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FUNDAMENTALS OF  
SECTION 1983  
LITIGATION

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**I. ELEMENTS OF SECTION 1983 CLAIM, FUNCTIONAL ROLE OF SECTION 1983, PLEADING, AND FEDERAL AND STATE COURT JURISDICTION**

- A. The Statute: 42 U.S.C § 1983 authorizes a claim for relief against a person who, acting under color of state law, violated an individual’s federally protected rights
1. Elements of Claim: The Supreme Court stated that there are two elements of a § 1983 claim: the plaintiff must allege (1) a deprivation of a federal right and (2) that the person who deprived him of that right acted under color of state law. Gomez v. Toledo, 446 U.S. 635, 640 (1980).
  2. In the author’s view there are at least four major elements of a § 1983 claim:
    - a. conduct by a “person”;
    - b. who acted under “color of state law”;
    - c. proximately causing;
    - d. a deprivation of federally protected rights.
  3. In addition, if the plaintiff is seeking to establish municipal liability, plaintiff must show that the deprivation of her federal right was attributable to the enforcement of a municipal custom of policy. See Part IX, infra.
  4. State of Mind: Section 1983 has no particular state of mind requirement. Parratt v. Taylor, 451 U.S. 527 (1981).
    - a. The particular constitutional claim however, may require a showing that the defendant had a certain state-of-mind.
      - i. Negligence by a state or local official does not give rise to a due process claim; there must be an intentional or deliberate deprivation of life, liberty or property. Daniels v. Williams, 474 U.S. 327 (1986). See also Davidson v. Cannon, 474 U.S. 344 (1986).
      - ii. A claim under the Equal Protection Clause alleging racial or gender-based discrimination requires a showing of intentional discrimination in order to invoke heightened scrutiny. See e.g., Arlington Heights v. Metropolitan Housing

Dev. Corp., 429 U.S. 252 (1977) (race); Personnel Adm. v. Feeney, 442 U.S. 256 (1979) (gender).

- iii. Medical malpractice is not a constitutional violation merely because the plaintiff is a prisoner. To establish an Eighth Amendment violation the plaintiff must demonstrate deliberate indifference to a serious medical need. Estelle v. Gamble, 429 U.S. 97, 106 (1976).
5. A wide range of federal constitutional and federal statutory rights may be enforced under § 1983. See Wilson v. Garcia, 471 U.S. 261, 273 (1985).
- B. Function: Section 1983 does not itself create or establish any federally protected rights. Rather, § 1983 authorizes the assertion of a claim for relief to enforce federal rights created by either the federal Constitution or, in some cases, by a federal statute (other than § 1983). Albright v. Oliver, 510 U.S. 266 (1994); Graham v. Connor, 490 U.S. 386 (1989); Chapman v. Houston W.R.O., 441 U.S. 600 (1979); Baker v. McCollan, 443 U.S. 137 (1979).
- C. Pleadings:
1. The Supreme Court rejected a heightened pleading requirement for federal Court § 1983 municipal liability claims. Leatherman v. Tarrant County, 507 U.S. 163 (1993).
    - a. The Court in Leatherman left open whether a heightened pleading rule may be applied when qualified immunity is a defense to a personal-capacity claim. Id. at 166-67.
      - i. i.The circuit courts have generally rejected a heightened pleading standard for personal-capacity claims subject to qualified immunity. See, e.g. Doe v. Cassell, 403 F.3d 986 (8<sup>th</sup> Cir. 2005); Educadores Puertorriqueones v. Hernandez, 367 F.3d 61 (1<sup>st</sup> Cir. 2004); Goad v. Mitchell, 297 F.3d 497 (6<sup>th</sup> Cir. 2002); Currier v. Doran, 242 F.3d 905 (10<sup>th</sup> Cir.), cert. denied, 534 U.S. 1019 (2001).
      - ii. ii.However, the courts have recognized that they have several tools to eliminate meritless claims early in the litigation, including ordering either a detailed reply to the defendant's answer, Fed. R. Civ. P. 7, or a more definite statement, Fed. R. Civ. P. 12(e), or tailoring discovery to

protect the defendant from unnecessary embarrassment or burdens, Fed. R. Civ. P. 26(c).

- b. Although most courts have dismissed conclusory allegations of conspiracy, the Seventh Circuit rejected a heightened pleading rule for conspiracy claims and held that under the Federal Rules of Civil Procedure these claims are governed by notice pleading. Walker v. Thompson, 288 F.3d 1005 (7<sup>th</sup> Cir. 2002).
2. The Supreme Court held that simplified notice pleading applies to federal court employment discrimination claims under Title VII and the ADEA. Swierkewicz v. Sorena, N.A., 534 U.S. 506 (2002).
    - a. The Court in Swierkewicz rejected a heightened pleading standard for Title VII and ADEA discrimination claims.
      - i. The Court relied upon the clear language of Fed.R.Civ.P. 8 and 9, the form complaints in the Appendix to the Federal Rules of Civil Procedure, and upon Leatherman v. Tarrant County, supra.
      - b. Swierkewicz reaffirmed that federal courts may “dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).
      - c. Swierkewicz clearly applies to § 1983 claims. See, e.g. Educa-dores Puertorriquenos v. Hernandez, 367 F.3d 61 (1<sup>st</sup> Cir. 2004); Walker v. Thompson, 288 F.3d 1005 (7<sup>th</sup> Cir. 2002).
  - D. Federal Court Jurisdiction: Section 1983 does not grant the federal courts subject matter jurisdiction.
    1. Original Jurisdiction: Federal court jurisdiction over § 1983 claims is authorized by either 28 U.S.C. § 1343(a)(3), Chapman v. Houston W.R.O., 441 U.S. 600 (1978), or by the general federal question jurisdiction statute, 28 U.S.C. § 1331.
      - a. Rooker-Feldman Doctrine: The Rooker-Feldman doctrine, however, deprives federal district courts of jurisdiction to review state court decisions. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity

Trust Co., 263 U.S. 413 (1923), 1A Schwartz, Section 1983 Litigation: Claims and Defenses, § 1.10 (3d ed. 1997).

- i. A party aggrieved by a state court decision of the highest court in the state must seek review in the United States Supreme Court.
  - ii. The Rooker-Feldman doctrine does not apply when the federal court plaintiff seeks review of state administrative or executive determinations. Verizon of Maryland v. Public Service Commission, 122 S. Ct. 1753, 1759 n.3 (2002).
  - iii. The Rooker-Feldman doctrine does not apply merely because a “parallel” state court proceeding that was pending when the federal suit was commenced comes to judgment during the pendency of the federal suit. Exxon Mobil Corporation v. Saudi Basic Industries, 125 S. Ct. 1517 (2005).
  - iv. However, as the Court in Exxon Mobil recognized, in these circumstances the federal suit may be barred by preclusion (28 U.S.C. § 1738) or by one or more of the abstention doctrines.
  - v. The Court in Exxon Mobil stated 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 proceeding commenced” who seek to overturn the state court judgment. 125 S. Ct. at 1521-22.
- b. Supplemental Jurisdiction: State law claims that arise out of the same transaction as the § 1983 claim may be asserted under the federal court’s supplemental jurisdiction. 28 U.S.C. § 1367.
- i. A state law judicial review claim may come within supplemental jurisdiction. See, Chicago v. International College of Surgeons, 522 U.S. 156 (1997).
  - ii. A federal court with supplemental jurisdiction over a state law claim has discretion to decline to exercise that jurisdiction. 28 U.S.C. § 1367(a).

- iii. The supplemental jurisdiction statute does not override the Eleventh Amendment and thus does not authorize district courts to exercise supplemental jurisdiction over claims against non-consenting states. Raygor v. Regents of University of Minnesota, 534 U.S. 533 (2002). Cf. Jinks v. Richland County, 123 S. Ct. 1667 (2003) (supplemental jurisdiction may be asserted in § 1983 action against municipality).
- iv. The supplemental jurisdiction statute provides for the tolling of the limitations period for supplemental claims while they are pending in federal court and for 30 days following a federal court’s dismissal of a supplemental claim, unless state law provides for a longer tolling period. 28 U.S.C. § 1367(d). See Jinks v. Richland County, 123 S. Ct. 1667 (2003) (§ 1367(d) tolling provision is within Congress’s legislative power, does not impermissibly intrude upon states’ rights, and encompasses claims against municipal entities).
- v. The supplemental jurisdiction tolling provision does not apply when a federal court dismisses a supplemental claim against a state on Eleventh Amendment grounds. Raygor v. Regents of University of Minnesota, 534 U.S. 533 (2002).
- c. Removal Jurisdiction: State court defendants sued under § 1983 may remove the action to federal district court. 28 U.S.C. § 1441(a) and (b).
  - i. A state court complaint alleging a § 1983 federal constitutional claim and state law claim may be removed to federal court and the federal court may exercise supplemental jurisdiction over the state law claim. Chicago v. International College of Surgeons, *supra*.
  - ii. When a state court complaint asserts a § 1983 personal capacity claim and a claim against a state entity that is barred by the Eleventh Amendment, the action is removable to federal court, which can hear the non-barred personal capacity claim. Wisconsin Department of Corrections v. Schacht, 524 U.S. 381 (1998).
  - iii. The state’s removal of a state court suit to federal court waives the state’s Eleventh Amendment immunity from liability on a state law claim to which the state had waived its

sovereign immunity in the state court. Lapides v. Board of Regents, 535 U.S. 613 (2002).

- d. Abstention: Federal courts may decline to exercise their subject matter jurisdiction pursuant to one or more of the abstention doctrines. See XIX, infra.
- E. State Court Jurisdiction: State courts have concurrent jurisdiction over § 1983 claims. National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995); Howlett v. Rose, 496 U.S. 356 (1990); Felder v. Casey, 487 U.S. 131 (1988); Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987); Patsy v. Bd. of Regents, 457 U.S. 496 (1982). See Steinglass, Section 1983 Litigation in State Courts (West).
- F. Law Applicable In State Court Section 1983 Actions
  1. When a federal claim is asserted in state court, ““federal law takes the state courts as it finds them”” S. Steinglass, Section 1983 Litigation in State Courts, § 10.1, p. 10-1, (quoting Hart, The Relations Between State and Federal Law, 54 Colum. L. Rev. 489, 508 (1954)).
    - a. This means that “[s]tates may establish the rules of procedure governing litigation in their own courts[,]” for example, neutral rules of procedure governing service of process and substitution of parties, and these rules apply to federal claims Felder v. Casey, 487 U.S. 131, 138, 145 (1988).
  2. On the other hand, state courts may not apply state rules that unduly burden, frustrate or discriminate against the federal claim for relief. Felder v. Casey, supra (state notice-of-claim rule not applicable to § 1983 claims). See generally Brown v. Western Ky., 338 U.S. 294, 296-299 (1949) (local practice rules may not unduly burden the federal right).
  3. The elements of the § 1983 claim for relief and the defenses to the § 1983 claim are matters of federal law that may not be modified by state law. Howlett v. Rose, 496 U.S. 956 (1990).
    - a. The Supreme Court in Howlett held that state law immunity defenses may not be applied to a state court § 1983 claim.

4. In United States Supreme Court decisions concerning state court § 1983 actions, the Supreme Court has normally 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. See National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) (policies of Tax Injunction Act apply in state court § 1983 actions challenging state tax policies); Howlett v. Rose, *supra* (state law immunity defense is not applicable to § 1983 municipal liability claim); Felder v. Casey, *supra* (state notice-of-claim rules are not applicable in state or federal court § 1983 actions); Will v. Michigan Department of State Police, 491 U.S. 58 (1989) (for purpose of monetary liability under § 1983, in both state and federal court, states and state entities are not suable section 1983 persons).
  - a. However, state courts are not obligated to grant § 1983 defendants a right of interlocutory appeal from the denial of qualified immunity even when there is a right to an interlocutory qualified immunity appeal in federal court. Johnson v. Fankel, 520 U.S. 911 (1977).
5. Pleadings: It is unclear whether state courts are required to apply the federal court's liberal notice pleading standards in state court § 1983 actions. It has been suggested that "state courts that desire to apply strict pleading requirements should be able to do so only if their pleading rules do not burden § 1983." Steinglass, Litigating Section 1983 Actions in State Courts, p. 41 (2003), in 20<sup>th</sup> Annual Section 1983 Civil Rights Litigation (Practising Law Institute Course Handbook H-700 2003).
  - a. The Supreme Court has stated that: "Should this Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, desirable uniformity in adjudication of federal rights could not be achieved." Brown v. Western Railway of Alabama, 338 U.S. 294, 299 (1950) (action under Federal Employers' Liability Act).
6. Discovery: Some state court decisions hold that discovery in state court § 1983 actions is governed by the Federal Rules of Civil Procedure rather than by state law. Mann v. Alvarez, 242 A.D.2d 318, 661 N.Y.S.2d 250 (2d Dpt. 1997) (discovery of police officer personnel files is governed by the Federal Rules of Civil Proce-

dure rather than by New York Civil Rights Law § 50-a). See also Svaigsen v. City of New York, 203 A.D.2d 32, 609 N.Y.S.2d 894 (1<sup>st</sup> Dpt. 1994).

- a. Commentary: In the author's view discovery in state court § 1983 actions should be governed by neutral state discovery rules unless the state discovery rule unduly burdens, frustrates, discriminates against, or otherwise conflicts with the § 1983 claim for relief.
7. State courts sometimes have to decide whether a determination in a federal court § 1983 action precludes litigation of a state law claim in state court. See 1A M. Schwartz, Section 1983 Litigation: Claims and Defenses, § 11.13 (3d edition 1997).
- a. Federal preclusion principles generally apply in these circumstances.
  - b. If a federal court rejects a state law claim on the merits, that determination will normally preclude relitigation of that claim in state court. Id.
  - c. What if the state law claim was not asserted in the federal court action? When a § 1983 claim was litigated in federal court, and no state law claim was asserted in federal court, whether the federal court judgment precludes litigation of the state law claim in state court will normally depend upon the likelihood that the federal court would have asserted supplemental jurisdiction over the state law claim. Id.

## II. PLAINTIFFS

- A. A wide range of plaintiffs are entitled to sue under § 1983, including legal and illegal aliens, and profit and non-profit organizations. See 1A Schwartz, Section 1983 Litigation: Claims and Defenses Ch. 2 (4<sup>th</sup> ed. 2003).
1. However, the Supreme Court held that a Native American Tribe that sought to vindicate its sovereign status was not a "person" entitled to sue under § 1983, because "Section 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." Inyo County v. Paiute-Shoshone Indians, 123 S. Ct. 1887 (2003).

2. 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.
  - a. For example, Michael Newdow was clearly a “person” entitled to sue under § 1983, but the Supreme Court held that he did not have standing to challenge the constitutionality of the Pledge of Allegiance. Elk Grove United School District v. Newdow, 124 S. Ct. 2301 (2004).
  - b. There is extensive decisional law governing standing to sue in federal court. The heart of standing to sue is a showing of (1) actual or threatened injury (2) fairly traced to the defendant’s conduct and (3) a sufficient likelihood that the injury will be redressed by a favorable decision on the merits. See, e.g., Allen v. Wright, 468 U.S. 737 (1984).
  - c. To entitled standing to obtain prospective relief, the plaintiff must demonstrate a realistic probability that she will be subjected to the same injurious conduct. Los Angeles v. Lyons, 461 U.S. 95 (1983).

### III. CONSTITUTIONAL RIGHTS

- A. A very wide range of constitutional rights are enforceable under § 1983. See 1A Schwartz, Section 1983 Litigation: Claims and Defenses, Ch. 3 (4<sup>th</sup> ed. 2003).
  1. Section 1983 is not limited to Fourteenth Amendment Claims.
    - a. A section 1983 claim may be based upon violation of the Dormant Commerce Clause. Dennis v. Higgins, 498 U.S. 439 (1991)
    - b. However, the Supremacy Clause does not create rights enforceable under § 1983. Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).
      - i. When state action is alleged to violate a federal statute, the pertinent issue is whether the particular statute creates rights enforceable under § 1983. See Part IV, infra.
  2. Whether the plaintiff has stated a proper constitutional claim depends upon an interpretation of the particular constitutional provision at issue, not upon an interpretation of § 1983. See, e.g.,

Graham v. Connor, 490 U.S. 386 (1989) (claims of excessive force during arrest, investigatory stop, or other seizure are evaluated under Fourth Amendment objective reasonableness standard).

- a. The Court in Graham v. Connor rejected the existence of “a generic ‘right’ to be from excessive force, grounded. . . in ‘basic principles of § 1983 jurisprudence.’” 490 U.S. at 393.
  - i. “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.” Id. at 394.
3. Violations of state law are not enforceable under § 1983. See, e.g. Baker v. McCollan, 443 U.S. 137, 146 (1979) (“Just as ‘[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,’ Estelle v. Gamble, 429 U.S. 97, 106. . . (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.”) See also Daniels v. Williams, 474 U.S. 327 (1986) (negligence does not give rise to due process claim); Paul v. Davis, 424 U.S. 693 (1976) (defamation by a governmental official does not itself give rise to a due process claim).
  - a. Violations of state constitutional rights are not enforceable under section 1983. See, e.g., Bookman v. Shubzda, 945 F. Supp. 999 N.D. Tex. 1996).
4. When official conduct is not proscribed by a textually explicit provision of the Bill of Rights, the Supreme Court has generally rejected a substantive due process constitutional remedy and left the plaintiff to available state tort remedies. See, e.g. Collins v. Harker Heights, 503 U.S. 115 (1992) (safe working conditions); De Shaney v. Winnebago County Dept. of Social Services, 489 U.S. 189 (1989) (protection of children from parental abuse); Paul v. Davis, 424 U.S. 693 (1976) (defamation).
5. The Supreme Court recognized substantive due process protection in high speed police pursuit cases, but imposed a very demanding burden on plaintiffs’. County of Sacramento v. Lewis, 523 U.S. 833 (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).

#### IV. FEDERAL STATUTORY RIGHTS

- A. In some cases federal statutory rights may be enforced under § 1983. Maine v. Thiboutot, 448 U.S. 1(1980).
1. The Court in Thiboutot rejected the argument that only federal statutes dealing with “equal rights” or “civil rights” are enforceable under § 1983.
  2. However, not all federal statutes are enforceable under § 1983. See, e.g., City of Ranco Palos Verdes v. Abrams, 125 S. Ct. 1453 (2005); Gonzaga University v. Doe, 536 U.S. 273 (2002); Suter v. Artist M., 503 U.S. 347 (1992); Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1(1981).
  3. To seek redress through § 1983, “a plaintiff must assert the violation of a federal right, not merely a violation of federal law”. Blessing v. Freestone, 520 U.S. 329, 340 (1997). (citing Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989)). Accord Gonzaga University v. Doe, supra.
  4. The Supreme Court has identified three factors to determine whether a particular federal statute creates a federal right.
    - a. “First, Congress must have intended that the provision in question benefit the plaintiff.” Blessing, 520 U.S. at 340 (quoting Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 430 (1987)).
    - b. “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.” Blessing, 520 U.S. at 340-41 (quoting Wright, 479 U.S. at 430).
    - c. “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.” Blessing, 520 U.S. at 341 (citing Wilder v. Virginia Hospital Ass’n, 496 U.S. 498, 500 (1990); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981)).

5. The pertinent issue is not whether the legislative scheme generally creates enforceable rights, but whether the specific statutory provision at issue creates an enforceable right. Blessing v. Freestone, *supra*.
6. If the plaintiff demonstrates that a federal statute creates an enforceable right, there is “a rebuttable presumption that the right is enforceable under § 1983.” Blessing, 520 U.S. at 341. Accord City of Rancho Palos Verdes v. Abrams, *supra*.
7. Defendant has the burden of rebutting the presumption by showing that Congress intended to preclude enforcement under § 1983. See City of Rancho Palos Verdes v. Abrams, *supra*; Smith v. Robinson, 468 U.S. 992 (1984).
  - a. Congress may preclude enforcement under § 1983 either expressly or impliedly by creating a remedial scheme that is so comprehensive as to demonstrate a congressional intent to preclude enforcement under § 1983. Middlesex County Sewerage Authority v. National Sea Clammers Ass’n, 453 U.S. 1 (1981);
  - b. A congressional remedy that is very specific and circumscribed may indicate a congressional intent to preclude enforcement under § 1983. City of Rancho Palos Verdes v. Abrams, *supra*.
8. Recent Supreme Court decisions have imposed stringent standards for enforcing federal statutes under § 1983. Gonzaga University v. Doe, *supra*; Blessing v. Freestone, *supra*; Suter v. Artist M; *supra*. See also City of Rancho Palos Verdes v. Abrams, *supra*.
  - a. In Gonzaga University, the Court stated that to create an enforceable federal statutory right, Congress “must do so in clear and unambiguous terms – no less and no more than is required for Congress to create new rights under an implied right of action.” Gonzaga University, 536 U.S. at 290.
  - b. The Court in Gonzaga University strongly indicated that federal statutes enacted under the Spending Clause are unlikely to create private enforceable rights.
    - i. The Supreme Court has found Spending Clause legislation enforceable under § 1983 only twice Wilder v. Virginia Hospital Ass’n Authority, 496 U.S. 498 (1990); Wright v.

Roanoke Redevelopment and Housing Authority, 479 U.S. 418 (1987).

9. The lower courts are in disagreement as to when a federal regulation is enforceable under § 1983. See 1 M. Schwartz Section 1983 Litigation: Claims and Defenses § 4.04[A] (4<sup>th</sup> ed. 2004).

## **V. DEFENDANTS: SECTION 1983 “PERSONS”**

- A. A suit may be brought under § 1983 only against a “person” who acted under color of state law.
- B. The word “person” does not include a state, state agency or state official sued in an official capacity for damages. Will v. Michigan Dep’t of State Police, 491 U.S. 58 (1989).
  1. A state official sued in an official capacity is considered a “person” when sued for prospective relief. Will, 491 U.S. at 71 n.10.
  2. A state official sued in a personal capacity is a § 1983 person. Hafer v. Melo, 502 U.S. 21 (1991).
  3. Municipalities and municipal officials who are sued in either an official or personal capacity are section 1983 persons. Monell v. Department of Social Services, 436 U.S. 658 (1978) (municipalities and municipal officials sued in an official capacity.) Accord Howlett v. Rose, 496 U.S. 356 (1990).
    - a. A claim against an official in her official capacity is treated as a claim against the entity. See VII, infra.
  4. Courts sometimes must decide whether an official is a state or municipal policymaker in a particular area or on a particular issue. McMillian v. Monroe County, 520 U.S. 781 (1997).
    - a. This determination is “dependent on an analysis of state law.” McMillian, 520 U.S. at 786.
  5. Municipal departments, offices and commissions are not suable under § 1983. See 1A Schwartz at § 5.03[F].

## **VI. COLOR OF STATE LAW AND STATE ACTION**

- A. An essential ingredient of a § 1983 claim is that the defendant acted under color of state law. Flagg Bros v. Brooks, 436 U.S. 149 (1978).

- B. The Fourteenth Amendment imposes limitations only upon state action; it does not reach the conduct of private parties, no matter how discriminatory or harmful. Brentwood Academy v. Tennessee Secondary School Athletic Ass’n, 531 U.S. 288 (2001); American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
1. “[P]ersons victimized by tortious conduct of private parties must ordinarily explore other avenues of redress.” Roche v. John Hancock Mutual Life Ins. Co., 81 F.3d 249, 253 (1<sup>st</sup> Cir. 1996).
- C. The Supreme Court and the lower courts have generally treated color of state law and state action as meaning the same thing. Lugar v. Edmonson Oil Co. 457 U.S. 922 (1982).
1. A finding that the defendant was engaged in state action means that the defendant acted under color of state law.
  2. 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.
- D. The clearest case of state action (and action under color of state law) is a public official who carried out her official responsibilities in accordance with state law.
1. The only case in which the Supreme Court found that a state or local official who carried out her official responsibilities was not engaged in state action was Polk County v. Dodson, 454 U.S. 312 (1981), holding that a public defender’s representation of an indigent criminal defendant was not under color of state law. See West v. Atkins, 487 U.S. 42, 50 (1988) (discussing Polk County).
    - a. Polk County was based upon the facts that when representing criminal defendants, the public defender, although employed and paid by the state, does not act for the state, but acts as an adversary of the state, and not under color of state law, but pursuant to the attorney-client relationship with undivided loyalty to her client.
    - b. A private physician who provides medical services pursuant to a contract with the state acts under color of state law. West v. Atkins, supra; West seems to be have been based primarily upon the fact that the prison physician performs a governmental function and carries out a constitutional obligation imposed

upon the state. See American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40, 55-58 (1999) (discussing West).

- E. Abuse of Power: Officials who abuse official power act under color of state law. Monroe v. Pape, 365 U.S. 167 (1961).
1. “Misuse 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.”. United States v. Classic, 313 U.S. 299, 325-26 (1941) (quoted in Monroe v. Pape, 365 U.S. at 184).
  2. Courts often must determine whether an official abused governmental power or acted as a private individual, e.g., as an irate spouse. See 1A Schwartz, Section 1983 Litigation at § 5.05.
- F. Off-Duty Police Officers: To determine whether an off-duty police officer acted under color of state law, courts consider such factors as whether: an ordinance deemed the officer on-duty for 24-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). See, e.g., Pickrel v. City of Springfield, 45 F.3d 1115 (7<sup>th</sup> Cir. 1995); Pitchell v. Callan, 13 F.3d 545 (2d Cir. 1994); United States v. Tarpley, 945 F.2d 806 (5<sup>th</sup> Cir. (1991) cert. denied, 504 U.S. 917 (1992); Bonsignore v. City of New York, 683 F.2d 635 (2d Cir. 1982); Layne v. Sampley, 627 F.2d 12 (6<sup>th</sup> Cir. 1980); Stengel v. Belcher, 522 F.2d 438 (6<sup>th</sup> Cir. 1975), cert. dismissed, 429 U.S. 118 (1976).
- G. State Action Tests: Supreme Court state action decisional law has advanced five state action tests:
- symbiotic relationship
  - public function
  - close or joint nexus
  - joint participation
  - pervasive entwinement

1. This does not mean that all Supreme Court state action holdings have been based upon one of the above doctrines; at times the Court has found state action based upon ad hoc evaluations of the connections between the private party and the state. See Georgia v. McCollum, 505 U.S. 42 (1992) (criminal defense attorney’s exercise of race based peremptory challenge); Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991) (private civil litigant’s exercise at race based peremptory challenge) West v. Atkins, 487 U.S. 42 (1988) (private physician’s provision of medical care to inmates). See also discussion in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n, 531 U.S. 288 (2001).
- H. Symbiotic Relationship: The Supreme Court’s decision in Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) is often cited to support the principle that state action is present when the state and private party have a symbiotic relationship. See Moose Lodge v. Irvis, 407 U.S. 163, 175 (1972).
  1. Although never overruled, Burton has been read narrowly as supporting a finding of state action only when the state profited from the private wrong. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982).
  2. The Supreme Court denigrated Burton as one of its “early” state action decisions containing “vague” “joint participation” language, American Manufacturers Mutual Insurance Co. v. Sullivan, 526 U.S. 40 (1999).
- I. Public Function: State action is present when a private party carries out a function that has been historically and traditionally the “exclusive” prerogative of the state.
  1. Very few governmental functions satisfy this test.
    - a. The Supreme Court has found state action under the public function doctrine in cases involving political primaries, Terry v. Adams, 345 U.S. 461 (1953), and has stated that eminent domain is an example of an exclusively governmental power. See discussion in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).

- b. The decision in West v. Atkins, *supra* that a private physician’s provision of medical care to prison inmates constitutes state action was based in part upon the fact that the physician carries out a governmental function. See American Manufacturers Mututal Insurance Co. v. Sullivan, 526 U.S. at 55-58 (discussing West).
  2. The Supreme Court has held that the following functions do not come within this doctrine because they are not “exclusively” governmental functions:
    - a. insurance companies’ suspension of workers’ compensation benefits pending utilization committee review. American Manufacturers Mutual Ins. Co. v. Sullivan, 526 U.S. 40 (1999).
    - b. education of maladjusted children. Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
    - c. nursing home care. Blum v. Yaretsky, 457 U.S. 991 (1982).
    - d. coordination of amateur athletics. San Francisco Arts & Athletics v. United States Olympic Committee, 483 U.S. 522 (1987). See also National Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179 (1988).
    - e. forced sale of goods by a warehouse company to enforce a possessory lien. Flagg Bros. v. Brooks, 436 U.S. 149 (1974).
    - f. operation of a shopping mall. Hudgens v. NLRB, 424 U.S. 507 (1976).
    - g. provision of utility service. Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).
- J. Nexus Test: State action is present if the state “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.” Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).
  1. Under this test state authorization of private conduct is not sufficient to constitute state action. Flagg Bros v. Brooks, 436 U.S. 149 (1978); Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

2. A private party's mere use of a state furnished dispute resolution mechanism does not constitute state action. American Mutual Manufacturers Insurance Co. v. Sullivan, 526 U.S. 40 (1999).
  3. A private party's mere request for police assistance does not constitute state action. See e.g., Ginsberg v. Healy Car & Truck Leasing, 189 F.3d 268 (2d Cir. 1999).
  4. A private party's mere attempt to influence governmental action does not constitute state action. NCAA v. Tarkanian, 488 U.S. 179 (1988).
  5. State licensing and regulation, even if pervasive, does not itself support a finding of state action. Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metropolitan Edison co., 419 U.S. 345 (1974).
  6. State financial assistance, even if extensive, is not sufficient to support a finding of state action. Rendell-Baker v. Kohn, *supra* (no state action even though educational institution received almost all of its funding from state). See also Jackson v. Metropolitan Edison Co., *supra* (state grant of monopoly power).
  7. Private parties which are extensively regulated by the state, receive substantial governmental assistance, carry out important societal functions, and act pursuant to state authority, have been held not engaged in state action. See Randell Baker v. Kohn, *supra*; Blum v. Yaretsky, *supra*; Jackson v. Metropolitan Edison Co., *supra*.
- K. Joint Participation: State action is present when the state and private party jointly participated in the alleged wrong. See Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); Dennis v. Sparks, 449 U.S. 24 (1980); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).
1. Joint participation requires some type of conspiracy, agreement, or concerted action between the state and private party.
  2. To be considered joint actors, the state and private sector must share common goals. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).
    - a. In Tarkanian the Court found that there was no joint action between the NCAA and state university because they had diametrically opposite goals: the NCAA's goal was that the uni-

versity's head basketball coach be suspended while the university sought to retain its head coach.

- L. Pervasive Entwinement: The Supreme Court held that a statewide interscholastic athletic association was engaged in state action because the state was pervasively entwined with the association. Most significantly, 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. Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288 (2001).

## VII. CAUSATION

- A. Section 1983 by its terms authorizes the imposition of liability only upon a defendant who "subjects, or causes to be subjected, any citizen. . .or other person. . .to the deprivation of any rights" guaranteed by federal law.
- B. This language has been read by the Supreme Court has imposing a proximate cause requirement on § 1983 claims. Martinez v. California, 444 U.S. 277 (1980).
  - 1. In evaluating the causation issue, courts interpret § 1983 "against the background of tort liability that makes a [person] responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961). Accord Malley v. Briggs, 475 U.S. 335, 344 n.7 (1986).
- C. A section 1983 defendant may be held liable for "reasonably foreseeable consequences attributable to intervening forces, including acts of third parties." Warner v. Orange County Dept. of Probation, 115 F.3d 1068, 1071 (2d Cir. 1996).
- D. Section 1983 defendants 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. See, e. g., Martinez v. California, *supra*; Townes v. City of New York, 176 F.3d 138 (2d Cir.), *cert. denied*, 120 S. Ct. 398 (1999). See Section IX, *infra*.
  - 1. "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 superseding causes that avoid liabil-

ity of an initial actor.” Zahrey v. Coffey, 221 F.3d 342, 351 (2d Cir. 2000).

- E. Causation plays a significant role in § 1983 municipal liability claims that are based upon inadequate training, supervision, or hiring practices. Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997); City of Canton v. Harris, 489 U.S. 378 (1989).
  - 1. In these cases the Supreme Court decisional law states that the municipal policy or practice must be the “moving force,” “closely related,” the “direct causal link,” or “affirmatively linked” to the deprivation of plaintiff’s federally protected rights. See IX.
    - a. It is unclear whether these standards are the same as proximate cause or are more stringent.

### VIII. CAPACITY OF CLAIM

- A. A claim against an official in her official capacity is treated as a suit against the entity itself. Kentucky v. Graham v. Graham, 473 U.S. 159 (1985); Brandon v. Holt, 469 U.S. 464 (1985); Monell v. New York City Dept of Social Services, 436 U.S. 658, 690 n. 55 (1978).
- B. By contrast, a personal (or individual) capacity claim seeks monetary recovery payable out of the responsible official’s personal finances. Hafer v. Melo, 502 U.S. 21 (1991).
- C. In Hafer v. Melo supra, the Supreme Court outlined several distinctions between personal and official-capacity suits:
  - 1. In official capacity suits the plaintiff must show that enforcement of the entity’s policy or custom caused the violation of her federally protected rights.
  - 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 absent any showing that the violation of federally protected rights was caused by enforcement of a policy or practice.

- a. “[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.” Hafer v. Melo, 502 U.S. at 25 (quoting Kentucky v. Graham, 473 U.S. 159 (1985)).
4. Personal-capacity defendants may assert common-law immunity defenses, that is, either an absolute or qualified immunity. See Sections XIII (Absolute Immunities) and XIV (Qualified Immunity), *infra*.
- D. The complaint should clearly specify the capacity (or capacities) in which the defendant is sued. Hafer v. Melo, *supra*.
  1. When the capacity of claim is ambiguous most courts look to the “course of proceedings” to determine the issue. 1A Schwartz, Section 1983 Litigation at § 6.05.
  2. 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. *Id.*

## **IX. MUNICIPAL LIABILITY**

- A. Section 1983 authorizes the imposition of municipal liability, but not on the basis of respondeat superior. Monell v. New York City Department of Social Services, 436 U.S. 658 (1978).
  1. Therefore, a municipality may not be held liable solely because it hired an employee who became a constitutional wrongdoer.
- B. A municipality is subject to liability under § 1983 only when the violation of the plaintiff’s federally protected rights was caused by enforcement of (1) a municipal policy, (2) a custom or practice, or (3) a decision of a final policymaker. Monell v. New York City Department of Social Services, *supra*.
  1. “[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 injury that the government as an entity is responsible under § 1983.” Monell, 436 U.S. at 694.

- C. Municipal Liability may be based upon:
1. an express policy, such as an ordinance, regulation, or policy statement. Monell v. Dept of Social Services, 436 U.S. 658 (1978).
  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.’” St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970)).
  3. The decision of a person with “final policymaking authority.” Praprotnik, 485 U.S. at 123. See also Pembaur v. Cincinnati, 475 U.S. 469 (1986).
  4. The following types of municipal policies and practices may give rise to § 1983 liability:
    - a. deliberately indifferent training: City of Canton v. Harris, 489 U.S. 378 (1989).
    - b. deliberately indifferent supervision or discipline: See 1B Schwartz, Section 1983 Litigation at § 7.18.
    - c. deliberately indifferent hiring: Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397 (1997).
    - d. deliberately indifferent failure to adopt policies necessary to prevent constitutional violations. See e.g. Oviatt v. Pearce, 954 F.2d 1470 (9<sup>th</sup> Cir. 1992).
- D. A municipality may be held liable under § 1983 only when the enforcement of a municipal policy or custom was the “moving force” behind the violation of plaintiff’s federally protected rights. Board of County Commissioners v. Brown, 520 U.S. 397 (1997); City of Canton v. Harris, 489 U.S. 378 (1989).
- E. A “municipality may not assert the good faith of its officers or agents as a defense to liability under § 1983.” Owen v. City of Independence, 445 U.S. 622, 638 (1980).
1. “[U]nlike governmental municipal officials, municipalities do not enjoy immunity from suit – either absolute or qualified under § 1983.” Leatherman v. Tarrant County, 507 U.S. 163, 166 (1993). See, e.g., Burge v. Parish of Tammany, 187 F.3d 452

(5<sup>th</sup> Cir. 1999) (absolute prosecutorial immunity not available in official capacity suit); Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2d Cir. 1992) (municipality may not assert legislative immunity).

- F. Although compensatory damages and equitable relief may be awarded against a municipality under § 1983, Monell v. Department of Social Services, *supra*, municipalities are immune from punitive damages. City of Newport v. Fact Concerts, 453 U.S. 247 (1981).
  - 1. Since 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.
- G. State law immunities may not be asserted by municipalities sued under § 1983. Howlett v. Rose, 496 U.S. 356 (1990) (state court § 1983 action). *See also*, Alden v. Maine, 527 U.S. 706, 740 (1999) (reaffirming Howlett)
- H. Federal courts may not impose a heightened pleading requirement for § 1983 municipal liability claims. Leatherman v. Tarrant County, 507 U.S. 163 (1993).
  - 1. This means that Fed. R. Civil 8's notice pleading standard governs § 1983 municipal liability claims.
  - 2. Even after Leatherman, however, some courts reject wholly conclusory allegations of municipal policy or practice. *See, e.g.* Spiller v. Texas City, 130 F.3d 162 (5<sup>th</sup> Cir. 1997).
- I. Municipal liability may be based upon a single decision by a municipal official who has final policymaking authority. St. Louis v. Praprotnik, 485 U.S. 112 (1988); Pembaur v. Cincinnati, 475 U.S. 469 (1986).
  - 1. Whether an official has final policymaking authority is an issue of law determined by the court by reference to state and local law. (Praprotnik; Pembaur).
  - 2. The mere fact that an official has discretionary authority is not a sufficient basis for imposing municipal liability. Pembaur, 475 U.S. at 481.
  - 3. Courts frequently must determine whether an official is a state or municipal policymaker. McMillian v. Monroe County, 520 U.S. 781 (1997).

- a. This issue, too, is determined by reference to state law. (McMillian).
  - b. When an official is a local policymaker, the entity cannot claim Eleventh Amendment immunity.
  - c. An official may be a state policymaker for one purpose and a municipal policymaker for another purpose.
    - i. For example, courts commonly hold that district attorneys are state policymakers when prosecuting criminal cases, but municipal policymakers for purposes of carrying out administrative and supervisory functions, such as the training of assistant district attorneys. See, e.g. Carter v. Philadelphia, 181 F.3d 339 (3d Cir.), cert. denied, 120 S. Ct. 499 (1999); Walker v. City of New York, 974 F.2d 293 (2d Cir. 1992), cert. denied, 507 U.S. 961 (1993); Baez v. Hennessey, 853 F.2d 73 (2d Cir. 1988), cert. denied, 488 U.S. 1014 (1989).
- J. Section § 1983 municipal liability may be based upon deliberately indifferent training that was the moving force of the violation of the plaintiff's federally protected rights. City of Canton v. Harris, 489 U.S. 378 (1989).
1. To make out such a claim the plaintiff must demonstrate specific training deficiencies, and either
    - a pattern of constitutional violations of which policymaking officials are charged with knowledge, or
    - a showing that training is obviously necessary to avoid constitutional violations, e.g., training in the constitutional limits on a police officer's use of deadly force.
  2. 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. City of Canton, 489 U.S. at 390.
  3. The Court in City of Canton held that negligent or even grossly negligent training does not give rise to a § 1983 municipal liability claim.

4. City of Canton's fault (“deliberate indifference”) and causation (“moving force”) standards are stringent.
  - a. The Court in Canton expressly stated that federal courts should not lightly second guess municipal training policies.
  - b. Although numerous municipal liability claims based upon allegedly inadequate training are alleged, relatively few succeed. See 1A Schwartz, Section 1983 Litigation: Claims and Defenses, Ch. 7 (4<sup>th</sup> ed. 2004).
- K. Municipal liability can be premised upon deliberately indifferent deficient hiring of a constitutional wrongdoer, but only if plaintiff demonstrates that the hired officer “was highly likely to inflict the particular injury suffered by the plaintiff.” Board of Commissioners of Bryan County v. Brown, 520 U.S. 397, 412 (1997).
  1. The fault and causation standards are even more stringent in inadequate hiring cases than in inadequate training cases. See Board of Commissioners of Bryan County v. Brown, supra.

## **X. SUPERVISORY LIABILITY**

- A. Supervisory liability cannot be based upon respondeat superior, but only on the basis of the supervisor’s own acts or omissions.
- B. It is important to distinguish between supervisory and municipal liability.
  1. Supervisory liability is a form of personal liability; municipal liability is a form of entity liability.
  2. Supervisors may assert a common law absolute or qualified immunity defense; municipalities may not. See Section IX, supra.
- C. To impose supervisory liability, there must be sufficient causation, that is, an “affirmative link,” between the supervisor’s wrongs and the violation of the plaintiff’s federally protected right.
- D. The circuit courts have adopted various standards to determine whether supervisory liability should be imposed. For examples, see:
 

First Circuit: Matos v. Toledo, 135 F.3d 182, 192 (1<sup>st</sup> Cir. 1998) (supervisory encouragement, condemnation, acquiescence or deliberate indifference). See also Camilo-Robles-Hoyos, 151 F.3d 1 (1<sup>st</sup> Cir. 1998), cert. denied, 525 U.S. 1105 (1999).

Second Circuit: Colon v. Coughlin, 58 F.3d 865 (2d Cir. 1995) (direct participation in wrongdoing, failure to remedy wrong after 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 (2d Cir. 2003); Poe v. Leonard, 282 F.3d 123 (2d Cir. 2002).

Third Circuit: Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) (supervisor must have had knowledge of and acquiesced in unlawful conduct). Accord Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995).

Fourth Circuit: Carter v. Morris, 164 F.3d 215 (4<sup>th</sup> Cir. 1999) (actual or constructive knowledge of risk or constitutional injury and deliberate indifference). See also Randall v. Prince George's County, 302 F.3d 188 (4<sup>th</sup> Cir. 2002).

Fifth Circuit: Doe v. Dallas Independent S.D., 153 F.3d 211 (5<sup>th</sup> Cir. 1998) (deliberate indifference).

Sixth Circuit: Shehee v. Luttrell, 199 F.3d 295 (6<sup>th</sup> Cir. 1999) (supervisory liability cannot be based upon mere failure to act; the supervisor must have at least implicitly authorized, approved, or knowingly acquiesced in unconstitutional conduct of subordinate officers); Poe v. Haydon, 853 F.2d 418 (6<sup>th</sup> Cir. 1988); Hays v. Jefferson County, 668 F.2d 869 (6<sup>th</sup> Cir.), cert. denied, 459 U.S. 833 (1982). See also Combs v. Wilkinson, 315 F.3d 548 (6<sup>th</sup> Cir. 2002).

Seventh Circuit: Jones v. Chicago, 856 F.2d 985 (7<sup>th</sup> 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 (7<sup>th</sup> Cir. 1997).

Eighth Circuit: Green v. Branson, 108 F.3d 1296 (10<sup>th</sup> Cir. 1997) (deliberate indifference).

Ninth Circuit: Cunningham v. Gates, 229 F.3d 1271, 1292 (9<sup>th</sup> Cir. 2000) (“Supervisors can be held liable for: (1) their own culpable action or inaction in the training, supervision or control of subordinates; (2) their acquiescence in the constitutional deprivation in which a complaint is made; or (3) for conduct that showed a reckless or callous indifference to the rights of others.”)

Tenth Circuit: Lankford v. City of Hobart, 73 F.3d 283 (10<sup>th</sup> Cir. 1996) (“personal direction” or actual knowledge of wrongdoing and acquiescence).

Eleventh Circuit: Cottone v. Jenne, 326 F.3d 1352 (11<sup>th</sup> Cir. 2003) (supervisor either (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 (11<sup>th</sup> Cir. 2003).

## **XI. RELATIONSHIP BETWEEN INDIVIDUAL AND MUNICIPAL LIABILITY**

- A. When claims are brought against an official in her personal capacity and against a municipal entity, the district court has discretion either to bifurcate the claim, or to try them jointly. Fed.R.Civ.P. 42 (b). See, e.g., Amato v. City of Saratoga Springs, 170 F.3d 311 (2d Cir. 1999).
- B. When the claims are bifurcated, a determination in the first phase that the individual officer defendants did not violate the plaintiff’s federally protected rights will normally result in dismissal of the municipal liability claim. Los Angeles v. Heller, 475 U.S. 796 (1986).
1. This is because, under Heller, a municipality cannot be held liable under § 1983 unless some official (or officials) violated the plaintiff’s federally protected rights.
  2. There may be situations, however, in which the named defendant(s) did not violate plaintiff’s federally protected rights, but the plaintiff’s rights were violated by the joint action of a group of officers, or by non-defendant officials.
    - a. Under these circumstances dismissal of the claim against the individual officer defendant would not result in dismissal of the municipal liability claim. See Fairley v. Luman, 281 F.3d 913 (9<sup>th</sup> Cir. 2002); Speer v. City of Wynne, 276 F.3d 980 (8<sup>th</sup> Cir. 2002); Barrett v. Orange County, 194 F.3d 341 (2d Cir. 1999); Anderson v. Atlanta, 778 F.2d 678 (11<sup>th</sup> Cir. 1985); Garcia v. Salt Lake City, 768 F.2d 303 (10<sup>th</sup> Cir. 1985).

3. The fact that the plaintiff's claim against the individual officer defendant is defeated by qualified immunity does not automatically result in dismissal against the municipality because, even though the officer was protected by qualified immunity, the officer may have violated plaintiff's federally protected rights; the qualified immunity determination may mean only that defendant did not violate plaintiff's clearly established federally protected rights. See, e.g., Doe v. Sullivan County, 956 F.2d 545 (6<sup>th</sup> Cir.), cert. denied, 113 S. Ct. 187 (1992).
  - a. Remember, the municipality may not assert qualified immunity.
- C. The interplay of the rules governing qualified immunity and municipal liability result in a cost allocation scheme among the municipality, the individual officer, and the plaintiff whose federally protected rights were violated. Owen v. City of Independence, 445 U.S. 622, 657 (1980):
  1. The municipality will be held liable when the violation of federally protected rights 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 rights (and thus not shielded by qualified immunity).
  3. The plaintiff whose federally protected rights were violated will not be entitled to recovery and will "absorb the loss" when the violation of rights is not attributable to a municipal policy or practice and the individual officer did not violate plaintiff's clearly established federal rights.

## **XII. STATE LIABILITY: THE ELEVENTH AMENDMENT**

- A. Section 1983 claims asserted in federal court that seek to impose state governmental liability may be defeated by Eleventh Amendment state sovereign immunity.
- B. Despite the language of the Eleventh Amendment referring to suit by a citizen of one state against another state, the Eleventh Amendment is interpreted to grant sovereign immunity protection even when a state is sued in federal court by one of its own citizens. Hans v. Louisiana, 134 U.S. 1 (1890). See Seminole Tribe v. Florida, 517 U.S. 44 (1996) (reaffirming Hans).

- C. The Eleventh Amendment applies to federal court § 1983 claims because, in enacting the original version of § 1983, Congress did not intend to abrogate the states' Eleventh Amendment immunity. Quern v. Jordan, 440 U.S. 332 (1979).
- D. A federal court award of damages against a state, state agency, or state official sued in an official capacity is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974).
- E. Prospective relief against a state official in her official capacity to prevent future federal constitutional or federal statutory violations is not barred by the Eleventh Amendment. Ex parte Young, 209 U.S. 123 (1908).
  - 1. The Court's reasoning in Young that a state official who violated federal law did not act for the state, but acted as an individual, is a fiction because the prospective relief operates in substance against the state and may impact substantially upon the state treasury.
  - 2. The Young fiction was born of necessity to enable the federal courts to compel state governmental compliance with federal law.
  - 3. To come within the Young fiction, the plaintiff must name the responsible state official in her official capacity; a claim for prospective relief against the state itself, or a state agency, will be barred by the Eleventh Amendment. Alabama v. Pugh, 438 U.S. 781 (1978).
    - a. The Young doctrine applies when the complaint alleges an ongoing violation of federal law and seeks prospective relief. Verizon of Maryland v. Public Service Commission, 122 S. Ct. 1753, 1760 (2002).
  - 4. Declaratory relief is within the Young doctrine, but only when there are ongoing or threatened violations of federal law. Green v. Mansour, 474 U.S. 64 (1985).
  - 5. When a federal court grants Young prospective relief, it has power to enforce that relief, including by monetary sanctions payable out of the state treasury. Hutto v. Finney, 437 U.S. 678 (1978).

- a. Similarly, a federal court's enforcement against a state of a consent decree that is based upon federal law does not violate the Eleventh Amendment. Frew v. Hawkins, 124 S. Ct. 899 (2004).
6. The Young doctrine does not apply to state law claims that are pendent ("supplemental") to the § 1983 claim. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984).
- F. The Eleventh Amendment does not encompass § 1983 claims for damages against state officials in their personal capacities. Hafer v. Melo, 502 U.S. 21 (1991).
  1. Relief awarded on such a claim would not be payable out of the state treasury.
  2. The fact that the state agreed to indemnify the state official for a personal-capacity monetary judgment does not invoke Eleventh Amendment protection because indemnification would be a voluntary policy choice of state government, not compelled by mandate of the federal court. See, e.g., Stoner v. Wisconsin Dept. of Agriculture, 50 F.3d 481 (7<sup>th</sup> Cir. 1995).
- G. The Eleventh Amendment does not protect municipalities. Mt. Healthy City S.D. v. Doyle, 429 U.S. 274 (1977).
- H. Federal courts frequently have to determine whether an entity should be treated as an arm of the state or of local government. See Mt. Healthy City S.D. v. Doyle, supra. See 1A Schwartz, Section 1983 Litigation at Ch. 8.
  1. In making this determination the most important factor is whether the federal court judgment would be satisfied from state or municipal funds.
- I. The state's removal of a state court suit to federal court waives the state's Eleventh Amendment immunity from liability on a state law claim to which the state had waived its sovereign immunity in the state court. Lapides v. Board of Regents, 535 U.S. 613 (2002).
- J. A district court's denial of Eleventh Amendment immunity is immediately appealable to the court of appeals. Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, 506 U.S. 139 (1993).

### XIII. PERSONAL CAPACITY CLAIMS: ABSOLUTE IMMUNITIES

- A. Officials sued for monetary relief in their personal capacities may be entitled to assert a common law defense of absolute or qualified immunity.
- B. In general, absolute immunity may be asserted by judges, prosecutors, witnesses, and legislators; executive and administrative officials may assert qualified immunity. (See Part XIV, *infra*).
- C. Whether an official is entitled to assert an absolute as opposed to qualified immunity depends upon “the nature of the function performed, not the identity of the actor who performed it.” Kalina v. Fletcher, 522 U.S. 118, 127 (1997) (quoting Forrester v. White, 484 U.S. 219, 229 (1988)).
  1. Thus, an official may be entitled to absolute immunity for carrying out one function, and qualified immunity for another.
    - a. 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 of court employees. Forester v. White, *supra*.
    - b. Prosecutors may claim absolute prosecutorial immunity for their advocacy functions, but only qualified immunity for their investigatory and administrative functions. See XII E, *infra*.
- D. Judicial Immunity: Absolute judicial immunity protects judges from liability for damages for their judicial acts so long as they do not act in the clear absence of all jurisdiction. Mireles v. Waco, 502 U.S. 9 (1991); Stump v. Sparkman, 435 U.S. 349 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 13 Wall 335; 80 U.S. 335 (1871).
  1. Judges may be protected by absolute immunity even if their actions are unlawful, in excess of authority, or motivated by malice. Stump v. Sparkman, *supra*.
  2. Judicial immunity is designed to allow a judge to act upon her “own convictions, without apprehension of personal consequences to [herself].” Stump v. Sparkman, 435 U.S. 349, 355 (1978); Bradley v. Fisher, 13 Wall 335, 337, 20 L.Ed. 646 (1871).

3. A judge does not lose absolute immunity simply because she acted in excess of jurisdiction; absolute immunity is lost only in the rare case when the judge acted in the clear absence of all jurisdiction, e.g., a surrogate court judge who tries a felony. See generally Stump v. Sparkman, supra.
  4. To determine whether the judge performed a “judicial act,” consideration is given to whether the judge engaged in action normally performed by a judge, and whether the parties dealt with the judge in her judicial capacity. Mierles v. Waco, 502 U.S. 9 (1991) (judge who ordered bailiff to use excessive force to bring attorney to courtroom performed judicial act); Stump v. Sparkman, supra, (acts were judicial even though informal and irregular, e.g., no docket number, no filing with clerk’s office, and no notice to minor subject to sterilization order).
  5. Administrative hearing officers may claim absolute quasi-judicial immunity if they are sufficiently independent (politically) and if the hearing affords sufficient procedural safeguards so that the administrative proceeding fairly resembles the judicial process. Compare Butz v. Economou, 438 U.S. 478 (1978) (federal hearing officers found entitled to assert absolute immunity) with Cleavinger v. Saxner, 474 U.S. 193 (1985) (prison officials who held disciplinary hearings were not entitled to absolute immunity because of lack of independence and insufficient procedural safeguards).
  6. Court reporters may not assert absolute immunity. Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993).
  7. Judges’ law clerks may claim absolute immunity. Olivia v. Heller, 839 F.2d 37 (2d Cir. 1988).
- E. Prosecutorial Immunity: Prosecutors are absolutely immune when acting “as an advocate for the State” and when engaging in conduct that is “intimately associated with the judicial phase of the criminal process.” Imbler v. Pachtman, 424 U.S. 409, 430-31 (1976).
1. Thus, prosecutors are absolutely immune for such actions as:
    - deciding whether to prosecute;
    - pretrial litigation activities concerning applications for arrest and search warrants, bail applications, and suppression motions;

- preparation for trial, including interviewing witnesses and evaluating evidence;
  - plea bargaining.
2. Prosecutors, however, may not claim absolute immunity for investigative and administrative functions.
  3. Thus, prosecutors may assert only qualified immunity for:
    - holding a press conference. Buckley v. Fitzsimmons, 509 U.S. 259 (1993);
    - engaging in investigative activity prior to the establishment of probable cause to arrest. Buckley v. Fitzsimmons, *supra*;
    - advising the police in the investigative phase that there “probably” was probable cause to arrest. Burns v. Reed, 500 U.S. 478 (1991).
  4. It is frequently difficult to determine whether the prosecutor’s actions should be characterized as advocacy as opposed to investigative or administrative. See e.g., Kalina v. Fletcher, 522 U.S. 118 (1997) (prosecutor protected by absolute prosecutorial immunity for preparing and filing motion for arrest warrant, but not for certifying facts to support probable cause, because that was function of complaining witness).
- F. Witnesses: Witnesses, including police officers, who testify in judicial proceedings are protected by absolute immunity. Briscoe v. LaHue, 460 U.S. 325 (1983).
1. Complaining witness, however, are not entitled to absolute immunity. See Malley v. Briggs, 475 U.S. 335, 340 (1986); Cervantes v. Jones, 188 F.3d 805 (7<sup>th</sup> Cir. 1999), *cert. denied*, 120 S. Ct. 1159 (2000); White v. Frank, 855 F.2d 956 (2d Cir. 1988).
  2. The “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.” Cervantes v. Jones, *supra* at 810.
- G. Legislators: State and local legislators enjoy absolute immunity for their legislative acts. Bogan v. Scott-Harris, 523 U.S. 44 (1998); Tenney v. Brandhove, 341 U.S. 367 (1951).

1. Under the functional approach the critical issue is whether the official was engaged in a legislative activity. See, e.g., Bogan v. Scott-Harris, supra, (city council member who introduced budget eliminating plaintiff's employment position and mayor who signed bill into law protected by absolute immunity); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) (state judges' promulgation of attorney professional responsibility rules protected by absolute immunity); Tenney v. Brandhove, supra (legislators who carried out legislative investigation protected by absolute immunity).

#### **XIV. PERSONAL LIABILITY: QUALIFIED IMMUNITY**

- A. Qualified immunity may well be the most important issue in § 1983 litigation.
  1. It is a very frequently asserted as a defense to § 1983 personal capacity claims for damages.
  2. It disposes of a high percentage of § 1983 personal capacity claims for damages in favor of the defendant.
  3. It is not just an immunity from liability, but an "immunity from suit," that is, from the burdens of having to defend the litigation. See Mitchell v. Forsyth, 472 U.S. 511 (1985). Accord Saucier v. Katz, 533 U.S. 194 (2001).
- B. 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. Harlow v. Fitzgerald, 457 U.S. 800 (1982). See also, Groh v. Ramirez, 124 S. Ct. 1284 (2004); Hope v. Pelzer, 536 U.S. 730 (2002); Saucier v. Katz, 533 U.S. 194 (2001); Wilson v. Layne, 525 U.S. 603, (1999); Anderson v. Creighton, 483 U.S. 635 (1987).
  1. That the official may have violated clearly established state law is generally irrelevant. Davis v. Scherer, 468 U.S. 183 (1984).
  2. The Harlow test is an objective reasonableness test.
    - a. An official who violated clearly established federal law did not act in an objectively reasonable manner.

- b. The official's subjective motivation is irrelevant to the qualified immunity defense, Harlow v. Fitzgerald, *supra*, but may be relevant to the constitutional claim asserted, Crawford-El v. Britton, 523 U.S. 574 (1998).
  3. The Supreme Court described the Harlow test as a "fair warning" standard, that is, if the federal law was clearly established, the official is on notice that violation of that federal law may lead to personal monetary liability. Hope v. Pelzer, *supra*; United States v. Lanier, 520 U.S. 259 (1997).
    - a. In Hope v. Pelzer, *supra*, the Supreme Court held that under the particular circumstances, 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.
      - i. The Supreme Court in Hope ruled that the Eleventh Circuit 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.
      - ii. "[O]fficials can be on notice that their conduct violates established law even in novel factual circumstances." Hope, 122 S. Ct. at 2516.
      - iii. In Hope, the Court found that the defendants had fair warning that their conduct was unconstitutional from (a) the reasoning of Eleventh Circuit authority, although not factually on all fours; (b) a regulation of the State Department of Corrections relevant to use of the hitching post that had been ignored by prison officials; and (c) a U.S. Justice Department transmittal to the State Department of Corrections advising it that its use of the hitching post was unconstitutional. (Note that the Court relied upon this last factor even though the record did not show that the Department of Justice's position had been communicated to the defendant state officials.
4. The fact that an official claims to have acted on advice of counsel or pursuant to orders of a superior normally will not by itself protect the official if the official violated clearly established federal law. See 1A Schwartz, Section 1983 Litigation: Claims and Defenses, Ch. 9A (4<sup>th</sup> ed. 2004).

5. The Second Circuit held that an official who acted pursuant to a presumptively constitutional state statute will normally be protected by qualified immunity. Connecticut v. Crotty, 346 F.3d 84 (2d Cir. 2003).
  6. Qualified immunity protects all but the “plainly incompetent” public official. Malley v. Briggs, *supra*.
- C. Officials who carry out executive and administrative functions may assert qualified immunity. See, e.g. Groh v. Ramirez, 124 S. Ct. 1284 (2004).
- D. So far the Supreme Court has not allowed private party state actors to assert qualified immunity. See Richardson v. McKnight, 521 U.S. 398 (1997) (private prison guards); Wyatt v. Cole, 504 U.S. 158 (1992) (use of state replevin statute).
1. The Supreme Court in Richardson and Wyatt left open whether the defendants in those cases were entitled to assert a good faith defense.
    - a. Some lower courts have allowed the private party state actor defendant to assert a good faith defense that implicates the defendant’s subjective intent. See Vector Research v. Howard & Howard, 76 F.3d 692 (6<sup>th</sup> Cir. 1996); Jordan v. Fox, Rothschild, O’Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994); Wyatt v. Cole, 994 F.2d 1113 (5<sup>th</sup> Cir.), *cert. denied*, 510 U.S. 977 (1993).
  2. It is unclear whether private parties who carry out public functions, such as mental health evaluations or civil commitments, may assert qualified immunity.
    - a. For post-Richardson v. McKnight, *supra*, decisions, compare e.g. Camilo-Robles v. Hoyos, 151 F.3d 1 (1<sup>st</sup> Cir. 1998) (psychiatrists under contract with state to assist police department in evaluating police officers were entitled to assert qualified immunity because they performed necessary function within police department) with Jensen v. Lane County, 222 F.3d 570 (9<sup>th</sup> Cir. 2000) (private physician who provided services to county relating to civil commitment was not entitled to assert qualified immunity); Halvorsen v. Baird, 146 F.3d 680 (9<sup>th</sup> Cir. 1998) (private not-for-profit organization providing municipality with involuntary commitment services for

- inebrates was not entitled to assert qualified immunity; fact organization was not-for-profit was not a sufficient basis for distinguishing Richardson).
3. A private defendant who conspired with government officials is not entitled to assert qualified immunity. Toussie v. Powell, 323 F.3d 178 (2d Cir. 2003).
    - a. For pre-Richardson decisions allowing the defendant to assert qualified immunity, see Young v. Murphy, 90 F.3d 1225 (7<sup>th</sup> Cir. 1996) (private doctor hired by county to evaluate individual's mental competency); Sherman v. Four County Counseling Center, 987 F.2d 397 (7<sup>th</sup> Cir. 1993) (private hospital that accepted and treated mental patients pursuant to court order).
    - b. An important factor may be whether the defendant acted under government supervision. See Richardson v. McKnight, *supra* (fact private prison guards acted without government supervision was important factor leading to denial of right to assert qualified immunity).
  - E. Qualified immunity normally is 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.
    1. The Supreme Court's goal in defining qualified immunity in wholly objective terms is to enable district courts to resolve qualified immunity, to the greatest extent possible, as a matter of law, pretrial and even pre-discovery. See Hunter v. Bryant, 502 U.S. 224 (1991).
    2. In many cases, however, disputed issues of fact must be resolved in order to determine whether the official violated clearly established federal law. Crawford-El v. Britton, *supra*.
  - F. The Supreme Court holds that when qualified immunity is asserted as a defense, the court must first determine if the complaint states a violation of federally protected rights. Hope v. Pelzer, 536 U.S. 730 (2002); Saucier v. Katz, 533 U.S. 194 (2001); Wilson v. Layne, 526 U.S. 603 (1999); Conn v. Gabbert, 526 U.S. 286 (1999); County of Sacramento v. Lewis, 523 U.S. 833 (1998); Siegert v. Gilley, 500 U.S. 226 (1991).

1. The Supreme Court explained that if qualified immunity is always taken up first, it is hard for constitutional standards to develop.
  - a. Deciding the constitutional question before addressing the qualified immunity question promotes clarity in the legal standards for official conduct. Wilson v. Layne, *supra*. See also Saucier v. Katz, *supra*.
2. Nevertheless, some circuit courts sometimes prefer to reach the immunity issue first. See, e.g. Horne v. Coughlin, 178 F.3d 603 (2d Cir. 1999).
  - a. The Supreme Court itself had deviated from the mandated methodology. See, e.g.; Brosseau v. Haugen, 125 S. Ct. 596 (2004)
- G. Normally, a controlling precedent of either the United States Supreme Court, the particular circuit, or the highest court in the state is necessary to clearly establish the federal law. Wilson v. Layne, *supra*.
  1. For federal law to be clearly established, there must be fairly close factual correspondence between the prior precedents and the case at hand. Anderson v. Creighton, *supra*.
  2. 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.” Wilson v. Layne, 526 U.S. at 612.
  3. A conflict in the lower courts is a strong indicator that the law was not clearly established. Wilson v. Layne, *supra*.
  4. The law might be clearly established even in the absence of controlling precedent if the official’s conduct was so obviously unconstitutional that the issue wasn’t litigated previously. See Wilson v. Layne, 526 U.S. at 621 (Stevens, J., dissenting) (sometimes the “easiest cases don’t even arise”). See also Hope v. Pelzer, *supra*.
- H. The qualified immunity defense applies even when, as in Fourth Amendment challenges to arrests and searches, the constitutional standard itself is an objective reasonableness standard. Anderson v. Creighton, 483 U.S. 635 1987).

1. The qualified immunity objective reasonableness test applies to Graham-Connor, 490 U.S. 386 (1989) Fourth Amendment excessive force arrest cases. Brosseau v. Haugen, 125 S. Ct. 596 (2004); Saucier v. Katz, *supra*.
2. Applying qualified immunity to constitutional claims litigated under an objective reasonableness standard gives the official two layers of reasonableness protection, one under the Fourth Amendment, *see, e.g.* Beck v. Ohio, 379 U.S. 89 (1964), and another under qualified immunity, Anderson v. Creighton, *supra*.
  - a. This can lead to the awkward conclusion that the official acted in a reasonably (for immunity purposes) unreasonable (for constitutional purposes) manner.
    - i. Courts typically try to avoid this awkwardness 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. Hunter v. Bryant, 502 U.S. 224, 227 (1987).
    - ii. In excessive force arrest cases, police officers who make reasonable mistakes in evaluating whether a particular use of force is legal in the circumstances are protected by qualified immunity. Saucier v. Katz, *supra*. *See also* Brosseau v. Haugen, 125 S. Ct. 596 (2004).
- I. There is a potential tension between a constitutional claim, such as a free speech retaliation claim which implicates the defendant's subjective intent, and qualified immunity, which is an objective reasonableness standard under which defendant's intent is irrelevant.
  1. In these cases the Supreme Court has instructed the lower courts to follow the Federal Rules of Civil Procedure and not place special burdens on plaintiffs who are faced with summary judgment qualified immunity motions. Crawford-El v. Britton, 523 U.S. 574 (1988).
    - a. The federal courts should not rewrite the Federal Rules of Civil Procedure, and should apply normal summary judgment principles. (Crawford).
    - b. Placing unduly harsh burdens on plaintiffs may rob meritorious claims of their fair day in court. (Crawford).

- c. Existing federal court pleading, motion, and discovery rules and the Prison Litigation Reform Act adequately protect defendants against insubstantial constitutional claims. (Crawford).
- 2. If qualified immunity cannot be decided until material factual disputes are resolved, the district court may allow limited discovery on facts relevant to the immunity defense.
  - a. Crawford-El sets forth various options that the district court can invoke:
    - i. allow the plaintiff to take a “focused deposition” of the defendant on the issue of retaliatory motive;
    - ii. allow discovery only on “historical facts” before allowing discovery on the defendant’s motive;
    - iii. order the plaintiff to file a reply or grant defendant’s motion for a more definite statement requiring specific factual allegations of defendant’s conduct and motive before allowing any discovery.
  - b. The decision in Crawford-El reads like a “Manual For District Court Judges For Resolving Qualified Immunity When Facts Are In Dispute.”
- J. When facts that are relevant to qualified immunity are in dispute, it may be proper for the district court to:
  - 1. submit the factual issues and the immunity defense to the jury under proper instructions that (a) tell the jury what the clearly established federal law is, and (b) describe the nature of qualified immunity; or
  - 2. submit the factual issues that are material to qualified immunity to the jury by special verdicts, while the district court reserves for itself the power to determine the qualified immunity defense in light of the jury’s responses to the special verdicts.
    - a. This is the prevailing view in the circuits. See, e.g. Stephenson v. Doe, 332 F.3d (2d Cir. 2003).
- K. 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, if the immunity appeal can be

decided on appeal as a matter of law. Behrens v. Pelletier, 516 U.S. 299 (1996); Johnson v. Jones, 515 U.S. 304 (1995); Mitchell v. Forsyth, 472 U.S. 511 (1985).

1. It is not always clear whether an immunity appeal presents an issue of law or fact.
  - a. If the district court denies a summary judgment immunity motion because there are disputed issues of material fact, defendant may not take an immediate appeal that contests the district court's factual evaluations. Johnson v. Jones, *supra*.
  - b. An immunity appeal taken by the defendant presents an issue of law if it:
    - i. contests the materiality of a disputed issue of fact found by the district court; or
    - ii. claims entitlement to qualified immunity even on the basis of the facts alleged by the plaintiff, or
    - iii. the appeal is from the denial of immunity raised on a motion to dismiss.
  - c. Circuit courts 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.
2. A qualified immunity appeal normally stays proceedings in the district court.
3. A defendant may take an immediate appeal from the denial of qualified immunity raised on a motion to dismiss, and if still unsuccessful, take another interlocutory appeal from a subsequent denial of qualified immunity raised on summary judgment, provided the immunity appeal can be decided as a matter of law. Behrens v. Pelletier, *supra*.
4. Qualified immunity appeals are very costly to civil rights plaintiffs in terms of litigation resources and delay of litigation.
5. The plaintiff may ask the district court to certify that an interlocutory immunity appeal is frivolous. Behrens v. Pelletier, 516 U.S. at 310-311; Chan v. Wodnicki 67 F.3d 137 (7<sup>th</sup> Cir. 1995); Yates v. City of Cleveland, 941 F.2d 444 (6<sup>th</sup> Cir. 1991); Apostol v. Gallion, 870 F.2d 1335 (7<sup>th</sup> Cir. 1989).

- a. “This practice. . .enables the district court to retain jurisdiction pending summary disposition of the appeal and thereby minimizes disruption of ongoing proceedings.” Behrens, 516 U.S. at 310-311.

## **XV. EXHAUSTION OF STATE REMEDIES**

- A. State Judicial Remedies: 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.” Monroe v. Pape, 365 U.S. 167, 183 (1961).
- B. 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. Hudson v. Palmer, 468 U.S. 517 (1984); Parratt v. Taylor, 451 U.S. 527 (1981).
  1. The Parratt-Hudson doctrine does not apply when the deprivation results from enforcement of the established state procedure, Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982), or from actions by officials with authority to both cause deprivations and provide pre-deprivation process. Zinermon v. Burch, 494 U.S. 113 (1990).
  2. Parratt-Hudson is not an exhaustion doctrine; rather, when applicable, it results in rejection of the procedural due process claim on the merits.
  3. A post-deprivation remedy may be adequate even if it does not afford all of the relief available under § 1983, like attorneys’ fees. Parratt v. Taylor, supra.
- C. 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 such a claim may come within the literal terms of § 1983. Preiser v. Rodriguez, 411 U.S. 475 (1973).
  1. In these circumstances federal habeas corpus is the exclusive remedy.

2. Preiser is based upon the rationale that the more specific federal habeas remedy prevails over the more general § 1983 remedy.
  3. Preiser is also based upon the rationale that prisoners should not be allowed to evade the federal habeas exhaustion requirement by filing the claim under § 1983.
  4. Preiser, however, does not preclude prisoners from utilizing § 1983 to either challenge the conditions of their confinement or to enforce procedural due process protections.
    - a. The Supreme Court held that a challenge to parole release procedures may be made in a § 1983 action because success would not necessarily spell immediate or speedier release. Wilkinson v. Dotson, 125 S. Ct. 1242 (2005)
    - b. The Supreme Court held that a death row inmate may assert a § 1983 to challenge to the constitutionality of a medical procedure that is a precursor to lethal injection. Nelson v. Campbell, 124 S. Ct. 2117 (2004).
      - i. The Court in Nelson did not decide whether a challenge to the method of execution itself, e.g., lethal injection may be filed under § 1983.
- D. In order to recover damages on a § 1983 claim that necessarily implicates the constitutionality of the claimant's conviction or sentence, the claimant must show that the conviction or sentence has been overturned, either judicially or by executive order. Heck v. Humphrey, 512 U.S. 477 (1994).
1. Lower courts often have a difficult time determining whether a § 1983 claim "necessarily implicates" the validity of a conviction.
  2. Strictly speaking, Heck is not an exhaustion doctrine.
    - a. The Heck doctrine is more onerous than an exhaustion requirement because, unless and until the conviction is overturned, the § 1983 claim is not cognizable.
  3. Under Heck, the § 1983 claim is not cognizable and thus does not accrue until the conviction has been overturned.

4. The doctrine of Heck v. Humphrey, *supra* applies to prisoner procedural due process claims that necessarily implicate the validity of a prison disciplinary sanction. Edwards v. Balisok, 520 U.S. 641 (1997).
    - a. But a challenge to some aspect of a prison disciplinary proceeding that does not implicate either the finding of “guilt” or the sanction is not governed by Edwards v. Balisok. Muhammad v. Close, 124 S. Ct. 1203 (2004).
  5. Five justices in concurring and dissenting opinions took the position that the Heck-Balisok doctrine does not apply to § 1983 claimants who are not in custody and, therefore, cannot seek relief in a habeas corpus proceeding. Spencer v. Kemna, 523 U.S. 1 (1998).
- E. State Administrative Remedies: The general rule is that state administrative remedies need not be exhausted in order to bring suit under § 1983. Patsy v. Bd. of Regents, 457 U.S. 496 (1982).
1. Under the Prison Litigation Reform Act, however, prisoners are required to exhaust administrative remedies before bringing suit to contest the conditions of confinement. 42 U.S.C. § 1997e(a).
    - a. Prisoners who seek money damages judicially must exhaust administrative procedures even if those procedures do not afford a monetary remedy, so long as some relief may be obtained administratively Booth v. Churner, 532 U.S. 731 (2001).
    - b. Prisoner excessive force claims are subject to the PLRA exhaustion requirement. Porter v. Nussle, 534 U.S. 516 (2002).
      - i. The Court in Porter held “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.” Id. at 532.
- F. Notice of Claim: State notice-of-claim rules may not be applied to § 1983 claims. Felder v. Casey, 487 U.S. 131 (1988).
1. The absence of a federal notice of claim rule is not a deficiency in the federal law within the meaning of 42 U.S.C. § 1988(a).
  2. Notice-of-claim rules are not neutral rules of procedure.

3. Notice-of-claim rules unduly burden and discriminate against civil rights claimants.
  4. State notice-of-claim rules may be applied to state law claims that are supplemental to § 1983 claims.
- G. Ripeness: The Supreme Court has imposed stringent ripeness requirements for § 1983 regulatory takings claims. Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).
1. Williamson requires:
    - a. a final determination from land use authorities concerning the use of the property;
      - i. This requirement is satisfied when the permissible uses of the property are known to a reasonable degree of certainty. Palazzolo v. Rhode Island, 503 U.S. 606 (2001).
    - b. a final determination from state court of the right to just compensation.
  2. When a takings claimant pursues a claim for just compensation in state court in order to satisfy Williamson, normal preclusion principles will apply in the federal court § 1983 action. San Remo Hotel v. San Francisco, 125 S. Ct. 2491 (2005).

## **XVI. PRECLUSION DEFENSES**

- A. 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. San Remo Hotel v. San Francisco, 125 S. Ct. 2491 (2005); Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984); Allen v. McCurry, 449 U.S. 90 (1980). See also Haring v. Prosis, 462 U.S. 306 (1983).
1. This principle controls so long as the federal litigant against whom preclusion is asserted had a full and fair opportunity to litigate her federal claims in state court.
    - a. A full and fair opportunity to be heard requires only that state judicial procedures meet minimal procedural due process requirements. Kremer v. Chemical Cost. Corp., 456 U.S. 461 (1982); Allen v. McCurry, *supra*.

2. The full faith and credit statute controls:
  - a. even with respect to federal claims asserted by involuntary state court litigants, like criminal defendants, Allen v. McCurry, *supra*, and takings claimants who invoke state court just compensation remedies in order to satisfy Williamson ripeness requirements. San Remo Hotel v. San Francisco, 125 S. Ct. 2491 (2005);
  - b. even if the federal court § 1983 claimant does not have an alternative federal court remedy, as when a Fourth Amendment claim is not assertable in a federal habeas corpus proceeding under Stone v. Powell, 428 U.S. 465 (1976). Allen v. McCurry, *supra*;
  - c. even as 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. Migra v. Warren City Sch. Dist., 465 U.S. 75 (1984).
- B. Administrative Res Judicata: An agency's fact findings may preclude relitigation in a federal court § 1983 action. University of Tennessee v. Elliott, 478 U.S. 788 (1986).
  1. The Court in Elliott held "that 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." Elliott, 478 U.S. at 799.
    - a. Elliott was not based upon the full faith and credit statute, but upon federal common law principles.
- C. Arbitration: Arbitration decisions are not entitled to preclusive effect in § 1983 actions. McDonald v. City of West Branch, 466 U.S. 284 (1984).

## **XVII. STATUTE OF LIMITATIONS**

- A. Federal law has no statute of limitations for § 1983 claims.

- B. Given this deficiency in federal law, 42 U.S.C. § 1988(a) requires federal courts to borrow the state's limitations period for personal injury actions, so long as the period is not inconsistent with the policies of § 1983. Wilson v. Garcia, 471 U.S. 261 (1985).
1. This means that the governing limitations period for federal court § 1983 actions may differ from state to state.
  2. An unduly short limitations period, e. g., 6 months, is inconsistent with the policies of section 1983. See Burnett v. Grattan, 468 U.S. 42 (1984).
  3. “[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.” Owens v. Okure, 488 U.S. 235, 236 (1989) (adopting New York’s three year residual period).
  4. The Supreme Court suggested in dicta that when a § 1983 claim is based on violation of a federal statute enacted after December 1, 1990, the 4-year catch-all limitations period in 28 U.S.C. § 1658(a) would apply. City of Rancho Palos Verdes v. Abrams, 125 S. Ct. 1453, 1460 n.5 (2005).
  5. Whether an amended complaint “relates back” to the filing of the original complaint for limitations purposes is determined under Fed.R.Civ.P. 15 (c).
  6. Most courts hold that an amendment of a complaint substituting the names of the defendant officers for John Doe defendants does not relate back to the filing of the original complaint. Wayne v. Jarvis, 197 F.3d 1098 (11<sup>th</sup> Cir. 1999), cert. denied, 120 S. Ct. \_\_\_\_ (2000); Jacobson v. Osborne, 133 F.3d 315 (5<sup>th</sup> Cir. 1998); Cox v. Treadway, 75 F.3d 230 (6<sup>th</sup> Cir.), cert. denied, 519 U.S. 821 (1996); Barrow v. Wethersfield Police Dept., 66 F.3d 466 (2d Cir. 1995), modified, 74 F.3d 1366 (2d Cir. 1996).
    - a. The rationale of these decisions is that lack of knowledge about the names of alleged wrongdoer defendants is not a “mistake” within the meaning of Rule 15 (c). But see, Single-tary v. Pennsylvania Department of Corrections, 266 F.3d 186 (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).

- C. Unlike the selection of the limitations period which is determined by reference to state law, accrual is a question of federal law.
- D. Section 1983 claims generally accrue when the plaintiff knows or has occasion to know of the injury which is the basis of her claim. See 1C Schwartz, Section 1983 Litigation at Ch. 12.
  - 1. In employment termination cases, the § 1983 claim accrues when the employee is notified of the termination, not when the termination became effective. Chardon v. Fernandez, 454 U.S. 6 (1981).
  - 2. Courts seek to determine “what event would have alerted the typical lay person to protect his or her rights.” Dixon v. Anderson, 928 F.2d 212, 215 (6<sup>th</sup> Cir. 1991). See also United States v. Kubrick, 444 U.S. 111 (1979).

## **XVIII. SURVIVORSHIP AND WRONGFUL DEATH**

- A. The survivorship of § 1983 claims is not covered by federal law.
- B. Given this deficiency in federal law, 42 U.S.C. § 1988(a) requires federal courts to borrow state survivorship law, as long as it is not inconsistent with the policies of § 1983. Robertson v. Wegmann, 436 U.S. 584 (1978).
  - 1. The mere fact that the particular plaintiff’s claim abates under state law does not mean that the state law is inconsistent with the policies of § 1983. Robertson v. Wegmann, supra.
  - 2. Whether state survivorship law is compatible with the policies of § 1983 depends upon whether it is generally hospitable to the survival of § 1983 claims. Robertson v. Wegmann, supra. See e.g., Banks v. Yokemick, 177 F.Supp.2d 239 (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).
- C. The Supreme Court has not resolved whether a wrongful death claim may be brought under § 1983.
  - 1. There is considerable disagreement on this issue in the lower courts. See 1B Schwartz, Section 1983 Litigation at Ch 13. See also S. Steinglass, Wrongful Death Actions and Section 1983, 60 Ind.L.J. 559 (1985).

## **XIX. ABSTENTION DOCTRINES**

- A. A federal court § 1983 action may be defeated by one or more abstention doctrines.
- B. Pullman Abstention: 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. Railroad Comm'n v. Pullman, 312 U.S. 496 (1941).
1. Pullman abstention requires the § 1983 claimants to obtain a state court determination from the highest court in the state.
  2. In some cases this may be accomplished expeditiously pursuant to a state certification procedure. See Arizonans for Official English v. Arizona, 520 U.S. 43 (1997).
  3. 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. England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964).
    - a. The plaintiff may make an “England reservation” on the state court record of the right to litigate the federal claim in federal court.
      - i. The England reservation applies only in the Pullman abstention context. San Remo Hotel v. San Francisco, 125 S. Ct. 2491 (2005).
- C. Younger Abstention: Under Younger v. Harris abstention, federal courts are generally prohibited from granting relief that interferes with pending state criminal prosecutions, or with pending state civil proceedings that implicate important state interests. Younger v. Harris, 401 U.S. 37 (1971). See also Pennzoil Co. v. Texaco, 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); Judice v. Vail, 430 U.S. 327 (1977) (civil contempt proceeding); Huffman v. Pursue, 420 U.S. 592 (1975) (quasi-criminal nuisance proceeding to enjoin allegedly obscene movie).

- D. Younger abstention applies to quasi-judicial administrative proceedings implicating important state interests so long as there is an adequate opportunity to litigate federal claims either in the administrative proceeding or in a state court judicial review proceeding. Ohio Civil Rights Comm'n v. Dayton Christian Sch., 477 U.S. 619 (1986).
- E. There are very narrow exceptions to the Younger doctrine.
1. The most important exception requires a showing that the state prosecution was undertaken in bad faith, meaning not to secure a valid conviction, but to retaliate against or chill the exercise of a constitutionally protected right. 1B Schwartz, Section 1983 Litigation, Ch. 14.
  2. 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.
- F. Colorado River Abstention: Under Colorado River abstention, a federal court may abstain when there is a “parallel” proceeding pending in state court. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976).
1. Even when a “parallel” proceeding is pending a federal court should abstain only in “exceptional” circumstances.
- G. Burford Abstention: Under Burford abstention, federal courts may abstain when federal court relief will disrupt a complex state regulatory scheme and the state’s effort to centralize judicial review in a unified state court of special competence. Burford v. Sun Oil Co., 319 U.S. 315 (1943). See also New Orleans Public Service Inc. v. Council of New Orleans, 491 U.S. 350 (1989).
- H. Domestic Relations Doctrine: A federal court may invoke the “domestic relations” doctrine when the § 1983 claim requires adjudication of a domestic relations matter, such as custody, support or alimony. See 1B Schwartz, Section 1983 Litigation at § 14.12. See generally Ankenbrandt v. Richards, 504 U.S. 689 (1992).
1. Federal courts, however, routinely adjudicate the constitutionality of state policies pertaining to family law matters.

- I. 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, 28 U.S.C. §1341. See California v. Grace Brethren Church, 457 U.S. 393 (1982); Rosewell v. La Salle National Bank, 450 U.S. 503 (1981). See also National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582 (1995) (policies of § 1341 apply to state court § 1983 actions contesting state tax policies); Fair Assessment in Real Estate v. McNary, 454 U.S. 100 (1981) (policies of § 1341 pertain to claims for damages).
1. The Tax Injunction Act, however, 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. Hibbs v. Winn, 124 S. Ct. 2276 (2004).
- J. Johnson Act: The Johnson Act generally prevents federal courts from interfering with utility rate orders issued by a ratemaking agency. 28 U.S. C § 1342.

## **XX. DAMAGES**

- A. Compensatory damages under § 1983 are normally determined according to common law tort principles. Memphis Community School Dist. v. Stachura, 477 U.S. 299 (1986) (First Amendment); Carey v. Phipus, 435 U.S. 247 (1978) (procedural due process).
1. This means that compensatory damages are computed based upon the actual injuries suffered by the plaintiff.
  2. When a plaintiff suffers a violation of constitutional rights, but no actual injuries, she is entitled to an award of only nominal damages. (Stachura; Carey).
  3. Section 1983 plaintiffs are required to take reasonable steps to mitigate their damages.
- B. 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 callous disregard of plaintiff's federally protected rights. Smith v. Wade, 461 U.S. 30 (1983).

1. The Smith v. Wade, standard does not require a showing that the defendant engaged in egregious misconduct. Kolstad v. American Dental Ass'n, 527 U.S. 526 (1999).
  2. Punitive damages may not be awarded against a municipal entity. City of Newport v. Fall Concerts, 453 U.S. 247 (1981).
  3. The Eleventh Amendment bars federal court awards of punitive damages payable out of the state treasury. See Section XII, supra.
- C. A “release dismissal” agreement in which the private party agrees to release of a § 1983 claim in return for the dismissal of criminal charges will be enforced if it is voluntary and not against public policy. Town of Newton v. Rumery, 480 U.S. 386 (1985).
- D. Whether the government will indemnify an official for a personal-capacity judgment is a matter of state law.

## **XXI. ATTORNEYS’ FEES**

- A. 42 U.S.C. § 1988(b) authorizes courts, in their discretion, to award reasonable attorneys fees, to the prevailing party. See M. Schwartz and J. Kirklin, Section 1983 Litigation: Statutory Attorney’s Fees (3d ed. 1997).
1. Fees should be awarded to a prevailing plaintiff almost as a matter of course.
  2. Fees should be denied to a prevailing plaintiff only when “special circumstances” would make a fee award unjust.
    - a. The fiscal impact of a fee award upon a municipality is not a special circumstance. Aware Woman Clinic v. Cocoa Beach, 629 F.2d 1146, 1149-50 (5<sup>th</sup> Cir. 1980).
    - b. Defendant’s good faith is not a special circumstance justifying denial of fees to a prevailing plaintiff. See e. g. Williams v. Hanover Hons. Auth., 113 F.3d 1294 (1<sup>st</sup> Cir. 1997).
    - c. The fact that the fees will ultimately be paid by taxpayers is not a special circumstance justifying either denial or reduction of fees. See, e. g. Ramos v. Lamm, 713 F.2d 546 (10<sup>th</sup> Cir. 1983).

- d. But submitting a grossly inflated fee application is a special circumstance justifying the denial of fees. 2 Schwartz & Kirklin, Section 1983 Litigation: Statutory Attorney's § 3.14 (3d ed. 1997).
3. 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." Hughes v. Rowe, 449 U.S. 5, 14 (1978); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).
  4. The plaintiff will be considered a prevailing party when she succeeds on "any significant issue" which achieves some of the benefit sought in bringing suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Texas State Teacher's Ass'n v. Garland Indep. S.D., 489 U.S. 782 (1989).
    - a. 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 plaintiff's constitutional rights were violated does not suffice to qualify the plaintiff as a prevailing party. Hewitt v. Helms, 482 U.S. 755 (1987).
      - i. 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, does not suffice to qualify the plaintiff as a prevailing party. Hanrahan v. Hampton, 446 U.S. 754 (1980).
    - b. There is lower court authority that a plaintiff may prevail by obtaining preliminary injunctive relief, but only when it is on the merits, Haley v. Pataki, 106 F.3d 478 (2d Cir 1997), and not when the temporary relief is granted merely to maintain the status quo. La Trieste Restaurant v. Port Chester, 188 F.3d 65 (2d Cir. 1999), cert. denied, 120 S. Ct. 1246 (2000); La Rouche v. Kezer, 20 F.3d 68 (2d Cir 1994).
    - c. A plaintiff who recovers only nominal damages is 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. Farrar v. Hobby, 506 U.S. 103 (1992).

- i. 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 plaintiff claims to have prevailed, and the public purpose served by the litigation.
- d. A plaintiff who asserts a § 1983 claim that is not insubstantial and obtains relief on a "pendent" state law claim is a prevailing party eligible for fees under § 1988. Maier v. Gagne, 448 U.S. 122 (1980).
  - i. The plaintiff, however, is not entitled to fees if the § 1983 claim is rejected on the merits. See, e. g. Milwe v. Cavuoto, 653 F.2d 80 (2d Cir. 1981).
- e. When plaintiff prevails on some but not all claims arising out of common facts, the results obtained by the plaintiff determine whether the fees should be reduced because of lack of success on some claims. Hensley, 461 U.S. at 435.
- f. The fact that the lawsuit was a catalyst in causing the defendant to alter its conduct to the plaintiff does not qualify the plaintiff as a prevailing party because, to be a prevailing party, the plaintiff must secure a favorable judgment on the merits or a court-ordered consent decree. Buckhannon Board and Home Care, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001).
  - i. The decision in Buckhannon overturned the catalyst doctrine that had been adopted by eleven circuits and rejected only by the Fourth Circuit.
  - ii. 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.'" 532 U.S. at 604.
  - iii. 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." Id. at 604 n.7.

- iv. Buckhannon has generated a great deal of lower court litigation, raising such issues as whether a preliminary injunction or “so ordered” settlement qualifies the plaintiff as a prevailing party. See Cumulative Supplement to Schwartz and Kirklin, Section 1983 Litigation: Statutory Attorney’s Fees § 2.11 (3d ed. 1997).
  - v. A “stipulation and order of discontinuance,” and court retention of jurisdiction over the settlement for enforcement purposes, may qualify the plaintiff as a prevailing party. Roberson v. Giuliani, 346 F.3d 75 (2d Cir. 2003).
5. A pro se plaintiff is not eligible for recover attorney’s fees, even if the plaintiff is an attorney. Kay v. Ehrler, 499 U.S. 432 (1991).
    - a. Thus, only a prevailing plaintiff who is represented by counsel is eligible to recover fees. Id.
  6. Fees awarded under § 1988 are generally computed under the lodestar method of multiplying reasonable hours by reasonable hourly market rates for attorneys in the community with comparable backgrounds and experience. Blum v. Stenson, 465 U.S. 886 (1984).
    - a. The Supreme Court has generally disapproved of the use of upward adjustments to the lodestar. Blum v. Stenson, supra.
    - b. In exceptional cases an upward adjustment may be made on the basis of superior quality of representation. Pennsylvania v. Delaware Valley Citizens’ Council, 478 U.S. 546 (1986); Blum v. Stenson, supra.
    - c. Fees may 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. Missouri v. Jenkins, 491 U.S. 274 (1989).
    - d. The lodestar should not be enhanced to compensate for the risk of non-success whether plaintiff’s attorney was retained on a contingency or on a non-contingency basis. City of Burlington v. Dague, 505 U.S. 557 (1992).

- e. The fees awarded need not be proportional to the damages recovered by the plaintiff and, in fact, may substantially exceed the damages recovered. City of Riverside v. Rivera, 477 U.S. 561, 575 (1986).
  - i. “Because damages awards do not reflect 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.” Id. at 575.
- f. The fees awarded under § 1988 are not limited to the amount of fees recoverable by counsel pursuant to a contingency fee agreement. Blanchard v. Bergeron, 489 U.S. 87 (1989).
  - i. Conversely, the fees collectable under a contingency agreement may exceed the fees awarded under § 1988. Venegas v. Mitchell, 495 U.S. 82 (1990).
- g. A prevailing plaintiff may recover fees for:
  - i. defending a judgment against post-judgment motions or appeals;
  - ii. post-judgment monitoring; and
  - iii. preparing and litigating the fee application.
- h. Fed.R.Civ.P 54 provides that a party seeking an award of attorneys’ fees must, unless otherwise provided by statute or court order, file and serve a motion for fees within 14 days after entry of final judgment.
  - i. Fees generally may not be awarded for work performed on administrative proceedings that preceded the § 1983 action. Webb v. Bd. of Ed., 466 U.S. 935 (1984).
  - j. Expert witness expenses are not recoverable as part of the § 1983 fee award in § 1983 cases. West Va. Univ. Hosps. v. Casey, 499 U.S. 83 (1991).
- 7. Legal services and other non-profit organization are entitled to have § 1988 fee awards computed on the basis of reasonable market rates rather than upon the lower salaries paid to the organization’s attorneys. Blum v. Stenson, 465 U.S. 886 (1984). Accord Washington v. Seattle School Dist., 458 U.S. 457 n.37 (1982).

8. When prospective relief is awarded against state officials under the doctrine of Ex parte Young, an award of fees payable out of the state treasury is not barred by the Eleventh Amendment. Hutto v. Finney, 437 U.S. 678 (1979).
  - a. The Eleventh Amendment does not bar an upward adjustment in the lodestar to compensate for delay in payment. Missouri v. Jenkins, 491 U.S. 274 (1989).
9. Simultaneous attempts to settle plaintiff's claim on the merits and the claim for fees is not necessarily unethical. Evans v. Jeff D., 475 U.S. 717 (1986).
  - a. Fees are 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" Id. at 731-32.
10. If the defendant makes an offer of judgment under Rule 68 of Fed.R.Civ.P that is rejected, and the offer turns out to be more favorable than the judgment obtained by the plaintiff, the plaintiff will not be entitled to fees for work done after the offer of judgment was made. Marek v. Chesny, 473 U.S. 1 (1985).
  - a. Attorneys' fees are "costs" within the meaning of Rule 68.