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FUNDAMENTALS OF SECTION 1983 LITIGATION

*Martin A. Schwartz*¹

Which is more important, major league baseball or Section 1983?² Today, as the 2000 World Series begins, of course, the answer is they are both important. It is the dream doubleheader, Section 1983 by day, subway series by night. It is hard to resist thinking about some of the Section 1983 issues that grow out of New York City baseball: Is George Steinbrenner³ a de facto New York City policy maker? Are designated hitters a discrete and insular minority? I am sure there are many excessive force issues

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² 42 U.S.C. § 1983 (1994 & Supp. 2001). This section provides in part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

See also 1A, 1B, 1C MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES (3d ed. 1997).

³ George Steinbrenner is the outspoken American business and sports executive who became principal owner of the New York Yankees baseball team in 1973. Steinbrenner is known for his strong ownership style and volatile temper, which resulted in disagreements with players and managers that resulted in frequent personnel changes—including hiring and firing the same manager, Billy Martin, five separate times. Microsoft Encarta Online Encyclopedia 2000 “Steinbrenner, George,” at <http://encarta.msn.com>.

surrounding the World Series.⁴ As tempting as it would be to spend my time on these issues, let me turn to more pedestrian questions. After all, that is my obligation today.

I. INTRODUCTION

My subject is the fundamentals of Section 1983 litigation. I thought it might help to start with a fact pattern in a typical police misconduct case. It is a fact pattern that I will come back to at different points during my presentation. Let us assume that we have a plaintiff, Paula Plaintiff, who was arrested. Paula claims that the arresting officer used excessive force during the course of the arrest, and she has asserted a claim for compensatory damages against the police officer. She is also seeking punitive damages. Let us assume that she asserted a claim against the municipality as well. Note that although Paula can bring a claim against the municipality for compensatory damages, municipalities remain immune from punitive damages.⁵ Judge Calabresi of the Second Circuit wrote a long opinion indicating that it may be time to reconsider that issue.⁶ However, in this case Paula does not seek punitive damages against the municipality. Let us assume that her claim against the municipality is based upon a failure of the municipality to train and supervise its police officers properly with respect to the use of force in making arrests. It goes without saying that the complaint would also assert a claim for attorney's fees, and there might be supplemental state law claims as well.

⁴ See Buster Olney, *Clemens Throws a Bat, Then Dominates the Mets*, N.Y. Times, October 23, 2000, at A1. In the second game of the 2000 World Series, Roger Clemens, pitcher for the New York Yankees, threw a broken bat at Mike Piazza, a New York Mets hitter. The Yankees went on to beat the Mets, 6-5.

⁵ *Newport v. Fact Concerts*, 453 U.S. 247, 271 (1981) (stating history and public "policy do not support exposing a municipality to punitive damages for the bad-faith actions of its officials").

⁶ See, e.g., *Ciraolo v. City of New York*, 216 F.3d 236, 242 (2d. Cir.), *cert. denied*, 531 U.S. 933 (2000). In his concurring opinion, Second Circuit Judge Calabresi wrote separately to suggest that the true purpose of Section 1983 would be better served by holding municipalities liable for punitive damages in order to serve as a deterrent against future state-sponsored deprivations of citizens' constitutional rights.

II. ELEMENTS OF THE SECTION 1983 CLAIM

The first question to be confronted is: what are the elements of Paula's Section 1983 claim for relief? If you look at the Supreme Court decisional law, it is quite consistent in articulating two, and only two, elements that Paula must allege.⁷ She must allege a violation of her federally protected rights, and that the violation occurred under color of state law.⁸ This description is incomplete, however, because there are actually four elements of a Section 1983 claim for relief, and in municipal liability cases, there are five elements. Paula must first allege a deprivation of her federally protected rights.⁹ Secondly, she has to allege causation by satisfying a type of proximate cause requirement that is read into Section 1983.¹⁰ As the third element she must allege that the deprivation of her federal rights was caused by a "person."¹¹ Finally, she must allege that this person acted under color of state law.¹² Additionally, since Paula is also seeking to establish municipal liability, she must also establish that the violation of her federally protected rights was attributable to the enforcement of some type of municipal policy or practice.¹³ I will address each of

⁷ See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (holding that to state a course of action under Section 1983 a plaintiff is required to allege only that some person deprived him of a federal right and such person acted under color of state law).

⁸ *Id.* See also *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999) (holding that to state a claim for relief in an action brought under Section 1983, plaintiffs must establish that they were deprived of a right secured by the constitution or laws of the United States, and that the alleged deprivation was committed under color of state law).

⁹ See *American Mfrs.*, 526 U.S. at 49-50.

¹⁰ See *Malley v. Briggs*, 475 U.S. 335, 345 n.7 (1986) (holding Section 1983 recognizes the same causal link as common law tort liability); *Martinez v. California*, 444 U.S. 277, 285 (1980) (holding that the language of Section 1983 imposes a proximate cause requirement on Section 1983 claims); *Monroe v. Pape*, 365 U.S. 167, 187 (1961) (stating Section 1983 litigation is interpreted "against the background of tort liability that makes a[n individual] responsible for the natural consequences of his actions").

¹¹ See *Monell v. Dep't of Social Services of the City of New York*, 436 U.S. 658, 690 (1978) (holding Congress intended municipalities and local governments to be included as a 'person' under Section 1983).

¹² See *Flagg Bros. v. Brooks*, 436 U.S. 149, 156 (1978).

the four elements of the claim for relief first, and, later on, the question of municipal liability.

A) DEPRIVATION OF A FEDERALLY PROTECTED RIGHT

One of the most important principles of Section 1983 litigation is that Section 1983 itself does not give the plaintiff any rights; it does not create any rights; it does not establish any rights.¹⁴ Section 1983 is the procedural vehicle that authorizes the assertion of a claim based upon the deprivation of a federal right created by some source of federal law other than Section 1983.¹⁵ That source of federal law is usually the Federal Constitution.¹⁶ In some cases, it is a federal statute, but it must be a federal statute other than Section 1983.

Paula claims that excessive force was used against her by the police officer during the course of her arrest. Given her claim, it is easy in Paula's case to identify the constitutional right at issue. Paula's claim is based upon the Fourth Amendment.¹⁷ Consequently, she must show that the use of force by the police officer was objectively unreasonable.¹⁸

¹³ *Monell*, 436 U.S. at 664 (holding that a local government may not be sued under § 1983 based solely on the fact that an employee or agent of the local government inflicted the injury. The government can, however, be held responsible when the injury was inflicted through the execution of a government policy or custom.). See also *Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) (separating the Section 1983 claim asserted against the municipality into two issues: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation").

¹⁴ *Albright v. Oliver*, 510 U.S. 266, 271 (1994); *Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979).

¹⁵ See *Albright*, 510 U.S. at 271 (holding "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred'" (quoting *Baker*, 443 U.S. at 144 n.3)).

¹⁶ See *Wilson v. Garcia*, 471 U.S. 261, 273 (1985).

¹⁷ U.S. CONST. amend. IV. The Fourth Amendment states in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"

¹⁸ See *Graham*, 490 U.S. at 397 n.5 (holding that, within the context of the Fourth Amendment, the question in an excessive force case is "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances").

It must be noted, however, that although it is easy to identify the constitutional claim in Paula's case, in many cases it is not easy to figure out what the constitutional violation is. In my opinion, one of the great difficulties with Section 1983 litigation is determining the basis of the constitutional claim. This difficulty arises because Section 1983 incorporates all, or at least virtually all, of the individual rights in the Federal Constitution and makes them all potentially enforceable against defendants who acted under color of state law.¹⁹ In many cases, Section 1983 complaints allege facts that add up to conduct by governmental officials that we might all agree is egregious in one respect or another. The bottom line, however, is that egregious governmental conduct does not always add up to a constitutional violation. In addition, it seems to me that no matter how long and hard one studies Section 1983 law, some new claim or allegation of misconduct by governmental officials always arises. Even for constitutional scholars, it is often difficult to figure out whether a constitutional violation exists because there is not always Supreme Court decisional law on point.

B) CAUSATION

The second element, causation, encompasses a type of proximate cause requirement that is built into Section 1983.²⁰ I refer to a "type" of proximate cause requirement because although courts sometimes refer to the requirement as "proximate cause," courts also use other language, such as "causal connection."²¹ In addition, in municipal liability cases, other language like "direct causal connection" or "affirmative link" may appear.²² One of the

¹⁹ *Dennis v. Higgins*, 498 U.S. 439, 444-45 (1991)(although the respondents in *Higgins* argued that "the 'prime focus' of § 1983 was to ensure 'a right of action to enforce the protections of the Fourteenth Amendment . . . ' the court stated that the scope of § 1983 has never been construed so narrowly).

²⁰ *Martinez*, 444 U.S. at 285. *See also supra* note 10.

²¹ *Id.*

²² *See, e.g., City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (requiring a direct causal link between a municipal policy or custom and the alleged constitutional violation); *Oklahoma City v. Tuttle*, 471 U.S. 808, 824-25 (1985) (requiring an "affirmative link" between municipal policy and constitutional violation).

unsettled questions is whether the causation requirement in Section 1983 is intended to be the same proximate cause requirement that exists with respect to common law torts, or whether the causation requirement is different under Section 1983. This question has not yet been resolved by the United States Supreme Court. The differences in the way causation is characterized, from decision to decision, might simply be attributed to the use of different language by the Court. Still, it remains somewhat of an unsettled question as to whether the causation requirement in Section 1983 is intended to be precisely the same as the proximate cause requirement that is used for common law tort cases.

The element of causation poses very sticky questions in Section 1983 cases when there are multiple officials who may have been involved in the constitutional violation. The Second Circuit's decision in *Townes v. City of New York*²³ illustrates the difficulties that can exist when multiple officials may be involved in a constitutional violation. The result in *Townes* is, perhaps, controversial. The plaintiff, Townes, was a passenger in a taxi.²⁴ The taxicab was stopped by a police officer, who searched Townes and uncovered evidence of a crime.²⁵ In the state court criminal proceeding, Townes' attorney moved to suppress the evidence, claiming that the search violated the Fourth Amendment.²⁶ The motion to suppress was denied, and Townes was convicted and incarcerated.²⁷ Subsequently, the Appellate Division, First Department, overturned the conviction finding that the search violated the Fourth Amendment, and the motion to suppress should have been granted.²⁸ So what did Townes do next? He brought suit in federal court under Section 1983, claiming that his Fourth Amendment rights were violated.²⁹ Here is where it gets interesting. Townes did not seek damages for the unconstitutional

²³ 176 F.3d 138 (2d Cir.), *cert. denied*, 528 U.S. 964 (1999).

²⁴ *See Townes*, 176 F.3d at 141.

²⁵ *Id.*

²⁶ *Id.* at 142.

²⁷ *Id.*

²⁸ *People v. Victor*, 149 A.D.2d 363, 363-64; 540 N.Y.S.2d 670, 670 (1st Dep't), *aff'd as modified* by 74 N.Y.2d 874, 547 N.Y.S.2d 831 (1989) (defendant Lamont Victor aka Victor Townes, aka Victor Lamont).

²⁹ *Townes v. City of New York*, No. 94 Civ. 2647, 1998 U.S. Dist. LEXIS 2739, at *1 (S.D.N.Y. Mar. 6, 1998), *rev'd in part* by 176 F.3d 138.

search itself, but sought damages for what he claimed was an unconstitutional conviction and incarceration.³⁰ On appeal, the Second Circuit Court of Appeals agreed that the search violated the Fourth Amendment, but held that there was a lack of sufficient causation between the unconstitutional search, on the one hand, and the conviction and incarceration, on the other.³¹ In describing the lack of causation, the Second Circuit used the phrase “gross disconnect” to say that the chain of causation between the stop and the search and claimed unconstitutional conviction and sentence was too remote.³²

There is another way to look at Townes’ claim, however. The state trial court’s decision to deny the motion to suppress, which turned out to be an erroneous denial of the motion to suppress, could be thought of as being an intervening cause that was not reasonably foreseeable.³³ In other words, the action by the state criminal trial judge, in denying the motion to suppress, was an intervening cause that broke the chain of causation between unconstitutional search and the conviction and incarceration.³⁴ One of the curiosities about the case is why the plaintiff did not simply seek damages for the unconstitutional search. My speculation would be that there may not have been much in terms of damages resulting from the search itself, and that the real damages occurred from the conviction and incarceration.

C) A “PERSON” WITHIN THE MEANING OF SECTION 1983

The third element is that the defendant must be a “person” within the meaning of Section 1983.³⁵ State and municipal officials who are sued in their personal capacities are clearly “persons” within the meaning of Section 1983 and they may be

³⁰ *Id.* at *4.

³¹ *Townes*, 176 F.3d at 147.

³² *Id.* at 148.

³³ *Id.* at 146-47.

³⁴ *Id.* (holding it is well settled that the chain of causation between a police officer’s unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment).

³⁵ *Will v. Michigan Dep’t of State of Police*, 491 U.S. 58, 65-66 (1989); *Monell*, 436 U.S. at 690.

sued under Section 1983.³⁶ Municipalities and other municipal entities are also considered “persons” within the meaning of Section 1983 as a result of the *Monell*³⁷ decision. If a plaintiff chooses to sue a municipal official in the official’s official capacity, that is considered the same thing as suing the municipality.³⁸ If you think about it then, there is no reason to sue a municipal official in his or her official capacity. The plaintiff can simply name the municipality as a defendant. There are a fairly large number of decisions holding that if the plaintiff names both the municipality and a particular municipal official in that official’s official capacity as defendants, the official capacity claim should be dismissed as redundant.³⁹ The official capacity claim is redundant because it does not add anything to the litigation.

One interesting point to note here, which is not an overwhelming point but worth mentioning in order to avoid needless headaches, is that departments of municipalities, like police departments and sheriffs departments, departments of corrections, and commissions, are usually held to be not suable entities.⁴⁰ They are not “persons” within the meaning of Section 1983. Since they are not suable entities, and are commonly dismissed as party defendants, the plaintiff’s lawyer should not bother naming them as defendants, but should name the municipality itself.

³⁶ *Hafer v. Melo*, 502 U.S. 21, 31 (1991); *Monell*, 436 U.S. at 690.

³⁷ *Monell*, 436 U.S. at 690.

³⁸ *Id.* at 691. See also *Will*, 491 U.S. at 71; *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985); *Brandon v. Holt*, 469 U.S. 464, 471 (1985).

³⁹ See, e.g., *Hafer*, 502 U.S. at 25.

⁴⁰ See, e.g., *Dean v. Barber*, 951 F.2d 1210, 1214 (11th Cir. 1992) (holding that the sheriff’s department was not a legal entity, and therefore not subject to suit under § 1983); *Orraca v. City of New York*, 897 F. Supp. 148, 151-52 (S.D.N.Y. 1995) (holding that neither the police department or its precinct have the authority to sue or be sued, and therefore the claims against these defendants under § 1983 were dismissed); *Marsden v. Federal Bureau of Prisons*, 856 F. Supp. 832, 836 (S.D.N.Y. 1994) (“a jail is not an entity that is amenable to suit”); *Skydiving Ctr. v. St. Mary’s County Airport Comm’n*, 823 F. Supp. 1273, 1280 (D. Md. 1993) (holding that only the Board of County Commissioners, and not the Airport Commission, was a cognizable entity). See also MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, 1A, 486-87.

In attempting to sue a state or state agency under Section 1983, the plaintiff must take into account that states and state agencies sued for monetary relief under Section 1983 are not considered Section 1983 “persons.”⁴¹ The interpretation of the word “person” under Section 1983 is thus in harmony with Eleventh Amendment decisional law.⁴² The plaintiff can, however, get prospective relief against a state government by naming the appropriate state official in his or her official capacity.⁴³ The plaintiff cannot sue the state or the state agency for prospective relief, but the plaintiff is able to obtain prospective relief against the responsible state official in his or her official capacity.⁴⁴

Sometimes the issue arises of whether a particular official is a municipal official or a state policymaker. This can be a very important question because a municipal official sued in his or her official capacity would be the same as suit against a municipality.⁴⁵ Municipalities are persons under Section 1983, and the Eleventh Amendment does not protect them.⁴⁶ If the plaintiff seeks monetary relief when suing a state official in her official capacity, that would be the same as suing the state.⁴⁷ The state official sued in his or her official capacity for money damages is not a Section 1983 person; therefore, in federal court, that claim would be barred by the Eleventh Amendment.⁴⁸ The way the state versus municipal policymaker issue gets resolved is the same way that the issue concerning so-called hybrid entities gets resolved.⁴⁹ Courts run

⁴¹ See *Will*, 491 U.S. at 71; *Howlett v. Rose*, 469 U.S. 356, 365 (1990); *Johnson v. Rodriguez*, 943 F.2d 104, 108 (1st Cir. 1991), *cert. denied* 502 U.S. 1063 (1992); *Gilbreath v. Cutter Biological, Inc.* 931 F.2d 1320, 1327 (9th Cir. 1991); *Manning v. Dep’t of Hwy. & Pub. Safety*, 914 F.2d 44, 48 (4th Cir. 1990).

⁴² See *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978).

⁴³ *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

⁴⁴ *Pugh*, 438 U.S. at 782.

⁴⁵ *McMillian v. Monroe County*, 520 U.S. 781, 784-85 (1997); *Brandon*, 469 U.S. at 472.

⁴⁶ *Will*, 491 U.S. at 70.

⁴⁷ *Id.* at 71.

⁴⁸ *Id.*

⁴⁹ *Mount Healthy School Dist. v. Doyle*, 429 U.S. 274, 282 (1977) (holding that a local school board is more like a county or city than it is like an arm of the

through a wide variety of factors in making a determination on this issue, such as: What type of function is the entity carrying out? How does the state law characterize the entity? How much supervision and control is there by state government?⁵⁰ The most critical question, however, is whether the judgment will be paid out of state funds or municipal funds. If the judgment is likely to be paid out of state funds, then the court is going to consider the entity to be a state entity. If it is to be paid out of local funds, then the court is very likely to consider the entity to be a local entity.⁵¹

D) ACTION UNDER COLOR OF STATE LAW

Assuming that we have a "person" who is suable under Section 1983, the plaintiff must show that this person acted under color of state law.⁵² The easiest case for a finding of action under color of state law is where the state or local official acted while carrying out his or her official responsibilities in accordance and compliance with state law.⁵³ Difficulty arises when the official acts in violation of state law. If you think about it, Paula Plaintiff's claim presents this type of issue. If she alleges that the officer used excessive force, there is a good probability that the officer was using force in violation of state law standards.

The key question here, and sometimes it is an easier question to ask than to answer, is whether the official was using state authority. Was the official acting pursuant to the power of the state? Was the official using, albeit abusing, state authority? An official who uses, but abuses, state authority by acting in

state, and therefore it is not entitled to assert any Eleventh Amendment immunity from suits in the federal courts).

⁵⁰ See *McMillian*, 520 U.S. at 781.

⁵¹ *Edelman*, 415 U.S. at 663 (holding 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); *Mount Healthy*, 429 U.S. at 280 (where the court found that the school district was not a state entity but rather a municipal corporation and therefore not protected by the 11th Amendment); *Brandon*, 469 U.S. at 471.

⁵² *Flagg Bros.*, 436 U.S. at 155.

⁵³ See *West v. Atkins*, 487 U.S. 42 (1988) (holding that it is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the state).

violation of state law nevertheless is said to be acting under color of state law?⁵⁴

As you go down the line, this issue gets tougher and tougher. The next question to ask is: how are officials who use state authority in violation of state law defined? How do we distinguish them from officials who may have been acting in a purely private capacity? In the examples that come to mind, there are two groups of cases where this is a recurrent issue. One example is the school teacher abuse cases where public school teachers abuse students. The question in those cases is whether the teacher was acting as an individual, or alternatively, whether the teacher was exercising, albeit abusing, state authority.⁵⁵

The other example is police officer cases – especially off-duty police officer cases. Let us suppose that an off-duty police officer, we will assume it is a male officer, is with his spouse. Somebody approaches the couple and is rude to the officer's spouse and the officer says something like, "Nobody treats my wife that way." The officer then roughs up the intruder. Was the police officer acting under color of state law? There is no magical formula to answer that question. The best that courts have been able to do is to look at all of the pertinent circumstances.⁵⁶ In my example, we have an off-duty police officer. Is there an ordinance in this jurisdiction that says that police officers are considered to be on-duty at all times? That is a pertinent consideration. However, even if there is such an ordinance, that does not mean that everything this police officer does is under color of state law. When the officer gets up in the morning and is rude to his children

⁵⁴ *Monroe*, 365 U.S. at 184 ("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." (quoting *United States v. Classic*, 313 U.S. 299, 325-26 (1941))).

⁵⁵ See, e.g., *Doe v. Rains County Indep. Sch. Dist.*, 66 F.3d 1402, 1407 (5th Cir. 1995); *Jojola v. Chavez*, 55 F.3d 488, 492-93 (10th Cir. 1995); *Wilson v. Webb*, 869 F. Supp. 496, 497 (W.D. Ky. 1994), *appeal granted* 230 F.3d 1361 (2000), *cert. denied sub nom Littrell v. Wilson*, 532 U.S. 942 (2001).

⁵⁶ See, e.g., *Pickrel v. City of Springfield*, 45 F.3d 1115 (7th Cir. 1995); *Pitchell v. Callan*, 13 F.3d 545 (2d Cir. 1994); *United States v. Tarpley*, 945 F.2d 806 (5th Cir. 1991); *Bonsignore v. City of New York*, 683 F.2d 635 (2d Cir. 1982); *Layne v. Sample*, 627 F.2d 12 (6th Cir. 1980); *Stengel v. Belcher*, 522 F.2d 438 (6th Cir. 1975).

while having breakfast, he is not acting under color of state law. All we can say is that an ordinance requiring the officer to be on duty at all times is a pertinent factor. Did the police officer flash his badge? Did he have his service revolver? Did he show his service revolver? Did he say, "You know, I'm a police officer." Did the officer who was defending his wife purport to make an arrest? The answers to these questions are relevant, but none is dispositive.

These are difficult questions for the courts because very often what we have are a number of factors that favor a finding that the officer did act under color of state law, and maybe a number of other factors that point in the opposite direction. I wonder whether, as some courts recently seem to be doing in this type of situation, it makes sense to give this issue to the jury with instructions about misuse of governmental authority. It may be better to just tell the jury about the pertinent considerations they may take into account, and then let the jury, as a fact-finder, do the addition and subtraction to come to the conclusion of whether this police officer on this occasion was or was not acting under color of state law.

How about private companies or private individuals? They will be found to have acted under color of state law only when they are engaged in state action.⁵⁷

III. THE IMMUNITY DEFENSES

Let us now look at the immunity defenses. My hypothetical police officer here has been sued for damages in his personal capacity. When there is a personal capacity claim against a public official under Section 1983, that official is very likely to raise an immunity defense. Common law immunities have been read into Section 1983 by the United States Supreme Court.⁵⁸ Although there is nothing in Section 1983 itself that speaks to the

⁵⁷ See, e.g., *American Mfrs. Mut. Ins. Co.*, 526 U.S. at 52 (holding private defendant will not be held to constitutional standards unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity" so as to treat the private entity as if it is the State).

⁵⁸ See *Hafer*, 502 U.S. at 28-29 (holding immunity from suit under Section 1983 is based on historical common law state interests).

question of immunity, the Supreme Court's position is that when Congress adopted the original version of Section 1983 back in 1871, Congress intended that the common law immunities be considered part of the Section 1983 cause of action.⁵⁹

A) ABSOLUTE IMMUNITY

Some officials are entitled to absolute immunity.⁶⁰ This is the cat's pajamas of immunity because absolute means absolute. Even if the official acted in bad faith or with malice, and even if the official violated clear federal law, the official will be protected from personal liability if she has absolute immunity.⁶¹ So the question becomes: who are these lucky souls? They are mainly judges, prosecutors, legislative officials, and witnesses.⁶² When Burt Newborn lectured on the subject of immunities at this program many years ago, he was very fond of saying, "It is not surprising that judges have absolute immunity, because after all, these are common law immunities and judges created the common law." I remember him suggesting that if dentists had been put in charge of immunities, we probably would have absolute dental immunity, and maybe not absolute judicial immunity.

I suppose that, given the number of judges who were formerly prosecutors, it is also not surprising that prosecutors have absolute immunity. As for legislators, members of the judiciary know that they do not get paid unless they are in the legislative budget. So it probably makes perfect sense that legislative officials should have absolute immunity as well. Most officials, however, and now we are talking about executive and administrative officials, have a somewhat lesser immunity we call

⁵⁹ *Id.* (stating that immunity from suit under § 1983 is "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it . . ." (citing *Imbler v. Pachtman*, 424 U.S. 409, 421 (1976))).

⁶⁰ *Id.* at 29 (stating "this Court has refused to extend absolute immunity beyond a very limited class of officials, including the President of the United States, Legislators carrying out their legislative functions, and judges carrying out their judicial functions . . .").

⁶¹ *Id.*

⁶² *Id.*

qualified immunity.⁶³ Qualified immunity will protect them as long as they do not violate clearly established federal law.⁶⁴

Whether an official is entitled to assert absolute immunity or qualified immunity depends upon the particular function that the official carried out. It does not depend upon the title that the official possesses.⁶⁵ In making their determinations, courts take a functional approach, which means that an official may have absolute immunity for carrying out one function, and qualified immunity for carrying out a different function.⁶⁶ For example, judges would have absolute immunity for carrying out the judicial function for engaging in the process of adjudicating cases, but when judges make hiring and firing decisions, they are carrying out an executive or administrative function for which they can claim only qualified immunity.⁶⁷

This functional approach can raise some difficult questions. For example, prosecutors get absolute immunity when they carry out their advocacy functions in making decisions about whether to prosecute and how to prosecute and prepare for prosecution, but prosecutors can only claim qualified immunity with respect to their administrative and investigatory functions.⁶⁸ The Supreme Court's position is that if a prosecutor chooses to act like a detective, and participates, for example, in the search or arrest of a defendant, then we are going to treat that prosecutor like a detective and only allow the prosecutor to claim qualified immunity.⁶⁹ There are some very close calls in these cases as to which side of the line the prosecutor's activity falls – the investigatory line on one hand, or the prosecutorial line on the other.⁷⁰

⁶³ See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (stating that, for executive officials in general, qualified immunity represents the norm).

⁶⁴ *Id.*

⁶⁵ *Id.* at 811 (holding that in general, the cases have followed a functional approach).

⁶⁶ See *Forrester v. White*, 484 U.S. 219, 227 (1988).

⁶⁷ *Id.* at 228 (holding that even though administrative decisions may be essential to the very functioning of the courts, they have not been regarded as judicial acts).

⁶⁸ See *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-71 (1993).

⁶⁹ *Buckley*, 509 U.S. at 273.

⁷⁰ See *Kalina v. Fletcher*, 522 U.S. 118, 129-31 (1997).

Sometimes there are tough questions in the land use area concerning municipal officials who make decisions regarding the permissible use of property.⁷¹ Are they acting as legislative officials who make policy, or are they merely enforcing policy? We can articulate these distinctions, which go back to the separation of power, as the distinction between legislating and making policy, and enforcing policy. But when you try to apply the distinction to a particular case, such as where a zoning board refuses to rezone, whether it is a legislative function or an executive function is not always obvious. If the zoning board held a hearing it may even come down to a question of whether it was a quasi-judicial function.

B) QUALIFIED IMMUNITY

Other than the question of whether the plaintiff has been able to establish a violation of a federally protected right, this is the most critical issue in Section 1983 litigation. In *Harlow v. Fitzgerald*, the Supreme Court attempted to simplify qualified immunity.⁷² Attempted, because qualified immunity continues to be nothing short of a nightmare. The court attempted to simplify qualified immunity by turning the qualified immunity defense into a legal issue that could be determined as a matter of law by federal district court judges early in the litigation.⁷³ The idea was that qualified immunity would be a test of objective reasonableness, of whether the official acted in an objectively reasonable fashion. The test would determine whether the official acted in such a fashion by asking the question: did this official violate clearly established federal law?⁷⁴ Officials who act in violation of clearly established federal law are considered officials who did not act in an objectively reasonable fashion and are, therefore, not protected by qualified immunity. On the other hand, officials who violate

⁷¹ *Bruce v. Riddle*, 631 F.2d 272, 278 (4th Cir. 1980) (holding that if legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of §1983).

⁷² *Harlow*, 457 U.S. at 800.

⁷³ *Id.* at 815. See, also, *Hunter v. Bryant*, 502 U.S. 224, 227 (1991).

⁷⁴ *Harlow*, 457 U.S. at 815.

federal law, but not clearly established federal law, are viewed as having acted in an objectively reasonable fashion and, therefore, would be protected from personal liability by the qualified immunity defense.⁷⁵

A useful way to look at this is set forth in the 1997 decision in *United States v. Lanier*,⁷⁶ where the Supreme Court described qualified immunity as a type of fair warning standard.⁷⁷ It is a way of saying to public officials, "If the federal law is clearly established, then you are on notice that you are expected to comply with that federal law, and you are on further notice that if you do not comply with the clearly established federal law, you can be held personally liable for damages." By contrast, if the federal law is not clearly established, then the official is not given fair notice or fair warning as to what that law is, and a violation of federal law will not lead to the imposition of personal liability.⁷⁸

The Supreme Court's attempt to simplify qualified immunity was designed to allow federal district court judges to make this immunity determination as early in the litigation as possible.⁷⁹ It was hoped that, wherever possible, pretrial or even pre-discovery immunity determinations would be made by the court as a matter of law.⁸⁰ In my opinion this has not worked very well because, in a high percentage of the cases, the relevant facts are in sharp controversy. The plaintiff has one version of the facts and the defendant has another. You cannot figure out what the governing law is until you resolve the facts, no less determine whether the law was clearly established.⁸¹

The Supreme Court's goal in having this immunity determination made early on in the litigation was to give public officials not only an immunity from liability, but what the Supreme

⁷⁵ *Id.* See also *Anderson v. Creighton*, 483 U.S. 635, 644 (1987).

⁷⁶ 520 U.S. 259 (1997).

⁷⁷ *Id.* at 265-66; see also *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1963) (stating that no man should be held responsible for conduct that he could not reasonably understand was proscribed).

⁷⁸ *Id.* at 270. See also *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2156 (2001) (holding that the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violated that right).

⁷⁹ *Harlow*, 457 U.S. at 815; see also *Hunter*, 502 U.S. at 235.

⁸⁰ *Hunter*, 502 U.S. at 225.

⁸¹ See *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998).

Court calls, “an immunity from suit.”⁸² The Court gave officials an immunity from the burden of even having to defend the litigation.⁸³ The Supreme Court has reiterated this point several times, and it is established law.⁸⁴ This is, however, a fairly extraordinary concept. Plaintiffs’ civil rights lawyers all understood from day one that they had to overcome immunity defenses in order to establish liability, but the idea that an immunity defense protects the defendant from even having to defend the case was really an extraordinary and radical idea.

Not only was this a new concept, but the Supreme Court took it one step further to insure that public officials could vindicate their immunity from suit. The Court held that where the district judge denies an assertion of qualified immunity that was raised either on a motion to dismiss or motion for summary judgment, the official may take an immediate appeal to the circuit court.⁸⁵ The only proviso is that the immunity appeal must be couched in legal terms.⁸⁶ In other words, the appeal must be couched so that the circuit court could resolve the immunity issue as a matter of law. But defendants are always capable of presenting the immunity issue to the circuit court as a matter of law by simply saying, “the immunity issue may be resolved in defendant’s favor based upon the factual allegations in the plaintiff’s complaint” Once a defendant says that, the immunity issue is presented to the circuit court as a matter of law. Defendants are not always willing to do that, however, and there are frequently tough battles on appeal as to whether the immunity appeal presents a question of fact or a question of law. Sometimes

⁸² *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982)) (stating “Harlow . . . recognized an entitlement not to stand trial or face the other burden of litigation, conditioned on the resolution of the . . . question whether the conduct of which the plaintiff complains violated clearly established law.” This entitlement is an immunity from suit rather than a mere defense to liability.).

⁸³ *Mitchell*, 472 U.S. at 526.

⁸⁴ See *Saucier*, 121 S. Ct. at 2155-56.

⁸⁵ *Mitchell*, 472 U.S. at 527 (holding “an appreciable interlocutory decision must conclusively determine the disputed question and that question must involve a claim of right separable from, and collateral to rights asserted in the action.”). See also *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

⁸⁶ *Id.* at 550. See also *Johnson v. Jones*, 515 U.S. 304, 319-20 (1995).

these immunity appeals present both questions of fact and questions of law. In those cases the circuit court has jurisdiction over the legal part of the appeal, but no jurisdiction over the factual part of the appeal.⁸⁷ So I come back to my astonishment at the Supreme Court's attempt to simplify qualified immunity. One only has to try to read some of these circuit court decisions and try to figure out whether the immunity appeal presents a question of fact or a question of law to know that simplification has not worked.

If I were a plaintiff's attorney, I would place great importance on the availability of interlocutory immunity appeals. These appeals are costly in terms of legal resources for plaintiffs' lawyers and the delay of litigation, because when an immunity appeal is taken, district court proceedings are stayed. Thus, the delay is usually a negative for the plaintiff, while governmental defendant's are normally quite happy to maintain the status quo.

C) FOUR MAIN QUALIFIED IMMUNITY ISSUES

I have picked out four qualified immunity issues for discussion. These are the big issues litigators have to deal with.

i. *Qualified Immunity or Violation of Federally Protected Rights?*

The first issue is: When a qualified immunity defense is raised, what should the court deal with first? Should the court go right to the qualified immunity defense, or should it first ask the question of whether the complaint states a violation of a federally protected right. This could be an important issue in terms of the practicality of litigation. Attorneys like to know the answer to this question in order to know how to frame their briefs and present their oral arguments.

Back in 1991, *Siegert v. Gilley*⁸⁸ seemed to definitively hold that the first question a court should confront when faced with

⁸⁷ See, e.g., *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 255-56 (2001).

⁸⁸ 500 U.S. 226 (1991).

a qualified immunity defense is whether the complaint states a violation of federally protected rights.⁸⁹ The idea was that, if the complaint does not state a violation of federally protected rights, that should be the end of the matter. There would be no need to deal with the qualified immunity defense. Post *Siegert*, the Supreme Court itself did not always adhere to the *Siegert* approach.⁹⁰ Naturally, that created some questions among lower court judges.

In *County of Sacramento v. Lewis*,⁹¹ in a lengthy footnote, the Supreme Court said, “the better approach” is for courts to first ask whether the complaint states a violation of federally protected rights.⁹² The Court reasoned that, if courts routinely went to the qualified immunity defense first, it would become difficult for constitutional standards to get resolved.⁹³ That is a fairly important point. How would constitutional issues get resolved if courts routinely decided cases on the basis of qualified immunity? Of course, the phrase “better approach” was unclear.

The next year, 1999, the Court decided two cases, *Conn v. Gabbert*⁹⁴ and *Wilson v. Layne*.⁹⁵ In those cases the former “better approach” language shifted to “must” language. The Court said that when qualified immunity is asserted as a defense, courts must first resolve whether the complaint states a violation of federally protected rights.⁹⁶ The Court did something here we would not accept from most law students though. The Court did not say whether this new “must” approach was intended to overturn the prior “better approach.” So there is still some uncertainty, but there is a clear message that having the lower courts first deal with the question of whether the complaint states a violation of federally protected rights is at least the preferred approach.

⁸⁹ *Id.* at 232.

⁹⁰ *See, e.g., Hunter*, 502 U.S. at 224.

⁹¹ 523 U.S. 833 (1998).

⁹² *Id.* at 842 n 5.

⁹³ *Id.* at 842.

⁹⁴ 526 U.S. 286 (1999).

⁹⁵ 526 U.S. 603 (1999).

⁹⁶ *Id.* at 609; *accord Saucier*, 121 S. Ct. at 2156 (stating that the threshold question is whether the facts alleged show the officer’s conduct violated a constitutional right).

Yet, despite strong messages from the Supreme Court, some lower court judges have been resistant and have sought to go first to the qualified immunity defense.⁹⁷ This is somewhat understandable. If you have a case that presents a difficult question of constitutional law, and there is a qualified immunity defense raised, then it might be appealing for a lower court to say, "I do not have to resolve this complex, unsettled question of constitutional law. All I have to hold is that regardless of what the constitutional law might be, it was not clearly established at the time the official acted."

ii. Clearly Established Federal Law

The second qualified immunity issue is: What do we mean by clearly established federal law? What precedent makes the law clearly established? The key decision here from the Supreme Court is *Wilson v. Layne*,⁹⁸ where the Supreme Court said, normally, for the federal law to be considered clearly established, there must be controlling precedent either from the United States Supreme Court, the particular circuit, or the highest court in the state.⁹⁹ That is what normally will establish federal law. Another component should be added to that, however. There must also be a close factual correspondence between the facts in the case at hand and the facts in the precedent that the plaintiff is relying upon.¹⁰⁰ Close factual correspondence is not the same as identical factual correspondence. That would be an unreasonable requirement to impose upon the plaintiff. But once we say close factual correspondence, predictably, judges are going to disagree, to some extent, as to how close that factual correspondence must be.

Decisions from outside the controlling jurisdiction, such as a decision from another circuit, or a decision from another state court, normally will not clearly establish federal law, absent a strong consensus of opinion in lower court decisions in other

⁹⁷ See, e.g., *Horne v. Coughlin*, 178 F.3d 603, 603 (2d Cir.), *denying reh'g of* 155 F.3d 26 (2d Cir.), *adhered to on reh'g*, 191 F.3d 244 (2d Cir.), *cert. denied*, 528 U.S. 1052 (1999).

⁹⁸ 526 U.S. at 603.

⁹⁹ *Id.* at 616-17.

¹⁰⁰ *Saucier*, 121 S. Ct. at 2156; *Anderson*, 483 U.S. at 639-40.

jurisdictions.¹⁰¹ A conflict in the circuits is a strong indicator that federal law was not clearly established, and courts can look at the strength of the government's argument in support of the constitutionality of the governmental practice.¹⁰² Therefore, there may be cases where the ultimate conclusion is that the official acted in an unconstitutional manner, but the court might go on to conclude that the constitutional arguments put forth by the official had some substance to them. In that case, the likelihood is that the law will not be found to be clearly established.

iii. Standards of Objective Reasonableness

The third qualified immunity issue is: how does qualified immunity apply when the constitutional standard itself is one of objective reasonableness? The bottom line answer, at best, is it applies awkwardly. Qualified immunity itself is an objectively reasonable standard. This comes up on a recurring basis in challenges to arrests and challenges to searches. Of course, the key standard in those Fourth Amendment challenges is whether the officer had probable cause.¹⁰³

Probable cause itself is an objective reasonableness test. In Paula Plaintiff's case, her excessive force, Fourth Amendment claim depends upon whether the officer acted in an objectively reasonable fashion.¹⁰⁴ In these cases, the application of qualified immunity as an objective reasonableness test might appear to be redundant because the constitutional claim already requires a showing that the officer acted in an objectively reasonable fashion.

Qualified immunity applies even when the Fourth Amendment standard itself is one of objective reasonableness.¹⁰⁵ That means the official is given two levels of reasonableness protection: one level of protection under the Fourth Amendment; another level of protection under qualified immunity. In *Anderson*

¹⁰¹ *Wilson*, 526 U.S. at 616.

¹⁰² *Id.* at 618.

¹⁰³ *Malley*, 495 U.S. at 341 (stating that if there is a lack of probable cause in obtaining an arrest warrant, there would be no immunity from suit under Section 1983).

¹⁰⁴ *See Graham*, 490 U.S. at 395.

¹⁰⁵ *Saucier*, 121 S. Ct. at 2156; *Anderson*, 483 U.S. at 639.

v. Creighton,¹⁰⁶ which dealt with a challenge to a warrantless search made by federal law enforcement officers, the Supreme Court held that the Fourth Amendment claim was subject to the qualified immunity defense even though the Fourth Amendment standard itself was an objectively reasonable standard.¹⁰⁷

Is it possible for a public official to act in an unreasonable manner for Fourth Amendment purposes and yet to be held to have acted in a reasonable fashion for qualified immunity purposes? Well, in *Anderson*, the Supreme Court said that is a possibility.¹⁰⁸ It is another way of saying that an official could be found to have acted in an unreasonable manner for constitutional purposes, but in a reasonable manner for qualified immunity purposes. An official can act reasonably unreasonably. It gets the mind spinning at some point.

It may be less awkward, at least semantically, to conclude that the officer had arguable probable cause. That is one way lower courts have gotten out of the semantic difficulty. There are many, many cases where the court finds a Fourth Amendment violation because the officer lacked probable cause, but the officer is protected from personal liability by qualified immunity because the officer had arguable probable cause.¹⁰⁹ That shows the potency of the defense of qualified immunity.

iv. Facts in Dispute

The fourth qualified immunity issue is: how does qualified immunity get resolved when facts that are relevant to the qualified immunity defense are in dispute? Who should decide the factual issues, the judge or the jury? One possibility, of course, is that the trial judge could say, "Let the jury decide the disputed factual questions on special verdicts, and let the judge reserve the qualified immunity defense for the court, to be resolved on the

¹⁰⁶ 483 U.S. at 635.

¹⁰⁷ *Id.* at 645.

¹⁰⁸ *Id.* at 641 (holding "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present . . . and in those cases those officials like other officials who act in ways they reasonably believe to be lawful should not be held personally liable.").

¹⁰⁹ See, e.g., *Hunter*, 502 U.S. at 227.

basis of what the judge finds to be the clearly established federal law, along with the facts that the jury has found.” An alternative system would give the qualified immunity issue itself to the jury under instructions which would explain the nature of the qualified immunity defense and also tell the jury what the clearly established federal law was. The court would never ask the jury to decide whether the federal law was clearly established or not, as that is clearly a question of law for the court.

Qualified immunity is a very, very potent defense. Defense attorneys understand how important and how powerful it is. Plaintiff's lawyers, by my observation, very often underestimate how significant and how powerful this defense is. It may not be absolute immunity, but it is just a rung below and maybe it is not a big rung below. A very large percentage of Section 1983 cases get resolved in favor of the defendants based upon qualified immunity.

V. MUNICIPAL LIABILITY

Municipal liability is the last issue I want to address. Because there is no respondeat superior liability under Section 1983, in order to establish municipal liability the plaintiff has to show that, in some way, the violation of her federally protected rights was attributable to the enforcement of a municipal policy or practice.¹¹⁰ Municipal entities, unlike public officials, cannot assert the official's common law immunities, so that, even if the municipal official is protected by an absolute immunity or qualified immunity because the official acted in an objectively reasonable manner, the municipality is still potentially subject to Section 1983 liability. This is one of the main reasons that Section 1983 plaintiffs often couple their personal liability claims with municipal liability claims. The other big reason is to get to the deeper pocket municipal entity.

While Section 1983 complaints commonly assert claims against municipal entities, Section 1983 plaintiffs very often have great difficulties establishing municipal liability. The reason for that is, if one looks at the different potential bases for establishing

¹¹⁰ *Monell*, 436 U.S. at 694.

municipal liability, one finds difficult problems for Section 1983 plaintiffs.

One possibility would be for the plaintiff to rely upon a formally promulgated policy by the municipality, for example, by the city council. The problem is that the formally promulgated policy is often not there. For instance, in police misconduct cases, municipalities typically do not have policies that allow police officers to use unreasonable force, to brutalize individuals, or to make arrests without probable cause. A formally promulgated policy is a potential basis of municipal liability, but it is not found in many cases. It is just not there.

The second possibility is for the plaintiff to be able to show a custom or practice. This custom or practice could be a custom or practice of the higher echelon municipal officials, the policy makers. Alternatively, it could be a practice by lower echelon employees, which, if sufficiently pervasive, gives the higher ups actual, or at least constructive, knowledge as to what is taking place. Although the law recognizes custom or practice as a basis for municipal liability,¹¹¹ sufficient evidence to establish the claim is often lacking. These claims are very difficult to prove. It is also very time consuming to find that kind of evidence, requiring a lot of investigation and discovery. The number of plaintiffs who are able to actually prove a municipal custom or practice is quite few in number.

The third possibility is a final decision by a municipal policy maker. This is a possibility, but again, very often, the wrong that the plaintiff is complaining about was not a wrong of a final policy maker of the municipality. Very often, it was the police officer on the beat, or some subordinate employee that engaged in conduct that violated the plaintiff's rights.

The Supreme Court says that who has final policy making authority is a question of state law.¹¹² In reality, it is more often a question of local law. That means that plaintiffs have to look at ordinances and municipal policy statements, and possibly regulations. A little practical suggestion here is that, when this issue does occur, the attorneys should furnish the materials to the

¹¹¹ *Id.*

¹¹² See *St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988); *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986).

court because those materials are not likely to be readily available in a federal court library. Once the materials are furnished to the court, they can be judicially noticed.

There is also a question of whether an official is a state policy maker, as compared to a municipal policy maker.¹¹³ This is a very important question because, if the official is found to be a state policy maker, then that official's decisions do not become the basis for establishing municipal liability.¹¹⁴ For example, in a series of decisions from the Second Circuit dealing with the functions of New York's prosecutors, the court has held that a prosecutor is considered to be a state policy maker acting on behalf of the State of New York as far as the decision to prosecute, and in actually prosecuting the case.¹¹⁵ For other functions, however, such as how the prosecutor's office gets administered, or the training of assistant district attorneys, the prosecutor is considered to be a municipal official.¹¹⁶

Finally, Supreme Court decisional law establishes that a plaintiff can base a claim of municipal liability on alleged inadequate training.¹¹⁷ The plaintiff has to show not just

¹¹³ See *McMillian*, 520 U.S. at 785 (where the issue was whether Alabama sheriffs are policymakers for the state or for the county when they act in a law enforcement capacity).

¹¹⁴ *Id.*

¹¹⁵ *Baez v. Hennessy*, 853 F.2d 73 (2d Cir. 1988), *cert denied*, 488 U.S. 1014 (1989).

¹¹⁶ *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *cert. denied*, 115 S. Ct. 735 (1995).

¹¹⁷ See *City of Canton*, 489 U.S. at 388 (holding "the inadequacy of police training may serve as a basis for 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."); *Bd. of the County Comm'rs. v. Brown*, 520 U.S. 397, 409 (1997) (holding it is possible "that evidence of a single violation of Federal rights, accompanied by a showing that a municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such violation, could trigger municipal liability"); *Pembaur*, 475 U.S. at 484 (where the trial judge instructed the jury that a single, unusually excessive use of force may warrant an inference that it was attributable to grossly inadequate training, and that the municipality could be held liable on that basis); *Oklahoma City*, 471 U.S. at 820-21 (the District Court charged the jury "that the city's policymakers could not merely have been negligent in establishing training policies, but they must have been guilty of gross negligence or deliberate indifference to the police misconduct . . .").

inadequate training in a vacuum, but a specific training deficiency.¹¹⁸ The plaintiff also has to show that the municipality was deliberately indifferent with respect to that training deficiency.¹¹⁹ It is often very difficult for the plaintiff to establish that deliberately indifferent training by the municipality was the cause, was proximately or directly linked to, the violation of the plaintiff's federally protected rights. My observation is that although these claims are asserted fairly routinely, relatively few succeed. It is a tiny fraction. I would be surprised if it was much more than one percent of the claims.

The Supreme Court has used the deliberate indifference standard in municipal liability claims for inadequate training, and for claims of deficient hiring.¹²⁰ The lower courts have extended the deliberate indifference standard to claims of inadequate supervision.¹²¹ The open question is whether the deliberate indifference standard for municipal liability claims also applies in cases where the plaintiff's claim is based upon a municipal policy that is facially constitutional, but the plaintiff alleges that the policy was the cause of the violation of her federally protected rights. The question is whether the deliberate indifference standard applies in that situation. The lower courts tend to take Supreme Court deliberate indifference liability decisions and apply deliberate indifference across the board.¹²² It is not clear, however, whether that is what the United States Supreme Court intended.

¹¹⁸ *City of Canton*, 489 U.S. at 389 n.7.

¹¹⁹ *Id.* at 389.

¹²⁰ *Bd. of the County Comm'rs*, 520 U.S. at 407.

¹²¹ *Young v. County of Fulton*, 160 F.3d 899, 903 (2d Cir. 1998).

¹²² *See, e.g., Trigalet v. Tulsa*, 239 F.3d 1151, 1153 (10th Cir. 2001); *Young v. City of Mt. Ranier*, 238 F.3d 567, 574 (4th Cir. 2001); *Newburgh Enlarged Sch. Dist.*, 239 F.3d at 254; *Piotrowski v. Houston*, 237 F.3d 567, 584-85 (5th Cir. 2001).