SUGGESTED TOPICS FOR

TRAINING POLICE DEPARTMENTS IN

SECTION 1983 LIABILITY

PRESENTED AT THE

TEXAS CITY ATTORNEY'S ASSOCIATION

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INTRODUCTION

"To protect people from drowning we can put up fences around our pools, put locks on the gates into the pool and install pool monitor alarms….but perhaps the best protection against drowning is to teach people to swim." Anonymous.

This paper is not about litigating section 1983 lawsuits (at least not in the classic sense), nor is it about case law updates regarding section 1983 actions. Rather, it is about the prevention of section 1983 cases. It is about training peace officers in section 1983 issues. Police departments are faced with liability issues everyday – it simply comes with the territory. As attorneys, we tend focus on how to litigate the issues once the underlying conduct has occurred. We also train ourselves in skill sets for handling those lawsuits. This presentation will focus on a different skill set, that of training law enforcement officers in liability issues. I realize that some attorneys are already involved in training police officers. Hopefully this presentation will encourage others to become involved in that training. I have trained police officers in legal topics for about 12 years. During that time I have discussed training and policy issues with many chiefs of police. Each one recognizes the need for training officers in legal topics, such as civil liability. Each one also tells me it is difficult to find attorneys to handle the training. I am a firm believer in the adage "an ounce of prevention is worth a pound of cure." Comprehensive, up-to-date policy/procedure manuals coupled with quality training of officers are two excellent preventative measures.

This paper will focus on what I suggest should be the minimum points of discussion for training officers about liability for police actions primarily in the federal realm. It is intended as a refresher on liability issues for experienced police officers and police trainers and as an introduction to those issues for persons new to the police training world. The excerpt from the *Texas Law Enforcement Handbook* (Holtz & Spencer, LexisNexis Gould Publications, 2006 Ed.) ("*Handbook*") which follows this general discussion contains case law illustrations of the points discussed in this paper. The *Handbook* also contains much information about arrest, search and seizure issues – which lend themselves well to liability concerns. Another good discussion of the basic principles of police civil liability can be found in *Critical Issues in Police Civil Liability* (Kappeler, Waveland Press, 4th ed., 2006) ("*Critical Issues*"). Both resources would help in creating a lesson plan for training officers. Please review the attached *Handbook* excerpt for a more complete discussion of applicable case law, with citations.

OVERVIEW OF CIVIL LIABILITY

The costs associated with handling civil liability lawsuits are considerable. A study published in 2000 of cases involving inadequate training for police officers revealed the average award for plaintiffs was about $492,000 and attorney fees for the prevailing party averaged $60,000. A study of federal circuit court cases between 2000 and 2005 found the average jury award for plaintiffs was about $627,000. A 2001 study in Texas found that about 25% of these cases settled out of court and the average settlement was about $55,000. Federal courts reported several theories of liability presented by plaintiffs, including: false arrest, unlawful detention, excessive force, assault & battery, unlawful search, unlawful seizure, inadequate supervision, improper strip searches, and inadequate training. (*Critical Issues*, p. 9-10). As you can see, police civil liability is an expensive proposition. Much of the liability exposure can be

minimized by training officers and supervisors in proper procedures, stressing the importance of supervisory oversight, and maintaining up-to-date policy manuals.

Police officers are not usually sued as individuals. Most plaintiffs want to gain access to the larger coffers of the government entity that employs the officer. This is accomplished by suing the municipality and its policymakers as well as the officer. Plaintiffs will have to establish that the police department chain of command and policy makers were, or should have been aware, of the behavior that violated a constitutional or federal protection and were deliberately indifferent to the consequences of the behavior that eventually led to the actions that prompted the suit. This theory of extended responsibility is frequently referred to by officers as vicarious liability. It will be helpful to point out to officers that section 1983 liability is not really vicarious in the truest sense (holding one person directly responsible for the actions of another); rather, in a section 1983 action the policy makers of the municipality are being held accountable for their role in the sequence of events that led to the lawsuit. That role could include, in the broadest sense, having inadequate policies in place or permitting unconstitutional practices or customs to remain unchallenged thereby demonstrating a deliberate indifference to the federally protected rights of the plaintiff.

For example, a plaintiff alleges that an officer used excessive force against her. That plaintiff could argue that the policies established by the chief are outdated and inadequate and allowed the officer to engage in illegal conduct; or if the policies were current and in line with the law on the use of force, the plaintiff could argue the training staff failed to instruct the skill sets necessary to comply with the policy; or, the plaintiff could argue that although the policies and training were up to specs, the sergeant failed to supervise the officer properly and essentially acquiesced to the officer's illegal conduct. In theory, these actions (or inactions) by various members of the department cumulatively lead to liability for the agency and government entity for the acts of the various employees.

Cases involving violations of civil rights are usually litigated in federal court. The reason is simple: Texas law provides for a cap on damages for causes of action under the Tort Claims Act. The Act also sets out strict rules whereby a government entity may actually be sued. Given the inherent difficulty of suing a government entity in state court, it is no real wonder that plaintiffs will utilize federal courts when possible, since the possibility of recovering greater damages is present and there is a provision requiring the government entity to pay the plaintiff's attorney's fees if the plaintiff prevails in the suit. The focus of this paper will be an overview of federal lawsuits. However, I have briefly mentioned state law matters in the next section so officers can at least be exposed to them, should the trainer choose to do so.

STATE STATUTES

Lawsuits involving officers at the state level are generally based upon the theory of tort law. A tort is simply conduct that interferes with another person's rights (staying alive is considered a right for purposes of liability discussions). This body of law does not address contract rights. In Texas, the relevant statute would be Chapter 101 of the Texas Civil Practice and Remedies Code. Section 101.021 of this statute states:

A governmental unit in the state is liable for:

(1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:

(A) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle or motor driven equipment; and

(B) the employee would be personally liable to the claimant according to Texas law; and

(2) personal injury and death so caused by a condition or use of tangible personal or real property if the government unit would, were it a private person, be liable to the claimant according to Texas law.

Officers could also be held criminally responsible under state law for violation of civil rights. One of the best examples of this liability can be found in section 39.03 of the Penal Code dealing with official oppression. Take a moment and point out to the officers the various forms of police conduct that fall under section 39.03.

FEDERAL STATUTES

United States Code, Title 42, Ch. 21, Section 1983

Every person, who under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any right, 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.

United States Code, Title 42, Ch. 21, Section 1988(b)

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1977, 1977A, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], or section 40302 of the Violence Against Women Act of 1994, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such

officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

United States Code, Title 18, Ch. 13, section 242

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any person in any State, Territory, Commonwealth, Possession, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned not more than one year, or both; and if bodily injury results from the acts committed in violation of this section or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse, or an attempt to commit aggravated sexual abuse, or an attempt to kill, shall be fined under this title, or imprisoned for any term of years or for life, or both, or may be sentenced to death.

The top two statutes form the basis for the issues surrounding police civil liability in the federal courthouse. As stated earlier, most actions against police officers for actions taken in their official capacities will be filed in federal court. Section 1983 sets forth the prohibited conduct. Section 1988 provides for the recovery of attorney's fees. Section 242 is included to illustrate federal criminal liability for officers who violate civil rights. There are also provisions in the U.S. Code for lawsuits against persons who conspire to violate civil rights and those who fail to intervene when rights are violated; however, those statutes are not included as the point is sufficiently made by these three.

A "PERSON"

Section 1983 tells us every *person* who, under color of…It is safe to conclude that the individual officer would qualify as a person for purposes of the statute. Municipalities and municipal officials also qualify as persons under Supreme Court rulings interpreting section 1983.

ACTING UNDER COLOR OF LAW VIOLATES A FEDERAL PROTECTION

The question will occasionally come up as to whether the officer who takes action while off-duty is acting under color of law. If the officer identifies herself as a law enforcement officer and undertakes some sort of arrest function or search function, then it will be safe to assume that will qualify as acting under color of law. Officers who engage in purely personal acts of criminal conduct will not automatically be deemed to

be acting under color of law. For example, an officer who murders his wife then kills himself and used his department-issued weapon to commit the crime would not be acting under color of law. It is important to note that each situation will be assessed on its own facts.

The officer's conduct must violate a federally protected right. A violation of a state law proscribing certain police conduct would not be sufficient to state a cause of action unless the conduct also violated a federal right. For example, in Texas warrantless arrests are regulated in general by Chapter 14 of the Code of Criminal Procedure. An arrest that violated one of those restrictions, but was supported by probable cause would not be sufficient for a federal constitutional violation. The conduct must rise to a level of significance so as to violate the constitution. Allegations of minor misconduct, such as a push or a shove would most likely not rise to the level of a constitutional violation. Allegations of mere negligence would also have difficulty meeting the requisite level of harm.

INDIVIDUAL AND OFFICIAL CAPACITY;

IMMUNITIES AND DEFENSES

When a plaintiff decides to sue an officer for an alleged civil rights violation, the plaintiff may sue the officer in her *individual capacity*, her *official capacity*, or both. The plaintiff will usually include the city in the lawsuit – since the municipality qualifies as a person for section 1983 liability.

Official Capacity:

Generally, if the plaintiff sues the officer in her official capacity *only*, i.e. not in her individual capacity, the net result is that it is the same as if the plaintiff sued the city. In this circumstance, in order to hold a municipality liable for a constitutional deprivation, the plaintiff would be obliged to show that:

1. the plaintiff possessed a constitutional or federally protected right;
2. the plaintiff was deprived of that constitutional or federally protected right;
3. the municipality had an unconstitutional policy or practice/custom;
4. the policy or practice/custom amounted to deliberate indifference to the plaintiff's constitutional or federally protected right; and
5. the policy or practice/custom caused the deprivation of the right or protection.

How will the plaintiff establish that the policy maker for the city knew about the deficient policy? He could show that the policy was designed and implemented in writing, e.g. an S.O.P. – that would likely show actual knowledge by the policymaker. If the policy is not in question, then the unwritten custom or practice argument would come into play. There could be repeated violations of constitutional rights by employees and the policymaker could fail to take corrective actions. Alternatively, the plaintiff may show that the policymaker had actual knowledge of the unconstitutional practice or custom.

Factors that could demonstrate knowledge of the custom or practice on the part of the policymaker:

1. participation by the policymaker in the custom or practice;
2. the amount of direct oversight the policymaker has over the daily operations;
3. the process used by the policymaker to review the incident;
4. the ratification of the custom or policy by the policymaker;

The plaintiff must also show a nexus between the officer's constitutional violation and the custom or practice. Some factors that could demonstrate that the action of the employee was based on a custom or practice are:

1. the frequency of the illegal conduct;
2. the extent to which the practice was routine for employees;
3. the extent to which the practice was accepted by supervisors;
4. the extent to which employees shared the beliefs underlying the action;
5. the number of employees involved in the violation;
6. failure to terminate the employee;
7. failure to investigate the violation;
8. failure to discipline the employee;
9. the failure to take steps to prevent the recurrence of the violation.

(*Critical Issues*, p.61)

Individual Capacity and Immunities and Defenses:

The difference between suing an officer in her individual capacity versus her official capacity lies mainly in the defenses available to the officer. The officer sued in her individual capacity could assert absolute immunity, qualified immunity, probable cause, and good faith as defenses.

Absolute immunity for peace officers is rare. One example of its applicability could be when an officer makes an arrest at the direction of a judge – a judge might verbally order a peace officer to arrest a person in the courtroom – in this circumstance the officer should be afforded the same level of immunity as the judge who ordered the arrest. See page 13 of the *Handbook* excerpt for a more thorough discussion.

Qualified immunity is a more common defense for officers. The standard for qualified immunity is whether the officer "violated clearly established constitutional or statutory rights of which a reasonable person would have known." [*Handbook* p.8, quoting the U.S. Supreme Court decision in *Harlow v. Fitzgerald,* (1982)]. See *Handbook* p. 8 et. seq. It should be noted that the officer's conduct need not have been expressly addressed in a previous opinion; rather, the law must simply establish fair warning to the officer that her conduct was unconstitutional.

If the claim against the officer is for false arrest or search, then the officer may be able to assert the defense of *probable cause*. An officer would be entitled to immunity from suit if a reasonable officer could have believed there was sufficient probable cause for the arrest or search. The safest route for officers is to obtain a warrant from a

magistrate authorizing the arrest or search, as the issuing magistrate will make the determination of probable cause. Please note that there are cases that have held that if an officer submits an affidavit to a judge that no reasonable officer could have believed set forth probable cause for the warrant, then that officer will not be allowed to assert this defense. Obviously, an officer who lies in an affidavit would likewise not be eligible for this defense.

The last defense, *good faith*, is one where the officer argues that, at the time the act was committed she could not have reasonably known that the act was unconstitutional or illegal. This is in effect a rebuttal to the claim that a reasonable officer should have known her conduct violated clearly established law. The best example of this defense would be when an officer executes a warrant in good faith, and it is later determined the warrant was not supported by sufficient probable cause. The officer could assert this defense with regards to the claim of false arrest or false search.

PRACTICE TIPS

I have found it helpful when training officers to break down the information about liability into smaller components as a training tool, much like the preceding sections of this paper. Persons who have the opportunity to train officers regarding liability issues, or counsel chiefs on liability issues could use the opportunity to stress the following points:

1. policies should be reviewed regularly to make sure they comport with the current law;
2. training should include arrest search and seizure topics, not just use of force issues;
3. supervisors must understand the need for observation of officers and be prepared to intervene when necessary;
4. supervisors, particularly first-line supervisors, should understand that they are the first line of defense in preventing an unconstitutional practice or custom from being established;
5. reports should be scrutinized to make sure there is sufficient information to support the officer's actions, e.g. did the officer articulate sufficient probable cause for the search or arrest?

Policy makers for departments should be aware that training is a critical component of any defense in civil liability cases. Departments should make sure that their training staff is current on all topics they teach. The training staff should maintain comprehensive records of each officer's training, including lesson plans.

Policy makers should also be reminded that any conduct that violates policy or law should be dealt with quickly. This should be stressed to all supervisors as well. Prompt action by the department will help the department defend against an argument that the policy makers acquiesced in the alleged illegal conduct.

EXCERPT FROM

TEXAS LAW ENFORCEMENT HANDBOOK

Holtz & Spencer

LexisNexis Gould Publications (2006)

§14.1. Introduction.

When a civil law suit is brought against a law enforcement officer for actions taken in the course of his or her employment, the officer may be protected by the doctrine of "qualified immunity." Procedurally, qualified immunity is deemed to be an "affirmative defense" that the officer must establish by the "preponderance of the evidence." Qualified immunity, also referred to as "executive or good-faith immunity, is generally raised by a law enforcement official in defense of a suit brought by a plaintiff under 42 U.S.C. §1983, alleging a constitutional or statutory violation. In pertinent part, Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.

In general, this statute provides a cause of action for a citizen claiming to have been deprived of his or her well-established federal constitutional or statutory rights by any person acting under the color of state law. Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 1923 (1980); Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).

Courts stress that the resolution of immunity issues should occur "at the earliest possible stage in litigation." Hunter v. Bryant, 502 U.S. 224, 227, 112 S.Ct. 534, 536 (1991). In fact, it is improper for a court to routinely submit the issue of qualified immunity to a jury. "Immunity ordinarily should be decided by the court long before trial,"id. at 228, 112 S.Ct. at 537, with the trial judge generally using the summary judgment standard.

To determine whether a law enforcement officer has a qualified immunity defense against a §1983 lawsuit, a court will look to see if the officer violated "clearly established statutory or constitutional rights of which a reasonable person would have known."Harlow at 818, 102 S.Ct. at 2738. If the police official did not violate clearly established constitutional or statutory law, he or she should have immunity. On the other hand, if the official did violate "clearly established law," the focus then shifts to a consideration of "extraordinary circumstances" that require the official to prove that he or she neither knew nor should have known of the relevant legal standard. See Harlow at 819, 102 S.Ct. at 2738. The "clearly established law" requirement also has a time component that requires a court to judge an officer's conduct based on the state of the law and facts that existed at the time of the alleged violation. Anderson v. Creighton, 483 U.S. 635, 639, 107 S.Ct. 3034, 3038 (1987).

In Anderson, the Court explained that the standard for determining whether qualified immunity exists is an "objective (albeit fact-specific) question whether a reasonable officer could have believed" the action taken was proper, "in light of clearly established law and the information" the officer possessed at the time. Id., 483 U.S. at 641, 107 S.Ct. at 3040. Therefore, an officer's "subjective beliefs" about the arrest, search or seizure "are irrelevant."Id.

Thus, to determine if law enforcement officer is entitled to qualified immunity, a two-part inquiry must be made:

(1) Was the law governing the officer's conduct clearly established?

(2) Under that law, could a reasonable police officer believe his conduct lawful?

In cases alleging that a police officer engaged in an unlawful arrest, search or seizure, the police officer will be entitled to qualified immunity if the officer can successfully prove: (1) that he or she acted with probable cause; or (2) even if probable cause did not exist, that a reasonable police officer could have believed in its existence. The latter inquiry consists of "a standard of objective reasonableness," which is interpreted as a lesser standard than that required for probable cause. Generally, the only time when that standard is not satisfied is when, on an objective basis, "it is obvious that no reasonably competent officer would have concluded' that the action taken was proper. See Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986).

When a search or seizure, or both, is performed under the authority of a warrant, the existence of probable cause will be presumed to exist for purposes of a Section 1983 cause of action based on an alleged Fourth Amendment violation. A plaintiff seeking recovery must then prove by a preponderance of the evidence that probable cause did not exist. If probable cause is found to have existed, then judgment should be entered for the law enforcement official as a matter of law. If probable cause did not exist, however, a court must then decide whether a reasonable police official could have believed in its existence.

§14.2. Cases and materials.

HOPE v. PELZER
Supreme Court of the United States
536 U.S. 730, 122 S.Ct. 2508 (2002)

QUESTION: In order for a plaintiff to defeat a government officer's "qualified immunity" defense, must the plaintiff show that the preexisting law on the subject was "clearly established" by cases having facts that are "materially similar" to the plaintiff's case?

ANSWER: NO. Although earlier cases involving "materially similar" facts can provide especially strong support for a conclusion that the law was "clearly established" at the time of an officer's conduct, such cases are not necessary for such a finding. Rather, for a constitutional or statutory right to be clearly established, it need only be shown that the contours of the right were "sufficiently clear that a reasonable official would understand that what he is doing violates that right."Id. at 2515.

RATIONALE: When a law enforcement or corrections officer is sued under 42 U.S.C. §1983, a court is required to make a threshold inquiry as to whether the plaintiff's allegations, if true, establish a constitutional violation. Even if the officer's conduct is determined to be constitutionally impermissible, the officer may nevertheless be shielded from liability for civil damages if the officer's "actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.' "Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982)). This standard is sometimes referred to as the "fair warning" standard, or the "Harlow test."

In this case, in assessing whether the constitutional violation here met the Harlow test, the court below took the approach that the facts of previous cases must be "materially similar" to the facts of the case at hand. This approach makes the plaintiff's case dependent on the existence of previously-decided, nearly identical cases. According to the United States Supreme Court, however, this rigid approach to the qualified immunity standard was improper. Id. The Court explained:

> [Q]ualified immunity operates "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful."* * * For a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful * * *; but it is to say that in the light of pre-existing law the unlawfulness must be apparent."
> Id. [Citations omitted.]

Naturally, there may be some cases—for example, where the earlier case law on the subject expressly leaves open whether a general rule applies to the particular conduct at issue—when a very high degree of prior factual similarity may be necessary. " 'But general statements of law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.' "Id. at 2516. [Citations and internal quotes omitted.]

Thus, law enforcement and corrections officials "can still be on notice that their conduct violates established law even in novel factual circumstances."Id. Although earlier cases involving "materially similar" facts "can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." Id. In the final analysis, the main question is whether the state of the law at the time of the challenged actions gave the law enforcement officials "fair warning" that their alleged conduct was unconstitutional. Id.

In this case, Larry Hope sued several prison officials employed by the Limestone Prison in Alabama, alleging that he was subjected to cruel and unusual punishment, in violation of the Eighth Amendment, when prison guards twice handcuffed him to a hitching post to punish him for disruptive conduct. In the second, more serious situation, Hope fell asleep during the morning bus ride to the chain gang's work site, and when it arrived, he was less than prompt in responding to an order to get off the bus. "An exchange of vulgar remarks led to a wrestling match with a guard. Four other guards intervened, subdued Hope, handcuffed him, placed him in leg irons and transported him back to the prison where he was put on the hitching post. The guards made him take off his shirt, and he

remained shirtless all day while the sun burned his skin. He remained attached to the post for approximately seven hours. During this 7-hour period, he was given water only once or twice and was given no bathroom breaks. At one point, a guard taunted Hope about his thirst."Id. at 2512.

Preliminarily, the Court determined that the use of the hitching post unnecessarily and wantonly inflicted pain, and thus was a clear violation of the Eighth Amendment. Arguably, the violation was so obvious that the Supreme Court's own Eighth Amendment cases gave these prison officials "fair warning that their conduct violated the Constitution."Id. at 2516. More directly, however, the earlier cases decided in this jurisdiction dictate the conclusion that the prison officials' conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Id. For example, in one of those cases, decided in 1974, the Court of Appeals "squarely held" that " 'handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods' " constitutes cruel and unusual punishment under the Eighth amendment. Id. (quoting Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974)). For purposes of providing "fair notice to reasonable officers administering punishment for past misconduct," the Supreme Court could find no "reason to draw a constitutional distinction between a practice of handcuffing an inmate to a fence for prolonged periods and handcuffing him to a hitching post for seven hours."Id. at 2517. Indeed, " '[n]o reasonable officer could have concluded that the constitutional holding of Gates turned on the fact that inmates were handcuffed to fences or the bars of cells, rather than a specially designed metal bar designated for shackling.' "Id. [Citation omitted.]

Accordingly, the Limestone Prison officials violated clearly established law. They should have realized that the use of the hitching post under the circumstances alleged by Hope violated the Eighth Amendment prohibition against cruel and unusual punishment. It was not necessary that the prior cases in this area of law be nearly identical on their facts in order to meet the "fair warning" standard.

> The obvious cruelty inherent in this practice should have provided [these officials] with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct. [The prior case law in this jurisdiction] put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The "fair and clear warning,"* * * that [this law] provided was sufficient to preclude the defense of qualified immunity at the summary judgment stage.
> Id. at 2518.

NOTE

See also Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001), a case in which police officers were granted qualified immunity from liability for shooting the plaintiff eight times after she lunged at a fellow officer with a knife. The United States Supreme Court

granted certiorari in Willingham, vacated the judgment and remanded the matter for reconsideration in light of Hope v. Pelzer.

MALLEY v. BRIGGS
Supreme Court of the United States
475 U.S. 335, 106 S.Ct. 1092 (1986)

QUESTION: May a police officer be sued for money damages by the victim of an unlawful arrest, when that officer's complaint and supporting affidavit, which gave rise to a judicially issued warrant, failed to establish probable cause for the arrest ?

ANSWER: YES. A police officer may be sued civilly for money damages by the victim of an unlawful arrest. The test is whether a reasonably well-trained officer, under the same circumstances, "would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant."Id. at 1098.

RATIONALE: Rhode Island State Troopers were conducting a narcotics investigation which gave rise to a reasonable suspicion that the defendant (and others) were in possession of marihuana. On the basis of this "suspicion," the state trooper in charge of the investigation drew up felony complaints charging the defendant (and the others) with conspiracy "to violate the uniform controlled substance act of the State of Rhode Island by having (marihuana) in their possession[.]"Id. at 1094. The trooper's complaints, supporting affidavits, and arrest warrants were presented to a judge who signed the warrants [authorizing the arrest of the defendant and the others].

The defendant and the others were arrested at their homes, brought to the police station, booked, arraigned, and released. However, all charges were dropped when the grand jury failed to return an indictment.

The persons arrested then brought a civil action under 42 U.S.C. §1983 for damages, asserting that the Rhode Island state trooper violated their Fourth and Fourteenth Amendment rights by applying for, obtaining, and executing an arrest warrant without probable cause.

In a seven-to-two decision, the United States Supreme Court held that the same standard of reasonableness set forth in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405 (1984), "defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional arrest."Malley at 1098. In Leon, the objective reasonableness test was presented in the context of whether evidence obtained pursuant to a defective search warrant should be suppressed when police officers act in good faith and objectively and reasonably rely upon a warrant issued by a detached and neutral magistrate.

The state trooper argued that a police officer, in these circumstances, is like a prosecutor, and should have the same absolute immunity from such a civil action. If not, "the officer may not exercise his best judgment if the threat of retaliatory lawsuits hangs over him."Id. at 1096.

The Court rejected this argument and emphasized that police officers have never been accorded an absolute immunity. Absolute immunity is only given to those functions

"intimately associated with the judicial phase of the criminal process."Id. at 1097. [Citations omitted; emphasis in original.] The act of a police officer applying for a warrant is much further removed from the "judicial phase" of a criminal proceeding than the actions of the prosecutor who maintains a central role in the continuing judicial process. Additionally, the American Bar Association has developed and presently enforces professional standards for prosecutors which lessen the danger of prosecutorial misconduct. "The absence of a comparably well developed and pervasive mechanism for controlling police misconduct weighs against allowing absolute immunity for the officer."Id. at 1097 n.5.

In the alternative, the state trooper argued that he should at least be shielded from liability for damages in this case for he presented his complaints and supporting affidavits to a judge who signed the arrest warrants, and, "the act of applying for a warrant is per se objectively reasonable, provided that the officer believes that the facts alleged in his affidavit are true."Id. at 1098.

The Court rejected this argument also, holding that the proper test in this case and cases similar "is whether a reasonably well trained officer in [the trooper's] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant. If such was the case, the [trooper's] application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest."Id.

If our criminal justice system operated perfectly, "an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should."Id.

As a result, police officers must "minimize this danger by exercising reasonable professional judgment."Id. An officer "cannot excuse his own default by pointing to the greater incompetence of the magistrate."Id. at 1098-99 n.9.

NOTE

1. Although Malley only involved an objectively unreasonable "arrest," police officers should take note that they are subject to the same civil liability standards for objectively unreasonable searches and seizures. Malley at 1097 n.6. However, the professional officer should not allow this case to deter performance of official duties. The officer who properly builds his case, and in good faith constructs an affidavit containing the requisite probable cause will be shielded from liability by the qualified immunity accorded police officers who act objectively and reasonably in the good faith performance of their official duties. At most, this case should cause those officers to take an extra few minutes to reflect upon their affidavits to ensure the existence of probable cause as mandated by the Fourth Amendment.

2. *Absolute immunity for officers effecting arrests at the direction of a judge*. In Valdez v. City and County of Denver, 878 F.2d 1285 (10th Cir. 1989), plaintiff, Robert Valdez, was present as a spectator in state traffic court. During the course of the proceedings, when the judge said something to a defendant with which Valdez disagreed, Valdez exclaimed, "bullshit," and exchanged words with the judge. Thereafter, Valdez was held

in contempt and the judge ordered several deputies from the sheriff's department to take him into custody.

After his release from custody, Valdez brought an action for damages under 42 U.S.C §1983, alleging, among other things, false arrest and imprisonment against the officers (in their individual capacities) who arrested him. Concluding that the complaint should be dismissed, the Tenth Circuit held that "an official charged with the duty of executing a facially valid court order enjoys absolute immunity from liability for damages in a suit challenging conduct prescribed by that order."Valdez at 1286.

Generally, " 'immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches.' "Id. at 1287 (quoting Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 542, 544 (1988) (emphasis in original)). In the context of judicial proceedings, courts have long recognized an absolute immunity " 'for all persons—governmental or otherwise—who were integral parts of the judicial process.' "Id. [Citations omitted; emphasis in original.] Thus, "the Supreme Court has recognized not only the absolute civil immunity of judges for conduct within their judicial domain, * * * but also the 'quasi-judicial' civil immunity of prosecutors, * * * grand jurors, * * * witnesses, * * * and agency officials * * * for acts intertwined with the judicial process."Id.

According to the Valdez court, "[e]nforcing a court order or judgment is intrinsically associated with a judicial proceeding."Id. at 1288.

> If losing parties were free to challenge the will of the court by threatening its officers with harassing litigation, the officers might neglect the execution of their sworn duties. As the Ninth Circuit aptly reasoned: 'The fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised.' * * * Absolute immunity for officials who carry out a judge's orders is necessary to insure that such officials can perform their function without the need to secure permanent legal counsel. A lesser degree of immunity could impair the judicial process.
> Id. at 1288 (quoting Coverdell v. Department of Social and Health Services, 834 F.2d 758, 765 (9th Cir. 1987)).

Moreover, "[t]o force officials performing ministerial acts intimately related to the judicial process to answer in court every time a litigant believes the judge acted improperly is unacceptable. Officials must not be called upon to answer for the legality of decisions which they are powerless to control."Id. at 1289. In this respect, the court concluded:

> [I]t is simply unfair to spare the judges who give the orders while punishing the officers who obey them. Denying these officials absolute immunity for their acts would make them a "lightning rod for harassing litigation aimed at judicial orders."* * *
> Tension between trial judges and those officials responsible for enforcing their orders inevitably would result were there not absolute immunity for both. * * *
>
> Absolute immunity will ensure the public's trust and confidence in courts' ability to completely, effectively and finally adjudicate the controversies before them. * * *
>
> Because the record viewed as a whole indicates that every action of the defendant[officers] to which Valdez objects was taken under the direction of a

> state court judge, * * * this ca[se is] remanded with instructions to dismiss the complaint as to [each of the officers] in their individual capacities on the basis of absolute immunity.

Id. at 1289-90. [Citations omitted.]

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[material omitted from original text - WS]

3. *Whether a reasonable officer could have believed the arrest to be lawful*. In Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534 (1991), James Bryant delivered two photocopies of a handwritten letter to two administrative officers at the University of Southern California. "The rambling letter referred to a plot to assassinate President Ronald Reagan by 'Mr. Image,' who was described as 'Communist white men within the National Council of Churches.' The letter stated that 'Mr. Image wants to murder President Reagan on his up and coming trip to Germany,' that 'Mr. Image had conspired with a large number of U.S. officials in the plot to murder President Reagan' and others, and that 'Mr. Image (NCC) still plans on murdering the President on his trip to Germany in May of 1985.' * * * President Reagan was traveling in Germany at the time."Id., 112 S.Ct. at 535.

"A campus police sergeant telephoned the Secret Service, and agent Brian Hunter responded to the call. After reading the letter, agent Hunter interviewed University employees. One identified James Bryant as the man who had delivered the letter and reported that Bryant had 'told her "[h]e should have been assassinated in Bonn." ' Another employee said that the man who delivered the letter made statements about ' "bloody coups" ' and ' "assassination," ' while moving his hand horizontally across his throat to simulate a cutting action."Id.

"Hunter and another Secret Service agent, Jeffrey Jordan, then visited a local address that appeared on the letter. Bryant came to the door and gave the agents permission to enter. He admitted writing and delivering the letter, but refused to identify ' "Mr. Image" ' and answered questions about ' "Mr. Image" ' in a rambling fashion. Bryant gave Hunter permission to search the apartment, and the agent found the original of the letter. While the search was underway, Jordan continued questioning Bryant, who refused to answer questions about his feelings toward the President or to state whether he intended to harm the President."Id.

Hunter and Jordan arrested Bryant for making threats against the President, contrary to 18 U.S.C. §871(a), and a magistrate ordered him held without bond. Ultimately, the criminal complaint against Bryant was dismissed on the Government's motion.

Bryant subsequently sued agents Hunter and Jordan, the United States Department of the Treasury, and the Director of the Secret Service. The only issue before the Supreme Court was whether the agents, as a matter of law, were entitled to a qualified immunity on the claim that they had arrested Bryant without probable cause. Rejecting the Ninth Circuit's conclusion that the agents "had failed to sustain the burden of establishing qualified immunity because their reason for arresting Bryant—their belief that the ' "Mr. Image" ' plotting to kill the President in Bryant's letter could be a pseudonym for Bryant—was not the most reasonable reading of Bryant's letter," the Court explained:

> Our cases establish that qualified immunity shields agents Hunter and Jordan from suit if "a reasonable officer could have believed [Bryant's arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed."* * * Even law enforcement officials who "reasonably but mistakenly conclude that probable cause is present" are entitled to immunity. [ ] Moreover, because "[t]he entitlement is an immunity from suit rather than a mere defense to liability,"* * * we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation.

Id. at 536. [Citations omitted; emphasis in original.]

According to the Court, the decision of the Ninth Circuit Court of Appeals "ignores the import" of the principles set forth above. That court should have asked "whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact."Id. at 536-37. "Under settled law, Secret Service agents Hunter and Jordan are entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest Bryant."Id. at 537.

> Probable cause existed if "at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing" that Bryant had violated 18 U.S.C. §871. * * *
>
> When agents Hunter and Jordan arrested Bryant, they possessed trustworthy information that Bryant had written a letter containing references to an assassination scheme directed against the President, that Bryant was cognizant of the President's whereabouts, that Bryant had made an oral statement that " 'he should have been assassinated in Bonn,' "[ ] and that Bryant refused to answer questions about whether he intended to harm the President. On the basis of this information, a magistrate ordered Bryant to be held without bond.
>
> These undisputed facts establish that the Secret Service agents are entitled to qualified immunity. Even if we assumed, arguendo, that they (and the magistrate) erred in concluding that probable cause existed to arrest Bryant, the agents nevertheless would be entitled to qualified immunity because their decision was reasonable, even if mistaken. * * *
>
> The qualified immunity standard "gives ample room for mistaken judgments" by protecting "all but the plainly incompetent or those who knowingly violate the law."* * * This accommodation for reasonable error exists because "officials should not err always on the side of caution" because they fear being sued. * * * Our National experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised.
>
> [T]he judgment of the Court of Appeals is reversed.

Id. at 537. [Citations omitted; emphasis added.]

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5*. Acting under color of state law.* In pertinent part, 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State * * *, 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. * * * (emphasis added).

In a civil rights lawsuit brought under §1983, the person suing must, in addition to alleging a violation of a right secured by the Constitution and laws of the United States, "show that the alleged deprivation was committed by a person acting under color of state law."West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55 (1988). [Emphasis added.]

"The traditional definition of acting under color of state law requires that the defendant in a §1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' "Atkins at 49, 108 S.Ct. at 2255 (quoting United States v. Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1042-43 (1941)). In this respect, acts of state or local law enforcement officers in their official capacities "will generally be found to have occurred under color of state law,"Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3rd Cir. 1994), even when an officer oversteps the bounds of his or her authority. Screws v. United States, 325 U.S. 91, 111, 65 S.Ct. 1031, 1040 (1945).

Under "color" of law also means under "pretense" of law. Screws at 111, 65 S.Ct. at 1040. "Thus, one who is without actual authority, but who purports to act according to official power, may also act under color of state law."Barna at 816. For example, in Griffin v. Maryland, 378 U.S. 130, 84 S.Ct. 1770 (1964), the Supreme Court held that a deputy sheriff employed as a private security guard by a private park operator acted under color of state law when he ordered the plaintiff to leave the park, escorted him off the premises, and arrested him for criminal trespass. While the deputy sheriff was actually acting as an agent of the private park operator rather than as an agent of the state, he nonetheless "wore a sheriff's badge and consistently identified himself as a deputy sheriff rather than as an employee of the park," and consequently "purported to exercise the authority of a deputy sheriff."Id. at 135, 84 S.Ct. at 1772. Finding that the deputy was acting under color of state law, the Court stated:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity.

Id.

Similarly, "off-duty police officers who purport to exercise official authority will generally be found to have acted under color of state law. Manifestations of such pretended authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations."Barna at 816.

"On the other hand, a police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law."Id. See e.g., Delcambre v. Delcambre, 635 F.2d 407, 408 (5th Cir. 1981) (alleged assault by on-duty police chief at police station held not to occur under color of state law because the altercation with the plaintiff, the chief's sister-in-law, arose out of a personal dispute and the chief neither arrested nor threatened to arrest the plaintiff).

Even an officer's use of a department-issue weapon in pursuit of a private activity may not be enough indicia of state authority to conclude that the officer acted under color of state law. Compare Bonsignore v. City of New York, 683 F.2d 635 (2nd Cir. 1982) (officer who used police-issue handgun to shoot his wife and then commit suicide did not act under color of state law even though he was required to carry the handgun at all times); Barna v. City of Perth Amboy, supra at 817-19 (off-duty police officers intervening in a family altercation involving one officer's sister, outside their official jurisdiction, where neither officer identified himself as a police officer, held not to be conduct "under color of state law," notwithstanding the unauthorized use by one officer of a police-issue nightstick) with United States v. Tarpley, 945 F.2d 806, 809 (5th Cir. 1991) (off-duty deputy sheriff acted under color of state law when the deputy assaulted his wife's alleged ex-lover in a private vendetta but identified himself as a police officer, used his service revolver, and intimated that he could use police authority to get away with the paramour's murder).

ANDERSON v. CREIGHTON
Supreme Court of the United States
483 U.S. 635, 107 S.Ct. 3034 (1987)

QUESTION: May a law enforcement officer who participates in a search that violates the Fourth Amendment be held personally liable for money damages if a reasonable officer could have believed that the search was consistent with the Fourth Amendment ?

ANSWER: NO. A law enforcement officer who participates in a search that is ultimately found to violate the Fourth Amendment may not be held personally liable for money damages so long as "a reasonable officer could have believed" the "search to be lawful, in light of clearly established law and the information the searching officers possessed."Id. at 3040.

RATIONALE: FBI Agent Russell Anderson, along with other state and federal officers, conducted a warrantless search at the Creighton home because Anderson believed that a man suspected of a bank robbery committed earlier that day, might be found there. Anderson believed that probable cause and exigent circumstances permitted the search he undertook. The suspect was not found.

The Creightons later filed suit against Anderson, asserting, among other things, a claim for money damage s under the Fourth Amendment. For summary judgment, Anderson argued that such a lawsuit was barred by his qualified immunity from civil damages liability. While the trial court granted Anderson's motion, finding the search to be lawful, the Circuit Court of Appeals for the Eighth Circuit reversed, refusing to permit Anderson to argue the lawfulness of his warrantless search on his motion for summary judgment.
The United States Supreme Court held that if Anderson could establish that a reasonable officer could have believed the search to be lawful, this qualification would

immunize him from civil liability and he would be entitled to summary judgment in his favor as a matter of law. Id. at 3040.

"When government officials abuse their offices, 'action(s) for damages may offer the only realistic avenue for vindication of constitutional guarantees.' * * * On the other hand, permitting damage suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."Id. at 3038 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736 (1982)). To accommodate these conflicting concerns, government officers performing discretionary functions are provided with "a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."Id. at 3038. In other words, whether a law enforcement officer will be protected from suit by a qualified immunity or held personally liable for an alleged unlawful official action "generally turns on the 'objective legal reasonableness' of the action, * * * assessed in light of the legal rules that were 'clearly established' at the time it was taken[.]"Id. [Citations omitted.] The "contours" of the "clearly established" right the officer is alleged to have violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right[;] * * * that in light of preexisting law the unlawfulness must be apparent."Id. at 3039.

Whether Anderson possessed the requisite probable cause and exigent circumstances is an issue he should be permitted to argue. Conversely, the trial court should "consider the argument that it was not clearly established that the circumstances with which Anderson was confronted did not constitute probable cause and exigent circumstances."Id.

"[I]t is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and * * * in such cases those officials * * * should not be held personally liable. * * * The same is true of their conclusions regarding exigent circumstances."Id.

Thus, the relevant objective, fact-specific question in this case is "whether a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Anderson's subjective beliefs about the search are irrelevant."Id. at 3040.

Accordingly, "[t]he principles of qualified immunity * * * require that Anderson be permitted to argue that he is entitled to summary judgment on the ground that, in light of the clearly established principles governing warrantless searches, he could, as a matter of law, reasonably have believed that the search of the Creighton's home was lawful."Id.

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OSABUTEY v. WELCH
United States Court of Appeals
857 F.2d 220 (1988)
Fourth Circuit

QUESTION: In the below set of circumstances, will Officers Welch and Kearney be entitled to a qualified immunity from §1983 civil liability with respect to the warrantless searches conducted ?

CIRCUMSTANCES: In the third week of February, Narcotics Officer Welch received a telephone call from a confidential informant at about 11:15 a.m. The informant reported that a red Ford Granada would be arriving at 827 Merrimon Avenue at approximately 12:00 noon that day. According to the informant, the Ford's passenger-side window was broken but covered with plastic. The informant also reported that in the vehicle would be a black male who was approximately 6¢1² to 6¢2² tall, about 230 pounds, dark complected, and he would be wearing a cream-colored shirt, blue jeans and white tennis shoes. This male, stated the informant, would be in possession of cocaine. Additionally, the informant stated that he/she had observed this black male in possession of approximately one and one half ounces of cocaine just fifteen minutes before the phone call, and the informant observed the male enter the Ford for the purpose of going to the Merrimon address. According to Officer Welch, the informant had provided information on more than 100 occasions during a three-year period preceding this incident and the information previously supplied had been reliable.

Welch advised Officer Kearney of the information received, and together they drove in an unmarked police vehicle to the address, "a known site for drug trafficking." The officers arrived at about 11:30 a.m. and parked about a half block away. At approximately 12:00 noon, as scheduled, the vehicle that had been described to Officer Welch arrived at the address. The vehicle fit the description provided by the informant in all respects. As soon as the car stopped, a black male, also fitting the description given by the informant, got out from the passenger side and approached the house in a hurried manner. A black female remained in the car, in the driver's seat. The presence of the female (plaintiff Beverly Osabutey) was not forecast by the informant.

Welch and Kearney approached the vehicle, identified themselves as police officers, and told Mrs. Osabutey of the information related to them by the informant. The officers then advised Osabutey of their intention to search her and the automobile. As Osabutey stood outside the car, Kearney and Welch searched the passenger compartment and trunk. No contraband was found. During the search, the vehicle's other occupant, Ulysses Gaither, came out of the house and approached the officers. The officers identified themselves and advised Gaither of their intention to search him. After completing the vehicle search, the officers searched Osabutey's purse and conducted a pat-down of her outer clothing. Gaither was also subjected to a pat-down. "Then, shielded behind the car door from spectator view, Gaither was instructed to loosen his belt and unbutton his pants. While Welch held Gaither's pants up, Gaither pulled his underwear outward, away from his body, in order to permit the officers to conduct a visual check inside Gaither's underwear, the purpose of which was to ascertain if the cocaine had been secreted therein. At no time were Gaither's private parts exposed nor did the officers do anything more intrusive than conduct a visual search. * * * No contraband was discovered as a result of these searches."Id. at 222-223. No arrests based on the informant's information were made.

ANSWER: YES. According to the court, it is not readily apparent that the actions of Officers Welch and Kearney violated any clearly established constitutional principles. They are entitled to a "qualified immunity" from suit because the circumstances demonstrate that the officers held a "reasonable belief," based on legal rules which were clearly established at the time of the search, that the search was supported by "probable cause and exigent circumstances."Id. at 223-224.

RATIONALE: The standard which applies to the circumstances of this case "is one of the 'objective legal reasonableness' of official conduct, 'assessed in light of the legal rules that were "clearly established" at the time it was taken.' "Id. at 223 (quoting Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 3038 (1987)). "It is the right which is alleged to have been violated that must be 'clearly established.' It must be sufficiently clear so ' . . . that in the light of pre-existing law the unlawfulness must be apparent.' "Id. [Citation omitted.]

In this appeal, plaintiffs contend, among other things, that Officers Welch and Kearney violated their right to be "free from unreasonable searches and seizures," and their right to be "free from the deprivation of liberty without due process."Id. According to the court, "[s]imply alleging violation of such general rights, however, does not meet the test articulated in Anderson."Welch at 223. Rather, the inquiry is "whether it was 'clearly established that the circumstances with which [Welch and Kearney were] confronted did not constitute probable cause and exigent circumstances.' "Id. (quoting Anderson, 107 S.Ct. at 3039).

"Unconstitutional conduct does not by itself remove the immunity. * * * Anderson requires the application of qualified immunity to law enforcement officers who act in ways they reasonably believe to be lawful, even in cases where they reasonably, but mistakenly, believe that probable cause or exigent circumstances exist."Id.

As a result, the court states that it "cannot conclude that the conduct of Welch and Kearney contravened any constitutional principles so 'clearly established' that they as reasonable officers 'would understand that what [they] . . . were doing violate[d the rights secured by those principles]."Id. [Citation omitted.] "Officer Welch had received a tip from a known, reliable informant. Subsequent surveillance corroborated every facet of the information given him. The only variance from the information provided by the confidential source * * * was the presence of the black female in the vehicle. Except for the presence of Mrs. Osabutey, the informant's descriptions of (1) the vehicle; (2) Gaither; (3) Gaither's presence in the vehicle; (4) the destination of the vehicle, i.e., the address; and (5) the time of arrival, were corroborated in every respect. Especially since the officer, Welch, had personally verified all of the information given him by the informant, he could reasonably believe that he had probable cause to arrest the suspects. * * * Rather than arresting plaintiffs, Welch and Kearney first conducted the searches, which produced no contraband, and thereafter decided not to make an arrest. While fortuitous for the plaintiffs, the decision not to arrest does not extinguish or qualify the reasonable belief, held by the officers, that they were acting within constitutional limits."Id. at 223-224.

Consequently, the searches were supported by probable cause and the search of the vehicle was valid under the automobile exception to the written warrant requirement. Id. at 224. Moreover, under the facts of this case, the officers could have reasonably

believed that exigent circumstances, coupled with the personal corroboration of a tip from a known and reliable informant, provided a sufficient basis for the personal searches of the plaintiffs.

The case is remanded with instructions to enter summary judgment in favor of the defendants.

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COOPER v. DUPNIK
United States Court of Appeals
963 F.2d 1220 (9th Cir. 1992)

QUESTION: Can police coercion of a statement from a suspect in custody amount to a full-blown constitutional violation sufficient to support a federal civil rights cause of action under 42 U.S.C. § 1983 ?

ANSWER: YES. The plaintiff in this case, Cooper, has adequately "stated a cause of action under § 1983 for a violation * * * of his clearly established Fifth Amendment right against self-incrimination. [The officers] conspired not only to ignore Cooper's response to the advisement of rights pursuant to Miranda, but also to defy any assertion of the Constitution's Fifth Amendment substantive right to silence, and to grill Cooper until he confessed. * * * [The officers] refused to honor Cooper's rights when Cooper asserted them, and simply continued questioning him as if no request for counsel had been made."Id. at 1242-43. The conduct of the officers in this case "shocked the conscience"; they deliberately chose to ignore the law and the Constitution, and as a result, subjected themselves to civil liability under § 1983. Id. at 1252.

RATIONALE: "Michael Cooper was arrested for rape. Pursuant to a preexisting interrogation plan, members of the Tucson Police Department and the Pima County (Arizona) Sheriff's Department ignored Cooper's repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession."Id. at 1223. The officers' plan was to purposely ignore the suspect's constitutional right to remain silent as well as any request he might make to speak with an attorney, to hold the suspect incommunicado, and to pressure and interrogate him until he confessed. "Although the officers knew any confession thus generated would not be admissible in evidence in a prosecutor's case in chief, they hoped it would be admissible for purposes of impeachment if the suspect ever went to trial. They expected that the confession would prevent the suspect from testifying he was innocent, and that it would hinder any possible insanity defense."44 Id. at 1224. As one officer testified:

> There was an agreement * * * that when we identified the Prime Time Rapist, that we would not honor an assertion of counsel or silence. * * * [T]he profile that I had was that he would immediately ask for an attorney. I knew he would, whoever he was. * * *
> [This plan] should be used only in two situations: Number one, where the [ ] evidence is overwhelming and the [ ] proof is evident and/or when you think you've got the wrong guy.

Id. at 1224. [Court's emphasis.]

"Eventually the evidence against Cooper began to disintegrate. Cooper's interrogators concluded that he was not guilty, and so advised Peter Ronstadt, Chief of the Tucson Police Department. Nonetheless, Ronstadt subsequently told the media that Cooper properly had been identified and arrested. Further investigation fully exonerated Cooper, and he was released. Two months later, the Tucson Police Department publicly cleared him of all charges."Id. at 1223.

Cooper sued the officers of the Pima County Sheriff's Department and the Tucson Police Department, as well as the agencies and municipalities for which they worked. Among the federal civil rights claims in his complaint, Cooper contended that the officers in this case did more than merely violate the procedural safeguards provided by Miranda. He charged that the officers violated his substantive constitutional rights to silence and counsel. The officers, on the other hand, argued that "this case clearly presents a situation in which they are entitled as a matter of law to a complete defense of qualified immunity."Id. at 1235. The officers "characterize[d] their conduct as simply 'continuing with custodial interrogation after a request for counsel.' At most, they concede a violation of Miranda safeguards."Id. The Court of Appeals for the Ninth Circuit rejected the officers' contentions.

"Section 1983 imposes civil liability on any person who, acting under color of state law, deprives a United States citizen of his federal constitutional or statutory rights."Id. at 1236. Cooper's lawsuit "hinges on whether the [officers] deprived him of a constitutional right."Id. The Miranda warnings and rights are not themselves constitutionally mandated, but rather are procedural safeguards, or prophylactic measures, designed to ensure that the Fifth Amendment right against compulsory self-incrimination is safeguarded. Yet, to characterize the officers' conduct in this case as a "mere violation of Miranda's prophylactic advisement requirements is to see a hurricane as but a movement of air."Id. at 1237. The officers in this case "engaged in the premeditated elimination of Mr. Cooper's substantive Fifth Amendment rights, not merely the disposal of the procedural safeguards designed to protect those rights. Thus, Cooper's statements were 'compelled' and 'coerced.' "Id.

"By the same reasoning, Cooper's Fourteenth Amendment rights also were violated. It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The [officers'] wrongdoing was complete at the moment [they] forced Cooper to speak."Id.

The court also determined that the officers were "not protected by the doctrine of qualified (good-faith) immunity. Qualified immunity protects officials from suits under § 1983 for violations of rights which are not 'clearly established at the time of the challenged actions * * *.' "Id. But this case, emphasized the court, does not involve any borderline constitutional violations. "There is no question that the constitutional holding in Miranda is 'clearly established' law; similarly, there is no question that the [officers'] conduct violate[d] both the Fifth Amendment itself (as opposed to just the Miranda rules designed to protect it), and the Fourteenth Amendment. [The officers] knew they were violating the Constitution."Id. See Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986) (qualified immunity not available to officials who "knowingly violate the law").

Although Cooper, an innocent man, was never actually coerced into a confession, he nonetheless made statements which the prosecution might have used at trial. “Cooper admitted that he had slapped his wife, and that he often left his home, unaccompanied, at night, sometimes for hours at a time.”Cooper at 1237-38. Such statements, concluded the court, support a constitutional violation—they are “sufficient to constitute a breach of his right to remain silent.”Id. at 1238. The court elaborated:

> [W]e conclude that Cooper adequately has stated a cause of action under § 1983 for a violation * * * of his clearly established Fifth Amendment right against self-incrimination. [The officers] conspired not only to ignore Cooper’s response to the advisement of rights pursuant to Miranda, but also to defy any assertion of the Constitution’s Fifth Amendment substantive right to silence, and to grill Cooper until he confessed. * * * The clear purpose of these tactics was to make Cooper talk, and to keep him talking until he confessed. [The officers] refused to honor Cooper’s rights when Cooper asserted them, and simply continued questioning him as if no request for counsel had been made. This tactic was designed to generate a feeling of helplessness, and we are sure it succeeded. * * * With his requests to see a lawyer disregarded, Cooper was a prisoner in a totalitarian nightmare, where the police no longer obeyed the Constitution, but instead followed their own judgment, treating suspects according to their whims.
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> If the evisceration of Miranda warnings and the indifference to repeated requests for counsel were not enough, the police continuously badgered Cooper for four hours in an attempt to [obtain] a confession. * * * The questioning was harsh and unrelenting. At one point, Cooper stated, “I’m breaking down,” but the questioning continued. Cooper told [one of the officers], “you’re making me sick, sir,” but the questioning continued. * * * Cooper was reduced to sobbing and pleading his innocence, but still the questioning continued. * * *
>
> Although Cooper did not retreat from his protestations of innocence, he did make a lengthy statement, and it is our view that every word he uttered after he was taken to the sheriff’s department was compelled. Cooper’s treatment presents a prima facie case of law-enforcement behavior that violates the Fifth Amendment’s privilege against self-incrimination.

Id. at 1242-43.

The court further ruled that the due process violation caused by the coercive behavior of the interrogating officers in pursuit of a confession was “complete with the coercive behavior itself.”Id. at 1245. “The actual use or attempted use of that coerced statement in a court of law is not necessary to complete the affront to the Constitution. * * * Hence, the fact that Cooper never formally was charged in court and that none of his statements ever were offered in evidence to his potential detriment is relevant only to damages, not to whether he has a civil cause of action in the first place.”Id.

Finally, as a matter of substantive due process, the court ruled that the officers’ conduct in this case “shocked the conscience.”Id. at 1249. By forcing Cooper to talk, “the officers hoped to prevent him from being able to do so in the courtroom. [T]heir purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether.”Id. There is, however, no “impeachment exception” to the Miranda rule for compelled, coerced, or involuntary statements. Id. at 1250. Moreover, the officers’ unlawful plot to deprive Cooper of his right to present an insanity defense, if one was

available, had an underlying purpose to deprive him of the defense altogether, not just to defeat it with the facts or the truth. All in all, the court concluded, based on the totality of the facts and circumstances, that the conduct of the officers was nothing less than shocking to the conscience. Id.

In sum, it is "clearly established" law that

> the Fifth and Fourteenth Amendments forbid the use of compulsion and coercion by law enforcement in pursuit of a confession. As far as the police are concerned, any violation is complete at the time of the offending behavior. Behavior like the [officers' in this case] shocks the conscience; it deprived Cooper of "one of our Nation's most cherished principles—that the individual may not be compelled to incriminate himself."* * * Indeed, one would have thought it unnecessary to spend so much time reiterating the settled law in an appellate opinion. Yet the facts of this case indicate that these law-enforcement officers resist that message. It is this stubborn resistance that has generated this lawsuit, not any lack of clarity as to the law.
>
> This case is an example of officials who deliberately choose to ignore the law and the Constitution in favor of their own methods. For victims caught in their snare, the Constitution of the United States becomes a useless piece of paper. When law-enforcement officials act this way, they invite redress under § 1983.

Id. at 1251-52.

NOTE

1. During the course of its opinion in Cooper v. Dupnik, the court emphasized that the case did not deal with a product of police interrogation that was just technically involuntary, or presumptively involuntary, as those terms are used in Miranda and the cases applying Miranda. Rather, the case dealt with a statement that was involuntary "because it was actively compelled and coerced by law-enforcement officers during in-custody questioning[.]"Id., 963 F.2d at 1243. [Court's emphasis.] Thus, this case should not be read as creating a Fifth Amendment cause of action under Section 1983 for conduct that merely violates Miranda's prophylactic safeguards. To maintain such a cause of action, the plaintiff would need to establish, in addition, that the police officials violated the actual constitutional right against self-incrimination that the Miranda safeguards are designed to protect. See id. at 1243-44. See also id. at 1252 ("our decision in this case does not expand liability under 42 U.S.C. §1983 to include ordinary Miranda rights advisement violations") (WIGGINS, Circuit Judge, concurring).

2. In Chavez v. Martinez, 538 U.S. 760, 123 S.Ct. 1994 (2003), the United States Supreme Court was presented with a case involving a single police interrogation which prompted two critical issues: First, whether a police officer's failure to administer Miranda warnings during custodial interrogation is itself a completed constitutional violation which may support civil liability under 42 U.S.C. § 1983; and second, whether, in this case, the law enforcement officials should be held civilly liable under the Due Process Clause of the Fourteenth Amendment when the interrogating officer may have used compulsion or extraordinary pressure in an attempt to elicit a confession.

In this case, during the course of a narcotics investigation, Martinez approached investigating officers, interfered with the investigation and grabbed an officer's gun. As a result of this conduct, an officer shot Martinez several times, causing severe injuries. Martinez was then placed under arrest.

A short time after the shooting, a patrol supervisor arrived on the scene and accompanied Martinez to the hospital. As Martinez was receiving treatment from medical personnel, the police supervisor questioned him, with the interview lasting a total of about 10 minutes, over a 45-minute period, with the officer stopping at times to permit medical personnel to administer emergency aid. During the course of the interview, Martinez admitted that he took the gun from the officer's holster and pointed it at the police. He also admitted that he used heroin regularly. At one point, Martinez said, "I am not telling you anything until they treat me," yet the officer continued the interview. Id., 123 S.Ct. at 1999. At no point during the interview, however, was Martinez given Miranda warnings. As a result of his injuries, he was permanently blinded and paralyzed from the waist down.

Martinez was never charged with a crime, and his answers were never used against him in any criminal prosecution. Nevertheless, he filed suit under 42 U.S.C. § 1983, maintaining that the interrogating officer's actions violated his Fifth Amendment right not to be "compelled in any criminal case to be a witness against himself," as well as his Fourteenth Amendment substantive due process right to be free from coercive questioning.

To determine if a police officer is entitled to qualified immunity, courts must first decide whether the officer's conduct "violated a constitutional right."Id. at 2000. If not, the officer is entitled to qualified immunity, and there is no need to determine if the asserted right was "clearly established."Id.

Preliminarily, the Court found that the mere "failure to give a Miranda warning does not, without more," establish a substantive constitutional violation sufficient to establish a ground for a civil action against the interrogating law enforcement officials. Id. at 2004-04. [Emphasis added.] In this regard, statements obtained in the absence of the administration of the Miranda warnings are inadmissible in a criminal trial by virtue of the "prophylactic rules" established in Miranda v. Arizona. Miranda's "prophylactic" exclusionary rule is designed to safeguard constitutional rights; its violation does not, however, provide a basis for civil liability. Accordingly, in this case, the Court held that the officer's failure to read the Miranda warnings to Martinez did not rise to the level of a direct violation of Martinez's constitutional rights, and therefore "cannot be grounds for a Section 1983 action."Id. at 2004.

Regarding the second issue, the justices were not wholly in agreement as to whether Martinez demonstrated a violation of his constitutional rights by virtue of the coercive nature of the officer's interrogation. A plurality of the Court, led by Justice Thomas, could not see how, based on the text of the Fifth Amendment, Martinez can allege a violation of this right, since Martinez was never prosecuted for a crime, let alone compelled to be a witness against himself in a criminal case."Id. at 2000.

Here, Martinez was "never made to be a 'witness' against himself in violation of the Fifth Amendment's Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case."Id. at 2001. Accordingly, "the mere use of

compulsive questioning, without more," did not violate the Constitution, "absent use of the compelled statements in a criminal case against the witness."Id. at 2001-02.

The Court did pause to add, however, that such a ruling does not mean that "police torture or other abuse that results in a confession is constitutionally permissible so long as the statements are not used at trial; it simply means that the Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases and provide relief in appropriate circumstances."Id. at 2004.

The Due Process Clause of the Fourteenth Amendment protects citizens from police methods that are "so brutal and so offensive to human dignity" that they "shock the conscience."Id. at 2005. Although several of the justices in this case were satisfied that the officer's interrogation did not violate Martinez's Due Process rights, finding an absence of "egregious" or "conscience-shocking" behavior, a majority of justices concluded that the case should be remanded to the trial court to permit Martinez to pursue his claim of civil liability for the possible substantive due process violation. In this respect, Justices Kennedy, Stevens and Ginsburg observed:

> A constitutional right is [violated] the moment torture or its close equivalents are brought to bear. Constitutional protection for a tortured suspect is not held in abeyance until some later criminal proceeding takes place. * * * In a case like this one, recovery should be available under § 1983 if a complainant can demonstrate that an officer exploited his pain and suffering with the purpose and intent of securing an incriminating statement. * * *

Id. at 2013.

COUNTY OF SACRAMENTO v. LEWIS
Supreme Court of the United States
523 U.S. 833, 118 S.Ct. 1708 (1998)

QUESTION: Will an officer be held civilly liable for harm caused by a high-speed motor vehicle pursuit when that officer did not intend to physically harm the fleeing suspect or worsen his legal plight?

ANSWER: NO. Officers who engage in high-speed motor vehicle chases "with no intent to harm suspects physically or to worsen their legal plight" will not be civilly liable under the Fourteenth Amendment's Due Process Clause. Id. at 1720. Civil liability will only arise in those cases where the officer's conduct reflects "a purpose to cause harm unrelated to the legitimate object of arrest[.]"Id. at 1711. Thus, the police conduct must be so egregious that it constitutes an abuse of official power that "shocks the conscience,"a necessary prerequisite for a due process violation. Id. at 1712.

RATIONALE: At about 8:30 p.m., Sheriff's Deputy James Smith and Officer Murray Stapp responded to a fight call. After handling the call, Officer Stapp returned to his patrol car, and as he did so, he observed a motorcycle approaching at high speed. Brian Willard, an 18-year-old, was operating the cycle. Seated behind him was his passenger, 16-year-old Philip Lewis.

"Stapp turned on his overhead rotating lights, yelled to the boys to stop, and pulled his patrol car closer to Smith's, attempting to pen the motorcycle in."Id. at 1712. Instead of pulling over, Willard maneuvered the cycle between the two patrol cars and sped away. Deputy Smith "immediately switched on his own emergency lights and siren, made a quick turn, and began a pursuit at high speed. For 75 seconds over a course of 1.3 miles in a residential neighborhood, the motorcycle wove in and out of oncoming traffic, forcing two cars and a bicycle to swerve off of the road. The motorcycle and patrol car reached speeds of up to 100 miles an hour, with Smith following at a distance as short as 100 feet; at that speed, his car would have required 650 feet to stop."Id.

"The chase ended after the motorcycle tipped over as Willard tried a sharp turn. By the time Smith slammed on his brakes, Willard was out of the way, but Lewis was not. The patrol car skidded into him at 40 miles an hour, propelling him some 70 feet down the road and inflicting massive injuries. Lewis was pronounced dead at the scene."Id.

In the lawsuit that followed, Philip Lewis' parents and the representatives of his estate brought the action under 42 U.S.C. §1983, against Sacramento County, the Sacramento County Sheriff's Department and Deputy Smith, alleging a deprivation of Philip's Fourteenth Amendment substantive due process right to life.

Determining that no civil liability should attach to Deputy Smith's conduct, the United States Supreme Court, in this appeal, resolved a conflict over the standard of culpability on the part of a law enforcement officer for violating substantive due process during the course of a motor vehicle pursuit.

Preliminarily, the Court ruled that the Lewis claim was not "covered by" the Fourth Amendment, which governs only "searches and seizures."Id. at 1715. The Court said:

> No one suggests that there was a search, and our cases foreclose finding a seizure. We held in California v. Hodari D. * * * that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment. And in Brower v. County of Inyo, * * * we explained "that a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." We illustrated the point by saying that no Fourth Amendment seizure would take place where a "pursuing police car sought to stop the suspect only by a show of authority represented by flashing lights and continuing pursuit," but accidentally stopped the suspect by crashing into him. * * * This is exactly this case.

Id. at 1715. [Citations omitted; Court's emphasis.]

This case is governed by the Due Process Clause of the Fourteenth Amendment, which guarantees more than just "fair process." In addition, it contains "a substantive sphere as well, 'barring certain government actions regardless of the fairness of the procedures used to implement them[.]' "Id. at 1713. [Citations omitted.] The Due Process Clause is intended to prevent government officers from abusing their power or using it as an instrument of oppression. Id. at 1716. [Citation omitted.] In this regard, courts will focus

on a "level of executive abuse of power as that which shocks the conscience."Id. at 1717. This was made clear in Rochin v. California, 342 U.S. 165, 72 S.Ct. 205 (1952), where the Court "found the forced pumping of a suspect's stomach enough to offend due process as conduct 'that shocks the conscience' and violates the 'decencies of civilized conduct.' "Lewis at 1717 (quoting Rochin at 172-73, 72 S.Ct. at 209-210). See also Breithaupt v. Abram, 352 U.S. 432, 435, 77 S.Ct. 408, 410 (1957) (conduct that " 'shocked the conscience' and was so 'brutal' and 'offensive' that it did not comport with 'traditional ideas of fair play and decency' would violate substantive due process").

In this case, the Court emphasized that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."Id. at 1718. In addition, the Court explained that the standard of fault must be above that of "deliberate indifference" or "reckless disregard," before an officer will be liable for harm caused in a vehicular pursuit. Id. at 1720, 1721. To support civil liability, and a substantive due process claim, the constitution should be interpreted to focus in on behavior that is at the other end of the culpability spectrum—"on conduct intended to injure in some way unjustifiable by any government interest[.]"Id. at 1718. This is "the sort of official action most likely to rise to the conscience-shocking level."Id.

> Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance."* * * A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

Id. at 1720. [Citation omitted.]

Accordingly, "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under §1983."Id. The Court concluded, therefore, that Deputy Smith's conduct "fail[ed] to meet the shocks-the-conscience test."Id.

> Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic * * *. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause him harm, or kill. * * *
>
> Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it d[Id] not shock the conscience * * *.

Id. at 1721.

CITY OF CANTON, OHIO v. HARRIS
Supreme Court of the United States
489 U.S. 378, 109 S.Ct. 1197 (1989)

QUESTION: May a municipality ever be held civilly liable (under 42 U.S.C. §1983) for constitutional violations resulting from its failure to adequately train its police officers or other municipal employees ?
ANSWER: YES. There are certain "circumstances in which an allegation of a 'failure to train' can be the basis for liability under §1983."Id. at 1204. "[T]he inadequacy of police training may serve as the 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." Id. [Emphasis added.]

RATIONALE: Geraldine Harris was arrested by several officers of the Canton Police Department, and thereafter transported to the police station in a patrol wagon. Upon arrival at the station, Harris was found sitting on the floor of the wagon. When asked if she needed medical attention, she responded in an incoherent manner. Once brought inside for processing, Mrs. Harris "slumped to the floor" on several occasions. "Eventually, the police officers left Mrs. Harris lying on the floor to prevent her from falling again. No medical attention was ever summoned for Mrs. Harris. After about an hour, Mrs. Harris was released from custody, and taken by an ambulance (provided by her family) to a nearby hospital."Id. at 1200. Thereafter, she was hospitalized for one week and received subsequent outpatient treatment for a year for severe emotional ailments.

In this appeal, Harris argues that the city should be held civilly liable under 42 U.S.C. §1983 for its violation of her right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody. It is contended that the constitutional violation resulted from the failure to adequately train the Canton shift commanders to make a determination as to when to summon medical care for an injured detainee.

Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978), held "that a municipality can be found liable under §1983 only where the municipality itself causes the constitutional violation. * * * It is only where the 'execution of the government's policy or custom . . . inflicts injury' that the municipality may be held liable under §1983."Harris at 1203. [Citations omitted; emphasis added.] Moreover, there must be "a direct causal link between a municipal policy or custom, and the alleged constitutional deprivation."Id. The pivotal question then becomes: "Under what circumstances can inadequate training be found to be a 'policy' that is actionable under §1983 ?"Id. at 1202.

In this case, the Court concludes that there are limited circumstances in which an allegation of a "failure to train" can form the basis for liability under 42 U.S.C. §1983; that case where a clearly valid policy is unconstitutionally applied by a police officer or other municipal employee because that employee has not been adequately trained and the constitutional wrong has been caused by that failure to adequately train. Id. at 1203-1204.

For the degree of fault to be applied, the Court holds that:

> the inadequacy of police training may serve as the 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.

Id. at 1204. [Emphasis added.] “Only where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under §1983.”Id. at 2105. This conclusion is consistent with the established rule that “ ‘municipal liability under §1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives’ by city policy makers. * * * ”

Thus, where a failure to adequately train the city’s police force reflects a “deliberate” or “conscious” choice by the city (i.e., municipal “policy”), civil liability will lie for such a failure under §1983. In this respect, the Court points out that a §1983 violation will not be made out “merely by alleging that the existing training program for a class of * * * police officers[ ] represents a policy for which the city is responsible. * * * The issue * * * is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent ‘city policy.’ ”Id. It is possible “that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.”Id.

To determine the issue of a city’s liability in these circumstances, the “focus must be on the adequacy of the training program in relation to the tasks the particular officers must perform.”Id. at 1205-1206. Liability will not be placed on the city, however, merely by showing that one particular officer was unsatisfactorily trained. The officer’s shortcomings “may have resulted from factors other than a faulty training program.”Id. at 1206. Moreover, liability will not be placed on the city when it is merely shown that an otherwise sound police training program has occasionally been negligently administered. “Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct.”Id. While such a claim could be made about almost any police-citizen encounter resulting in injury, it does not, however, establish a police training program so inadequate as to warrant §1983 liability. Naturally, “adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.”Id.

In order for liability to attach, therefore, “the identified deficiency in a city’s training program must be closely related to the ultimate injury.”Id. The injured individual must ultimately “prove that the deficiency in the police training program actually caused the police officer’s [clearly inappropriate response].”Id. In this case (on remand), Ms. Harris must prove that the alleged deficiency in the police training program actually caused the police officer’s indifference to her medical needs; questioning whether the injury would “have been avoided had the police officer been trained under a program that was not deficient in the identified respect.”Id.

Accordingly, a citizen may bring a §1983 civil action against a municipality for its failure to provide adequate training to its police officers or other employees when that citizen suffers injury at the hand of one or more of those employees. The constitutional deprivation will only produce civil liability against the municipality, however, where that "city's failure to train reflects a deliberate indifference to the constitutional rights of its inhabitants." Id. [Emphasis added.]

NOTE

1. *Failure to train on the subject of strip/body cavity searches*. Since the Supreme Court's decision in City of Canton, Ohio v. Harris, it has been well settled that administrators and department chiefs in charge of municipalities and law enforcement agencies may incur civil liability for the failure to provide their police officials with sufficient, up-to-date training. Whenever that failure amounts to a " 'deliberate indifference' to the rights of its inhabitants" with whom their police come into contact, civil liability will likely ensue.

Thus, in DiLoreto v. Borough of Oaklyn, 744 F.Supp. 610 (D.N.J. 1990), the court held that Oaklyn Borough's failure to provide its police officers with formal training on (1) the subject of strip searches and (2) whether officers were routinely permitted to accompany detainees to the bathroom and observe their use thereof, constituted "deliberate indifference" to the rights of persons arrested or detained at the Borough's police department. The DiLoreto court elaborated:

> As can be seen from the large number of cases discussing the issue, strip searching by police and accompanying detainees to the bathroom is not an uncommon occurrence. It is something that the police must confront daily and an area in which they should receive training. Police officers should be aware of the limits placed on their actions by the Constitution. The Borough has the responsibility to implement policies that are consistent with the Constitution and to train its officers accordingly. * * * By not creating and implementing a policy and not training its employees regarding [strip searches and] accompanying detainees to the bathroom, the Borough has expressed deliberate indifference to the fourth amendment rights of detainees[.] * * *
>
> The court is dismayed that there has been so little progress in educating police officers as to the constitutionality of strip searching detainees and arrestees * * *. It is unfortunate that so many boroughs in this state appear to have adopted a policy of non-acquiescence to the constitutionally mandated norms. * * *

Id. at 621 n.7, 623-24. [Emphasis added.]

Regarding the claim of the particular police officer involved—that she should be accorded a "qualified immunity" based on the good-faith performance of her duties—the court ruled that the qualified immunity defense is not available to her because the law concerning the unconstitutionality of such searches was so clearly established that no reasonable officer could have believed that [her] conduct was constitutional. * * *

> [T]he actions of [this officer] obviously constitute[d] a violation of the fourth amendment's protection against unreasonable searches and seizures. In Wilkes v. Borough of Clayton, 696 F.Supp. 144 (D.N.J. 1988), [the court] clearly

> established that * * * "arrestees may reasonably expect to defecate, urinate and change sanitary napkins or tampons without direct visual observation by law enforcement officers, unless some justification for the intrusion is demonstrated."* * *
>
> An additional factor supports the conclusion that the law concerning the action involved here was clearly established by June of 1987. Davis v. [City of] Camden[, 657 F.Supp. 396 (D.N.J. 1987),] was published before the events in this case occurred and thus placed the defendant on notice as to the unconstitutionality of unreasonable strip searches. * * * The Davis court held that in order for a strip search to be constitutional there must be reasonable suspicion that the arrestee is concealing weapons or contraband; such suspicion could arise either from the specific circumstances of the [arrest, or the] arrestee, or from the nature of the offense charged. The law was clearly established in June of 1987 such that reasonable officials would have realized that the conduct here was unconstitutional. Qualified immunity is not available as a defense based on the undisputed facts of this case.

DiLoreto at 618-20.

2. *Failure to adequately train on the subject of deadly force*. In Zuchel v. City and County of Denver, Colo., 997 F.2d 730 (10th Cir. 1993), the court identified four elements that a plaintiff must prove under City of Canton, Ohio v. Harris, to support a §1983 claim that a municipality's failure to adequately train its police officers on the subject of deadly force constituted deliberate indifference to the constitutional rights of its citizens.

First, the plaintiff must establish that the officer's use of deadly force was unconstitutional. This determination must be made from the perspective of a reasonable officer on the scene at the time of the event. Id. at 735.

Second, the plaintiff must prove that the circumstances giving rise to the shooting "represented a usual and recurring situation with which police officers were required to deal."Id. at 737.

Third, the plaintiff must show that the municipality's police training program was inadequate, and the inadequacy of the training was directly linked to the officer's unconstitutional use of excessive force. Id. at 738. In this case, the Zuchel court agreed with the plaintiff's experts that the City's "police use of deadly force" training program was inadequate because of the absence of periodic, live "shoot-don't shoot" range training. Id. at 738-40.

Finally, the plaintiff must demonstrate that the municipality "was deliberately indifferent to the rights of persons with whom the police come in contact."Id. at 740.

3. *Abandoning a citizen in a "high crime area*." In Hilliard v. City and County of Denver, 930 F.2d 1516 (10th Cir. 1991), plaintiff alleged in her Section 1983 suit that several officers of the Denver Police Department violated her rights under the Colorado "emergency commitment statute,"Colo.Rev.Stat. §25-1-310 (1989), by failing to take her into protective custody. Plaintiff was a passenger in an automobile driven by an individual who was arrested by the defendants for drunk driving. At the time plaintiff's companion was taken into custody, the defendants also determined that plaintiff was too

intoxicated to drive and ordered her not to do so. The car was impounded and plaintiff was left by defendants to fend for herself in a location described by the district court as "a high crime area." Some time after the defendants left the scene, plaintiff was robbed and sexually assaulted. Later the next morning, she was found "stripped naked, bleeding and barely conscious."Id. at 1518.

In the appeal which followed the district court's denial of defendants' motion for summary judgment on qualified immunity grounds, defendants argued that, at the time of the incident, the Colorado "emergency commitment statute" created no "constitutionally protected liberty interest," and even if it did, it was not "clearly established." The Tenth Circuit agreed.

In Harlow v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727 (1982), the Supreme Court set forth the standard by which claims of qualified immunity are to be evaluated. "This standard provides that '[w]hen government officials are performing discretionary functions, they will not be held liable for their conduct unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." ' "Hilliard at 1518. [Citations omitted.] "In determining whether the law involved was clearly established, the court examines the law as it was at the time of defendants' actions."Id.

> It is the plaintiff's burden to convince the court that the law was clearly established. * * * In doing so, the plaintiff cannot simply identify a clearly established right in the abstract and allege that the defendant has violated it. Instead, the plaintiff "must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited."* * * While the plaintiff need not show that the specific action at issue has previously been held unlawful, the alleged unlawfulness must be "apparent" in light of preexisting law. * * * The " 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' "* * * If the plaintiff is unable to demonstrate that the law allegedly violated was clearly established, the plaintiff is not allowed to proceed with the suit.

Id. [Citations omitted.]

In this case, the district court "identified the plaintiff's interest as a liberty interest in personal security protected by the [F]ourteenth [A]mendment,"id. at 1519, relying largely on Ingraham v. Wright, 430 U.S. 651, 674-75, 97 S.Ct. 1401, 1414-15 (1977). The Tenth Circuit, however, rather than expressly finding that the Colorado statute creates such a constitutionally protected liberty interest—which would be a necessary basis for plaintiff's Section 1983 claim—held that "even if such a constitutional right exists, it was not clearly established in the law at the time of the defendants' actions thus entitling them to immunity from suit."Hilliard at 1519.

According to the court, the Ingraham right to personal security attaches when there is some element of state-imposed confinement or custody. It is, however, less than clear whether such a right to personal security would apply in the absence of such confinement or custody. Hilliard at 1520. As a result, the court concluded that "it was not clearly established in 1988 that someone whose person was not under some degree of

physical control by the state or who was not involved in a [F]ourth [A]mendment search or seizure would have a clearly established, constitutionally protected liberty interest."Id. Notwithstanding its conclusion, the court did pause to observe:

> While we are appalled by the conduct of the defendants in this case, we note the danger of confusing the question of whether the plaintiff has state tort remedies with whether the plaintiff has stated a claim amounting to the deprivation of a constitutional right. The district court's opinion makes a persuasive case * * * that state tort remedies may exist under these facts. We are not persuaded, however, that the plaintiff here has articulated the deprivation of a constitutional right, much less a "clearly established" constitutional right.

Id. at 1521. [Citation omitted.]

4. *Failure to provide adequate protective services*. In DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998 (1989), the United States Supreme Court held that the failure of a state or local municipality or its agents to provide an individual with adequate protective services will not constitute a violation of the individual's due process rights. In this appeal, arising from a 42 U.S.C. §1983 action, 4-year-old Joshua and his mother (plaintiffs) allege that defendants Winnebago County, its Department of Social Services, and various individual employees deprived Joshua of his liberty without due process of law, in violation of his rights under the Fourteenth Amendment, by failing to intervene to protect him against a risk of "known" violence at the hands of his father. The last beating inflicted by Joshua's father caused the 4-year-old to fall into a life-threatening coma which ultimately caused brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded.

Because the government agencies here involved knew of the family's case history, and in fact investigated past instances of suspected child abuse, plaintiffs contend that the government agencies deprived Joshua of his Fourteenth Amendment liberty interest to be free from unjustified intrusions on personal security, "by failing to provide him with adequate protection against his father's [known] violent propensities."Id., 109 S.Ct. at 1003. The United States Supreme Court disagreed.

According to the Court, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security."Id. While the Due Process Clause prohibits the State from depriving its citizens of life, liberty, or property without "due process of law," it does not, however, "impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. * * * Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing (its) power, or employing it as an instrument of oppression[.]' "Id. [Citations omitted.] Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." Id. [Emphasis added.]

Since "the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them."Id. at

1004. (“The State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause.”Id. at 1004 n.3). “As a general matter, then, [the Court holds] that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”Id.

A State may, however, under its own tort law, address such a problem by imposing liability upon State officials in situations where they voluntarily undertake to protect or render services to a particular individual but do so negligently.
Cf. Collins v. City of Harker Heights, Texas, 503 U.S. 115, 112 S.Ct. 1061 (1992) (“the Due Process Clause does not impose an independent federal obligation upon municipalities to provide certain minimum levels of safety and security in the workplace”).

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[material omitted from original – WS]