BATON ROUGE BAR ASSOCIATION • JULY 27-29, 2017
HILTON SANDESTIN BEACH GOLF RESORT & SPA

CIVIL RIGHTS 1983 ACTIONS: WHEN CRIMINAL AND CIVIL ISSUES COLLIDE

SPEAKERS:
FRANZ BORGHARDT
AND
AMY NEWSOM

SATURDAY, JULY 29, 2017 • 11:15 AM - 12:15 PM

I. 42 U.S.C.A §1983

A. Brief History

42 U.S.C. §1983 was enacted on April 20, 1871 as part of the Civil Rights Act of 1871, also known as the "Ku Klux Klan Act", because one of its primary objectives was to remedy the abuses being committed in local jurisdictions by the KKK. The Act was intended to provide a private remedy for violations of federal law.

B. Language of Statute

> Every **person** who, under **color** of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights, privileges, or immunities secured by the Constitution and laws**, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(1) Persons

Only persons are subject to suit under 1983.

Entity	Person?	Damages
State *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)	No	X
State Official-Official Capacity	Yes	Injunction Only

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed.2d 714 (1908)		
Municipality and Local Government *Monell v. New York City Dept. of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)	Yes	Retroactive and Prospective
Individual Employees of State and Local Government *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)	Yes	Retroactive and Prospective

No respondeat superior or vicarious liability under §1983. A municipality may not be subject to liability under 1983 merely by employing a tortfeasor. Municipal liability requires a deliberate action attributable to the municipality that is direct cause of the alleged constitutional violation. There must be a policymaker, an official policy and a violation of constitutional rights whose moving force is the policy or custom. *Zarnow v. City of Wichita Falls, Tex.,* 614 F.3d 161 (5th Cir. 08/09/2010). The policy may be an express policy or it may be by its custom or practice.

(2) Color Of Law

The Chairman of the House Select Committee which drafted this legislation described §1983 as modeled after the Civil Rights Act of 1866—a criminal provision that also contained language that forbade certain acts by any person 'under color of any law, statute, ordinance, regulation, or custom. In the Civil Rights Cases, 109 U.S. 3, 16, 3 S.Ct. 18, 25, 27 L.Ed. 835 (1883), the United States Supreme Court said of this 1866 statute: 'This law is clearly corrective in its character, intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified.'

Congress included customs and usages within its definition of law in §1983 because of the persistent and widespread discriminatory practices of state officials in some areas of the post-bellum South. As Representative Garifield said: '(E)ven where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.' Although not authorized by written law, such practices of state officials could well be so permanent and well settled as to constitute a 'custom or usage' with the force of law.

A public employee acts "under color of law" while acting in his official capacity or while exercising is responsibilities pursuant to state law. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 90 S.Ct. 1598 (1970). A defendant acts under color of state law if he "misuses or abuses his official power" and if "there is a nexus between the victim, the improper conduct, and [the defendant's] performance of official duties." *Id.* "If, [however,] a state officer pursues personal objectives without using or misusing the power granted to him by the state to achieve the personal aim, then he is not acting under color of state law." *Harris v. Rhodes,* 94 F.3d 196, 197 (5th Cir.1996).

C. Common Law Immunities

(1) Qualified Immunity

Most law enforcement and other executive branch officials have qualified immunity from suits for damages for acts done in reasonable good faith. Qualified immunity strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions. The courts have recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service. *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992).

Qualified immunity protects government officials from liability for civil damages to the extent that their conduct is objectively reasonable in light of clearly established law. *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982); *Kinney v. Weaver,* 367 F.3d 337, 346 (5th Cir.2004). When a defendant invokes qualified immunity, the burden is on the plaintiff to demonstrate the

inapplicability of the defense. *McClendon v. City of Columbia,* 305 F.3d 314, 323 (5th Cir.2002). To demonstrate the inapplicability of the qualified immunity defense, the plaintiff must satisfy a two-prong test: First, he must claim that the defendants committed a constitutional violation under current law. Second, he must claim that the defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of. *Atteberry v. Nocona Gen. Hosp.,* 430 F.3d 245, 253 (5th Cir.2005).

A district court's denial of a §1983 defendant's claim of qualified immunity, to the extent it turns on an issue of law, is an appealable "final decision". *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

(2) Absolute Immunity

Judges have absolute immunity from damages for judicial acts. They only have qualified immunity for administrative or executive actions. For example, a judge does not have absolute immunity for firing a subordinate. *Forrester v. White*, 484 U.S. 219, 108 S.Ct. 538 (1988).

Prosecutors have absolute immunity from damages for prosecutorial functions. Immunity does not attach because of the prosecutor's role, but rather the prosecutor's conduct. See *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606 (U.S. 1993); *Hoog-Watson v. Guadalupe County, Tex.*, 591 F.3d 431 (5th. Cir. 2009). [P]rosecutorial immunity protects 'the advocate's role in evaluating evidence and interviewing witnesses as he prepares for trial,' but not 'the detective's role in searching for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested.'…prosecutorial immunity does not extend to "the prosecutorial function of giving legal advice to the police" because such an extension finds insufficient support in common law immunities, and because the existence of such an immunity is not necessary to protect the integrity of the judicial process. *Hoog-Watson v. Guadalupe County, Tex.*, 591 F.3d 431 (5th. Cir. 2009)

(3) No Immunity

Private parties that conspire with state officials to violate constitutional rights do not have the right to invoke qualified immunity. *Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992).

Employees of a private prison management firm do not enjoy qualified immunity from suit under §1983. *Richardson v. McKnight*, 521 U.S. 399, 117 S.Ct. 2100 (1997).

Foster parents not entitled to qualified immunity. *Hernandez v. Hines*, 159 F.Supp.2d 378 (N.D. Tex. 03/29/01).

Private party health care providers are not entitled to qualified immunity. *McDuffie v. Hopper*, 982 F.Supp. 817 (M.D. AL. 10/23/1997).

D. Pitfalls

(1) Prescription

The text of §1983 does not include a prescriptive period. Thus, it "borrows" the prescriptive period for personal injury suits of the state in which it is pending.

(2) Administrative Remedies- Prisoner Suits

Prison Litigation Reform Act (PRLA) requires that prisoners exhaust administrative remedies prior to an inmate filing suit. 42 U.S.C.A. § 1997e. Prisoners must exhaust the process available to them, including all appeals prior to bringing suit. Prisoners must exhaust the remedies available, even if they do not provide the same relief as a federal suit. *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819 (U.S. 2001).

(3) Naming Parties

The law has to extend separate legal status to an entity for it to be sued. Example: The St. Mary Sheriff Department does not have legal existence; the legal status is reserved for the Sheriff. *Loston v. St. Mary Parish Sheriff's Office*, 2016 WL 8715617 (Wd.La. 12/09/2016).

"Unnamed Office #1" or "John Doe" does not relate back to the original complaint. Rule 15 (c) is meant only to allow a change as a result of an error, such as a misnomer or misidentification. Not knowing the defendant's name is not covered by the language or intent of 15(c). If John Doe is a named defendant and his actual name is later determined after the prescriptive period has run, the cause of action against him has prescribed. *Jacobsen v. Osborne*, 133 F.3d 315 (5th Cir. 1998).

II. 1983 Interaction with a Criminal Case

a. **Initial Considerations:**

i. Which case is your priority?
ii. Is there a conflict of interest?
iii. Constitutional considerations: 5th Amendment Right Against Self Incrimination

b. **Heck Standard:**

In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364 (1994), the Supreme Court held:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has **been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus**. . . . A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the **invalidity of his conviction or sentence**; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, absence of some other bar to the suit.

c. **Pretrial Diversion Programs and Pretrial Probation:**

i. **Fifth Circuit: *Taylor v. Gregg***, 36 F.3d 453 (5th Cir. 1994):In Taylor v. Gregg, 36 F.3d 453 (5th Cir. 1994), the Fifth Circuit reasoned that "entering a pre-trial diversion agreement does not terminate the criminal action in favor of the criminal defendant." Id. at 456. The court held that "by entering these agreements, criminal defendants are

effectively foregoing their potential [civil] suit[s] in exchange for conditional dismissal of their criminal charges." Id.[3] The Fifth Circuit has also noted that "proceedings are terminated in favor of the accused *only* when their final disposition indicates that the accused is not guilty." Evans v. Ball, 168 F.3d 856, 859 (5th Cir. 1999) (emphasis added).

ii. ***Cabot v. Lewis*: Summary of Circuits:**
Courts are divided as to whether imposition of a pretrial probation (or an analogous disposition, such as pretrial diversion) constitutes a "conviction" for purposes of the *Heck* rule. The Sixth, Tenth, and Eleventh Circuits have concluded that *Heck* does not bar a subsequent lawsuit after disposition of a criminal case through pretrial diversion that ultimately results in dismissal of criminal charges. *See S.E. v. Grant Cty. Bd. of Educ.,* 544 F.3d 633, 637-39 (6th Cir. 2008) (Kentucky juvenile pretrial diversion program); *Vasquez Arroyo v. Starks,* 589 F.3d 1091, 1095 (10th Cir. 2009) (Kansas pretrial diversion program); *McClish v. Nugent,* 483 F.3d 1231, 1250-51 (11th Cir. 2007) (Florida pretrial intervention program); *see also Butts v. City of Bowling Green,* 374 F.Supp.2d 532, 537 (W.D. Ky. 2005) (Kentucky pretrial diversion program).

iii. The Second, Third, and Fifth Circuits have reached the opposite conclusion. *See Miles v. City of Hartford,* 445 Fed. Appx. 379, 382 (2d Cir. 2011) (Connecticut accelerated pretrial rehabilitation program); *Gilles v. Davis,* 427 F.3d 197, 209-11 (3d Cir. 2005) (Pennsylvania "Accelerated Rehabilitative Disposition" program); *DeLeon v. City of Corpus Christi;* 488 F.3d 649, 655-56 (5th Cir 2007) (Texas deferred adjudication procedure). *See also Roesch v. Otarola,* 980 F.2d 850, 852-53 (2d Cir. 1992) (adjournment in contemplation of dismissal under New York law; case decided prior to *Heck*); *Taylor v. Gregg,* 36 F.3d 453, 455-56 (5th Cir. 1994) (federal pretrial diversion program; case decided prior to *Heck*).

iv. The First Circuit has not yet addressed the issue. Two judges in this district, however, have concluded that the imposition of pretrial probation under Massachusetts law triggers the rule of *Heck* and bars a subsequent related claim under § 1983. *See Kennedy v. Town of Billerica,* 2014 WL 4926348 at *1 (D. Mass. 2014) (pretrial probation bars subsequent related § 1983 claim); *Cardoso v. City of Brockton,* 62 F.Supp.3d 185, 186 (D. Mass. 2015) (same).

v. ***What about conditions in favor of a dismissal?*** *Bates v. McKenna* 11-1395 (W.D. La. Aug. 13, 2012): *Heck* applies to a DA Probation

d. **No Contest Pleas/*Alford Pleas*:** *Ballard v. Burton*, 444 F.3d 391, 397 (5th Cir. 2006): We likewise view an *Alford* plea as nothing more than a variation of an ordinary guilty plea. Moreover, we are not persuaded by Ballard's suggestion that, because his plea was pursuant to *Alford,* there is an insufficient factual basis to support a finding that his simple assault conviction was terminated unfavorably. "Once accepted by a court, it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence." *Blohm v. Comm'r of Internal Revenue,* 994 F.2d 1542, 1554 (11th Cir. 1993) (citing *Boykin v. Alabama,* 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)). Accordingly, we hold that a conviction based on an *Alford* plea can be used to impose *Heck*'s favorable termination rule.

e. **Exceptions or Inapplicability of *Heck:***

i. A. Constitutional violation while upholding the conviction itself as constitutional: Harmless Error, Inevitable Discovery Rule, Independent Source Rule.

ii. ***Lawful Arrest Executed In An Unlawful Manner:*** Lora-Pena v. F.B.I, 529 F. 3d 503, 506 (3d. Cir 2008). Excessive force while present in a lawful arrest is not a bar under *Heck*.

iii. ***Conceptually and Temporally Distinct From Conviction:*** *Bush v. Strain*, 513 F.3d 492 (5th Cir. 2008): In Bush, the plaintiff brought an excessive force claim against law enforcement officers alleging that they pushed her head into the window of a car after she was arrested. The plaintiff was convicted of resisting arrest. *Id.* at 495-96. The Fifth Circuit held that *Heck* did not bar the excessive force claim because "a claim that ***excessive force occurred after the arrestee has ceased his or her resistance*** would not necessarily imply the invalidity of a conviction for the earlier resistance." *Id.* at 497 (emphasis added).

f. **Younger v. Harris Doctrine:** Court held that federal courts may not hear civil rights case until the person is convicted or found not guilty of the crime unless the defendant will suffer an irreparable injury that is "both great and immediate." Merely having to endure a criminal prosecution is no such irreparable harm.

g. Ethical and Professional Considerations

As §1983 case is often pending at the same time as a criminal prosecution related to the same facts, to what extent can the §1983 case be leveraged over the criminal case?

HYPOTHETICAL

The police get an anonymous and unverified tip that there is illegal drug dealing happening at 2333 Cottonport Ave within the city of Rougeburg. The Rougeburg City Police send an unmarked surveillance unit to watch the house. The police officer sees lots of "traffic" coming in and out of the house, but doesn't see any drug dealing happening from his vantage point. The narcotics unit plans to do an investigatory "knock and talk" to see if they can find out more information on the house.

Officers Tyler and Smith knock on the door and Bobby Thompson opens. When Bobby opens the door they smell the strong odor of marijuana emanating from Bobby's person and inside the residence but do not see any drugs in "plain view." Bobby denies them entry and the officers force their way inside. While doing a "protective sweep of the house," the officers encounter Bobby's 12-year-old son, Robert, Jr. Robert, Jr has a toy replica gun that Officer Tyler mistakenly believes is real firearm. Robert, Jr. lifts up the gun and screams "bang, bang!"

Officer Tyler proceeds to shoot and kill Robert, Jr. Later, after a complete search of the house is performed, police will discover 3lbs of marijuana, $10,000 in cash, small plastic baggies, a digital scale, and a real firearm in the master bedroom. Bobby is arrested for possession with intent to distribute marijuana.

The District Attorney of Rougeburg is handling the case and charges Bobby Thompson with Possession With The Intent To Distribute Marijuana, Child Endangerment, and 2nd Degree Murder of Bobby, Jr. There is a law in Rougeburg that states that if a homicide happens during a felony drug transaction, then you can be charged with murder.

Bobby Thompson hires a civil rights attorney that thinks he might have a good civil rights case on behalf of Bobby Jr and himself.

What If?

The Chief of Police for Rougeburg becomes very concerned about the Robert Jr.'s death, the possible implication of the officers involved and the potential for a large judgment against the officers and reaches out to the Rougeburg District Attorney. The prosecutor handling the case then contacts Bobby Thompson's civil rights attorney and offers to make all charges disappear if there is no §1983 suit.

Implication of Louisiana Rules of Professional Conduct

Rule 8.4(g)

It is professional misconduct for a lawyer to:

> (g) threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.

History of 8.4(g)

Rule 8.4(g) in the ABA model rules deals with discrimination in delivery of legal services. There is no counterpart to Louisiana's 8.4(g) in the ABA Model Rules. The language of Louisiana's 8.4(g) finds its origins in the ABA Model Code of Professional Responsibility (withdrawn in 1983):

> A lawyer shall not present, participate in presenting, or threaten to present criminal charges to obtain an advantage in a civil matter DR 7-105(a)

The purpose of DR 7-105 (a) was discussed in Ethical Consideration 7-21:

> The civil adjudicative process is primarily designed for the settlement of disputes between parties, while the criminal process is designed for the protection of society as a whole. Threatening to use, or using, the criminal process to coerce adjustment of private civil claims or controversies is a subversion of that process; further, the person against whom the criminal process is so misused may be deterred from asserting his legal rights and thus the usefulness of the civil process in settling private disputes is impaired. As in all cases of abuse of judicial process, the improper use of criminal process tends to diminish public confidence in our legal system.

DR 7-105(a) did not carry forward into the Model Rules. Due to this issue, the ABA Standing Committee on Ethics and Professional Responsibility issued a Formal Opinion on July 6, 1992. 92-363:

> The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing

> criminal charges against the opposing party as part of a settlement agreement, ***so long as such agreement is not itself in violation of law.***
>
> Accordingly, it is the opinion of the Committee that a threat to bring criminal charges for the purpose of advancing a civil claim would violate the Model Rules if the criminal wrongdoing were unrelated to the client's civil claim, ***if the lawyer did not believe both the civil claim and the potential criminal charges to be well-founded,*** or if the threat constituted an attempt to exert or suggest improper influence over the criminal process. If none of these circumstances was present, however, the threat would be ethically permissible under the Model Rules.
>
> Likewise, threatening to bring criminal charges, or agreeing to forbear doing so in return for settlement of a civil action, may well have civil or criminal law consequences for the forbearing lawyer or client in the relevant jurisdiction.

Formal Opinion 92-363 discusses the issue largely in the context of private parties settling a dispute that has both criminal and civil implications. Example: Neighbor throws a rock through the window. Would it be unethical or a violation of the rules for the injured party to agree not to press charges in exchange for payment of the damages? The ABA opinion states that it is not unethical to do so, as long as it does not violate the law in the relevant jurisdiction.

LSA-RS 14:131 Compounding a Felony

> **A.** Compounding a felony is the accepting of anything of apparent present or prospective value which belongs to another, or of any promise thereof, by a person having knowledge of the commission of a felony, upon an agreement, express or implied, to conceal such offense, or not to prosecute the same, or not to reveal or give evidence thereof.
>
> B. Whoever commits the offense of compounding a felony shall be fined not more than one thousand dollars or imprisoned, with or without hard labor, for not more than two years, or both.

For attorneys and clients to agree to not prosecute a felony in exchange for money damages may be a crime under Louisiana law.

The only reported case in Louisiana dealing with 8.4(g) and a prosecutor is *In Re Ruffin*, 2010-2544 (La. 1/14/11); 54 So.3d 645.

> Dwayne Anthony and Dandre James hired Philip Jenkins to paint their residence. The check written by James for $375 bounced due to being written on a closed account. Assistant District Attorney for Orleans Parish, Tanzanika Qiann Ruffin, a lifelong friend of Jenkins, offered to approach Mr. Anthony to resolve the dispute. Ruffin went to the Anthony residence and spoke with Ms. James. During the conversation, Ruffin said:
>
> "Girl don't you know that you shouldn't be writing bad checks…well you know, I'm an assistant district attorney and you can't be doing those kinds of things".
>
> At the time that the comment was made Ruffin was wearing a badge on the outside of her suit and writing her cell number down on the back of her business card.
>
> Ruffin later returned to the Anthony residence. Anthony argued that he owed no debt to Mr. Jenkins, at which time Ruffin threatened him with arrest and prosecution if he failed to pay the balance due.
>
> Ruffin self-reported her conduct to her employer and was terminated. The Attorney General's Office investigated and determined there would be no criminal charge.
>
> Ruffin stipulated that she violated Rule 8.4(g)- "respondent admits that she threatened to present criminal charges against an individual solely to obtain an advantage in a civil matter". Suspended for six months, all but 30 days deferred.

What if Ruffin hadn't stipulated that she violated 8.4(g) and maintained that the threat was not "solely" to gain an advantage in a civil matter?

What should Bobby Thompson's attorney do? What can he ethically do?