealable under the collateral order doctrine.<sup>1047</sup>

#### D. *Burford Abstention*

Under *Burford* abstention, named after *Burford v. Sun Oil Co.*,<sup>1048</sup> a federal court may abstain when federal relief would disrupt a complex state regulatory scheme and the state’s effort to centralize judicial review in a unified state court of special competence.<sup>1049</sup> In *Burford*, the plaintiff sought to enjoin the enforcement of a Texas Railroad Commission order permitting the drilling of some wells on a particular Texas oil field. The order was challenged as a violation of both state law and federal constitutional grounds.<sup>1050</sup> The Texas legislature had established a complex, thorough system of administrative and judicial review of the commission’s orders, concentrating all direct review of such orders in the state court of one county.<sup>1051</sup> The state scheme evidenced an effort to establish a uniform policy with respect to the regulation of a matter of substantial local concern. The Court found that “[t]hese questions of regulation of the industry by the state administrative agency . . . so clearly involve basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”<sup>1052</sup>

Thus, where complex administrative procedures have been developed in an effort to formulate uniform policy in an area of local law, “a sound respect for the independence of state action requires the federal equity court to stay its hand.”<sup>1053</sup> Unlike *Pullman* abstention, *Burford* abstention does not anticipate a return to the federal district court. The federal court dismisses the action in favor of state administrative and judicial review of the issues, with “ultimate review of the federal questions . . . fully preserved” in the Supreme Court.<sup>1054</sup>

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1047. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 278 (1988).

1048. 319 U.S. 315 (1943).

1049. *New Orleans Pub. Serv. Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989).

1050. *Burford*, 319 U.S. at 316–17.

1051. *Id.* at 324–26.

1052. *Id.* at 332.

1053. *Id.* at 334.

1054. *Id.* at 333–34.

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In *New Orleans Public Service, Inc. v. Council of New Orleans (NOPSI)*,<sup>1055</sup> the Court clarified that “[w]hile *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a ‘potential for conflict’ with state regulatory law or policy.”<sup>1056</sup> The *NOPSI* Court emphasized that the primary concern underlying *Burford* abstention is the avoidance of federal disruption of “the State’s attempt to ensure uniformity in the treatment of an ‘essentially local problem.’”<sup>1057</sup>

The Court in *NOPSI* stated that under the *Burford* doctrine,

[w]here timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are “difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”<sup>1058</sup>

The Supreme Court has held that the power to dismiss or remand based on *Burford* abstention principles exists only where the relief sought is equitable or otherwise discretionary in nature.<sup>1059</sup> Where damages were sought, the Court found the district court’s remand order to be “an unwarranted application of the *Burford* doctrine.”<sup>1060</sup>

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1055. 491 U.S. 350 (1989). *NOPSI* involved a refusal by the New Orleans City Council to allow NOPSI to get a rate increase to cover additional costs that had been allocated to it, along with other utility companies, by the Federal Energy Regulatory Commission for the Grand Gulf nuclear reactor.

1056. *Id.* at 362.

1057. *Id.*

1058. *Id.* at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

1059. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 731 (1996).

1060. *Id.* Given the facts of the case before it, the Court found it unnecessary to decide whether a more limited “abstention-based stay order” would have been appropriate. *Id.*

### E. Domestic Relations Doctrine

The “domestic relations” doctrine generally prohibits federal court adjudication of a domestic relations matter, such as child custody, child support, or alimony.<sup>1061</sup> Whether this doctrine applies to § 1983 constitutional claims is unclear. In fact, federal courts have routinely adjudicated the constitutionality of state policies pertaining to family law matters.<sup>1062</sup>

### F. Tax Injunction Act

The Tax Injunction Act prohibits federal courts from interfering with state and local tax collection, so long as the state provides a “plain, speedy, and efficient remedy.”<sup>1063</sup> The Tax Injunction Act “is a jurisdictional bar that is not subject to waiver, and the federal courts are duty-bound to investigate the application of the Tax Injunction Act regardless of whether the parties raise it as an issue.”<sup>1064</sup> However, in

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1061. See generally *Akenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

1062. See *Troxel v. Granville*, 530 U.S. 57 (2000); *Clark v. Jeter*, 486 U.S. 456 (1988); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91 (1982); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18 (1981); *Little v. Streater*, 452 U.S. 1 (1981); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Orr v. Orr*, 440 U.S. 268 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Stanley v. Illinois*, 405 U.S. 645 (1972). Given these decisions, it is hard to conclude that the domestic relations doctrine extends to all federal questions arising in the family law area. See *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984). The Supreme Court’s decision in *Lehman v. Lycoming County Children’s Services Agency*, 458 U.S. 502 (1982), that federal habeas corpus is not available to contest the involuntary termination of parental rights, is based on the fact that Congress did not intend that the federal habeas corpus statutes encompass child custody cases.

1063. 28 U.S.C. § 1341 (1996). See *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982) (Tax Injunction Act applies to federal court suit for declaratory judgment that state tax policy is unconstitutional); *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100 (1981) (policies of § 1341 pertain to § 1983 claims for damages); *Rosewell v. La Salle Nat’l Bank*, 450 U.S. 503 (1981). See also *Nat’l Private Truck Council, Inc. v. Okla. Tax Comm’n*, 515 U.S. 582 (1995) (policies of Tax Injunction Act pertain to § 1983 action against state tax and require state courts to refrain from granting prospective relief under § 1983 when there is adequate state legal remedy).

1064. *Folio v. City of Clarksburg*, 134 F.3d 1211, 1214 (4th Cir. 1998) (citations omitted).

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*Hibbs v. Winn*,<sup>1065</sup> the Supreme Court held that the Tax Injunction Act does not apply to a constitutional challenge to a state tax credit policy because such a claim does not interfere with the collection of state taxes.

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1065. 542 U.S. 88, 107–12 (2004).

## XXI. Monetary Relief

The full range of common-law remedies is available to a plaintiff asserting a claim under § 1983. Legal relief may take the form of nominal, compensatory, and punitive damages. Claims for damages may raise issues concerning “release-dismissal agreements,” indemnification, and limitations on prisoner remedies in the Prison Litigation Reform Act.

### *A. Nominal and Compensatory Damages*

“When § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts.”<sup>1066</sup> The Supreme Court has stressed, however, that “[t]he rule of damages . . . is a federal rule responsive to the need whenever a federal right is impaired.”<sup>1067</sup>

Compensatory damages generally fall into one of two categories: special or general damages. Special damages relate to specific pecuniary losses, such as lost earnings, medical expenses, and loss of earning capacity. General damages include compensation for physical pain and suffering, as well as emotional distress. Nominal damages are awarded for the violation of a right with no proven actual injury.

In *Carey v. Piphus*<sup>1068</sup> and *Memphis Community School District v. Stachura*,<sup>1069</sup> the Supreme Court held that compensatory damages for a constitutional violation under § 1983 must be based on the actual injuries suffered by the plaintiff. The Court in *Carey* and *Stachura* ruled that when a § 1983 plaintiff suffers a violation of constitutional rights, but no actual injuries, she is entitled to an award of only \$1 in nominal damages.<sup>1070</sup> In *Carey*, the Court held that “although mental and emotional distress caused by the denial of procedural due process itself is compensable under § 1983, neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensa-

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1066. *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306 (1986).

1067. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969).

1068. 435 U.S. 247 (1978) (procedural due process claim).

1069. 477 U.S. 299 (1986) (First Amendment claim).

1070. *Stachura*, 477 U.S. at 308 n.11; *Carey*, 435 U.S. at 267. *See also* *Corpus v. Bennett*, 430 F.3d 912, 916 (8th Cir. 2005) (“[O]ne dollar is recognized as an appropriate value for nominal damages.”).

tory damages without proof that such injury actually was caused.”<sup>1071</sup> Thus, actual damages will not be presumed in a procedural due process case and, without proof of damages, the plaintiff will be entitled only to “nominal damages not to exceed one dollar.”<sup>1072</sup> The Court noted that the primary purpose of the damages remedy in § 1983 litigation is “to compensate persons for injuries caused by the deprivation of constitutional rights.”<sup>1073</sup> Actual damages caused by a denial of procedural due process may be based on either the emotional distress caused by the denial of fair process, or by an unjustifiable deprivation of liberty or property attributable to lack of fair process.<sup>1074</sup>

Relying on *Carey*, the Supreme Court in *Stachura* extended its holding to a case involving the violation of a plaintiff’s First Amendment rights. In *Stachura*, the Court held that “damages based on the abstract ‘value’ or ‘importance’ of constitutional rights are not a permissible element of compensatory damages” in § 1983 cases.<sup>1075</sup> The problem identified in *Stachura* was that the district court’s jury instructions allowed for an award of damages that was neither compensatory nor punitive, but was based solely on the perceived “value” or “importance” of the particular constitutional right violated.<sup>1076</sup> The Court distinguished the line of common-law voting rights cases awarding presumed damages “for a nonmonetary harm that cannot easily be quantified.”<sup>1077</sup> Thus, while presumed damages ordinarily will not be available in § 1983 actions, presumed damages may be appropriate “[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish.”<sup>1078</sup>

Like common-law tort plaintiffs, § 1983 plaintiffs are required to take reasonable steps to mitigate their damages.<sup>1079</sup> The burden is on

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1071. *Carey*, 435 U.S. at 264.

1072. *Id.* at 267.

1073. *Id.* at 254.

1074. *Id.* at 263–64 (mental and emotional distress actually caused by denial of procedural due process is compensable under § 1983).

1075. *Stachura*, 477 U.S. at 310.

1076. *Id.* at 310 n.13.

1077. *Id.* at 311 & 312 n.14.

1078. *Id.* at 310–11.

1079. 1B Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 16.08 (4th ed. 2006). See, e.g., *Miller v. Lovett*, 879 F.2d 1066, 1070–71 (2d Cir. 1989).

the defendant to show that the plaintiff has not mitigated her damages.<sup>1080</sup>

### B. Punitive Damages

In *Smith v. Wade*,<sup>1081</sup> the Supreme Court held that a § 1983 plaintiff may recover punitive damages against an official in her personal capacity if the official acted with a malicious or evil intent or in callous disregard of the plaintiff's federally protected rights.<sup>1082</sup> "Although the specific intent to violate plaintiff's federally protected right will support a punitive damages award, 'reckless indifference' towards a plaintiff's federally protected right also suffices to authorize liability for punitive damages under § 1983."<sup>1083</sup> The *Smith* standard does not require a showing that the defendant engaged in "egregious" misconduct.<sup>1084</sup> The majority view in the circuits is that punitive damages may be awarded even when the plaintiff recovers only nominal damages.<sup>1085</sup> If a reasonable jury could find that the defendant acted with malice or callous indifference, the district judge should submit the issue of punitive damages to the jury under proper instructions.<sup>1086</sup> The courts in § 1983 cases hold that the burden is on the defendant to introduce evidence of his financial circumstances.<sup>1087</sup>

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1080. 1B Schwartz, *supra* note 1079, § 16.08[B].

1081. 461 U.S. 30 (1983).

1082. Punitive damages may also be based on "oppressive" conduct when the defendant misused authority or exploited the plaintiff's weakness. *Dang v. Cross*, 422 F.3d 800, 809–11 (9th Cir. 2005).

1083. *Powell v. Alexander*, 391 F.3d 1, 19 (1st Cir. 2004).

1084. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538–39 (1999).

1085. 1B Schwartz, *supra* note 1079, § 16.14[D][1]. *See, e.g., Campus-Orrego v. Rivera*, 175 F.3d 89, 97 (1st Cir. 1999) ("[A]s a matter of federal law, a punitive damage award which responds to a finding of a constitutional breach may endure even though unaccompanied by an award of compensatory damages." (footnote and citations omitted)); *King v. Macri*, 993 F.2d 294, 297–98 (2d Cir. 1993) (citing cases).

1086. 1A Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 16.14[D][3] (4th ed. 2005).

1087. *Tapalian v. Tusino*, 377 F.3d 1, 8 (1st Cir. 2004); *Mason v. Okla. Tpk. Auth.*, 182 F.3d 1212, 1214 (10th Cir. 1999); *King v. Macri*, 993 F.2d 294, 298 (2d Cir. 1993); *Zarcone v. Perry*, 572 F.2d 52, 56 (2d Cir. 1978). *See also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 n.28 (1993) (noting that it is "well settled" that defendant's net worth is factor typically considered in assessing punitive damages).

In *City of Newport v. Fact Concerts, Inc.*,<sup>1088</sup> the Supreme Court held that punitive damages cannot be awarded against a municipal entity. The Court in *City of Newport* found the municipal entities are immune from punitive damages under § 1983. Nor may punitive damages be awarded under § 1983 against a state entity. Eleventh Amendment state sovereign immunity bars a federal court award of punitive damages payable out of the state treasury.<sup>1089</sup> Furthermore, states and state entities are not suable “persons” within the meaning of § 1983.<sup>1090</sup>

Supreme Court decisional law holds that “grossly excessive” punitive damage awards violate substantive due process.<sup>1091</sup> To determine whether the award is “grossly excessive,” consideration must be given to (1) the degree of reprehensibility of the defendant’s conduct—the most important factor; (2) the ratio between the harm or potential harm to the plaintiff and the punitive damages award; and (3) the disparity between the punitive damages award and civil penalties authorized or imposed in comparable cases.<sup>1092</sup> The Supreme Court stated that “in practice, few [punitive damages] awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”<sup>1093</sup> However, the Court also recognized that a larger ratio “may comport with due process when a particularly egregious act has resulted in only a small amount of economic damages.”<sup>1094</sup> These principles apply in § 1983 actions.<sup>1095</sup>

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1088. 453 U.S. 247, 261 (1981).

1089. *See supra* Part XIII.

1090. *See supra* Part VI.

1091. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996).

1092. *Campbell*, 538 U.S. at 416; *Gore*, 517 U.S. at 562.

1093. *Campbell*, 538 U.S. at 425.

1094. *Id.* at 419 (quoting *Gore*, 517 U.S. at 582).

1095. *See, e.g., Tapalian*, 377 F.3d at 8–9; *Williams v. Kaufman County*, 352 F.3d 994, 1016 (5th Cir. 2003); *DiSorbo v. Hoy*, 343 F.3d 172, 186 (2d Cir. 2003); *Bogle v. McClure*, 332 F.3d 1347, 1360 (11th Cir. 2003); *Lee v. Edwards*, 101 F.3d 805, 808–09 (2d Cir. 1996); *Morgan v. Woessner*, 997 F.2d 1244, 1256–57 (9th Cir. 1993), *cert. dismissed*, 510 U.S. 1033 (1994).

### C. Release-Dismissal Agreements

Section 1983 damage claims may be settled, waived, or released.<sup>1096</sup> A recurring issue in § 1983 actions concerns the validity of “release-dismissal agreements” pursuant to which law enforcement authorities agree to dismiss criminal charges in exchange for the release of § 1983 claims. In *Town of Newton v. Rumery*,<sup>1097</sup> the Supreme Court held that these agreements are not automatically invalid. Rather, the validity of a release-dismissal agreement should be evaluated on a case-by-case basis to determine whether the agreement (1) was voluntary, (2) was the product of prosecutorial overreaching or other misconduct, and (3) adversely affects the public interest.

### D. Indemnification

An important issue in many § 1983 cases is whether the relevant governmental entity will indemnify the defendant official for her monetary liability. Indemnification is not covered by federal law; it is strictly a matter of state or local law.<sup>1098</sup> Some of the issues that may arise in federal court § 1983 actions are whether there is supplemental jurisdiction over the indemnification claim and, if so, whether the federal court should exercise that jurisdiction;<sup>1099</sup> the meaning and application of state indemnification law;<sup>1100</sup> and whether the jury should be informed about indemnification. Although most courts hold that indemnification is akin to insurance and should be shielded from the jury,<sup>1101</sup> the authors believe that it is better that the jurors be informed about indemnification rather than being kept in the dark.<sup>1102</sup>

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1096. The validity of a settlement, waiver, or release of a § 1983 claim depends on whether it is voluntary, informed, and not contrary to public policy. 1B Schwartz, *supra* note 1079, § 16.16[B].

1097. 480 U.S. 386 (1985).

1098. See 1B Schwartz, *supra* note 1079, § 16.17.

1099. See 1 Martin A. Schwartz, Section 1983 Litigation: Claims and Defenses § 1.07[C] (4th ed. 2004).

1100. See 1B Schwartz, *supra* note 1079, § 16.17[B][1].

1101. Fed. R. Evid. 408. See, e.g., *Larez v. Holcomb*, 16 F.3d 1513 (9th Cir. 1994).

1102. See Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify for Constitutional Wrongdoing?*, 86 Iowa L. Rev. 1209 (2001).

*E. Prison Litigation Reform Act*<sup>1103</sup>

In any action involving prisoners' rights, there are likely to be substantial limitations placed on the availability and scope of the remedies sought. Although a comprehensive discussion of the various provisions of the Prison Litigation Reform Act (PLRA) is beyond the scope of this monograph, the importance of consulting the Act in appropriate cases cannot be overemphasized. For example, the PLRA precludes the bringing of a civil action by a prisoner "for mental or emotional injury suffered while in custody without a prior showing of physical injury."<sup>1104</sup> Exhaustion of administrative remedies is required in actions relating to prison conditions.<sup>1105</sup> The availability of attorneys' fees for prevailing prisoners is significantly restricted.<sup>1106</sup> Injunctive relief in prison reform litigation must be narrowly drawn to remedy violations of federal rights.<sup>1107</sup> Government officials may seek the immediate termination of all prospective relief that was awarded or approved before the enactment of the PLRA "in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and is the least intrusive means necessary to correct the violation of the federal right."<sup>1108</sup>

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1103. On April 26, 1996, Congress enacted the Prison Litigation Reform Act as Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

1104. 42 U.S.C. § 1997e(e) (2006). *See, e.g.,* Zehner v. Trigg, 133 F.3d 459, 464 (7th Cir. 1997) (upholding constitutionality of provision). *See* 1B Schwartz, *supra* note 1079, § 16.07[H][2].

1105. 42 U.S.C. § 1997e(a) (2006). *See supra* Part XVI.

1106. 42 U.S.C. § 1997e(d)(1)–(4) (2006).

1107. 18 U.S.C. § 3626(a)(2) (2006).

1108. *Id.* § 3626(b)(2). *See* 1B Schwartz, *supra* note 1079, § 16.03[D].

## XXII. Attorneys' Fees<sup>1109</sup>

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), authorizes courts, in their discretion, to award reasonable attorneys' fees to the prevailing party in a § 1983 action. Section 1988 fees are an "integral part" of § 1983 remedies.<sup>1110</sup> The Supreme Court has admonished the lower federal courts that a "request for [§ 1988(b)] attorney's fees should not result in a second major litigation."<sup>1111</sup> Nevertheless, § 1988(b) fee disputes often do result in a "second major litigation."<sup>1112</sup> Fee litigation "can turn a simple civil case into two or even more cases—the case on the merits, the case for fees, the case for fees on appeal, the case for fees for proving fees, and so on ad infinitum or at least ad nauseam."<sup>1113</sup> The goal of avoiding a second major litigation "has proved a somewhat pious and forlorn hope. In view of the complexities the Supreme Court and the lower courts have grafted onto the fee calculation process, federal courts are today enmeshed in an inordinately time consuming and ultimately futile search for a fee that reflects market forces in the absence of a relevant market."<sup>1114</sup>

### A. Prevailing Parties

Section 1988(b) authorizes a fee award to a "prevailing party."<sup>1115</sup> Whether a party is a prevailing party is a question of law for the

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1109. See generally Awarding Attorneys' Fees and Managing Fee Litigation (Federal Judicial Center 2d ed. 2005).

1110. *Maine v. Thiboutot*, 448 U.S. 1, 11 (1980). See also *Hudson v. Michigan*, 126 S. Ct. 2159, 2167 (2006) ("Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").

1111. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Accord *Webb v. County Bd. of Educ.*, 471 U.S. 234, 244 n.20 (1985); *Blum v. Stenson*, 465 U.S. 886, 902 n.19 (1984).

1112. *Doe v. Ward*, 282 F. Supp. 2d 323, 329 n.4 (W.D. Pa. 2003) (principle that fees should not result in major litigation "is one of the emptiest phrases in our jurisprudence" because "fee questions most definitely constitute major litigation").

1113. *Ustrak v. Fairman*, 851 F.2d 983, 987 (7th Cir. 1988). See also *Divane v. Krull Elec. Co.*, 319 F.3d 307, 314 (7th Cir. 2003) (ERISA suit).

1114. *System Mgmt., Inc. v. Loiselle*, 154 F. Supp. 2d 195, 207 (D. Mass. 2001).

1115. "Liability on the merits and responsibility for fees go hand in hand; where a defendant has not been prevailed against, either because of legal immunity or on the merits, § 1988 does not authorize a fee award against the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (citation omitted).

court.<sup>1116</sup> Courts interpret the § 1988 fee-shifting statute to mean that attorneys' fees should be awarded to a prevailing plaintiff almost as a matter of course.<sup>1117</sup> Fees should be denied to a prevailing plaintiff only when "special circumstances" would make a fee award unjust. The fiscal impact of a fee award upon a municipality,<sup>1118</sup> defendant's good faith,<sup>1119</sup> and the fact the fees will ultimately be paid by taxpayers<sup>1120</sup> have all been held not to be "special circumstances" justifying either a denial or reduction of fees. However, a plaintiff's grossly inflated fee application may be a special circumstance justifying the denial of fees.<sup>1121</sup>

Prevailing defendants are entitled to attorneys' fees only when the plaintiff's action was "frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so."<sup>1122</sup> Although "attorney's fees should rarely be awarded against [pro se] § 1983 plaintiffs," the district court has discretion to do so.<sup>1123</sup> In most cases the district court's failure to give adequate reasons or explanation

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1116. *Jenkins v. Missouri*, 127 F.3d 709, 713–14 (8th Cir. 1997).

1117. *See, e.g., Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 293 (1st Cir. 2001) (awards to prevailing § 1983 plaintiffs are "virtually obligatory").

1118. *Aware Woman Clinic, Inc. v. Cocoa Beach*, 629 F.2d 1146, 1149–50 (5th Cir. 1980).

1119. *See, e.g., Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1301 (1st Cir. 1997).

1120. *See, e.g., Ramos v. Lamm*, 713 F.2d 546, 552 (10th Cir. 1983).

1121. 2 *Martin Schwartz & John E. Kirklin, Section 1983 Litigation: Statutory Attorney's Fees* § 3.14 (3d ed. 1997).

1122. *Hughes v. Rowe*, 449 U.S. 5, 15 (1980); *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978); *Sullivan v. Sch. Bd. of Pinellas County*, 773 F.2d 1182, 1189 (11th Cir. 1985) (no "hard and fast rules" for determining whether plaintiff's claim was frivolous—courts may consider whether plaintiff established prima facie case; whether defendant offered to settle; and whether district court dismissed case before trial or after trial on merits). The circuits are in conflict over whether a prevailing defendant is entitled to attorneys' fees when the plaintiff asserts frivolous and non-frivolous claims that are significantly intertwined. Some courts hold that in these circumstances the defendant cannot recover fees for defending against the frivolous claims. *Colombrito v. Kelly*, 764 F.3d 122, 132 (2d Cir. 1985); *Tarter v. Rauback*, 742 F.3d 977, 987–88 (6th Cir. 1984). Other courts have allowed the defendant to recover fees for the frivolous claims, even when the frivolous and non-frivolous claims are factually interrelated, so long as the claims are sufficiently distinct, and the merits of each can be evaluated separately. *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1064 (9th Cir. 2006); *Quintana v. Jenne*, 414 F.3d 1306, 1312 (11th Cir. 2005). *See also Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1994).

1123. *Houston v. Norton*, 215 F.3d 1172, 1174–75 (10th Cir. 2000).

for awarding fees to a defendant is an abuse of discretion necessitating a remand.<sup>1124</sup>

The plaintiff will be considered a prevailing party when he succeeds on “any significant issue” that achieves some of the benefit the plaintiff sought in bringing suit.<sup>1125</sup> To be a prevailing party, the plaintiff must obtain some judicial relief as a result of the litigation; the mere fact that the court expressed the view that the plaintiff’s constitutional rights were violated does not qualify the plaintiff as a prevailing party.<sup>1126</sup> The mere fact that the plaintiff prevailed on a procedural issue during the course of the litigation, such as by obtaining an appellate decision granting a new trial, also does not qualify the plaintiff as a prevailing party.<sup>1127</sup> “[A] plaintiff ‘prevails’ when actual relief on the merits of [the plaintiff’s] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”<sup>1128</sup>

In *Farrar v. Hobby*,<sup>1129</sup> the Supreme Court held that a § 1983 plaintiff who recovers only nominal damages is nevertheless a prevailing party eligible to recover attorneys’ fees under § 1988(b); but usually a reasonable fee in these circumstances is either no fees or very low fees. Justice O’Connor’s concurring opinion in *Farrar* urged courts to consider the difference between the damages sought and the damages recovered, the significance of the legal issues on which the plaintiff claims to have prevailed, and the public purpose served by the litigation.<sup>1130</sup> The lower federal courts have generally relied on Justice O’Connor’s concurrence in *Farrar* in evaluating the fee issue in nominal damages cases.<sup>1131</sup>

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1124. *Dehertoghen v. City of Hemet*, 159 F. App’x 775, 776 (9th Cir. 2005); *Patton v. County of Kings*, 857 F.2d 1379, 1381 (9th Cir. 1988).

1125. *Texas State Teachers Ass’n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 789 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

1126. *Hewitt v. Helms*, 482 U.S. 755, 763 (1987).

1127. *Hanrahan v. Hampton*, 446 U.S. 754, 757–59 (1980).

1128. *Farrar v. Hobby*, 506 U.S. 103, 111–12 (1992).

1129. *Id.* at 112–15.

1130. *Id.* at 120–25 (O’Connor, J., concurring).

1131. *See, e.g., Lippoldt v. Cole*, 468 F.3d 1204, 1222 (10th Cir. 2006); *Mercer v. Duke Univ.*, 401 F.3d 199, 203–04 (4th Cir. 2005); *Muhammad v. Lockhart*, 104 F.3d 1069, 1070 (8th Cir. 1997); *Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2d Cir.), *cert. denied*, 513 U.S. 876 (1994).

A plaintiff who asserts a § 1983 claim that is not insubstantial and obtains relief on a “pendent” (i.e., “supplemental”) state law claim is a prevailing party eligible for fees under § 1988, even though the § 1983 claim is not decided on the merits.<sup>1132</sup> The plaintiff, however, is not entitled to fees if the § 1983 claim is insubstantial.<sup>1133</sup>

The plaintiff may be a prevailing party even if she did not prevail on all of her claims. In *Hensley v. Eckerhart*,<sup>1134</sup> the Supreme Court held that when the plaintiff prevails on some but not all claims arising out of common facts, the results obtained determine whether the fees should be reduced because of lack of success on some claims. The Court said that in determining the amount of the fee award, “the most critical factor is the degree of success obtained.”<sup>1135</sup> The Court also ruled that when the plaintiff prevails on some but not all claims that are not interrelated, the plaintiff should be awarded fees only for the successful claims.<sup>1136</sup> However, when the successful and unsuccessful claims are interrelated, the district court should focus on the overall results achieved. If the plaintiff achieved “excellent results,” she should recover a full compensatory fee award. If the plaintiff achieved “only partial or limited success,” the district court should consider whether the lodestar fee amount (reasonable hours multiplied by reasonable rates) is excessive. The district court should award only the amount of fees that is “reasonable in relation to the results obtained.”<sup>1137</sup>

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1132. *Maher v. Gagne*, 448 U.S. 122, 127 (1980); *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d Cir. 1981).

1133. *See, e.g., United States v. Washington*, 813 F.2d 1020, 1024 (9th Cir. 1987), *cert. denied*, 485 U.S. 1034 (1988); *Reel v. Ark. Dep't of Corr.*, 672 F.2d 693, 697–98 (8th Cir. 1982) (plaintiff prevailed on state tort claims, but district court rejected plaintiff's § 1983 claims as “insubstantial”).

1134. 461 U.S. 424, 434 (1983).

1135. *Id.* at 436. *Accord Farrar v. Hobby*, 506 U.S. 103, 114 (1992).

1136. “[W]ork on an unsuccessful claim [based on different facts and different legal theories] cannot be deemed to have been ‘expended in pursuit of the ultimate result achieved.’ The congressional intent to limit awards to prevailing parties requires that these unrelated claims be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim.” *Hensley*, 461 U.S. at 435 (citation omitted).

1137. *Id.* at 440.

In *Buckhannon Board & Care Home v. West Virginia Department of Health & Human Resources*,<sup>1138</sup> the Supreme Court held that the fact that the lawsuit was a catalyst in causing the defendant to alter its conduct in relation to the plaintiff does not qualify the plaintiff as a prevailing party. The Court said that to be a “prevailing party,” the plaintiff must secure a favorable judgment on the merits or a court-ordered consent decree. The decision in *Buckhannon* overturned the catalyst doctrine that had been adopted by eleven circuits and rejected only by the Fourth Circuit. Under *Buckhannon*, only “enforceable judgments on the merits and court-ordered consent decrees create the ‘material alteration of the legal relationship of the parties’ necessary to permit an award of attorney’s fees.”<sup>1139</sup> Dictum in *Buckhannon* states that private settlements not embodied in a judicial decree will not qualify the plaintiff as a prevailing party because “[p]rivate settlements do not entail the judicial approval and oversight involved in consent decrees.”<sup>1140</sup>

*Buckhannon* directly involved the fee-shifting statutes in the federal Fair Housing Act and Americans With Disabilities Act. However, the lower federal courts have uniformly applied the decision to other civil rights fee-shifting statutes, including 42 U.S.C. § 1988(b).<sup>1141</sup>

The decision in *Buckhannon* has generated a great deal of litigation, raising such issues as whether a preliminary injunction or “so ordered” settlement qualifies the plaintiff as a prevailing party.<sup>1142</sup> A “stipulation and order of discontinuance,” combined with court reten-

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1138. 532 U.S. 598, 607 (2001).

1139. *Id.* at 604.

1140. *Id.* at 604 n.7.

1141. See Schwartz & Kirklin, *supra* note 1121, 2008-1 Cum. Supp. § 2.11.

1142. *Id.* See, e.g., *Sole v. Wyner*, 127 S. Ct. 2188 (2007) (preliminary injunction does not qualify plaintiff as prevailing party when final decision on merits is in favor of defendant); *Roberson v. Giuliani*, 346 F.3d 75, 84 (2d Cir. 2003) (stipulation and order of discontinuance acknowledging parties’ settlement agreement and providing for retention of district court jurisdiction over settlement agreement for enforcement purposes carried “sufficient judicial sanction” to render plaintiffs prevailing parties); *Toms v. Taft*, 338 F.3d 519 (6th Cir. 2003) (private settlement did not qualify plaintiffs as prevailing parties); *Truesdell v. Phila. Hous. Auth.*, 290 F.3d 159 (3d Cir. 2002) (settlement incorporated in court order giving plaintiff right to seek judicial enforcement of settlement rendered plaintiff a prevailing party).

tion of jurisdiction over the settlement for enforcement purposes, may qualify the plaintiff as a prevailing party.<sup>1143</sup>

A pro se plaintiff is not eligible to recover attorneys' fees, even if the plaintiff is an attorney.<sup>1144</sup> Thus, only a prevailing plaintiff who is represented by counsel is eligible to recover fees.

### *B. Computation of Fee Award*

Fees awarded under § 1988 are generally computed under the “lode-star” method of multiplying reasonable hours by reasonable hourly market rates for attorneys in the community with comparable backgrounds and experience.<sup>1145</sup> The underlying goal of a § 1988(b) fee award is to “attract competent counsel.”<sup>1146</sup>

The “fee applicant has the burden of showing by ‘satisfactory evidence—in addition to the attorney’s own affidavits’—that the requested hourly rates are the prevailing market rates.”<sup>1147</sup> “At a minimum, a fee applicant must provide some information about the attorneys’ billing practices and hourly rate, the attorneys’ skill and experience (including the number of years that counsel has practiced law), the nature of counsel’s practices as it relates to this kind of litigation, and the prevailing market rates in the relevant community.”<sup>1148</sup>

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1143. *Roberson*, 346 F.3d at 78, 83.

1144. *Kay v. Ehrler*, 499 U.S. 432, 437–38 (1991).

1145. *Blum v. Stenson*, 465 U.S. 886, 897 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) (“The most useful starting point for determining the amount of a reasonable fee is the amount of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.”). *See also* *Arbor Hill Concerned Citizens Neighborhood Ass’n v. County of Albany*, 522 F.3d 182, 188, 190 (2d Cir. 2008) (acknowledging that Supreme Court has adopted lodestar method “in principle,” but adopting modified approach using reasonable hourly rate to determine “presumptively reasonable fee”).

1146. *Hensley*, 461 U.S. at 430.

1147. *Farbotko v. Clinton County*, 433 F.3d 204, 209 (2d Cir. 2005) (quoting *Blum*, 465 U.S. at 896 n.11). *Accord* *Smith v. Phila. Hous. Auth.*, 107 F.3d 223, 225 (3d Cir. 1997); *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994).

1148. *Blackman v. District of Columbia*, 397 F. Supp. 2d 12, 14 (D.D.C. 2005). *See* *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1284 (N.D. Ga. 2006) (“The applicant attorney’s customary billing rate for fee paying clients ordinarily is the best evidence of the market rate although that information is not necessarily conclusive.”).

The district court may “rely in part on [its] own knowledge of private firm hourly rates in the community.”<sup>1149</sup> The district court may also “consider other rates that have been awarded in similar cases in the same district.”<sup>1150</sup> The fee applicant bears the burden of documenting and demonstrating the reasonableness of the hours claimed.<sup>1151</sup> The reasonableness of the hours depends in part on counsel’s expertise.<sup>1152</sup> “A fee applicant cannot demand a high hourly rate—which is based on his or her experience, reputation, and a presumed familiarity with the applicable law—and then run up an inordinate amount of time researching that same law.”<sup>1153</sup>

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1149. *Ass’n for Retarded Citizens of Conn. Inc. v. Thorne*, 68 F.3d 547, 554 (2d Cir. 1995) (citing *Miele v. N.Y. Teamsters Conference Pension & Ret. Fund*, 831 F.2d 407, 409 (2d Cir. 1987)). *Accord* *Lippoldt v. Cole*, 468 F.3d 1204, 1225 (10th Cir. 2006).

1150. *Amato v. City of Saratoga Springs*, 991 F. Supp. 62, 66 (N.D.N.Y. 1998). *Accord* *Anderson v. Rochester-Genesee Reg’l Transp. Auth.*, 388 F. Supp. 2d 159, 167 (W.D.N.Y. 2005).

In *Farbotko v. Clinton County*, 433 F.3d 204 (2d Cir. 2005), the Second Circuit held that the district court erred in basing the hourly rates solely on the rates used in other cases in the federal district. A reasonable hourly rate must reflect the “prevailing market rate.” *Farbotko*, 433 F.3d at 208. “Recycling rates awarded in prior cases without considering whether they continue to prevail may create disparity between compensation available under § 1988(b) and compensation available in the marketplace. This undermines § 1988(b)’s central purpose of attracting competent counsel to public interest litigation.” *Id.* at 209. There must be a “case-specific inquiry into the prevailing market rates for counsel of similar experience and skill to the fee applicant’s counsel. This may . . . include judicial notice of rates awarded in prior cases and the court’s own familiarity with the rates prevailing in the district,” as well any “evidence proffered by the parties.” *Id.* A reasonable rate “is not ordinarily ascertained simply by reference to rates awarded in prior cases.” *Id.* at 208. The same rate should be used for both the trial and appellate courts. Rather than establish the appropriate rates itself, the Second Circuit found that it was preferable to remand the issue to the district court, which is “in closer proximity to and has greater experience with the relevant community whose prevailing market rate it is determining.” *Id.* at 210 (citations omitted).

1151. *In re Donovan*, 877 F.2d 982, 994 (D.C. Cir. 1989) (fee application must “include contemporaneous time records of hours worked and rates claimed, plus a detailed description of the subject matter of the work with supporting documents, if any”); *Grendel’s Den, Inc. v. Larkin*, 749 F.2d 945, 952 (1st Cir. 1984) (“the absence of detailed contemporaneous time records, except in extraordinary circumstances, will call for a substantial reduction in any award or, in egregious cases, disallowance”).

1152. *Bell v. United Princeton Props., Inc.*, 884 F.2d 713, 721 (3d Cir. 1989).

1153. *Id.* (quoting *Ursic v. Bethlehem Mines*, 719 F.2d 670, 677 (3d Cir. 1983)).

The district court should exclude hours that are “excessive, redundant, or otherwise unnecessary.”<sup>1154</sup> The fee applicant’s failure to exercise proper billing judgment by failing to exclude hours that are excessive, redundant, or otherwise unnecessary may lead the district court to reduce the fee award.<sup>1155</sup>

The Supreme Court has generally disapproved of the use of upward adjustments to the lodestar.<sup>1156</sup> In rare cases, an upward adjustment may be made because of the superior quality of representation<sup>1157</sup> or for “exceptional success.”<sup>1158</sup> Fees may also be adjusted upward to compensate the prevailing party for delay in payment, either by using current market rates rather than historic rates, or by adjusting historic rates to account for inflation.<sup>1159</sup> The lodestar should not be enhanced to compensate for the risk of non-success when the plaintiff’s attorney was retained on a contingency basis.<sup>1160</sup> In *City of Riverside v. Rivera*,<sup>1161</sup> the Supreme Court held that the fees awarded need not be proportional to the damages recovered by the plaintiff. The approximately \$245,000 in fees awarded in *Riverside* substantially exceeded the \$33,350 in damages plaintiff recovered. “Because damages awards do not reflect

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1154. *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *Gay Officers Action League v. Puerto Rico*, 247 F.3d 288, 298–99 (1st Cir. 2001).

1155. *See, e.g., Anderson v. Rochester-Genesee Reg’l Transp. Auth.*, 388 F. Supp. 2d 159, 167–69, 171 (W.D.N.Y. 2005) (court reduced rates of plaintiffs’ counsel by 20% because plaintiffs’ counsel failed to exercise proper billing judgment and exclude excessive, redundant, or unnecessary hours).

1156. *Blum v. Stenson*, 465 U.S. 886, 897–98 (1984). *See Ballen v. City of Redmond*, 466 F.3d 736, 746 (9th Cir. 2006) (“only in rare circumstances should a court adjust the lodestar figure, as this figure is the presumptively accurate measure of reasonable fees”).

1157. *Pennsylvania v. Dela. Valley Citizens’ Council*, 478 U.S. 546, 566 (1986); *Blum*, 465 U.S. at 899 (“The ‘quality of representation’ . . . generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was ‘exceptional.’”).

1158. *Hensley*, 461 U.S. at 435.

1159. *Missouri v. Jenkins*, 491 U.S. 274, 282–84 (1989). The rationale for allowing an adjustment for delay of payment, or the use of current rates, is that “compensation received several years after the services were rendered—as it frequently is in complex civil rights litigation—is not equivalent to the same dollar amount received reasonably promptly as the legal services are performed.” *Id.* at 283.

1160. *City of Burlington v. Dague*, 505 U.S. 557, 560–61 (1992).

1161. 477 U.S. 561, 574–75, 582 (1986).

fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases . . . to depend on obtaining substantial monetary relief.”<sup>1162</sup>

The fees awarded under § 1988 are not limited to the amount of fees recoverable by counsel pursuant to a contingency fee agreement.<sup>1163</sup> Conversely, the fees collectable under a contingency agreement may exceed the fees awarded under § 1988.<sup>1164</sup>

Fees generally may not be awarded for work performed on administrative proceedings that preceded the § 1983 action.<sup>1165</sup> In addition, expert witness expenses are not recoverable as part of the § 1988 fee award in § 1983 actions.<sup>1166</sup>

Legal services organizations and other nonprofit organizations are entitled to have fee awards computed on the basis of reasonable market rates rather than on the lower salaries paid to the organization’s attorneys.<sup>1167</sup>

### C. Other Fee Issues

When prospective relief is awarded against state officials under the doctrine of *Ex parte Young*,<sup>1168</sup> an award of fees payable out of the state treasury is not barred by the Eleventh Amendment.<sup>1169</sup> The Eleventh Amendment does not bar an upward adjustment in the lodestar to compensate for delay in payment.<sup>1170</sup>

Federal Rule of Civil Procedure 68 provides that “a party defending a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money. . . specified in the offer, with costs then accrued.” If the offeree rejects the offer and “the

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1162. *Id.* at 575.

1163. *Blanchard v. Bergeron*, 489 U.S. 87, 92–94 (1989).

1164. *Venegas v. Mitchell*, 495 U.S. 82, 86–88 (1990).

1165. *Webb v. County Bd. of Educ.*, 471 U.S. 234 (1985).

1166. *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 86–92 (1991). An amendment to § 1988 authorized an award of expert witness fees only in actions under 42 U.S.C. § 1981 or § 1981(a). 42 U.S.C. § 1988(c) (2006).

1167. *Blum v. Stenson*, 465 U.S. 886, 894–95 (1984). *Accord* *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 487 n.31 (1982).

1168. 209 U.S. 123 (1908). *See supra* Part XIII.

1169. *Hutto v. Finney*, 437 U.S. 678, 690–92 (1978).

1170. *Missouri v. Jenkins*, 491 U.S. 274, 279–84 (1989).

judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after making the offer.” In *Marek v. Chesney*,<sup>1171</sup> the Supreme Court held that the “costs” referred to in Rule 68 encompass § 1988(b) attorneys’ fees. Therefore, under Rule 68, even though the plaintiff was the prevailing party, if the plaintiff did not obtain more favorable relief than he had been offered under Rule 68, he may not recover from the defendant any § 1988(b) fees that accrued after the rejected offer of judgment.<sup>1172</sup>

*Marek* did not address whether a defendant who makes a successful Rule 68 offer is entitled to § 1988 fees that accrued after the date of the offer. The great weight of lower court authority holds that although Rule 68 authorizes an award of post-offer “costs” to the defendant, these costs do not include § 1988 fees to a nonprevailing defendant.<sup>1173</sup>

In *Evans v. Jeff D.*,<sup>1174</sup> the Supreme Court held that an offer by a defendant to settle the plaintiff’s claim on the merits and the claim for fees simultaneously is not necessarily unethical. The Court said that a claim for § 1988 fees is considered part of “the arsenal of remedies available to combat violations of civil rights, a goal not invariably inconsistent with conditioning settlement on the merits on a waiver of statutory attorney’s fees.”<sup>1175</sup>

Finally, the district court should provide an adequate explanation for its fee decision in order to allow for meaningful appellate review.<sup>1176</sup>

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1171. 473 U.S. 1, 8–11 (1985).

1172. See *Bogan v. City of Boston*, 489 F.3d 417, 431 (1st Cir. 2007) (Rule 68 requires comparison between amount of offer at judgment, including “costs then accrued,” and damages recovered plus pre-offer fees actually awarded, not pre-offer fees requested by plaintiffs).

1173. *Champion Produce, Inc. v. Ruby Robinson Co.*, 342 F.3d 1016, 1026–28 (9th Cir. 2003) (non-§ 1983); *Payne v. Milwaukee County*, 288 F.3d 1021, 1026–27 (7th Cir. 2002); *Harbor Motor Co. v. Arnell Chevrolet-Geo*, 265 F.3d 638, 645 (7th Cir. 2001) (non-§ 1983); *O’Brien v. City of Greers Ferry*, 873 F.2d 1115, 1120 (8th Cir. 1989); *Crossman v. Marcoccio*, 806 F.2d 329, 334 (1st Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). *Contra Jordan v. Time, Inc.*, 111 F.3d 102, 104 (11th Cir. 1997).

1174. 475 U.S. 717, 729–32 (1986).

1175. *Id.* at 731–32.

1176. *Bogan*, 489 F.3d at 431; *Tutor-Saliba Corp. v. City of Hailey*, 452 F.3d 1055, 1065 (9th Cir. 2006) (following *Chalmers v. Los Angeles*, 795 F.2d 1205 (9th Cir. 1986)); *Browder v. City of Moab*, 427 F.3d 717, 721 (10th Cir. 2005) (“Generally, district courts must give an adequate explanation for their decision regarding requests for attorney’s fees, otherwise we have no record on which to base our decision.”).

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